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Feature Article

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Judicial Selection: A Discussion of Elective and Appointed Systems in Light of Current Developments in the Law

On October 5, 2010, the Illinois Association of Defense Trial Counsel partnered with four other legal associations in Illinois (the Illinois State Bar Association, the Chicago Bar Association, the Cook County Bar Association and the Women's Bar Association) to present a symposium on the judicial selection process in Illinois.[1] The joint effort was in furtherance of the commitment by IDC to reach out to other bar organizations in the state to advance the balanced interests of the legal community. The symposium not only provided an overview of the judicial selection process but also addressed historical efforts at reform through the opinions and presentation of legislators, former judges, and lawyers with policy roles relating to the judiciary. The speakers, panelists, and attendees all support promoting a fair, qualified, unbiased and independent judiciary. Many of the panelists and speakers also view diversity as a significant factor in improving our judiciary.

The issue of judicial selection in Illinois has become a much discussed topic for several reasons. First, the well publicized election in 2004 for the Illinois Supreme Court Justice vacancy for the Fifth District generated concerns with regard to the amount of money that was raised by both judicial candidates. The campaigns of Justices Karmeier and Maag raised approximately $9.3 million in their respective efforts to seek out the vacant Supreme Court position. Jacer Aguilar, *et al.*, JUDGING ILLINOIS JUDICIAL SELECTION: AN ANALYSIS ON THE NEED AND METHOD FOR REFORM, Final Report of the 2009-2010 University of Illinois Civic Leadership Practicum (2010).

The Karmeier-Maag campaign was followed by the 2009 U.S. Supreme Court decision in *Caperton v. Massey*, __ U.S. __, 129 S.Ct. 2252 (2009). In *Caperton*, the owner of a private company in West Virginia spent approximately three million dollars towards the campaign fund of a state supreme court justice. *Id.*, at 2257. After the election, that state supreme court justice became the deciding vote to overturn a 50 million dollar verdict against his contributor's private company. *Id.*, at 2258. On June 8, 2009, in a five-four decision, the U.S. Supreme Court held that elected judges must recuse themselves from cases where the contributions create an appearance of partiality. *Id.*, at 2266. The *Caperton* decision was followed by *Citizen's United v. The Federal Election Committee*, __ U.S. __, 130 S.Ct. 876 (2010), another landmark case. In *Citizen's United*, the Supreme Court invalidated portions of the 2002 Bipartisan Campaign Reform Act holding unconstitutional the limitation on independent expenditures by corporations as violative of the First Amendment. *Id.* at 917.

In light of the developing expanse in campaign finance expenditures for judges, discussion turns to the use of a merit selection process over our current elective process. Support for merit selection is currently being carried on by retired Associate Justice of the United States Supreme Court Sandra Day O'Connor who notes that the amount of money involved in judicial selection, the partisanship of the campaign process, and a dramatic change in the public perception suggests that we should move toward a merit selection process.[2] Panelists and speakers, including State Representative Barbara Flynn, suggested that polls indicate public perception favors merit selection to achieve an independent judiciary. Dawn Clark Netsch, a former Illinois

legislator, comptroller, and 1994 Democratic gubernatorial candidate[3], explained that merit selection has been proposed previously both legislatively and constitutionally.

In 1951, a legislative commission was assembled to develop a new article on the judiciary that suggested a merit selection proposal via appointment. Sears, New Judicial Article for Illinois: From the 1848 Horse and Buggy Days to 1955, 40 A.B.A. J. 755 (1954). In 1954, an "appointed judiciary" article was defeated, but certain provisions eventually were adopted by the Judicial Article of 1964, which allowed vacancies and associate judges to be handled by appointment. Ill. Const. 1870, art. VI, § 9 (amended 1964). The Constitutional Convention of 1970 made two proposals with regard to the selection of the judiciary: Proposition 2(a) set forth an elective proposal, whereas Proposition 2(b) set forth a merit selection proposal. PROPOSED 1970 CONSTITUTION BY THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION (as Adopted on September 3, 1970), pp. 11-12. A scanned copy of the publication can be found at **http://www.idaillinois.org/cdm4/document.php?CISOROOT=/isl2&CISOPTR=12571&REC=11**.

Proposition 2(a) for elective system defeated merit selection by a margin of 50% in favor of Proposition 2(a) and 43% percent in favor of Proposition 2(b). Dawn Clark Netsch indicated that the most interesting aspect of the vote was that Proposition 2(b) was carried by Cook County despite vigorous opposition by Mayor Richard J. Daley.

State Representative Elaine Nekritz, member of the Judiciary Committee and the Chair of the Elections and Campaign Reform Committee, believes that our electorate and its legislators generally only respond by constitutional amendment to a perceived crisis; however, after the Karmeier-Maag campaign and the *Citizen's United* decision, Illinois may be approaching such levels of concern. A merit selection process is not without its shortcomings. It is recognized that a merit selection process itself can be politicized and bias can become entrenched in the process. In particular, a repeated comment initially raised by Senator Kirk Dillard is "who picks the pickers?"[4] Senator Kwame Raoul believes that there was no way to achieve a completely unbiased or non-political process as subjectivity is always involved. Senator Raoul suggested the process can only be improved when we acknowledge bias and then adopt a system that depoliticizes the process. An audience member of the symposium commented, "merit selection frankly scares me." Senator Donald Harmon set forth that it is our obligation as lawyers and legislators to improve the judiciary's independence and caliber as well as the public's perception of the judiciary. However, even as there might be broad agreement as to these obligations, Senator Harmon notes there is disagreement as to what a better judiciary looks like.

