

Editorial Advisory Board: Md. must end anomaly of judicial elections

By: Editorial Advisory Board January 30, 2020

Ten years ago we wrote: “Just as surely as the swallows annually return to Capistrano, each winter advocates for and against Maryland’s current system of electing circuit court judges line up to do battle in Annapolis.” Nothing has changed. Recently Chief Judge Mary Ellen Barbera once again advocated for a constitutional amendment that would abolish contested elections for Maryland circuit court judgeships. We agree with the chief judge. However, we also add what we also wrote 10 years ago: “(T)he choice has nearly always been presented as “either/or” – either Maryland retains its current system of Circuit Court judicial elections or else Maryland passes a constitutional amendment to give the governor untrammelled power to appoint the state’s circuit court judges, subject only to periodic “retention” elections.”

Judges should not have to run for election. Unlike candidates for the executive or legislative branches of government, judges cannot run on platforms of promises to the electorate. To remain impartial, they cannot express their preferences. Judges have ethical constraints on what they can say publicly about cases. And, running for election costs money, which forces judges to raise campaign funds from the public – usually from lawyers who appear before them. Finally, elected judges can be held accountable for unpopular decisions; this is never good for an impartial judiciary.

Circuit court judges are the only judges in Maryland who must stand for contested elections. District court judges are appointed by the governor for 10-year terms, with confirmation by the state Senate. Appellate judges are appointed by the governor, with confirmation by the state Senate, and are then subject to retention elections for 10-year terms. Circuit court contested elections are an anomaly, a vestige from the days when all Maryland judges were subject to contested elections.

There should be consistency in the selection and retention methods for judges in all Maryland courts – district, circuit and appellate. There are a number of possible methods that are a compromise between pure contested elections and federal-style appointment with simple majority confirmation by the Senate and lifetime tenure. Ten years ago, we suggested two compromise methods: (1) Appointment and a judge would not have to stand for election if he or she was confirmed by an 80% vote of the Senate; if the judge received between 50% and 80% approval, he or she would have to stand for a contested election. (2) An appointment and retention election system patterned on Arizona’s public judicial nominating process, with ultimate gubernatorial appointment and retention elections. There are other possibilities.

Should Maryland retain contested elections for circuit court judges, there are reforms that could improve the process. For example, public funding for judicial campaigns could avoid the need for judges to raise campaign funds from lawyers and litigants who may appear before them.

Currently pending before the General Assembly are House Bill 518 and Senate Bill 415. The bills are not identical, but both would provide for appointment by the governor and retention elections for circuit court judges. We support the bills. But, should the decades-long stalemate regarding circuit court judges stymie these bills, we strongly encourage advocates on both sides of the debate to come together in an attempt to agree upon some compromise that could improve the current unsatisfactory system for selecting and retaining circuit court judges in office.

Editorial Advisory Board members James B. Astrachan, James K. Archibald, Susan Francis, Michael Hayes and H. Mark Stichel took part in this editorial. Astrachan is married to Judge Julie R. Rubin of the Baltimore City Circuit Court. Stichel is the chair of the Baltimore City Sitting Judges Election Committee.