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JUDICIAL RESPONSIBILITY, JUDICIAL INDEPENDENCE AND THE ELECTION OF JUDGES

NATHAN S. HEFFERNAN*

It is a pleasure and an honor to be the first E. Harold Hallows Judicial Fellow. I had the privilege of serving on the Wisconsin Supreme Court with Justice Hallows from August 1964, when I came to the court, until July 1974, when he retired. For about seven years he was my chief—a judge whom I very much admired and respected. Harold Hallows was a great judge and an exceptional scholar. He was on the Marquette Law School faculty for many years. He was an expert in the field of equity jurisprudence, and for twenty-eight years he practiced law in the City of Milwaukee. His record of being a skilled practitioner as well as a distinguished academician has seldom been matched in the history of the Wisconsin courts.

Harold Hallows was, in a very real sense, the founder of our present court system—whose essential elements are a one-level trial court, the result of the abolition of county courts and their re-creation as circuit courts; the establishment of the court of appeals; and a constitutionally reinvigorated Supreme Court whose chief justice is the administrator of the entire court system.

It was Harold Hallows who went to Governor Lucey in 1971 and persuaded him that the court system was in serious trouble and that the Supreme Court was being deluged by an increasing caseload which in effect denied justice to the people of Wisconsin. Chief Justice Hallows persuaded Governor Lucey to appoint a “blue ribbon committee” to study the problems of the court system and to recommend solutions to those problems.

Governor Lucey commissioned The Citizens Study Committee on Judicial Organization to provide rational solutions to the problems of the judicial system. The proposed solutions were to be a part of a long-range plan instead of patchwork tinkering and minor modifications that

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marked the so-called judicial reforms of the past.

The impetus for court reform came from the judge and scholar we honor today, Justice Harold Hallows. The people of Wisconsin and the state's judiciary are forever in his debt. I hasten to add that Harold would have left his mark as a great justice and chief justice regardless of the fact that he was the key contributor to our court reorganization of the 1970's.

Let me repeat a portion of a talk that I gave on January 19, 1969, at a dinner in honor of Chief Justice Hallows. I commented then:

Chief Justice Hallows has been a great asset to the judiciary as a whole. He is concerned about the art of judging and has sought ways to make himself and other judges more effective in bringing inexpensive, faster, but higher quality justice to the entire state. He has been a leader in judicial reform. As a lawyer and judge, he has been an advocate of court reorganization. He is an enthusiastic backer of the college of trial judges and the Appellate Judges Seminar. He is a staunch advocate of better working conditions and adequate compensation for all judges. He has supported special training for new judges so litigants will not be the victims of a judge's inexperience.

As Chief Justice of Wisconsin, he has—even as he did before his judgeship—stressed the independence of the judiciary and its right and obligation to make decisions free from partisan pressures or the passions of the moment.

He has administratively improved the court so that, despite an increased workload, it operates more efficiently than ever before. Under the leadership of Harold Hallows the Supreme Court is a smoothly working team—a team not in the sense that we all have the same idea on each case, but rather that we have the same ideal, the furtherance of justice in our legal system.

Our attempts to reach this ideal . . . are coordinated by the chief justice so that we expeditiously arrive at our conclusions after a fair and rational exchange of ideas.

He is learned in the law and in the problems of our society. His great experience makes him . . . an indispensable asset to our state and our legal system. I am honored to be his colleague, and I am proud to have him as my chief.

I should note, however, that Justice Hallows could be difficult. He possessed the arrogance that comes from a superior intellect and from insights that he sometimes correctly believed were not always given to others.

Chief Justice Hallows always insisted that *obiter dictum* be expunged from all of our opinions. He felt that "dicta" was an abuse of the

powers of a common law court, and weakened the value of an opinion as a precedent. On one occasion, Justice Horace Wilkie, on examining one of Justice Hallows's opinions recently circulated to the court discovered what he thought was dicta and decided he should talk to the Chief about it. Justice Wilkie said, "Harold, see this paragraph, it looks like dicta to me." Justice Hallows paused, read the paragraph out loud and said, "It's dicta, but it's good dicta. It stays in."

Because I so respect and honor the great judge whose memory has triggered this occasion, I have some unease about my general position concerning the selection of judges. My position is opposed to one of the propositions that Hallows, among others, convinced the Citizens Committee to adopt in its report—that the elective system of selecting judges be abolished in Wisconsin and that judges should be selected by appointment on the basis of "merit." The Citizens Committee proposed that the governor nominate judicial candidates, but that a Commission on Judicial Qualifications should conduct a thorough investigation of the nominee or nominees proposed by the governor and advise the governor of the qualifications of each. If a nominee was not certified as qualified by the Commission, the governor could not appoint that person.

It is my view that the elective system in Wisconsin has worked reasonably well and should not be discarded. Rather, contrary to the mandate of Governor Lucey, the elective system should be "tinkered with" by instituting a reasonable system of public financing of judicial elections which would hopefully cure the principal ills attendant to the election of judges.

