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**Vol. 13, No. 6, Pg. 20. Judicial selection in South Carolina: who
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20

Judicial selection in South Carolina: who gets to judge?

By Kevin Eberle

South Carolina is in the minority when it comes to judicial selection and appears ready to remain there following a significant opportunity to revise the whole process. Throughout the history of the state, the appointment of judges has been a function of the state legislature. Modifications were made to the system in 1996, but the ultimate decision remained in the hands of the General Assembly.

As the 1996 reforms were being debated, some called for eliminating this historical model completely and substituting a system based on popular elections. Popular election is the most widely used system nationwide with 33 states using some form of direct vote. Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1201-02 (2000). In contrast, only Connecticut, Virginia and South Carolina select judges through legislative selection. Daniel R. Deja, *How judges are Selected: A Survey of the Judicial Selection Process in the United States*, 75 MICH. B.J. 904, 904-05 (1996).

22

Whether South Carolina's system is better or worse than a system of popular elections is a question for political philosophers that will never be resolved. The argument often made in favor of the system used by states such as

South Carolina is that their judges are somewhat freed from concerns of public opinion - but only "somewhat freed" because where the term of appointment is for a specific period, there is always the specter of re-appointment by those who do answer directly to the public. That strength is cited as a weakness by those who prefer the notion of popular elections. Those critics claim that judges who do not face public elections tend not to be in step with public sentiment. While popular elections no doubt produce a judiciary more aware of popular sentiment, accountability to the public is cited by opponents as a hindrance to a judge's impartiality; an elected judge must contend not just with the pressure to please the masses, but also the need to please the donors to his or her campaign.

And so the circle continues unbroken with each side pointing to the other's supposed strengths as its weakness. A third system, known as the Missouri Plan (named for the state that first adopted the system) is a twentieth century hybrid. There are variations on this merit-based system, but generally a panel of commissioners is formed by political appointment, usually to include lay members. The panel develops a slate of officers based on merit from which either the legislature or governor appoints judges. Thereafter, judges face only uncontested retention elections similar to a no-confidence vote. Fourteen states have now adopted merit selection as their sole method of selection.

During the 1990s, the legislative method came under increased scrutiny and the General Assembly was faced with the opportunity to change the method of judicial selection in South Carolina. At times, the legislature appointed certain judges who were attacked as unqualified, and the public became increasingly vocal about the perception that judges were being selected based on the good-oldboy system. For an excellent source cataloging many of the contemporaneous newspaper articles, editorials and other comments about the need for reform, one should consult Martin Driggers Jr., *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. LAW. REV. 1217, 1226 (1998).

Many critics pointed out the fact that all of South Carolina's justices and many of its appellate judges had served in the Statehouse before joining the judicial branch, with many moving directly from the Statehouse to the courthouse. Indeed, the election of Judge Randall Bell to the South Carolina Supreme Court in 1994 was labeled a "surprise" victory in the newspapers despite 10 years on the Court of Appeals, a professorship at the University of South Carolina School of Law and degrees and honors from the College of William & Mary, Oxford University and Harvard University Law School. The element of surprise was that he had never served in the Statehouse. See Sid Gulden, *Bell Wins Post on Top Court*, Charleston Post & Courier, May 26, 1994, at 1B.

In 1996, the South Carolina Statehouse tackled the issue of judicial selection head-on. In the end, the General Assembly retained its power to select judges. However, the General Assembly did move in the direction of merit-based selection when it passed a combination of statutory and constitutional modifications to the selection process.

The most notable change to the process was the creation of the Judicial Merit Selection Commission. The Commission is required now under the South Carolina Constitution. S.C. CONST. art. V, § 27.

Previously, any person - at least those meeting constitutional age and residency requirements - could be considered for a judgeship by the General Assembly. A committee formed by members of both houses of the legislature convened to review the qualifications of the candidates. However, the enabling statutes for the committee neither defined what qualifications were to be reviewed nor how they were to be weighed. S.C. Code Ann. §§ 2-19-20, 2-19-30 (Law. Co-op. 1986). More importantly, the committee did not have any power to remove a candidate from consideration, and a finding that the candidate was unqualified did not affect the process at all.

Today, in contrast, the Judicial Merit Selection Commission has the exclusive power to nominate candidates for consideration by the General Assembly. S.C. Code Ann. § 2-19-80(B) (Law. Co-op. Supp. 2001). Under the amended system, there are 10 members of the Merit Commission. *Id.* § 219-10(A). Five volunteer members are selected by the leadership of the Senate (i.e., the chairman of the Senate Judiciary Committee and the President Pro Tempore of the Senate) and five volunteer members are selected by the Speaker of the House of Representatives. Of each group of five, three must be General Assembly members and two must be persons selected from the general population. *Id.* § 2-19-10(B)(1), (2).

