

**THE WASHINGTON COURT OF APPEALS:
FAIR AND EQUAL ELECTION RIGHTS VIOLATED,
AN OPPORTUNITY FOR JUDICIAL IMPROVEMENT**

Stephen K. Eugster¹
(January 19, 2009-ver.)

CONTENTS

1.	Introduction.	3
2.	Fair and Equal Elections and the Washington Constitution.	4
3.	Power of the Vote: The Two Principles of Apportionment.	5
4.	One Person - One Vote: Judge Election Districts Not Fairly Apportioned.	6
	a. Introduction.	6
	b. Apportionment and the Court of Appeals.	7
	c. Application of the <i>Story Test</i> to the Districts of the Court of Appeals.	8
5.	Court of Appeals Panel System: Violation of Main Principles of Apportionment.	11
	a. Judges Not Elected to the Panels.	11

¹ © Stephen K. Eugster. B.A. 1966, University of Denver; J.D. 1969, University of Washington School of Law. Note this article is still in revision stage.

b.	Panels Are Not Apportioned.	13
c.	Panels Often Made Up of Judges With No Electoral Connection to Cases on Appeal. . . .	14
i.	Division III – Spokane County Cases 2008.	14
ii.	Division III – Spokane County Cases 2007.	15
d.	Judges Not Connected to the Cases or Voters of the District	16
6.	Urgency Regarding the Need to Correct Problems?.	17
a.	Ethical Requirements.	17
b.	Legitimacy of the Court of Appeals: Jurisdiction of the Court of Appeals May Be In Question.	18
7.	Opportunity.	18
8.	Conclusion.	19

APPENDICES

- Appendix A – Court of Appeals and Apportionment Statistics
- Appendix B – Letter from Chief Judge of Div. I, Court of Appeals.
- Appendix C – Letter from Court Clerk of Div. II, Court of Appeals
- Appendix D – Letter from Chief Judge of Div. III, Court of Appeals
- Appendix E – 2008 Reported Cases, Spokane County, Dist. 1, Div. III
- Appendix F – 2008 Unreported Cases, Spokane County, Dist. 1, Div. III
- Appendix G – 2007 Reported Cases, Spokane County, Dist. 1, Div. III
- Appendix H – 2007 Unreported Cases, Spokane County, Dist. 1, Div. III

1. Introduction

Over the past several months I have been conducting research concerning the Washington Court of Appeals. Since November 2008 my research has focused on the Washington constitutional requirement of “free and equal” elections² as applied to the court. That is, as applied to the legislation intended to fulfill the constitutional mandate regarding the implementation of the court.³

I have come to the conclusion that the Court of Appeals, as provided for under RCW Ch. 2.06, is in violation of the “fair and equal” election requirements of the Washington constitution in two principle respects. First, the districts from which judges are elected are not fairly apportioned. Second, the panels of judges, by which the court acts (a) are not made up of judges elected to the panels and (b) are not fairly apportioned.⁴

I believe there may be need take immediate action in light of the fact it may be argued and maintained that a court which does not comply with the election of judges requirement of the state constitution is not a proper court and that the judges of the court have no authority to render decisions. I refer to *Rothwell v. Spokane*⁵ and cases cited therein – a case in which it was held that judges of the Spokane County District Court not additionally specially elected by the people of Spokane to serve as judges of the City of Spokane Municipal Court (which was a part of the District Court) did not have authority (jurisdiction) to render the decisions in question.

² Wash. Const. Art. I, § 19.

³ Wash. Const. Art. IV, § 30; RCW Ch. 2.06.

⁴ Apportionment has at least two main aspects to it in Washington. First, that election districts be approximately the same in terms of population. Second, that electors have a right to actually vote in the elections of those whose work or efforts affects them or presumed by law to affect them.. See the discussion *infra* at 5.

⁵ See the discussion *infra* at 15.

In the process of addressing the problems discussed, there may be an opportunity for the Legislature to consider, at least in this instance of the judges of the Washington Court of Appeals, new methods by which lawyers are vetted, selected and nominated, and elected as judges of the court. For example, a method used by at least 12 states as to their courts of appeal – nomination commission vetting, gubernatorial selection, and retention elections⁶ – might be implemented.

