FALL 2001 | VOLUME 3 | NO. 2

NYSBA 125 Years

Government, Law and Policy Journal

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Contents

 ISSN 1530-3942. The *GLP Journal* is published twice a year.

Message from the Chair

By Barbara F. Smith

Some First Words

As this issue goes to print, the news of the tragedy at the World Trade Center is still fresh. As we struggle to understand the mind-set behind the attack and to find relevance and normalcy in our lives, our heartfelt sympathy goes out to the injured and to families and friends of victims and those who are missing. We commend, in particular, the selfless acts of the firefighters, police, rescue workers and medical personnel who exemplify the best in the human spirit and true public service.

* * *

One of my favorite admonitions is to "seize the moment," advice which seems the more relevant because of recent events. I am lucky to follow Henry M. Greenberg as the Chair of the Committee on Attorneys in Public Service. Thanks in great part to his leadership, and that of Patricia K. Bucklin, our out-going Vice-Chair, the Committee has many successes to celebrate.

In November 1998, the Committee became a permanent, standing Committee of the NYSBA. We have three main goals: to provide public service attorneys with a voice in the profession to improve New York's legal system; to develop a network for public service attorneys within the NYSBA; and to facilitate public service attorneys' professional development. We also encourage greater involvement by public service attorneys in existing Committees and Sections of the NYSBA. Under the stewardship of Tricia Troy Alden, Hank Greenberg and Patricia Bucklin, the Committee has undertaken several projects that have brought the Committee recognition and distinction, while serving our members well.

Certainly, one of the Committee's most visible accomplishments is this *Government, Law and Policy Journal,* which provides a unique opportunity for discussion of topics of particular interest to public service lawyers. This edition of *GLP*—focusing on judicial selection—features articles by prominent lawyers, professors and a journalist who provide perspective and commentary on a wide range of topics. Previous issues dealt with ethics in government, law and technology for government lawyers, administrative law and intergovernmental relations.

Another major accomplishment within the last year was the approval, first by the State Ethics Commission, then by the NYSBA House of Delegates, of the "Fundamental Concepts Concerning Government Lawyers and Government Interests." This groundbreaking document removes a significant barrier to government attorney participation in bar association activities. The five concepts are that: (1) it is in the best interest of the government that its lawyers participate in activities sponsored by bar associations; (2) government lawyers may serve in leadership positions within professional organizations; (3) government lawyers may use indirect support services for professional association activities that have been deemed to be in the government's interest; (4) government lawyers may encourage colleagues to join professional associations and to participate in professional association activities; and (5) government lawyers may accept discounts on dues, meeting and member benefits, and CLE course fee waivers or discounts.

This year, the Committee will work to spread the word about the Concepts throughout state and local government to encourage greater support for involvement in bar association activities. Likewise, the Committee will explore the process to have the Concepts adopted into the Code of Professional Responsibility.

As a new initiative, the Committee has undertaken the publication of a monograph on "good government" issues. Proposed topics include: the Ethics in Government Act, with commentary; Ethics for Members of the Legislature; Ethics in the Judicial Branch; Administrative Law Judges and Practice before Select State Agencies; Lobbying; Municipal Ethics; Hatch Act Issues; FOIL and Open Meetings Law; Procurement Law; and Special Considerations for Government Lawyers. This will be a useful publication, of interest to lawyers both in and outside of state service.

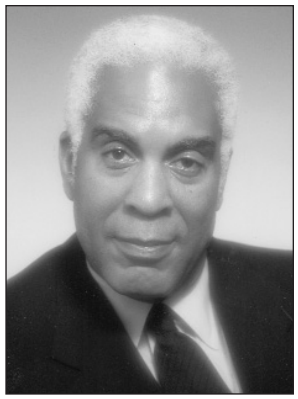
As Committee Chair, I urge you to become involved in bar activities generally, and in those of this Committee, in particular. Thanks to the founding members of the Committee—and the wisdom of the Bar Association to make a welcome place for public service attorneys—we have the opportunity to make our voices heard. Seize the moment and make a difference. You'll be glad you did.

Barbara F. Smith is Chair of the NYSBA Committee on Attorneys in Public Service and a member of the Committee on Attorney Professionalism. She currently serves as the Executive Director of the Lawyer Assistance Trust. The views expressed are not necessarily those of the Trust.

Message from the Vice-Chair

CAPS Is Looking Forward

By Tyrone Butler



I want to welcome you to the second issue of Vol. 3 of the *Government, Law and Policy Journal,* the scholarly publication of the Committee on Attorneys in Public Service. I have the honor of serving as the new and third Vice-Chair of "CAPS." Filling the shoes of previous Vice-Chairs, Henry Greenberg and Patricia Bucklin, will be a tall order, but I am determined to carry on and continue their successful work in fulfilling the Committee's avowed mission to further the common interests of government and public service attorneys.

"The active participation of public sector attorneys in the State Bar Association and other specialty bar associations is necessary if we are to have a voice in the future. We can only remain viable and effective with your help and assistance in planning the goals and objectives for this Committee."

It is very satisfying to know that the New York State Bar Association has recognized the need for a forum that allows government and public sector attorneys to focus on those issues that are of particular interest and importance to our chosen specialty areas. The Bar Association is in the forefront of advocating standards and conditions of practice for the government and public sector practitioner.

CAPS sponsors many sub-committees dedicated to the specific practice areas of government and public service attorneys. Volunteers are needed and always welcome to join the various sub-committees and share their cumulative expertise and knowledge with colleagues who have similar interests. Membership in the New York State Bar Association is a prerequisite for sub-committee participation, but membership on CAPS itself is not. We need to hear from you through our committees, sub-committees and colleagues what steps might be initiated to improve the myriad of legal governmental processes in our state. The active participation of public sector attorneys in the State Bar Association and other specialty bar associations is necessary if we are to have a voice in the future. We can only remain viable and effective with your help and assistance in planning the goals and objectives for this Committee.

CAPS is looking forward to organizing another year of educational programs of special interest to those who practice in the government and public sector. A CLE program on Administrative Adjudication is planned for the spring of 2002; suggestions from the membership on a central topic would be appreciated. You can communicate your ideas to me or any member of the Committee.

I hope that you, the reader of the *GLP Journal*, after perusing all of the articles, will pass it on to your colleagues for their enjoyment and enlightenment.

Tyrone T. Butler is the Chief Administrative Law Judge and Director of the Bureau of Adjudication, Division of Legal Affairs, New York State Department of Health. In 1998 and again in 1999, he was voted to the Board of Governors of the National Association of Administrative Law Judges (NAALJ). Judge Butler also serves on the Board of Directors of the National Conference of Administrative Law Judges (NCALJ); American Bar Association, the Committee on Attorneys in Public Service; New York State Bar Association, and he is the current President of the New York State Administrative Law Judges Association. Judge Butler is a graduate of John Jay College of Criminal Justice, 1977, summa cum laude, with a B.A. in English and New York Law School, 1981. He was admitted to the New York State Bar in 1981, and to the U.S. District Court for the Southern and Eastern Districts in 1982.

Passing the Torch

At the May 31, 2001 Meeting of the Committee on Attorneys in Public Service (CAPS), members rotating off the Committee, and others stepping into new leadership positions, were recognized for their contributions to the Committee.

Patricia Bucklin, former CAPS Vice-Chair, accepts a recognition gift from Barbara Smith.

Barbara Smith, new Chair of the CAPS, presents Henry Greenberg, past Chair, with a NYSBA leadership recognition plaque for his service in establishing the Committee and, most recently, in his service as Chair. Mr. Greenberg, formerly Counsel at the NYS Department of Health, is now with the law firm Couch White in Albany.

In Appreciation:

The NYSBA Committee on Attorneys in Public Service wishes to express its sincere thanks and appreciation to the following Committee members whose terms concluded in 2001:

Henry M. Greenberg
Patricia K. Bucklin
Tricia Troy Alden
Daniel C. Brennan
Michael R. Cuevas
Ellen B. Fishman
Kirk M. Lewis
Kathleen M. Spann
Jonah I. Triebwasser
Robert Smith

Attendees at the May 31 CAPS Meeting: (l-r) Pat Wood, Tyrone Butler, Barbara Smith, Hank Greenberg, Sharon Stern Gerstman, Patricia Bucklin, Rachel Kretser, James Horan, Marjorie McCoy and Michael Moran.

For 2001, the CAPS welcomes these new Committee members:

Carrie H. Cohen
Gloria Johnson
Anthony Cerreto
Myriam Cyrulnik
Julie Michaels Keegan
Kimberly Troisi Paton
Mark M. Rider
Ventura A. Simmons
Janiece Brown Spitzmueller
Leslie B. Neustadt

Patricia Bucklin left her position as Director of Public Affairs at the NYS Office of Court Administration to assume the position of Executive Director of the New York State Bar Association.

Marjorie S. McCoy thanks Michael S. Moran for his design and ongoing direction of the Committee's Web site.

Editor's Foreword

By Vincent Martin Bonventre

God help this country, and help us to keep it free.

* * *

There is perhaps nothing more critical to the American scheme of ordered liberty than the competence, character and courage of the judiciary. Who and what the judges are is profoundly important. And perhaps nothing is more important in determining the quality of our judicial officials than the methods and reasons for their selection.

This issue of the *GLP Journal*, devoted to the compelling topic of judicial selection, examines a variety of facets of the means we use in this country to choose those public officers who interpret and apply the law, and in turn, safeguard our cherished principles of freedom and justice. Appointment, election and retention; politics, partisanship and performance; campaigns, interest groups, finances and speech—these are all explored here. Moreover, a particularly strong collection of authors and articles makes that exploration especially worthwhile and enjoyable. From the bar, legal and law-related academia, and journalism, the contributors to this issue provide a wide spectrum of insights and perspectives. Our readers should find plenty herein that is both edifying and provoking, and that reaffirms the basic proposition that judicial selection matters.

"This issue of the GLP Journal*, devoted to the compelling topic of judicial selection, examines a variety of facets of the means we use in this country to choose those public officers who interpret and apply the law, and in turn, safeguard our cherished principles of freedom and justice."*

In the opening article, Leo Romero outlines a proposed selection system that combines appointment and election, intending to preserve the virtues of each, while reducing the shortcomings. Several authors then examine current appointment selection systems. Richard Freer reviews the U.S. Senate's exercise of its "advice and consent" role and predicts continued political posturing, as well as preening for television cameras, in confirmation hearings. Robert Martin suggests improvements for New Jersey's appointment selection process, which by implication, could serve other states as well; among these are strengthening the role of the state Senate's judiciary committee to get beyond mere rubber stamping of gubernatorial nominations, and establishing performance evaluations to help identify problems and provide beneficial feedback and training. Two articles focus on New York's appointment system for Court of Appeals judges. Stephen Younger and Frederick Warder give an inside view of the official procedures of the state's Commission on Judicial Nomination. John Caher provides a contrasting, journalist's perspective, taking a critical look at various stages of the selection process.

"From the bar, legal and law-related academia, and journalism, the contributors to this issue provide a wide spectrum of insights and perspectives."

In the next group of articles, the authors explore various aspects of judicial elections. Lawrence Baum reviews the findings of judicial election scholarship to offer a voters' perspective on these generally "low-information" contests. David Brody and Nicholas Lovrich discuss judicial performance evaluations as a method to educate voters, and simultaneously, to appraise and apprise judges and judicial candidates. Larry Aspin recommends the Internet as a readily available and economical means of disseminating to voters the considerable information gathered in judicial performance evaluations and elsewhere.

The role played by interest groups is examined next. Lauren Bell surveys the participation of interest groups, their activities and the results, in state judicial selections generally. Anthony Champagne and Kyle Cheek zero-in on recent Texas Supreme Court races, where extremes of party politics and interest group spending have changed both the character of judicial elections in Texas and the composition of the state's

high court. Finally, two articles address a thorny issue of increasingly evident importance: the ethics governing judicial candidates. Cynthia Gray warns of the danger posed to an independent judiciary by judicial campaign speech degenerating into partisan, political, intemperate speech that is usually associated with campaigns for other elected positions. Vincent Johnson then examines the ethical restrictions on negative speech and positive endorsements by candidates, as well as by non-running lawyers, in the course of judicial elections.

Two features are introduced with this issue. The first, which immediately follows this foreword, is a letter to the editor from former U.S. Attorney General Dick Thornburgh. He takes issue with an article we published in Spring 2001 which examined the Federal Justice Department's differences with the "no contact" ethics rule in effect in the states. We will publish similar responses and reactions that contribute substantively to topics addressed in the *GLP Journal* and which we believe will be of significant interest to our readers. The second new feature, the *GLC ENDNOTE*, offers a few closing thoughts, as well as information about related events and activities, from Albany Law School's Government Law Center, which publishes this *Journal* jointly with the Bar Association.

As always, I conclude with appreciation for the assistance and efforts of those at the Bar Association, the Committee, the GLC, and the Law School. In particular, the publications staff at the Bar Association has been, as always, truly exceptional; the new Chair and Vice-Chair of CAPS, Barbara Smith and Tyrone Butler, have actively provided welcome input and support; Patty Salkin and Rose Mary Bailly of the GLC have continued to be inestimable sources of good judgment and ideas; and our student editorial board, especially Robyn Ginsberg, who joyfully and expertly reviewed all the manuscripts, and Erin Kate Calicchia, the current academic year's Executive Editor, whose meticulous attention to everything editorial has been as tireless and enthusiastic as it has been indispensable to the quality of this issue. Of course, any omissions or other flaws are mine alone. Comments and complaints may be directed to me at the editorial office of the *GLP Journal* or at vbonv@mail.als.edu.

Vincent Martin Bonventre, Editor-in-Chief of the *GLP Journal*, is Professor of Law at Albany Law School. He is also the Editor of *State Constitutional Commentary*, published annually by the *Albany Law Review*.

Erin Kate Calicchia, in her second year on the *GLP* Student Editorial Board, is the Executive Editor for the current academic year. A member of the Albany Law School class of 2002, she is also an Associate Editor of the *Albany Law Review* and a judicial intern with Appellate Division Justice Edward O. Spain.

Letter: Response from the Former Attorney General

August 22, 2001

Dear Editor:

Your recent article [Heather Davis, *The Thornburgh Memorandum and State Ethical Rules: Has The Conflict Been Resolved?*, Spring 2001, at 19] by the Editor-in-Chief of the Albany Law Review has been brought to my attention. [Ed.'s note: Ms. Davis, a May 2001 graduate of Albany Law School, served as Editor-in-Chief of the school's law review the past academic year.]

Since I am identified in this article as the issuer of a 1989 United Stated Department of Justice memorandum described as "attempting to circumvent ethical rules adopted and enforced by the states" (subsequently reissued in substantially unaltered from by Attorney General Janet Reno in 1994), I feel compelled to respond.

First, it is important to realize that the thrust of the Department of Justice's position has never been to "circumvent ethical rules" or exempt federal prosecutors wholesale from ethical strictures. It is instead designed to meet specific problems created by certain state ethical rules.

Consider that often in the investigation of a criminal enterprise, federal investigators and prosecutors are approached by members of that enterprise who wish to cooperate with efforts to uncover illegal activity. Whether these are lower level members of an organized crime family or "whistleblowers" within a corporate enterprise, such cooperation can sometimes provide a vital link in the effective prosecution of major wrongdoing.

But what if, as is sometime the case, the individual seeking to cooperate is "represented" by the legal counsel for the enterprise? Must prosecutors deal with him or her only through such counsel? What would be the effect on the well-being, or even physical safety, of such individuals should their intent to cooperate with authorities become known? Because the individual is represented by counsel, must the prosecutor then turn his or her back on what might be vital evidence for fear of "blowing" the investigation or jeopardizing his or her professional career?

These are the types of hard questions posed by the literal application of state ethical rules which prohibit any lawyer from communicating with an individual know to be represented by counsel (see, e.g., Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct). The seeming dilemma posed by such rules was addressed by the United States Department of Justice in 1989 by the promulgation of procedures designed to safeguard the interests of represented individuals and the public alike.

Under these guidelines, the practice was followed that when an individual involved in a criminal enterprise approaches a prosecutor seeking to provide information regarding illegal activities by the organization with which he or she is involved, but does not want counsel provided by that organization to know of any cooperation, the prosecutor must

- take the individual before a federal magistrate to make his or her wishes known
- secure another lawyer to represent the individual thereafter
- afford all constitutional protections to the individual during interrogation.

Only then may the prosecutor take advantage of any information possessed by the individual who has made the approach. All of this was to require prior approval by the Department of Justice and would be contemplated only in the unique type of circumstance outlined above.

Much has been made by criminal defense lawyers of this common sense solution to a seeming ethical dilemma. They claim the government is seeking a wholesale exemption of its lawyers from state ethical rules in the jurisdiction where they practice. This is certainly not the case. As is evident, what is sought is the removal of impediments to effective law enforcement which might otherwise exist through the unanticipated consequences of a particular ethical rule never designed to cover the circumstances alluded to.

Clearly, the Fifth and Sixth Amendments to our Constitution significantly restrict contacts with defendants after their initial appearance before a judge or after indictment, but these constraints do not generally apply before a person has been taken into custody or charged. Rule 4.2 and its counterparts in the various states should not be applied in a manner that would expand these constitutional provisions so as to hamper effective law enforcement without any corresponding benefit to the public at large.

Legislation, felicitously titled the Citizen Protection Act but often known as the "McDade Amendment," attempted to overrule the Justice Department's good faith efforts to resolve this dilemma. Opposed by both Attorney General Reno and myself, among others, this act creates an unnecessary potential cloud over the efforts of federal prosecutors to root out complicated criminal activity involving drug trafficking, organized crime and sophisticated white-collar wrongdoing. These provisions should be repealed.

Sincerely,

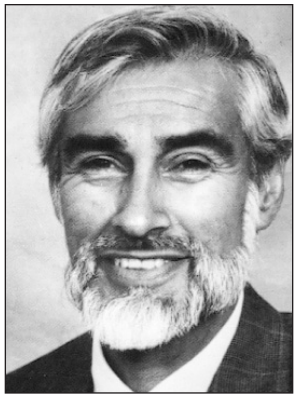
Dick Thornburgh

Attorney General of the United States, 1988-91

cc: Honorable John Ashcroft

Hybrid Proposal: Combining Commission Nomination and Election Methods

By Leo M. Romero



The debate over the best method of selecting judges often centers on the relative merits of commission nomination plans versus partisan elections. Although there are other methods of choosing judges, like the presidential appointment system for federal judges, most states are divided into two camps—those selecting judges through some kind of commission nomination plan and those using elections, either partisan or nonpartisan, to choose their judges.[1]

This article suggests an alternative to the two major methods of selecting judges—a two-track system that combines elements of both systems, nomination-appointment and contested election. A hybrid system substantially accomplishes the goals of a nomination-appointment plan and yet preserves popular accountability and an alternative route to the bench. The electoral part of the compromise does not render meaningless the nomination-appointment process. To the contrary, the commission nomination and appointment part of the compromise have a substantial influence on the electoral outcome.

This hybrid system would be most appealing to states wishing to move from election of judges to a nomination-appointment system, but the political forces make such a move politically unfeasible.[2] The hybrid system represents a compromise that gives to proponents of each system some of what they want. Proponents of a nomination-appointment method will get commission screening of judicial candidates, appointment of judges from a list of commission nominees, and retention elections. Election proponents will get an electoral route to the bench, a route independent of the nomination-appointment process.

One state, New Mexico, has adopted a hybrid system incorporating features of both commission nomination and contested election.[3] The New Mexico plan emerged as a result of a political compromise. When proponents of a nomination-appointment-retention election proposal met opposition in the Legislature, they agreed to the addition of a partisan election.[4] The experience in New Mexico over a ten-year period demonstrates that most of the judges winning the partisan election went through the commission nomination-appointment process.[5] The nomination-appointment part of the compromise gives an advantage to appointed judges in the partisan election, as almost 75 percent of the appointed judges win the election.[6] On the other hand, the electoral part of the compromise, which provides an alternative route to the bench, produced the other 25 percent of the judges. Nomination and appointment, therefore, significantly influenced the electoral outcome.

"A combined system would borrow elements of both the nomination-appointment and the partisan election methods of selecting judges."

Features of a Hybrid System

A combined system would borrow elements of both the nomination-appointment and the partisan-election methods of selecting judges. The commission-nomination part of the hybrid would subject all judicial vacancies to a commission nominating process that would evaluate applicants on prescribed criteria and nominate the best candidates for appointment by a governor or other official. It would also limit the appointment to candidates nominated by the commission, and it would include retention elections in which judges would be periodically subject to approval by the electorate on a retain or reject vote. The election part of the compromise would interpose a contested election between the appointment and the retention election. The winner of the contested election would then be subject to retention elections in the future. In short, a combined system of selecting judges would include these features: commission nomination, appointment from the list of nominees, contested election and retention election for those surviving the contested election.

