A Judgment Call
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According to a widely circulated story, a prominent politician once said, when asked if he would like to a judge, "Yes, I would like to be a judge, and what's more, I would be an honest judge, except in political cases."

It's an amusing little story--but it makes an important point as well--that American judges are often involved in political questions, that in fact judges have political roles.

The latter point is important because the political aspect of the American judiciary is not always frankly acknowledged in public discussions about law and politics. And that is because we are not really comfortable with the dual role judges have in our governmental system.

Unlike many other systems, American judges are not mere extensions of political authority, constituted in the executive and legislative branches. Instead, American judges are themselves constituted authority--an independent branch of government, accountable not to presidents or governors, but to the people themselves.

Accountability to the people is tricky business with judges because it means they have to be selected in some way that makes them answerable for their actions--and not answerable just in some abstract or theoretical way, but in a concrete and meaningful way, as are presidents, governors, and legislators.

How to accomplish accountability has been an enduring dilemma since judges are both like and unlike other politicians. They are like other politicians in that they have independent authority, exercise wide latitudes in decision-making, frequently have well-developed ideological outlooks, and often come from political backgrounds. Indeed, becoming a judge is a capstone for many political careers.

But judges are unlike other politicians in that they are guided by facts and evidence, follow rigorous procedures in reaching decisions, adhere to the rule of law, and render decisions that are subject to review. In short, judges are unique actors in American politics--neither fish nor fowl.

Historically, there have been two main approaches to selecting judges: appointment and election. At the federal level, the appointment system has been used exclusively, with the President nominating and the Senate confirming all federal jurists.

Experts have different views of how well the federal appointment system works, but no one with any experience in it would argue that it has taken the politics out of federal judge selection.

At the state level, both appointment and electoral systems have been used. Many of the appointment systems are referred to as merit appointments--wherein judges are appointed usually by governors from lists of candidates assembled on the basis of some explicit criteria, such as experience, training, temperament and so forth. Political considerations usually play out in this selection process as well.
Historically, elections have been the default option at the state level with the contemporary trend toward appointment systems. Some states use a combination of election and appointment. And eight states, including Pennsylvania still use partisan elections to select their appellate jurists.

Until last year, candidates for judgeships in Pennsylvania were restricted as to what they could actually say when campaigning. The result was mostly non-controversial campaigns that only marginally transgressed judicial dignity.

The good news was that most of the ultimate winners crossed the finish line with their decorum intact. The bad news was that few voters had a clue which candidates had won, much less why, and even fewer cared.

But that may be about to change. Last year the US Supreme Court in Minnesota v. White ruled against judicial codes of conduct, such as the one in Pennsylvania that restricted judicial candidates from stating their views on political and legal issues. According to the Court, these restrictions infringe on the 1st amendment rights of judicial candidates.

In simplest terms, judicial candidates—those running for district magistrate, common pleas judgeships or the appeals courts (Commonwealth, Superior, and Supreme), are now free to adopt regular style campaigning. They can now engage in appeals to voters that resemble other political campaigns.

For example, they can state their positions on the hot button issues—capital punishment, abortion, gay rights, and on just about any issue likely to come before them as sitting jurists. In addition, their campaigns can run negative attack commercials, with less likelihood that they will be hauled before some discipline board to account for the truthfulness or sleaziness of the commercials.

The big question now is—has the Court's decision made an already bad situation worse—or has it made a bad situation a little better?

Both arguments have their advocates. The bad to worse argument goes something like this:

Before the Minnesota case, the State Supreme Court provided some reasonable limits on judicial candidates. Now it's anyone's guess what judicial candidates will do and say to get elected. But if they follow their political colleagues in the other two branches, prepare for the worst. In the last round of state judicial elections, the bounds of propriety had already been stretched, even before the Minnesota ruling.

Make no mistake about it, as this argument continues both parties and the special interest groups will now turn judicial races into mud wrestling events. Judge candidates might now join the world of candidate-centered campaigns—and hire media advisors, pollsters, opposition researchers, and most of all join the money chase—and barter away the reputation of the bench.

But not everyone buys the bad to worse mud wrestling view of the post-Minnesota world. The more sanguine counter argument is that the Minnesota decision may make judicial elections better. After all, electing judges is not such a bad thing—and if we are going to do it, Minnesota allows us to do it correctly.

The essence of this argument is that we haven't been doing it correctly, at least up to now. The fact is that until the Minnesota decision voters could get almost no information they could use to decide how to vote.
For example, in 2001, Pennsylvania voters elected seven new appellate court judges, and probably not even a Pennsylvania Jeopardy Grand Champion could name one of the winners. Pre-Minnesota, judicial candidates won or lost because of many factors; unfortunately, almost none of them related to the qualities that make for good jurists.

But, under the Minnesota ruling, candidates can discuss their political and legal views. At last, voters will have a fighting chance to make an intelligent vote.

Which of these diametrically opposed views is correct? Well, we do have an opinion, but not the same opinion. Like many in the political community, the authors of this column disagree on this one.

And maybe that's appropriate, because the issue has befuddled and divided Americans for generations: should we elect judges or should we appoint them? And what difference will it make?

Perhaps in retrospect, we will come to see that the Minnesota decision turned out to be one of those crucial forks in the road that takes us decisively in one direction or the other--either toward an electoral system that provides for informed choices--or toward an appointment system that provides the people with an accountable judiciary.

We might not be able to agree on which system is preferable. But we agree that either is better than the one we have had.

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