

## A Committeeperson's Perspective on Electing Judges

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I have been a committeeperson for almost three decades—a job I enjoy EXCEPT for the job of recommending judicial candidates to my neighbors. It is extraordinarily difficult to get reliable information about judicial candidates and I'm uncomfortable making recommendations when I don't feel I can personally vouch for these endorsements.

Last January a group of civic/advocacy organizations which endorse candidates met with representatives of the Bar Association to express our dismay at their endorsement of recently elected Common Pleas Judge Thomas Nocella, who has a well-documented history of ethics violations and other dubious practices. The officers of the Bar assured us they were making changes to their process which should prevent another such occurrence.

The Nocella appointment was unusual due to the last-minute resignation by a sitting judge, which allowed the Democratic Party to make an election eve appointment. Because the Bar Association recommendation is good for three years, Nocella could make his last-minute entrance into the race as a recommended candidate. Well, a lot happened in those three years, including citations by the Ethics Commission. Also, the last minute appointment of Nocella was particularly egregious as he had been previously rejected by the voters three times.

The Bar Association acknowledged that there were flaws in the process which they intend to correct. They described their process to us and it was apparent that they spend considerable time and effort on judicial recommendations. Several of us expressed concerns about the secrecy surrounding the process. Voters are given a recommendation of endorsement or non-endorsement without knowing the reasons why. (A rejected candidate gets that information but not the source of the information. The public simply gets the recommendation.) The representatives of the Bar Association made a good case for the necessity of confidentiality—principally the difficulty of getting accurate information without guaranteeing confidentiality.

However necessary confidentiality may be, there are serious tensions between guaranteeing confidentiality and the democratic process. It's clear that if we are to elect judges we need some independent agency to certify that candidates are at least minimally qualified. But the Bar Association recommendation is often trumped by Party affiliation, and both are trumped by ballot position! The Party this year, according to some news reports, waited until candidates had received their ballot positions before making

endorsements, thus making it more likely that Party-endorsed candidates would win. Judicial elections are money-makers for the Party. If its candidates don't win, its endorsement no longer seems so necessary, and more candidates might balk at paying 35,000 for a Party endorsement.

Advocates of electing judges often say that the electoral process provides an opportunity for a candidate who might never get through an appointive process. No doubt this is true, and this includes some seriously tarnished candidates like Nocella and perhaps some worthy candidates as well. However, many seriously good candidates who might make excellent judges will not get down into that gutter. If they are not independently wealthy, they have little choice but to raise money from trial lawyers. The only people (other than the candidates' friends and relatives) who give to judicial candidates are trial lawyers who might later appear before a judge to whom they had contributed. Judicial candidates are frequently indebted both to donors and to the Party machine; this hardly inspires confidence in the independence of the judiciary. Opponents of appointing judges say that politics and money would be still involved in an appointive process. True, but at least we would not have money directly changing hands between trial lawyers and potential judges.

Advocates of electing judges argue that in a democracy the people should choose their judges. But that does not happen; voters have opted out of the process. In an off-year election when many local judicial candidates are selected, turn-out is often quite low—between 15% and 20%. However, that figure is the number of people who came out to vote; cut that in half for those who vote in judicial elections. Even in my middle class Mt. Airy neighborhood, with a high percentage of educated voters, about half choose not to participate in judicial races. Committee people get the number of undervotes in each election—that is, the number of people who did not vote in a particular race. I've been checking this for years now and the pattern is consistent. Participation drops off dramatically in the judicial races. One interpretation is that the people are sending a message that they do not want to elect judges.

Another argument made by advocates of electing judges is that women and minorities would not fare as well under an appointive system. But is this the case? The research I've done is inconclusive, with some studies contending that women and minorities do better in appointive systems, others indicating they fare better under an elected system. Since I lack a subscription to Law Library Journal, there are many studies I can't access. Presumably this is an empirical question, as we have a sample of states in each category. A much more difficult question: how many well-qualified women and minorities who might make excellent judges have not run for election because they lack the financial resources and/or don't want to participate in a process riddled with potential conflicts of interest?

Several representatives of the groups involved in the meeting with the Bar Association spoke informally after the meeting about these questions, and there does seem to be sentiment towards working together to change the way we choose judges. Getting a consensus and action plan around this issue will not be easy, but some of those community leaders who once defended electing judges are no longer doing so and more and more voices are demanding change.

There was great deal of outrage about Nocella but, as one officer of the Bar said, one good thing about the Nocella debacle is that a better process may emerge. The Bar Association will no doubt improve its process and we will be able to rely on their recommendations with a greater degree of confidence. But is it possible to significantly improve our deeply flawed process of electing judges????