The New Mexico plan incorporates these features but provides that appointed judges serve only until the next election.[7] If the judge wishes to continue in office, the judge must run and win in that election, which is partisan.[8] Subjecting the appointed judge to the partisan election means that the appointed judge must run in the primary election and if successful, in the general election. The person winning the general election, either

the appointed judge or the challenger, then serves until the expiration of the original term,[9] at which time the elected judge becomes eligible to run in periodic retention elections in which the electorate votes to either retain or reject the judge on a nonpartisan ballot.[10]

The New Mexico plan also has features that handicap appointed judges in the partisan election.[11] The appointed judge does not have an automatic right to be on the general election ballot. In order to be placed on the general election ballot, the appointed judge must get involved in party politics and receive a party's nomination in a primary election.[12] In addition, the timing of the appointment and election sometimes gives the judge insufficient time to establish a record to take to the voters. When a vacancy occurs shortly before an election, the appointed judge must immediately engage in a political campaign instead of building a judicial record that would support the advantage of incumbency.[13]

Assessment of the New Mexico Experience with a Hybrid Plan

A combined system will, if the New Mexico experience is an accurate predictor of what will occur, produce a judiciary in which most judges have been subjected to commission screening and nomination. Although a hybrid system will permit some judges to come to the bench without the benefit of commission evaluation, the combined system favors judicial candidates who go through the nomination-appointment process.

The New Mexico experience with a hybrid system shows that most of the judges in a ten-year period came to the bench through the commission nomination-appointment process. Indeed, as Table 1 shows, 74 percent of the vacancies occurring in that period were filled with judges who were nominated by a commission, appointed by the governor, and won in the partisan election,[14] even with the handicaps faced by appointed judges in the New Mexico plan. An additional eight judges came from lawyers who applied to the commission, were nominated, but were not appointed.[15] These eight nominees then ran against appointed judges in the partisan election and won. With these eight successful challengers added to the 58 appointed judges who survived the partisan election, 84 percent of the judges winning the partisan election went through all parts of the combined process and succeeded in both the nomination and electoral stages.[16] An additional four judges came from lawyers who applied to a commission, but were not nominated.[17] Of the 78 judges winning the partisan election, 70 applied to a commission and, therefore, subjected themselves to commission evaluation.[18] In short, almost 90 percent of the judges who won in the partisan election received commission scrutiny. Only eight of the judges who came to the bench during the period of the study, or about 10 percent, bypassed the commission part of the system and went directly to the voters in the partisan election.[19]

Table 1: Election Results in Judicial Races in New Mexico in Five Elections Over Ten Years (Elections in 1990, 1992, 1994, 1996 and 1998)[20]

	No.	Success Rate
Total Judicial Elections	78	
Winning Candidates Who Applied to a Commission		
Appointed Judges Winning	58	74%
Nominated Lawyers Winning	8	10%
Non-nominated Lawyers Winning	4	5%
Winning Candidates Bypassing Commission Process	8	10%

The New Mexico experience also shows that a majority of the lawyers who choose the electoral route first try the nomination process. Table 2 shows that of the 89 lawyers who ran against appointed judges, 48 submitted to the commission nomination process before they ran for the judicial position in the partisan election.[21] The most successful challengers in the partisan election had been nominated by a commission but were not appointed by the governor. Thirty-three percent of these challengers unseated appointed judges.[22] The least successful challengers were lawyers who applied to a commission but were not recommended. Only 16.6 percent of those challengers beat appointed judges in the partisan election.[23] Most of the judges winning the partisan election, therefore, received commission screening and public scrutiny. Only a small percentage of the candidates winning the partisan election, 10.2 percent, totally bypassed commission screening and chose only the electoral route to the bench.[24]

Table 2: Election Results for Lawyer Candidates Challenging Appointed Judges[25]

	No.	No. Successful	Success Rate
Total Number of Lawyer Candidates	89	20	22.50%
Lawyers Applying to a Commission and Nominated	24	8	33.30%
Lawyers Applying to a Commission but Not Nominated	24	4	16.60%
Lawyers Bypassing Commission Screening	41	8	19.50%

The hybrid method favors the nomination-appointment part of the compromise for several reasons. First, most judicial aspirants will choose to go through the nomination-appointment process, as reflected in the New Mexico experience. Nomination after evaluation by a commission provides a candidate with an endorsement that can be used to advantage in the subsequent election campaign. Conversely, a candidate's failure to be recommended by a commission places that candidate at a significant disadvantage, as only 16.6 percent of the challengers in this category prevailed in the partisan election.[26] Second, and even more important, judges appointed to the bench following a recommendation by a commission have the advantage of incumbency in the partisan election. The value of incumbency served to deter challengers in a substantial number of judicial races and also provided a decided advantage in contested elections. In New Mexico, many of the appointed judges faced no opposition in either the primary or general elections. Of the 78 judicial races in partisan elections, 44 appointed judges won in uncontested primaries,[27] and 31 won in uncontested general elections.[28] Twenty-one of the 78 appointed judges had no opposition in either the primary or general election and had free rides through the electoral process.[29] In contested races, incumbent judges fared much better than the challengers. Appointed judges won 67 percent of the contested primary races[30] and 73 percent of the contested races in the general election.[31] Overall, counting the uncontested and contested races, 74 percent of the appointed judges won in the partisan election.[32]

In sum, the New Mexico experience shows that most judicial aspirants choose to go through the nomination-appointment process, even if they later decide to run for a judgeship in the partisan election. It also shows that lawyers evaluated by commissions and nominated for judicial positions fare much better in the partisan election than lawyers who bypass the commission process. Finally, those who are appointed and run as incumbent judges had the best success in the electoral process, even with the handicaps they face in the New Mexico election law. The nomination-appointment part of the hybrid system, therefore, has played a much more significant role in selecting judges, producing 74 percent of the judges. The role of the partisan-election part of the combined system has been important, but it has not trumped the impact and significant advantages provided by commission screening and appointment.

The New Mexico experience also shows that the hybrid system attracts a larger pool of lawyers from which to select judges than does the purely political electoral system. The predominance of the commission nomination-appointment process over the partisan election in selecting judges has the benefit of attracting many candidates who might avoid a purely electoral system. A total of 932 applicants applied to commissions to fill 81 vacancies during the first ten years under the hybrid system in New Mexico, an average of 11.5 applicants per position.[33] Many of these lawyers, according to anecdotal information, would not have run for judicial office in a partisan election if that were the only way to the bench, but they were willing to run as incumbents if nominated by a commission and appointed by the governor. By way of comparison, only 89 lawyers ran for these 81 judicial positions at the election stage.[34] More lawyers, therefore, seem willing to subject themselves to commission screening and gubernatorial politics than to enter the electoral arena in the absence of a nomination-appointment process.

"The New Mexico experience . . . shows that the hybrid system attracts a larger pool of lawyers from which to select judges than does the purely political electoral system."

A combined system, by providing alternative routes to the bench, provides a check on nomination politics and gives voters more of a voice in the selection of judges. Critics of the nomination process often claim that it is dominated by bar politics that favor certain groups of lawyers and disfavor others.[35] For example, many of the opponents of the constitutional amendment that produced the hybrid system in New Mexico claimed that minorities and women would be at a disadvantage in the nomination process.[36] Although this claim is not supported by the data and experience in the first ten years,[37] the electoral route allows those who believe that the nomination process is unfair an alternative way to become a judge, even though the electoral route is not as promising as the nomination-appointment route. In essence, the partisan-election aspect provides an alternative avenue for candidates dissatisfied with, or suspicious of, the nomination-appointment process. The combined system also allows voters two opportunities to approve or disapprove of judges produced by the nomination and appointment part of the system. Voters can, first, in the partisan election, choose the challenger over the appointed judge, and second, in the retention election, choose to retain or reject the incumbent judge.

Costs of a Combined System

A combined system has the disadvantages of a compromise. The benefits of a purely nomination-appointment system can be trumped by the political process, and the electoral system can be influenced by a process that places judges on the bench for a period of

time before voter approval. The New Mexico experience demonstrates that the costs of a combined system are not substantial and that they can be minimized by changes that would increase the influence of the nomination-appointment part of the compromise.

The most obvious cost of a hybrid system that interposes a partisan election between nomination-appointment and retention election is the loss of judges who were recommended by a commission and appointed by the governor. The defeat in partisan elections of judges who had undergone favorable scrutiny by a commission and governor represents the loss of qualified judges, as well as the wasted expenditure of time and effort in selecting short-term judges.[38] The loss of judges at the electoral stage also has personal and professional costs to the lawyers who closed their practice or resigned a position only to lose in the partisan election.

"[C]ritics may claim that a compromise system is not perfect because of the conflicting values that each part brings to the compromise . . ."

The hybrid system election also results in the election of some judges who have not been evaluated by a judicial selection commission. The partisan election permits lawyers seeking to become judges to bypass the commission screening process and go directly to the electoral process.[39] Some judges, therefore, will have come to the bench without filling out the questionnaire seeking information relevant to their qualifications, without reports from the Disciplinary Board about their professional conduct, and without subjecting themselves to the interview process at open meetings of the nominating commissions. Judges who bypass the commission-appointment process avoid evaluation of their qualifications,[40] and most importantly, the public scrutiny that the commission process entails.[41]

Another cost of a compromise system, harder to measure, is the potential loss of good candidates from the pool from which judges will be selected. Some lawyers may not seek commission nomination and appointment knowing that they must run in a partisan election and face the risk of losing.[42] They may not want to enter the political arena and run a campaign for the judicial office, even if they have the advantage of incumbency. They will not want to collect signatures to become a candidate in the electoral race, raise money to fund a campaign, file reports on campaign contributions and expenditures, and appear at political rallies.

Finally, a compromise system that incorporates an election component has the costs associated with contested judicial elections. Contested elections, whether partisan or nonpartisan, require judicial candidates to fund their campaigns by raising money. Some of the money raised by judges comes from attorneys who may appear before them. Other contributions come from special interest groups trying to elect judges inclined to decide certain types of cases in a particular way.[43] As reported at the National Summit on Improving Judicial Selection, the increasing influence of money in judicial elections creates an appearance, if not the reality, of impropriety, threatens judicial independence and impartiality, and threatens to undermine the public confidence in the judicial system.[44]

Conclusion

A hybrid system of selecting judges, incorporating aspects of both commission nomination and election, provides an alternative method of selecting judges that states might consider. Although critics may claim that a compromise system is not perfect because of the conflicting values that each part brings to the compromise, perfection ought not be the criterion by which any judicial selection system is measured. Rather, a hybrid system should be evaluated by weighing its benefits and costs. On this measure, a compromise system's benefits clearly outweigh its costs. The New Mexico experience shows that the costs described above, although real, are not substantial enough to outweigh its benefits. Although the compromise results in the election defeat of judges who met commission and gubernatorial approval, as well as the election of judges who did not receive commission approval or scrutiny, a substantial number of the judges serving at the end of a ten-year period had successfully won approval by a commission and by the voters. In addition, because a substantial number of judicial races were uncontested, the amount of money raised and expended in these judicial races was minimal.

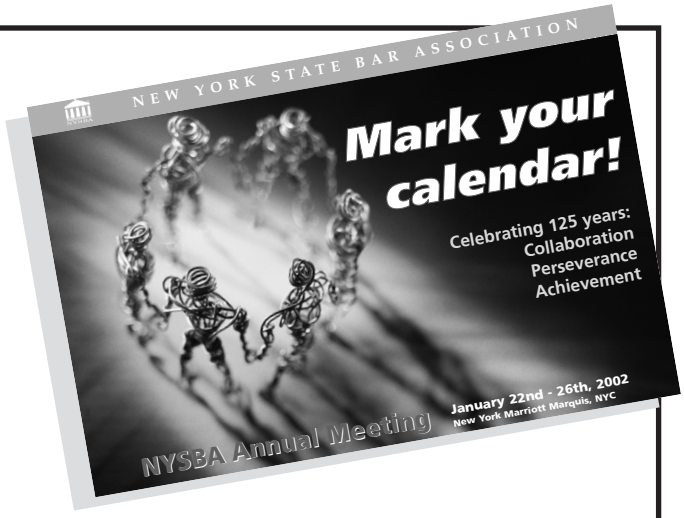
Two in-depth examinations of the New Mexico hybrid plan agreed that its benefits outweighed its costs and concluded that the plan was an acceptable compromise and should not be abandoned. The 1993 New Mexico Constitutional Revision Commission held hearings on the New Mexico plan, hearing from judges, lawyers, commissioners, applicants to commissions, candidates in judicial elections and members of the public, and decided to retain the hybrid system in the New Mexico Constitution.[45] The State Bar of New Mexico's Task Force on Judicial Selection surveyed members of the bar and likewise accepted the New Mexico plan, stating that although it is not perfect, it "has increased the quality of New Mexico's judges."[46] Both reports found that the criticisms of the plan warranted changes

that would improve the system, not the wholesale rejection of the system.[47]

States considering adoption of a hybrid system can learn from the New Mexico experience and avoid some of the election features that handicap the appointed judges in the partisan election. They can evaluate the results of the New Mexico plan and determine whether such results would be acceptable in their states, and if not, whether some of the recommendations by the State Bar of New Mexico task force should be incorporated into their compromise plan.[48] States can tailor their own hybrid plans, reflecting the political realities in their jurisdictions, to produce results that would be acceptable to the bench, bar and public. The choice need not be either election of judges or a system of commission nomination and appointment. An acceptable alternative, borrowing from both methods, can be crafted that meets the interests of the public and profession.

Endnotes

1. *See, e.g.*, Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, *in* Judicial Politics Reading *from* Judicature 44, 45 (2d ed. 1999); Chart showing Judicial Selection in the States, Appellate and General Jurisdiction Courts, Summary of Initial Selection Methods, American Judicature Society 1986, revised July 1999.
2. Most states choose their judges through elections, either partisan or nonpartisan. Fifty-three percent of the state appellate judges and 76 percent of the state trial judges face contested elections. *See* Schotland, *Summit on Improving Judicial Selection, Introduction: Personal Views*, 34 Loy. L.A. L. Rev. 1361, 1365. Professor Schotland obtained these statistics from the survey in the U.S. Dept. of Justice Bureau of Justice Statistics, State Court Organization 1998.
3. In 1988, an amendment to the New Mexico Constitution changed the way judges are selected. *See* N.M. Const. art. VI, §§ 33-36.
4. *See* Eric D. Dixon, *A Short History of Judicial Reform in New Mexico*, 73 Judicature 48 (1989); telephone interview with Judge W. John Brennan, Chief Judge of the Second Judicial District, who spearheaded the effort to change the method of selecting judges in New Mexico from election to commission nomination and appointment (1999).
5. *See infra* Table 1; *see generally* Leo M. Romero, *Judicial Selection in New Mexico: A Hybrid of Commission Nomination and Partisan Election*, 30 N.M. L. Rev. 177 (2000) for a detailed evaluation of the results of the first ten years under the hybrid system. The data about the results under the nomination and appointment part of the New Mexico process comes from the records of the Judicial Selection Office at the University of New Mexico School of Law. The data regarding the election results in judicial races during this period comes from the official returns for the elections of 1990, 1992, 1994, 1996 and 1998. *See* Secretary of State, State of New Mexico Official Returns, 1990, 1992, 1994, 1996, 1998.
6. *See infra* Table 1; *see* Romero, *supra* note 5, at 206.
7. *See* N.M. Const. art. VI, § 35.
8. Although the New Mexico Constitution does not specifically state that the election must be partisan, the language of the constitutional provision refers to the next general election, which under New Mexico election law includes primary elections for the selection of candidates by political parties and general elections contested by the nominees of the political parties. *See* N.M. Stat. Ann. §§ 1-8-1 to 1-24-4 (Supp. 1999).
9. Judges of the supreme court and court of appeals have terms of eight years, and judges of the district court have terms of six years. *See* N.M. Const. art. VI, § 33.
10. *See* N.M. Const. art. VI, § 33.
11. *See* Romero, *supra* note 5, at 222, for a description of the handicaps faced by appointed judges in the partisan election.
12. *See* Romero, *supra* note 5, at 195-198, for a description of the electoral process in New Mexico.
13. *See* Romero, *supra* note 5, at 222. Some vacancies occurred within several months of the next general election, and the appointed judges had to begin the campaign for the primary and general election immediately after appointment. *Id.*
14. *See also* Romero *supra* note 5, at 210 and Table 9, at 211, for an account of the results in the general elections under the New Mexico judicial selection system.
15. *See infra* Table 1; *see* Romero, *supra* note 5, at 217.
16. *Id.*
17. *Id.*
18. *See infra* Table 1.
19. *Id.*
20. The data reflected in Table 1, regarding the results under the nomination and appointment part of the New Mexico process, comes from the records of the Judicial Selection Office at the University of New Mexico School of Law. The data regarding the election results in judicial races during this period comes from the official returns for the elections of 1990, 1992, 1994, 1996 and 1998. *See* Secretary of State, State of New Mexico Official Returns, 1990, 1992, 1994, 1996, 1998.
21. *See* Romero, *supra* note 5, at 217.
22. *See infra* Table 2.
23. *Id.*
24. *See supra* Table 1.
25. *See supra* note 20, for the sources of data reflected in Table 2.
26. *See* Table 2.
27. *See* Romero, *supra* note 5, at 208-209, for the results in primary elections for appointed judges.
28. *See id.* at 210-211, for general election results for appointed judges.
29. *See id*. at 208, 210.
30. *See id*. at 209 (Table 8).
31. *See id*. at 211 (Table 9).
32. *See id*. at 210-211.
33. *See id*. at 204 (Table 5).
34. *See id*. at 215-216 (Table 14).
35. *See* Dixon, *supra* note 4, at 49, for the arguments of the opponents of the New Mexico compromise plan.
36. *See id.*
37. *See* Romero, *supra* note 5, at 219-221, for a comparison of results for women and minority lawyers under the old election system and the new compromise method of selecting judges.
38. *See* Romero, *supra* note 5, at 221-223, for an assessment of the impact of the partisan election on the nomination-appointment part of the process.
39. *See id*. at 221.



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Tuesday, January 22, 2002
Elder Law Section • General Practice Section • Intellectual Property Law Section • Tax Section

Wednesday, January 23, 2002
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40. *See* Rules Governing Judicial Nominating Commissions § 4, published as an appendix to N.M. Const. art. VI for the evaluative criteria used by commissions for evaluating judicial candidates. These criteria were borrowed from the Handbook for Judicial Nominating Commissions, published by the American Judicature Society (1985).

41. The applicant questionnaires submitted by applicants are considered public documents available for anyone to see. *See* Preface to Applicant Questionnaire, N.M. Const. art. VI appendix. Commission meetings are open to the public. *See* Rules Governing Judicial Selection Commissions § 5(B). In addition to the interviews of the candidates, members of the public are allotted time for comments on the qualifications of individual candidates. *See* Rules Governing Judicial Selection Commissions § 5(E).

42. A 25 percent chance of losing in the partisan election, the odds reflected in the New Mexico experience, may be sufficiently high enough to deter some lawyers from applying.

43. *See* Anthony Champagne, *Interest Groups and Judicial Elections*, 34 Loy. L.A. L. Rev. 1391 (2001), for an account of the increasing involvement of interest groups in judicial elections and the impact of such involvement on public opinion regarding judicial impartiality.

44. *See Call to Action Statement of the National Summit on Improving Judicial Selection*, 34 Loy. L.A. L. Rev. 1353, at 1354; Schotland *supra* note 2, at 1365. *See also* David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary,* 50 Cath. U. L. Rev. 361 (2001), for a particularly strong indictment of the corrupting role of money in judicial elections.

45. *See Report of the Constitutional Revision Commission* 53 (Dec. 1995).

46. *See Report and Recommendations of the Task Force on Judicial Selection* 4 (Dec. 23, 1997).

47. *See Report of the Constitutional Revision Commission*, *supra* note 45, at 53; *Report and Recommendations of the Task Force on Judicial Selection*, *supra* note 46, at 4.

48. The Task Force recommended that an appointed judge serve at least one year before standing for election and recommended that the appointed judge be given a place on the general election ballot without the need for nomination by one of the political parties. *See Report and Recommendations of the Task Force on Judicial Selection*, *supra* note 46, at 7-8. The Constitutional Revision Commission recommended that for vacancies occurring after the general election proclamation, the appointed judge would run in the next succeeding general election. Because the proclamation is issued on the last Monday in January of election years, the recommendation would give appointed judges almost two years in the position before running in the partisan election. *See Report of the Constitutional Revision Commission*, *supra* note 45, at 53.

