1989

Commentary on State Selection of Judges

Robert F. Stephens

Kentucky Supreme Court

Follow this and additional works at: https://uknowledge.uky.edu/klj
Part of the Judges Commons
Click here to let us know how access to this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol77/iss3/15
Commentary on State Selection of Judges

BY HON. ROBERT F. STEPHENS*

My task is to comment on the judicial selection process in Kentucky. But first I have a few comments on some of the other articles. Professor Baum raised the question of accountability, which is a constant concern among political scientists and people interested in the judiciary. In other words, should judges be responsible in their decisions to the public? I feel very strongly that the answer to this question is no. I suggest that over a period of time, if a judge continues, for example, to probate every felon that comes before him, he will not be in office very long if he is in an elected system. There are many other illustrations. Sitting on the Kentucky Supreme Court as I have for nearly nine years, I have received many suggestions from members of the public, even some from lawyers, on how decisions should be made. These suggestions are rarely objective, and they are rarely based on fact, but rather, most commonly they are based upon the effects the decision will have on them as individuals or on their communities.

My own view, however corny or idealistic it may be, is that a judge’s job is to be objective and to interpret the constitution and the statutes the best way possible, by using precedent. I will not say that the court does not change, because the court regularly overrules precedent. My votes in those instances when precedent is overruled are simply a reflection of my feelings as a person, my education, my experience as an attorney, and my experience as a citizen of this country.

If judges are to be directly responsible to the public, then the judicial system ought to be abolished and every time an issue comes up just have a vote on whether X should be convicted or whether this decision should be made. That is obviously an

---

* Chief Justice, Supreme Court of Kentucky.
overstatement of the case, but I'm very concerned that more and more people are advocating this. For example, in Kentucky all of the income that is generated from the court system goes into the general fund of the state, and all of the expenditures of the court come from the general assembly. Part of my responsibility as Chief Justice is to prepare a budget and help to get it passed. Sometimes it is called lobbying. One would be amazed, or maybe wouldn't be, at how many of the legislators, lawyers and nonlawyers alike, when we ask for a raise (which we do every year) will say, "How do you feel about such-and-such case? How do you feel about this issue?" I know very well that it is in the "pipelines" somewhere in the lower courts or is going to be there. If it is a controversial bill, which has obvious problems with the constitution, the legislators want to know how one feels about the bill's validity. Of course, judges are not allowed to discuss pending cases or give their viewpoint on particular issues. One often gets the feeling that a raise may be dependent on the answers given.

There is generally a lack of knowledge of the judicial system and judicial campaigns among the public. I do a lot of door-to-door campaigning in central Kentucky, which is a pretty high educational and economic level district. Most of the public didn't know there was a race. Many voters didn't know that judges were elected or what judges did. So I can confirm what Professor Baum said that the knowledge which the public has is absolutely minimal, and as Professor Alfini said that the knowledge that the public can get is severely restricted by the Judicial Canons of Ethics, which Kentucky has adopted.

As far as the money that is spent on campaigns, I'm a little bit familiar, obviously not as familiar as Professor Baum, with the Ohio campaign. I recently saw some television commercials from a judicial race in Ohio, and I'm not sure that the information that was circulated through television and newspaper ads really added much to the knowledge of the candidates and their qualifications. The ads were highly political, accusatory, and sometimes without any basis of fact. This kind of campaigning does not give the public the proper information upon which to cast an intelligent vote. The great majority of ads in that Ohio campaign were very negative, which seems to be the trend in this country. So, therefore, I do not believe that the type of
information that comes out in these political campaigns should be the basis of a vote.

When I ran in 1984 I had one television ad. I was sitting in a chair and had a string on my finger. I raised the string and said, "Hi. I'm Bob Stephens, your present supreme court justice from the fifth appellate district. This string is on my finger to remind you to be sure to vote in that election." That is how I spent my television money. In spite of the television ad and the fact it was a presidential election year, there was an enormous turnout, but only forty-seven percent of the voters actually voted in the independent judicial ballot.

The *Lexington Herald-Leader* conducted a poll a few years ago. They polled 500 people in seven counties in the central Kentucky area. Thirty-three percent of the people in this fairly well-educated, fairly high economic level area, believed that accused criminals are presumed guilty and have to prove themselves innocent. Twenty-five percent of the people polled believed that the governor of the state had the right to review opinions and decisions of the supreme court. Needless to say, I am concerned about the lack of knowledge the public has of the justice system.