Before discussing the pros and cons of an elective system, let us examine the events that preceded the work of the Citizens Court Study Committee. In 1967, Chief Justice George R. Currie was defeated. Chief Justice Currie was widely regarded as one of the great common law judges of the United States. When I was first elected, nationally recognized jurists as Roger Traynor of California, Walter Shaeffer of Illinois, and Frank Kennison of New Hampshire came to me at judicial meetings and commented on how fortunate I was to be a colleague of George Currie.

Chief Justice Currie, however great his qualities of intellect and character, was far from being a charismatic personality. Although intellectually vigorous, he gave the impression on the platform of ambivalence and unease. He was soundly defeated by an eloquent circuit judge, who proved to be extremely capable, but never gave the electorate any reason for replacing a truly distinguished jurist.

I believe it was Chief Justice George Currie's defeat that cast a pall

over the wisdom of continuing the elective system for the judiciary and was a principal factor in the Committee's decision.

However, the question of whether judges should be elected or appointed has persisted over the years, dating back even to pre-revolutionary days in America. Accordingly, I do not hope to convince you that one method is in all circumstances clearly superior. With our recent judicial elections raising a high degree of anxiety among those who are court watchers, I will address some of the points argued by proponents and opponents of the present system. While legal scholars and political scientists have covered this area with great thoughtfulness by legal scholars and political scientists, I will attempt to convey my personal impressions and insights as one who was first appointed to the Wisconsin Supreme Court by Governor Reynolds in 1964 and subsequently elected to three ten-year terms. Regarding my three elections, the first one was a hotly contested election, including the primary; in my second election I faced only nominal opposition, and my third one was the best type of election for an incumbent—an election with no opposition. In my nearly thirty-one years as a judge, I have enjoyed the initial appointive process and have undergone the anxieties and the euphoria attendant upon the elective system.

During my second campaign, I had what appeared to be only token opposition, but my opponent had run for the court on several earlier occasions so I took him seriously. Early in the campaign, he and I appeared at a League of Women Voters forum. After some rather uninformative and desultory interchanges, the interviewer asked, "Mr. A, I was wondering why you're running for this office. The general opinion is that your chances are very slim." The reply was, "Well, I don't expect to win, but Justice Heffernan is campaigning all over the state on these slippery roads and if he is killed in an accident, I automatically will be elected." About a week later Mrs. Heffernan and I headed out of Madison to Wausau on a slippery, snowy morning. When a car ahead of us skidded and spun out of control into a ditch, Mrs. Heffernan, who was driving, slowed and said, "We're going home. We're not going to go to Wausau today." In fact, after that, I never left Madison during that campaign.

I should state that the present system has been good to me. Perhaps, therefore, I am not as impartial an observer as I ought to be.

Let me address the history of the selection of judges in America and Wisconsin. In the litany of grievances set forth in the *Declaration of Independence* appears this, "[The king] has made judges dependent on his will alone, for the tenure of their offices, and the amount and

payment of their salaries.”¹ There was the corollary complaint that the king had refused his assent to “laws for establishing judiciary power.”

It is important to note that the colonists objected to the appointive powers of the executive, yet almost all of the currently proposed “merit” systems of judicial selection would vest appointive powers in the executive—the governor—and generally without the consent of the legislature.

The Constitution of the United States, adopted in 1787, translated the concerns of the colonists into fundamental law by the provision that stated the President “shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . Judges of the Supreme Court”² Hence in Article II of the Constitution, the power for the final selection of judges was shared by the executive and the representatives of the people in the Senate.

In addition to wresting this sole power from the executive, the Constitution addressed the other grievance of the Declaration of Independence. Judges were dependent upon the will of the executive for tenure and for the amount and payment of salaries.³ The Constitution, however, provided that all judges of the United States, whether of the Supreme Court or of other Article III courts, were to hold their offices “during good behavior” and be paid a salary that could not be diminished “during their continuance in office.”⁴

These provisions of the Declaration of Independence and the Constitution set the pattern for years to come. Clearly the founding fathers wanted independence and stability in the judiciary, free of exclusive executive control and free of the whims of pure democratic control that might come from an elected judiciary.

John Marshall, touting the virtues of the selection system under a Constitution that granted judicial independence, stated at the Virginia Convention, “[T]he greatest scourge that could be inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt or dependent judiciary.” It would appear he feared the people almost as much as he feared a dependent judiciary.

Initially all of the new states selected their judges by executive appointment shared with the legislature. Gradually, however, with the expansion of the frontier, some states adopted the elective system. Of

1. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

2. U.S. CONST. art. II, § 2, cl. 2.

3. *Id.* at art. III, § 1.

4. *Id.*

the original thirteen states, Georgia was the first to shift to an elective system for the selection of lower court judges in 1812. Indiana, admitted to the Union in 1816, provided in its constitution for the election of some of its judges, and in 1832, Mississippi decided to elect all of its judges.

The theory of popular election of all officers, which came to be known as "Jacksonian Democracy," held sway from the late 1840's until the middle of this century. In fact, by the time of the Civil War, twenty-four of thirty-four states had adopted an elected judiciary. It was not until 1959, with the admission of Alaska, that any new state stood against the tide of a fully elected judiciary.⁵

Wisconsin, admitted in 1848, became a state at the high tide of Jacksonian democracy. *The Story of a Great Court* reveals that one principal philosophical justification for the election of judges was simply that under our American theory of government, the source of all power was the people.⁶ Hence, inasmuch as both executive and legislative officers were elected by the people, consistency demanded that the judicial branch, of a constitutionally co-equal and independent dimension, also be elected in order to have a claim to legitimacy.

