



A Review of the Advantages and Disadvantages of the Elected and Appointment Methods of Judicial Selection for Municipal Court Judge

Prepared by

Ted Baggett

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“If I could do just one thing to improve the reputation of this country’s judiciary, it would be to convince the states that select judges through elections to switch to a merit-selection system or some other appointment system.” – Retired Associate U.S. Supreme Court Justice Sandra Day O’Connor

“From our vantage point, democratic politics is alive and well in the American states. Given a choice between citizen control of the American state court bench and elite control that serves to constrain the exercise of judicial review and impairs the capacity of courts to act as co-equal branches of government while protecting arrogant and incompetent judges, we think the better choice is obvious.”
-Chris W. Bonneau and Melinda Gann Hall, In Defense of Judicial Elections

Introduction

The City of Roswell requested that the Carl Vinson Institute of Government provide an analysis of the advantages and disadvantages of elected and appointed methods of municipal court judicial selection. To accomplish this, the faculty at the Institute of Government reviewed state law, the City Charter of Roswell, charters of other Georgia municipal corporations, relevant literature and data, and interviewed select individuals, including staff of the Georgia Administrative Office of the Courts and lower court judges.

Legal Framework

Roswell's City Charter provides for a competitive election for the position of Chief Judge of the Municipal Court. The judge is elected to a four year term on the same schedule as elections for city council posts 1, 2, and 3.¹ This makes the City of Roswell unique among Georgia's approximately 400 cities that operate a municipal court.² The City of Atlanta is the only other Georgia municipality that municipal court judges to any type of election, a retention election which asks city voters if a particular judge (originally appointed by the Mayor) should be retained for another four year term.³

Providing for elections for Georgia municipal court judges is such a rarity most likely because it does not appear to be in conformance with state law. O.C.G.A. Section 36-32-2(a) provides as follows:

“(a) Notwithstanding any other provision of this chapter or any general or local Act, the governing authority of each municipal corporation within this state having a municipal court, as provided by the Act incorporating the municipal corporation or any amendments thereto, is authorized to appoint a judge of such court. Any person appointed as a judge under this Code section shall possess such qualifications and shall receive such compensation as shall be fixed by the governing authority of the municipal corporation and **shall serve at the pleasure of the governing authority.”** (*emphasis added*)

Although state law does not expressly state that municipal court judges cannot be elected, it does make it clear that they are subject to removal by the governing authority of the city. The constitutionality of this provision was upheld ten years ago in Ward v. Cairo, 276 Ga. 391 (Ga. 2003). In Ward, the Mayor and Council directed the Judge to honor a private probation services contract and terminated him when he refused to do so. Furthermore, the use of the legal employment term “at the pleasure” in the statute is an indication of the state legislature’s

¹ See Roswell City Charter, Chapter 7.20 (3).

² Source: Georgia Administrative Office of the Courts.

³ See Atlanta City Charter, Sections 4-104, 4-106, 4-107.

intent that municipal court judges be removable at any time by the governing authority of the city.⁴

Literature Review

Assuming that Georgia municipal charters could legally provide for popular elections as a means of selecting municipal court judges, it may be useful to consider the policy arguments concerning the different methods of selecting judges nationwide. While the structure and nature of municipal courts is not uniform across the states, it appears that for the majority of municipal courts across the country, judges are appointed by the city governing authority and are not popularly elected.⁵ A review of data collected among the 27 other states that maintain municipal courts similar in jurisdiction to those used in Georgia reveals that 13 of them exclusively utilize appointment by the city governing authority, while only nine exclusively utilize popular elections.⁶

While there is consistency among the states in favor of appointing municipal court judge, there is variation about whether to appoint or elect state court appellate and trial court judges. Most of the literature debating the merits of the different methods of judicial selection centers on state appellate judgeships. In states that support the popular election of judges and those that prefer an appointment system, however, there is agreement that the most essential goal of any method of selection is to produce a highly competent judge that is capable of independence and impartiality in both appearance and reality. The question then is which method is best at producing competent and independent judges.

A review of recent literature indicates that the debate over the most appropriate method to be employed for judicial selection has become very one sided against judicial elections after the 2009 United States Supreme Court decision in Caperton et. al. v. A. T. Massey Coal Co., Inc.⁷ Indeed, even supporters of judicial elections acknowledge that the American Bar Association, the National Center for State Courts, and a “veritable throng of legal scholars in the nation’s leading law schools” are part of “an increasingly loud clamor in the United States to end the election of judges altogether.”⁸

The Caperton case provides the leading example cited in the argument against judicial elections based on concerns that they endanger the reputation of the judiciary for impartiality.

⁴ “Pleasure appointment: The assignment of someone to employment that can be taken away at any time, with no requirement for notice or a hearing.” Black’s Law Dictionary 1192 (8th edition) 2004.

⁵ Jones, Lawrence F. Kean Review *Reforming the Structure of Municipal Courts*, 2008.

⁶ In another five states, cities either used appointment by the governing authority or conducted elections as determined by the city charter. See American Judicature Society, *Methods of Judicial Selection among Limited Jurisdiction Courts* at http://www.judicialselection.us/judicial_selection/methods/limited_jurisdiction_courts.cfm?state, accessed on October 29, 2013.

⁷ 556 U.S. 868.

⁸ Bonneau, Chris W. and Hall, Melinda Gann, *In Defense of Judicial Elections* (Routledge 2009).

