

A legal note from Marshal Willick about the necessity of altering our method of judicial selection

Adopting the Missouri plan for appointing judges and holding retention elections is the only rational thing to do and deserves the backing of every thinking person – and some of the most important reasons are those least talked about.

## I. WHAT IS ACTUALLY UP FOR A VOTE

Senate Joint Resolution 2 provides for the merit selection of all Supreme Court Justices and district court judges. The Commission on Judicial Selection would nominate a list of candidates based on their experience and qualifications, the Governor would appoint one of those nominated, and after a year, the public would vote on whether the new judge was sufficiently good at the job to deserve to keep it for another six years – and would vote again every six years thereafter.

## II. THE USUAL ARGUMENTS ON BOTH SIDES

Proponents of merit selection always try to explain how the quality of judges will be improved by having applicants vetted and made to go through a rigorous application and nomination process. They further decry the ever-escalating cost of judicial elections, and the inherent risk – and apparent history of actuality – of bias when judges preside over trials conducted by those who have – and have not – given them campaign money.

In response, there is always the immediate reactionary reflex that “the elites” are “taking away the people’s right to vote.” Letters to the editor propounding that nonsense have already started to appear.

But the current system repeatedly leaves judges running unopposed – giving the people *no* vote; the headline of the May 9 Review Journal read “Few sitting judges face challengers” – and the *next day* the RJ ran a story reporting that lawyers found about 10% of the sitting judges so deficient that they should not remain on the bench.

Merit selection would ensure that *every* judge gets an up-or-down vote every six years. In fact, the retention elections the year after appointment (at which 55% approval is required) provide the public with ample prompt opportunity to toss out any whack-job that somehow made it through the appointment process.

But the whole point is that the vetting and examination process of selecting judges *should* mean that unqualified twits do not make it to the bench in the first place – as compared with the current system where elections are too often based on familiar-sounding names, gross appeals to ideological, ethnic, or religious constituencies, or personal bankrolls.

Those thinking clearly on this would realize that they should not even *want* judges selected on any of those bases. Unlike one’s legislators, or Governor, what every rational person should want in

judges is skill, not similarity in origin and orientation. Judging is a job that should be obtained by meritocracy, **not** popularity.

And the role of money deserves special consideration. The August 16 Review Journal contained an article (at page 6A) titled “Campaign fundraising rises for top court posts,” which reviewed a study of 26 states. Nevada came in eighth, and was notable for being one of only six states where at least one judicial candidate “took in more than \$1 million in donations.” The study noted that over the last decade spending just on Nevada Supreme Court seats skyrocketed to about \$207 million, from \$83 million during the prior decade.

That amount of money is just nuts, and cannot help but create the appearance – and risk the reality – that justice is for sale in this State. On that basis alone, the current process must be changed.

There are other alternatives for reform of judicial selection. Some States provide public financing for judicial campaigns, and others prohibit judicial candidates from accepting campaign contributions or require recusal from cases in which a party or their attorneys have contributed to the judge’s campaign.

Those would be helpful steps, but they don’t address the primary goal of getting the best possible judges on the bench. In fact, restricting the ability of judicial candidates to raise funds would, if anything, only ensure that the electorate is even **more** uninformed and ignorant of the qualifications of candidates than people are now.

I was once told by a supposed “insider” that the “real” reason the RJ has always opposed judicial merit selection is that appointed judges don’t have to raise and spend campaign funds, and the loss of ad revenue – **any** ad revenue – is to be opposed by all means necessary.

I hope that such grubby self-interest is not the real motivation, and that philosophy, however ill-considered, is the actual basis of that historical opposition. But, if so, it is unlikely that those opposing merit selection would find any of those other steps any more appealing; the same folks would protest any use of tax dollars, or restricting the “freedom” of candidates to accept money from people and then preside over their cases.

They should re-think their stance. Those in the media **should** want as high a quality of judiciary as possible, and pandering to ignorant populism directly interferes with that goal.

### III. THE MUCH-IGNORED BEST FEATURE OF MERIT SELECTION

Weirdly absent from most public discussions of merit selection of judges is the one feature of the program that is best positioned to both encourage quality judging **and** serve the public’s interest in casting informed retention election votes: the independent performance evaluations by the new Commission on Judicial Performance.