This argument flies in the face of much thoughtful and scholarly teaching, but it did prevail when the Wisconsin Constitution was finally adopted. The vote at the Wisconsin Constitutional convention was seventy-eight to twenty in favor of the elective system despite opposition from such leaders as Edward G. Ryan, "Lion of the Law" and Chief Justice from 1874-80.

Many others learned in the law have opposed the elective system. Chief Justice Hallows was one of them. In addition, Harold Laski, a prominent political thinker early in this century, stated, "for the election of judges by popular vote there is nothing to be said." Nevertheless, the elective system in Wisconsin has never been seriously challenged, although there has been an occasional and sometimes a deep dissatisfaction with it.

During this century three Wisconsin Supreme Court justices with outstanding records were defeated at the polls. I have mentioned George Currie, who was defeated in 1967 by Robert Hansen. In addition, after serving an initial appointment lasting less than two years, James Ward Rector was defeated in 1946 by Henry Hughes, and Emmert

5. See generally AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE UNITED STATES (1993).

6. JOHN B. WINSLOW, THE STORY OF A GREAT COURT (1912). Winslow was the chief justice of Wisconsin from 1907 to 1920.

L. Wingert, after serving only a twenty-eight month appointment, was defeated in 1958 by William Dietrich. Each of these defeated justices was recognized as an outstanding lawyer and scholar—a fine writer of judicial opinions and a person of impeccable integrity. They, however, shared an added characteristic with Chief Justice George Currie. They were rather shy and retiring and lacked the presumptuous ego that a candidate for public office seems to need. In short, they were not politicians. They, like Currie, were “charismatically impaired.”

Like many lawyers at the time, I deplored the defeat of Emmert Wingert by Bill Dietrich. However, it was a serendipitous event for me because in 1964, when Justice Dietrich suffered a fatal heart attack, I was appointed to succeed him.

The defeats of these three outstanding jurists triggered talk of changing the system, but no substantial change was initiated. After Fred R. Zimmerman, former governor and non-lawyer, nearly defeated incumbent Justice Elmer Barlow in 1945 and in 1949 again ran well against a field of seven lawyers, a constitutional amendment was adopted requiring that all judges be licensed as lawyers for at least five years prior to election or appointment.⁷

The principal saving grace of the Wisconsin elective system has been its nonpartisan nature. Former Chief Justice John B. Winslow pointed out that nothing in the constitutional debates indicated the existence of a belief or even a desire that judges should not be nominated and supported by political parties.⁸ There was, however, an opinion that judges would be less partisan if they were nominated by political parties rather than selected by the executive. This is an argument I do not understand. However, as Winslow noted, even in the early days of our courts there evolved “a sentiment which has slowly crystallized among the people of the state to the effect that judges . . . should not be nominated by political parties and that a sitting judge who has performed his duties faithfully should be retained . . . regardless of his political opinions.”⁹

Although the Wisconsin constitutional debates envisioned political slating, the state constitution itself provided that “[t]here shall be no election for a justice or judge at the partisan general election for state or county officers, nor within 30 days either before or after such elec-

7. WIS. CONST., Art. VII, § 24.

8. WINSLOW, *supra* note 6, at 1-10.

9. *Id.* at 7

tion."¹⁰

This provision has remained substantially intact. It is an unusual provision in state constitutions and in researching materials collected by the American Judicature Society, I was unable to find an analogous constitutional provision in any state. Even in Missouri, where a number of counties have adopted a selection process based on a nonpartisan nominating commission, the retention election, though it was a separate judicial ballot, apparently takes place at the same time as the general partisan election.

This clause in the Wisconsin Constitution, prohibiting judicial elections to be held at or in near proximity to other state and local partisan elections, has had a great effect. It changed the vision of judges being office holders beholden to a party or a partisan cause to one where the judiciary is truly nonpartisan. Of course Wisconsin's provision has also had the effect of markedly reducing the number of voters at a judicial election. The question to be asked is, we really trust the people to pick judges, shouldn't we have them vote at a time that is more likely to assure maximum participation? The argument is that because the vote is lower in judicial elections, it produces a better informed and more interested electorate. I am not convinced that is the case. Also, the constitutional provision¹¹ that vacancies during the term are to be filled by gubernatorial appointment to serve until a subsequent election has changed the Wisconsin judiciary from one wholly dependent upon the election process to one substantially influenced by appointment. Winslow stated that as of 1912, eleven of the Supreme Court's twenty-five justices were placed on the court by gubernatorial appointment and all but one of those appointments was later ratified by election.¹² When Henry Hughes was elected to the bench in 1947, he was the first justice in thirty years to initially reach the Supreme Court bench by election.

