Mississippi College Law Review

Volume 21
Issue 2 *Vol. 21 Iss. 2*

Article 3

2002

Introduction to the Judicial Selection

William F. Winter

INTRODUCTION TO THE JUDICIAL SELECTION

Governor William F. Winter

This Judicial Selection Symposium Issue of the Mississippi College Law Review represents a highly valuable compilation of articles which were initially presented at a memorable assembly on November 8, 2001 in the historic House Chamber of the Old Capitol.

That meeting developed into a stimulating and provocative discussion worthy of the many other convocations which have assembled there, including the Constitutional Convention of 1890. Indeed the genesis for the convening of this more recent meeting can be ascribed to the events of that long ago assembly when the Constitution which was adopted at that time brought forward the provisions for an appointive judiciary from the Constitution of 1869, which also had met in that same House Chamber some eighteen years before.

This represented a departure from the Jacksonian concept of the popular election of judges which had prevailed under the Constitution of 1832. The issue remained unsettled after 1890, however, and with the advent of the so-called progressive era in Mississippi politics, the people of the state in a referendum in 1916 returned to an elective judiciary.

Now over a hundred years after the 1890 Constitution was adopted and over eighty years after the 1916 amendment, we find renewed debate over the issue. It was to address this subject in as impartial and nonpartisan a way as possible that the Mississippi College Law Review brought together an impressive combination of academicians and practitioners to share their varying insights.

There was general agreement across the spectrum that, regardless of the method of selection, the public interest is best served when the judiciary is made as free as possible from political intimidation and partisan subjectivity. There was also the concession from all presenters that, given the imperfection of all humans institutions, it was manifestly impossible to devise a system that was totally free of the potential for error. That after all is what the appellate process is supposed to be about. But what, we are asked, do we do when the system sometimes seems to be permeated by the potential for error. That is the dilemma that this symposium sought to address.

These are the views that have been put forth in response to that call. The three participants with actual judicial experience presented three different points of view. The sitting Chief Justice of the Mississippi Supreme Court advocated reforms within the present elective system. His immediate predecessor called for gubernatorial appointment through a merit selection process with the addition of a retention election feature. The representative of the Court of Appeals defended the current elective procedure. All agreed, however, that the injection of large sums of money into judicial political campaigns posed disturbing problems and somehow needed to be addressed.

The widest variance in approach comes from the academics. Professor Erwin Chemerinsky, who was joined in his views in print by Mr. Brad Clanton, Counsel to the U.S. House of Representatives Subcommittee on the Constitution, felt that the selection process was less important than the need to liberate judges to speak freely about various public issues in their role both as citizens and as judges.

Professor Chemerinsky unequivocally acknowledged the political reality that, indeed, judges do and should make public policy and, therefore, have the privilege and the responsibility to make known their ideological positions.

Professor Lino Graglia of the University of Texas represented the voice of judicial restraint. His view of the judiciary is one that minimizes its role in shaping public policy. Since in his opinion the courts should never invade the political sector, he feels that how they are chosen is more or less irrelevant.

Professor Arthur Hellman of the University of Pennsylvania came from an entirely different direction in his perception of the role of the courts but seemed to side with Professor Graglia in diminishing the importance of the selection process, concentrating instead on the nature of judicial activism.

It was Professor Carl Baar of York University in Canada who most forthrightly and emphatically attempted to make the case for an appointive judiciary. He considers that the Mississippi system is in grave danger of losing its independence and consequently the confidence of the people, for it is after all only that confidence that validates our entire legal structure and the rights and freedoms which that structure is supposed to guarantee and protect.

It was obvious that this symposium struck enough sparks that the subject of judicial selection in Mississippi will continue to be a hot button topic. That is as it should be. At the very least it should cause all thoughtful Mississippians, whether in the legal profession or not, to look with more critical eyes at how our system of jurisprudence is structured and administered.

As one who served as Governor of Mississippi, I was faced on some twenty occasions with the duty of making appointments to fill judicial positions made vacant by the death or resignation of incumbent judges. Encouraged by a resolution adopted by the Mississippi Young Lawyers Association, I initiated a process by executive order which I felt worked exceedingly well. It is a process which I recommend for consideration as a permanent means of judicial selection.

Simply stated it calls for the creation of a judicial nominating committee named by the joint action of the Governor and the Mississippi Bar. That committee, which should have a full-time director, would receive applications and nominations for the various judicial positions. All candidates would then be intensively interviewed by the judicial nominating committee or subcommittees thereof and a short list of the most eligible candidates would be submitted to the Governor for his consideration. He would then make the appointment from the list provided.

Should such a process ever be adopted for the selection of all judges, an added feature might well be the requirement for confirmation by the State Senate and a retention election after each six year tenure. This is a concept which I respectfully submit as worthy of continued deliberation. At the very least it should eliminate the concerns over the growing influence of big money in judicial races under our present system. It is to be hoped that this symposium will be the basis for a continuing critical appraisal of Mississippi's system of judicial selection.