The WALSH REPORT – THE PEOPLE SHALL JUDGE should be of significant interest in the process of reforming the Court of Appeals.⁷

2. Fair and Equal Elections and the Washington Constitution

Unlike the United States constitution, the Washington constitution has a specific section devoted to elections – fair and equal elections. Wash. Const. Art. I, § 19.

All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

There can be no question that this section applies to the election of judges in Washington. The fact that judicial positions are to be filled by election, of necessity, requires that the provisions of the “fair and equal” election requirements be fulfilled as to such elections. It applies to the election of judges of the Supreme Court.⁸ It applies to the election of Superior Court judges sitting in the various counties of the state.⁹

It also applies to the election of judges to the Washington Court of Appeals.

⁶ L. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 181 - 82 (1981-82).

⁷ The Report of the Walsh Commission, March 1996. The WALSH REPORT – THE PEOPLE SHALL JUDGE may be obtained at www.courts.wa.gov/newsinfo/index.cfm.

⁸ Wash. Const. Art. IV, § 3.

⁹ Wash. Const. Art. IV, § 5.

Art. IV, § 30.¹⁰

Pursuant to this constitutional amendment creating the Court of Appeals, the Legislature was delegated the task of providing for the “manner of election” of the Court of Appeals judges. Wash. Const. Art. IV, § 30 (4). This “manner of election” must comply with the election requirements of Art. I, § 30. The election of judges of the Court of Appeals must be “fair and equal” and each elector must be engaged in his or her “free exercise of [his or her] right of suffrage” with respect of the elected offices connected to the right to vote. *Id.*

3. Power of the Vote: The Two Principles of Apportionment

In *Brower v. State*,¹¹ the Washington Supreme Court said:

Article I, section 19 provides that “[a]ll Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” The right to vote is fundamental, and art. I, sec. 19 provides greater protection for a free and equal vote than does the federal constitution's one

¹⁰ Wash. Const. Art. IV, § 30 provides:

(1) Authorization. In addition to the courts authorized in section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute.

(2) Jurisdiction. The jurisdiction of the court of appeals shall be as provided by statute or by rules authorized by statute.

(3) Review of Superior Court. Superior court actions may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute.

(4) Judges. The number, manner of election, compensation, terms of office, removal and retirement of judges of the court of appeals shall be as provided by statute.

(5) Administration and Procedure. The administration and procedures of the court of appeals shall be as provided by rules issued by the supreme court.

(6) Conflicts. The provisions of this section shall supersede any conflicting provisions in prior sections of this article.

¹¹ 137 Wn.2d 44, 52, 969 P.2d 42 (1998), *cert. denied*, 526 U.S. 1088 (1999) (Seattle Seahawks Stadium Case).

person-one vote equal protection right. *Foster v. Sunnyside Valley Irrig. Dist.*, 102 Wn.2d 395, 687 P.2d 841 (1984).

The *Brower* court went on to say:

Article I, section 19 requires "that otherwise qualified voters who are significantly affected by the results of an election be given an opportunity to vote in that election." *City of Seattle v. State*, 103 Wn.2d 663, 673, 694 P.2d 641 (1985).

Thus, Article I, § 19 contains two primary principles: (1) The rule of "one person - one vote," and (2) Each voter affected by an election must be given the opportunity to vote in that election.

These two principles are the essence of fair electoral apportionment.

4. One Person - One Vote: Judge Election Districts Not Fairly Apportioned

a. Introduction

In its most basic terms, election apportionment requires a fair division of the electoral power among the persons who have the power of election. The power of election must be fairly apportioned.¹² It assumes that there is an electoral power, that the power must exist, and that it is fairly apportioned among those who have a right to exercise the power.¹³

The legislation enabling the court (RCW Ch. 2.06) provides for three

¹² The genesis of the concept of one person - one vote is found in the equal protection discussion in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962). There, the United States Supreme Court held that a claim asserted under the Equal Protection Clause (of the 14th Amendment to the Constitution) challenging the constitutionality of a state's apportionment of seats in its legislature, on the ground that the right to vote of certain citizens was effectively impaired since debased and diluted, in effect presented a justiciable controversy subject to adjudication by federal courts.

