



Selecting Alabama's Appellate Judges— A Better Way

BY DANIEL J. MEADOR

A major challenge for the people of Alabama today is to improve the means of selecting the judges of our appellate courts. Those three courts at the pinnacle of the judicial pyramid—supreme court, court of civil appeals, court of criminal appeals—play a crucial role in the state's legal order, one little understood by the public but well known to most lawyers. Thus, lawyers have a unique responsibility to educate and influence public opinion concerning those courts' judges. To its credit, the Alabama State Bar has risen to this challenge by supporting a change in the procedure for filling those appellate judgeships. Lawyers throughout the state should join the state bar in an all-out effort to secure acceptance of this proposal by the legislature and the citizens. Here I undertake to explain why.

It is useful at the outset to remind ourselves of the obvious, that the state's supreme court justices are the ultimate voice of the law in Alabama, interpreting statutes and constitutional provisions and managing the application of common law precedents under ever-changing circumstances. The two intermediate appellate courts perform a similar function in a

significant number of cases. The 19 judges on those three courts are housed in one of the finest judicial buildings in the nation. The judicial function in preserving government under law is impressively symbolized in the courtroom in that building. In that distinctive, high-domed, circular space, the proceedings stand in a centuries-long tradition originating in Westminster Hall, transplanted to North American shores and descended to us. The system presupposes—and depends upon—high-minded judges of unblemished character, learned in the law, impartial and independent of external interests.

From sad experiences elsewhere in the world where such judiciaries do not exist, we have learned that judges of that type are an essential feature of civilized society. In Alabama, as elsewhere, the extent to which the judges on the appellate courts embody those characteristics depends in considerable part on the means through which they come to the bench. We need to match the creative architecture of that magnificent structure in which they sit with a creative effort to ensure as much as possible that the appellate judges in the future do possess those ideal qualities.



Among the 50 states, appellate judges are put in office in four basic ways: executive appointment with legislative confirmation; election by the legislature; popular election by the voters; nomination by a non-partisan commission with appointment by the governor. Each of these is in the hands of human beings and thus is imperfect. Considering all the imperfections and the pluses and minuses of each, there can be debate as to which is best. But experience over time has shown which is the worst. Sad to say, it is the system currently prevailing in Alabama—popular election by the voters.

A major reason why this system is bad is money—contributions of vast amounts of money in support of candidates for election to these appellate judgeships, an evil not present in any of the other selection systems. Money began to be a serious problem in the 1990s. In 1994, candidates for four Alabama Supreme Court seats spent more than \$6.5 million. In 1996, the victor in a supreme court race raised \$2.68 million; the defeated candidate raised \$1.76 million. In 1998, seven candidates for three seats spent more than \$7 million. The year 2000 set a national record of more than \$13 million in races for five seats. Indeed, by the early 2000s, Alabama had set the national record for money spent by candidates in state supreme court campaigns since 1993: a total of more than \$41 million, even beating out Texas. This is truly remarkable when one considers that Alabama is far from among the wealthiest states. The pattern continued in the 2006 general election where candidates for four contested supreme court seats raised at least \$10.5 million, and this does not include several million dollars spent in the earlier primary elections.¹

It is especially troubling that a significant amount of money spent in these campaigns comes from out of state. What legitimate interest can anyone outside of Alabama have in determining who sits on its supreme court?

The evil in this money is the threat to, and undermining of, the most fundamental feature of the judiciary—the impartiality and unbiased character of the judges, both in reality and in public perception. The money contributed to these campaigns comes from numerous sources, including individual lawyers and citizens, law firms and organizations of various sorts. Special interest

groups are especially heavy contributors. Most of the contributors give to a particular candidate because they believe that candidate, if elected, will decide certain issues and types of cases the way the contributors want them decided. In other words, most contributors typically do not want an independent, objective judge. One might debate whether they always get what they want, but whatever the reality, the damaging perception is undeniable.

The money fueling this selection system gives the unavoidable impression that seats on Alabama's appellate courts are for sale. In Ohio, where spending on statewide judicial elections is also high, at least one of its supreme court justices has candidly acknowledged the unseemly situation. According to a press report, he said, "I have never felt more like a hooker down by the bus station in any race I've ever been in as I did in a judicial race."

Imagine yourself a litigant or lawyer appearing before judges on the supreme court or one of the intermediate courts to whose election your opponents, either parties or lawyers or interests backing them, contributed money and you did not. Although recusal by the judge is in order, experience suggests that there is no clear and enforceable recusal practice in place. Even if such a judge is able to overcome natural human tendencies, and, in fact, hold the scales even, you are likely to be skeptical, especially if you lose the case. And the public is unlikely to believe that a judge who has received contributions from one side of a case and not from the other will be impartial. A basic notion in our legal order is that it is not enough that justice be done; it must also be seen to be done. As Justice Frankfurter once put it, justice must satisfy the appearance of justice. The role that money plays in putting judges on Alabama's appellate courts is inconsistent with that basic concept. This alone is sufficient reason for abandoning the current system of selecting those judges, but there are additional reasons.