When the Commission learns that there will be a vacancy or attempt at re-election by a sitting judge, the Commission must notify the South Carolina Supreme Court and have a notice of the vacancy run in the *Advance Sheets* at least 30 days before closing the window for applications. S.C. Code Ann. § 2-19-20(B). (Law. Coop. Supp. 2001). The Commission will also notify the South Carolina Bar, newspapers and others of the opening.

A person interested in the position shall then file a notice of intention to seek the office with the Commission. S.C. Code Ann. § 2-19-20(C) (Law. Coop. Supp. 2001). Upon receipt of the notice of intent, the Commission will "begin to conduct the investigation of

the candidate as it considers appropriate and may in the investigation utilize the services of any agency of state government." S.C. Code Ann. § 2-1920(D) (Law. Co-op. Supp. 2001).

At this stage, there is a wholly new provision of the process by which at least members of the legal profession have an added opportunity to influence the process. At least four weeks before conducting public hearings on the candidates, the Commission's chairman must notify the president of the South Carolina Bar of the candidates whose names have been received. The Bar then has the chance to offer its "assessment of each candidate's qualifications" as well as the reasons for that finding. S.C. Code Ann. § 2-19-25 (Law. Co-op. Supp. 2001).

The South Carolina Bar uses its Judicial Qualifications Committee (JQC) to form its assessments. The JQC had already been established by the time the modifications were made to the law but has now taken on a more official role. The JQC, consisting of 25 active lawyers appointed by the president of the Bar, will form subcommittees to investigate at least every candidate for a contested office. The investigation, similar to the Judicial Merit Selection Commission's own investigation in its confidentiality, includes interviews with at least 30 individuals knowledgeable of the candidate as well as the candidate himself or herself. In the end, the JQC rates each candidate as either meeting the established criteria or not meeting the established criteria in a report that also outlines the group's reasoning. Examples of the end product can be viewed at the South Carolina Bar's Web site at www.scbar.org.

According to current Bar President Elizabeth Van Doren Gray, the opportunity for the Bar to review candidates is an important one. While the evaluations might sometimes be given less weight than they might deserve, she notes that the process itself can help produce a better field of candidates.

When a preliminary finding that a candidate does not meet established criteria is made, that candidate becomes more likely to withdraw from the

selection process rather than face the Judicial Merit Selection Commission's non-confidential hearings.

During the General Assembly's modification to the selection process in 1996, an opportunity for the public-at-large to become involved in the process was also added. The chairman of the Judicial Merit Selection Commission, upon the advice of the Commission, shall select individuals to serve on Citizens Committees on Judicial Qualifications for each geographic district set by the Commission. S.C. Code Ann. § 2-19-120 (Law. Co-op. Supp. 2001). The citizens' committees provide their advice on the candidates in such form as requested by the Commission.

Once the Commission has completed its own investigation, it will schedule a public hearing. S.C. Code Ann. § 2-19-30 24 (Law. Co-op. Supp. 2001). The forum is not a traditional open-mike setting, though. Rather, interested persons must submit their proposed testimony at least 48 hours in advance. The Commission then selects the persons who will testify at the hearing. The Commission can also subpoena testimony from those who are not willing to volunteer testimony or materials. S.C. Code Ann. § 2-19-60 (Law. Co-op. Supp. 2001).

A transcript of the hearing and copies of the submissions to the Commission must then be made as soon as possible and made available. The information obtained under oath during the public hearing is made public, but other materials used by the Commission must be kept strictly confidential. S.C. Code Ann. § 2-19-50 (Law. Co-op. Supp. 2001). According to a 1998 amendment, if a candidate withdraws his or her name from consideration, the investigation of such individual will conclude and the materials relating to that candidate will be destroyed. S.C. Code Ann. § 2-19-30(E) (Law. Co-op. Supp. 2001).

Within a reasonable time following the hearing, the Commission must render its tentative findings and give its reasons. Whereas the former statutes did not specify any criteria for judging the qualifications of candidates, the 1996 amendments contain a non-exclusive list of specific factors: constitutional qualifications, ethical fitness, professional and academic ability, character, reputation, physical health, mental stability, experience and judicial temperament. S.C. Code Ann. § 2-19-35(A) (Law. Co-op. Supp. 2001). In making nominations, "race, gender, national origin and other demographic factors should be considered by the commission to ensure nondiscrimination to the greatest extent possible as to all segments of the population of the State." S.C. Code Ann. § 2-19-35(B) (Law. Co-op. Supp. 2001).

The report of the Commission must submit no more than the three candidates it considers best qualified to the General Assembly. S.C. Code Ann. § 219-80(A) (Law. Co-op. 2001). Not less than 48 hours after the nominees have been released to the members of the General Assembly, the formal release may take place.

