

Nos. 26653 *State of West Virginia ex rel. John Rist, III v. Honorable Cecil H. Underwood, Governor of the State of West Virginia, and Robert S. Kiss*
and

No. 26554 *State of West Virginia ex rel. Richard A. Robb, W. Kent Carper, Rudolph L. diTrapano, Roger D. Forman, Marvin W. Masters, Anthony J. Majestro, American Civil Liberties Union of West Virginia, Thomas W. Pettit, Mark E. Gaydos, Carl N. Frankovitch, Michael G. Simon, James C. Peterson, R. Edison Hill, Harry G. Deitzler, Michael C. Bee and Norman Steenstra, Jr.*

Starcher, C.J., concurring:

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RELEASED

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I.

Pouring Gasoline on the Fire

I am truly upset by the dissenting opinion. I have never read an opinion by a member of this Court that compared the opinion of fellow justices to a cruel act of human slaughter, like the Japanese attack on the United States of America at Pearl Harbor. In fact, I don't think I've ever seen such a vicious comparison in a judicial dissent -- anywhere.

Tension between this Court and the other branches of government is not new. It is the Court's job to interpret the *West Virginia Constitution*, and almost every year or two, we are required to stand in the way of some action by the executive or the Legislature because their actions have violated the *Constitution*.

There are two ways to react to the sparks that inevitably fly when this Court has to say "no" to an action by the executive or Legislature. One way is to try to understand the proper role of the Court, and to keep the discussion on a respectful and civil plane.

The other way to react is to do what the dissent has done -- to pour gasoline on the flames!

It does not serve anyone for a judicial officer to invite dissension and open warfare between the judicial branch of government and other branches. Nor does mean-spirited ridicule of the majority's reasoning process serve any purpose. By exaggeration, misstatement, and inflammatory rhetoric, the dissent fuels and fans the flames of discord. This is just what our state does *not* need.

II.

Getting the Job of Being A Judge

It is people who vote who ultimately give our court system its legitimacy as an independent branch of government, protective of the rights enshrined in our laws and *Constitution*.¹

When it comes to deciding who will get to hold the powerful job of being a judge (or justice, or magistrate), we have used popular elections in West Virginia for more than 125 years. This system has by all accounts has served us well.²

¹See Appendix A, Larry V. Starcher, "Judicial Selection in West Virginia," Volume 12, Number 3, *West Virginia Lawyer*, October 1998.

²The forces of money and power are always opposed to the popular election of judges. These forces fund so-called "good government" campaigns against the popular electoral system for judicial selection. While any system for selecting judges has its negatives, the basic arguments against judicial elections are in fact well-refuted by research comparing the electoral and appointed approaches. "Good government" arguments against the popular election of judges are in large measure a rhetorical cover-up for the fact that it is easier for the rich and powerful (who are a numerical electoral minority) to affect and control who does and does not become a judge, when the selection is by means other than popular election.

Unlike some states, we don't ordinarily hand out our judging jobs in West Virginia in a back-room swap, trade, or deal -- in the governor's office or in the Legislature -- even to highly qualified candidates. We require our judges, *before* they get the job and exercise power, to stand publicly for election, and to receive the direct approval of the people.

When there is a vacancy between judicial elections, we make an exception. The governor selects the person who gets the job until the next election. Not surprisingly, when this "appointment exception" to judicial selection kicks in, the role of the electorate is diminished, and the role of the politicians is enhanced.³

(*See Starcher, supra.*)

³Political decisions are quite American. Creating and giving people jobs and raising salaries is a normal (and legal) part of what has historically been central to the operation of the legislative and executive arenas. Consider, for example, the "Budget Digest," a mechanism whereby millions of dollars for local projects and jobs are annually passed out like holiday gifts by the West Virginia legislative leadership. This mechanism has been severely criticized by one of the dissenters in the instant case:

What a true laboratory of horrors the majority has concocted with this lineage of back-room documents that will transform what was originally pronounced as dead and having no force and effect of law into something alive. The Igors of the world may rejoice at the majority's concoction. I do not, because it takes the legislative process out of the clear light of day where matters are voted on by the entire legislature and condemns it to that subterranean realm where memoranda of negotiations, compromises, and agreements exist and discussions in committee are used to validate the specific expenditure of funds through the Budget Digest.

