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Screening Judicial Candidates for Election

W. David Curtiss
Cornell Law School

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Screening judicial candidate

The question of whether election or appointment produces a higher quality judiciary is a matter of continuing debate. The following comments are not addressed to that issue but to the question of whether it would not be possible to unite the two approaches in such a way as to preserve important values associated with each. More particularly, would it be feasible to combine the partisan election of judges with the use of judicial nominating commissions?[1]

An interesting proposal was advanced in 1967 by James T. Prendergast and Edward N. Costikyan of New York.[2] They outlined a plan by which a judicial selection panel would submit names of possible nominees for a particular judgeship to the political parties and to the public. Each political party would then consider these recommendations, but would not be limited to them in designating its nominee; and

> [i]f a political party rejects the panel's recommendation the panel should then be authorized to contest the party's designation in either a primary or a general election without the necessity of petitioning or complying with similar requirements of the election law, and with a position on the ballot at least as prominent as the party's designation.[3]

A notable feature of the Prendergast plan is that the judicial selection panel's recommendations are advisory to, not binding upon, the political parties. An earlier proposal, put forward in 1960 by Roger Bryan Hunting, differs in this important respect requiring that the parties restrict their nominations to individuals found qualified by a state selection board.[4] Mr. Hunting wrote:

> This [selection of the best possible judges] can be accomplished entirely without relation to method of selection by this requirement: No person's name shall be placed on a ballot for, nor shall any person be appointed to, judicial office unless he shall have been found to be qualified to be a judge. Evidence of qualification shall be a "Certificate of Qualification" issued by a "State Board of Judicial Qualification," to which any person who wished to be eligible for appointment or election to the bench could submit himself, with a request for a finding as to his qualification.[5]

The election of judges, unlike their appointment, brings into focus the right to run for public office as well as the right to vote. There are, of course, well-recognized limitations upon an individual's becoming a candidate for election to judicial office. Typically, these state constitutional or statutory restrictions relate to such formal matters as minimum and maximum age levels, state or federal citizenship, and minimum periods of residence and of law practice within the jurisdiction. In this context, suppose a particular state were disposed to enact legislation requiring political parties to nominate for judgeships only individuals found qualified by appropriately constituted state judicial selection committees. Would such legislation accord with sound public policy? And would such a procedure be constitutionally permissible?

To the extent that the personal attributes essential to a good judge can be identified

1. For an excellent treatment of judicial nominating commissions, see A. Ashman & J. Alfini, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS (1974).

2. *See* Prendergast & Costikyan, *Judicial Selection—The Prendergast Plan,* 157 N.Y.L.J., Mar. 22, 1967, at 4, col. 1; Mar. 23, 1967, at 4, col. 1; Mar. 24, 1967, at 4, col. 1 (serialized article).

3. *See* Prendergast & Costikyan, *supra* note 2, at 157 N.Y.L.J., Mar. 23, 1967, at 4, col. 3.

4. *See* Hunting, *Toward the Best Possible Judges,* 15 RECORD OF N.Y.C.B.A. 400 (1960).

5. *Id.* at 406.

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or election

by W. David Curtiss

In the marriage of appointment and election need the bride blush?

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and measured, it seems clear that the screening function performed by judicial nominating committees would improve the quality of elected judges. But tying in merit selection committees with partisan nomination and election of judges raises important constitutional issues. In a 1965 Supreme Court of New Jersey case, Chief Justice Joseph Weintraub defined a state's power to establish qualifications for elective office in these terms:

> A prescribed qualification for office must relate to the needs of officeholding as such or the special needs of the particular office involved, with the voters free to judge the personal or individual fitness of the candidates who have those basic qualifications. The line separating the basic needs of office from the individual fitness of a candidate, perhaps more easily felt than described, is vital, and the fundamental value involved is best served if the judiciary insists that the reason for the inroad upon the right to vote be real, and clear, and compelling.[6]

If a political party desires to nominate a certain person for election to judicial office, but is precluded by state law from doing so unless and until he has been certified as qualified for the position by a judicial nominating commission, that person's right to run for public office has clearly been restricted, and, by the same token, the right of voters to vote for that person has been correspondingly limited.[7] It is questionable whether this type of regulation of the electoral process could pass constitutional muster as an exercise of power consistent with the equal protection clause of the fourteenth amendment as well as other constitutional limitations.

Two extensive and helpful commentaries on the legal principles and precedents generally applicable to a resolution of this question have recently appeared, one in 1974 in the *Utah Law Review*[8] and the other last year in the *Harvard Law Review*.[9] No attempt will be made here, therefore, to review relevant constitutional cases and doctrines. It is noteworthy, however, that the restraint upon eligibility for elective office that would result from the joinder of statutory nominating committees and the partisan election of judges has never been reviewed by the United States Supreme Court, nor apparently by any other court. Under these circumstances, a recent New York State Court of Appeals case, *Rosenthal v. Harwood*,[10] deserves particular attention.

Tying in merit selection with election of judges raises important constitutional issues.

