

Pennsylvania's Churchillian Problem

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Let's be frank. Pennsylvania's long running dilemma about selecting judges is here for the duration. It's been around a long time and it's not going away soon.

It might well be termed the "Churchillian problem," after Winston Churchill's famous remark about democracy being the worst system in the world except for all the others. That, in substance, is how Pennsylvanians feel about electing appellate judges. It's the worst way to select judges except for all the other ways to do it.

Essentially, there are just two ways to get judges on the bench. They can be elected or appointed. Pennsylvanians have problems with either option.

Presently we elect them, but many voters are really not comfortable electing judges because that requires judicial candidates to get into the grimy business of electioneering - a role many find inappropriate for judges.

But others are even less comfortable with adopting some sort of "merit appointment" system - in part because it removes judges from direct voter accountability and in part because merit selection smacks of elitism. We are, in a phrase, stuck between a rock and a hard place. And we are doing what we always do when confronted with a tough policy choice.

Nothing!

And truth be told, Pennsylvania does nothing as well as any state in the union. Leaders in Pennsylvania have been busily doing nothing about appellate judicial selection for decades now - interrupted only intermittently by long, ponderous, and ultimately unfruitful debates about the benefits and liabilities of election versus appointment. No repetition of those interminable arguments is necessary. Suffice it to summarize two take-away points:

1. Both sides of the question have some pretty good arguments; and
2. We are going to do nothing to change anything.

Zero. Zip. Nada.

Repeat: we are not going to change the way we select judges - not now, probably not ever. Whether that's good or bad is irrelevant. It's what will happen. It's what almost always happens when Pennsylvania has a rip-roaring debate about changing anything important. Change comes slowly or not at all in the Keystone State, and on the question of judicial selection, change won't come. Count on it!

And count on something else too: the "judge problem" is going to get worse. Under the current holding of the U.S. Supreme Court, judges can campaign more aggressively and say more about issues than ever before.

In response, judicial candidates must raise ever larger amounts of campaign money, most of which comes from lawyers and lawyer political action committees. This leaves the ugly impression that the very contributions that help elect a jurist may be coming from lawyers who have cases before him or her.

In short, some appellate judges are now behaving like other politicians - operating tough campaigns, running negative ads, and taking money from special interests.

But that's only part of the problem. Usually one or two judicial contests may attract big contributions because the political stakes are high. But most races are underfunded and most judicial candidates are virtually unknown - especially in the Commonwealth and Superior Court races where candidates may not be known by two-thirds of the electorate. Even high-profile races can be obscure. The most recent *Franklin and Marshall College Poll* found that more than 50 percent of registered voters were undecided about this year's Supreme Court race. Inevitably, most judicial races are well below the radar screen. Ultimate winners in these races are determined not on candidate qualifications, but instead upon such vagaries as party turnout, candidate gender, geography, or ethnicity.

These conflicting electoral trends are now threatening the fundamental integrity of state judicial elections. On the one hand, a single race may attract huge sums of special interest money - thus creating the appearance of bias in any future cases involving those contributors. In the most cynical reading of it, judges are being bought by the special interests funding these elections. But on the other hand, the same system is creating an equally bad, if not worse, outcome by asking voters to vote for judicial candidates about whom they know little or nothing. Indeed, the vast majority of judicial candidates cannot raise enough money to get their name, let alone their message, to the voter.

Most complex policy problems don't have straightforward solutions. This one, however, does. And it should be informed by two simple principles:

1. If we are going to have elections, the voters ought to know enough about the candidates to cast an intelligent vote; and
2. We cannot continue to compromise the integrity of elections to our highest state courts with the taint of special interest money.

The adoption of public financing for appellate judicial races would accomplish that objective. Public financing is used effectively in a number of states. In Pennsylvania, it could be utilized to accomplish the two broad policy goals of limiting special interest money and providing a sufficient funding floor for judicial candidates to run adequate campaigns. Moreover, the cost of doing so would be relatively small considering the great benefit to democracy in guaranteeing the integrity of the state appellate courts.

A necessary caution: public financing will not be a panacea or a cure all for the state's judicial problems. Probably none exists outside the textbook answers some offer. Candidates could still opt-out and self-finance their own campaigns, and nagging problems of how to pay for the funding would remain.

But let's not allow the perfect to be an enemy of the good. Public financing certainly would help to build public trust in the integrity of the courts while giving voters a better chance to make informed decisions. The existing system has ripened into one large policy lemon that is quickly souring public opinion about the judicial system. Public financing could yet make some pretty good lemonade from it all.

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