By Gino L. DiVito

Judicial elections? Merit selection? While the decades-old debate continues in the wake of November's election, a respected former judge proposes a third way: a constitutional amendment that would retain but rework the judicial election system to reduce partisanship while increasing the percentage of the electorate that actually chooses Illinois judges.

JUDICIAL SELECTION IN ILLINOIS: A Third Way

Closing the gap between those who insist that judges must be elected and those who want a merit appointive system appears impossible. Election proponents fervently believe that the people must be allowed to choose, linking "consent of the governed" to the right to elect, both concepts deeply engrained in the American psyche. They turn a deaf ear to contentions that the "right to choose" is illusory, that approximately half the judges in Illinois are already appointed rather than elected, and that voters who lack knowledge to make intelligent choices are selecting judges based on bias rooted in gender, race, and ethnic identity.

If the preceding paragraph does not reveal my bias, let me make it clear: I am solidly in the merit-selection camp. That Illinois has outstanding judges is not due to our elective system but in spite of it. Too often voters, especially in some subcircuits in Cook County, have had to choose between candidates deemed unqualified by virtually every evaluating bar association.

Candidates in Cook County frequently avoid bar association evaluations, choosing instead to rely on the ignorance of voters and characteristics that meant victory for others despite unfavorable bar ratings. Voters are uninformed and disengaged, primarily because of

the very nature of judicial elections. And there are dangers, real and perceived, in election-related fundraising.

But this article is not about rekindling the old debate about selecting judges. On the contrary, as its title suggests, it takes a fresh look at the way we select judges and offers a third way, one that lives within the framework of our elective system and, by tweaking it, actually makes it more democratic.

The problem with the status quo

Currently, we elect judges after nominations at primary elections.[1] To be elected a judge in Illinois, a candidate files nominating petitions as prescribed by the general assembly to win the nomination of a political party to be its candidate at the general election. The final selection is made by registered voters who declare their party affiliation and vote in the judicial portion of the primary ballot.

We know through experience, however, that the primary does not merely set the table for the general election to follow. Instead, it is the de facto election of judges almost everywhere throughout Illinois. Except for a few subcircuits, circuits, and counties where there are genuine contests, winning a dominant party's nomination at the primary election is a virtual guarantee of victory in the general election.

The same applies, with few exceptions, to primary elections for supreme and appellate court judges in the five judicial districts in the state. Indeed, the nominated candidate of the dominant political party often has no opponent in the general election.[2]

In most parts of the state, winning a dominant party's nomination at the primary election is a virtual guarantee of victory in the general election.

Thus, the victorious candidate for the Democratic nomination for a circuit judgeship (as well as for an appellate or supreme court judgeship) in a Cook County primary is virtually assured election. The same goes for Republican candidates in Republican-dominated areas outside of Cook County.

That the winner of the dominant party's primary is almost assured victory in the general election is a reality we have come to accept. But consider the consequences of that reality.

It means we are electing judges in Illinois based on the vote of a fraction of a single party in primary elections. It means that in Cook County, for example, Republican and independent voters – those who vote in the Republican primary or who do not declare a party affiliation and therefore do not vote in the primary – have no say in who is elected judge. And it means only the small percentage of Democrats who vote in the primary – and who choose to vote for judicial candidates – are selecting our judges. The same logic applies where Republicans constitute the dominant party.

That reality must change.

Reducing partisanship, increasing participation

Fortunately, there is a way to elect judges in non-partisan elections while giving the entire electorate the ability to participate in the process.

What we need – if we are to retain the elective system – is a constitutional amendment that allows broader participation of voters in electing judges in a non-partisan fashion. The primary is the perfect vehicle for an election that is both nonpartisan and more reflective of the will of the entire electorate.

Under the system created by the constitutional amendment, candidates seeking judgeships would be required to file nominating petitions as they do now, except that petitions would be filed without political party designation. All candidates for any specific judicial vacancy would run on a separate judicial ballot, offered together with the primary ballot. Each candidate would appear on the ballot without party designation.

Every registered voter, regardless of party affiliation or lack of it, would have access to a judicial ballot and would be eligible to vote in the judicial election. Thus, Democrats, Republicans, and members of any other political party could cast votes in the separate judicial election held concurrently with the primary election.

Those who choose not to declare political party affiliation – independent voters – also could vote in such elections. Because any registered voter could vote, election by a fraction of one party's voters would end.

One more feature of the constitutional amendment: Only a candidate receiving more than 50 percent of the vote would be elected to judicial office. This would eliminate the current phenomenon of electing candidates with a small percentage of the votes from a single dominant

1. Article VI, § 12(a) of the Illinois Constitution provides, in addition, that an eligible candidate may appear on the ballot at the general election "by submitting petitions." For many reasons, however, that option has never been a favored method for achieving election in judicial contests.

2. For example, in the November 2, 2010 general election in Cook County, none of the three Democratic candidates for the appellate court had an opponent, only one of the eight Democratic candidates for circuit-wide judge had an opponent, and none of the 13 Democratic candidates for subcircuit judge had an opponent.

Gino DiVito served as a judge of the circuit court of Cook County for 12 years and a justice of the Illinois Appellate Court, First District, for eight years. He is now in private practice, focusing on trial and appellate advocacy, as a partner in the Chicago firm of Tabet DiVito & Rothstein LLC.

political party, a frequent occurrence in current primary elections with numerous candidates.