In Caperton, the high court reviewed circumstances surrounding the election of an appellate judge in West Virginia. After Massey Coal was found liable for a fraud verdict of \$50 million by a trial jury, the chairman of the company spent \$3 million in campaign contributions to elect Brent Benjamin as a Justice to the state's appellate court bench. After defeating the incumbent, Justice Benjamin refused to recuse himself from the appellate court's review of Massey's appeal and concurred in the overturning of the trial court verdict against Massey. The Supreme Court of the United States held that constitutional due process requires recusal in such cases. The danger of the appearance of favoritism to campaign contributors is an issue of concern for any elected judge. Former Justice O'Connor and others have repeatedly cited their concerns about what she describes as "interest groups pouring money into judicial elections that will threaten the integrity of judicial selection and compromise public perceptions of judicial decisions."⁹

It may be fairly argued that comparing elections for judgeships for statewide appellate courts and a municipal court for a city of 90,000 is unfair. It is highly unlikely that exorbitant sums are to be spent on a campaign for a judgeship in a municipal court whose jurisdiction is limited to traffic, specified misdemeanor crimes, and municipal ordinance violations. It is possible, however, that parties that appear before a municipal court judge may have made a contribution to that judge's campaign. Given the ruling in Caperton, it would be wise for a municipal court judge in such a position to recuse.

The other primary argument made by opponents of judicial elections which is to some degree irreconcilable from the above arguments about the potential negative impact of campaign funding questions the efficacy of elections due to the limited information available to voters in making decisions. This view of judicial elections maintains that because fairly evaluating the merits of judicial decisions requires specialized knowledge of the law, most voters are not equipped to make informed decisions between candidates in a judicial race. To underscore their view, they point out that despite notable examples, very few elected judges are ever defeated because voters have so little interest in judicial elections and elected judges are so rarely challenged.¹⁰ The danger seen by these opponents is that the electorate will not hold the elected judge accountable for their performance.

Although there is very little written in defense of judicial elections, the scholars that have taken this position point out that there is very little empirical evidence to support the notion that appointed judges are somehow superior to elected judges. One article, written before the Caperton decision, suggests that elected judges may make quicker and better decisions in order to please the voting electorate.¹¹ Another critic of municipal courts has suggested that the appointment of municipal court judges by city governing authorities

⁹ Justice for Sale: How Special-Interest Money Threatens the Integrity of our Courts, Wall Street Journal November 15, 2007.

¹⁰ Bruhl, Aaron-Andrew P and Leib, Ethan J., Elected Judges and Statutory Interpretation (University of Chicago Law Review Fall 2012).

¹¹ Posner, Eric, Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary (American Law & Economics Association Annual Meetings (2008).

contributes to the public impression that these courts are designed to generate revenue for the city and that the judges have an inappropriately cozy relationship with the city police.¹²

Interviews

Given that the national debate is centered around statewide judicial elections, it may prove wise to consider the experience of those that have served as municipal court judges in Georgia. Two judges in particular are uniquely qualified to share the wisdom of their experience with municipal court methods of appointment given their service as elected or appointed judges.

The recent history of the neighboring City of Alpharetta (population 57,000) is instructive. Until 2011 Alpharetta, like Roswell, elected its municipal court judge. In the early 2000s tensions between the City and the then-elected municipal court judge flared and were documented in the press. Jim Matoney, a city council member at the time ran for municipal court and defeated the incumbent judge. Judge Matoney was re-elected in 2009 but urged the city governing authority to change the judgeship to an appointed post, which they did in 2011. Judge Matoney believes that it makes more sense to appoint municipal court judges. He pointed out that in elections for municipal court judge, voters have little on which to base their decision other than likeability of the candidates. He echoed concerns found in the literature, notably the argument that because few people engage in the electoral process for such races there is very little public oversight of the judiciary. He also acknowledged, however, the danger for political interference under an appointment system and stressed that there needed to be reasonable measures taken to protect court operations from political pressure.¹³

Tommy Bobbitt is the elected Chief Magistrate Judge in Laurens County, Georgia (population 48,000). He continues to serve as the appointed part time municipal court judge for four small cities and served as the appointed municipal court judge of the City of Dublin from 1981 to 2004. Judge Bobbitt believes that the most appropriate method for selecting a municipal court judge is appointment, provided that the judge is appointed for a one or two year term and they only be subject to removal for cause in accordance with due process. Judge Bobbitt expressed concerns about judicial independence in situations where judges can be removed for a single decision with which mayor and council disagree and where there are expectations from the city governing authority that the municipal court maximize revenue generation. He stressed that the advantages to appointed judges are that they are more integrated into the overall city operation and have incentives to cooperate with the city to make the court run more smoothly and efficiently. Elected judges in his view have greater independence from city politics that can serve to shield them from political pressure from the mayor and council. He also pointed out, however, that elected judges may feel the need to spend more time engaged in political activity which can detract from their duties as judge.¹⁴

¹² Jones, Lawrence F., *Reforming the Structure of Municipal Courts* (2007).

¹³ Interview conducted with Jim Matoney on October 24, 2013.

¹⁴ Interview conducted with Tommy Bobbitt on October 24, 2013.

Conclusion

Georgia's statutory structure, scholarly opinion, and local expert experience all weigh towards appointing rather than electing municipal court judges. Appointment allows for careful vetting of the most qualified candidates by the city governing authority which will have a greater ability to weigh their merit than an electorate and makes operational cooperation between the court and the rest of the city more likely. The important caveat to this conclusion, however, is that the integrity of the municipal court rests on the independence of the judge and that if appointed judges become subject to the political interference by the city government, they will not be fulfilling the proper role of the judicial branch in serving the public.