# THE ELECTION OF JUDGES

## A DISCUSSION ON WHETHER WE FOLLOW AMERICA DOWN THE ELECTION PATH

JUSTICE K.A CULLINANE

Benjamin Franklin is reported to have suggested a method of selection of judges. He said that judges ought to be elected by the method employed in Scotland where the lawyers selected the judges. Thus, he contended the Scots secured the best judges because they elected the lawyer with the largest practice in order to get rid of him so that they might divide his practice amongst themselves. This appears to be apocryphal on my searching of the internet as the only reference I can find to it is a reference to Franklin's suggestion.

It is fair to say that whilst there appears to be a significant level of interest in the community as to the manner in which judicial appointments are made there has been very little in the way of agitation for any form of election by the community generally of judges.

This may be about to change. On 10 November 2010 the leader of the Federal Opposition, Tony Abbott, ignited debate on this subject when he asserted that election of judges is "almost inevitable" in order to ensure that judges impose sentences in criminal matters which fit the crime.

He was reported as saying:

> *"If judges don't treat this kind of thing appropriately, sooner or later, we will do something that we have never done in this country. We will elect judges. And we will elect judges who will better reflect what we think is our sense of anger in this kind of thing."*

Implicit in what the alternative prime minister had to say is that elected judges would be more responsive to community views and more in tune with public opinion than appointed judges.

The purpose of this paper is to briefly examine the arguments for and against the popular election of judges. The paper will examine the various ways in which this occurs in the United States of America.

The former Chief Justice, Murray Gleeson, in a speech delivered at the Judicial Conference of Australia's Colloquium in Darwin on 31 May 2003 said:

> *"Proposals to change methods of judicial appointment appeal to voters. In a number of Australian states, judicial vacancies are now advertised and expressions of interest solicited. It may only be a matter of time before it becomes necessary for people who want to be considered for appointment even to some of the highest judicial offices, to appear before selection panels to display their professional and ideological credentials. Perhaps this will only mean that governments will take as much care in appointing members of the selection panels as they now take in appointing judges. The capacity to control or influence the selection of judges is regarded on all sides of politics, as an important aspect of*

*governmental power. It would be surprising to see it given away. However, governments like to be seen to be progressive even if there is no general agreement as to what kind of change constitutes progress."*

The process of advertising for judicial vacancies and the appearance of applicants or proposed appointees before selection panels whilst representing a significant move away from the practice of appointment by the executive that has long been used in the filling of judicial office is outside of the scope of this paper.

Only a few countries elect judges. Of these of course, the most significant are the states of the United States of America. In the Soviet Union the peoples Courts were elected but these have now passed into history. In Japan and Switzerland there are popularly elected judges. In the case of Switzerland this is limited to a number of the cantons and in the case of Japan, elections are confined to certain categories of the judiciary.

Nor is there any evidence of elected judges in antiquity. The judiciary in ancient Athens was chosen by lot and in ancient Rome, by the senate or specially appointed bodies.

It is of some importance then to examine the history of elected judges in America.

Whilst some judges were elected in the state of Georgia as early as 1812, the first state in the United States to elect judges generally was Mississippi in 1832. This can be taken as the beginning of the era of the election of judges. There followed a period of intense constitution making with constitutional conventions being held on no less than 21 occasions between 1846 and 1860 in the various states of the Union. Nineteen of these conventions approved constitutions providing for the election of judges. In two states (Massachusetts and New Hampshire) the delegates to the constitutional convention rejected the concept of elected judges but in both instances the voters rejected the resolutions of the delegates to the convention and decided upon an elected judiciary.

By the time of the civil war, some 21 of the 30 states had constitutions which provided for the popular election of judges.

This was a period in which the new country was seen as "*a grand experiment in popular self government and the spirit of experimentation did not cease with the adoption of the Federal and State constitutions*" (Selection of Judges - An Historical Introduction Glynn R Winters 44 Tex. L. Rev 1081).

Historians refer to this era as the Jacksonian era taking its name from President Jackson (president 1829 - 1937).