In examining the history of the Wisconsin Supreme Court from its separate existence in 1853, forty-one of its sixty-eight justices came to the court by appointment. This represents a little over sixty percent. During my tenure of thirty-one years, eleven of nineteen justices were originally appointed by the governor; that number is about fifty-eight percent. Hence, it is apparent that a clear majority of our supreme court justices have been selected by the governor. Do we really have an "elected" judiciary?

10. WIS. CONST. art. VII, § 9.

11. *Id.*

12. WINSLOW, *supra* note 6, at 8-9.

In the first decades after the adoption of the constitution, there were partisan conflicts in judicial elections. The issues of slavery, the role of the federal government, federal supremacy as it affected the interpretation of the Fugitive Slave Act, and the dispute with President Lincoln over federal habeas corpus, frequently created partisan strife in the courts. The Wisconsin Supreme Court, in its own "judicial" civil war, rejected federal supremacy and refused to honor or even to follow the mandate of the United States Supreme Court's opinion reversing the Wisconsin Court's decision in *Ableman v. Booth*.¹³ Our elected court, in effect, nullified the Fugitive Slave Act which was supported by the appointed United States Supreme Court. A discussion of these issues, however, is beyond the scope of this article.

The last hurrah during the hey-day of partisan nomination by party caucus came in 1879, when the Democratic Central Committee met and nominated Montgomery M. Cothren of Mineral Point, Wisconsin. Cothren adhered to the statement that only "important men and sound Democrats who had never swerved from the straight line of party duty or allegiance to Democratic principles should be nominated or elected."

Justice Orasmus Cole, despite his Republican party antecedents, was elected as an independent in 1853 and was re-elected as a nonpartisan in 1860. In 1879 he again ran as a nonpartisan and was elected over Cothren, handily defeating him by a margin of 33,000 votes in a 168,000 vote election. This was the last judicial election in which any candidate chose to run as a partisan.

The 1879 election was substantially without issues. One of the disadvantages of nonpartisan campaigning without party issues is the substitution of specious issues during the campaign. This problem remains with us to this day. The issue raised in opposition to Cole was his age. The *Milwaukee News*, supporting Cothren, said of Cole: "[H]e has arrived at an age where a man's perceptions grow dim."¹⁴ In another edition of the same paper, this statement appeared: "He is an old man, the duties are becoming irksome to him. He has arrived at an age when United States judges are retired and pensioned off."¹⁵ In fact, Justice Cole was fifty-nine years old and in excellent health and was but twenty-six days older than the candidate who sought to replace him.¹⁶ As history demonstrates, Cole served on the court in good health until

13. 62 U.S. 506 (1858)

14. WINSLOW, *supra* note 6, at 372 (quoting MILWAUKEE NEWS, Feb. 23, 1879).

15. *Id.* (quoting MILWAUKEE NEWS, Mar. 4, 1879).

16. *Id.*

1892. Even then, he was urged to run again and if he had done so, it was conceded that he would have been re-elected without opposition. So much for "real" issues in the "good old days."

The election of Cole in 1879 was the last time partisan nomination or selection by a legislative or a party caucus was attempted. As Justice Winslow stated, the party caucus followed the party convention to the political graveyard. "Henceforth, nominations for justices of the Supreme Court were made by nonpartisan calls."¹⁷

By 1910, Justice Winslow commented that any partisan political activity by a Wisconsin candidate was considered

a breach of judicial etiquette . . . [a]n attempt to place a party candidate in the field would almost certainly with defeat. That this condition of public opinion makes for independence and efficiency of the judiciary there can be no doubt. In this respect, as in many others, Wisconsin is in the best sense a progressive commonwealth.¹⁸

I have my own experience with respect to the nonpartisan nature of a judicial election. I had been an active Democrat. I had served as general chairman of two state Democratic conventions and was serving as United States Attorney by the appointment of John F. Kennedy when I was appointed to the court by Governor Reynolds, also a Democrat. The co-chairs of my election campaign, however, were Stewart Honeck, the former Republican Attorney General, and James E. Doyle, Sr., who was probably Wisconsin's leading Democrat. The chair of my Citizens Committee was former Republican Governor Oscar Rennebohm, and one of my leading supporters was the chair of the Dane County Republican Party. I do not think that this kind of bi-partisan support has been unusual. In fact, it is typical and almost traditional.

Justice Winslow did not carry his story of a great court beyond the commencement of his tenure in 1898. However, the provisions for the appointment, election, and retention of judges have remained substantially unchanged, with the exception that some governors by the 1950s paid lip service to the merit selection of judges. Walter Kohler, Jr. and John W. Reynolds both used an *ad hoc*, perhaps *post hoc*, merit screening system for the Wisconsin Supreme Court. They first made a personal selection based on subjective criteria and then asked the Bar Committee on Judicial Selection to ratify their choice by publicly proclaiming that the person selected by the governor had the necessary requisites of

17. *Id.* at 375.

18. *Id.* at 386.

learning and integrity to hold the office. This was a political plus for an appointee, who was required to run for office at the first opportunity. This system also guaranteed that the governor exercised his constitutional responsibility to select judges for vacancies and, at the same time, allowed the governor to satisfy his own political agenda—that his selectee would, hopefully, conform to the political preferences of the governor and his party. Because the governor only submitted his single preference to the committee, it was *fait accompli*. The committee was not likely to demur.