The selection of three candidates is a significant change to the process. Before the modifications, the reviewing panel was not authorized to remove any names from consideration and simply passed all the names, qualified or not, to the General Assembly for consideration. Now, "[t]he nominations of the Commission for any judgeship are binding on the General Assembly, and it shall not elect a person not nominated by the Commission." S.C. Code Ann. § 2-1980(B) (Law. Co-op. Supp. 2001). To further increase public confidence in the system, changes were made to the process which alter the likely slate of candidates, regardless of their qualifications. First, to promote even access to the decision-makers, there is now a ban on legislators from running for judicial office until one year from (1) leaving the General Assembly or (2) failing to file for reelection to the General Assembly. S.C. Code Ann. § 2-19-70(A) (Law. Co-op. Supp. 2001). Similarly, no member of the Judicial Merit Selection Commission is eligible for nomination as a judge or justice until having been off the Commission for one year. *Id.* § 2-19-10(G).

It appears that this change has been effective. In 1996, 60 percent of circuit court judges were former members of the General Assembly, but, of the 17 circuit court judges who were elected after the July 1, 1997 effective date of the amendments, 14 had no previous experience in the General Assembly. Neither of the two judges elected to the Court of Appeals since the effective date had a legislative background. And, in marked contrast to the accounts of the "surprise" election of political outsider Judge Bell to the Supreme Court in 1994, few, if any, newspapers even reported that not

one of the candidates had served in the General Assembly when Justice Costa Pleicones was elected in February 2000.

A second change which influences the slate of candidates is that a candidate may not seek more than one judgeship at a time. S.C. Code Ann. § 2-19-20(C) (Law. Co-op. Supp. 2001). The restriction against running for more than one post at a time, especially when coupled with the gatekeeping

function of the Commission, is especially important. In the past, members of the General Assembly were able to shepherd certain candidates through an election by selectively pitting strong and weak candidates for individual races.

Another change to the selection process which improves public confidence in a level playing field is the ban on early lobbying and vote-trading. *See* S.C. Code Ann. § 2-19-70(D) (Law. Co-op. Supp. 2001.) In previous elections, legislators often engaged in vote-trading, not to elect particular judges *per se*, but rather to influence the racial composition of the bench by trading support for various candidates. *See* Martin Driggers Jr., *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. LAW. REV. 1217, 1232 n. 115 (1998). Even prior to the 1996 amendments, no candidate was to seek the pledge of a member of the General Assembly until the qualifications of all of the candidates for that office had been determined. Under the revisions, candidates are not to solicit votes until the Commission has formally released its report. S.C. Code Ann. § 2-19-70 (Law. Co-op. Supp. 2001).

Additionally, no member of the General Assembly may offer his pledge until that same time. Even after open lobbying is allowed, no member of the General Assembly may trade anything of value, including a pledge to vote for legislation or for other candidates, in exchange for votes for a particular candidate. S.C. Code Ann. § 2-19-70(D) (Law Co-op. 2001).

The ban on premature campaigning has already been the subject of some controversy. One may review three advisories published by the Judicial Merit Selection Commission on the subject by visiting the Commission's Web site, www.lptr.state.sc.us/misc/judrun.htm. By one advisory of November 1999, members of the Statehouse were instructed to cease the growing practice of soliciting sponsors for letters of introduction on behalf of candidates. Members of the General Assembly would circulate the letters and ask other legislators to sign on in anticipation of the release of the final report of the Commission. The draft letters, that were to be saved and circulated among the General Assembly at a later date after the release of the final report on the candidates, did not specifically ask for a pledge of support, but only requested one's support at "the appropriate time." The practice was seen as too akin to pledging support and was banned. To underscore the seriousness of the problem, the Commission's chairman wrote that "a violation of the screening law is likely a disqualifying offense and must be considered when determining a candidate's fitness for judicial office. The Commission would therefore counsel members to please be careful that the actions undertaken on behalf of a candidate or at his request comport with the requirements of the screening law as set out above."

Finally, at least two weeks after receiving the recommendations, the General Assembly may vote. S.C. Code Ann. § 2-19-80(E) (Law. Co-op. Supp. 2001). The actual election takes place during a joint session of the General Assembly with a candidate requiring a majority vote of the members voting. S.C. Code Ann. § 2-19-90 (Law. Co-op. Supp. 2001).

Have the changes to the system really resulted in a meaningful difference? Some who have been personally involved in the movement for many years and are familiar with the old and new systems cautiously call the amendments improvements. Bar President Gray, for instance, believes that, in total, the modifications have made the system better, although not perfect. Supporters of a true merit-based system, even if not entirely pleased, can rightfully remind critics of the 200 years of inertia reformers faced. And to those who contend that the changes are either ineffective or do not go far enough, some solace may be found in the quip of one-time American Bar Association President Arthur Vanderbilt: "Judicial reform is no sport for the short-winded." Charles Henning, *The Wit & Wisdom of Politics* 107 (1989).

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