¹³ See generally, *Reynolds v. Sims*, 377 U.S. 533, 565-66, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964)

divisions of the Court of Appeals. Each division is divided into three districts. A certain number of judges are required to be elected from each of the districts.

At the outset, Division I was assigned 6 judges, Division II 3 judges, and Division III 3 judges.¹⁴ The number of districts in each division has always been the same – 3.

b. Apportionment and the Court of Appeals

The right to vote in Washington is subject to fair apportionment and “[w]hether the right to vote is in fact so apportioned is subject to strict judicial scrutiny.” *Foster v. Sunnyside Valley Irrig. Dist.*, 102 Wn.2d 395, 410, 687 P.2d 841 (1984).

The Washington Supreme Court has adopted an approach by which apportionment is analyzed and judged.

In *Story v. Anderson*, 93 Wn.2d 546, 553 - 54, 611 P.2d 764 (1980) the court considered the Island County district scheme for the election of county commissioners. The court said:

In applying the one person, one vote analysis, the degree of inequality of voter representation is measured by the ratio of the largest district to the smallest and by the combined percentage deviation from the average. *See, e.g., Mahan v. Howell*, 410 U.S. 315, 35 L.Ed.2d 320, 93 S.Ct. 979 (1973).¹

In the footnote in the quoted material the *Story Court* pointed out exactly how the measurement process worked.

(fn1) The ratio figure is obtained by simply comparing the population of the largest district with that of the smallest. The percentage deviation figure is obtained by ascertaining first, the average size of the districts. The percentage by which the largest district is overpopulated and the percentage by which the smallest district is under the average are computed. These two figures are added together to yield the total deviation figure.

¹⁴ RCW 2.06.040, 1969 ex.s. c 221 § 2.

In *Story* the court found that the Island County Washington commissioner district scheme was disproportional.

An examination of prior case law reveals that the disparity in this case greatly exceeds disparities that have been struck down as impermissibly large. In *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 12 L.Ed.2d 632, 84 S.Ct. 1459 (1964), the court struck down an election scheme with a ratio of 3.6 to 1 and a percentage deviation of 115.44 percent. In *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 12 L.Ed.2d 568, 84 S.Ct. 1418 (1968), the court invalidated an election scheme with a ratio of 2.6 to 1 and percentage deviation of 88 percent.

The court went on to set forth the disparity analysis as to the Island County district scheme and concluded that the scheme was unconstitutional.

In the present case, the ratio of largest district to smallest is 6.87 to 1, and the percentage deviation is 168.62 percent. The disparity is approximately one and a half times as great as the disparity struck down in *Lucas* and double the disparity struck down in *WMCA*. Such a disparity is far too great to meet the bedrock requirement of "substantial population equality."

c. Application of the *Story Test* to the Districts of the Court of Appeals

As we will see, application of the *Story Test* to the Washington Court of Appeals districts establishes that the Court of Appeals is unconstitutionally constituted.

Washington has population of about 6,558,800.¹⁵ The Divisions are not apportioned according to population. Rather, they were created using geographic criteria.¹⁶ The apportionment applies to the number of judges in a Division.

¹⁵ The statistical information used in this paragraphs and those which immediately follow come from Appendix A. The information in Appendix A comes from the Washington Office of Financial Management.

¹⁶ RCW 2.06.020.

Division I, with 12 judges, has a population of 2,984,700 -- 248,725 per judge.

Division II, with 5 judges, has a population 2,157,200 -- 308,171 per judge.

Division III, with 5 judges, has a population of 1,445,700 -- 289,140 per judge.

There is also considerable variation of apportionment within each Division. Division I has per judge apportionment in its three districts as follows: District 1-- 235,525 per judge, District 2 -- 348,300 per judge, and District 3-- 201,950 per judge.

In Division II the district per judge apportionment is this: District 1 – 268,467 per judge, District 2 -- 358,650 per judge, and District 3 -- 270,733 per judge.

