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INTRODUCTION

Since 1970, the District of Columbia court system has been comprised of the District of Columbia Court of Appeals and the Superior Court of the District of Columbia.[1] From the time of the establishment of the District, judges of its courts have been appointed by the President of the United States, acting on the advice of the Attorney General. When the general issue of District home rule came before Congress in the 1960s, one of the subjects considered was the judicial appointment process.

In 1970, the District of Columbia Court Reform and Criminal Procedure Act[2] continued the Presidential appointment authority but made the appointments subject to Senate confirmation. In 1973, in the legislation known as the D.C. Home Rule Act, Congress modified the judicial appointment process by creating the District of Columbia Judicial Nomination Commission ("Commission").[3] This body is charged with the responsibility of recommending three nominees for every vacancy on either the Court of Appeals or the Superior Court. The appointment power is retained by the President, but the selection must be made from the lists provided by the Commission. Presidential appointments also remain subject to Senate confirmation.

The system established by the Home Rule Act has now been in place for over thirty-three years. The issue under consideration by the Third Branch Project is whether this system for selecting judges of the D.C. courts should be altered to be more consistent with the goal and concept of home rule. Specifically, this would mean transferring the appointment power for D.C. judges to the Mayor, and the approval power to the Council of the District of Columbia ("Council"). This report identifies the most important considerations relating to that question and recommends that the appointment and approval powers be transferred to the elected District officials.

I. HOW THE CURRENT SELECTION PROCESS WORKS

The heart of the present selection process for D.C. judges is the Commission. As established by the Home Rule Act, the Commission is made up of seven

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1 *See* District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 11-101, 84 Stat. 473, 554 (1970).

2 *Id.*

3 *See* District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. No. 93-198, § 434, 87 Stat. 774, 874 (1973).

members and appointed by five different entities: The President, the Council, and the Chief Judge of the United States District Court for the District of Columbia each appoint one member, while the D.C. Bar Board of Governors and the Mayor of the District of Columbia each appoint two members. Members' terms on the Commission are staggered.

When a judicial vacancy arises, the Commission seeks applicants for the position by publishing notice in the Washington Daily Law Reporter.[4] Applicants are then reviewed by the Commission, a background check is completed, and recommendations are solicited from D.C. and federal court judges and attorneys who are acquainted with the applicants.[5] The Commission also interviews each candidate.[6] No later than sixty days after the vacancy arises, the Commission submits its recommended list of three candidates to the President, who must make the selection within sixty days of receiving the list of nominees.[7]

There are certain minimum statutory qualifications for D.C. judges: They must be United States citizens; they must be D.C. residents for more than ninety days prior to their appointment and must reside in D.C. during their entire judicial tenure; they must have been an active member of the D.C. Bar; and they must, in the five years immediately preceding their appointment, have been actively practicing law in the District, or been on the faculty of a law school in the District, or been employed as a lawyer by either the federal or the District governments.[8]

The D.C. courts are considered to be Article I courts (rather than having been established under Article III of the Constitution). The primary significance of this categorization is that the judges do not have life tenure,[9] are not protected from reductions in salaries during their terms of service, and are subject to mandatory retirement at age seventy. There is a reappointment process established in statute for those judges wishing to continue serving on the bench. The process is administered by a different commission—the D.C. Commission on Judicial Disabilities and Tenure ("JDT Commission"), which was established by the District of Columbia Court Reform and Criminal Procedure Act of 1970.[10] If that commission determines that the applicant for renomination is "well qualified," reappointment is automatic.[11] If the JDT Commission finds the candidate to be "qualified," the President may renominate him or her but is not required to do so. If the President does not, the position becomes vacant and is filled as are other vacancies. If

4 COUNCIL FOR COURT EXCELLENCE, HOW THE DISTRICT OF COLUMBIA GETS ITS JUDGES: A COUNCIL FOR COURT EXCELLENCE COMMUNITY EDUCATION GUIDE 4-6 (2005) [hereinafter CCE PUBLICATION].

5 *Id.*

6 *Id.*

7 D.C. CODE § 1-204.34(d)(2005).

8 D.C. CODE § 1-204.33(b) (2005).

9 Each judge is appointed to a fifteen-year term.

10 *See generally* Pub. L. No. 91-358, *supra* note 1.

11 Although, the judge is still subject to mandatory retirement at age seventy.

the JDT Commission finds the candidate "unqualified," the judge may not be reappointed, and the position becomes vacant.[12]

Over the past thirty years, the JDT Commission has evaluated fifty-eight judges who were candidates for reappointment. All but three were found to be "highly qualified." In two cases, the Committee made a "qualified" finding. In one, the JDT Commission advised the candidate of its intent to issue an "unqualified" finding. The candidate withdrew his candidacy, retired from the bench at the conclusion of his term, and, therefore, the JDT Commission did not issue any finding.