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Supreme Court Appointments in the New Century

By Richard D. Freer

One of my colleagues shook his head as he told me something we both find hard to believe: Most of the members of the new first-year law school class were 8 or 9 years old when the Senate rejected the nomination of Robert Bork to serve as Associate Justice of the Supreme Court. These students have no mature recollection of that confirmation battle. And to them, the names of Clement Haynsworth and Harrold Carswell probably ring no bell at all. Yet these were three of only four Supreme Court nominees whom the Senate rejected in the entire 20th century. Interestingly, though, all three were rejected between 1969 and 1987. Did the events of those years change the Senate's conception of its role in Supreme Court appointments? The odds are good that we will find out in the next few years. We have not had a Supreme Court vacancy since 1994, making this the longest period without a new justice since 1823.[1]

The Appointments Clause[2] allows the president to nominate and, if successful, to appoint federal officers, including, of course, all federal judges. The process goes from nomination to appointment, however, only if the president can get the "Advice and Consent of the Senate." The clause lays out only a procedure for appointment, and says nothing about what factors the president and Senate are to consider.[3]

Despite this substantive gap, presidents have always understood that they can make nominations based purely on political or ideological considerations. This is nothing new. George Washington and John Adams wanted good Federalists on the bench. But in the 20th century, we saw more overt efforts. The most extreme example was Franklin Roosevelt's desire to pack the Supreme Court with additional justices expressly to ensure substantive results in sympathy with the New Deal.[4] Especially in the latter third of the century, presidential efforts to shape the ideological direction of the federal courts became commonplace. Richard Nixon ran for office in 1968 in part on a platform of appointing "strict constructionists," a theme reiterated by George Bush in 1988 and George W. Bush in 2000. Ronald Reagan, like FDR, criticized specific holdings, and appealed to an earlier day when judges interpreted the Constitution and did not rewrite it.[5] In addition, Jimmy Carter's efforts to appoint more minorities and women to the federal bench "did a fairly good job of stacking the lower federal courts with liberals."[6]

In addition, modern presidents seem to have adopted particular career profiles for Supreme Court nominees. Look at the present Court. What kind of people are not there? There are no former senators, such as Hugo Black or Sherman Minton. There are no major political figures, such as Earl Warren, Jimmy Byrnes or William Howard Taft. There are no giants from the practice of law, such as Lewis Powell, Abe Fortas or John Marshall Harlan.

So who is there? The last eight justices added to the Court—over 26 years, by four presidents (Nixon, Reagan, Bush (Sr.) and Clinton)—all came from the ranks of appellate judges.[7] More strikingly, three of those eight (Scalia, Breyer and Ginsburg) were law professors before being appointed to the federal appellate bench. What's more, two failed candidates for the Supreme Court over this period—Robert Bork and Douglas Ginsburg—were law professors turned appellate judges.[8] On the present Court, only William Rehnquist came to the Court from a career path other than appellate judge.

"[P]residents have always understood that they can make nominations based purely on political or ideological considerations."

Why are these types of people on the Court? Of all the members of the legal profession, appellate judges and academics have published opinions or articles staking out positions in a variety of areas. And someone who has taken a public position in writing might be reluctant to stray from it. Moreover, academics (and to a lesser extent appellate judges) are not known for a willingness to compromise (ask any dean for examples). Although I cannot prove it, it seems that presidents may have concluded that appointing people with these types of backgrounds may be less risky than appointing a practicing member of the bar or career politician, whose professions require an ability to compromise and moderate position.

What, then, is the Senate's role in giving advice and consent? For several reasons, one would expect an active role—one in which the Senate engages the Executive in a dialogue about the role of the federal courts in our government. First, although not free from doubt, it

does seem likely that the Founders envisioned such an activist role for the Senate.[9]

Second, it is worth remembering that the Founders vested the advice and consent power in the Senate, and not in the House of Representatives. The Senate is more removed than the House from direct electoral pressure. In Stephen Carter's elegant terms: "The Senate is more capable than the House of reflective and deliberative consideration of the issues confronting the legislative branch. The House . . . might be considered the heart of the democracy. The Senate, then, must surely be the soul."[10]

"In Stephen Carter's elegant terms: 'The Senate is more capable than the House of reflective and deliberative consideration of the issues confronting the legislative branch. The House . . . might be considered the heart of the democracy. The Senate, then, must surely be the soul.'"

Third, an activist Senate role is dictated by simple notions of checks and balances. Federal judges serve for life, and thus routinely serve long after the president who appoints them has left office. If the Senate were to fail to exercise a meaningful check on judicial appointments, it would be giving plenary power to the president to appoint federal judges. And if, as history shows, the president considers ideological factors in nominating judges, senatorial abdication would result in giving the president a blank check to shape the direction of the judiciary. Surely, the Founders' insertion of the advice and consent requirement was not a meaningless act. Right?

Wrong. Or at least, mostly wrong. In our nation's history, the Senate has rejected 12 nominations to the Supreme Court and has thwarted (usually by postponing consideration of a nominee) 14 more. So the Senate has stopped—either *de jure* or *de facto*—26 formal nominations to the High Court. But 20 of those came before 1896. Let us focus on the 20th century, during which the Senate defeated only four nominations. In addition, it thwarted two others (the elevation of Abe Fortas to the Chief Justiceship and the appointment of Homer Thornberry to replace Fortas as Associate Justice). During the century, 52 people were appointed to the High Court. That means that 52 of 58 nominations in the century were successful (54 of 58 that actually went to a Senate vote)—giving the president a remarkable success rate of about 90 percent.

Why should the success rate be so high in a century in which presidents were fairly overt about appointing on ideological grounds? Part of the answer lies in the "orthodox view" of the Senate's role in the appointments process. That view holds that the Senate must confirm a nomination unless the nominee is unqualified professionally or in terms of character. By this view, the Senate is not supposed to inquire into the nominee's ideology or judicial philosophy.[11]

On its face, this orthodox view is wrongheaded, because it abdicates to the president full power to shape the ideology of the bench. But no one imposed the orthodox rule on the Senate; it is free to change its role whenever it finds the political will to do so. And perhaps it did precisely that during the last third of the 20th century. Of the six nominations the Senate thwarted in the 20th century, five came during a remarkable period from 1969 through 1987. Did this activity mean that the Senate may have found the political will to play the contemplative, deliberative role the Founders evidently envisioned?

Maybe not. The rejections of Haynsworth and Carswell, along with the thwarting of the elevation of Fortas and appointment of Thornberry, are closely related and involve unique political facts. They have been treated ably by others[12] and, in my judgment, did not involve mature senatorial discussion of judicial ideology. In a nutshell, the rejection of Haynsworth was political payback for the Republican's treatment of Fortas, in forcing his resignation in 1969. Instead of admitting what it was doing, the Senate hid behind manufactured "character" issues to reject Haynsworth, including one supposed lapse of ethics that Harry Blackmun (who ultimately got that seat) committed four times.[13] The rejection of Carswell is one of the few in our history that was based on the merits; he was not qualified.

So through the events of the late 1960s, one still sees a Senate afraid or unwilling to tackle judicial ideology directly, willing to engage in charade to manufacture "character" issues and reject a nominee on that basis. This behavior is completely consistent with the orthodox rule.

Many observers believe that the Bork nomination in 1987 changed the rules. Any observer could see that the Bork nomination would be contentious and that ideology would be on the table. For starters, opponents simply had no colorable issue about Bork's qualifications or character, so the orthodox rule would not allow an attack. Reagan had made it clear that he wished to transform the Supreme Court. He had been successful the year before in elevating William Rehnquist to the Chief Justiceship and appointing Antonin Scalia as Associate Justice. Further, Bork had written a great deal

and was seen as a contumacious conservative. Importantly, the Democrats had just seized control of the Senate. The showdown was set.

From the outset, however, the Senate did something odd. Various leaders said that the Senate could reject the nomination only if Bork's views were "out of the mainstream" of American legal thought.[14] So instead of a deliberative discussion, the Senate locked itself into a charade of having to show—or appear to show—that Bork was out of touch. It should have been a difficult job. The Senate had to show that Bork was out of touch with legal thought even though (1) it had overwhelmingly approved Bork's appointment to the District of Columbia Circuit six years before and (2) it had confirmed the appointment of the conservative Scalia to the Supreme Court the previous year by a vote of 98 to 0.

But the Senate proved equal to the task. In the process, it trampled the reputation of an honorable man by painting a picture of him as essentially daft. (As it had to Haynsworth by painting a picture of a man with a character flaw.) The pathetic part of the story is that the Senate simply did not have to undertake the task it gave itself. It could have made a straightforward assessment and said to Reagan, in essence: "Mr. President, we find this nominee too conservative (or too influential) and we think this appointment at this time will tilt the balance of the Court in a way we find inappropriate. Send us someone else." The Senate has the clear authority to do that. Indeed, as the soul of our democracy, it has the responsibility to do that. For whatever reason, the Senate has never undertaken such a contemplative role.

If the Senate ever did make such a measured and clear statement in rejecting a nominee, it would put the pressure on the president to find a more moderate nominee in the next round. Instead, though, when the Senate plays the games it did with Haynsworth and Bork, what does the president do? The short answer may be that he loses the battle and wins the war. Unless the president nominates a Carswell, the Senate will approve the second nominee. It is difficult for the Senate to muster the nerve to reject two in a row. It is also risky, because then the president can blame the Senate for a prolonged vacancy on the Court. So with the second nomination, the Senate and the president have the same interest: They want the vacancy filled. It behooves everyone to have the second nominee at least *appear* to be different from the one just rejected. As Professor Monaghan notes, "The senators made every effort to see [Justice Kennedy] as different from Judge Bork, regardless of whether he actually was."[15]

And how does the Senate do that? By not requiring the nominee to give meaningful answers to questions during the confirmation hearings. In each appointment after Bork—from Kennedy through Breyer—we heard much of the "stealth" nominee—one who reveals little if anything of an overarching theory of jurisprudence. Some senators carped about the lack of meaningful answers from nominees. Frustrated in one hearing, Senator Specter suggested that the Senate might "get up on its hind legs" and reject a nominee for failing to answer the Senate's questions.[16] But remember, we have stealth nominees only because the Senate lets them get away with it.

The Bork nomination did indeed put ideology on the front burner in confirmation hearings, and in that sense may signal a step away from the orthodox rule. But the advent of the stealth nominee proves that it is not the ideology of the nominee that is being put on display—rather, it is the ideology of the Senator! In each of the post-Bork confirmation hearings, senators asked questions without insisting on answers. Why? Because they have discovered in the confirmation proceedings a wonderful vehicle for achieving goal No. 1: Reelection. The hearings provide free television time in a serious setting. The senator gets to lecture the nominee about issues of perceived constitutional import. The fact that the nominee does not answer is actually a good thing—it means the senator can vote to confirm, and can tell constituents that the nominee has obviously received the message the learned senator was trying to impart.

"As it has for 200 years, the Senate will exercise [the] power [to vote yea or nay] to flex its political muscle and tweak embattled or shaky presidents. . . . So much for the 'soul' of our democracy."

So what can our current students expect if George W. Bush gets to nominate someone to the Court? The days of supine deference to the president probably have waned. There is today an increased possibility that the Senate would reject a nominee. This is especially true because the Senate is in the hands of the Democrats and may be especially true given Bush's narrow electoral victory. And if Bush's nominee is expressly advertised as an ideological choice, the chances of rejection go up.

Whether the nomination will generate opposition will be determined not by the Senate but by interest groups. If some group starts a campaign, then we can expect both sides to put their PR machines into high gear. At the hearings, the senators will ask narrow, hot-button questions that reflect the concerns of the relevant interest groups. The nominee will dodge the questions. The senators will express concern, look worried, lecture

the nominee and ultimately decide the nominee's fate. That decision will not be based upon a mature deliberation about the role of the federal courts and the president's authority to shape them. Instead, it will be based upon each senator's polling and weighing whether it is politically expedient for his or her reelection to vote yea or nay. It's a new century, but there is no reason to believe it's a new advice and consent power. As it has for 200 years, the Senate will exercise that power to flex its political muscle and tweak embattled or shaky presidents. As they have since they learned how in 1969—with the first televised hearings—and as they perfected in the 1980s and 1990s, they will preen for the cameras and posture for the sound bite to maximize the chances of reelection. So much for the "soul" of our democracy.

Endnotes

1. Joseph Story and Gabriel Duval were appointed in 1811. There was not another vacancy until 1823, when Smith Thompson replaced Henry B. Livingston.
2. U.S. Const. art. II, § 2, cl. 2.
3. *See* Richard D. Manoloff, *The Advice and Consent of the Congress: Toward a Supreme Court Appointment Process for Our Time*, 54 Ohio St. L.J. 1087, 1090 (1993) ("There was little discussion [among the Founders] of the appropriate factors to be taken into consideration during the appointments process." (footnote omitted)).
4. *See* John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 Va. L. Rev. 833, 843 n.24 (describing FDR as "quite single-minded about appointing men who could be counted on to side with the New Deal on issues of federal power.").
5. Bruce A. Ackerman, *Transformative Appointments*, 101 Harv. L. Rev. 1164, 1166 (1988) (discussing the "myth of rediscovery" in context of presidential nominations to the bench).
6. Ely, *supra* note 5, at 843 n. 20. The ideological nature of Carter's appointments is overlooked in part because it was hidden behind Carter's "blue ribbon" panels and in part because Carter did not appoint a Supreme Court Justice.
7. These are Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer.
8. Douglas Ginsburg was never formally nominated. President Reagan introduced him as the nominee-to-be at a press conference. The effort was scuttled, however, in the wake of allegations that Ginsburg had smoked marijuana with students while on the faculty at Harvard.
9. *See, e.g.*, Manoloff, *supra* note 4, at 1102 ("A review of the debates surrounding the appointment of judges at the Federal Convention of 1787 supports the view of an active Senatorial role in the Supreme Court appointment process.").
10. Stephen Carter, *The Confirmation Mess*, 101 Harv. L. Rev. 1185, 1196 (1988).
11. *See generally* Jeffrey K. Tulis, *Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court*, 47 Case W. Res. L. Rev. 1331, 1332 (1997) (noting the "supinely deferential" treatment accorded the Senate under the orthodox view.).
12. *See* John P. Frank & Clement Haynsworth, *The Senate and the Supreme Court* (1991). In the interest of disclosure, I had the honor of clerking for Judge Haynsworth from 1970-1980.
13. "The Blackmun confirmation made the Haynsworth pretense transparent. . . . The truth . . . is that neither of them . . . did anything wrong under the law as it [then] stood." *Id.* at 135.
14. David A. Strauss & Cass R. Sunstein, *The Senate, The Constitution, and the Confirmation Process*, 101 Yale L.J. 1491, 1491 (1992).
15. Henry P. Monaghan, *The Confirmation Process: Law or Politics?*, 101 Harv. L. Rev. 1202, 1209 (1988).
16. *Senate Committee Unanimously Endorses Ginsburg—Confirmation by Full Chamber Likely Next Week*, Ariz. Republic, July 30, 1993, at A2.

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Judicial Selection in New Jersey

By Robert J. Martin

I. Present System of Selection

Over the past half century, New Jersey's judiciary has enjoyed an enviable national reputation for excellence.[1] According to many observers, this reputation has been due at least partially to the state's manner of judicial selection.[2] Unlike many other states, New Jersey utilizes strictly an appointive process, quite similar to that employed at the federal level. In the Garden State, all judges (other than local magistrates) are appointed by the governor, with "the advice and consent of the Senate."[3] Once nominees obtain appointment to the superior or supreme courts, they serve for seven years, at which time they must be renominated by the governor and reconfirmed by the senate to remain in office. If they succeed, they can continue on the bench—assuming they maintain "good behavior"—until the state's mandatory retirement age of 70.

Most judges appointed under this judicial system are highly qualified. Most can attribute their appointment largely to demonstrated legal skill—rather than political activity. Prominent commentators have deemed this type of judicial selection system superior to those based on election, either partisan or nonpartisan. Some have asserted that voters may be simply too uninformed[4] or incompetent[5] to make intelligent choices about judicial vacancies. Arthur Vanderbilt, the former Dean of NYU Law School and first Chief Justice of the New Jersey Supreme Court, has warned that if New Jersey were to convert to an elective system, it would lessen "the independence of the judiciary by making politics a primary element in [judges'] selection and continuance in office."[6]

II. Problem Areas

But even though New Jersey's judicial selection system may be less overtly political than those in sister states, it does possess significant structural problems. The most odious is a custom called "senatorial courtesy." The term refers to an informal privilege permitting individual state senators to block the appointment of a judicial or other gubernatorial nominee simply because the nominee resides in the senator's home county or legislative district.[7] The privilege traces its origins to the state Constitution of 1844 that intentionally revised the appointment process to mirror the system set forth in the U.S. Constitution. In so doing, the new system also gave rise to a practice initiated by U.S. senators, allowing them to invoke veto-like powers over judicial and other federal appointees who reside in their home states.[8]

When invoking senatorial courtesy in New Jersey, state senators do not need to offer a valid explanation; in fact, they do not need to offer any explanation at all. As a collegial "courtesy," other senators will not proceed with confirmation of a judicial nominee unless each of the local senators from the nominees' same district and county has personally "signed off." Regrettably, some senators have chosen to abuse this privilege for all sorts of reasons unrelated to a nominee's qualifications. Among the more frequent, are attempts to secure gubernatorial appointments for personal friends and support for pet projects and legislation. Senate colleagues rarely object, since they too may feel inclined to employ the same kind of leverage.

"Unlike many other states, New Jersey utilizes strictly an appointive process, quite similar to that employed at the federal level. In the Garden State, all judges (other than local magistrates) are appointed by the governor, with 'the advice and consent of the Senate.'"

A second problem, interrelated to the first, concerns actions of the Senate Judiciary Committee, the committee charged with reviewing the qualifications of judicial nominees. This committee has traditionally relied too much on the influence of the governor and local senators in deciding the fate of judicial nominees. Consequently, it often acts more as a "rubber stamp" than as a separate forum committed to independent decision-making. Typically, for example, the governor has insisted that nominees to the state supreme court be approved without objection, and the Judiciary Committee and subsequently the full Senate have meekly complied. Given the New Jersey Supreme Court's strong inclination toward activism and policy-making,[9] the Senate must fulfill its constitutional mandate by giving such nominees legitimate "checks."

The need for closer and more independent senatorial review became a prominent issue in the spring of 2001, when the New Jersey Legislature debated whether Justice Peter Verniero, a 1999 supreme court appointee of Governor Whitman, deserved to be impeached.[10] Prior to joining the bench, Justice Verniero had served as the state's Attorney General and chief law enforcement officer. As details of pervasive racial profiling by state police became apparent, critics accused Justice Verniero of being the most responsible individual.[11] Although Justice Verniero managed to escape formal impeachment proceedings,[12] the acting governor and all leading gubernatorial candidates called on him to resign. When the justice adamantly refused, much of the criticism was shifted back to the Senate and its Judiciary Committee. Had the Senate not been so conciliatory to the former governor, Justice Verniero may never have been confirmed in the first place.

"Unfortunately, senatorial courtesy is so deeply entrenched and so advantageous to state senators that it probably cannot be completely eliminated."

A third problem related to judicial selection involves the lack of experience and training of some new judges to handle assigned responsibilities. As in many states, New Jersey's Administrative Office of the Courts (AOC) governs judicial administration. Although the AOC offers general training to new judges, the training does not include extensive coverage of substantive and procedural topics.

This problem is particularly acute in New Jersey because the AOC usually requires untenured judges to serve in all or most sections of the superior court. Each year county assignment judges rotate other judges in their vicinage among the family, criminal, civil and small claims courts.[13] New and relatively new judges are routinely placed into courtroom settings where they may never have practiced previously. Regardless of expertise, new judges are typically assigned to the family part. This assignment sometimes leads to unsatisfactory results—both for judges and litigants.

To remedy such deficiencies in its judicial system, New Jersey policy-makers can and should take corrective action. The remainder of this article is devoted to making specific recommendations for counteracting the abuse of senatorial courtesy, for strengthening the Senate Judiciary Committee and for improving judicial administration.

III. Recommendations for Improvement

A. Counteracting Senatorial Courtesy Abuse

Unfortunately, senatorial courtesy is so deeply entrenched and so advantageous to state senators that it probably cannot be completely eliminated. Nevertheless, two remedial measures, currently being applied on a limited basis, could be expanded to counteract the most deleterious effects of senatorial courtesy.

The first measure involves a program begun in 1994 by two state senators and is officially known as the "Morris County Compact." Its main feature is a Selection Committee, whose purpose is to advise the senators of the relative merits of candidates seeking judicial appointments. The Selection Committee is comprised of both laypersons and attorneys. The participating senators choose five laypersons; the County Bar Association chooses five attorneys; and those ten members choose an 11th member who serves as the committee chair. The full committee interviews and reviews the credentials of all judicial candidates and recommends for appointment only those deemed "highly qualified." To receive this distinction, a candidate must receive the approval of at least eight committee members.