There were instances, however, when governors made appointments on non-political grounds. For example, Republican Walter Kohler, Sr., appointed Democrat John D. Wickhem on the basis of his qualifications as a legal scholar and a law professor of national repute. Additionally, Harold Hallows, who had never been a figure in partisan politics, was appointed by Governor Vernon Thompson, a very partisan Republican.

Even when a governor made an appointment that he hoped would prove politically satisfactory to him and his party, he did so knowing that once the judge took office, there were no political ties to bind him. The new judge was beyond the governor's control. When I was appointed by Governor Reynolds in 1964, he said, "Well today I probably have made 10 enemies and one ingrate." Regarding the ingrate, he added, "and that's the way it should be." I know of no governor who has even implied that an appointee would be "his" judge when it came to passing on the merits of gubernatorial action, although the governor may have hoped that he had not appointed an ingrate. The press mistakenly assumes that judges will support the political agenda of the appointing authority. Consider, however, the Watergate tapes: how wrong was the press' speculation!

It should also be emphasized that governors make judicial appointments in good faith. They know that judges will probably hold office long after the governors have departed. Governors also know the quality of their term of office will be evaluated, in part, by their judicial appointments. When I became a judge, the LaFollette progressive movement was long dead, but a large number of judges on the bench remained who were originally LaFollette appointees.

In Wisconsin, the populist sentiment that judges should be elected to express the "will" of the people remains strong. As previously stated, in 1973, Governor's Committee on Court Reform recommended the abandonment of the elective system. However, important committee members, particularly those from organized labor, felt so strongly about continuing the elective system that there was a threat the whole reform

package would be defeated. Consequently, before the constitutional amendments were proposed, the merit system of selection by the governor was withdrawn. I think, however, that we should recognize the political reality of the moment. Furthermore, no matter what the theorists and political philosophers might think, there has been, in general, no popular dissatisfaction with the elective system.

In 1996, however, I believe there is a sense that something is awry in how we select our judges in Wisconsin. Charges are made that campaign contributions taint the process, that partisan political operatives are assisting in the campaign and that there is an implicit promise (or at least the appearance of a promise) that the beneficiary of such political assistance will support, in court, the political agenda of those supporters.

In addition, the cost of judicial elections has become far greater than could have been predicted only a few decades ago. When I first ran for the Supreme Court in 1965 following my appointment, my committee spent somewhere between \$40,000 and \$50,000—and it was a reasonably well-financed campaign. When Justice Hallows appeared before the Court Reorganization Committee in 1972, he testified that campaign costs then were approximately \$50,000, and that this great cost militated against continued election of judges.

Television, the great consumer of campaign dollars, was only in its infancy when I ran in 1965. There was so little network programming that local stations were hungry for whatever they could put on the air. I went to the University of Wisconsin Photo Lab and had them prepare two short video tapes carrying my campaign message. The cost of the tapes was less than \$100, and the TV stations aired them at no cost to me, just to fill up air time. A great bargain indeed, but perhaps few were watching or listening even then.

Justice William Bablitch, who has closely monitored the cost of judicial campaigns, estimates that even a rather minimal state supreme court race will cost from \$350,000 to \$400,000. A candidate for the Supreme Court must campaign statewide and pitch the campaign to the same potential electorate that votes for the governor. The territory to be covered is huge—from Superior to Kenosha to the extreme southwest of the state—so the costs are huge.

Even if campaign funds are not solicited from major political action committees with expressed political agendas, contributions from individuals carry with them overtones of a *quid pro quo*. The most likely individual contributors are lawyers. Some may argue that lawyers are officers of the court and as such are only interested in stimulating the educational aspect of the election process or are only hoping for a

“good” judge as a contribution to the general welfare. It has been my experience that lawyers make contributions in the “hope” that the recipient will vote “right,” although I can truly say that no lawyer in over thirty years has ever indicated to me that his or her contribution was for an expected favor. In fact, numerous lawyers have made contributions in subsequent elections even after I had voted “wrong” on issues important to them.

While some candidates assert they do not even know who contributes to their campaign, I find this hard to believe because contributions are a public record and the candidate is usually present at fundraising events. But even if those judges are adamant that they will not be influenced by contributions, can they really be sure? Perhaps they are subconsciously influenced or they may bend over backward to be fair, which may indeed deny justice to contributors.

It is clear in the recent Wisconsin Supreme Court campaign that there were no genuine issues as compared to the way voters perceive issues in a political campaign. When deciding whom to vote for people are taught to examine issues, not personalities. But in the 1996 election for the Supreme Court, newspapers complained that one of the candidates for the Supreme Court was “flamboyant” and the other “boring.” The adjectives are for the media to choose. They could just as well have typified the candidates as “flaky” and “thoughtful” or “inspirational” and “dull.” These adjectives are not helpful touchstones for the selection of a judge whose job it is to find and construe the law, not on the basis of idiosyncratic surface characteristics, but on the basis of scholarship, integrity, and jurisprudential principles of the common law.