In Division III we find the following: District 1 – 286,850 per judge, District 2 -- 467,500 per judge, and District 3 – 202,250 per judge.

Here are some analyses of the ratios and percentage deviations.

Apportionment Statewide Statistics 2008			
2008	High District	Low District	State Average Per District
	487,500	201,950	273,283
Ratio	$487,500 / 201,950 = 2.41$ to 1		
Percentage Deviation Calculation	$487,500 - 273,283 = 214,217$		
	$214,217 / 487,500 = .78$		
	$273,283 - 201,950 = 71,333$		
	$71,333 / 201,950 = .26$		
Percentage Deviation	$.78 + .26 = 1.04$ or 104%		

Apportionment Statewide Statistics 2000			
2000	High District	Low District	State Average Per District
	405,880	177,720	245,283
Ratio	$405,880 / 177,720 = 2.28$ to 1		
Percentage Deviation Calculation	$405,880 - 245,283 = 160,587$		
	$160,587 / 245,283 = .65$		
	$245,283 - 177,720 = 67,563$		
	$67,563 / 245,283 = .27$		
Percentage Deviation	$.65 + .27 = .92$ or 92%		

Apportionment Division I Statistics 2008			
2008	High District	Low District	State Average Per District in Division I
	348,300	201,950	248,725
Ratio	$348,300 / 201,950 = 1.72$ to 1		
Percentage Deviation Calculation	$348,300 - 248,725 = 146,598$		
	$146,598 / 248,725 = .59$		
	$248,725 - 201,950 = 46,775$		
	$46,775 / 201,950 = .23$		
Percentage Deviation	$.59 + .23 = .82$ or 84%		

Obviously, elections of judges to the Court of Appeals are not properly apportioned.

The ratios and percentage deviations are so great as to render unconstitutional

the judicial elections system of the Court of Appeals set out in RCW Ch. 2.06

5. Court of Appeals Panel System: Violation of Main Principles of Apportionment

In actual fact, the Court of Appeals is made up of three courts. Each court division is separate from the other divisions. The judges of the divisions are not interchangeable.

Further, the divisions of the Court of Appeals are made up of separate courts. The divisions do their work using separate three judge panels.¹⁷ These separate courts are made up from time to time consisting of three judges from the division.

Not only is the court, as a totality, not fairly apportioned, the court panels are not fairly apportioned. The panels are not representative.¹⁸

a. Judges Not Elected to the Panels

The first infirmity of the panel system is that the judges making up the panels are not elected.

The constitution requires the judges of the Court of Appeals to be elected.¹⁹

The court does its work through panels of three. The chief judge of each division appoints the judges to serve on the panels. Judges are appointed on selected to the panels by the division chief judge. They are not elected to the panels.

There are no rules as to how these selections are to be made under RCW Ch. 2.06. Court rule merely provides that the chief judge is to make a fair apportionment of the cases. CAR Rule 7 says “The Chief Judge shall apportion cases fairly among all judges of the division.”

¹⁷ RCW 2.06.040.

¹⁸ Indeed, there is no effort to make them representative.

¹⁹ Wash. Const. Art. IV, § 30(4) refers to the “manner of election” of the judges.

There are no rules as to how CAR Rule 7 is to be implemented.

In Division I it is done this way:

1. All cases are assigned randomly, and in equal numbers, to the 10 judges of our court. This statement covers oral argument cases and non oral argument cases set for decision on oral argument days. This process produces 700 opinions per year.
2. In addition, each month 3 judges are assigned as a "duty panel." One of the responsibilities of the judges so assigned is to resolve simple cases (concession of error, etc.) that need not be placed on a calendar. This process produces 80 to 100 opinions per year.²⁰

In Division II it is done this way:

Appointments of pro tem judges are done on an "as needed" basis and no apportionment is involved. We have appointed pro tems to about three to four cases during the last two years. With respect to the elected judges in this division, cases are apportioned equally based on case complexity. The judges rate cases based on complexity during the screening process on new appeals. The ACORDS system produces a report showing cases that are ready for setting according to when all briefs are filed. Using this report, I prepare a preliminary calendar that randomly assigns an equal number of cases of equivalent complexity to each judge sitting during a calendar period or cycle. I submit the proposed calendar to the Chief Judge for approval. Thereafter, changes are made only to accommodate conflicts or sudden illness or unavailability.²¹

In Division III it is done this way:

As Chief Judge of the Court of Appeals, the case docketing process

²⁰ Letter to author from Chief Judge Stephen J. Dwyer dated November 25, 2008. Appendix B.