As part of the Compact, the participating senators pledge that they will not support any judicial candidate who has not previously garnered committee approval. The senators also pledge that they will not subject any committee-approved candidate to senatorial courtesy. Moreover, the senators agree to urge the governor to nominate only committee-approved candidates. By consenting to the senator's request, the governor can be virtually assured that nominees will be of high caliber and be able to win quick confirmation.

Since its implementation, the Morris County Compact has clearly met the expectations of its proponents.[14] It has succeeded in its dual mission: To assist outstanding candidates in obtaining judgeships, and thwarting the efforts of less-qualified candidates—even those with strong political connections. Because of its success, the program has begun to generate interest among state senators in other counties. Adaptation of its merit-based approach would afford them a principled means of informing political allies that they may not be suited to be judges, while at the same time encouraging capable individuals to pursue a judicial career.

A second measure designed to counteract the abuses of senatorial courtesy involves judicial *reappointment*.[15] Following a widely criticized incident of courtesy in 1993,[16] Senate President Donald DiFrancesco announced that henceforth any gubernatorial nominee

for judicial reappointment would be automatically directed to the Senate Judiciary Committee for review.

Since then, this informal policy has reduced the scope of senatorial courtesy because individual senators can no longer block a nominee's reappointment. Although the Senate Judiciary Committee still considers the input of local senators, the Committee must make its own assessment on each candidate's worthiness for reappointment. So far, the results of this reform have proven positive. It has generated favorable endorsements from the media and the bar. More importantly, it has produced no reported incidents of senatorial circumvention.

But a more permanent step is required. The state Senate must enact the reform measure as a formal amendment to the Senate Rules to forestall the risk of its abandonment due to a change in party leadership or political realignment. By doing so, the Senate can ensure that untenured judges receive an important safeguard: fundamental due process.

B. Strengthening the Senate Judiciary Committee

To overcome the Senate Judiciary Committee's propensity to simply rubber stamp judicial candidates promoted by the governor and local senators, that Committee must acquire the appropriate tools to conduct its own independent investigations. Under the energetic leadership of its current chairman, Senator William Gormley, the Committee appears committed to furnishing a more vigilant review of gubernatorial nominations. Recently, it demonstrated its capacity to carry out increased oversight by undertaking an extensive investigation into the causes of the racial profiling scandal.[17] This investigation was noteworthy for the high level of cooperation evinced by committee members, who consistently explored sensitive issues without resorting to partisan finger-pointing.

Because (as state senators) Committee members serve only on a part-time basis, they cannot be expected to conduct a thorough review of each judicial nominee by themselves. Nevertheless, they can follow the lead of their counterparts in the U.S. Senate and utilize professional assistance to assemble and analyze critical information.[18] The Committee employed a similar technique in dealing with the racial profiling scandal, and it proved to be an effective method of essential fact-finding.[19]

Therefore, the committee should appoint a full-time aide to conduct background checks of each judicial nominee and prepare recommendations to its membership. The committee aide should be an attorney admitted to practice in New Jersey and be willing to serve in a nonpartisan capacity. The aide should be proactive, and aggressively seek out the opinions of laypersons and attorneys familiar with the nominee's work product and temperament. The aide should also serve as a confidential repository for complaints and praise about sitting members of the bench. Such information—especially from trial lawyers who might otherwise feel reluctant to express their views—should prove invaluable in helping to decide whether a judge should be accorded reappointment.

"One way to improve the performance of nontenured judges is by giving them more particularized and extended training."

Additionally, the Senate Judiciary Committee should look to an outside source for guidance: The New Jersey State Bar Association's Judiciary and Prosecutorial Appointments Committee. Given its unique insight, the Appointments Committee must continue to play a meaningful role in the appointment and reappointment process. Unfortunately, Governor Whitman decided two years ago to withdraw prior gubernatorial assurances to consider the State Bar Committee's recommendations, at least with respect to supreme court nominations.[20] Regardless of any particular governor's inclination, the Judiciary Committee should continue to request recommendations from the State Bar Committee, and give those recommendations strong consideration. Such input would make the Judiciary Committee's independent review more comprehensive and give it more credibility within the legal community.

C. Improving Judicial Administration

Judicial selection and—equally important—judicial retention can also be enhanced through increased AOC supervision and mentoring of judges during their seven-year "probationary period" (prior to potential reappointment with lifetime tenure). If the AOC can help improve the performance of untenured judges, their prospects for reappointment should also improve. Generally, the only time that reappointment becomes an issue (other than instances of professional misconduct) is when nontenured judges consistently display substandard competency or undignified temperament.

One way to improve the performance of nontenured judges is by giving them more particularized and extended training. To do so, the AOC must revise its two existing programs: the "Baby Judges School" and the Judicial College.

The AOC devised the Baby Judges School as an immersion program to introduce recently appointed judges to the basics of superior court.[21] Although vital, the program is not comprehensive and is not offered frequently enough. Its curriculum concentrates mainly on judicial process, thus neglecting topics related to specific sections of the superior court.[22] Furthermore, the program is given only when a substantial number of recently appointed judges can attend together as a class. As a result, some judges work on the bench for months before attending their first session. In revamping this program, the AOC should ensure that (1) all new judges be given specific training for the court in which they are assigned, and (2) all new judges attend the program *before* they assume their duties, not sporadically thereafter.

"Although highly acclaimed, New Jersey's judicial selection system contains deficiencies that have led to the appointment and reappointment of less than outstanding judges."

In addition, the AOC should expand its Judicial College, a program designed to educate and update all trial, appellate and supreme court judges on noteworthy changes in substantive and procedural law.[23] Although meritorious, the Judicial College only provides mandatory instruction once a year during a three-day session immediately prior to the annual Thanksgiving vacation. In this short time span, the College cannot offer as much specialized instruction as is needed to properly inform all segments of the judiciary.

To supplement its annual three-day session, the AOC should create an "Auxiliary School for Continuing Education" to address the particularized needs of judges in specific areas. This program should be mandatory, especially for judges who exhibit performance problems. To house both the Judicial College and the Auxiliary School, the AOC should establish a permanent Judicial Education Center. Similar centers have been created in other states, most notably in Massachusetts. There, the Flaschner Judicial Institute annually holds over 30 courses devoted exclusively for judges.[24] Response to the Flaschner Institute has been highly favorable, and over 90 percent of the Massachusetts bench annually attends one or more of its classes.[25]

The AOC should establish a similar institute in affiliation with one or more of New Jersey's three law schools. In addition to providing year-round instruction, the institute could serve as a repository for special materials and a place for conducting judicial research. Increasingly, New Jersey judges and their law clerks find themselves overwhelmed with immediate matters and unable to set aside time to research legal theory and emerging law in other jurisdictions. A judicial institute, partially staffed by voluntary upper-class law students, could complement the limited resources of New Jersey judges and also improve the education of in-state law students by giving them more exposure to the judicial system.

Another way that the AOC could improve judicial administration is through more frequent judicial evaluations. The AOC has already enacted a well-respected "Judicial Performance Program," which relies on questionnaires as its principal means of evaluating judicial performance.[26] These questionnaires compile opinions from judges, attorneys and jurors, seeking to appraise judges on the basis of legal ability, judicial management skills and comportment. Their benefits are clear-cut: They help in measuring the overall competence of individual judges and in identifying whether judges need specialized assistance in particularized areas.

The main problem with these evaluations is the limited number of times they are conducted. Presently, evaluations are administered only during a judge's second and fifth year of service. Given their acknowledged effectiveness, evaluations should be administered more frequently (and be given to tenured judges as well). The AOC should evaluate all nontenured judges at least once every two years.

A final way that the AOC could improve judicial performance is by limiting the placement of nontenured judges to those sections of the superior court in which they have had prior experience or can otherwise demonstrate sufficient expertise. There appears to be no compelling reason why the AOC allows superior court judges to rotate through all sections of the superior court, regardless of their competence. In this increasing age of specialization, many lawyers have limited their practices to specific areas, such as civil, criminal or family law. The AOC should acknowledge that many judges who formerly engaged in specialized practices would be better off confining their courtroom exposure to areas in which they have gained mastery. This is especially true of new and other nontenured judges, who already face a substantial learning curve. Should the AOC nevertheless determine that the best interests of court administration require rotation, it should suspend the placement of judges into unfamiliar settings until they have completed their nontenured period. After reappointment, judges will be in a more relaxed and confident state of mind and thus better prepared to tackle new judicial assignments.

IV. Conclusion

This article sought to describe New Jersey's judicial selection system, identify its major problems and propose viable methods of reform. Although highly acclaimed, New Jersey's judicial selection system contains deficiencies that have led to the appointment and reappointment of less than outstanding judges. The system also relies on an inadequate means of training of new and sometimes inexperienced judges. Corrective steps can be taken to strengthen the system, such as counteracting senatorial courtesy abuse, bolstering the Senate Judiciary Committee and increasing the effectiveness of judicial administration. By doing so, a good system can be made even better.

Endnotes

1. *See, e.g.,* John B. Gates & Charles A. Johnson, *The American Courts* 111 (1991) (stating that New Jersey "appears on every list of innovative or prestigious courts").
2. *See, e.g.,* Carla Vivian Bello & Arthur T. Vanderbilt II, *New Jersey's Judicial Revolution: A Political Miracle* (1997).
3. *See* N.J. Const., art. VI, § VI.
4. *See* Bruce W. Kauffman, *Judicial Selection In Pennsylvania: A Proposal,* 27 Vill. L. Rev. 1164, 1166-68 (1982) (discussing voter apathy and ignorance).
5. *See* Harold J. Laski, *The Technique of Judicial Appointment*, 24 Mich. L. Rev. 529, 531 (1926) (arguing that the public cannot properly assess qualifications for judicial office).
6. Arthur T. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection,* 36 B.U. L. Rev. 1, 36 (1956).
7. *See* Robert J. Martin, *Reinforcing New Jersey's Bench: Power Tools for Remodeling Senatorial Courtesy and Refinishing Judicial Selection and Retention,* 53 Rutgers L.R. 1 (2000).
8. *See, e.g.,* Jeffrey A. Goldberg, *Due Process Denied? Exploring the Constitutionality of the Senate's Failure to Timely Consider and Vote on Federal Judicial Nominees,* 35 Ct. Rev., Summer 1998, at 28.
9. New Jersey's Supreme Court has achieved national fame for creative interpretation of its state constitution to establish such entitlements as greater funding for public education in urban areas (*see, e.g., Abbott v. Burke,* 149 N.J. 195, 224-26, 693 A.2d 417, 456-57) and obligatory low-income housing in suburban municipalities *(see, e.g., N.A.A.C.P. v. Mt. Laurel Township*, 456 A.2d 390 (N.J. 1983)). *See* John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 Rutgers L.J. 701 (1998).
10. The Senate Judiciary Committee passed a formal Resolution calling for Justice Verniero's ouster, but—following a heated debate in the General Assembly—the Assembly Speaker decided not to call for a vote on the matter. *See* Michael Booth, *Clock for Impeachment Process Winds Down, as Collins Waits,* 164 N.J.L.J. 292, 292 (2001).
11. Michael Booth, *Verniero Accusers Have Their Day,* 163 N.J.L.J. 1209, 1209 (2001).
12. Justice Verniero escaped impeachment primarily because key legislators, especially Speaker of the General Assembly Jack Collins, appeared unwilling to hold the justice solely accountable for long-standing institutional failures. *See* Michael Booth, *Verniero Dodges Impeachment,* 164 N.J.L.J. 365, 378 (2001).
13. In New Jersey, the court that handles small civil claims and landlord-tenant cases is named the Superior Court "Law Division Special Civil Part."
14. *See* Thomas R. Curtin, *Judicial Selection: The Times They Are A-Changing,* The Morris Lawyer, May 2000, at 1.
15. *See* Tom Hester & Ron Marsico, *DiFrancesco Whittles "Courtesy Powers,"* Star-Ledger (Newark, N.J.), Jan 12, 1994, at 1.
16. *See, e.g.,* Brian T. Murray, *Controversy Continues Over Judge's Ouster,* Star-Ledger (Newark, N.J.), Nov. 27, 1994, at 8.
17. Michael Booth, *Senate Panel Calls for Adjudication of State Indictments Within Six Months,* 164 N.J.L.J. 1071 (2001).
18. *See* U.S. Senate, *About the Senate Committee System, available at* http://senate/gov./committees.comm.html (last visited Sept. 7, 2001).
19. The Committee hired lawyers from the private sector to assist in the investigation. The leading attorney, Michael Chertoff, has since been appointed to the position of Assistant Attorney General in charge of the Criminal Division of the U.S. Dep't of Justice. *See* Wendy Ruderman, *Senate Confirms Chertoff for Key Justice Position*, The Record (Hackensack, N.J.), May 25, 2001, at A3.
20. Gov. Whitman did so in relation to the appointment of Justice Verniero, who was not favorably rated by the Appointment's Committee. *See* Michael Booth, *Verniero Squeaks Through, But At What Cost?*, 156 N.J.L.J. 529, 532 (1999). In deciding to no longer rely on the State Bar for guidance, Gov. Whitman displayed the same attitude recently expressed by President Bush, who has indicated that he will not rely on the ABA for guidance in filling federal court vacancies. *See* Robert Cohen, *Bush Slate of Judicial Nominees in Doubt,* Star-Ledger (Newark, N.J.), May 29, 2001, at 1, 7.
21. The technical name of this school is the "Orientation Seminar for Newly Appointed Judges." *See* Melissa Tennen, *The Days of Rookie Judges,* 6 N.J Law. 1649 (1997).
22. *See* New Jersey Administrative Office of the Courts, *Orientation for Newly Appointed Judges Agenda* (1999).
23. *See* Interview with David Anderson, Director, Office of Professional and Governmental Services, AOC, in Trenton, N.J. (Mar. 23, 2000) (copy on file with author).
24. *See* Flaschner Judicial Institute, *About The Flaschner Judicial Institute* (2000).
25. *See* Harboridge House, Inc., Report, *Justice Endangered: A Management Study Of The Massachusetts Trial Court* (1995).
26. *See* Supreme Court Committee On Judicial Performance: First Report On The Judicial Perofrmance Program, *reprinted in* 125 N.J.L.J. 1136 (1990).

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Much of the information in this article is derived from a lengthier work previously published in 53 *Rutgers Law Review* 1 (2000).

Court of Appeals Selection: Two Perspectives

The two articles that follow focus on the process for selecting judges in New York for the state's high court. But they take decidedly different views.

Stephen Younger and Frederick Warder, both of whom provide legal counsel to the State Commission on Judicial Nomination, outline the official procedures by which nominees are chosen pursuant to the state constitution and statutory law. The authors commend the current appointment system. They view it as a significant improvement over the election process which was replaced three decades ago. Indeed, despite the democratic virtues of judicial elections, there was widespread concern at the time that Court of Appeals races were degenerating into shameful contests of wealth, partisanship and pandering.

John Caher, a distinguished legal journalist, takes a critical outsider's look. He agrees that the current system has succeeded in insuring qualified appointees and avoiding clearly bad ones. But he finds fault with certain aspects of the process that have generated serious concerns and that create the risk of unfortunate—because inadequately scrutinized—appointments. Most recently, the nomination and confirmation of Judge Victoria Graffeo (whose qualifications and merit Caher does not dispute) raised questions about the limited information and input allowed the public throughout the process, and the minimal examination undertaken by the State Senate in the performance of its confirmation responsibilities.

V.M.B.

Merit-Based Appointment of Court of Appeals Judges in New York

By Stephen P. Younger and Frederick B. Warder

I. Introduction: New York State's Commission on Judicial Nomination

Stephen P. Younger

In 1977, New York State adopted a major change in the process of selecting judges to serve as members of its highest court. Since the mid-1800s, the judiciary in New York State had been almost wholly selected by popular election.[1] Throughout our country's history, the selection of judges through the electoral process has been subject to charges of political favoritism, special interests, personal bias and even corruption. In particular, the 1970s saw several highly publicized elections campaigns for the New York Courts of Appeals.

As a result of such concerns, then-Governor Hugh L. Carey, with the support of the State's Chief Judge, Charles D. Breitel, called a special session of the Legislature to address reform of the judicial selection process. Thereafter, on November 8, 1977, the voters of the state passed a referendum to amend the New York State Constitution to create a Commission on Judicial Nomination. By adding five subdivisions to Section 2 of the Judiciary Article of the Constitution, the voters provided for the creation of an independent body designed to ensure that judges on the Court of Appeals are selected on the basis of merit.

Frederick B. Warder

This effort to promote merit selection has borne fruit. The multi-partisan nature of the Commission and its emphasis on consensus have served the people of the state well in advancing merit-based appointment of Court of Appeals judges.[2]

II. The Creation and Functions of the Commission

Any examination of the Commission on Judicial Nomination must start with article VI, section 2 of the New York State Constitution which the electorate adopted in 1977. Section 2(c) provides:

Merit-Based ***(continued on page 26)***

Fine Results, But a Flawed Process

By John Caher

An Albany attorney and political gadfly once suggested, only half in jest, that every generation we ought to flip-flop the way we select judges—electing those we have been appointing, appointing those we've been electing. His reasoning was that whatever process of judicial selection is used, it always ends up polluted by politics or malaise. And besides, he figured, it's always healthy to rattle the status quo every so often. Recent experience with the New York Court of Appeals selection process suggests he just may have a point.

It is hard to believe that when New Yorkers gave up their right to elect Court of Appeals judges—nay, when they *delegated* their responsibility to an independent commission and the governor, with the promised oversight of the Senate—they bargained for this: A process where the public is entirely excluded, is kept in the dark as to how and why a certain candidate emerges for consideration, knows next to nothing about the nominee's qualifications and is generally denied any meaningful opportunity to comment about a designee—whose elevation is rubber-stamped by a Judiciary Committee that seems more intent on conducting coronations than anything that might approximate a serious confirmation inquiry. Yet that is the system as it exists today. That this process has generally produced outstanding judges and has never yielded a bad judge is quite beside the point. Rather, the point is that a process that has grown sloppy will inevitably, eventually produce bad results, and risks sowing the seeds of its own destruction.

At the beginning, the Court of Appeals was designed to be an elective bench, consisting of four judges elected statewide and four elevated from the popularly elected trial bench. Eventually, the configuration changed, but the elective method of selection remained intact. However, after bitterly contested races for chief judge in 1896, 1913 and 1916 were criticized as unseemly, political leaders reached a general agreement to cross-endorse candidates and avoid true electoral contests.[1] That arrangement broke down in 1972 when State Democratic Committee Chairman Joseph Crangle of Buffalo demanded the lion's share of three open seats. Infuriated, Republican Governor Nelson Rockefeller decided to go for all three. Governor Rockefeller's hand-picked candidates—Dominick Gabrielli, Hugh Jones and Sol Wachtler—were all victorious, and the days of cross-endorsing were numbered.

Momentum for converting the court to an appointive bench began building. The incidents that finally propelled the issue to the forefront were the 1973 and 1974 campaigns of Jacob Fuchsberg, a wealthy Manhattan lawyer with no judicial experience and no bar support. Although Mr. Fuchsberg was defeated in a 1973 crusade, his high-profile media promotion forced Judge Charles Breitel, who would soon become chief judge, to campaign and spend excessively to retain his seat.[2] The following year, Mr. Fuchsberg succeeded in winning a Court of Appeals seat by defeating the first black man to serve on the court, Harold A. Stevens.

"That this process has generally produced outstanding judges and has never yielded a bad judge is quite beside the point. Rather, the point is that a process that has grown sloppy will inevitably, eventually produce bad results, and risks sowing the seeds of its own destruction."

The Fuchsberg races were deemed so injudicious and his career was so checkered (Judge Fuchsberg was the target of a 1977 court-initiated investigation into his financial dealings and was criticized by a special court), that Chief Judge Breitel and Judge Wachtler convinced Governor Hugh Carey to actively promote a merit selection process.[3] With the strong support of Governor Carey and Chief Judge Breitel and a massive public relations campaign, voters in 1977 approved by a 200,000-vote margin a constitutional amendment making the court an appointive bench.[4] To a large degree, the Legislature was left to work out the logistics, and the scheme it concocted was most fervently opposed by Assemblyman Charles D. Henderson of Hornell.

In a May 10, 1978 letter to Governor Carey, Assemblyman Henderson bemoaned that a "plush hundred-thousand dollar campaign by [political media consultant] David Garth . . . persuaded about 20% of the total

Flawed ***(continued on page 29)***

Merit-Based ***(continued from page 24)***

> There shall be a commission on judicial nomination to evaluate the qualifications of candidates for appointment to the court of appeals and to prepare a written report and recommend to the governor those persons who by their character, temperament, professional aptitude and experience are well qualified to hold such judicial office.

These four requirements are designed to ensure that candidates for the Court of Appeals will be highly qualified to hold judicial office.

"The overriding goal of the Commission is to nominate highly qualified candidates for the Court of Appeals through a non-political process."