Under the proposal, if no candidate reaches the required percentage, a run-off election between the two top vote-getters would be held in the November general election – without party designation. This should focus attention on the relative merits of the two candidates rather than their party affiliation.

Under the proposal, if no primary candidate reaches 50 percent, a run-off election between the two top vote-getters would be held in November – without party designation.

In sum, to be elected judge in Illinois under the proposed constitutional amendment, candidates would run in a separate non-partisan contest during the primary election, with every registered voter eligible to vote, resulting in the election of a candidate receiving more than 50 percent of the vote or a run-off non-partisan contest in the general election between the two candidates receiving the most votes. This process would apply to all elected judges – at the subcircuit, circuit, appellate, and supreme court levels.

The proposed amendment

What follows is the specific proposal, showing the appropriate amendments to the current relevant constitutional provision, with strikeouts indicating deletions and underlining indicating additions.

ARTICLE VI, SECTION 12. ELECTION AND RETENTION

(a) Supreme, Appellate and Circuit Judges shall ~~be nominated at primary elections or by petition. Judges shall be elected at general or judicial elections as the General Assembly shall provide by law.~~ stand for election without party designation. At the primary election, a separate ballot containing the names of candidates for each judicial office, listed without party designation, shall be provided to those voting in the primary election and to those who wish to cast votes only for judicial candidates. A person eligible for the office of Judge may cause his or her name to appear on the ballot as a candidate for Judge ~~at~~ during the primary ~~and at the general or judicial~~ elections by submitting petitions. The General Assembly shall prescribe by law the requirements for petitions and the requirements for the implementation of this Section. A candidate for judicial office who receives more than 50% of the votes cast in the contest for that office during the primary election shall be elected. If no candidate receives more than 50% of the votes cast in the contest for that office during the primary election, the names of the two candidates with the highest vote totals for that office shall appear on the general election ballot, without party designation. The candidate for that office receiving the higher number of votes in the general election shall be elected.

(b) The office of a Judge shall be vacant upon his or her death, resignation, retirement, removal, or upon the conclusion of his or her term without retention in office. Whenever an additional Appellate or Circuit Judge is authorized by law, the office shall be filled in the manner provided for filling a vacancy in that office.

(c) A vacancy occurring in the office of Supreme, Appellate or Circuit Judge shall be filled as the General Assembly may provide by law. In the absence of a law, vacancies may be filled by appointment by the Supreme Court. A person appointed to fill a vacancy 60 or more days prior to the next primary election ~~to nominate Judges~~ shall serve until the vacancy is filled ~~for a term at the next general or judicial election~~ pursuant to subsection (a). A person appointed to fill a vacancy less than 60 days prior to the next primary election ~~to nominate Judges~~ shall serve until the vacancy is filled pursuant to subsection (a) at the second primary or general ~~or judicial~~ election following such appointment.

(d) Not less than six months before the general election preceding the expiration of his or her term of office, a Supreme, Appellate or Circuit Judge who has been elected to that office may file in the office of the Secretary of State a declaration of candidacy to succeed himself or herself. The Secretary of State, not less than 63 days before the election, shall certify the Judge's candidacy to the proper election officials. The names of Judges seeking retention shall be submitted to the electors, separately and without party designation, on the sole question whether each Judge shall be retained in office for another term. The retention elections shall be conducted at general elections in the appropriate Judicial District, for Supreme and Appellate Judges, and in the circuit for Circuit Judges. The affirmative vote of three-fifths of the electors voting on the question shall elect the Judge to the office for a term commencing on the first Monday in December following his or her election.

(e) A law reducing the number of Appellate or Circuit Judges shall be without prejudice to the right of the Judges affected to seek retention in office. A reduction shall become effective when a vacancy occurs in the affected unit.

The proposed amendments are not designed to alter other aspects of the current elective system. Candidate endorsements by political parties would not be prohibited, nor would a candidate be forbidden from declaring party affiliation. Indeed, United States Supreme Court and seventh circuit rulings make clear that political party endorsement and other involvement in judicial elections – including declarations by candidates regarding party affiliations – *cannot* be prohibited.[3]

Note that the proposed amendments are not related to the so-called "top two" provisions in Washington and California, procedures adopted by citizen initiative to fundamentally alter the primary system for elections to all offices.[4] The proposal does not challenge or alter the primary election system, except for judicial elections and only for the reasons provided.

Judicial election proponents should be pleased (perhaps even triumphant) that the proposed constitutional amendment retains the right to elect. Both they and critics of the present system, however, should see the value of an elective system that brings more reason to the process, potentially includes a broader spectrum of the electorate, and could reduce party involvement for an office that should be devoid of political partisanship. ■

3. See, for example, *Republican Party of Minnesota v White*, 536 US 765 (2002) (striking down a Minnesota canon of judicial conduct that prohibited judges and judicial candidates from announcing their views on disputed legal and political issues); *Siefert v Alexander*, 608 F3d 974 (7th Cir 2010) (striking down a Wisconsin canon of judicial conduct that prohibited a judge running for political office from declaring his affiliation with a political party).

4. For more on those provisions, see *Washington State Grange v Washington State Republican Party*, 552 US 442 (2008) (rejecting a facial challenge to Washington's citizen Initiative 872 which replaced the "blanket primary," struck down in *California Democratic Party v Jones*, 530 US 567 (2000), with "top two" provisions); see also California's Proposition 14, approved by California voters on June 8, 2010.