II. Retention of the Roles of the Commissions

During the course of the Third Branch Committee's inquiry into the question of who should appoint D.C. judges, it became evident that there is virtually universal acceptance of the existing method for developing nominees for judicial vacancies. The Commission has earned the highest accolades for its independence, its careful and thorough vetting of nominees, and for the diversity of the nominees it has forwarded to the President. The Third Branch Committee is aware of no sentiment for altering this aspect of the judicial selection process.

The "merit" method of selecting judicial nominees mirrors practices now utilized in a large portion of the states of the union. There are twenty-seven states that initially appoint their appellate court members by merit appointment, while the remaining twenty-three do so by election. Twenty states initially appoint their trial court judges by merit appointment; the other thirty do so by election. In merit appointment states, the governor or other appointing authority is usually required to select from a list provided by an independent judicial nominating commission.[13] Commentators, attorneys, and judges generally agree that the merit method of selection produces more qualified judges and judges with more diverse backgrounds than any other method. The Third Branch Committee believes that this has been the result of the merit selection method employed in the selection of judges in the District of Columbia for the past thirty-plus years.

Accordingly, it is strongly recommended that, however the issue of who should appoint judges is resolved, the current method of selecting nominees should be retained.[14] While there has been much less attention focused on the role of the JDT Commission in the reappointment process, no objections either to the con-

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12 D.C. Code § 1-204.33(c)(2005).

13 National Center for Court State Courts, Caseload Highlights: Judicial Selection 101: What Varies and What Matters 7 (2006), *available at* http://www.ncsconline.org/D_Research/csp/Highlights/Vol13No2.pdf.

14 In the event that it is decided to change to a mayoral appointment method of selection, it might make sense at some point to have someone other than the President appoint the one member of the Commission that the President now appoints (although this is not a necessary consequence of such a change). Consideration could be given to giving this appointment authority to, for example, a

cept or the manner in which it has functioned have come to light during consideration of this subject, and there is no basis for recommending any change in the role of that commission.

III. PROS AND CONS OF PRESIDENTIAL VS. MAYORAL SELECTION OF JUDGES

A. *Reasons for Mayoral Selection of Judges*

The primary impetus for altering the present method of selecting D.C. judges is the desire to fulfill the home rule aspirations of citizens of the District. The selection of judges by the President and approval by the Senate is seen as a vestige of colonialism. The selection process is viewed as inconsistent with the principle that citizens of the District of Columbia should enjoy all rights enjoyed by citizens of other states, which include the right to have judges selected and confirmed by officials elected by the citizens of the District.

The home rule concept is most significantly embodied in the Home Rule Act of 1973.[15] That bill originated in the House of Representatives and, as reported by committee to the full House, provided for mayoral appointment and Council confirmation of judges. However, this element of the reported bill was deleted by floor amendment by a fairly closely divided vote, and the provisions for Presidential appointment and Senatorial confirmation were restored.[16]

Throughout the nation, appointments of non-federal judges to courts of general jurisdiction are typically made by the highest elected official in the state, the Governor, and are usually subject to legislative confirmation. There are some instances of judges of city courts in which Mayors have the appointment power.[17]

For the District, the analogy is not perfect to other states or to other cities. Geographically, the District resembles other cities, but its powers and functions include many that would reside elsewhere with state governments.[18] On the other hand, the District differs from states in that its legislative acts are subject to congressional oversight, and it does not possess sufficient territory to allow for different geographic characteristics and population centers that are characteristic of most states. Nonetheless, those who support changing to a mayoral selection system point out that the Mayor is the highest elected executive official in the jurisdiction, and in that sense, is equivalent to the Governor of a state. The Council is the legislative body elected from the entire jurisdiction. The selection and confirmation from these offices is said to be preferable to those functions being per-

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panel of retired judges, or to the Dean of the U.D.C. David A. Clarke School of Law, or to a panel of the deans of all law schools situated in the District.

15 *See generally* Pub. L. No. 93-198, *supra* note 3.

16 119 CONG. REC. 33635-33641 (Oct. 10, 1973).

17 New York, Denver, Atlanta, and Kansas City are among the more prominent examples.

18 For example, vehicle registration, health care programs, and oversight of the education system are typical state government functions.

formed by an executive not elected by the people of the District and a confirming legislative body that neither is elected by nor contains a representative of the people of the District.

