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The District Of Columbia's Judicial Selection Process: The Good, The Bad, And The Ugly

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**EDITED PROCEEDINGS FROM THE SYMPOSIUM ON
DISTRICT OF COLUMBIA DEMOCRACY AND THE
THIRD BRANCH OF GOVERNMENT**

**THE DISTRICT OF COLUMBIA'S JUDICIAL SELECTION
PROCESS: THE GOOD, THE BAD, AND THE UGLY**

Comments of
Patricia M. Worthy*

It is a great honor to participate in the critical discussion of the selection of the District of Columbia's Third Branch. I want to thank the sponsors of today's Symposium, the Council for Court Excellence and the David A. Clarke School of Law for appreciating the value of such a dialogue given the unique characteristics of the existing selection process and its impact on the daily lives of the citizens of this great city.

I am proud to be able to state that I was the longest serving Chairperson of the District of Columbia Judicial Nomination Commission ("Commission")¹ and, thus, extremely pleased when invited to comment on whether, in my opinion, any changes are warranted to the present judicial selection process.²

Before I begin my remarks, however, I want to take a few moments to share my views on one of the questions posed by the Third Branch Project. That is, the question of whether the judicial selection process should be altered to better capture the ideal and goal of home rule. Stated differently, whether we should seek authorization to transfer the appointment authority from the President of the United States to the Mayor of the District of Columbia and reassign the approval

* Former Chairperson of the District of Columbia Judicial Nomination Commission and Professor of Law, Howard University School of Law. I want to express my appreciation to my research assistants Clarion Johnson and Shannon Stokes.

1 I served as a member of the Commission from 1992 until 2005 and as its Chairperson from 1994 until 2004. However, the views expressed in these comments are my own.

2 The Commission is comprised of seven members. One member is appointed by the President with a five-year term while the remaining members serve for six year terms on a staggered basis. Two members are appointed by the Mayor; two members are appointed by the Board of Governors of the District of Columbia Bar; one lay member is appointed by the D.C. Council; and one member is a federal judge appointed by the Chief Judge of the United States District Court for the District of Columbia. The Commission is charged with the responsibility of recommending three nominees for every vacancy on either the Court of Appeal or the Superior Court. The appointment authority rests with the President, who is restricted in his selection from the names provided by the Commission and his appointment is subject to Senate confirmation. See District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. No. 93-198, 87 Stat. 774 (1973).

authority away from the United States Senate to the Council of the District of Columbia.

As you all know, in the United States, the vast majority of state judges are elected.³ Some contend that making judges directly accountable to the people both allows the electorate to define the limits of acceptable judicial conduct and promotes discussion about evolving standards of judicial conduct,⁴ while others contend that judicial elections increase the representation of women and minorities on the bench.⁵ Because of these and other factors, I would ask that we not totally ignore or abandon a debate that includes the possibility of judicial selection through the electoral process in the District of Columbia. As a legal ethics professor, I clearly understand the potential harms associated with judicial elections. Judges and judicial candidates are constantly pressured to speak on such current issues as the death penalty and abortion. Furthermore, the Code of Judicial Conduct generally cautions that judicial candidates should refrain from making “pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”⁶

Spending on campaigns in 2004 for state Supreme Court positions rose to \$42 million nationwide, an increase of almost \$30 million from just two years earlier.⁷ Commentators are concerned that spending in these elections is likely to continue to increase and “pressure on candidates from interest groups seeking firm commitments, in writing, on controversial issues is likely to intensify.”⁸ However, there has been a trend toward reform in judicial elections. More than thirty states have adopted some form of nonpartisan judicial election procedures as a way to minimize inappropriate partisan political influence on courts, judges, and their

3 States in forty-eight jurisdictions identify the tribunals representing the highest level of judicial review “supreme courts,” and of this number, thirty-eight states have some type of judicial election. States in thirty-nine jurisdictions hold some form of elections for trial courts. A.B.A. Standing Committee on Judicial Independence, *Fact Sheet*, available at <http://www.abanet.org/judind/jeopardy/fact/html> (last visited June 7, 2006).