There are admittedly grave problems inherent in the election of judges. While judges no longer need bend to the whim of a king, do they bend to the whim of the electorate? Do candidates curry favor with the electorate by what appears to be the current popular sentiment? If the cry is for law and order, are candidates likely to vie with each other to be the toughest sentencer? We should remind ourselves, as Chief Justice Hallows reminded us, that there may be “hard” judges and “soft” judges, but what we need are “just” judges. It is sometimes difficult for a judge facing election to ignore the momentary popular will, and it is difficult to campaign on “justice” alone. A “just” judge is very likely to be politically vulnerable for being legally right.

Aside from these appeals to the passing passions of the populace, it is difficult to frame meaningful campaign issues. If a candidate cannot pose as either a Republican or a Democrat and espouse the respective

partisan position, what can the candidate stand for in an election? Emmert Wingert based his campaign on the proposal to repeal the "deadman's statute." The issue did not attract popular fancy. He lost. Another candidate campaigned on the problems inherent in the parole evidence rule. The subject failed to electrify the public. Accordingly, candidates may be reduced to "flamboyancy," for there is little else for the public to see and understand.

There have been Supreme Court elections, however, when crucial policy decisions of constitutional proportion were decided and where there were real issues. When the first support for court reform surfaced, it was clear that the legislature would not propose or pass the necessary amendments. Despite the legislatures inaction, each incumbent on the court campaigned on the real issues of court reform: the Court of Appeals; one-level trial court; discipline and removal of judges; and vesting the Supreme Court and its chief with control over the court system. Each incumbent was fortunate enough to have an opponent who opposed the reform platform. In each instance the incumbent won. The issue of court reform and detailed information on the issue was conveyed to the people. The legislature took notice that court reform was popular with the people. The legislature put the constitutional amendments on the ballot and they won overwhelmingly. The election process worked and assured the needed court reform.

Additionally, to go before the public and merely say "what a bright person am I" can be an ego-smashing venture. When there are no issues, defeat can only be viewed as a personal rejection. It cannot be explained away as merely a rejection of controversial policies. The process of election may discourage excellent judicial candidates whose only purpose is to follow the law and judge wisely. When an election is carried on in a sterile, academic, personality-centered way, we are likely to elect outwardly attractive persons who have not revealed a bit about their personal principles or even whether they have any at all.

Judicial elections may depend on questions and circumstances that are entirely extraneous to the merits of the candidates. When I ran in a contested election, I benefitted from the fact that there were hotly contested elections for mayor in Milwaukee, Madison, and Sheboygan—all Wisconsin localities where I had substantial support. It was these other races, not mine, that produced my vote. If there had not been the concern for the mayoral races, there probably would have been a very low turnout and I probably would have lost the election.

Judicial races in many instances are skewed by other races. While the Wisconsin Constitution provides that there shall be no judicial

election within thirty days of a partisan election for state and county officers,¹⁹ there is no prohibition of judicial election that coincides with a presidential primary. While a presidential primary is likely to produce a huge partisan turnout of persons whose least concern is the judicial election, they will vote. Even in run-of-the-mill elections, the judicial choices are likely to be an afterthought or of no thought at all. One survey of voters who did vote for judge at a general election in New York revealed that immediately following the election, seventy-five percent of the voters could not remember the name of the person for whom they voted.

The elective system has another disadvantage. During the campaign, for a period of four to six months, the Wisconsin Supreme Court is deprived of the full attention of one of its members. This is a grievous wound to the court and deprives the citizens of a fully attentive court. In one instance that I recall, one justice of the Supreme Court at the end of the campaign had twenty-three opinions assigned but none completed. The opinions were finally completed, but I doubt the task was accomplished with the carefulness and thoroughness of a judge who did not have campaigning on the mind. Consider also the recent bizarre situation that occurred when all the judges of the court of appeals in Milwaukee were simultaneously campaigning for a judicial office.

Thus, it is rather apparent that there are grave defects in our present system of judicial selection. In a sense, however, it calls to mind Winston Churchill's remark that democracy is the worst possible system of government except for all others. One of the charges leveled against our system is that when compared to a "merit" system, it does not recruit the best lawyers to be judges, particularly when there is no assurance of tenure. In response, I reiterate the names of lawyers who came to the bench directly from the law practice and with whom I served: Currie, Fairchild, Hallows, Day, Abrahamson, and Wilkie all were leaders of the bar, secure in their reputations and livelihood. Yet, they eagerly accepted appointment to the court. I would match those judges collectively against any who would be chosen by merit and with a system of tenure. It is argued that we will not get the best lawyers to play this "high risk" game; yet the fact is that we have attracted the best.

It is also argued that the elective system has a chilling effect upon a judge's opinions. Perhaps that is true, but this adage gives too little respect to the courage of elected judges. All judges know that there is

19. WIS. CONST. art. VII, § 9.

some risk in the decisions they make, sometimes even a career-killing risk. Yet, I would not attribute less courage to judges than to other elected officials who put their careers on the line. Also, we should remember that the terms are long, for the Supreme Court a term is ten years a period established for the specific purpose of lessening the impact of a particular decision on a judge's chances for election. Yet, as Mr. Dooley stated in the early 1900's, "Even the supreme court reads the newspapers." Judges should not be too confined to the ivory tower. I do not suggest that they be intimidated by that "jungle" out there, but they should be aware of the effect of their decisions in real life. Judges should ask whether their decisions will work; judging should not be simply an abstract exercise in sterile logic.