The concept of sovereignty of the people reigned supreme and it was inevitable that a proposal to elect judges would emerge.

In 1846 New York adopted an elected judiciary.

From that time all states entering the union until the entrance of Alaska in 1958 came into the union with an elected judiciary and even what are described as the colonial states of Georgia, Maryland, Virginia and Pennsylvania joined in the switch from appointment to election.

Associated with the concept of sovereignty of the people were powerful resentments against appointed judges who were seen to be highly politicised and unaccountable.

However, disenchantment with the election of judges developed and by the close of the 19th century there was widespread acceptance that the election of judges brought with it a number of problems and much discussion about a possible solution to the problem was generated.

In Roscoe Pound's 1906 address on "The Causes of Popular Dissatisfaction with the Administration of Justice" he said *"putting courts into politics and compelling judges to become politicians in many jurisdictions has almost destroyed the traditional respect for the bench."*

Election of judges took the form of either a partisan election in which the judges competed against each other under the banner of a political party or a non-partisan election in which they competed against each other independently of political parties.

The contest between a judiciary elected by the populace and one appointed by merit has been one of the enduring debates in American society since the election of judges became wide spread.

Various suggestions and proposals were made for an alteration to the system so as to retain the benefits of a direct election but to place greater emphasis upon securing the selection of judges by merit.

The contest then was between an elected judiciary and a judiciary chosen on merit. Merit selection usually involves appointment or nomination by a commission made up of persons qualified to assess the suitability of a nominee candidate for judicial office.

These suggestions and proposals were debated throughout the early years of the 20th century.

In 1940 Missouri became the first state to adopt a system of appointment of judges which involved elements of nomination, appointment and election and thus achieved merit selection whilst maintaining popular election. The system was called the Missouri Non-Partisan Court Plan.

It was perhaps inevitable that Missouri should be the first state in which significant changes in the selection of judges occurred.

In the first part of the 20th century, there were particular problems in Missouri associated with the judiciary which led to widespread agitation for change.

Judicial positions were tenuous and between 1918 and 1941 only two Supreme Court judges were able to successfully stand for re-election.

The climate of Missouri at the time was one of intense political conflict with an ongoing struggle between two factions of the Democratic party. These fought an intra party battle in the State Supreme Court primary contest in 1936 and shortly afterwards joined forces in an attempt to unseat a highly regarded incumbent Supreme Court Justice who was said not to have voted the way that one of the party bosses wanted in certain litigation before the Court.

In addition, there was much concern about the quality of those obtaining support of party bosses to be placed on the list of candidates for election. In particular, the case of Judge Padberg has entered American folklore. Judge Padberg at the time of election had made his living as a pharmacist in a St Louis hospital and during the eight years between his admission to the Bar and the time of taking office as a circuit judge, he had been the filing attorney in eight divorce cases and one annulment case.

His judicial career was marked by spectacular mistakes and miscarriages of justice and the St Louis Post Dispatch described his six years on the bench as a "humiliation to the law and to the city".

The impetus for the development of the Missouri Non-Partisan Court Plan largely came from the bar associations of the state and its major cities as well as the general community. It was adopted in 1940 and all attempts since that time to repeal or alter it have been defeated. This is not to say there has not been at times a significant level of opposition to it.

The plan combines the elements of nomination, appointment and election. Where there is a judicial vacancy a commission prepares a list of candidates to fill the vacancy. The commission is chosen from the bar associations and in addition includes members of the public. Three names are forwarded to the governor by the commission. The governor has sixty days to select one of these. If he does not select one of the three to fill the position, the committee then makes the selection. At the general election soonest after the completion of one years service, the judge must stand in a retention election. If a majority votes against the retention, the judge is removed from office and the process starts anew. A judge in a retention election does not stand in competition with others. The question is whether the judge should remain in office or should be removed.

The proponents for election of judges do not regard retention elections as achieving the aims of an elected judiciary. They are said to typically involve low voter interest and thus turn out. Limited knowledge of the judge by voters and a strong tendency to support incumbents whose party affiliation will not be known to the general public are seen as other negatives.