In this case, the petitioner was nominated by both the Democratic and Conservative parties as a candidate for county judge in the general election. He questioned the validity of an internal bylaw of the Nassau County Democratic Committee which restricted nominations by that party to a person who agreed that he would refuse to accept the nomination of any other political party. The Court of Appeals struck down this bylaw provision, and its opinion contains language highly relevant to the topic under discussion here. Writing for the court, Judge Hugh R. Jones stated:

> Although the political elective process for the judiciary makes judicial candidates political party candidates, they are not as others. They may not indorse one another. They may not attack one another. They may not indorse or attack candidates, of their own or another party, for nonjudicial office. They may not contribute to the politi-

6. Gangemi v. Rosengard, 44 N.J. 166, 171, 207 A.2d 665, 667 (1965). The court invalidated a state requirement that certain elected municipal officers be registered municipal voters for at least two years prior to the election.

7. "The initial and direct impact of filing fees is felt by aspirants for office, rather than voters. . . . However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." Bullock v. Carter, 405 U.S. 134, 142–43, 92 S.Ct. 849, 855–56 (1972).

8. Jardine, *Ballot Access Rights: The Constitutional Status of the Right to Run for Office*, 1974 UTAH L. REV. 290.

9. *Developments In The Law—Elections*, 88 HARV. L. REV. 1111 (1975).

10. 35 N.Y.2d 469, 363 N.Y.S.2d 937, 323 N.E.2d 179 (1974).

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cal war-chests of other candidates. They may appear at political meetings but must maintain political neutrality publicly, as to other candidates or issues not involving the courts. They are, in short, to be as nonpartisan as the selection of Judges by election permits (Code of Judicial Conduct, Canon 7).

The offending rule cuts right across these principles. It compels or would compel a judicial candidate to be involved more deeply than he already is in the political contest and the trading for party nominations and designations. The candidate's obeisance to the rule must signify a lack of independence to make his own judgment whether another party is entitled to name him as a candidate or whether he wishes to run as a candidate on the ticket of that other party. Hence, it would compel him to take a partisan position not essential to his candidacy under the present political system of selecting Judges by election. . . . So long as Judges are chosen by popular election they cannot, we recognize, be isolated entirely from the political process. A line must be drawn, however, demarking permitted from impermissible practice. In our view the exaction of agreements against cross-indorsements falls over the line into the forbidden area.

We accordingly hold this by-law provision invalid as in contravention of a public policy which mandates that insofar as practicable both selection for and performance in judicial office shall be free from political manipulation.[11]

Rosenthal v. Harwood provides insights which are helpful in determining whether a state could validly mandate the use of judicial nominating committees as a prerequisite to the popular election of judges. First, in nullifying the bylaw requirement of a promise of party loyalty as a condition of party support, the New York court explicitly invalidated the rule only as applied to a candidate for judicial office. This narrow holding, based on the inherent nature of the judicial function, emphasizes an important distinction between a judge and a legislator insofar as any restraint upon eligibility to run for office is concerned.[12] And second, in removing the restriction upon eligibility for judicial office which the bylaw provision imposed, the court was primarily moved by a desire to depoliticize as much as possible the process of selecting judges by popular vote. This goal, in the writer's view, could likewise be advanced by introducing the use of nominating committees into the process of electing judges.

Whether judicial nominating commissions would in fact appreciably reduce the political pressures involved in the popular election of judges, thereby contributing to an improvement in the quality of the judiciary, would depend on their composition and operating procedures. The commission's makeup (judges, lawyers, nonlawyers) should provide reasonable assurance that its decisions would be nonpartisan as well as representative of the views of the entire community.[13] It would also be important that the commission's operating procedures permit a thorough and objective screening and evaluation of all prospective candidates under consideration. Sound criteria and standards to guide the commission's discretion, a program of active recruitment of judicial talent, a competent staff, a manageable workload—these would be among the ingredients of a successful judicial selection committee. Clearly, if the effectiveness of judicial nominating commissions in an elective setting is demonstrated, thereby establishing the relationship between their use and the objective of improving the quality of elected judges, it would constitute a strong argument that the procedure did not represent an unconstitutional restraint upon eligibility for elective office. □

11. *Id.* at 473–75, 363 N.Y.S.2d at 941–43, 323 N.E.2d at 182–83.

12. Another aspect of this distinction is found in the fact that a judge is typically required to have been admitted to the bar and engaged in practice for a given period of time, a requirement which of itself involves a measure of professional screening for the bench. This, of course, goes beyond the standards of age, citizenship and residence which all candidates for elective office, legislative as well as judicial, must usually meet.

13. *See* Alfini, *Partisan Pressures on the Nonpartisan Plan*, 58 JUDICATURE 217 (1974).

"If the nonpartisan merit selection plan is to grow both in rural and urban areas, it is inevitable that commissions will have to approximate more closely than they do now a representative cross-section of our society. Judicial nominating commissions need, and can profit from, an infusion of more minority groups, more women, more non-businessmen, and more young people." *Id.* at 221.

W. DAVID CURTISS, a Professor of Law at Cornell University, was a member of the New York Temporary Commission on the State Court System (the Dominick Commission) in 1970–73.

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