Common Cause of West Virginia v. Tomblin, 413 S.E.2d 358, 401, 186 W.VA. 537, 580 (1991). (Miller, J., dissenting).

To adopt the dissent's approach in the instant case, and to permit legislators who

But there are some restrictions on who is eligible for such appointment to office. In the case of a gubernatorial appointment to a judge's job (or any other public job), our *West Virginia Constitution* -- and the *United States Constitution*, and the constitutions of almost all other states -- say that legislators are *ineligible* for the job -- if the job was created or the pay for the job was increased during the term that the appointment to the office is to be made.

These constitutional limitations are "Emoluments Clauses," or "Legislative Ineligibility Clauses." See John F. O'Connor, "The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution," 24 Hofstra L.Rev. 89, 91 n.2 (1995).

The legislative ineligibility clauses in our federal constitution and dozens of state constitutions *absolutely* bar legislators from eligibility for offices that were created or had the pay increased during the legislator's term. Most of these clauses make no exception whatsoever for popular election to such an office. Somehow the dissent loses sight of this elementary point.

This strict ineligibility for legislators is not a diabolical invention of this Court, directed at Speaker Kiss. It is a central fixture of our American governmental system.

For example, in 1793, George Washington had to withdraw his nomination of William Paterson to the United States Supreme Court because Paterson had been in the

create or raise the salary of jobs to then take and hold those jobs without first obtaining popular approval, would surely furnish the "laboratory of horrors" with the raw materials of even more un-democratic concoctions.

Senate when the office of Associate Justice was created. *Id.* at 105. I suppose that according to the dissent, President Washington was like Admiral Tojo!

West Virginia (and about nine other states) have in their constitutions some sort of a “popular election exception” to the “legislator ineligibility rule.” Our state’s “popular election” exception, Article VI, Section 15 of the *West Virginia Constitution*, is the constitutional clause that is at issue in the instant case.

To summarize, then, here is how a person gets the job of judge or justice in West Virginia:

(1) the general rule for deciding who gets the judging jobs in West Virginia is this: the people decide, through popular elections;

(2) if there is a vacancy in a judicial office, there is an “appointment exception” to the rule that the people decide;

(3) however, there is a constitutional rule that makes legislators ineligible to hold any job during a particular term during which they were involved with creating or improving the salary the job; and

(4) there is a “popular election” exception to this “legislative ineligibility rule,” so that such a legislator may hold an office during a term in which he was involved in creating the job or improving the salary of the job, *if* the people override the ineligibility through an election, even during the particular term.

III. *The Benefits of Incumbency*

I have gained my judicial jobs through popular election on four occasions. Twice (with the help of many people), I successfully stormed the castle from outside, as a challenger and non-incumbent. Twice I have stood on the battlements of office as an incumbent, and repelled the attempts of would-be evictors.

From this experience, I understand well the benefits of incumbency -- and I might add, I earned that incumbency in elections.

Of course incumbency does not assure victory. But the significant weight that “being in office” brings to a popular electoral contest undoubtedly makes incumbency a rich asset and prize.

If -- to fill a judicial vacancy -- the “leg up” of incumbency must be awarded to a person who has not earned that benefit in an election, then that benefit must be awarded in adherence to the *strictest possible reading* of any applicable proscriptions and limitations. Otherwise, our democratic system for judicial selection would be distorted and unfair.

IV. *The Error of the Dissent*

The dissent does not take this approach -- quite to the contrary. The dissent would allow the mere *possibility* of a future popular election to permit an otherwise ineligible legislator to not only get a “free ride” on the horse of a powerful office, but also to grab the coveted “brass ring” of incumbency -- all without first “paying the fare” of submitting to the

will of the people in a popular election -- and winning.

Under the dissent's *laissez-faire* approach to the constitutional language in question, a legislator could enjoy an otherwise prohibited office for literally years, without popular approval -- if an election was in some way forthcoming.⁴ In short, the position that the dissent advocates would gut the constitutional ineligibility of legislators to hold offices that they have created or for which they have improved the pay.

V.

The Majority Opinion is Correct

The majority in the instant case has staked out a position that strictly applies the constitutional legislative ineligibility rule. The majority opinion is solid and well-reasoned. The dissenting approach ignores both constitutional purpose and history.

There will always be those who cry politics in such a case -- whichever way it goes. But the law is with the majority in the instant case. Accordingly, I concur with the majority decision and opinion.

And, as a footnote, I would say that it is time to let the healing begin.