Article 3-A of the New York State Judiciary Law, which was adopted by the Legislature to implement the constitutional revisions, contains additional requirements for the creation and functions of the Commission, including the mechanics of the selection of commissioners. These procedural provisions are further amplified in the Commission's rules and may be found in 22 N.Y.C.R.R. § 7100.1 *et seq*.

III. The Make-Up of the Commission

Pursuant to article VI, section 2(d) of New York's Constitution, the Commission consists of 12 members, of whom the governor appoints four, the chief judge appoints four, and the speaker of the Assembly, the Assembly minority leader, the Senate majority leader and the Senate minority leader each appoint one. In this fashion, each of the three branches of state government is responsible for appointing one-third of the Commission's membership.

The multi-partisan nature of the Commission is also reflected in other provisions of section 2(d) of the Constitution. For example, of the four gubernatorial appointees to the Commission, no more than two may be enrolled in the same political party. The same is true of the chief judge's four appointees.

Section 2(d) of the Constitution also provides other protections that serve to advance the integrity of the judicial selection process and therefore the independence of the judiciary itself. No Commission member is allowed to hold or have held judicial office or elected public office for which compensation is received during the commissioner's tenure (except that up to two Commission members may be former judges). Moreover, no commissioner may be eligible for appointment to state judicial office during their tenure or for one year thereafter.

According to a Commission brochure, members of the Commission "have traditionally come from both public and private life, from business, professional, and educational as well as legal and political backgrounds, and from across New York State." Moreover, they are not compensated for their service on the Commission.

All of these provisions serve to promote the independence of the Commission members and the multipartisan nature of the Commission itself.

IV. The Goals of the Commission

The overriding goal of the Commission is to nominate highly qualified candidates for the Court of Appeals through a non-political process. This is accomplished in part by selection of commissioners from a broad range of backgrounds, as described in section III above. Moreover, the provisions governing the Commission's work prescribe that the selection of nominees for the Court of Appeals shall be on the basis of merit. For example, the Commission is directed by statute to develop procedures to seek out candidates who may be well qualified for judicial office.[3]

The Commission evaluates the qualifications of the nominees and attempts to screen out nominees who may have potential conflicts or who otherwise do not meet the requisite criteria. Section 63(4) of the Judiciary Law requires that the candidates submit a detailed application, and a financial statement. The Commission selects a group of the applicants to be interviewed and they each must be personally interviewed by a quorum of the Commission membership in order to be considered for nomination.[4] The Commission is empowered to conduct investigations; subpoena witnesses; require information and data from state courts, departments, agencies and other public authorities; and establish written rules of procedure, all with the goal of identifying the best candidates to recommend to the governor.[5]

A major goal of the Commission's voting structure is to reach a consensus on the individuals whom the Commission recommends to the governor. To that end, Judiciary Law § 63(3) requires that eight members (rep-

resenting two-thirds of the Commission) must concur on each nominee recommended to the governor.[6]

In the interest of attracting the best possible nominees, the proceedings and records of the Commission must be kept confidential.[7] A breach of this confidentiality restriction can lead to serious consequences for a Commission member, including the possibility of removal.[8]

V. The Commission's Nomination Process

As per article VI, section 2(e) of the Constitution and Judiciary Law § 63, when a vacancy occurs on the Court of Appeals, the Commission recommends to the governor a list of qualified nominees, from which the governor, with the advice and consent of the Senate, appoints one candidate to sit on the Court. Judiciary Law § 63 provides for the Commission to formulate a list of seven individuals to be sent to the governor for the position of chief judge, and a list of between three and seven names for other vacancies on the Court.[9]

When a vacancy occurs, the Commission publicizes the vacancy broadly, including through newspapers and bar associations.[10] Commission members are encouraged to solicit applications from those who may be well qualified for the vacancy.[11] In addition, other members of New York's legal community suggest candidates for the vacancy. Candidates must submit written applications to the Commission, and must answer a comprehensive questionnaire covering their background, prior government service, legal experience and community activities. Additionally, each candidate must submit a personal statement describing their qualifications to serve on the Court.

The Commission considers all of these materials, in addition to writing samples, judicial decisions, the candidates' reputations in the community and information collected from third parties.[12] The Commission and its staff devote considerable attention to investigating the qualifications of each candidate. According to the Commission's brochure, the Commission "also endeavors to ensure that candidates from diverse geographic, professional, and ethnic backgrounds, as well as of both genders, are among those considered for nomination."

The Commission meets as a body to interview a final round of candidates and vote on which names to send to the governor.[13] The Commission carefully considers the applications it receives in order to select well-qualified candidates for nomination.

The Commission's brochure notes that the Commission's voting procedures "ensure that no candidate will be recommended to the Governor without broad support from a large majority of the Commission, including the favorable votes of at least eight of the twelve Commissioners." The Commission utilizes a balloting process in which each commissioner ranks all of the interviewed candidates in preference order with each commissioner's first choice being the number "1" and so on.[14] In order to be nominated, a candidate must both be among those candidates receiving the lowest number of points when all commissioners' votes are totaled and have received the affirmative votes of at least eight commissioners.[15] As a result of this voting process, each individual whose name is submitted to the governor must have support from a broad consensus of the commissioners. This is a critical aspect of the Commission's work.

"[T]he Commission on Judicial Nomination has succeeded in fulfilling its constitutional mandate by ensuring that judges of the New York Court of Appeals are appointed on the basis of merit."

VI. Conclusion

George Bundy Smith, a current Court of Appeals judge, has written that "the main reason" for changing the selection process in 1977 was to "eliminate the negative aspects of politics" from the selection of Court of Appeals judges.[16] Through the procedures described above, the Commission on Judicial Nomination has succeeded in fulfilling its constitutional mandate by ensuring that judges of the New York Court of Appeals are appointed on the basis of merit.

Endnotes

1. Interestingly, as early as 1777 New York's first constitutional convention conferred the authority to appoint judges in New York on a Council of Appointment. This power was transferred to the governor in 1821 who held the appointment power until 1846. *See* http://www.moderncourts.org/js-merit.htm.
2. Other appointive systems for the selection of judges are found in New York, including for Court of Claims judges and judges of the New York City Criminal and Family Court. Most of New York's judiciary continues to be chosen by election, with various screening committees playing advisory roles.
3. N.Y. Jud. L. § 64(l).
4. Jud Law. § 63(4).
5. Jud Law. §§ 64-65.

6. This requirement is further implemented in the Commission's balloting procedure, which is spelled out in 22 N.Y.C.R.R. § 7100.7(b).
7. Jud. L. § 66. *See also* 22 N.Y.C.R.R. § 7100.1.
8. Jud. L. § 67.
9. There was some debate at the time this provision was adopted over the appropriate number of nominees to be forwarded to the governor. *See* Committee on State Courts of Superior Jurisdiction, *Legislation Implementing the Court Reform Amendments*, 33 Rec. of the Ass'n of the Bar of the City of N.Y. 8, at 525 (1978).
10. 22 N.Y.C.R.R. § 7100.5(a).
11. 22 N.Y.C.R.R. § 7100.5(b).
12. For additional information on the Commission's investigation of candidates and initial screening procedures, *see* 22 N.Y.C.R.R. §§ 7100.6, 7100.7(a).
13. 22 N.Y.C.R.R. §§ 7100.7(b)(2), 7100.8.
14. 22 N.Y.C.R.R. § 7100.7(b)(3).
15. 22 N.Y.C.R.R. § 7100.7(b)(4). To be counted as an "affirmative vote" in the case of a nomination for a chief judge vacancy, for example, the candidate must be listed among the seven candidates receiving the lowest points on a commissioner's ballot, assuming no other nominations have yet been made. *Id*.
16. George B. Smith, *Choosing Judges for a State's Highest Court*, 48 Syracuse L. Rev. 1493, 1498 (1998). *See also* Edward I. Koch, *The Independence of the Judiciary?*, 1 N.Y. City L. Rev. 457, 457 (1996) (favoring "merit-based judicial selection system" because it is "far less political and more openly public"); http://www.moderncourts.org/js-merit.htm ("Merit selection . . . eliminates the role of [campaign contributions] and significantly reduces the role of politics in judicial selection. . . . It provides for selection of highly-qualified judges by representatives of diverse groups of people.").

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***Flawed** (continued from page 25)*

registered voters in this state to surrender their elective franchise."[5] The Assemblyman observed that the occasion marked only the second time in history where a free people had voluntarily surrendered their right to vote. "The first time was in Germany in April of 1933 and I need not remind you of the disastrous results of that experiment," he wrote to the governor.[6]

Further, Assemblyman Henderson complained that no public hearings were held on the bill, which was available for legislators to review only a few days before the vote. "The disgraceful and repugnant method by which the amendments and implementing legislation was presented to the people and the Legislature has never been equaled, at least in this century," the assemblyman wrote.[7] "How, in good conscience, Governor could you, the Chief Judge of the Court of Appeals and the legislative leaders who participated in this ignominious power grab from such an unholy alliance in the rape of the people?"

The process that resulted is as follows: A 12-member Commission on Judicial Nomination is appointed by the governor, chief judge and legislative leaders. Section 63 of the Judiciary Law requires the commission to evaluate the applicants and simultaneously reveal to the governor and the public its "findings relating to the character, temperament, professional aptitude, experience, qualifications and fitness for office of each candidate who is recommended."[8] The governor then must select from the list provided by the Commission (usually seven candidates) and his or her selection is then subject to Senate approval.

In practice, the Commission operates in near total secrecy. It does not disclose who has applied, who it has selected to interview, how many votes a particular candidate received, whether there was a dissent or why a particular applicant made the final seven and another did not. The "findings" that it is required to prepare for the governor and the public amount to one-paragraph, bare-bones biographical snapshots. They do not dissect or even mention the candidate's primary opinions (if he or she is already a judge) or major cases (if he or she is a practicing attorney). They do not discuss the candidate's intelligence, aptitude or temperament. They do not even reveal his or her political affiliation. Although this practice is apparently acceptable to the current overnor, his predecessor was, initially anyhow, quite critical.

Interestingly, just prior to taking office, Governor-elect Mario M. Cuomo in 1982 recommended change that would require the Commission to "provide a more detailed account of its activities, along with a more complete assessment of the strengths and weaknesses of those whose names it submits." In an interview with *New York Times* writer David Margolick, the governor-elect said: "Obviously it needs to be something more than what you get out of a yearbook, which is what we got here . . . They ought to help me make a judgment, not just say that somebody was born in Hamilton County and has been on the bench for 14 years."[9] Nearly two decades later, the governor and the public get little more from the Commission.

"We are more out of the loop now than we ever were," complained Robert L. Schulz, a citizen activist and chairman of an organization called *We the People*. [10] "There ought to be 'findings,' there ought to be much more information about people who approach the Commission, people who the Commission approaches, what the Commission discovered during its investigations . . . but there is nothing."[11]

In a Nov. 2, 2000 article in the *New York Law Journal*, Stuart A. Summit, counsel to the Commission, provided a revealing perspective into how the panel performs, and why it functions as it does.[12] At the outset, he said, the Commission rejected a proposal to numerically rate the nominees, fearing that "would lead to at least conjecture, and probably worse, that the Commission really liked this one better than that one."[13] Ultimately, it adopted a set of procedures designed to preclude the endorsement of a candidate who lacks consensus support.

There are several rounds of voting. In the first round, members rank all of the interviewed candidates in order of preference. The ballots are counted and aggregate scores are computed. In order to survive to the next round, an applicant must be among the top seven choices of at least eight commissioners (statutorily, two-thirds support is required to make the final cut). After the list is whittled through several rounds of voting and it becomes clear that some applicants have more support than others, the Commission generally agrees to limit voting to those at the top of the heap.

Mr. Summit said that as the collective body begins leaning toward particular individuals, the voting patterns of the commissioners begin to shift to reflect newly emerging levels of support. While the voting remains secret, commissioners openly discuss the various contenders. It is during those discussions that matters such as race, gender and geography—in other words, matters other than objective merit—are factored in. Eventually, the list is reduced to seven names for submission to the governor. Mr. Summit said:

> I honestly concede it would be really neat to have some sort of description of what makes people different, and why they have risen to the top . . . It would be really nifty. If I was the czar of the process, or [the commission chairman] was, and we could actually write out what we thought made these the seven best that we had seen, that would be lovely. But it can't be done . . . There is no one view of what makes a good judge of the highest court.[14]

Mr. Summit acknowledged that "it is arguable that the drafters of the statute were hoping for high detail," but said that goal is impractical. "Twelve people vote and who is nominated evolves from a highly complex voting process. You would have to have 12 psychoanalysts, and good supply of sodium pentothal [truth serum] handy, to take each commissioner and diagnose their reasons and findings for who they chose."[15]

In the fall of 2000, when the Commission on Judicial Nomination was called to action following the retirement of Senior Associate Judge Joseph W. Bellacosa, two fringe organizations demanded a full accounting of just how the Commission arrived at its list of seven. As usual, the Commission in its report to the public and governor did not in any sincere sense address the individual "character, temperament, professional aptitude, experience, qualifications and fitness for office" of the candidates. It simply noted generally that all met the criteria, including, of course, Appellate Division Justice Victoria A. Graffeo, who was ultimately nominated by Governor George Pataki and confirmed by the Senate. The "findings" the commission reported on Justice Graffeo were typical:

> Currently serving as an Additional Justice, Appellate Division, Third Department, she was born in 1952, and admitted to the Bar in 1978. Received a B.A. degree with high honors, State University of New York Oneonta, and a J.D. degree from Albany Law School of Union University. Engaged in private practice of law in Albany, 1978-82, and 1984-89. Assistant Counsel, New York State Division of Alcoholism and Alcohol Abuse, 1982-84. Counsel to New York Assembly Minority Leaders, 1984-94. Solicitor General and Counsel to the New York Attorney General, 1995-96. Became a Justice of the Supreme Court, Third Judicial District in 1996. Designated Additional Justice, Appellate Division, Third Department in 1998. Lecturer to professional and community organizations. Active in professional, educational and community affairs.

Mr. Schulz and Elena Ruth Sassower, who runs an organization called the Center for Judicial Accountability, raised a ruckus, but to no avail. In a letter to Mr. Schulz, the governor's counsel, James McGuire, opined that the report from the Commission "contained the statutory finding that the candidates were qualified to hold judicial office as associate judges of the Court of Appeals. There is no requirement in statute that the report set out in detail the factual basis for this finding."[16]

Despite occasional grumblings, the procedures followed by the Commission on Judicial Nomination have been relatively consistent since it was formed following the 1977 election. Not so with the Senate Judiciary Committee. Although the Judiciary Committee has never conducted hearings as probing (and perhaps political) as those that are customary in Washington, once upon a time it did actively solicit and accept public comment and members occasionally asked questions that suggested the senator actually knew something about the nominee. For instance, when Judge George Bundy Smith came before the committee in 1992, he was questioned for a full two hours and asked about constitutional interpretation, search and seizure and other relevant issues.[17] Similarly, a year later Judge Carmen Beauchamp Ciparick was grilled over a decision she had written on abortion rights,[18] and asked to reveal her thoughts on separation of powers and legislative intent.[19]

But the tide seemed to shift following the 1993 confirmation hearing for Judge Howard A. Levine. Judge Levine's hearing was disrupted when Ms. Sassower and her mother, Doris L. Sassower, were escorted from the floor by the sergeant-at-arms and six assistants. The Sassowers, who have for years alleged widespread corruption within the judiciary, were removed after Doris Sassower exceeded the ten-minute time limit for testimony.[20] Now, Judiciary Committee confirmation sessions are held in a relatively small meeting room rather than the auditorium where they were previously conducted, very little advance notice is provided, testimony is by invitation only—and only friends of the nominee are invited to testify.

When Justice Graffeo came before the committee in November 2000, Mr. Schulz and Elena Sassower both asked to testify. Both were denied. Instead, four admirers spoke, predictably bestowing praise and adulation.

The day before the hearing, two minority members of the Committee, Senators Richard A. Dollinger, D-Rochester, and Neil Breslin, D-Albany, called for more open hearings. Senator Dollinger said:

> It seems to me that there is nothing wrong with giving people, even people who may have an ax to grind [an opportunity to testify] . . . We are big enough boys and girls to deal with someone who clearly has an unrelated complaint. This is the only chance the public gets. I don't think it is unfair for people to be given a chance before the Judiciary Committee to air their concerns.[21]

Senator Breslin made similar remarks.

> If there are zealots who want to yell about the courts, the confirmation of a judge is not the proper forum . . . But if you have some information, you ought to be presented with a forum to present it . . . We should allow public testimony on the nominations and not close it off.[22]

Yet, at the hearing neither Senator Dollinger nor Senator Breslin said a thing about open hearings and neither raised a finger when Mr. Schulz and Ms. Sassower pleaded for an opportunity to testify. If either Mr. Schulz or Ms. Sassower had anything to offer other than zealotry, we will never know. During the hearing, Justice Graffeo was asked a grand total of one question, and an incredibly generic one at that: Senator Dollinger inquired as to what the judiciary could do, in light of the presidential electoral fiasco in Florida, to restore and maintain public confidence. No one asked Justice Graffeo about her qualifications, her decisions on the Third Department bench, her juridical philosophy or even why she wanted to be a Court of Appeals judge. The nomination was promptly forwarded to the full Senate where, following more accolades, Justice Graffeo was unanimously confirmed that same afternoon.

Defenders of the process deny that it has devolved to an exercise in rubber-stamping,[23] and persistently claim the proof is in the pudding of the results. They note that by the time a nominee arrives before the full Senate, he or she has undergone intense scrutiny by the Commission and the governor's office—including a review of opinions, interviews with adversaries, an accounting of personal finances and taxes, and so forth. The fact that there has never been a scandal arising from an appointed Court of Appeals judge's official performance, and the consistent quality of the bench, suggests that the process has yielded positive results. But the increasing exclusion of the public from this process can only erode confidence and jeopardize a system which, after all, is allowed to exist only through the good graces of the very people who are seemingly excluded—the voting public.

Endnotes

1. *See* Francis Bergan, *The History of the New York Court of Appeals, 1847-1932* at 247 (1985).
2. *See* John M. Caher, *King of the Mountain: The Rise, Fall, and Redemption of Chief Judge Sol Wachtler,* 75 (1998).
3. *Id.* at 78.
4. *See* Luke Bierman, *Institutional Identity and the Limits of Institutional Reform: The New York Court of Appeals in the Judicial Process*, unpublished doctoral dissertation, 1994, at 87.
5. *See* Charles D. Henderson, letter of May 10, 1978 to Governor Carey re: Senate Intro 10014, at 1.
6. *Id.*
7. *Id.* at 3.
8. Jud. L. § 63(3).
9. *See* David Margolick, *Cuomo Requests Greater Leeway to Select Judges*, N.Y. Times, Dec. 30, 1982, at B1.
10. *See* John Caher, *Semi-Secret Court of Appeals Nominations Draw Criticisms*, N.Y.L.J., Nov. 2, 2000, at 1.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *See* Jay Gallagher, *Picking Judges Can Be a Tricky Business*, Albany Times Union, Dec. 4, 2000, at A9.
17. *See* Gary Spencer, *Smith Confirmed as Court of Appeals Judge*, N.Y.L.J., Sept. 25, 1992, at 1.
18. *Hope v. Perales,* 150 Misc. 2d 985.
19. *See* Gary Spencer, *Ciparick Faces Sharp Questions from Senators*, N.Y.L.J., Dec. 16, 1993, at 1.
20. *See* Gary Spencer, *Levine Wins Confirmation to Top Court*, N.Y.L.J., Sept. 8, 1993, at 1.
21. *See* John Caher, *Support Grows for Open Confirmation Hearings*, N.Y.L.J., Nov. 29, 2000, at 1.
22. *Id.*
23. *See* Gary Spencer, *Polite, Friendly Senators Likely to Confirm Smith Swiftly*, N.Y.L.J., Sept. 21, 1992, at 1.

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Voting in Judicial Elections

By Lawrence Baum

Judicial elections are widely discussed in the legal community. These discussions are often speculative, in part because there has been only limited research on the actual workings of judicial elections. But the research that does exist tells us something about those workings. This article, based on that research, examines judicial elections from the voter's perspective.[1]

Because of this focus, I will consider only judicial elections that have multiple candidates.[2] It is common for a single candidate to run unopposed.[3] Indeed, in some states contested elections are the exception, especially when sitting judges run for reelection. This state of affairs has several sources, including norms against opposing sitting judges, the limited attraction of some trial judgeships and explicit or tacit agreements between the political parties. This is a central reality of judicial elections that should not be ignored.

Putting Judicial Elections in Context

The most important fact about judicial elections is that they are not unique. Rather, most contests for judgeships fall into a category that includes the great majority of elections in the United States: "low-information" contests.[4] This category is best defined in relation to those electoral contests that fall outside it. In a presidential election, most voters receive considerable information about the candidates, and their task is to sort through that information to make a choice. In contests for U.S. senator, for governor, and to a lesser extent for the House, at least a substantial proportion of potential voters learn some relevant information.[5]

For most other offices most of the time, the great majority of potential voters know little about electoral contests or the candidates in them. Indeed, voters are likely to learn about the existence of some contests and the identities of the candidates in them only when they get to the polls.

