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ETHICAL CONSIDERATIONS<sup>®</sup>

## Regulating Judicial Election Campaigns is Difficult

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When most practitioners turn to the Rules of Professional Conduct, they are looking for guidance on a specific question. Few pause to read the Preamble to the whole set of rules. That's too bad, for the Preamble has a lot to say about what it means to be a lawyer. For example, it says: "As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients [and] employ that knowledge in reform of the law. . . . A lawyer should be mindful of deficiencies in the administration of justice. . . . A lawyer should aid the legal profession in pursuing these objectives."

This paragraph speaks separately of "lawyers" and "the legal profession," suggesting that there are both individual and collective responsibilities involved. These distinct responsibilities should be on our minds as Oklahoma considers whether the method by which state judges are selected should be altered. Neither lawyers nor the organized bar should be bystanders on this issue.

This is not to say that all lawyers should be expected to be of one view, nor should they expect their view to prevail simply because they are lawyers. But we should be involved, and we should be guided, not by what we may perceive to be beneficial for particular clients or our practice, but by an assessment as to what would be best for the legal system, given our understanding of the role of courts in our constitutional democracy.

It is clear that there are drawbacks to any option and that a choice must be made among imperfect systems. The basic trade-off is between judicial independence and judicial accountability. The more independence judges have, the less accountable they will be, and vice versa. These are both exceedingly important values; yet, in designing a trade-off, one value will have to be subordinated to the other. Those who value independence more will ask, "What's the most amount of independence we can create while still providing for an acceptable degree of accountability?" Those for whom accountability is more important will ask, "What's the greatest degree of accountability we can establish while still preserving an acceptable amount of independence?" Most lawyers tend to value independence more than does the public at large, and lawyers also tend to have a unique understanding of accountability. The following thoughts may be of interest to those who wish to participate more actively in the effort to find the optimal

trade-off between independence and accountability.

A contested election system presents serious challenges to judicial independence. Several judges of unquestioned integrity have told the Legislative Task Force on Judicial Selection that, while they believe they avoid being influenced by improper factors, they are definitely cognizant of popular opinion and the need to have financial support from lawyers in their campaigns - particularly as elections approach. Knowledge as to who contributed last time, concern over who will contribute next time, awareness of potential public reaction to an unpopular decision - these are some of the ways that a contested elections system casts a shadow over the judicial decision-making process. These aspects of the election process may contribute to a public cynicism that undermines trust and confidence in the justice system.

How desirable is it for judges to be politically accountable for the substance of their decisions? The judicial branch of government was not designed to be responsive to political forces with respect to the merits of cases. Even in a state with a strong populist tradition like Oklahoma, it is the role of the judiciary sometimes, perhaps even often, to make politically unpopular rulings. Making judges vulnerable to potential attack by an opponent in a contested election campaign threatens their ability to fulfill this role. It also weakens the system of checks and balances sought to be created by the separation of powers.

Accountability for results is to be distinguished from accountability with respect to performance in office, knowledge, ability, ethics, impartiality, integrity, temperament, diligence, punctuality, attentiveness, administrative skills, and communications skills. It would be nice if judges could be held accountable under these standards through a meaningful system of evaluation without making them directly accountable to the voters for the substance of their decisions. Unfortunately, when the accountability system involves the electorate, there is no way to insist that voters consider only those qualities that lawyers believe are genuinely relevant.

Therefore, one must ask whether the enhancement in accountability thought to be associated with contested elections justifies the loss of independence that elections bring. Elections do not necessarily produce "better" judges; indeed, they seem as likely to produce bad apples as does an appointment system. Some well-qualified potential candidates surely opt out because they do not wish to engage in adversarial politics, devote substantial time to raising money, or risk running against an incumbent judge before whom they may have to practice if they lose.

It is hard to imagine how we might

more effectively regulate the election process to foster "fairer" or "better" results. When the choice of judges is submitted to the electoral process, the First Amendment protects the rights of all concerned - incumbents, candidates, supporters, interest groups, opponents - to speak and campaign. The Code of Judicial Conduct cannot effectively be enforced to restrain the rough and tumble of the campaign process. It is questionable how strictly its speech-suppressing provisions can be enforced against judges and judicial candidates, and they certainly cannot be enforced against non-candidates.

The most seriously considered option to a contested election system is an appointment/retention system, like we presently have for appellate judges. Advocates of this system contend that it enhances judicial independence while providing for a meaningful degree of accountability. However, this system, too, has its critics, and we should examine the objections to it that are most commonly raised.<sup>1</sup>

Retention ballots present many of the same problems as do contested elections, including the possibility of "misguided" voter behavior. Of course, to say that an appointment/retention system is "as bad as the contested election system" is hardly an argument in behalf of contested elections. The issue is, given the imperfection of each system, which is preferable. Which system is more likely to produce campaigns that focus on inappropriate issues? Which system is more likely to produce results that are based on undue voter attention to inappropriate factors? Which system is less amenable to reforms that could mitigate the influence of demagoguery? Which system is more likely to retard diversification of the judiciary? When these sorts of questions are asked, the answers do not establish the clear superiority of contested elections.

Still, some complain that appointment/retention deprives candidates of the "beneficial impact" of having to go through an election. However, it is not self-evidently advantageous for judges to have the same sense of political connectedness that is true for the legislative and executive branches of government. Some public opinion polls show that, if it were put to an election, the voters would reject many of the provisions in the Bill of Rights. Do we really want to expose judges to this line of popular thought?

Another complaint is that an appointment system involves political considerations, yet these political decisions are insulated from the influence of democracy. Of course, this claim is true. But is this a vice or a virtue? Does a democratic governmental system that is structured to create a separation of powers require that judges be answerable to the voters in the same manner as legislators? Perhaps

democratic values are given sufficient play, and the influence of politics is held reasonably in check, if the appointing authority is politically answerable for the way the appointment power is exercised, as is the case in the federal system. At least once a nominee is appointed he or she enjoys substantially more decisional independence than does a judge who must confront a contested election.

Let me add one point from my observations as co-chair of the Oklahoma Bar Association Task Force on Professionalism and Civility. That Task Force has heard privately and publicly from several judges, including judges who are ex-posed only to a retention ballot, that knowing that their continuance in office will be subjected to a vote of the people, and knowing that they will rely predominantly on the support of the bar for retaining their office, they are more reluctant than they would like to be to rigorously enforce the Rules of Professional Conduct, court rules, and precepts of professionalism and civility. If the system of direct political accountability affects this aspect of the decision-making of judges, goodness knows how it must affect the substance of decisions that judges make on the merits of cases. This is powerful evidence of how the trade-off between judicial independence and accountability works under our present system of contested elections. Is this threat to independence justified by the enhanced accountability that contested elections offer over a retention system?

Dean Hellman is a member of the Legislative Task Force on Judicial Selection.

<sup>1</sup> In an appearance before the Legislative Task Force on Judicial Selection, then-judge Dan Boudreau summarized the objections to both contested elections and an appointment/retention system. The following list of objections is based on his presentation, but the responses to the objections are mine.