⁴The dissent has relied upon a simplistic grammatical construction, to read the relevant constitutional language as permitting this perversion of the constitutional intent. But there is, of course, an equally permissible grammatical construction that reflects a constitutional intent to require popular election before an otherwise ineligible legislator may take an office. That grammatical construction is consistent with the fact that our West Virginia constitutional language -- "offices *to be* elected by the people" is mandatory -- as opposed to the language in the cases relied upon by the dissent -- "offices as *may be* elected by the people." The construction that the majority adopts is in accord with history and scholarship.

APPENDIX A

Choosing West Virginia's Judges

by Larry V. Starcher, Justice, West Virginia Supreme Court of Appeals⁵

[M]any months of reading opinions from the six states canvassed here creates a strong subjective impression that a judicial vibrancy exists in West Virginia and Pennsylvania that simply is not found in Virginia and Rhode Island. As a general rule, the decisions from the legislatively selected benches are laconic, prosaic, and sterile. Contrariwise, those from the elected courts (especially West Virginia's) are vigorous and often inspiring.

Daniel R. Pinello, *The Impact of Judicial-Selection Method on State-Supreme-Court Policy: Innovation, Reaction, and Atrophy* 135, 140 n.31, Greenwood Press, 1995.

[T]he experience of most jurisdictions with merit selection plans has not been the elimination of political considerations from judicial selection, but the substitution of some kinds of political forces by others.

Phillip L. Dubois, "Accountability, Independence and the Selection of State Judges: the Role of Popular Judicial Elections," 40 S.W.L.J. 31, 33 (1986).

For more than 125 years, West Virginians have used open, competitive and partisan elections to choose our judges -- as required by our *Constitution*.

Nevertheless, in recent years it has been suggested that by eliminating judicial elections, and by adopting a purportedly "non-political" system of "merit-based" judicial appointment, we would have "better" judges, and more "dignity and respect" for our judicial system.

There are at least two perspectives that may underlie such suggestions for changing

⁵ The author was elected as judge of the Seventeenth Judicial Circuit in 1976, 1984, and 1992. He was elected to the Supreme Court of Appeals of West Virginia in 1996. The author is grateful for the assistance of Thomas W. Rodd, Supreme Court Law Clerk, J.D. West Virginia University College of Law 1982, in the preparation of this article.

West Virginia's judicial selection process.

One perspective is the idealistic and unselfish desire to improve government for the benefit of all people. I understand, respect and appreciate this perspective. In a world of competing interest groups the sense of civic responsibility that leads people to disinterestedly work for "good government" is all too rare. We all should try to bring this perspective to our professional lives.

I am writing this article primarily to address those who value and share this "good government" perspective. It is my belief that with respect to our judiciary total appointment of our judges is not the best way to achieve "good government." Hopefully, readers will consider my points with an open mind and perhaps be persuaded by my comments.

I would also note that, in my view, there is a second perspective that is associated with calls for abolishing the popular election of judges. This second perspective is less idealistic, and is more about power, pure and simple. This perspective reflects the desire of elites to shape, orient, and control our legal system. I do not share this perspective.

Keeping these two perspectives in mind, I submit, for the reasons discussed below, that it would be a serious mistake for West Virginians to change our present system for choosing judges.

Fortunately for our state, I think the likelihood of such a change is nil. I do not believe that the citizens of Raleigh, Hardy, or Hancock counties, etc., are going to seriously entertain the idea of letting a few lawyers and other political appointees have the major say in who their local judge is -- or in who serves as the judges that hear appeals from those counties.

I thank my readers in advance for their attention. I also thank all those West Virginians who participate in selecting our judges by casting ballots in our elections. It is people who

vote who ultimately give our court system its legitimacy as an independent branch of government, protective of the rights enshrined in our laws and *Constitution*.

1. Competitive Electoral Judicial Selection is a Desirable and Time-Tested Democratic Process.

There is a great deal of political science research, scholarly opinion, and just plain common sense in support of choosing our judges in elections. Researchers agree that the competitive election process results in just as able or “qualified” a judiciary as the appointment process.⁶

Moreover, it is widely found that there are substantial social and political virtues associated with the competitive election of judges.⁷ These virtues include the accountability⁸,

⁶ Our research confirms previous studies which find little evidence that selection systems produce judges with markedly different or superior judicial credentials or that they vary on most other background characteristics. . . . we find that selection systems have no important impact on selecting judges with different or superior credentials for office

Henry R. Glick and Craig F. Emmert, “Selection Systems and Judicial Characteristics: the Recruitment of State Supreme Court Judges,” 70 *Judicature* No. 4, 228, 235 (1987). *See also* David Adamany and Philip Dubois, “Electing State Judges,” 1976 *Wis. L.Rev.* 731 773.