Senator Dale Righter expressed concern over a substantial change in judicial selection that would remove power from the voters. Moving from an elective system to a merit selection process may remove authority from the voters, and in turn, bestow that power on people who are already close to others in power. Senator Righter commented that an elective process helps keep government accountable. Further, Senator Righter cautioned that an appointment process could more easily be "improperly" influenced as compared to an elective process. Even recognizing concerns with merit selection, Senator Righter expressed support for reforms such as restricting campaign financing and conducting non-partisan elections. Senator Dillard also expressed support for discussions on public funding for supreme court elections and non-partisan elections for judges.

The symposium speakers also discussed in depth diversity in the judiciary. The Hon. William Cousins, Jr., retired Justice of the First District Appellate Court, believes that diversity on the bench is a substantial goal to pursue in any judicial system, which includes both gender and minority representation. Senator Dale Righter believed that diversity can more easily be achieved by an elected system versus a merit selection system.

The symposium also addressed merit as a goal of the judiciary. The Hon. Joy Cunningham, Justice for the First District Appellate Court, who has both been appointed to the bench and suffered through an election, indicated that an election can be exhausting, expensive (she was shocked as to the amount of money she spent in her election) and achieves "serendipitous" results. Justice Cunningham felt that "surprising" voting results may make for good reality television, but it is not desirable in elections of our judiciary. Retired Justice Gino L. DeVito, formerly a Judge of the Circuit Court of Cook County and Justice of the First District Appellate Court, set forth the proposition that the goal of a judicial candidate in an elective system is to (1) raise the most

campaign finances that one can achieve, (2) seek out the most publicity that one can achieve, and (3) obtain the most support because of race, gender, ethnicity or political identity. None of these goals, however, are relevant to doing the work of a judge. If merit and independence are the goals, then an elective system may defeat those objectives. Paula Hudson Holderman, the Vice-President-Elect for the Illinois State Bar Association, stated that one of our greatest fears is that a judge will answer to someone other than the rule of law.

Justice William Cousins, in speaking on behalf of the elective process, believes that we should not apologize for a system that requires you to raise some amount of money and to put your credentials before the people. He believes that democracy works and that the electorate usually does the right thing. In one hundred years, Justice Cousins does not believe that any states have come up with a good merit selection system. There was discussion with regard to the process as adopted by other states noting that public perception had not faired any better in states that have adopted an appointment process. Justice Gino DeVito believes that we have a very good judiciary, but the quality of our judiciary is "in spite of" the current system, not because of it.

Paula Holderman expressed that substantial efforts have been made by the ISBA and other bar associations to inform the electorate on candidates for judicial election or retention. Professor Ann Lousin, on the other hand, felt that our bar associations, current judiciary, and citizens do not do enough to remove incompetent judges when the opportunity arises. Paula Holderman responded that the electorate does not pay attention to judicial ratings, which are designed to better educate voters and the public regarding judicial candidates' credentials. Judge Michael B. Hyman also agreed that one of the problems with the current elective process is that the voters do not know much about the credentials, competency, and independence of the judicial candidates. Further, Judge Hyman noted a substantial distinction between the election of other public officials, namely the executive and legislative branch, versus the judicial branch. Both the executive and legislative branches can offer campaign promises, can take positions with regard to political issues, and can favor certain persons or classes of persons over others. In contrast, judicial candidates cannot promise what they will do, other than to uphold the law, and cannot favor one class of persons over the other.

Although many of the panelists and speakers recognize that there is no imminent solution to the perception of judicial independence, retired Justice Gino DeVito has made specific proposals that involve a non-partisan elective process. DiVito, *Judicial Selection in Illinois: A Third Way*, 98 ILL. B. J. 624 (2010). Justice DeVito proposes a constitutional amendment that retains the election of judges through a process open to all registered voters in a non-partisan contest held concurrently with primary elections. *Id.*, at 625-27. If none of the judicial candidates receive more than fifty percent of the vote in the initial non-partisan contest, then a non-partisan elective contest would be held during the general election between the two candidates receiving the most votes. *Id.*, at 625. One of the primary concerns of Justice DeVito is that election of our judges occurs at the primary level of the dominant political party. *Id.*, at 625. For example, a downstate predominately Republican community, for which there may not even be a Democrat running in the general election, will decide its judicial election by the Republican primary vote. *Id.*, at 625. Not only does such an election exclude the registered Democratic voters, but will also exclude the independent voters that did not choose a Republican primary ballot. *Id.*, at 625. Similarly, in Cook County, where the Democrat candidate is almost virtually assured of winning the general election, the Democratic primary ballot for judge becomes the election. *Id.*, at 625. Therefore, in Cook County, the Republican voters and independent voters are virtually excluded from the elective process of their judiciary. Therefore, our current system, for many counties, excludes a substantial portion of the electorate in selecting our judicial candidates. *Id.*, at 625-27. A proposal for a non-partisan election would serve to remedy such concerns.

It is clear that the overall goals of the judicial selection process in Illinois should be to obtain a well credential, unbiased, independent, diverse and accountable judiciary. Concerns are raised over both merit selection systems and a politicized elective process. In a merit selection system, politically connected, hand-selected elites may wield ultimate power over judicial selection or the nomination of electors. A merit selection process may be more susceptible to corruption than an elective process. On the contrary, the current elective process of our judiciary is testing public confidence in the independence and competence of ultimate interpreters of the law. A view towards reigning in campaign financing to achieve an independent judiciary, as

well as a non-partisan elective process for judges may guide the way to a more independent judiciary while furthering the public's perception of a qualified, unbiased and fair judicial system.

About the Author

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About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation.
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