Voters respond to this situation in various ways, but the key to their responses is the value of any information when information is scarce. Voters' participation in a specific contest and their choice if they do participate depend heavily on whether they recall or discern anything about the candidates that provides a basis for picking one over the other. The available evidence suggests that the decision to vote and the choice of a particular candidate tend to be simultaneous, based primarily on the availability and use of relevant information.[6] (It should be noted as well that voters' judgments in low-information contests are volatile, subject to influence by attributes of the ballot such as the order in which candidates' names are listed.)[7]

The information that moves voters to participate in a contest and to select one of the candidates must be perceived as relevant. Party affiliations matter more than the candidates' cities of residence.[8] Whatever its relevance, of course, information must be available to voters. Because most voters in low-information contests bring little knowledge of the candidates with them to the polls, information that can be discerned from the ballot itself is the most consequential. Characteristics that voters infer from the candidates' names may make a good deal of difference. For that matter, name recognition in itself is important because it provides voters with a degree of comfort with a candidate.

"The widespread perception that voters know little about judicial election contests and the candidates in them is mostly accurate."

Voting in Judicial Elections

What we know about low-information contests provides a perspective with which to examine voting behavior in judicial elections. Scholarship on judicial elections supports several generalizations:

1. The widespread perception that voters know little about judicial election contests and the candidates in them is mostly accurate. The typical voter in the typical contest for a judgeship comes to the polling place with little or no information about that contest. The surveys which report that few voters remember the names of the judicial candidates they voted for[9] are somewhat misleading, because it is more difficult to recall names than to recognize them. But studies consistently show that voters' stock of information about the candidates is quite limited in the typical judicial contest.[10] Indeed, asked about their choices in contests for a state supreme court seat a few weeks later, a good many voters forget that they actually participated in those contests. Surveys of presidential elections overstate the participation rate, because some respondents recall inaccurately that they voted; in judicial contests, just the opposite happens.[11]

It would be unfair to blame the voters for their lack of knowledge. Low-scale campaigns, limited media coverage and constraints on what judicial candidates can say combine to make the voter's task very difficult. This difficulty is compounded by the large number of choices that voters typically are called upon to make in a given election.[12] But even citizens who make a concerted effort to learn about a particular judicial contest are likely to gain only a limited stock of information.

2. The candidates' political party affiliations are the most important piece of information for voters in judicial contests. Most voters identify with one party or the other to at least some degree, and virtually every voter has images of the two parties. If voters know the competing candidates' party affiliations, they have information that most consider quite meaningful. Not only can voters bring their attitudes toward the parties to bear, they can also infer the candidates' stands on some legal issues from party affiliations.[13]

   In turn, this means that there is a fundamental difference between partisan and nonpartisan judicial elections. Those engaged in the historical debates over the use of one system or the other were not wasting their energies. In nonpartisan elections, other sources must substitute for the ballot if voters are to learn the candidates' party affiliations. Candidates and party organizations often try to provide voters with that information, and sample ballots distributed by the parties can have considerable influence.[14] But this is a hit-or-miss proposition.

   Where the ballot does provide the candidates' party affiliations, even the least knowledgeable voter obtains that information at the polls. The effects are predictable: More people actually vote for judicial candidates[15] and their voting follows party lines to a much greater degree. In states with partisan elections, there is a much stronger relationship between partisan voting patterns for the highest offices and for the supreme court than in states with nonpartisan elections.[16] Further, the party cue gives some voters a reason to vote against the incumbent, and this is one source of the relatively high rate of defeat for sitting judges in partisan elections.[17]

3. The candidates' names serve as another important source of information. I have noted that voters may react to names on the basis of gender. Voters also react to the apparent ethnicity of the candidates, and they may even infer candidates' party affiliations from their names.[18]

   Pure name recognition operates in judicial contests just as it does in other low-information contests. Candidates who have recognizable names can thereby gain a considerable advantage over those who do not. It matters little whether name recognition is "real," linked specifically to the candidate or "false," in that the candidate has a name that sounds familiar or pleasing. One reason for the success of judicial candidates from well-known families is simply that their names are familiar to most voters.

   On the whole, name recognition works to the advantage of sitting judges. Past elections and service on the bench make incumbents' names familiar to some portion of the electorate. More often than not, incumbents have a funding advantage over their opponents that enhances their advantage in familiarity. But there are exceptions. Some challengers are well known. Others benefit from false name recognition. In Washington State during the 1990s, one supreme court justice was defeated and another barely survived a challenge when they were opposed by candidates with familiar and pleasing names, even though those opponents did little campaigning.[19]

   Political party officials and others who help to select judicial candidates are well aware of the importance of names. For that matter, candidates occasionally change their names with electoral advantage in mind. A Chicago candidate in 1998 added "Fitzgerald" as a middle name to enhance her appeal to Irish voters,[20] and in 1991 two candidates who were challenging an Indiana trial judge both tried to adopt the judge's own name.[21]

Higher-Visibility Elections

The pattern of judicial election contests has changed somewhat in the past two decades. The primary source of change is increased levels of funding for judicial campaigns,[22] which enable candidates to communicate their messages more effectively and which attract media attention to their campaigns.

The extent of this change should not be exaggerated. In many states the growth in campaign funding has been limited.[23] Moreover, the change has been concentrated at the supreme court level; in most states, the traditional pattern of electoral contests below that level has been modified only to limited degrees. The absence of dramatic change in New York State judicial elections results largely from the fact that judges on the Court of Appeals are not elected.[24]

Low-information contests, then, remain the rule. But increased funding means that even in such contests, some

candidates are better able to achieve name recognition and to get some kind of message out to some voters. And the small minority of contests that depart from the low-information model has become somewhat larger.[25] In states such as Texas, candidates in some contests have been very well funded.[26] As a result, they have communicated their messages far more effectively than the typical candidate for offices below the top levels.

These developments, which seemed to accelerate in the 2000 elections,[27] have attracted considerable attention and concern. Commentators worry, among other things, about the "buying" of judgeships and about the creation of obligations by judges to the interests that fund their campaigns.[28] These are serious issues, but my concern is the impact of medium- or high-information judicial contests on the voters—with the caveat that we have relatively little systematic evidence about voting behavior in these exceptional contests.

"Claims that a judge has been soft on crime (especially in reviews of death sentences) or has misbehaved have the best chance to resonate with voters."

Even lavishly funded judicial campaigns may have some difficulty in getting through to the voters. Where judges are elected at the same time as the president or the governor, voters' attention is likely to be directed more at those high-level offices than at judicial contests. Still, when candidates or supportive interest groups spend several million dollars on a supreme court campaign, they are likely to attract considerable attention from media organizations and—directly and through the media—from voters.

High levels of spending on a campaign usually reflect the interest of lawyers and interest groups in a court's decisions on economic issues, especially in tort law.[29] Some campaigns have focused primarily on those issues, but that choice of a theme has two drawbacks: Most voters do not feel strongly about these economic issues, and those who do hold strong feelings are divided in their opinions. For this reason, lavishly funded campaigns frequently emphasize issues that are of greater salience and on which opinion is one-sided: criminal justice and judicial conduct. Claims that a judge has been soft on crime (especially in reviews of death sentences) or has misbehaved have the best chance to resonate with voters.

The potential effectiveness of this message is reflected in the defeats of some incumbent judges who are subject to well-funded opposition. The prototype was the campaign to defeat three members of the California Supreme Court in 1986,[30] and the success of that campaign has been repeated in several other states.[31] Notably, the California defeats and several of those that followed came in retention elections, in which groups can attack an incumbent's record without the complications created by the presence of another candidate. But this phenomenon is hardly limited to retention elections. In Texas, for instance, Republican candidates for the Court of Criminal Appeals and other courts have used the crime issue effectively to win voter support (though the growing Republicanism of Texas voters has assisted them considerably in the effort).[32]

The contest for Ohio chief justice in 1986 featured heavy spending on both sides, fueled by tort issues. The Republican party and conservative groups emphasized allegations of misbehavior by Chief Justice Frank Celebrezze rather than tort matters; both sides spent a great deal of money by the standards of that era.[33] A substantial proportion of voters were aware of the issues raised by the two sides, and the choices of many voters seemed to be rooted in those issues.[34] The same likely was true of recent large-scale campaigns for state supreme courts around the country.[35]

Whether this development is good, bad or a mix of the two certainly can be debated. But it underlines a general point: If voters' choices in judicial contests typically are ill-informed, the primary reason is not some deficiency in the voters, but rather the dearth of information available to voters. When the scale of a campaign gives voters a better opportunity to learn what a contest is about, voters learn more.

Some Implications

The long-standing debate over the desirability of judicial elections has proceeded with too little attention to the actual workings of election and other systems for the selection of judges. Too often, the combatants argue on the basis of conjecture and anecdote. The debate needs to be better informed on the basis of what we currently know and what we can learn about the selection process.

Whatever the merits of the two sides in the debate, it is clear that judicial elections will not disappear soon. Indeed, the movement away from elections and toward the Missouri Plan has nearly halted. That being the case, those who care about the selection of judges need to think about how to improve their functioning. One means of improvement is providing voters with more extensive information on which to base their choices. This is not an easy task, for the reasons that I have described. Moreover, people disagree about the relevance of some kinds of information, such as the candidates' party affiliations. But most voters recognize that they have too little information about judicial candidates,[36] and one useful path for reformers to take is finding means to provide voters with more information.

Endnotes

1. The discussion of elections in the article draws some of its information from a series of surveys over the years in connection with elections to the Ohio Supreme Court. The findings from these surveys are reported most comprehensively in Lawrence Baum, "Electing Judges," in *Contemplating Courts*, 18-43 (Lee Epstein ed. 1995).
2. Also excluded (except for a brief discussion of campaigns to defeat incumbents) are the retention elections used by Missouri Plan states and California, in which voters cast ballots for or against the incumbent judge and the incumbent generally requires a simple majority to retain office. Patterns of outcomes in retention elections are described in Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 Judicature 79 (1999).
3. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 Am. Pol. Sci. Rev. 315, 317 (2001).
4. John E. Mueller, *Choosing Among 133 Candidates*, 34 Pub. Opinion Q. 395 (1970); Masao Nakanishi *et al.*, *Voting for a Political Candidate Under Conditions of Minimal Information*, 1 J. Consumer Res. 36 (1974); Gary C. Byrne & J. Kristian Pueschel, *But Who Should I Vote for For County Coroner?*, 36 J. Pol. 778 (1974).
5. Barbara Hinckley *et al.*, *Information and the Vote: A Comparative Election Study*, 2 Am. Pol. Q. 131 (1974); Stephen D. Shaffer, *Voting in Four Elective Offices: A Comparative Analysis*, 10 Am. Pol. Q. 5 (1982).
6. David Klein & Lawrence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, Political Research Quarterly, forthcoming.
7. *See, e.g.*, Joanne M. Miller & Jon A. Krosnick, *The Impact of Candidate Name Order on Election Outcomes*, 62 Pub. Opinion Q. 291 (1998); Stephen M. Nichols & Gregory A. Strizek, *Electronic Voting Machines and Ballot Roll-Off*, 23 Am. Pol. Q. 300 (1995).
8. Klein & Baum, *supra* note 6.
9. An old example from New York State is reported in *How Much Do Voters Know or Care About Judicial Candidates?*, 38 Judicature 141 (1955).
10. Charles A. Johnson *et al.*, *The Salience of Judicial Candidates and Elections*, 59 Soc. Sci. Q. 371 (1978); Anthony Champagne & Greg Thielemann, *Awareness of Trial Court Judges*, 74 Judicature 271 (1991); Baum, "Electing Judges," *supra* note 1.
11. David Adamany & Mack C. Shelley II, *Encore! The Forgetful Voter*, 44 Pub. Opinion Q. 234 (1980).
12. The smaller number of contests on the ballot in rural areas, combined with the greater number of voters who have personal knowledge of the candidates, seems to produce higher levels of voter information. *See* Paul Raymond & Peter Paluch, *The American Voter in a Local, Judicial Election*, paper presented at the Midwest Political Science Association Annual Meeting, Chicago (1994).
13. *See* Peverill Squire & Eric R.A.N. Smith, *The Effect of Partisan Information on Voters in Nonpartisan Elections*, 50 J. Pol. 169 (1988).
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22. *See* Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J. Law & Pol. 57 (1985); James Eisenstein, *Financing Pennsylvania's Supreme Court Candidates*, 84 Judicature 10 (2000); Kyle Cheek and Anthony Champagne, *Money in Texas Supreme Court Elections 1980-1998*, 84 Judicature 20 (2000).
23. In North Carolina, for instance, *see* Robert Moog, *Campaign Financing for North Carolina's Appellate Courts*, 76 Judicature 68 (1992); Theodore S. Arrington, *When Money Doesn't Matter: Campaign Spending for Minor Statewide Judicial and Executive Offices in North Carolina*, 18 Just. Sys. J. 257 (1996).
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28. *See*, e.g., Schotland, *supra* note 22; Patrick M. McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns* (1990).
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31. *See, e.g.*, Traciel V. Reid, *The Politicization of Judicial Retention Elections: The Defeat of Justices Lanphier and White*, 1999 Res. Jud. Selection 41 (2000).
32. L. Douglas Kiel *et al.*, *Two-Party Competition and Trial Court Elections in Texas*, 77 Judicature 290 (1994). *See Judge Not*, Tex. Observer, Nov. 22, 1996, at 32.
33. *See* G. Alan Tarr & Mary Cornelia Aldis Porter, *State Supreme Courts in State and Nation*, ch. 4 (1988).
34. Lawrence Baum, *Voters' Information in Judicial Elections: The 1986 Contests for the Ohio Supreme Court*, 77 Ky. L. J. 645 (1988-89); Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 Judicature 300 (1992).
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Judicial Performance Evaluations and Judicial Elections: Informing the Voter and Protecting the Judiciary

By David Brody and Nicholas Lovrich, Jr.

David Brody

"The quality of our justice in America patently hinges, in large measure, on the quality of our judges."[1] While this statement is undoubtedly true, it raises the difficult question of how American judges should be selected. Should our state and local judges be selected by the people through popular elections, or should they be put into office by elected officials? What is the proper basis for selection, however one is recruited into judicial office? Such questions have been debated since the founding of the nation, and active discussion of the matter of judicial recruitment continues to this very day.

At the founding of the nation, American state and local judges were appointed by either the governors or by the state legislatures in the several states. This practice continued until the era of Jacksonian Democracy in the 1830s when populist sentiments moved many states to adopt popular election as the means of judicial selection. This overall trend toward elected judiciaries continued up until the mid-20th century, at which point some of the liabilities associated with elective judiciaries became evident and some states adopted merit selection systems for the recruitment of their judges. Even with all of this change, however, 31 states still use popular elections (either partisan or nonpartisan)[2] to select at least a portion of their judiciary.

Sadly, voters in most judicial elections (both popular and retention elections) are provided very little information about judicial candidates.[3] The lack of relevant information concerning candidates for judicial posts occasions a low voter turnout in judicial elections, particularly in "retain or do not retain" elections associated with merit selection systems.[4] In an effort to address the problem of low voter engagement, several states employing merit selection with retention elections have implemented *judicial performance evaluation* (JPE) programs. These programs are largely intended to provide information to the electorate about the character of the service rendered by the judges standing for retention.[5] Unfortunately, to date not a single state whose judiciary is selected through partisan or nonpartisan elections undertakes judicial performance evaluation to inform the public about the quality of work conducted by state and local judges. This article discusses why the adoption of JPE programs in states with elective judiciaries would benefit society in general, improve the quality of the judiciary, enhance public confidence in the courts and provide instructive feedback to individual judges running for reelection.

Nicholas Lovrich, Jr.

Judicial Elections

Judicial selection methods are designed to accommodate the difficult tradeoff between democratic accountability and judicial independence. Should judges be held accountable to the electorate in democratic societies—and if so, to what extent should this be provided for in the method of selection? While some level of accountability to the public is indeed desirable, it is important that the independence of the judiciary be maintained and that the power given to citizens to hold judges accountable be used knowingly and intelligently.

Research has consistently shown, however, that the public tends to command very little knowledge about candidates in judicial elections.[6] Consider the following observations:

- In the 1979 general election only 14 percent of voters could identify a single judicial candidate on the ballot;[7]
- In the 1998 Washington State primary and general elections only one out of four voters believed they had enough information about the judicial candidates;[8]
- In the 1998 Washington State primary and general elections less than half of voters were able to distinguish between candidates who appeared on the ballot and bogus candidates;[9]
- In the 1980 retention elections in Wyoming almost 25 percent of voters did not know why they voted as they did.[10]

This paucity of relevant information significantly affects judicial elections in a number of ways. Individuals who lack knowledge about judicial candidates are much less likely to vote in judicial elections.[11] The end result of this situation is that those judicial races that are contested are often decided by a small minority of the electorate, many of whom do not have a rational basis for their vote.[12] The less informed voters are, the more susceptible they are to deceptive and/or negative campaign tactics.[13] This susceptibility is especially true when one or both candidates in a race expend a great deal of money on vacuous media images, negative advertising or misleading campaign literature.[14]

Just as importantly, voters who do cast votes, but who do not possess much relevant information upon which to base their vote, often base their choices on inappropriate cues such as a candidate's name, ethnicity, gender or position on the ballot.[15] So, while on the surface popular elections would seem to further the democratic ideal, it has been noted that, "democracy is a poor name for a system in which voters routinely vote for people they know nothing about."[16]

Adding to the problems associated with judicial elections is the place the judiciary holds in the American system of government. The judiciary was designed by the Founding Fathers partly to protect individuals from government oppression and from improper majoritarian demands. Consequently, on numerous occasions, judges have the duty to render decisions contrary to the will of the people. Such decisions can be used by politicians, challengers or special interest groups to mount an effective electoral challenge to a sitting judge. That is exactly what has been happening increasingly over the last two decades.

Over the last 20 years, judicial elections have become notably "nastier and noisier."[17] A number of challengers have focused on sitting judges' isolated decisions, employed distorted facts and exploited the anti-crime sentiment felt by the majority of citizens to mischaracterize an incumbent's performance on the bench.[18] Similarly disconcerting, special interest groups have spent millions of dollars attacking incumbent judges who do not adhere to their agenda.[19] Judges often must withstand criticism from prominent politicians regarding their rulings in individual cases. Whether it be New York Governor George Pataki labeling specific decisions as "Junk Justice,"[20] or Tennessee Governor Don Sunquist asking rhetorically, "[s]hould a judge look over his shoulder [when making decisions] about whether they're going to be thrown out of office? I hope so,"[21] such actions injure judicial independence. These tactics are all the more troubling due to ethical restrictions prohibiting judges from discussing specific cases or issues as directed by judicial canons.[22]

The Use of Bar Polls

In an effort to provide the public with some helpful information, the vast majority of states utilizing judicial elections have their state and local bar associations conduct polls of practicing attorneys regarding judicial candidates. The aim of such polls is to provide voters with information they can use in selecting candidates. In reality, however, bar polls have rather limited utility—and frequently beget rather unintended results. The reasons underlying these limitations are threefold.

First, while a variety of methods and candidate assessment criteria are used in bar polls across the nation, the results they produce and the information they provide tend to be rather unreliable.[23] While all attorneys in a jurisdiction are generally sent a questionnaire asking them to assess judicial candidates, only a fraction of the attorneys surveyed actually complete and return the survey questionnaire.[24] Because the respondents who do take part are "self-selecting," the results of the survey are likely to be seriously skewed by what is referred to as *nonresponse bias*.[25] Individuals who respond often have a specific interest in the subject matter of the survey.[26] "This means that mail surveys with low response rates almost invariably will be biased significantly in ways that are related directly to the purpose of the research."[27] This aspect of bar polls can prove especially troubling with respect to attorney polls conducted in locales where high profile events or a notorious jurist may stimulate a specific, limited segment of the bar to unite against an individual judge or a group of like-minded judges.[28] As a result, judges or candidates who receive poor ratings complain about the unreliability of the bar polls, the limited number of opinions included and attributes considered and the fact that the attorneys polled don't represent the attitudes of the electorate.[29]

"[V]oters who do cast votes, but who do not possess much relevant information upon which to base their vote, often base their choices on inappropriate cues such as a candidate's name, ethnicity, gender or position on the ballot."