“Amid the clamor of contentions in support and opposition to each of the [judicial selection] systems, there have emerged several empirical studies which demonstrate that, in many respects, the benefits of any one system over another are negligible.”

John M. Scheb, II, “State Appellate Judge’s Attitudes Toward Judicial Merit Selection and Retention: Results of a National Survey,” 72 *Judicature* No. 3, 170 n.8 (1988) (citations omitted).

⁷ Too often it has been assumed, without argument or discussion, that the only major objectives in judicial selection are to secure judicial independence and to recruit the “highest quality” legal professionals to staff the bench. Other goals, such as judicial accountability or the desirability of having a judiciary that is broadly representative of the population that it serves, are assigned positions of secondary importance or go unnoticed entirely. As suggested above, the experience of most jurisdictions with merit selection plans has not been the elimination of political considerations from judicial selection, but the substitution of some kinds of political forces by others.

Phillip L. Dubois, “Accountability, Independence and the Selection of State Judges: the Role of Popular Judicial Elections,” 40 *S.W.L.J.* 31, 32 (1986) (citations omitted).

independence⁹ and legitimacy of the judicial branch of government -- and the selection of persons as judges who are involved in and attuned to their communities.¹⁰ A competitively elected judiciary has

8

There is no escaping that judges make policy. Since any judicial decision involving broad policy questions advantages some interests far beyond the immediate litigants and disadvantages other interests, one scholar has argued that “a judge is in the political process and his activity is interest activity not as a matter of choice but of function.” The mere act of deciding is inherently policy formulation in such cases. But judges make policy as a matter of choice as well as function, for most know that sweeping public issues are involved and they act upon their personal values in resolving those issues.

Since judges make public policy, it follows that, like other policy makers, they should be accountable to the people in a representative political system. Accountability usually means that those who lead policy making departments are subject to direct, periodic popular review in elections. In some cases, accountability may be achieved indirectly through the appointment of policy makers by those who are periodically subject to voter approval.

David Adamany and Philip Dubois, “Electing State Judges,” 1976 Wis. L.Rev. 731, 768 (footnote omitted).

9

The judiciary is the strong and effective shield of the personal rights of the subject or citizen, against executive tyranny and legislative encroachment. It should be kept separate from and independent of both. Liberty has every thing to fear from the union of the judiciary with either, and the effect of a disguised dependence is as dangerous as an ostensible union. *Montesquieu* in his “Spirit of Laws,” says “There is no true liberty if the judiciary power be not separated from the legislative and executive powers.” The same view will be found reiterated in the *Federalist*, that text book of the American Constitution: -- “Though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter, so long as the judiciary remains truly distinct from both the Legislature and the Executive.”

W.E. Drake, *Remarks of Mr. Smyser of Adams County, in the House of Representatives, on Thursday, the 14th of March, 1850, on the Bill To Amend the Constitution by Providing for the Election of judges by the People*, Pa. Telegraph, Mar. 23, 1850, at 2, *quoted* in Harry L. Witte, “Judicial Selection in the People’s Democratic Republic of Pennsylvania: Here the People Rule?” 68 Temple L.Rev. 1084, 1116 n. 210 (1995).

10

At the simplest level, partisan elections are much more likely to assure the existence of opposition, vigorous criticism of those in power, and effective presentation of alternative policies. Political party leaders feel an obligation to recruit qualified candidates for each partisan office contested in an election, if for no other reason than to fill out and balance the party ticket. Further, party organizations provide some of the campaign resources necessary to promote a candidate and his program.