4 Ryan L. Souders, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 548 (2006).

5 Tanya L. Green, *The American Judiciary: Understanding Federal and State Courts*, <http://www.cwfa.org/> (search “merican judiciary,” then click on first hyperlink).

6 See ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 4.1(A)(13)(2003). Note that as a result of the Supreme Court’s decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) this particular Canon has been revised to ensure adoption of a more narrow interpretation of the “pledges” and “promises” clause. See particularly Comments 11 through 15. For an excellent discussion on the limits of judicial speech during election campaigns following the *White* decision, see Roy A. Schotland, *Should Judges Be More Like Politicians?*, 39 CT. REV. 8 (2002).

7 *Judicial Politics Run Amok*, N.Y. TIMES, Sept. 19, 2006, at A24.

8 *Id.* The average cost of winning in 2004 increased forty-five percent from the elections just two years earlier, to over \$650,000. The candidates raising the largest amount of money were successful in over eighty percent of the elections. See ROGER WARREN, *STATE JUDICIAL ELECTIONS: THE POLITIZATION OF AMERICA’S COURTS* (2006).

judicial decisions.⁹ As a citizen and long-time resident of this wonderful city, where historically so few opportunities have existed to exercise a right to vote,¹⁰ I would hope that we would at least consider discussing the value of nonpartisan elections for our judicial officers.

A debate as to whether or not to have the Mayor or the President of the United States select our judges must be joined by a discussion of the value of having the electorate make this most important decision. This notion must, in my opinion, stay as a viable option and not be relegated to a footnote in the final position paper on the topic of judicial selection. There must and should be a dialogue, and the dialogue should include all of the citizens in our fair city, and not disputed among narrowly defined groups associated with only one or two discrete interests. The debate must include the people who actually appear before these judges, and whose lives depend on justice being dispensed by our courts in a fair and compassionate manner. I hope these comments will be received in the spirit they were given, and that is to encourage diversity of viewpoint and celebrate social justice. Now on to the topic of my discussion—the Commission’s selection process, and whether, in my opinion, change is warranted.

It would be inexcusable if I did not begin my comments today on the “good” elements of our present selection process. The existing process has resulted in a bench comprised of the finest judges anywhere in the nation, and I am extremely proud of both the men and women who serve on the District of Columbia Superior Court and Court of Appeals. Many of our citizens have no clear idea as to the intellectual and personal strengths of the jurists who serve on the local court. Think for just a moment about the sheer number of judicial officers that were serving in our court system when the federal government appropriated their talents for the benefit of the District of Columbia Circuit.¹¹

9 *Id.* at 15.

10 In 1820, District of Columbia residents petitioned Congress for a municipal charter, which made Washington an incorporated city and gave them the right to elect a local legislature (called a Council) that could pass laws and levy a tax on real estate to pay for city services. However, the President still appointed the city’s Mayor. In 1963, District of Columbia residents won the right to vote for President and Vice-President of the United States with the ratification of the 23rd Amendment to the Constitution. Four years later, citizens were granted the authority to elect a School Board. In 1970, the District of Columbia residents gained a nonvoting delegate to the House of Representatives. Finally, in 1973, the Home Rule Act was enacted by Congress and ratified by the citizens in a special referendum. District of Columbia residents were finally allowed to elect a Mayor and Council. In addition, the citizens voted to approve the election of Advisory Neighborhood Commissioners who advise the Council on neighborhood concerns. Council of the District of Columbia, *History of Self-Government in the District of Columbia*, <http://www.dccouncil.us/history.html> (last visited Nov. 13, 2007).