²¹ Letter to author from David C. Ponzoha, Court Clerk, at the direction of Chief Judge Marywave Van Deren, dated December 4, 2008. Appendix C.

is done under my supervision. As previously stated, the Judges of this Court consider many factors when setting pending cases for hearing. Given those factors as outlined in our letter to you of November 24, 2008, the cases are randomly set for hearing before panels of three Judges. The cases are reviewed and the three-Judge panel then conferences about the applicable law and how the case should be decided. One Judge is assigned to write the first draft of the opinion, which is then circulated to the other panel members for review. The other panel Judges are then free to make suggestions or changes or in some cases, a Judge may choose to write a dissenting opinion.²²

What is apparent is this: The panel selection is essentially *ad hoc*. It is designed to cause a sharing of the work. It has nothing to do with the fact that judges are to be elected. It has nothing to do with the concerns for electoral apportionment.

And, importantly, it has nothing to do with the fact that judges are to exercise their power in contexts which allow for voter connection with the work in which the judges engage. This is the second principle of the apportionment in Washington.²³

b. Panels Are Not Apportioned

The chief judges do not ensure that the panels are divided up amongst the districts.

The panels are not made up of a judge from each of the three districts of the Division.

Thus, one approach to the panel selection might be to make sure that each panel was made up of a judge from each district. This does not happen. See the way in which the panels are selected set forth above.

But, even if it did happen, such an approach would not be a fair and equal

²² Letter to author from Chief Judge John A. Schultheis dated December 11, 2008. Appendix D.

²³ See discussion *supra* at 5.

apportionment because the districts in the divisions have wide variations with respect of district population. And, this would no be practical because judges from the district with lesser numbers of judges would work harder that those districts with more judges.

Apparently, no effort is made to ensure that a judge from each district in the division is represented on a panel.

In fact, it even appears that often, judges from the district from which the case on appeal arises, do not serve on the panels and if they do, do not write the majority opinion.

c. Panels Often Made Up of Judges With No Electoral Connection to Cases on Appeal

A phenomenon of the apportionment and the mal-apportionment of districts and the ways in which the chief judges assign judges to panels is this: Judges who have no relation to the case before the court, in that the case does not come to the court or to a panel from a superior court within the district from which the judge is elected.

i. Division III – Spokane County Cases 2008

The experience of Division III with respect of cases coming to the court from the Spokane County Superior Court (in District 1) is instructive.

During the period of January 1, 2008 to October 31, 2008, Division III produced 19 published opinions.²⁴ District 1 judges were on the panels in 13 cases.²⁵ The single judge from District 2 was on the panels in 15 cases. Judges from District 3 were on the panels in 15 cases.

As far as judges making up a majority of the panel (two judges) District 1 was in the majority in 4 cases. Districts 2 and 3 together were in the majority in 17 cases. Judges from District 3 alone made up the majority in 8 cases.

As far as judge combinations making up all three judges on case panels,

²⁴ Appendix E.

²⁵ This number includes judges serving *pro tempore*.

District 2 and 3 accounted for 6 cases. That is to say, 6 of the cases were decided by judges having no connection to Spokane County and to District 1.

During this same period, there were 40 unreported cases which were appealed to the court from the Superior Court of Spokane County (District 1).²⁶ District 1 judges were on the panel in 32 cases, including service by *pro tempore* judges. Without the *pro tempore* judges, judges from District 1 were on the panels in 18 cases. The single judge from District 2 was on the panels in 25 cases. Judges from District 3 were on the panels in 37 cases.

As far as judges making up a majority of the panels (two judges) District 1 was in the majority in 8 cases. Districts 2 and 3 together were in the majority in 33 cases. Judges from District 3 alone made up the majority in 19 cases.