David Adamany and Philip Dubois, “Electing State Judges,” 1976 Wis.L.Rev. 731, 774-778.

been said to result in a more well-rounded, responsive and enlightened bench.¹¹ Certainly, that is our general experience in West Virginia.¹²

Importantly, competitive elections open the judicial selection process to new and challenging people and ideas. Innovative and energetic self-starters who have not received “the establishment’s” blessing -- are able to compete for judicial positions.¹³ Judges who come to office

11

The position in favor of accountability and judicial elections assumes both a different view of the judicial function and of the basis of popular support and respect for the courts. In this view, the process of judicial decision-making, particularly at the level of state supreme courts, is far from straight-forward or predetermined by legal precedents and the principles of syllogistic legal reasoning. Rather, judges must often exercise their discretion and in so doing are influenced by their own political, economic, social, and moral viewpoints. And, in a democratic political system, voters are entitled to periodically select those who make law and public policy, including those who interpret their laws and give meaning to the constitution.

Phillip L. Dubois, “Accountability, Independence and the Selection of State Judges: the Role of Popular Judicial Elections,” 40 S.W.L.J. 31, 51-52 (1986) (citations omitted).

12

Popularly elected judges occasionally might perceive a sense of mandate for them to act differently than other elected officials. For example, in a 1978 interview (reported in John Patrick Hagan, *Policy Activism in the West Virginia Supreme Court of Appeals, 1930-1985*, 89 West Virginia Law Review 149, 164 [1986]), Justice Darrell McGraw of the West Virginia Supreme Court of Appeals noted:

[T]he West Virginia court over the years has been primarily an appointed court. That is to say, that the way one got on the Supreme Court was to be appointed by some friend who was a governor and then to run for election after the appointment. . . . [The] current court consists of four [of a total of five] members who actively sought the office of Supreme Court of Appeals and were not appointed by any executive authority. We probably feel a devotion to an independent judiciary, which some people in the past have not felt. . . . [The state] Constitution quite clearly says that the three branches of government . . . are separate, distinctive, and independent, and our court is determined to vindicate that separation.

Daniel R. Pinello, *The Impact of Judicial-selection Method on State-Supreme-Court Policy: Innovation, Reaction, and Atrophy*, 135, 140 n.31, Greenwood Press, 1995.

13

But the impact of the traditional elective system may be even greater at the point of entry, because it opens every initial judicial election and subsequent re-election to competing candidates. One cannot well treat judgeships as elective and not expect many of them to be contested and some filled by self-starters, particularly self-starters with political skills whose names are known

in this independent fashion help insure a fair forum for citizens who come up against the “powers that be.”

In summary, the advantages of competitive judicial elections are numerous and well-documented. West Virginia is a better place because we have these advantages.

2. West Virginia Currently Has an Appropriate Balance of Electoral and Appointment Based Judicial Selection.

Most states in our Union, including West Virginia, rely upon some system of popular elections to choose their judges.¹⁴ However, in states that use elections, the appointment of judges

from past elections for some other office.

Once we gave up drawing our highest judges in a genetic lottery, by birth into the House of Lords, every system of judicial selection other than some form of competitive civil service examination had to be political. The interesting question is what kind of politics distinguishes the different systems.

In essence, as Justice Grodin says, the tension is between professional and popular standards of judging judges. The law schools’ Platonic ideal might be judges chosen by professors and confirmed by law review editors, but I do not recall that this ideal was shared by the rulers or citizens even of Athens. The knowledge of having been elected directly by the people can be a source of strength as well as of weakness. Many theorists unaccountably cite the lack of accountability of lifetime appointed judges as an argument against enforcing constitutional law against elected officials, but I hear no argument that we elected judges should do our job differently or less professionally because we are “accountable.” In our court, I have never heard popular or political reaction discussed as a factor bearing on the decision before us. To adopt Justice Otto Kaus’s much-quoted simile for the risk of defeat in a judicial election, if you cannot cope with the crocodile, get out of the bathtub.

Hans A. Linde, “Elective Judges: Some Comparative Comments,” 61 S.Cal.L.Rev. 1995, 1997-98, 2004 (1988).

14

Today there are only twelve states in which the majority of judges are not directly elected by the people. Most of these states select their judges through executive nomination and legislative confirmation. In the remaining thirty-eight states judges are subject to popular elections.

Jason Miles Levien and Stacie L. Fatka, “Cleaning up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation,” 2 Mich.L. & Pol’y Rev. 71, 74-75 (1997) (footnotes omitted).

The rise of popular, partisan election of appellate judges is best understood as an essentially thoughtful response by constitutionally moderate lawyers and judges in the

nevertheless plays a significant role in the judicial selection process.

This is because a substantial percentage of judges do not complete their full terms of office. Career changes, financial issues, death, retirement, and disability all combine with long judicial terms of office, to produce many vacancies during a judicial term.