The Missouri Non-Partisan Court Plan has served as a model for 34 other states using merit selection to fill some or all of the judicial vacancies.

Attached hereto is a summary of the way in which judges are selected in the appellate and general jurisdiction Courts of the various states of America.

Some seven states have a system of partisan election whilst some fourteen adopt non-partisan election. Nine (including Missouri) combine merit selection with other methods including a retention election.

Before leaving Missouri it is worth pointing out that one of the states' elected judiciary was an attorney who later became President of the United States, Harry Truman.

A retention election differs from a re-election election. In the latter judges who wish to have a further term will have to compete with other candidates including candidates standing for the first time.

Some states employ a wholly appointative method as we do in Australia.

In many states different methods of appointment of judges are used for different courts within the state.

In the United States, the question of the election of judges is inevitably interconnected with the question of campaign funding and donors and the impact of these upon the independence of the judiciary and the appearance of bias in the judicial system.

The First Amendment of the American Constitution has largely determined the way in which the principles in this area have developed. The Supreme Court in *Buckley v*

*Valeo* 424 U.S. 1 (1976) is generally regarded as the leading case on this subject. Since this case, laws preventing judicial candidates from face-to-face fund raising and requiring them to fund raise through a Committee have been struck down.

In the absence of the constraints which the First Amendment impose, there would it seems be no impediment to the establishment of an appropriate framework of laws and principles in this country which would avoid the problems which have arisen in the United States.

In a relatively recent judgment of the US Supreme Court in *Caperton v A.T. Massey Coal Co* 129 S. Ct. 2252 (2009) the Court held that judges were obliged to disqualify themselves in cases involving big campaign donors to avoid most of the appearance of bias in the judicial system.

It is perhaps surprising that such a principle emerged so late.

This is an area which I think it can confidently be said Australians would find a very negative feature of the American system.

In that case a group of small coal companies sued Massey claiming that that company, a large coal company, had run them out of business. The chairman of Massey had given $2.5 million to a committee supporting a judge who he wanted to see on the Appeals Court and to defeat an incumbent judge who he saw as unsympathetic to his company's interests.

Following his election, the judge who had received the benefit of Massey's donations, refused to disqualify himself from a pending appeal and cast the deciding vote to overturn a $50 million judgment against Massey.

In describing the facts of the Massey case Justice Kennedy said:

> *"There is a serious risk of actual bias -- based on objective and reasonable perceptions -- when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."*

He went on to say that in future the Courts will have to enquire into *"the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election and the apparent effect such contribution had on the outcome of the election."*

Strict rules apply to the amount which members of the legal profession can contribute to an election campaign including a retention election or a re-election campaign for an incumbent judge in most states.

There is as might be expected a vast literature about these subjects and in particular the choice between a merit selection of judges and a direct election of judges. Each of the options has strong levels of support which tend to fluctuate over time and in response to particular events.

It can I think however be said that the evidence would suggest that there is majority support by the electorate to retain the power to remove a judge.

To these supporters of an elected judiciary, an appointed judiciary leads to an insufficiently accountable judiciary. To their opponents, an elected judiciary leads to a judiciary lacking independence.

Both of these are desirable (the Chief Justice of Victoria has recently described the independence of the judiciary as lying 'at the heart of our democracy') and the community would want to see judges who combine independence and accountability. The question is which of the methods of filling judicial vacancies best achieves these qualities – at least in the right amount.

There is strong opposition from some quarters to what is seen as the excessive influence of the legal profession in merit appointments. It is argued that to confer such powers upon the legal profession simply exposes potential judges to a different form of politics, namely the politics of the Bar which in America tends to be divided between plaintiff's lawyers and defendant's lawyers.

Having said of all of this, it is also clear that there has been a drift towards merit selections of recent years and this movement is reflected in the attachment to this paper.

There has also been a tendency to strengthen the security of judicial tenure by extending terms of office for judges.

The debate between merit appointment and election gives rise to a number of questions. Some of these are set out below, many which are interrelated.

Firstly, do elections make judges more or less accountable?