An article recently appeared in *Common Cause* titled *Justice for Sale*. It ought to be mandatory reading for every high school senior, every college student, and every citizen. The reason is very simple: it has finally been determined and recognized by the special interests in this country that courts are important as far as what courts do and how they effect businesses and people. Special interest groups are now focusing their money on judicial elections—the Ohio election is a classic illustration and the *Pennzoil* case is even more shocking. Plaintiffs' lawyers are spending enormous sums of money on candidates who have encouraged plaintiffs and big verdicts. Whereas the defense attorneys, the lawyers that represent the big insurance companies, are putting in inordinate amounts of money behind candidates with the opposite viewpoint. Battle lines have been drawn because it is possible that a judge will be the swing vote in deciding cases.

Judges do unfortunately (albeit occasionally) make policy. It is just that simple. The men, women, companies, and organizations that have been electing governors, presidents, and legislators are now getting into the judicial system, and that is frightening. When I vote in a case I like to think that my vote
Kentucky’s judicial system has had a very checkered history. Kentucky used to have pure partisan democratic/republican elections, with all the implications that it carries. The pure partisan system was modified by statute in an effort to minimize politics. There were still partisan elections, but a candidate could run in both primaries, being both the democratic and republican nominee. But this only exacerbated the problem. Then in 1975 the people of this great state installed a new system of judicial reform that is second to none. I believe this system is the best in the country. But, of course, it is only as good as the people who run it. The new system created nonpartisan elections on a separate judicial ballot. In the initial draft that was given to the legislature, the Missouri plan of retention elections was proposed. But there was great opposition to the Missouri plan because people wanted to be able to vote for their judges, so the nonpartisan system was provided.

There are nominating commissions to fill vacancies that occur in the courts. There is one nominating commission statewide for supreme court and court of appeals vacancies. There is also a nominating commission for each circuit, which is the court of general trial jurisdiction, and district court in the state. Each nominating commission is composed of seven people. The chief justice serves as a member and chairperson of all of those commissions. The bar association, local or state-wide, votes for two members. The remaining four members—two republicans and two democrats—are appointed by the governor. All attorneys are given official notice by mail of any vacancies. The attorneys then have a limited time in which to nominate someone (even themselves). Nominees must file an application that discloses their educational background, their legal experience, why they want to be a judge, whether they have had any criminal problems or have been disciplined, etc. A meeting is then held, which must be confidential under the supreme court rules. The seven members of the commission discuss the various qualifications of the lawyers who have applied for the position. The constitution says that the commission shall then certify three candidates whom they consider to be qualified. No criteria regarding qualifications is given except the basic eligibility age and
practice of law. The position, since I’ve been chief justice, is that the commission doesn’t have to certify three, even though that is what the constitution says, because implicitly it means three qualified people. For example, if there is only one applicant for a circuit judge’s job, then the governor makes the appointment, and the appointment lasts until the next election. My rule as chairman has been to try not to influence for or against a particular person. Sometimes the members and I have to call lawyer friends to find out about lawyer A, lawyer B, and lawyer C. There is no question that the process can be and has been very political.

I believe that no plan is ever going to satisfy everyone because of the conflict of independence, accountability, and politics that has been discussed previously. I personally prefer the Missouri plan. Judges should not spend three months away from the office campaigning for their primary, and three more months campaigning in the fall for the general election. Judges should not have to go to fund raisers put on by committees, because the implication to the public is that judges can be bought.

Partisanship has no place in judicial elections. If we as citizens of this country want judges to do what the constitution requires, we need judges who are objective, talented, fair, and nonpolitical in the long run. I realize that this is a very idealistic situation. I think there should be a judicial nominating commission to fill vacancies, with the chief justice on the commission to provide continuity. There ought to be the same number of lay people as there are attorneys, so that no majority is given to the governor’s appointees. I would put the appointment authority in the hands of a majority of the Kentucky Supreme Court to get more qualified attorneys. I would then provide that, at the next election, the judge would stand for retention with the simple question, “Do you think that the judge has done a satisfactory job?” Many people think that retention elections preserve the judges in office. In Missouri, they have two coexisting systems—nonjudicial election and retention. Amazingly, the statistics show that more judges are removed from office by retention than by political races. I hope that we continue to look for the best method of selecting judges. I think it is essential that, whatever we do, we retain the separation of powers that
is specifically in the Kentucky Constitution. It is not specifically written in the federal Constitution but has been interpreted to be. I think if it is too easy for one branch of government to infringe upon the duties of another, then the whole system of our republic will break down. For this reason, I'm going to propose the Missouri plan at the next legislature.