Thus, on a regular basis, replacements for judges who do not complete their terms are appointed to office. Many of these appointed judges run for office in the next election, with the advantage of incumbency.

In West Virginia, appointment to the bench has been the beginning of some distinguished judicial careers. As West Virginia State Bar President Elliot Hicks noted in a recent article in the *West Virginia Lawyer*, appointment has opened the judiciary to under represented groups like African-Americans and women.

My point is this: to have a balanced role for “appointive judicial selection” in West Virginia no change is needed. We have such a role, we have had it for over 100 years, and it is working. (See note 8.)

3. To Argue That “Politics” Can Be Removed from Judicial Selection Is Either to Be Unrealistic, or to Be Concealing One’s Own Political Agenda.

In 1801 John Marshall, rather than Judge Spencer Roane, the distinguished Virginia

Whig, Democratic, and Republican parties. . . . popular election was not viewed as inconsistent with the ideal of a powerful independent judiciary. Indeed, elections were seen as the mechanism by which the courts could call upon a base of popular support and credibility sufficient to allow them to effectively rival legislative and executive power.

Phillip L. Dubois, “Accountability, Independence and the Selection of State Judges: the Role of Popular Judicial Elections,” 40 S.W.L.J. 31, 35 (1986) (citations omitted).

jurist for whom my home town and county were named, was appointed to the United States Supreme Court. Why? Because Marshall had more political clout than Roane.

This statement should come as no surprise. The scholarly and professional consensus is overwhelming that the selection of judges (including all federal judges), whether by election or by appointment, has always been political.^{15, 16}

15

Reflecting on this body of empirical work, one realizes the extent to which politics--partisan politics and bar politics--pervades every type of selection mechanism.

Regardless of the form of the selection mechanism, the content seems constant. Choosing judges in America is a political process with a political result. The major loss in accepting this past and present reality is the illusion that our judges are totally above politics. While reformers have often wanted us to believe the recruitment and selection of our judges should be beyond politics, we have yet to determine if that is a result either achievable or desirable--even if it could be concretely imagined. For if limited resources are to be divided in a world in which demand all too often exceeds supply, what will be the standard of distributive justice that includes no concept of politics? Even those who believe in "equal opportunity for all" must confront the truth that all never have equal social position or talent, and our judges must of necessity apply some concept of right in order to decide disputes wherein everyone cannot have what is claimed as deserved.

Thus we have senatorial courtesy, and we should never expect that our judges will be "value free." The motives behind reform movements designed to change judicial selection mechanisms can often be reduced to a claim that the judges currently being selected are objectionable--politically objectionable to the reformers. While our attention is focused on the debate over the change desired in the selection mechanism itself, the change may not be fully comprehended until we ask, "What different types of judges do the reformers envision this changed mechanism will produce?" By keeping our attention on the result sought rather than on the debate over procedure, we can often cut to the heart of the matter more quickly.

The curious aspect of this entire question has been the reluctance of Democrats to admit they want Democratic judges, and of Republicans to admit they want Republican judges. Virtually nowhere in the literature does anyone face this question directly and either argue for it or against it. We prefer the debate over merit selection because we think when we are articulating a principle above politics. We can then posit and believe that we are looking for judges who apply those abstract and universal principles of justice we believe exist, even if we have not yet stated them in practice with the certainty and permanence of logical necessity.

Jerome R. Corsi, *Judicial Politics* 113-14, 153, Prentice-Hall 1984.

¹⁶ "The process of picking a person to be a judge is woven into the political fabric and is, by any definition, a political process." Daniel J. Meador, *Some Yins and Yangs of Our Judicial System*, 66 A.B.A. J. 122, 122 (1980), *quoted in* Peter D. Webster, "Selection and Retention of Judges: Is There One 'Best' Method?", 23 Fla.St.U.L.Rev. 1, 3 n. 4 (1995).

Thus, the issue is *not* whether there will be politics in the judicial selection process, for the selection of judges always has been and always will be political. The issue is: what sort of politics? The politics of the few -- or the politics of the many?¹⁷

I favor a politics that gives all citizens a direct voice in choosing judges -- in an open and competitive marketplace. I disfavor a politics that gives the choice of judges to a select few, behind closed doors.¹⁸ I also believe in merit selection -- but with the merit of judicial candidates being determined by the electorate rather than by a handful of the politically powerful.