I also submit that the election process affords the Wisconsin judiciary some legitimacy as a co-equal branch of government. As I mentioned earlier, the Constitutional Convention in 1846 and 1847 relied heavily on the fact that if the judiciary were to be truly independent, it must have the same roots in the people as the executive and legislative branches of government. While this leads to the problems which have been discussed—accountability versus independence and representativeness versus individual judgment—it strengthens the hand of the judiciary when dealing with the other branches.

When discussing budget problems with the legislature and the governor, I was not shy in asserting that I, like the governor, had been elected by all the people of the state. I believe the electoral process materially strengthens the political power of the judiciary as a co-equal branch. No one can ever criticize Wisconsin judges, as they do federal judges, by saying they are "unelected." I do not, by that statement, intimate that judges should create policy; that is not their function. I do mean, however, that the power of the judiciary, through the constitution, is a power emanating from the people and not by the largess of the executive and the legislature.

A legitimate criticism of our system is not only that some politicians become judges, but that it forces all judges to become politicians. I see nothing wrong with this if politician is defined as the honorable profession of ensuring that government performs for the benefit of the people. Also, from my long experience, I believe that the tripartite division of government requires judges to make political decisions, such as what is good and what is necessary for the judiciary, and to have the skill to secure the necessary resources for the judiciary from the other branches for a just society. To be a good judge on either a local or state level requires skill, adroitness, and understanding in dealing with all

levels of government. In addition, the premise implicit in the common law is that judges must confront problems, as they have developed in cases and controversies, that have not been previously addressed. Can anyone say that "with all deliberate speed" is not a political test? To be effective, judges must have the political skills and insight to forecast what will work—at least until the legislature can act.

Some argue that the independence that is required to assure the protection of civil rights for all, and the rights of minorities in particular, can only come from an appointed, tenured judiciary. However, this argument can be countered by noting that the appointed justices of the United States Supreme Court enforced the Fugitive Slave Law, while the elected justices of the Wisconsin Supreme Court were refused to do so. I have no doubt that the anti-slavery political environment of Wisconsin impelled the Wisconsin judges' decision, but I emphasize that appointment, as opposed to election, is not the touchstone of whether civil rights will be protected. Examining more recent history, when the United States Supreme Court appeared to lag in protecting the minorities' civil liberties and rights, who rode "once more into the breach?" It was by and large elected state judges relying on the "new federalism."

I do not wish to overstate my conclusion, but it seems clear that as in the days of the Fugitive Slave Law, the judicial "guts" which protect the oppressed are not necessarily the product of the merit system or of assured tenure. Such an assertion would denigrate the numerous courageous judges who daily make decisions that they know may affect their futures. It is outrageous to predicate a system based on the *sub silentio* proposition that only those who are shielded from the personal consequences of their decisions can make honest and just decisions.

I have pointed out that the elective system in Wisconsin does supply meritorious and distinguished judges. Would reversion to a so-called merit system necessarily assure that judges are selected on merit alone? I think not. Not too long ago I contacted the counsel for a "merit" appointing panel regarding one of the panel's three choices for a leading judicial post. I was greeted with the remark, "What kind of a Democrat are you to support that guy who ruled against us!" I recall the incident just to note that merit has different meanings to different persons. Just this week we have the question of Judge Baer, a touted merit selection judge appointed by President Clinton, who suppressed evidence in a situation where it appears the judge erred. The President considered asking for Judge Baer's resignation. Fortunately, on reflection, the Executive Office commented that it was only asking for reconsideration and a possible appeal. It is alarming, however, when

merit selection tenured judges are threatened with a resignation request from the executive.

Notwithstanding the crucial financing question, the elective system allows anyone to be a judicial candidate. On the other hand, the commission selection system may winnow out applicants on a basis unrelated to merit and on criteria that are unstated and unknown to anyone, perhaps on bases that depend only on the momentary caprice of a committee.

In Wisconsin, the judicial selection committee is the governor's creature, created by executive order. The governor chooses persons who are likely to select judges on the basis of the political and personal preferences of his selectees. While in Wisconsin all may apply who meet stated minimum standards, I doubt that all applicants are examined for merit alone. In one merit system when the appointing authority decided to appoint a friend, the appointing authority modified the merit commission to better assure that the appointee could not be challenged. The selection was a good one, but factors in addition to merit were considered.

Also, the Commission members may be heavily lobbied to make the "right" selection. Once names have been submitted to him, the governor will expectedly feel the impact of political pressures.

I particularly object to the usual voluntary merit commission plan which limits the governor's power to choose an appointee exclusively from selectees of a commission. Governors in Wisconsin have the constitutional duty to select judges to fill vacancies and should not allow that duty to be diffused. A plan that voluntarily or involuntarily limits a governor's choice is, in my opinion, an unconstitutional surrender of responsibility in derogation of the people's directives as set out in the constitution. A governor should make the judicial selection unfettered by others who would limit his executive prerogative. If the people are dissatisfied with a selection, it is the governor who should be held accountable, not a faceless and irresponsible commission. Changing the constitution so that nominating power resides in a "commission" is not acceptable either.