A second problem with bar polls is that only a small percentage of voters consider the content of bar polls in deciding how to vote.[30] The reason behind this is largely due to the general disdain with which attorneys are held by much of society.[31] Since 1991, lawyers have been rated as having high ethical standards by less than 20 percent of the public, with the 2000 poll showing an ethics rating of 17 percent.[32] It is not surprising, then, to learn that voters place little value upon the information provided by bar associations. In fact, it is routinely put forth among lawyers that scoring well in the bar poll can be a "kiss of death" and have a negative effect on judicial elections as anti-attorney voters deliberately vote contrary to bar poll results.[33]

A third negative effect bar polls have on judicial elections involves the manner in which the polls are typically designed and the way that results tend to be used. A number of larger jurisdictions present the results of the bar poll as a ranking among the various judges in a jurisdiction. Using this ranking, which consists entirely of attorney opinions regarding judges, and which may or may not actually relate to how well a judge is performing on the bench, potential challengers choose the seats belonging to the lowest-ranking judges as vulnerable candidates to mount an election challenge. Accordingly, bar polls conducted in this way put more weight on the popularity and competitive aspect of courthouse politics and less on the quality of judicial performance.

Judicial Performance Evaluation Programs

While bar polls have had less of a positive effect providing information to voters in judicial elections than one would wish, other means of informing voters have been attempted with some success. It has been shown in a number of states that state-operated judicial performance evaluation (JPE) programs have the capability of providing voters with trustworthy information obtained from both lawyers and non-lawyers who have observed a judge perform his or her duties on the bench. The first such state-sponsored judicial performance evaluation program was established in Alaska in 1975. In 1985, the American Bar Association developed a set of proposed guidelines for the implementation and operation of such programs.[34] The major considerations involved with such programs are the following: (1) Who will develop and administer the program? (2) On what criteria will evaluations be based? (3) What will be the sources of information? and (4) How will the information be analyzed and how will the results of the evaluation be disseminated?

In order to build public confidence in the program and trust in the results produced by it, experience dictates that it is important to include lay citizens in the process to the greatest degree possible.[35] The JPE program should be developed and operated by an *independent* commission consisting of appointed attorneys, judges and prominent lay citizens held in high regard. Clear criteria for evaluating judges should be developed as well.[36] The major categories of assessment to be considered are *professional integrity*, *legal ability*, *communication skills*, *judicial temperament and demeanor* and *administrative performance*.

Among the most critical aspects of any JPE process are how the information concerning judicial performance is to be obtained, and whether said information can be viewed as reliable.[37] In order to avoid the types of problems associated with bar polls noted above, evaluative information should be obtained from multiple sources. The relevant sources of informed impressions of judicial performance are *jurors, witnesses* and *litigants* who have appeared in a judge's courtroom, as well as *attorneys* who actually appeared before a judge during the evaluation period in question. Information can be gathered from surveys that would be designed by and returned directly to an independent research unit (such as a university). Results from the evaluation should be reviewed with the judge being evaluated for his or her input, as well as for educational purposes with respect to the judge's future performance. Results of the JPE process should then be presented to the public in a clear and parsimonious form such as a voter's pamphlet, in a press release for the media and for Internet posting.

Programs such as this are not without their critics. The primary concern of JPE opponents has been the release to the public of information obtained in the evaluation process. Opponents of JPE programs argue that providing information to the public will inhibit judicial independence and place inappropriate pressure on judges.[38] Additionally, some opponents charge that if the performance assessment is administered improperly or with bad intentions, evaluation programs can be used as a sword to attack excellent judges.[39] To date, in retention election states where JPE is utilized, these concerns have not come to fruition.[40] Despite the claims of the critics, social scientific research on the effect of JPE programs has been uniformly favorable of them. Several studies have shown that judges who have been subject to evaluation have not felt any loss of judicial independence.[41] Moreover, research in this area indicates that nearly all of the judges studied believe that JPE programs are beneficial and they approve of their use.[42]

It is our belief that the JPE programs in states with elected judges would provide even greater benefits than have been obtained in retention states. The information provided to the public is likely to increase voter knowledge about judicial races, and therefore increase voter participation.[43] Furthermore, because such programs feature direct citizen oversight and input, and because the evaluations themselves focus largely on lay citizen ratings, the reported results will likely be given higher credence than is the case with bar polls. Sitting judges benefit from JPE because the public is provided with reliable information based on their actual performance on the bench rather than relying on specific issue-based or misleading information provided by an opponent's or interest group's negative campaign. This objective information will help reduce the need for spending large sums of money on judicial campaigns and will actually increase judicial independence. Moreover, judges are provided with feedback on their performance that can help them become better judges.

Specific political concerns exist about using JPE programs in states with partisan and nonpartisan judicial elections. First, does such a program give a sitting judge an advantage over a challenger? While judges receiving favorable evaluations will certainly have an advantage over an election opponent, judges who receive poor evaluations will not. As the goal is to provide increased information to the voter, any benefits or hindrances in actual elections is up to the individual voter in deciding how to vote. A second concern is that potential challengers will use the results of the evaluation in deciding which sitting judge to challenge. This problem can be overcome by releasing the evaluation results to the public after the deadline for filing one's candidacy. For instance, in Washington State the deadline for filing is July 31, while the primary election is conducted in September. By releasing the results in mid-August, judges would be protected from "poachers" and the public would still receive the information for its use in the primary and general elections.

Conclusion

Public trust in government, including its judiciary, has been in serious decline since Vietnam and Watergate. The

"reinventing government" revolution that swept through state and local government in the 1990s and found expression in the Clinton administration's National Productivity Review reflected the widespread realization among executive branch officials across the country that purposive reform was required to restore citizen trust in government. The goal has been to convince the citizenry that effective efforts are under way to address the most serious shortcomings of government, and that people of good intention are doing all they can to improve the level of service being provided to taxpayers. In many ways the judicial performance evaluation process advocated by the American Bar Association in 1985 reflects this same desire to address a fundamental problem in American democracy—namely, the obvious loss of trust and continuing disaffection from civic engagement demonstrated by Americans. It is our belief that this JPE reform measure is indeed one that could make a difference for the better in an important area of public life—how we decide who our judges will be.

Endnotes

1. Special Commission on Evaluation of Judicial Performance, *Am. Bar Ass'n Guidelines for the Evaluation of Judicial Performance*, at i (1985).
2. In this article, partisan and nonpartisan elections, which are closely related, are treated similarly. *See* Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?* 23 Fla. St. U. L. Rev. 1, 24 (1995).
3. Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 Judicature 300 (Apr./May 1992).
4. Sara Mathias, *Electing Justice: A Handbook of Judicial Election Reforms* (1990).
5. David C. Brody, *Judicial Performance Evaluations by State Governments: Informing the Public While Avoiding the Pitfalls,* 21 Just. Sys. J. 333 (1999).
6. Charles H. Sheldon & Nicholas P. Lovrich Jr., *Voter Knowledge, Behavior and Attitudes in Primary and General Judicial Elections*, 82 Judicature 216 (March/Apr. 1999).
7. Mathias, *supra* note 4.
8. Sheldon, *supra* note 6.
9. *Id.*
10. Kenyon Griffin & Kenyon N. Horan, *Patterns of Voting Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming*, 67 Judicature 68 (1983).
11. Nicholas P. Lovrich *et al.*, *Citizen Knowledge and Voting in Judicial Elections,* 73 Judicature 28 (June/July 1989); Webster, *supra* note 2; Hojnacki, *supra* note 3.
12. Webster, *supra* note 2.
13. Mathias, *supra* note 4; Robert L. Brown, *From Whence Cometh our State Appellate Judges: Popular Election Versus the Missouri Plan*, 20 U. Ark. Little Rock L.J. 313 (1998).
14. Brown, *supra* note 13; Webster, *supra* note 2.
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16. Joel Achenbach, *Why Reporters Love Elections*, 49 U. Miami L. Rev. 155, 158 (1994).
17. Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?* 41 S. Tex. L. Rev. 1197, 1224 (2000).
18. Webster, *supra* note 2; Mathias, *supra* note 4.
19. F. Andrew Hanssen, *The Political Economy of Judicial Selection: Theory and Evidence,* 9 Kan. J.L. & Pub. Pol'y 413 (Spring 2000); *Webster,* supra *note 2; Mathias,* supra *note 4.*
20. Greg B. Smith, *Megan's Law Gets Curbed by Judge*, N.Y. Daily News, Sept. 25, 1996, at 5.
21. Wade, *White's Defeat Poses a Legal Dilemma: How is a Replacement Justice Picked?*, Memphis Com. Appeal, Aug. 3, 1996, at A1.
22. Stephen B. Bright, *Political Attacks on the Judiciary*, 80 Judicature 165 (Jan./Feb. 1997).
23. Mathias, *supra* note 4.
24. Mathias, *supra* note 4.
25. Floyd J. Fowler, *Survey Research Methods* (1984).
26. John C. Whitehead, *Environmental Interest Group Behavior and Self-selection Bias in Contingent Valuation Mail Surveys*, 22 Growth and Change 10 (1991).
27. Fowler, *supra* note 25, at 49, citing Marjorie N. Donald, *Implications of Nonresponse for the Interpretation of Mail Questionnaire Data*, 24 Pub. Opinion Q. 99 (1960).
28. For example, in 1988 the bar poll in King County, Washington, received an average of 415 responses per judge (5.8% of all bar members). Six of the 37 judges included in the bar poll were rated as "poor" or "very poor." *See Washington State Chief Justice Attacks Public Rating of Judges,* 19 Crim. Just. Newsletter 5 (Aug. 1, 1988), cited in Mathias, *supra* note 4.
29. Charles H. Sheldon, *The Role of State Bar Associations in Judicial Selection*, 77 Judicature 300 (May/June 1994).
30. Sheldon, *supra* note 6; John M. Graecen, *What Standards Should We Use to Judge Our Courts?* 72 Judicature 23 (June/July 1988).
31. Barbara Wolfson, *Preserving the Independence of the Judiciary: The Dual Challenge of Democracy and the Budget Crisis: Report of the 1993 Forum for State Court Judges* (1994).
32. Darren K. Carlson, *Nurses Remain at Top of Honesty and Ethics Poll*, Gallup News Service (Nov. 27, 2000).
33. Sheldon, *supra* note 29.
34. Special Commission on Evaluation of Judicial Performance, *supra* note 1.
35. *Id.*
36. *Id.*
37. *Id.* at 26.
38. Special Committee on Judicial Evaluations, *Report of Special Committee on Judicial Evaluations,* Haw'i B. J. 6 (Feb. 2000).
39. A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 Ariz. St. L.J. 643 (1998); Xiaohu Wang & Gerasimos Giankakis, *Public Officials' Attitudes Toward Subjective Performance Measures,* 22 Pub. Productivity & Mgmt. Rev. 537 (1999).
40. *But see* Brody, *supra* note 5 (discussing the evaluation of Pima Co. Arizona Superior Court Judge Robert Donfeld).
41. Kevin Esterling & Kathleen M. Sampson, *Judicial Retention Evaluation Programs in Four States: A Report with Recommendations* (1997).
42. Kevin Esterling, *Judicial Accountability the Right Way*, 82 Judicature 206 (1999).
43. Sheldon, *supra* note 6.

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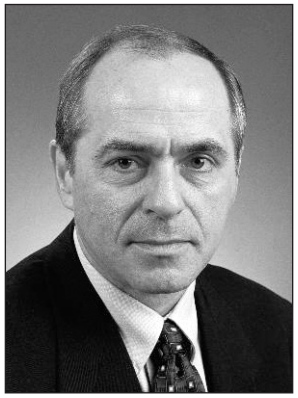
Judicial Retention Elections: Using the Internet to Enhance Voter Knowledge of Judicial Performance

By Larry T. Aspin

Introduction



The traditional merit selection system includes both appointive and elective components as it seeks to appoint qualified judges and then give voters a direct role in deciding whether or not to retain them. Several states adopted merit selection in the 1960s and 1970s, and we now have several decades of experience with and research on the merit selection system. One clear pattern in retention elections is that if voters are to cast their ballots having evaluated judicial performance, many are ill-equipped to do so. Several studies have documented voters' shortage of information, and consequently their use of other cues in casting their ballots. One of the greatest changes in the flow of information in the last ten years has been the Internet. This article briefly examines the information shortage in retention elections and how the Internet is being used, and can be used, in disseminating information to the American voter.

"One clear pattern in retention elections is that if voters are to cast their ballots having evaluated judicial performance, many are ill-equipped to do so."

Retention Elections: Structure, Controversies and Empirical Patterns

Merit selection produces qualified judges who are initially provided independence via a selection process designed to remove politics and the influence of political parties.[1] The typical pattern is that a commission evaluates the professional credentials of candidates and recommends several qualified candidates to the governor, who in turn makes the final selection. Thus, judges gain their seats on the bench without having to solicit money and/or votes from those who may appear before them.

Having put them on the bench, the question is what to do about keeping judges on the bench. Most states using merit selection employ the traditional judicial retention election (Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah and Wyoming). Either at the next general election or after a fixed term on the bench, the judge's name appears on the ballot and voters have the option of voting yes to retain the judge for another fixed term, or voting no to remove the judge. There is no opposition on the ballot and judges do not campaign, unless there is significant organized opposition campaigning against them. Alternatives to the retention election include life tenure (Rhode Island), tenure to a fixed age (Massachusetts), reappointment/retention by the governor or legislature, or some combination thereof (Connecticut, Delaware, New York, South Carolina, Vermont), or reappointment by the selection commission (Hawaii).[2]

Why the retention election over the other alternatives? Several benefits are claimed for this mechanism. Retention elections are said to: (1) increase the legitimacy of the court by giving the public a role in judicial selection, recognizably a reduced role when compared to other types of elections; (2) promote independence and focus attention on judicial duties by not having judges campaign and raise money; (3) attract those good lawyers to the bench who find raising money distasteful; (4) hold judges accountable for their judicial performance and, if necessary, allow voters to remove them; and finally (5) solidify judicial independence by the almost automatic retention produced by this type of election.[3] On the other side of the ledger are two often-heard criticisms of retention elections. The complaint that voters will remove judges because of last-minute smear campaigns or for decisions that were legally correct but were either unpopular or misunderstood, comes most often from within the judiciary. The complaint that retention elections are not removing poor judges from the bench comes from outside the judiciary. Advocates of the proposal to replace Illinois' retention elections with a retention commission contend that even with organized opposition, unqualified judges are not being removed from the bench by retention elections.[4]

What is the empirical record? Starting with the criticisms, research has not eliminated either as being without some merit. Not debatable is that judges rarely lose retention elections. It was previously reported that from 1964 to 1998 in only 52 of 4,588 retention elections was the judge not retained.[5] In 2000 there were another 402 elections and again, as in 1998, every judge was retained. Thus, only 1 percent of the 5,080 judges lost, and the majority of these are in Illinois, which has a 60 percent threshold required for retention, in contrast to

the 50 percent required in most other states. Half of the defeated judges had been previously retained, most by a comfortable margin, but then saw their support drop by an average of 22.9 percent in the election in which they were defeated.[6] Were any of these losses because of an unpopular decision? Yes. One study of 34 defeated judges reports that some—the percentage is not reported—lost because of "egregious decisions," mostly involving "absurdly lenient" sentences.[7]

Turning to the charge that retention elections have not removed poor judges, it is clear that in numerous elections judges have been opposed, and/or were found unfit in bar association polls, yet voters still chose to retain them.[8] Most recently in the 2000 retention elections, Colorado State Commission on Judicial Performance recommended that two judges not be retained. While their affirmative vote percentages were lower than other judges, voters returned both judges to the bench. It can be safely said that those opposing the retention of judges have failed far more often than they have succeeded. Thus, critics of retention elections would argue that they are not effective in holding judges accountable for their judicial performance.[9]

"Clearly, many voters are not holding judges accountable for their behavior because they lack information on judicial performance."

What can be said about how effective retention elections are in holding judges accountable for their judicial performance? Empirical research has discovered an interesting asymmetry on this issue. On the one hand, studies indicate that judges believe voters cast their ballots on the basis of the judges' behavior on the bench, and judges report this shapes their behavior.[10] While few judges have been defeated, judges know they are accountable to the voter on election day. Yet on the other hand, numerous studies report large percentages of voters lack information on courts in general,[11] and more specifically on the judicial performance of the judges on whom they are voting.[12] These voters are not holding judges accountable for their behavior, but rather casting their ballot on the basis of some other cue. Some such voters may look to the ballot for help casting their vote on the basis of perceived gender or ethnic background of the judge.[13] Others rely on variables such as their level of political trust, and particularly their trust in the judiciary.[14] Using the year as the unit of analysis, from 1964 through 2000 the correlation between the national level of political trust and the average percentage vote in retention elections is a very high .85.[15]

Clearly, many voters are not holding judges accountable for their behavior because they lack information on judicial performance. Currently retention elections are at least a potential scalpel for removing a clearly unfit judge, but if they are to be a regular referendum on judicial behavior in more than the judges' minds, then voter information levels must be increased. While communicating information about candidates to voters is not a new problem,[16] there is now a new technology for doing so: the Internet. Is the Internet solving the information dilemma? Can it?

During the 2000 election, the Judicial Retention Project systematically observed the Internet information sources available to voters in the ten states encompassed by the project.[17] We put ourselves in the position of the Web-savvy voter searching for information about the upcoming retention election. We located the sites of traditional information providers and then searched the Internet with several combinations of key words (e.g., "retain judge," "do not retain," "retention election").

Information Providers

We found very few instances of information being pushed to voters. This is probably because currently there are no databases of voter e-mail addresses. Pushing information is presently limited to groups that maintain their own e-mail address lists. Thus, in 2000 the typical retention voter had to pull information from existing Web sites. But from where could the voter pull information? In 2000, information about retention elections, judges and judicial performance was found primarily at Internet sites maintained by (1) the secretary of state or election commission, (2) the judicial branch itself, (3) judicial evaluation commissions, (4) bar associations and (5) other public interest organizations. Clearly traditional information providers are using the Internet as yet one more means of transmitting information to voters.

For reasons that are unclear, little information was provided by individuals or groups opposed to one or more specific judges.[18] Was this because (1) few judges were opposed, (2) we did not search using every judge's name, (3) opposition groups are not familiar with the Web or (4) the Web is an inefficient use of opposition group resources? While the answer is not clear, the problems faced by an opposition group are. "Build it, and they shall come" may not apply to Web sites of those opposed to a judge. To find such Web sites, voters must be using search engines with the correct keywords; however, this may be an inefficient use of the voter's time. Voters who will be faced with several judges standing for retention may want centralized sites with information on all judges. Thus, the Web sites of familiar institutions and groups may be a voter's first and last stop.

Table 1: Type of Information on the Internet by State and Provider

State	Type of Information								
	List of Judges Standing for Retention	Voter Guide Containing Information on Candidates	Description of Merit Appointment and Retention Elections	Biographies of Supreme and Appellate Court Judges	Biographies of Trial Court Judges	Supreme and Appellate Court Cases	Trial Court Cases	Recommendation/Report of Judicial Performance Commission	Separate State Bar Association Polls
Alaska	1	1	2, 3	1, 2	1	2	0	3	0
Arizona	1	1	3	2	2 Partial	2	2	3	0
Colorado	1	0	0	2	2	2	0	2	0
Illinois	1, 5	0	2	2, 5	0, 5	2	0	0	4, 5
Indiana	1	0	2	2	0	2	0	0	4
Iowa	1	0	2	2, 3	2	2	0	0	0
Kansas	0	0	0	2	2 Partial	2	2 Partial	0	0
Missouri	0	0	2, 4	2	2 Partial	2	2 Partial	0	4
Nebraska	1	0	0	2	0	2	2 Partial	0	4
Wyoming	1	0	2	2	0	2	0	0	0

Location Key:
0 Not Found
1 Secretary of State/Election Commission
2 Court(s)
3 Judicial Performance Commission
4 Bar Association
5 Other Private Association

Information Content

What types of information are being provided? Voters could find (1) lists of judges up for retention, (2) voter guides containing information on candidates, (3) basic information on the merit retention system, (4) biographies of judges, (5) opinions/cases by judge, (6) reports/recommendations from judicial performance commissions and (7) reports/recommendations from bar associations.

As can be seen in Table 1, not unexpectedly the public entity charged with supervising elections usually provided a list of the judges standing for retention, but little information about the candidates. Only two states provided voters guides with information about the candidates (e.g., biographies, judges' statements, recommendations of judicial performance commissions). The voter guides in other states simply focused on the mechanics of the elections (e.g., how to register, where to vote). If the voter surfed over to the court site, he or she would find descriptions of the merit retention system, biographies of the judges and case information. In the three states employing judicial performance commissions, there were clear links at the court site or the secretary of state/election commission site to the pages containing the commissions' reports/recommendations. In contrast, there were no such links to the pages containing the reports/recommendations of private groups like the bar associations.

