

Merit Selection? Judges Shouldn't Be Politicians

By Judge James A. Shapiro

It might seem strange for a recently elected judge to oppose our current system of electing about two thirds of the judiciary, yet it's the right thing to do in Cook County. Lest anyone question the propriety of a sitting judge expressing his position on this issue, Illinois Judicial Ethics Committee Opinion 1994-17 makes clear that "judges may speak freely about the advantages and disadvantages of merit selection of judges." I hope my elected colleagues and other potential critics will forgive me for honoring my father, "the real Judge Shapiro" (of blessed memory), by speaking out on this issue.

In November of 2016, I persuaded the Anti-Defamation League at its National Commission meeting in New York to support a judicial merit selection resolution after it was about to be voted down. I did so by telling the National Commission about anti-Semitism I had encountered on the judicial campaign trail; in some cases my own, in some cases those of other judicial candidates. Like the time two men told me during my first of many unsuccessful judicial campaigns, "Just what we need, another Jew judge." Or the time when a musical band otherwise sitting mute in the corner of a big room in Lemont struck up *Hava Nagila* when officials introduced a Jewish judicial candidate. Or the time when a prominent politician yielded to political reality when he told a Jewish judicial hopeful, "Oh, I can't get a Jew elected."

Yes, the anti-Semitism in much of Cook County is palpable. And though we somehow managed to elect no fewer than three (3!) Jewish judges this election cycle from three different subcircuits, we cannot count on that trend continuing. That's aside from the fact that electing trial court judges is simply wrong, and leads to an overall weaker judiciary, because the best candidate, or even a competent candidate, doesn't always win.

Let's be honest: in most of Cook County, especially in countywide races but also in most subcircuits, voters are voting for a name on the ballot rather than the candidate behind that name. There are simply too many judicial races to expect voters to do their homework and choose candidates based on relevant criteria like bar ratings and newspaper endorsements rather than ethnicity and gender. This fact encourages judicial campaigns to perpetrate a veritable fraud on the voters. For example, male candidates taking advantage of an androgynous name or nickname to trick voters into thinking they are female. The instances of that are too legion to enumerate, but it was all I could do to thwart my campaign managers from having me run as just "Jamie." Bad idea that the political professionals thought of as *de rigueur*.

The ethnic tricks are also too many to mention. Judicial aspirants legally changing their names to make them more Irish, for decades the biggest vote-getting names on the judicial ballot. Or even more Jewish: I still recall the late, great election lawyer, Mike Lavelle, suggesting I change my middle name to something familiar-sounding like "Rothschild" to try to attract votes. These are not things that lawyers and judicial aspirants should be doing, yet our current system of electing judges encourages it.

Lawyers and judicial aspirants should not be pitted against each other in judicial elections, often engaging in all sorts of pettifogging nastiness during judicial campaigns. Leave that to the real politicians, and avoid the cynicism and pettiness that breeds both within the bar and in public opinion. Judges should not be politicians.

So what's the alternative? When I advocate for merit selection, people assume only lawyers from the big law firms will become judges, or that politicians will pick them. But we already have the closest thing to merit selection right in our midst, a system we already use for no less than a third of the judiciary.

Yes, it's called the associate judge process. It may not be perfect, but it's probably the closest we are ever going to get to merit selection. It approximates the federal magistrate judge selection process, which by most accounts is true merit selection. The associate judge process contains at least three levels of scrutiny, from all the evaluating bar associations, a committee of pretty distinguished presiding judges, and then the circuit judges. Who better to choose the judges than the judges before whom the judicial candidates practice? They have every incentive to want the best colleagues possible, ones who are least likely to embarrass themselves and the judiciary.

Having voted in several of these associate judge elections, I can assure you with certainty that the circuit judges call each other and vote based on whom they think would be a good judge rather than anything else. And remember the bar associations have weighed in favorably and unanimously on each of the associate judge candidates before the committee of presiding judges will even seriously consider them. Moreover, through the careful stewardship of Chief Judge Evans and his associate judge selection committee, we have generally gotten genuine diversity among our associate judges.