The plan proposed by Chief Justice Hallows for the 1973 court reorganization would avoid this constitutional pitfall. Under Chief Justice Hallows' plan, the governor would make the nomination of one person to the commission, and the commission would have the option of voting qualified or unqualified. There would be no yielding of the power to nominate.

In short, I strongly believe that our system is not defective to the

point that it should be discarded. Although it is not "broken," I do think it needs fixing. The true evil of our elective system is not that it has affected the quality of our judiciary, or that the quality or integrity of opinions has been affected. Rather, my problem with our present system stems from the huge and ever increasing cost of campaigning and the public's perceptions that arise from that process. I criticize this process not so much for its effect upon the candidates who eventually must run for office but for its effect in screening out persons who do not have access, personal or contributed, to great amounts of money, or persons who feel uncomfortable raising large amounts of money.

First, I have few qualms with the freedom of speech that allows persons to contribute unlimited sums of their own money to their own partisan campaigns. I also believe that legislators' and executives' responsiveness to their supporters' financial and policy interests rests on a different basis than the decisions that are made between the parties who appear before a court.

It would be entirely appropriate, indeed it is necessary, for the state to finance 100 percent of judicial campaigns with a reasonable statutory limit on state funding. Assuring the continuation of an honorable, independent, and qualified judiciary is a public purpose for which tax money may properly be used. I would eliminate the use of all private funds for the primary and general elections. Because I believe money spent for the support of an independent branch of government could rest on a basis different from that used to support the legislative and executive policy makers, it would be possible to constitutionally limit the expenditure of a judicial candidate's personal funds.

An in-depth analysis of all the unsolved ramifications regarding election law and First Amendment rights that have arisen out of *Buckley v. Valeo*,²⁰ and *Buckley v. Illinois Judicial Inquiry Board*,²¹ and the effects of the Federal Voting Rights statutes is beyond the scope of this article. The personal expenditure issue however, deserves a brief discussion. While the First Amendment right to spend unlimited amounts of one's own funds for election appears to be undisputed in partisan elections, that right is less clear where non-partisan judicial elections are concerned. Moreover, the incentive to spend huge amounts of personal capital to obtain a semi-monastic judicial position is not apparent. It would probably never be a problem. The constitutional

20. 424 U.S. 1 (1975).

21. 997 F. 2d 224 (7th Cir. 1993).

question regarding judicial elections should, however, be explored further.

Justice Hans Linde of the Oregon Supreme Court has pointed out that all judicial selection processes are tainted with politics, except perhaps the genetic selection of the hereditary members of the House of Lords, whose ancestral origins were clearly political.

Presently, the state funds provided by tax return check-offs are minuscule in light of the total costs. A partial, although not a complete answer, is full state funding of serious candidates. Obviously, it would not be in the public interest to fund frivolous contenders or those who run hoping the opposition skids off the road. Currently, to be placed on the ballot, only 2000 signatures are needed on nomination papers for the Supreme Court. These signatures can be obtained by spending an afternoon in a strategic location. I propose that we revert to the system in existence in the early 1960s, when nomination papers were to be obtained in each county in a considerable quantity.

We do have some qualification tests now, for example, the requirement of bar admission for at least five years. Perhaps there should be additional qualifications in relating to scholarship and experience. We also have "secret" tests that are applied *sub silentio* by nominating commissions. I propose placing the cost of obtaining nomination papers, and it would not be inconsiderable, on the candidate. Perhaps there can be other qualifying hurdles that would be constitutional as well. Only after passing this threshold of qualifications could a judicial candidate access public funds.

I urge us to maintain an elective system that has served us so well for so long. I am disheartened that the present campaign costs loom as impediments to a democratic assurance of an independent, qualified, competent, and honorable judiciary.

I believe it is worth tinkering with our system to preserve its essentials. I urge that a commission be established to study the public financing of judicial campaigns in order to keep the meritorious parts of elections and to eliminate deleterious ones. President-elect David Saichek of the State Bar has appointed a commission, of which Justice Wilcox is a co-chair, to study the "independence of the judiciary." Because I believe the elective process does implicate and affect the independence of the judicial branch, perhaps this commission would find it appropriate to study the process by which judges are elected.

I believe it is the special political and cultural ambience of Wisconsin that makes our judicial system, indeed our entire political system, work. As Justice Winslow stated in 1912, "[n]o state . . . has been [as]

successful in eliminating political considerations from judicial contests as Wisconsin.”²²

Although I have some misgivings about our elective system as concerns it the judiciary, I would have grave misgivings were we to adopt a “merit” commission system. Furthermore, my present misgivings are not with the product of our current system. We, in Wisconsin, have a unique political and judicial culture, a heritage of independence, integrity, honesty, fairness, and openness. And our present system works! Although flawed, as any other human institution, a system that can and has produced judges of the quality and character of E. Harold Hallows should not easily be supplanted. It must be made to work better.

22. WINSLOW, *supra* note 6, at 385.