As far as judge combinations making up all three judges on case panels, District 2 and 3 accounted for 8 cases. Thus, 8 of the cases were decided by judges having no connection to Spokane County, to District 1.

This mis-apportionment is true for other periods.

ii. Division III – Spokane County Cases 2007

During the period of January 1, 2007 to December 31, 2007, Division III produced 80 published opinions.²⁷ District 1 judges were on the panels in 55 cases.²⁸ The single judge from District 2 was on the panels in 50 cases. Judges from District 3 were on the panels in 66 cases.

As far as judges making up a majority of the panels (two judges) District 1 was in the majority in 19 cases. Districts 2 and 3 together were in the majority in 57 cases. Judges from District 3 alone were in the majority in 34 cases.

As far as judge combinations making up all three judges on case panels,

²⁶ Appendix F.

²⁷ Appendix G.

²⁸ This includes Judge Thompson as a *pro tempore* judge.

District 2 and 3 accounted for 20 cases. That is to say, 20 cases were decided by judges having no connection to Spokane County, to District 1.

During this same period, January 1, 2007 to December 31, 2007, there were 102 unreported cases which were appealed to the court from the Superior Court of Spokane County (District 1).²⁹ District 1 judges were on the panel in 90 cases. The single judge from District 2 was on the panel in 61 cases. Judges from District 3 were on the panels in 95 cases.

As far as judges making up a majority of the panels (two judges) District 1 was in the majority in 32 cases. Districts 2 and 3 together were in the majority in 71 cases. Judges from District 3 alone made up the majority in 28 cases.

As far as judge combinations making up all three judges on case panels, District 2 and 3 accounted for 14 cases. That is to say, 14 of the cases were decided by judges having no connection to Spokane County, to District 1.

d. Judges Not Connected to the Cases or Voters of the District

The long and short of it is this: Spokane County produces a majority of the cases for review by Division III. The people of Spokane County, the county being within District 1, participate in the election of two judges to the Court of Appeals, Division III.

Despite these facts, the judges elected in District 1 play a relatively minor role as to Spokane County cases. Consider the reported cases for the period January 1, 2008 through October 31, 2008 as shown in Appendix E.

The judges from District 2 and 3 served most of the time. These judges wrote the opinions in 13 of the 19 cases reported during the period. The judge from District 2 served on case panels for the period 15 out of the 19 cases. Judge Schultheis from District, the most active District 1 judge for the period, served on only 8 of the 19 panels.

Next, look at the information regarding the Spokane County cases reported for the period of 2007. Appendix G.

²⁹ Appendix H.

Again, the judges from District 2 and 3 served most of the time. These judges wrote the opinions in 24 of the 40 cases reported during the period. The judge from District 2 served on case panels for the period 23 out of the 40 cases. Judge Schultheis from District, the most active District 1 judge for the period, served on only 17 of the 40 panels. The judges from District 3 served on 23 times for Judge Brown and 27 times for Judge Kulik.

For the most part the judges responsible to the people of District 1 are not really found playing a primary role in District 1 cases. In addition, judges who cannot be affected by the electors of District 1 play a major role – a major role in terms of service on the panels but an even greater role concerning the authorship of opinions from the cases coming up from the District.

Making matters even worse in this regard, the judge from District 2 is even more involved than all the other judges. This is so because the mis-apportionment as to District 2 has the effect of giving the single judge more effective judicial decision-making power than any of the other judges. The reason: If there were two judges from the District the person who is presently the single judge would not be serving on the panels as much as he would be if there were two judges from the District.

Clearly, mal-apportionment has a direct effect on the electors of other Districts.

6. Urgency Regarding the Need to Correct Problems?

Let us assume the concerns set forth are legitimate and call for correction by legislative action. Is there any need to be expeditious in taking action? The answer is yes.

a. Ethical Requirements

Judges and lawyers have taken an oath to abide by the law. RCW 2.48.210. The Canons of Judicial Conduct require that judges uphold the integrity of the courts and the law and indeed that the court be itself the embodiment of the law. Code of Judicial Conduct. The lawyer Rules of Professional Conduct require that the law be upheld. *See, e.g.* RPC 8.4. Indeed, lawyers are encouraged to ensure that one's fellow lawyers in the association of lawyers abide by the rules by supporting reporting of wrongful conduct.

