MARYLAND
THE DAILY RECORD
YOUR TRUSTED SOURCE OF BUSINESS, LEGAL AND GOVERNMENT NEWS FOR 131 YEARS.

The judge's bench in a courtroom in Carroll County Circuit Court. (File photo)

Commentary: A better way to appoint, elect circuit court judges
By: Commentary: Del. Chris West and Del. Erek L. Barron February 23, 2017

In 1968, the proposed new Maryland Constitution was defeated by the voters largely on the strength of the argument that it would remove their right to elect their circuit court judges. Since then, the supporters and opponents of the current system of electing circuit court judges have continued to fight over the issue. This year, two bills – House Bill 579 and House Bill 534 – yet again propose the total elimination of contested elections for circuit court judges. We feel that, after 49 years of gridlock on this issue, it is time to consider a new approach that might lead to a resolution of this long-festering dispute.

The annual debate over circuit court judicial elections is always presented as an either/or choice. On the one hand, retention of the current system, in which every circuit court appointee must run in a contested election; on the other, the replacement of the current system with one giving the governor untrammeled power to appoint circuit court judges, subject only to periodic "retention" elections which, in our view, are phony elections, as none of the judges running in a retention election ever campaigns, there are no opponents, and no judge in a retention election has ever come close to losing.

House Bill 826 presents an alternative solution containing attractive provisions that will provide considerably more than "half a loaf" to the partisans on each side. Our bill represents a true "win-win" for both sides and, we feel, represents a reasonable compromise solution to this long-vexing problem.

Our bill would make a structural change in the appointment process. Upon a judicial vacancy, the governor would nominate a replacement. The nomination would go to the state Senate for confirmation. If the Senate vote exceeded 80 percent in favor, the nominee would be installed and would NOT have to run in an election at all. If the vote in favor were under percent 50 percent, the nomination would fail. If the vote were between 50 percent and 80 percent, the nominee would be confirmed but would have to run in a contested election, as at present.

Problems addressed

House Bill 826 would either entirely solve or at least greatly ameliorate the principal objections to the current system. First, given the track record of gubernatorial appointments in the state Senate in the last 25 years, it seems quite likely that nearly all appointees to the circuit courts would receive more than 80 percent of the Senate vote – especially if the governor appoints individuals who are qualified to serve as judges and who are ethically sound. If the governor also pays attention to the need to ensure diversity on the circuit court bench, it is difficult for us to foresee more than rare occasions when Senate opposition to an appointee would exceed 20 percent. (Even if the Senate were to deny all of a governor's appointees the magic 80 percent of the vote for confirmation, we would merely be left with the same situation that exists right now in which all circuit court appointees would need to run in contested elections.)

Second, one objection to the current system is that many of the most qualified attorneys decline to apply for a circuit court judgeship. They are concerned that upon their appointment, they would have to close down their private law practices, get sworn in and then have to run for election; should they lose, they would have to start from scratch to rebuild their law practices. Our bill would lead to more and better attorneys applying for appointment to the bench for two reasons: the greatly enhanced possibility that the judicial appointees of a prudent governor would not have to face elections at all; and the fact that, following the vote by the Senate, in the event that a judicial appointee failed to achieve the magic 80 percent, he or she would know the nature of the opposition and would be able to make an educated decision whether to give up his or her private practice and go on the bench and then face the voters or, alternatively, to decline the judicial appointment and continue to practice law as a private attorney.

Third, another objection to the current system is that every newly appointed circuit court judge has to run in a contested election. So, in the larger jurisdictions with regular judicial turnover, it has become common for "sitting judge" tickets to be formed, and the judge whose name starts with the letter closest to the end of the alphabet is the most imperiled "sitting judge." Under this new system, contested elections would be rare and only affect the particular judge who failed to achieve 80 percent of the vote in the Senate. The days of "sitting judge" tickets in the larger jurisdictions would be over

Our bill's 80-percent requirement will hold future governors' feet to the fire and ensure that they will pay close attention to the need for diversity on the bench. No governor will want to suffer the embarrassment of his judicial appointees having to run in contested elections and perhaps losing. Governors will thus strive to make diverse judicial appointments.

We believe that HB 826 will finally cut the Gordian knot that has tied up this issue for nearly 50 years. The approach we have taken in our bill may not be perfect, but thinking outside the box in this way presents an opportunity to adopt a creative compromise that will eliminate nearly all contested circuit court elections in the future while providing a needed check on untrammeled gubernatorial appointive authority.

Dels. Chris West, R-Baltimore County, and Erek L. Barron, D-Prince George's, are co-sponsors of House Bill 826. This article was adapted from testimony they gave Wednesday to the House Judiciary Committee in support of the legislation.