11 Hon. Ellen Segal Huvelle, Hon. Norma Holloway Johnson, Hon. Henry H. Kennedy, Jr., Hon. Gladys Kessler, Hon. Colleen Kollar-Kotelly, Hon. William Pryor, Hon. Judith W. Rogers, Hon. Emmet Sullivan, Hon. Ricardo M. Urbina, Hon. Reggie B. Walton. United States District Court for the District of Columbia, <http://www.dcd.uscourts.gov/judge-info.html> (last visited Nov. 13, 2007);

In addition, I must also recognize the quality of the Commission members who have traditionally been a group of dedicated, hard-working individuals who invest many, many hours in the service of the city and its citizens. These are people who, for the past several years, have received no compensation, other than the satisfaction that they were making a contribution toward continued judicial excellence. They worked tirelessly, on a nonpartisan basis, to ensure that our local courts reflect the diversity of its community and reap the benefits of a city steeped in outstanding legal talent. Having acknowledged both the high quality of our judicial officers and the talent and dedication of the Commission members, how, you ask, could one possibly suggest that there are also “bad” and “ugly” qualities associated with the existing selection process?

First, it must be obvious to all that Presidential appointments to the District of Columbia courts do not illicit the same degree of interests, vigilance, and commitment that accompanies comparable appointments to the federal bench. This is made clear by the deficient administrative structure utilized by the Office of White House Counsel to manage our judicial selections. More specifically, the procedures established to handle the selections for the District of Columbia have varied with each new President, White House Counsel, and ultimately, the Associate White House Counsel (“Associate”) assigned the responsibility of working with the Commission. This is of great importance, because during the period that I was Chairperson, we experienced a substantial number of personnel changes in the Office of White House Counsel, which frequently impacted the adequacy and efficiency of the selection process.¹² Each White House Counsel designated one Associate after the other to manage the District of Columbia’s judicial selection process.¹³ Though competent and well meaning, they often lost the official files of the Commission, forgot the procedures associated with the process, and often needed assistance to ensure that deadlines were satisfied. Individuals would resign from their positions without the courtesy of notice to the Commission or

District of Columbia Court of Appeals, <http://www.dcappeals.gov/dccourts/appeals/judges.jsp> (last visited Nov. 27, 2007); <http://www.jtbf.org/index.php?src=> (click on “Integration of the Federal Judiciary”, then click on “Biographies of African American Judges”, then click on “Judith Rogers”); <http://www.jtbf.org/index.php?src=> (click on “Integration of the Federal Judiciary”, then click on “Biographies of African American Judges”, then click on “Norma Holloway Johnson”).

12 During my tenure as a Commission member, Abner J. Mikva (1994-1995); Jack Quinn (1995-1996); Lanny Davis (1996-1998); Charles F.C. Ruff (1998-1999); Beth Nolan (1999-2001); Alberto Gonzales (2001-2005); and Harriet Miers (2005-2007), served as White House Counsel. During that same period, Christopher Bartolucci, Brad Verenson, Mark Childress, Michael Drummond, Charles S. Duggan, Tim Flanigan, Dabney Friedrich, Brett Kavanaugh, Naomi Rao, Theodore (Ted) Ullyot, and John Yarowsky served as Associate White House Counsel designated to work with the Commission. E-mail from Peggy Williams Smith, Executive Director, D.C. Judicial Nomination Comm’n, to Patricia M. Worthy, Professor of Law, Howard University School of Law (Nov. 14, 2007)(on file with author).

13 These individuals were responsible for such duties as scheduling interviews, initiating background checks, and issuing press releases.

advising the newly designated Associate the legal requirements and responsibilities associated with the selection process. We had to train people over and over again. They didn't know the candidates, they didn't know us, and we always understood that we would never be a priority in an office dealing with legal issues of national and international importance. In fact, when terrorist attacks necessitated heightened security at the White House, our fortitude was profoundly tested in our efforts to find ways to deliver important documents to the White House in a timely manner.

Another important and "bad" thing associated with having our existing selection process is the insertion of national interests into what should be solely matters of local concern. One of today's commentators has explained that a major objection to having the Mayor, as opposed to the President, appoint judicial candidates was the potential of unduly politicizing the selection process.¹⁴ We would be extremely naive to advance the notion that politics plays no role in the present selection of jurists. My experience at the Commission would suggest a very different dynamic. Politics clearly plays a role once the Commission has forwarded to the White House the list of three judicial candidates. The difference is that the politics that are in play have national as opposed to local implications. In other words, the people who are ultimately sent over by our Commission are extremely qualified, and most, but not all, have strong ties to the community. The candidate selected, however, may well have benefited from relationships in the Congress, the White House, or national organizations and have no ties or commitments to the local community.