There can be little doubt that direct election in one form or another results in a more accountable judiciary. This was the point that the leader of the opposition made in his statement in November last year. Those who favour popular elections argue that they preserve the right of each eligible citizen to vote for those who will serve him or her by applying the laws that govern all citizens and that this is "the very touchstone of the foundation of the democratic process." They contend appointment on the basis of merit removes social responsibility from citizens and places it in the hands of a few.

Those who take the opposite view point out that judges are indirectly accountable as those who appoint them are answerable to the electorate.

Those who support elections contend that elections represent a far more transparent process than a judicial appointment process.

Secondly, can voters and elections produce an appropriately qualified judiciary as well as the process of appointing judges in a merit based process?

Proponents of the election of judges say that research conducted over a long period has failed to reveal any evidence of improvements in the law as a result of the adoption of the Missouri plan or any other merit selection system. Those who oppose elections contend that voters do not have enough information to pick the best judges and will usually know little more about candidates for judges than what is to be found in the information which political candidates or their parties in the case of partisan elections provide. Electing judges forces them to campaign for cash from various parties who might appear before them in Court and forces voters to choose from a number of persons who will in the main be unknown to them. The result will be that voters will in many cases fall back on considerations irrelevant to the judicial role.

The figure of Judge Padberg is usually raised by those who oppose election of judges.

Thirdly, do elected judiciaries better uphold the checks and balances of our system of government?

The opponents of unelected judiciaries often cite Thomas Jefferson who attacked the (appointed) federal judiciary as "an irresponsible body which worked like gravity by night and by day gaining a little today and a little tomorrow and advancing its noiseless step like a thief over the field of jurisdiction ---."

On the other hand, Alexander Hamilton argued for the independence of judges contending that they should be appointed to serve during good behaviour and insulated from the political process in order to best help the judiciary check the excesses of the legislature and the executive.

Fourthly, which system better upholds public trust in the judiciary?

The supporters of an election contend that electing judges gives the appearance of public legitimacy having the confirmation of the people as a whole and carrying with it the accountability of those elected. Thus it is said judicial elections are more effective in upholding confidence in the judicial system.

The opponents point to the very small number of countries which have judicial elections and a general perception within the United States and internationally that judicial elections produce inferior judiciaries, thus undermining the claimed legitimacy of the judicial system said to be brought about by elections. It is also said that the public has less respect for politician judges and that their election has about it the appearance of judges selling influence particularly having regard to their need to raise large sums of money to campaign.

Other questions which arise are:

Do unelected judges lack sufficient authority and legitimacy?

On the one hand it is said that the various branches of government should be equal to provide the necessary checks and balances but that an unelected judiciary is weaker than the other branches not having the legitimacy and power which comes from the people through an election. On the other hand, it is argued that the judiciary is rightly considered the weakest of the branches of government having only the power of judgment and an elected judiciary poses a risk to the correct balance between the branches of government.

Do elections or appointments better avoid judicial corruption?

Judicial corruption is virtually unknown in our society of which has an appointed judiciary. The fact that it is an issue in the United States does not necessarily mean an elected judiciary is less likely or more likely to avoid corruption than an appointed judiciary. The possibility of corruption can exist in either system whether through the influence which comes from donors to campaign funds or from the power of appointments. Judicial corruption, or lack of it is largely a reflection of a community's values and standards.

Does the election of judges fit with the idea of meritocracy?

The proponents of elections contend that judicial elections are more competitive, open and fair than the process of appointments and are thus more likely to produce better judges than the somewhat shadowy process of appointment. Supporters of a merit based process point to the role of party machines in selecting candidates. They content that democracy has nothing to uphold beyond letting the voters choose and meritocracy is not achieved in this way. To quote Winston Churchill; '*The best argument against democracy is a five minute conversation with the average voter.'*

To the proponents of an elected judiciary the fundamental principle that all power comes from the electors (as an Australian Prime Minister put it ‘every last morsel of it’) and this fundamental principle is not to be whittled down. To those who support the appointment of judges, democracy has no obligation other than letting the voters have a voice and the involvement of the judiciary in the elective process weakens it and is destructive of its vital independence.