For those who are supposed to be in the business of fairness, how fair is it to have a system that disqualifies so many because of the ethnicity and/or gender of their ballot name? In other words, a significant segment of the legal community who aspires to the bench is relegated exclusively to the associate judge process because they don't stand a snowball's chance of getting elected, simply because of their name. I can't think of anything more absurd or unfair.

I propose that all trial court level judges in Cook County be chosen through the associate judge process rather than through literally a dozen or more judicial elections at the end of a primary ballot. (The collar counties and downstate still prefer to elect their judges and would have a manageable number of races for their voters to evaluate.) This would effectively triple the number of associate judge positions and require a virtual "rolling admissions" associate judge selection process, with associate judge elections at least once a year in Cook County. The number of applicants would presumably increase since this would be the exclusive method of becoming a Cook County judge, but there would probably be more self-selection going on as well, since candidates would have to get past all the bar associations.

So if all trial level judges would eventually become associate judges, who would vote on the associate judges? The answer is all the judges, including the associates. Exclusively circuit judges voting for associate judges barely passes rational basis scrutiny. If the rational basis is that the circuit judges have gone through the crucible of running for election and winning (even if by the accident of name), then that doesn't explain appointed and unelected circuit judges like I used to be voting in no fewer than three of these associate judge elections. No, the judicial candidates practice just as much in front of the associate judges as they do the circuit judges. All sitting judges should be allowed to vote for associate judge.

What about the p(P)olitics? Keep in mind that the so-called "Madigan List" has not been circulated in associate judge races for about an entire decade now. I personally never got calls from politicians asking me to vote for associate judge candidates, although that might have been attributable to the fact that I have always run as an independent, with little or no political support. But even if some politicians do call the voting judges, is it the worst thing in the world that our elected leaders weigh in on who becomes part of the third branch of government? Besides, it's a genuinely secret ballot.

In any event, the p(P)olitics involved in the associate judge selection process are far less naked than the (P)olitics involved in electing judges. Just the slating process itself is nakedly (P)olitical and breeds cynicism on the part of the public. What possible relevance does a committeeman, especially one who is not a lawyer, have in choosing which judicial candidate the party will support? Because the candidate is "a good guy" (or woman)? Because the candidate paid his/her dues by "carrying water" for the party? Even though the vast majority of elected judges,

including those the Democratic Party slated, are pretty competent and independent, it is the appearance of impropriety that is concerning. Every time a heated case comes along (the Rahm Emanuel residency case from 2011 comes immediately to mind), the media scrutinizes the judge's political connections at every level and well-nigh assumes that (P)olitics entered into their decision, even if it didn't.

And what of appellate and supreme court vacancies? How do we keep p(P)olitics out of that selection process? Unlike the trial court, with its multiplicity of races, appellate and supreme court races are far fewer, higher profile, and give the public and the media a chance to focus on them. The public has actually done a reasonably good job of separating the wheat from the chaff in the reviewing court races. Although perhaps not ideal, those judgeships should remain chosen by election. One would have to be a trial level judge for at least ten years to run for the appellate court and an appellate judge for at least ten years to run for supreme court. I simply cannot think of a fair merit system for choosing higher court judges that does not involve the ultimate choice by a politician, which would breed cynicism on the part of the public.

The Brennan Center is vehemently opposed to electing state supreme court judges. They are rightly concerned with the influence of money, especially at the supreme court level. But in Illinois, I find no workable alternative because two of our recent governors, who would ultimately appoint supreme court justices under a merit selection system, have gone to jail.

In summary, my proposal for judicial merit selection in Illinois is:

1. Select all trial level judges in counties with more than 3,000,000 people (i.e., Cook County) through the associate judge method.
2. Counties with fewer than 3,000,000 people would continue to elect their trial court judges.
3. Continue to elect all reviewing court judges as we do now, because I can't come up with a workable way of selecting them by merit in Illinois that does not breed public cynicism.

Unless and until we come up with a viable merit selection system, good luck in court with a judge whom the voters may have elected because of his or her name rather than his or her qualifications.

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[Read the Brennan Center Report on Merit Selection](#)