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How Did Elections Affect Pa. 'Merit Selection' Battle?

Howard J. Bashman

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Howard Bashman

Upon Further Review

Last week's decision by Iowa voters to remove three justices serving on that state's Supreme Court has produced the predictable hand-wringing and consternation from those who think they know better than we do what's best for society. In actuality, however, the judicial retention vote in Iowa merely shows that the system is operating in the manner in which it was designed.

One of the least reported aspects of Iowa's judicial retention vote is that Iowa's system of selecting appellate judges is actually a so-called "merit selection" system. In Iowa, a judicial nominating commission assesses the qualifications of applicants for an opening on an appellate court and then submits the names of the two or three applicants deemed most highly qualified to Iowa's governor, who then must appoint a judge from that list. Thereafter, from time to time, appellate judges face judicial retention elections in which the voters get to decide whether to keep the judges in office.

According to news media reports, the decision of Iowa voters to remove three sitting Iowa Supreme Court justices from office was based on widespread disagreement with the Iowa Supreme Court's recent unanimous decision recognizing a right to same-sex marriage in that state. Ironically, the judicially recognized right to same-sex marriage in Iowa survived the vote, because it was not on the ballot, even though the justices up for retention election who recognized that right did not.

If voters are going to be allowed to decide whether to retain sitting appellate judges in office, which is something that even the supporters of "merit selection" in Pennsylvania have pledged to allow, then it is to be expected that voters may base their retention vote on whether they agree with the substance of rulings that the judges in question have issued. The typical voter is likely to have an opinion on whether same-sex marriage ought to be allowed, but the typical voter is unlikely to be capable of evaluating whether a judicial ruling that recognizes the right to same-sex marriage represents a well-reasoned application of the law or impermissible judicial overreaching.

If we accept that an appellate judge's fidelity must be to the law, and not to whatever constituencies have placed or can retain him or her on the court, then the risk of having judges who will base their rulings on the public's desires or whims remains quite small. Here in Pennsylvania, where elections decide not only who is retained as a judge but

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who joins the judiciary in the first instance, I have never seen a candidate for judicial office campaign on the promise that he or she will endeavor to apply the law based on his or her understanding of what the public at large desires.

If the public at large is unqualified to evaluate the performance of appellate judges, and if appellate judges should be entirely unconcerned about the public's reaction to rulings that a judge believes are compelled by the law, then it makes little to no sense to allow judicial elections or retention votes. Nevertheless, in Pennsylvania at least, judicial elections and retention votes manage to keep appellate judges connected to the people. Moreover, sometimes the judicial philosophy of pragmatism, which is quite popular among appellate judges these days, requires judges to appreciate what result is in the public's best interest. Often the result that is in the public's best interest is the result that the public desires most.

On the same day that voters in Iowa removed three justices, voters in Nevada rejected a measure to replace the contested election of Nevada Supreme Court justices with a "merit selection" process. Even if voters are not the most highly qualified selectors of appellate judges, they understandably do not wish to relinquish their control over that process to others.

The reaction of voters in Nevada to a ballot proposal that would authorize the "merit selection" of judges is instructive, because here in Pennsylvania voters would need to twice approve a similar ballot proposal in order for "merit selection" to replace the election of judges. Gov. Edward G. Rendell, who was a vocal supporter of judicial "merit selection," will complete two terms in office without having made any significant progress on that issue.

Despite having been bombarded by months of advertising from the major party candidates to replace Rendell, I did not observe any discussion of the issue of judicial "merit selection" in those campaigns. An Internet search reveals that Governor-elect Tom Corbett has voiced support for the "merit selection" of judges in Pennsylvania, but I doubt that he will champion that issue as forcefully as Rendell has. As a result, I do not foresee any impending changes in the manner in which judicial selection occurs in Pennsylvania.

An op-ed that appeared in *The Wall Street Journal* in advance of this month's vote sought to cast the question of judicial elections as something that conservatives should support because merit selection systems supposedly result in the selection of judges of a more liberal ilk. Presumably that conclusion will come as news to the conservative bloc now serving on the U.S. Supreme Court, given that the federal system for selecting judges represents a form of merit selection.

In Pennsylvania, we have seen that judicial elections can result in the election of Democratic or Republican candidates, and I have seen no overall trend toward elections producing judges who are more conservative. In addition, I have not noticed in the cases on which I have worked any correlation in the Pennsylvania appellate courts between a judge's political affiliation and his or her willingness and ability to apply the law faithfully and correctly.

The best way for judges to respond to the results of the judicial retention election in Iowa is to change absolutely nothing about the way that they approach their work. It is indeed bizarre to have a system that allows voters to reject judges based on the outcomes of cases with which the voters disagree, but that reality should not and cannot lead judges to base their rulings on anything other than their obligation to faithfully apply the law. •

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