If this Commission (composed of the Chief Justice of the Nevada Supreme Court and equal numbers

of attorneys and non-attorneys) fulfills its promise, judicial performance will be subject to ongoing monitoring and evaluation. Those evaluations will be provided to the public before each retention election. If it is done right, both lawyers and litigants will be able to provide ongoing reviews of judicial performance that should allow the electorate to make *informed* choices about whether judges should be retained.

I am a huge proponent of judicial evaluation, and believe that judges (like most folks) are most likely to do their jobs well when someone is watching and grading their performance. I may be the last member still around of the original “core committee” that designed the bi-annual Judicial Evaluation Survey now run by the Review Journal; the whole idea was that shining a spotlight on judicial performance is likely to improve it.

A Judicial Performance Commission, tasked with *ongoing* monitoring of judicial performance, can be expected to do a more thorough – and inherently “fairer” – review than a bi-annual voluntary survey of lawyers. Including feedback from both attorneys and litigants should also go some way toward addressing the criticisms heard every two years that it is somehow “unfair” that only lawyers are asked about how well judges do their jobs.

#### IV. THE DEVIL IS IN THE DETAILS

The trick to making merit selection really work, and overcoming the paranoia of those who believe that it is a conspiracy of lawyer-insiders, is to ensure that all phases of the process are as open and transparent as they can be.

Already, the Judicial Selection Commission meetings are open to the public, and involve both attorney and lay members. The Judicial Performance Commission should be similarly staffed, and similarly run. Done right, adoption of merit selection can have the Nevada judiciary cease being the target of both investigative journalists and late-night comedians, and be transformed into a system worthy of admiration and emulation.

#### V. CONCLUSIONS, AND WHAT TO DO

I am continuously amazed at the results of primary elections in which knowledgeable and competent judicial candidates do not “make the cut” to the general – apparently for a lack of enough colorful roadside signs. And while some true train-wrecks are also thus eliminated, there are always a couple more, unqualified to sharpen pencils, who are placed within striking distance of a six-year judicial term, virtually ensuring many years of future colorful Judicial Discipline hearings. Which might not be so bad, except for the unnecessary misery to be inflicted on untold numbers of litigants until those cretins eventually retire, die, or are removed.

Corruption can creep into any selection process. But those of good intent can, with care, make a process pretty corruption-resistant, while those opposing merit selection of judges seem to be the same ones who want legal decisions to be made by “the people” – preferably carrying pitchforks

torches, and a rope.

Yes, merit selection will involve lawyers being more directly involved in examining, vetting, and nominating judges. This is not a bad thing. As put with far more eloquence quite a long time ago: “I cannot believe that a republic could subsist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people.” Alexis de Tocqueville, *Democracy in America*, 1835-1840.

Those fixated on ensuring that “the people” select judges at the first instance – no matter how uninformed the selection – unwisely elevate process over product. Most people tend to be concerned with judicial ability only when *their* fortune, their freedom, or their family rests in the discretion of a judge, at which time it is much too late. Justice is too important to be left to the largely random selection of the current election process. It can and should be made much smarter, and that is best achieved by passing merit selection when it comes up for a vote this November.

I hope that each person reading this legal note is as convinced as I am that this change is crucial to improving the quality and respectability of the Nevada judiciary. If so, please forward it to someone else who might vote this November, and discuss this choice with other voters.

Those with the means should donate to the organization spearheading this effort: “Nevadans for Qualified Judges,” led by William Maupin, the eminently respected retired Chief Justice of the Nevada Supreme Court. The mailing address is 5455 South Fort Apache Road, Ste. 108-147, Las Vegas, NV 89148-6416. I don’t often answer calls for contributions – but I made an exception for this effort.

And for those readers of these notes in other States, perhaps this could be a spur to similar efforts in places with similar problems. Smarter selection of judges would also be useful in a few places outside Nevada that my practice has given me reason to visit.

This is one of those moments in history where there is a real chance to make a difference by improving the justice system. Please help do so.

## VI. QUOTES OF THE ISSUE

“I hope you will be yourself, human, even a little sentimental, possessed of a sense of humor and a sense of humility. . . . There are arrogant people in this world and, what is worse, arrogant judges.”  
– Harry A. Blackmun (U.S. Supreme Court Justice)

“Democracy is the theory that the common people know what they want, and deserve to get it good and hard.”

“Judge — A law student who marks his own examination-papers.”  
– H.L. Mencken, *A Mencken Chrestomathy* (1949)

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