RPC 8.3.

These considerations alone seem to call for immediate attention to the problems which have been described.

b. Legitimacy of the Court of Appeals: Jurisdiction of the Court of Appeals May Be In Question

Perhaps more compelling as a basis for immediate attention to the problems is the possibility it may be contended that the Court of Appeals does not have authority or jurisdiction to render decisions. This concern may fall into two parts. The first would have to do with cases which come up on appeal as to issues determined in a lower court. The second would have to do with the court exercising rule authority to impose on its own motion or at the behest of a litigant an exercise of non-appellate power -, e.g., the assessment of terms and costs against an attorney for something the court did not like.

In *Rothwell v. Spokane*³⁰ the Court of Appeals reversed certain decisions of the Spokane County District Court sitting as the Municipal Court for the City of Spokane. The court held judges of the Spokane County District Court did not have jurisdiction to conduct a City of Spokane Municipal Court within the District Court, because though the judges had been elected countywide in Spokane County they had not been specifically elected by the voters of the City of Spokane.

7. Opportunity

These matters provide an opportunity to significantly improve the quality, competency, and stature of the Washington Court of Appeals. The court, for the vast number of cases which come up on appeal is the really supreme court of the state of Washington. As such, it deserves to be highly respected and its work has to be of the highest quality.

Whatever the Legislature does, the election of judges to the court must be fairly apportioned. In addition, the work of the court has to be done by panels of judges who are elected fairly and sit as judges elected in a fairly apportioned manner on the bench, on the panels.

³⁰ 141 Wn. App. 680 , 170 P.3d 1205 (2007), *pet. rev. granted*, 164 Wn.2d 1008 (2008).

This can be easily accomplished by electing judges at large in the state of Washington.

But there is something more which might be considered and that is to put in place a method by which judges are nominated to serve as properly elected judges. The constitution, Art. I, § 30 (4) provides:

(4) Judges. The number, manner of election, compensation, terms of office, removal and retirement of judges of the court of appeals shall be as provided by statute.

This language – “manner of election” – may be understood to allow for the use of judicial nominating commissions and retention elections. This manner of election is used in at least 12 states which have a state court of appeal. There would be obvious advantages to this approach.

For example, an appropriately constituted commission could review and provide a list of a certain number of qualified judicial candidates for each Court of Appeals position. This list could go to the governor for selection. The person selected for the open position would serve as a “pro tem” judge until the next election. The person would be retained if the electors assented to the selection. *See* the WALSH REPORT - THE PEOPLE SHALL JUDGE: RESTORING CITIZEN CONTROL TO JUDICIAL SELECTION , a Report of the Walsh Commission, March 1996.³¹

Indeed, these matters may serve as an impetus for a legislative discussion of the Walsh Report and its recommendations for court improvement.

8. Conclusion

It appears there are two constitutional infirmities regarding the Washington Court of Appeals. First, the judicial districts are unconstitutionally apportioned. Second, the judicial panels are not made up of judges elected to the panels and the panels are not fairly apportioned so that those having electoral power have power with regard to judges serving on the panels.

³¹ Again, the WALSH REPORT can be found on the Washington Courts website at www.courts.wa.gov/newsinfo/index.cfm.

Something should be done and it should be done soon.

These infirmities may be of significant consequence in that it might be said that the Washington Court of Appeals does not have jurisdiction because the judges of the court, the panels of the court, are not elected and/or not properly elected. That is to say, these problems may call into question the jurisdiction of the court. The issue of jurisdiction can be raised at any time, even after a case has been completed and is “history” so to speak.

The situation provides an opportunity for the legislature to improve and enhance the Court of Appeals. It provides an opportunity to engage in serious debate about the WALSH REPORT and a new way in which qualified and competent people with integrity and character might be nominated to be elected to the court or designated to serve if successful in retention elections.

Spokane, Washington
January 10, 2009

W:\WIP\CourtAppeals\article_january_19_2009.wpd