Another reason is the damage that campaigns inflict on public respect for the judiciary and on the victorious candidates. It is, of course, well known that campaigns for judgeships began to grow nastier in the 1990s, with opponents attacking each other's character in destructive ways. No matter who is elected, citizens generally will perceive that they now have a judge on one of the highest courts

whose character is seriously blemished, ethics doubted or personal morality drawn in question. Even if all the accusations are in fact untrue, the damage has been done, and public respect for the court diminished. The judge sits under a taint that cannot be entirely erased, a gross unfairness to a truly capable judge of integrity.

The Canons of Judicial Ethics attempt to limit the worst aspects of such abuses as well as other aspects of campaigning, but their main effect in Alabama seems to have been to generate a welter of dysfunctional litigation, further degrading the judiciary in the public eye. Judicial Campaign Oversight committees appear to have had some, but limited, effect in lifting the tone of judicial elections. A suggestion often made to improve the process is to make elections non-partisan, removing party identification from the candidates, but that change would not eliminate the evil of money and demeaning campaign tactics. All of these measures merely tinker with the problem; they treat symptoms but not the disease, which is the popular election of judges.

Campaigning for these judgeships has also led or tempted candidates, one way or the other, to disclose their views on issues that are likely to come before their court and which they must decide, if elected. There is nothing more fundamental in our legal order than the notion that a court must decide in unbiased fashion each case on the law and the evidence as they

then appear. Previously revealed positions by a judge cannot be squared with the concept of an objective, neutral judiciary.

Still another reason why political elections for these statewide judgeships are bad is the voters' inability, as a practical matter, to know and evaluate the qualifications of the candidates. Good appellate judges must possess a unique combination of abilities. Like all judges they should, of course, be intelligent, honest, of good character and have a solid grounding in the law. In addition, however, they need a special analytical ability—an ability to synthesize a body of case law and statutory authority, to sort out complicated factual situations and to reason their way to a sound conclusion, one that fits comfortably within the existing legal corpus. They need an excellent writing ability, a facility in the English language that enables them to put all of that into clearly written opinions providing guidance to lower courts and practicing lawyers. The work requires an above-average intellectual interest in the law. And then there is the requisite of wisdom—the product of experience playing on an intelligent mind—and good common-sense judgment. Because appellate judging is teamwork, the judges need the kind of temperament and personality that enables them to work collegially, to accommodate their views with those of their fellow judges in order to reach a maximum degree of consensus.

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It is obvious that the public is unlikely to be aware of these desirable qualifications, much less be able to determine whether a candidate meets them. Indeed, surveys, as well as our own experiences, tell us that a large percentage of the electorate does not even recognize the names of most judicial candidates. Voters are likely to act on the basis of one-line sloganeering, negative TV ads or party affiliation. It is a sad commentary on our system to realize that it is possible for almost any lawyer, regardless of qualifications, to become a supreme court justice if he can afford the filing fee, raise a lot of money and advertise vigorously on TV, especially with emotional pitches and negative attacks on opponents.

Finally, a significant disadvantage of the elective system is that it causes us to lose the services of some highly qualified lawyers. There are Alabama lawyers who would make superb appellate judges but who are reluctant—perhaps unwilling—to undergo the process it takes to get there. There is the time element—days and weeks on the road campaigning and raising money, time that is difficult for a busy lawyer to take away from practice. Moreover, some able lawyers would find such activity unattractive or even unethical and not suited to their personality. Then, perhaps worst of all, there is the high risk of character assassination. Experience shows that regard for truth or relevance is not always the top concern in races for the appellate bench. So, anyone entering the contest, no matter how honorable, becomes fair game for unpredictable, demeaning charges. In short, the political road to the bench is off-putting to many able lawyers who are well qualified, a great loss to the state judiciary.

Realization of these defects in judicial elections led to the formation of the American Judicature Society in the early 20th century. Under AJS aegis, the plan was developed for selecting state judges by gubernatorial appointment from a list of nominees screened on their merits and certified to be well-qualified by a non-partisan nominating commission. Over the years, support for that plan has grown across the nation. Today, 24 states initially choose their supreme court justices in this manner. (Only seven other states use the Alabama system of partisan elections.)²

This nominating commission-gubernatorial appointment plan, endorsed by the Alabama State Bar, would entirely eliminate money and character assassination from the process of selecting appellate judges. It would provide assurance that whomever the governor picked from the list would have been

thoroughly examined and determined by the commission to possess qualifications along the lines of those described above. Able lawyers could be sought out for judgeships and become appellate judges without the grueling, time-consuming and often degrading process of running for the position.