I believe that my view is shared by most West Virginians. I doubt that West

“In every state a judge needs to be some kind of politician.” Richard Neely, *Why Courts Don't Work* 41, Houghton Mifflin, 1980.

17

Investigative reporting has been sorely lacking in comparing the chances of public interest attorneys, plaintiffs' attorneys, union attorneys and corporate attorneys of gaining seats on the federal bench -- or in examining the client and prior law firm base of judges who have ruled that gun manufacturers have no liability to families of murder victims; that tobacco companies have no liability to families of cancer victims; that the scope of permissible affirmative-action programs should be steadily reduced.

Advocates of “merit selection” hew to the line that merit is to be determined by the nebulous criterion of reputation rather than by objective measurable criteria. They do not seek civil service tests or advanced legal degrees or even extra hours of continuing legal education to measure legal knowledge, or any specific measure of legal scholarship, or any specific measure of experience, objectivity or character. They believe that the definition of merit varies from individual to individual, from case to case, from day to day.

A system of elections in which all citizens have the right to participate is more likely to serve public interests than a system in which participation is limited to economic, legal and political elites.

Mark B. Cohen, Chairman
Democratic Caucus
Commonwealth of Pennsylvania House of Representatives

Letter, *The Nation Magazine*, March, 1998.

18

Officials of state bar associations have been the first to admit that the merit selection system provides them with the most effective means of influencing the choice of who will serve on the bench.

Mary L. Volcansek, “The Effects of Judicial-Selection Reform: What We Know and What We Do Not,” in *The Analysis of Judicial Reform*, 79, 87, Philip L. DuBois, ed., D. C. Heath 1982 (citation omitted).

Virginians would favor a system where our state judges are selected by a non-elective -- but undoubtedly political -- process.

4. West Virginia's Judicial Election Campaign Finance Laws Represent a Fair and Workable Compromise that Reflects Current American Political Philosophy.

The financial cost of running a competitive election campaign, especially state-wide, is substantial. It frequently serves as the focal point for disfavoring the election of judges. However, West Virginians are ahead of the curve in judicial campaign finance regulation. We limit and make public campaign contributions in a way that a number of other states are just trying out. And campaign finance committees insulate judicial candidates from fundraising.

I do favor reducing political campaign costs -- for example, by providing free or low-cost air time to candidates. But the issues of campaign costs and financing are distinct and different from the issue of judicial selection methods. Campaign finance issues should not be used as a smokescreen for depriving West Virginians of the right to choose judges in competitive popular elections.

5. "36 Hours on the Campaign Trail" Or "What Makes A Good Judge?"

The following notes, taken from my campaign experience, reflect the grass-roots realities of the judicial election process.

Wednesday, early April, 1996. Awake 6:00 a.m., leave house in Morgantown at 6:30 a.m., pick up traveling partner Ron Kelly. We head for Wheeling, about eighty miles on I-79. Arrive Wheeling around 8:00 a.m. Leave requested campaign signs and brochures in Electrical Workers and Carpenters' Union doorways. Drive to

Laborers' Union office, meet with local president, leave materials. Then drop off materials at two lawyers' offices. Drive to Weirton and meet with Steelworkers' Union board. Noon -- lunch at Nick's Village, local political tavern. 1:00 p.m., drive to New Cumberland. Visit magistrate and judicial offices. Stop and shake hands at businesses, malls.

3:00 p.m., head for Franklin in Pendleton County, over 150 miles away -- my first campaign visit there. Travel through Elkins, stop and put up road signs. Dinner at Franklin KFC. Arrive at Democratic Rally about 7:00 p.m. Speak, answer questions, meet voters. 9:30 p.m. - stop at convenience store, get coffee. Ron says we need some more signs in this area. Put up signs in Seneca Rocks area. Head home to Morgantown, drop off Ron.

Arrive home at 2:00 a.m. My wife Becky tells me that I am wanted at the union hall in Weirton at 5:00, to go to the plant gates at 5:30 with union steward and lawyer. They assumed I had stayed in the Weirton area. Union has 5600 members. Need to go. Shower, change clothes, leave home at 3:00 a.m. Arrive at Weirton 5:00 a.m., stop at Hardee's for coffee. 5:30 - 8:00 a.m., meet 800 workers at four different work gates. Travel to city offices, campaign. 12:00 luncheon with local supporters. 2:00 p.m. Travel to Wheeling - revisit courthouse, spend 1 1/2 hours visiting offices. Head toward home, pull off to nap. Traffic too noisy to sleep, drive home to Morgantown. Sit in recliner, turn on news, asleep within 30 seconds. Full day of campaigning tomorrow!