There appears to be no constitutional barrier to the mayoral method of selecting judges for the District. Given the broad power of Congress over the capital district under the District clause of the Constitution[19] and the fact that the courts are established under Article I rather than Article III of the Constitution, the authority of Congress to, in effect, delegate the selection process to local entities cannot seriously be questioned. On the other hand, an Act of Congress would be required to achieve that end, for, as indicated above, the Presidential selection process is currently required by the Home Rule Act.

An important point made in favor of the mayoral selection method is that there is a significant delay in filling vacancies under the current regime. The delay is derived primarily from the length of time it typically takes to secure senatorial confirmation of a nomination.[20] Among other consequences, this can substantially deter lawyers from pursuing judicial appointment. Many lawyers, particularly those not associated with very large firms, might be unable to sustain their practices during an indefinite period of time between their appointment and their confirmation. The delay also impacts the courts, as protracted vacancies in judicial positions add to the work pressure on the remaining members of the bench. These points assume that confirmation by the Council would typically occur far more rapidly.

B. *Reasons Against Mayoral Selection of Judges*

The case against changing the current method of judicial selection is based on two principal considerations: (1) That the proposed change would introduce potentially undue political influence into the judicial process, and (2) that the present system works well and produces excellent judges. The essence of the first objection is that, by giving the Mayor the power to select judges and the Council power to confirm any appointments, the process would become too political. This concern is exacerbated by the absence of life tenure for judges. It is contended that some judges would be reluctant to render a decision adverse to political figures who have a major role in the judicial appointment or reappointment process.

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19 U.S. CONST. art I, § 8, cl. 17.

20 A recent study by the Council for Court Excellence reported that for twenty-nine completed judicial appointments under the Home Rule Act regime for which data was available, the average time from the forwarding of nominations to the President to the actual investiture of judges was eleven months. The range of time was between five and twenty-nine months. *See* CCE PUBLICATION, *supra* note 4. Given the sixty-day deadline for Presidential action on nominations forwarded by the Commission, it is evident that the Senatorial confirmation process was the primary cause of the delay in completing the filling of judicial vacancies.

The roles of the Judicial Nomination Commission and the Commission on Judicial Disabilities and Tenure undoubtedly mitigate this potential adverse affect but do not entirely eliminate it. Even though the Mayor would presumably be limited to selecting from a list of three nominees proposed by the Judicial Nomination Commission, there is concern that cronyism and local politics would govern, or at least significantly influence, the Mayor's exercise of the selection power. Those who hold this concern believe that these considerations have not noticeably influenced the choices that Presidents have made for D.C. judgeships, though it would be naïve to believe that the Presidential selection is not influenced by political considerations, albeit different considerations from those that might influence a mayoral selection.

Likewise, even though judges seeking reappointment are entitled to it automatically if they are found to be "highly qualified" by the JDT Commission, there is no assurance that this will be the finding. If the finding is not forthcoming, the judge's reappointment would be subject to the Mayor's discretion, and thus, would possibly be influenced by local politics. Given the infrequency of findings of less than "highly qualified" over the past thirty years, the concerns about political influence in this aspect of the process may not be weighty. However, even one instance of denial of reappointment to a judge based on the issuance of decisions adverse to the appointing authority would be a cause for concern.

It is also argued that the present system produces extremely high quality judges who reflect considerable diversity and who, by reason of the statutory qualifications, are part of and attuned to the City and knowledgeable of its legal system. This position essentially is that the process is not broken and does not need to be fixed.

Two other points are advanced in opposition to a change in the existing system which, though perhaps not dispositive on their own, deserve mention. First, there appears to be substantial support among sitting judges for retaining the current system. This may derive from the prestige that accompanies an appointment by the President and confirmation by the Senate. Arguably, the pool of high caliber lawyers interested in seeking judgeships could be reduced in number or quality if the process were to be changed, although there is no inherent reason to believe that would be the case.

Second, the Commission currently relies on the FBI for the conduct of background checks on prospective nominees. It has no staff of its own to conduct such checks. There is a question whether the resources of the FBI would be available were the selection process to be changed. The loss of this resource would make the process of vetting candidates more difficult. Were the FBI role to be retained, the District would most likely be asked to contribute to the agency's investigative costs.

A final consideration relates to the impact that a change to a mayoral selection process could have on the funding of the District's judicial system.[21] Pursuant to the 1997 Revitalization Act,[22] the federal government now bears the cost of the District's judicial system. It is possible that congressional willingness to accept a mayoral selection process might be linked to the District's resumption of financial responsibility for the judicial system. Suffice it to say here that there is no necessary connection between responsibility for funding the courts and the process of selecting judges. Thus, for decades the District government bore the cost of the judicial system even though the President and the Senate exercised the selection power. The issue of who selects judges ought to be resolved on its own merit, though with an eye on the possible financial ramifications of shifting to a mayoral selection process.

