

CONSTITUTIONALITY OF RETENTION ELECTIONS FOR APPELLATE JUDGES

To determine whether yes/no elections for appellate judges are contrary to our Constitution, the Legislature must ask the threshold question: "Did the Founding Fathers intend to limit the power and authority of the Legislative branch to determine the type of elections for appellate judges?" The Legislature's answer to this question will set a precedent that will define the scope of its power on many issues for years to come.

At the core of our Constitution is the premise that, while the Judicial and Executive branches have limited authority, the broadest possible authority is vested in the Legislative branch. Unless specifically allocated elsewhere, the Founding Fathers intended for all residual power to rest in the Legislature. For a provision of our Constitution to be interpreted as a limitation on the power and authority of the Legislative branch, it must be both *express* and *unequivocal*.

When the Founding Fathers intended to limit the discretion of the Legislature, they made this intention clear. For example, the constitutional provisions for the election of the Governor¹ are detailed and specific. In contrast, the constitutional provision on the election of Supreme Court judges says only: "The judges of the Supreme Court shall be elected by the qualified voters of the state." The Constitution does not specify or limit the type of election to be selected for judges.

The breadth of the Legislature's authority to choose the type of judicial elections was one of many issues for delegates to the 1977 Constitutional Convention. They had no question about the constitutionality of retention elections; the Supreme Court had rendered its 1973 decision on that very issue. However, delegates were unhappy with the Legislature's 1974 decision to remove the Supreme Court from retention elections, and proposed a constitutional amendment mandating merit selection and retention elections for all appellate judges. This proposed amendment had broad statewide support. However, the retention election proposal was "bundled" with 15 other proposals into a single judicial article and presented to voters on a "take-it-or-leave-it" basis. Some of the bundled proposals generated intense opposition, such as proposals to merge court systems and thus eliminate clerks and court staff statewide. Despite the broad support for retention elections, opposition to the controversial proposals resulted in a negative vote on the overall judicial article, and the Legislature's broad authority remained unchanged.

To interpret any Constitutional provision, it is useful to see if similar language is used elsewhere in the document. Compare the brief language used by the Founding Fathers regarding Supreme Court elections to nearly identical language in another Constitutional provision. Article II, section 29 authorizes cities and counties to give credit to individuals or corporations only "*upon an election to be first held by the qualified voters of such county, city or town.*" The term "election" in this provision could only refer to a yes/no vote. Thus, the language used by the Founding Fathers in referring to elections for Supreme Court judges can clearly encompass a yes/no election.

Most important, though, is to honor the broad inherent authority accorded to the Legislature by the Founding Fathers. It is noteworthy that no one—*no one*—in the debate surrounding elections for appellate judges has pointed to any language in the Constitution that limits the power and authority of the Legislature on this issue. The reason is simple: *there is no such language*.

For the Legislature to begin reading into the Constitution limitations that are not stated expressly would set a precedent that would corrode the power envisioned for the Legislative branch by the Founding Fathers. The Legislature must not accept an interpretation of the Constitution that diminishes its lawful power and authority, even if urged to do so by those within its own ranks. It is essential to our republic that the Legislature recognize and embrace the full measure of its lawful authority.

Under our Constitution, the Legislature may, in its wisdom, select the type of election that is best suited to the Judiciary, including retention elections.

¹ Article III, section 2 states that the Governor is "chosen by the electors of the General Assembly," specifies that the "person having the highest number of votes" is Governor, and details procedures in the event of a tie vote or a contested election.

NO TO ELECTION OF JUDGES

We in business believe directly electing judges would be negative for the State of Tennessee. It would be negative for our public confidence, negative for the predictability and stability of the rule of law, and it would change a process that is now working well. We call on our Legislature to pass legislation reestablishing the Judicial Selection Commission.

First, foremost and overriding--the corrosive influence of money.

On Wednesday February 11, 2009, Chief Justice Wallace Jefferson of the Texas Supreme Court told the state legislature that the polls show over 80% of Texans believe campaign contributions affect judicial decisions. He told them the corrosive influence of money in judicial election campaigns has undermined respect for the rule of law.

Austin American Statesman 2/12/09

In West Virginia, a coal baron spent \$3MM in a 2004 election cycle in one race. The winner later cast the deciding vote throwing out a judgment against the coal baron's company. The United States Supreme Court has agreed to hear this case.

In Alabama during 2008, more than \$5.1MM was spent on a race for a single Supreme Court seat, with \$1.5MM of that coming from one out of state group.

Southern Political Report 11/03/08

We could go on, but the reality is the ordinary citizens of the states in which judges are elected perceive that judicial decisions are affected by campaign contributions. The judicial system cannot maintain the dignity and respect necessary for the trust in the rule of law and the perception that ordinary citizens, small businesses, medium businesses, rich and poor, powerful and powerless, can at least have a fair chance in the judicial system when the people believe it is corrupted by money.

The cost of state wide campaigning for judicial positions would virtually guarantee only the very wealthy or very well connected could run. No office in state government, except Governor, uses state wide popular elections as a method of selection. The cost of statewide campaigning runs into millions, effectively barring all but a very few from being able to seek to serve on the appellate courts. None of the members of our Supreme Court now, all well qualified and respected jurists, would likely have been able to seek the high office in which they serve so ably if Tennessee used elections.

Second--the corrosive effect on the public perception of the rule of law

From the founding of this country to the current time Americans have known the importance of an independent, impartial judiciary with judges basing decisions not on popular will, but the rule of law. The popular will is supposed to find voice in the Legislative and Executive branches of government. In the Judiciary, the rule of law is to be the constant, with the attendant duty to protect the Constitution and the rights protected under the Constitution. Direct partisan elections mean judges would be making decisions with an eye to the polls and a careful ear open to the sources of campaign funds. Whether it is true or not, there is no question the perception would be there. That undermines the very foundation of our society that we are a nation of laws, not of men, and no one is above the law.

Direct partisan elections would lead directly to the perception that justice can be bought, breeding disrespect for the rule of law, undermining an independent judiciary and threatening the very foundation of our democratic society.

Third--what we are doing is working

Don't fix it if it isn't broken. This wisdom applies here. Look at the judges that are serving on our Courts of Appeals and Supreme Court. These are fine, honorable, well qualified men and women. They hand down well reasoned decisions, even the ones I disagree with. They are thoughtful, scholarly and respected. What we are doing is working.

Janice Holder would not be on the Supreme Court if she had to run in a state wide popular election, in my opinion. Neither would Sharon Lee, a lawyer from Madisonville, Tennessee. And probably neither would any of the others. The qualities that make a good judge are not the same as the qualities that make a gifted politician. That is not to say one is bad or another is good, it is to say they are different. We do not need judges with the gift of anticipating public opinion or whipping up partisan support. We need judges with the gift of understanding the correct rule of law, the importance of predictability in the law, and fairness and even handedness.

What we are doing is working. Unlike so many things we are doing, this thing is working. Let's keep doing it.