It is sometimes asked why judges should not be elected by the voters like all other public officials. The answer is that judges are different from all other public officials. Candidates for the governorship and the legislature properly run on platforms, announce positions on controversial issues and make pledges as to how they will act if elected. They are not expected to be objective or neutral. Voters properly support or oppose those candidates based on the positions they expect them to take. It goes without saying—or should—that such advance commitments by a prospect for judicial office are at odds with the principles of independence, objectivity, open-mindedness and unbiased judgment that a judge is expected to embody.

Opponents of merit selection plans sometimes argue to citizens that, “They’re trying to take away your vote.” This is an emotional appeal that avoids analysis of the proposal. The claim is untrue under the plan supported by the ASB. Under that plan, at the end of a six-year term, each judge, in order to continue in office, would be required to go before the voters, who could vote him or her out of office. Thus, judges are ultimately accountable to the people. In that election the voters would have the benefit of something very important they do not now have, an evaluation of the judge’s judicial performance, thus enabling voters to make the kind of informed decision they cannot now make. The evaluation would be done by a balanced, non-partisan Judicial Evaluation Commission established by law, which would review all aspects of the judge’s work and release a report to the public. In the 24 states selecting their supreme court justices through nominating commissions there are no complaints from people that their “votes have been taken away,” and there has been no substantial move to return to a politically elective system.

It is also said that politics cannot be taken out of judicial selection. To an extent this is so. In a democracy we would not want politics, in the best sense of that term, to be altogether eliminated. But the most baleful aspects of partisan politics can be drastically reduced by a commission nominating system. That system combines in optimum fashion non-partisan merits

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screening with the political judgment of the elected governor. Under the bar-supported plan, the commission's membership is required to be fairly balanced and widely representative in every respect, functioning under known procedures. No "back room" here. The governor will have a choice from the multiple names submitted by the commission, but the governor cannot go wrong, because every individual on the list will have been vetted by the Commission and found to meet the requisites for an appellate judgeship. The system will be in the hands of human beings, like any system, and thus may not be perfect. But the test is not perfection. The procedure need only be better than what we have.

It is significant that in England, mother country of our common law system, judicial independence was established (by the Act of Settlement of 1701) on the heels of the emergence of modern-day representative government. The courts and the legislature have coexisted ever since, demonstrating that a non-elected, independent judiciary is consistent with popularly elected representatives exercising political functions. Both are essential in a constitutional democracy, but judicial elections tend to merge the two, undermining the rule of law.

Likewise, it is significant that in the other democratic countries of the common-law world, descended jurisprudentially, like ourselves, from England, judges are not and never have been

elected by the people. Indeed, nowhere in the world outside the United States are judges popularly elected. Not that we need follow what others do, but it does cause one to wonder why, if the Alabama system of electing judges is good, no other country has ever adopted it. It is also noteworthy that Alabama's type of elective system has been viewed as both undesirable and detrimental to the rule of law in studies by major national, non-partisan organizations and by numerous independent analysts.

Improving the method of selecting Alabama's appellate judges is not—and certainly should not be—a partisan matter. Over the last decade, this move has been supported by both Republicans and Democrats, as it is now, and consistently supported by the Alabama State Bar.³ Some may seek to make it a partisan issue, out of narrow, short-run interests or out of insufficient understanding of the proper role of appellate judges. Those who act on partisan grounds do a disservice to the state, its judiciary and its citizens. The lawyers of Alabama have an unusual opportunity to demonstrate true statesmanship—to rise above party attachment and self-interest and to consider in an objective way the long-range public good. The time has come to put in place a method of ensuring that judges come to the appellate benches free of the taint of money and of questions about their character and qualifications. In short, we need a system that will guarantee that in the decades to come Alabama will have appellate judges to match the grandeur of that courtroom in which they sit. ■

Endnotes

1. Information on the financing of judicial elections is compiled by two national, non-partisan organizations and is available on the Web at www.justiceatstake.org and www.followthemoney.org. See also www.ajs.org. The 2006 figures are not final at this writing; they are likely to be higher.
2. Information about state judicial selection methods is collected by the American Judicature Society and can be found at www.ajs.org. See Also Ryan L. Souders, "A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States," 25 *THE REVIEW OF LITIGATION* 529 (2006).
3. See, e.g., Warren B. Lightfoot, "President's Page," 58 *ALA. LAW.* 194 (1997); Wade Baxley, "Merit Selection of Judges—A Concept Whose Time Has Come," 60 *ALA. LAW.* 366 (1999); William N. Clark, "President's Page," 64 *ALA. LAW.* 280,281 (2003); Bobby Segall, "The Independence of Our Judiciary," 66 *ALA. LAW.* 326 (2005). Retired Alabama Supreme Court Justice Gorman Houston, Jr., first elected to office as a Democrat and then as a Republican, is chairing a statewide, bi-partisan committee to enlist support for this proposal.

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