Finally, there is the "ugly" fact that our judicial nominees are faced with lengthy and stressful delays during the Senate confirmation process. During my tenure as Chairperson, we have had, on more than one occasion, nominations languishing in the Senate for more than a year.¹⁵ The judicial nominations to the District of Columbia Superior Court and the Court of Appeals are not managed in the customary fashion. The names of judicial candidates are not submitted to

14 See Charles A. Miller, *Who Should Appoint Judges of the D.C. Courts*, 11 UDC/DCSL L. Rev. 25 (2008).

15 The Hon. Patricia Broderick was nominated by the President on February 11, 1997, and confirmed by the Senate on October 21, 1998. The Hon. Gregory E. Jackson was nominated by the President on September 25, 2003, and confirmed by the Senate on November 21, 2004. <http://thomas.loc.gov> (click on "Presidential Nominations" hyperlink, then search "Superior Court," then select "District of Columbia" as the State of the Nominee, then select "confirmed by Senate" as the Legislative Action, then enter "1992-2004" as the dates). In fact, the Council for Court Excellence conducted a study in which it reported that for twenty-nine completed judicial appointments under the procedures provided by the Home Rule Act, the average time from the forwarding of nominations to the President to the actual investiture of judges was eleven months. The range of time was between five and twenty-nine months. See *How the District of Columbia Gets Its Judges*, A Council for Court Excellence Educ. Guide (Dec. 2005), available at <http://www.courtexcellence.org/publications/booklets.shtml>.

the Senate Judiciary Committee, but instead are submitted for consideration to the Senate Government Affairs Committee. In my opinion, some of the difficulty lies in the Government Affairs Committee staff working outside of their traditional responsibilities and the White House feeling no political obligation to assert the needed pressure to ensure that the nominations move forward in a timely manner. The candidates are basically on their own in their efforts to maneuver the confirmation process. Efforts to obtain dates for confirmation hearings are often left to “friends” of the candidates, and on some occasions, the leadership of our local courts.¹⁶ Resolving this problem poses tremendous challenges. It is extremely difficult to impart to a constituency that has minimal connection with the interests of the city, the importance of having a full complement of judicial officers. In addition, the problem of undue delay has another consequence, one that affects the selection process itself because it effectively eliminates from the pool of possible applicants, lawyers who are sole practitioners or members of small law firms.

The Commission found that the uncertainty associated with potential lengthy delays in Senate confirmation directly impacts those lawyers whose clients are unwilling or unable to hire an attorney that may be precluded from completing the work required. We have been told by these lawyers that clients will not hire them if they think that they are going to be leaving in the middle of their cases. However, because of the lengthy delay in the confirmation process, if one is fortunate enough to be selected as a nominee, they are available for employment for several months, and thus, during this period, possibly without the benefit of new client business. So the “ugly” result is that the existing selection process tends to favor lawyers from large firms or lawyers who work for the government, because for them, the delay has no direct impact. It is understood that even when and if they leave someone of equal experience will be available to manage the client’s legal needs. Therefore, you have segments or groups of lawyers who tend to fare well in the existing process, while the process tends to discourage other groups of lawyers from applying.

Hopefully, I have provided some “food for thought” and have highlighted some aspects of the selection process that need a full and honest discussion because they are of such great significance for us as a city.

16 This is not at all surprising given the sheer number of cases filed in the District of Columbia Superior Court and the impact unfilled judicial vacancies have had on the number and timeliness of case dispositions. For example, from 1996-2004, in most years, the number of filings in the Civil Division exceeded 100,000, while yearly filings in the Criminal Division ranged from 69,325 to 46,276. *See* 1996-2004 D.C. CTS. ANN. REP.