Conclusions

This study has reconfirmed the value of the Commission in assuring the availability of judges of high quality and diverse background and of the renomination process in supporting the independence of the judiciary. Changing the selection methodology for judges could not be justified if it resulted in the loss of these components of the current system.

The Commission, the criteria for judicial selection, and the process of nomination and renomination are all grounded in federal statutory law. Were the selection power transferred to the Mayor, a question could arise whether this law could or should be maintained. At least as a theoretical matter, retention of the current process could be seen as a form of continuing federal control, and in that sense as inconsistent with the home rule and democracy underpinnings for the movement to transfer the selection and confirmation powers to the Mayor and the Council.

Yet there is clearly a federal interest in the District as the seat of government. Whatever the scope of that interest, it ought to include an independent and high quality local judiciary. That interest would be advanced by retaining the current selection process, including the role of the Commission, even if the selection power is ceded to the Mayor. While it is true that such retention would restrict the authority of the local government to establish the method of judicial selection, the congressional imposition of the selection process is akin to a state constitutional mandate that would similarly restrict the discretion of elected officials.[23]

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21 The subject of funding of the District court system is considered at length in another essay in this journal, entitled *Organization, Budgeting, and Funding of the District of Columbia's Local Courts.*

22 *See* National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, § 11-1743, 111 Stat. 251, 752-53 (1997).

23 It is true that state constitutional provisions are adopted by vote of the electorate, whereas in the present case the selection process would be imposed by the Congress. This makes the analogy to a

Maintaining the Commission and the current selection and renomination criteria ought to neutralize the major objection to transferring the selection authority to local officials—namely, the concern for undue politicization of the selection process. By constraining the Mayor's discretion to choose only from those nominated by the Commission, the public should be assured that local politics could not unduly impact the process. If the Mayor's selections were to reflect a narrowing of the diversity of the bench, the Commission, as now, would have the ability to assure that future vacancies will be filled by candidates whose backgrounds and experience are different from those serving on the courts.

There is no reason to believe that highly qualified lawyers from diverse backgrounds would not continue to aspire to judicial careers if the selection power were transferred from the President to the Mayor. Judges are among society's most respected members. The judicial function, involving dispute resolution and determination of issues that can be of great public importance, is among the most satisfying career options for lawyers. Throughout the nation, high quality judges serve in state court systems without the imprimatur of Presidential selection or United States Senate confirmation. Given the progressive character of the local bar, the impressive public service record of lawyers practicing in the District, and the heightened interest in government often associated with residents of the Nation's Capital, it is hard to believe that judicial nominees of the highest quality would not continue to be available under a mayoral-selection system.

In fact, it is likely that transfer of the appointment and approval function to local officials would broaden the pool of attorneys willing to be considered for judicial appointments. There appears to be a substantial impediment to such consideration currently because of the uncertain but generally lengthy time between nomination and Senate action. This particularly discourages solo practitioners or those in smaller firms that would be unable to maintain a flow of clients during a period of prolonged uncertainty over confirmation. Action by the Council on a mayoral nomination can be expected to be taken far more quickly, thus substantially diminishing the risk to private attorneys who are nominated for judicial positions.

Finally, there is no intuitive reason to believe that the Mayor's selections from among those nominated by the Commission would be of lesser quality than those of the President. Rather, to the extent that the candidates are likely to be better known to the Mayor than to the President, it is not unreasonable to believe that mayoral selections would be more informed, and in that sense, better.

In the end, the Third Branch Committee believes that the case for appointment and confirmation of District judges by District officials is compelling. The current process of judicial selection has yielded a bench that is high in quality,

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state constitution less than perfect. But the hybrid and unique nature of the District in the federal system means that analogies to any comparable structure are likely to be imperfect.

diversity, and independence. Transfer of the role from the President and the Senate to the Mayor and the Council, under the current judicial nomination regime, promises no diminution in quality and has a distinct prospect of greater diversity (in the sense of legal background and experience) as well as more rapid filling of judicial vacancies, both of which would be substantial improvements. Even apart from these specific advantages, the desirability of having judges selected and confirmed by officials elected by the people who are subject to the judicial power cannot be overestimated. In a very real sense, the citizens' confidence in the judiciary will be greater if the selection power is exercised and confirmed by officials elected by and responsible to the people who inhabit the District. Citizen confidence in the judiciary is a vital part of the foundation of a democratic government, and in this case, fortifies the conclusion that the judicial selection process for local judges ought to be exercised by locally-elected officials.