Reflecting on this campaign trip and dozens like it, I conclude that I am a better person and a better judge, because of my time on the campaign trail.¹⁹

¹⁹

Physical effort of campaigning, candidate's time consumed in a political race, campaign expenses, and general indignities of direct exposure to the voting public are the inconveniences most frequently named. Standing alone, these are not asserted to be sufficiently objectionable to support adoption of a nonelective plan, but when considered in light of their discouraging effect on prospective judges, the case is thought to have been made. It may be easily overlooked, but uncertainty, inconvenience, and sacrifice have gone hand in hand with service to country, and no citizen has reason to be assured that their removal guarantees, or even suggests, dramatic improvement in public service or public servants.

Phillip L. DuBois, *From Ballot to Bench* 12, University of Texas 1978.

Each voter with whom I have spoken -- and there are thousands -- has strengthened my commitment to do a quality job for my fellow citizens.²⁰ Each vote cast in a judicial election -- *including the votes cast for my opponents* -- reminds me to try not to disappoint the voters' faith in our democratic system.

Here is a challenging fact about our present judicial selection system: it gives the same weight to the opinion of a minimum-wage dishwasher, as it does to the opinion of a multimillionaire.

The "merit-selection" arguments against popular judicial elections in essence ask: what does a dishwasher know of judging? But one might as well ask, what does a dishwasher know of governmental budgeting, or of foreign policy? Perhaps not much. Yet it is the key to our system that we entrust the selection of key public officials to our citizenry in general, rather than to elites with purportedly superior knowledge and training.

To me, this egalitarian, one-person/one-vote approach to selecting those who exercise state power -- including the power of judging²¹ -- is the essence of sustainable "good government."

20

There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub. (Former California Supreme Court Justice Otto Kaus, *quoted in* Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52, 58.)

* * *

In reality, judges are not asked to refrain from deciding political questions at all; rather they are asked to refrain from deciding political questions in too openly partisan a fashion. . . . Paradoxically, the effectiveness of an appellate judicial decision is related to its ability to transcend mere partisanship; and yet the more effective a decision, the wider its political impact. (G. White, *The American Judicial Tradition*, 371 (1976)).

Quoted at Robert F. Utter, "State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?", 64 Wash.L.Rev. 19 (1989).

21

Rather than seeing the process of judicial decision-making as one in which judges serve to apply fixed and enduring principles of law impersonally and impartially, it is possible to see the tasks of judging as calling for far more

I'm at the age when I'm beginning to acknowledge my accomplishments, instead of disparaging them. So I'll admit that I'm proud of what I have done over many years (working with others, of course) to try to build good government in West Virginia.

Based on that experience, I'm certain that changing West Virginia's current electoral system for choosing our judges, would not be a move in the direction of good government.

discretion and human judgment. Whether engaged in the resolution of constitutional, statutory, or common law cases, judges are required to make choices in their determination of the relevant facts, in the selection of the appropriate legal principles and precedents, and in the application of those principles to the determined facts. These choices are pregnant with underlying questions of equity, justice, and public policy which are inevitably influenced by the judge's personal attitudes and values. In making these choices judges, like other political decision-makers, "allocate values in society such as opportunity, liberty, money, protection, or representation in other types of decision-making. Like other political decision-making, this allocation of values is differential; that is, some individuals and groups are favored and others are disadvantaged." Accordingly, in a democratic political system governed not entirely but in the main by the principle of majority rule, judges should be held popularly accountable for their decisions.

However, by comparison with trial courts, appellate courts, and especially state supreme courts, are less frequently called upon to implement narrow procedural rules, more frequently asked to answer questions with importance beyond the immediate case at hand, required to exercise more discretion, and in general play "a (more) significant role in the policy making process of their state." For these reasons, when selecting the state's highest judges, it is particularly appropriate to strike the accountability/independence balance on the side of accountability.

Phillip L. Dubois, "Accountability, Independence and the Selection of State Judges: the Role of Popular Judicial Elections," 40 S.W.L.J. 31, 38-40 (1986) (footnotes omitted).