While the Internet means some types of information (e.g., biographies and case material) are more accessible than ever before, most types of the information found on the Web sites were available to voters via other means. The Internet, however, has two clear potential advantages over the other means of conveying information. The first advantage is that the smaller space and time restrictions on the Internet translate into greater

amounts of information. Text takes up little space in an electronic file that can be moved very rapidly across the Internet. A printed newspaper article is restricted to a few columns and an audio news report limited to a few spoken words. Web pages are not so encumbered and can easily contain far more information. A newspaper article, or report on a news program, may only have space/time to report the total score and recommendation of a bar association poll on a few judges, but the Internet file is capable of greater depth and/or breadth. Web pages can also contain details of how the survey was conducted and details about a judge's ratings on each dimension of judicial behavior (e.g., the Nebraska survey rates judges on 14 criteria at http://www.nebar.com/publicinfo/2000JPEEvaul.htm). Web pages can also report poll results for numerous judges. For example, in order to include all the judges up for retention, the Chicago Council of Lawyers posted a 33-page recommendation report on their Internet site (http://www.chicagocouncil.org/news/st_evaluations/2000retentionevalreport.pdf).

The second potential advantage of the Internet is that it is possible to bring all of the types of information listed in Table 1 together at a single, easy-to-use Web site. The voter need not fire up the search engine and go on a protracted scavenger hunt for information. Rather, at a single site the voter could simply select which type of information he or she wanted to review before voting. The next best comprehensive source, although lacking in case information, would be the detailed voter guides some states send to every registered voter. As reported in Table 1, both Alaska and Arizona also post their voter guides on the Internet.

While the Internet could provide a wealth of easily accessible information to voters, it currently falls well short of its potential. In viewing the types of information in Table 1, it is difficult to see what additional information is necessary for a voter to make an informed choice about retaining a judge. However, it is also clear in Table 1 that very few voters currently have access to all types of information. The types of information and the depth of information available to voters vary greatly by state and level of court. Voters in Alaska have a tremendous amount of information only a mouse click away, whereas those in Kansas have far less, and much of it is the raw-case information—probably the least useful type of information. Not evident in Table 1 is that states using a judicial performance evaluation commission are providing voters with the greatest amounts of summary information. These reports often contain not only surveys of lawyers, but also those from other judges and all groups who have been in a judge's court.

Voters usually found much more information about supreme and appellate court judges than about the more numerous trial court judges. Frequently state-maintained Web sites provide detailed information about the former (e.g., biographies, case decisions), but not the latter. The voter may find detailed information at separate trial court sites, but more often than not, trial court jurisdictions have not created their own Web sites, or do not provide the information. This is the usual reason why in Table 1 the word partial appears for trial courts, as information is only available for some districts within a state. Thus, while retention elections are far more numerous for trial court judges than for appellate court justices, voters have more information on the latter than on the former.

"While the Internet could provide a wealth of easily accessible information to voters, it currently falls well short of its potential."

Not visible in Table 1 is additional variation within types of information on both depth and ease of acquisition. For example, both the Missouri and Indiana state bar associations surveyed their members on the qualifications of the judges up for retention. Missouri posted its detailed report on the Internet (http://mobar.net/judges/) and printed 150,000 copies for distribution.[19] In contrast, in Indiana the results were released as a one-quarter-page summary in the monthly ISBA publication *Res Gestae* (http://www.inbar.org/content/pdf/RG_102000.pdf.). While brief and hard to find, the Indiana results were on the Internet. Other state bar associations in states like Wyoming conducted bar polls, but did not post the results on the Internet.

Less serious than the low level of information available in some situations is the current lack of centralization in the available information. Most of the aforementioned types of information are being provided by different sources and there are not always links from one source to another. While the persistent voter can gather information from various sources, this task can be done for the voter. The most outstanding Web site in terms of centralization of information and ease of use was that created by the Illinois Civil Justice League. According to its Web site, "Illinois Civil Justice League is a coalition of Illinois citizens, small and large businesses, associations, professional societies, not-for-profit organizations, and local governments." Called "Justice 2000" (http://www.illinoisjudges2000.com/index.html), the Web site organized existing information on the Web and added the league's own content. At this site, voters could find judges by county, then view a separate page with links for each judge or candidate. To the extent each was available, voters would find on each judge's page (1) biographical information, (2) cam-

paign spending information, (3) responses to the Illinois Civil Justice League's questionnaire sent to each judge and/or candidate, (4) the candidates' Web pages and (5) endorsements and evaluations made by newspapers and bar associations, including its own recommendation. In addition, the site provided links directly to other original sources, including bar associations and the Illinois State Board of Elections.

"Not only must pertinent information be accessible from a Web site, voters must be made aware of its existence."

The absence of one type of information from the "Justice 2000" site again focuses our attention on the issue of information utility. Missing from this site were any links to court decisions that were online. In all likelihood, most retention voters have neither the time nor expertise to evaluate a judge by wading through a written record of all the judge's decisions. However, case information is one of the very few sources of raw information about a judge's performance. Lists of judges, descriptions of retention elections and even biographies tell the voter little about actual judicial performance. By forgoing case information, the typical retention voter, lacking any other first-hand knowledge, must rely on reports of judicial performance from others. Through the years, bar associations have sought to provide such voters with summary snapshots of judicial performance from the lawyers' point of view. With the Internet, bar associations can begin with the simple yes/no recommendation (e.g., Indiana http://www.inbar.org/content/pdf/RG_102000.pdf), but then also present how a judge was evaluated on numerous dimensions (e.g., Nebraska http://www.nebar.com/publicinfo/2000JPEEvaul.htm). The retention voter then has the option of simply picking off the general recommendation or digging deeper into the evaluation of a judge's performance.

Bar association polls were a first step in providing summary information to voters, but their shortcoming is that they represent the views of just one of the actors in the courtroom. One of the tremendous advantages of the judicial performance evaluation commission used by a handful of states (e.g., Alaska, Arizona, Colorado, Tennessee and Utah) is that they report the evaluations of a judge from numerous clientele (e.g., court employees, jurors, lawyers, other judges).[20] The retention voter, if he or she desires, can examine how each of several different groups rated the judge on basic elements of judicial behavior (e.g., the Arizona Voter Information Guide reports scores on administrative performance, integrity, judicial temperament, legal ability and communication skills and deportment at oral argument and is available at http://www.sosaz.com/election/2000/info/pubpamphlet/english/review.htm#pgfId-1). As with bar polls, the retention voter can simply take the overall recommendation or delve deeper into reported results for each judge.

The breadth and depth of information provided in a judicial performance evaluation commission report would seem to make it an ideal candidate for distribution on the Internet. The commission reports are released via the Internet, but they are also published or incorporated into voter guides that can be mailed to voters.[21] For the immediate future, distributing a printed pamphlet to each voter is the superior method of delivering judicial performance information. While dissemination of information via the Internet is far less costly than printing a book for each voter, the real price is the inability to reach all voters via the Internet. While one-third of the country may be regular users of the Internet, a sizable proportion of voters do not have access to the Internet. A second minor advantage of the pamphlet is that it can be carried into the voting booth (e.g., the Arizona Voter's Guide has detachable pages for the voter to carry their prerecorded choices into the voting booth). While not a major consideration when a voter will see only one judge up for retention, it is an advantage when the voters, such as those in Chicago, will face dozens of judges standing for retention. In the future, a conscientious voter standing in the voting both wondering about a judge, or dozens of judges, can turn on their PDA, connect to the Internet and look up information on the judge. Presently only a few technology-savvy individuals are capable of using the Internet in this fashion.

Conclusion

The Internet represents one more means of providing information to voters so that more can make informed choices in judicial retention elections. Presently the Internet is an under-utilized resource in that there is far more that can be done to provide useful information in an easy-to-use format. The steps taken so far to post information have made it easier for connected voters to become more informed; however, the number of voters who have taken advantage of this is unclear. Being the new kid on the block, the Internet has a recognition problem that other information sources do not. Whether or not they pay attention to them, most voters know that newspapers and newscasts are information sources, but how many people are aware of Web sites containing information of judicial performance? Not only must pertinent information be accessible from a Web site, voters must be made aware of its existence. Until then the information may be posted, but it may go

unused. Ultimately it may be possible to push such information to many voters, but never all. Like the voter guide that comes with the snail mail, a voter guide could arrive via e-mail.

Endnotes

1. The first description of what was originally called the Missouri Plan was by Richard A. Watson & Rondal G. Downing, *The Politics of the Bench and the Bar: Judicial Selection Under the Missouri Nonpartisan Court Plan* (1969). For a more recent description, see Charles H. Sheldon & Linda S. Maule, *Choosing Justice: The Recruitment of State and Federal Judges* 125-34 (1997).
2. For a summary of judicial selection procedures by state, see the U.S. Dep't of Justice, Bureau of Justice Statistics, *State Court Organization 1998*, and particularly the Judicial Selection and Service file available at http://www.ojp.usdoj.gov/bjs/abstract/sco98.htm.
3. Sheldon, *supra* note 1, at 130-132; Philip L. Dubois, *From Ballot To Bench: Judicial Elections and the Quest for Accountability* 8 (1980).
4. Stephen Anderson, *Proposal Adopted to Expedite Judicial Retention,* ISBA Bar News, May 3, 1999, *available at* http://www.illinoisbar.org/Association/may0399news.asp.
5. Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 Judicature 79-81 (1999). Supporters and critics of retention elections interpret the small number of losses differently. Supporters argue that it attests to the quality of individuals appointed, whereas critics argue it is evidence that poor judges are not being removed. Both may be correct. In 2000, the judicial performance commissions in Alaska, Arizona and Colorado recommended that only two of 172 judges not be retained. Voters, however, retained all 172.
6. For an extended discussion of defeated judges, *see* Larry Aspin *et al*., *Thirty Years of Judicial Retention Elections: An Update*, 37 The Soc. Sci. J. 1-17 (2000).
7. Robert C. Luskin *et al.*, *How Minority Judges Fare in Retention Elections*, 77 Judicature 320 (1994).
8. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 Judicature 306-15 (1994).
9. *See, e.g., Assembly Adopts Merit Retention Plan,* ISBA Bar News, July 15, 1999, *available at* http://www.illinoisbar.org/Association/7-15a.htm. Other than the study of bar association polls, campaigns against judges standing for retention have not been systematically studied. However, a study of campaigning by Illinois judges found their actions to have little effect on the affirmative vote. *See* Larry Aspin, *Campaigns in Judicial Retention Elections: Do They Make a Difference?* 20 The Just. Sys. J. 1-16 (1998).
10. Aspin, *Retention Elections, supra* note 8, at 312.
11. *See, e.g.*, National Center for State Courts, *The Public Image Of Courts* (1978).
12. Kenyon N. Griffin & Michael J. Horan, *Merit Retention Elections: What Influences the Voters?,* 63 Judicature 78-88 (1979); Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Voters in Contested, Nonpartisan Judicial Elections: A Responsible Electorate or a Problematic Public?*, 36 W. Pol. Q. 241-256 (1983); Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Is Voting for State Judges a Flight of Fancy or a Reflection of Policy and Value Preferences?*, 16 Just. Sys. J. 57-58 (1994).
13. Philip L. Dubois, *Public Participation in Trial Court Elections*, 2 Law & Pol'y Q. 133-60 (1980); G. C. Byrne & J. K. Pueschel, *But Who Should I Vote for for County Corner?,* 36 Pol. 778-84 (1974); *see also* Dubois, *Ballot*, *supra* note 3, at 81.
14. Larry T. Aspin & William K. Hall, *Political Trust and Judicial Retention Elections*, 9 Law & Pol'y 451-70 (1987).
15. For details on the measurement of this relationship, see Aspin *et al.*, *Thirty Years*, *supra* note 6, at 4.
16. See Dubois, *Ballot*, *supra* note 3, at 18.
17. The ten states followed in the project are those which by the 1970s used traditional retention elections in even-numbered years for supreme, appeals, courts and at least some major trial courts. The states are Alaska, Arizona, Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska and Wyoming.
18. One example of such information was the Web page of the Colorado State Shooting Association, urging the defeat of the four appellate judges up for retention in Colorado, available at http://former.cssa.org/articles/judges_aug00.html.
19. One of the most accessible bar polls was at the Nebraska State Bar Association Web site, where a clearly labeled link to the information was on the home page. *See* http://www.nebar.com.
20. For an evaluation, including voter utilization of the information, see Kevin M. Esterling & Kathleen M. Sampson, *Judicial Retention Evaluation Programs In Four States* (Am. Judicature Soc'y 1998).
21. For Alaska, *see* http://www.gov.state.ak.us/ltgov/elections/oep2000/internet/html/2000oephome.htm.

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Compelling State Interests: State Judicial Selection in an Interest Group Age

By Lauren Cohen Bell

Across the country, interest groups have become important actors in the judicial selection process for state court judges. One might consider the following examples:

- In 1986, California State Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso lost their bids for retention after being opposed by conservative interest groups.[1]
- Since 1996, pro-business interest groups in seven states have used a rating system developed with funding from Koch Industries, a multi-state energy and agribusiness corporation, to rate state judicial candidates on their friendliness toward business interests.[2]
- In 1998, Oklahoma State Supreme Court Justice Alma Wilson was forced to campaign vigorously for retention after a conservative group calling itself Oklahomans for Judicial Excellence targeted Wilson as being hostile to the interests of the business community in Oklahoma.[3] The group's founder, Ron Howell, is the creator of the business-friendly state judge rating system.[4]
- According to statistics compiled for a report in the *Chicago Sun-Times*, in 2000, business and lawyers groups donated more than $26 million to judgeship candidates in Illinois, Ohio and Michigan, and spent much more on independent expenditures to influence judicial elections.[5]

Although interest groups have long targeted state courts, whose rulings on matters of public policy comprise the majority of the nation's body of judicial policy precedents, few scholars have documented or systematically explored the ways in which interest groups participate in the judicial selection process at the state court level. With interest group participation in state judicial selection increasing and becoming more professional, this article seeks to review what is known about interest group participation in the state court selection processes, document the strategies and techniques currently being utilized by interest groups, and offer new insights into the effects of this participation.

Interest Group Activities

An interest group can be defined as a strategic organization that seeks to influence government and public policy through participation in electoral and policy-making processes. Such groups include trade associations, professional associations, ideological groups and public advocacy groups. These groups are active at every level of government and have been frequent participants in the states, including the judicial selection process, since the 1960s and 1970s, when a national interest group explosion led groups to refine and enhance their state and local affiliates.[6] Today, national interest groups use their state affiliates for "trial runs" of new lobbying techniques and often apply successful national techniques to their lobbying work in the states. As Hrebenar writes: "In many states, more sophisticated grassroots lobbying campaigns have become common as the successful tactics perfected in Washington are tried out in the halls and offices of state capitols."[7] Today, the activities of interest groups at the state level mirror those at the national level.

Groups' lobbying activities take one of two general forms. The first form is direct lobbying, in which interest group lobbyists contact elected or appointed officials to express their groups' opinions and to urge action in a particular direction. They may do this through one-on-one meetings with officials, through social lobbying or through cultivating relationships with key decision-makers. Indirect lobbying also occurs when interest groups attempt to mobilize elected officials' constituents in favor of or against policy ideas and actions. Interest groups also engage in indirect lobbying in the electoral process by distributing information to voters through voter guides, "scorecards" and the mass media. Interest groups also form Political Action Committees, or PACs, to make contributions to political campaigns. These fund-raising arms of interest groups can give money more freely to candidates for elective office. Although they are limited by both federal and state laws in terms of the amount that they may contribute to the candidates themselves, PACs can spend unlimited amounts of money on independent campaigns in favor of or against a policy or a candidate. Interest group scholar Robert Hrebenar notes that "[i]n various states, the number of PACs have [sic] multiplied by ten to fifteen times in the past several decades."[8]

Interest Groups In State Judicial Selection

Since many judicial decisions have an effect on public policy, it is not surprising that interest groups consistently seek ways to participate in the judicial process. As Oregon Supreme Court Justice Hans A. Linde has stated: "The active participation of state judges in the policy process is much more taken for granted and much less controversial than the involvement of federal judges in the national government."[9] As active policymakers, state court judges may find themselves subject to the same kinds of interest group campaigns usually reserved for executive or legislative branch officials. Typically, interest groups participate in the judicial policy-making process either by filing lawsuits on behalf of group members affected by laws or policies or by submitting *amicus curiae* briefs that seek to inform the courts of their interest in, and analysis of, a pending case.[10] Interest groups have also begun to increase their participation in state judicial selection processes. As Goldman writes: "One can also consider . . . judicial appointments being made because of the policy views or orientation of the appointees. Interest groups have been known to be concerned about appointments to the bench, particularly at the highest [state] court levels."[11]

The quality and quantity of interest group participation in state judicial selection processes depends in large part on the type of selection process used in a particular state. States employ one of five types of judicial selection: partisan election, nonpartisan election, merit selection, gubernatorial appointment or legislative appointment.[12] Table I highlights the method of selection used for state supreme court judges and justices during 2000.

Interest groups participate most frequently in states that elect their judges, although they have recently begun to increase their participation in the retention elections that occur in merit selection systems. In states where judges stand for election (either for their initial appointment or for retention), interest groups may make contributions to judicial candidates, often to the fullest extent allowable by law, and then use their independent advocacy ability to mobilize grassroots support for or against particular judgeship candidates through independent advertising on television, radio and in newspapers. According to Goldman, interest groups can be "most effective with electoral selection methods."[13]

However, not all interest groups participate equally in state judicial elections. A survey of judicial candidates receiving money in 1998 (the last year for which the National Institute for Money in State Politics has complete data) reveals that lawyers groups—especially state trial lawyers associations and state defense attorneys associations—medical groups, party committees, educational associations and labor groups were the most frequent contributors to candidates for state judicial offices.[14] This is consistent with previous work demonstrating that teachers groups, business groups, bar associations, labor groups and medical associations (in that order) are among the most active organizations in state politics.[15] Table II highlights some of these contributions and contributors to state judicial candidates in 1998.

The effects of interest group contributions in state judicial elections have not been systematically studied, but anecdotal evidence suggests that two important

Table I: Method of Appointment for State Appellate Court Judges

Partisan Election	Nonpartisan Election	Merit Appointment	Gubernatorial Appointment	Legislative Appointment
Alabama	Georgia	Alaska	Delaware	Connecticut
Arkansas	Idaho	Arizona	Indiana	South Carolina
Illinois	Kentucky	California	Maine	Virginia
Louisiana	Minnesota	Colorado	Massachusetts	
Michigan	Mississippi	Florida	New Hampshire	
New York	Montana	Hawaii	New Jersey	
North Carolina	Nevada	Iowa	Rhode Island	
Ohio	North Dakota	Kansas		
Pennsylvania	Oregon	Maryland		
Texas	Washington	Missouri		
West Virginia	Wisconsin	Nebraska		
		New Mexico		
		Oklahoma		
		South Dakota		
		Tennessee		
		Utah		
		Vermont		
		Wyoming		

Source: Council on State Governments, *Book of the States*, Vol. 33 (2000-01 ed., 2000).

Table II: Interest Groups Participating in 1998 State Judicial Elections

State	Partisan or Nonpartisan Election	Candidate Name	Total Amount Received	Top Interest Group Contributor*	Group Contribution Amount
Kentucky	Nonpartisan	Johnstone	$89		
Michigan	Partisan	Borman	$660,863	MI Trial Lawyers Assn./UAW (tie)	$34,000
		Collins	$122,721	MI Health & Hospice Assn.	$11,500
		Youngblood	$590,461	MI Trial Lawyers Assn./UAW (tie)	$34,000
		Thomas	$4,200		
		Taylor	$960,559	MI Republican State Committee	$55,000
		Runco	$17,472		
Montana	Nonpartisan	Day	$7,316		
		Gray	$40,516		
		Haker	$2,344		
		Harkin	$2,730		
		Langton	$4,088		
		Neil	$13,672		
		Prezeau	$25		
		Trieweiler	$102,869		
Ohio	Partisan	Moyer	$871,246	Ohio Republican Party	$154,133
		Pfeiffer	$568,569	UAW/Ohio Education Assn./AFL-CIO (tie)	$5,000
		Powell	$207,991	Butler County (OH) Republican Party	$20,000
		Suster	$271,094	Ohio CPA PAC/ OH Medical PAC/Comm. For Agricultural Political Education (tie)	$5,000
		Sweeney	$530,969	UAW/OH Educ. Assn./ AFL-CIO (tie)	$5,000
		Tyack	$281,417	Ohio Democratic Party	$10, 192
Oregon	Nonpartisan	Hoffer	$500		
		Linder	$4,470		
		Riggs	$148,555	Oregon Education Assn.	$5,000
		Tiernan	$198,226		
		Warren	$2,986		
		Westwood	$58,415		
		Wollheim	$877		
Texas	Partisan	Abbott	$1,377,317	TX Medical Assn./TX Assn. Of Defense Counsel (tie)	$10,000
		Enoch	$1,448,314	TX Medical Assn./ TX Assn. Of Defense Counsel (tie)	$10,000
		Harkinson	$1,144,427	TX Medical Assn.	$12,500
		O'Neill	$1,183,284	Republican Party of Texas	$16,736
		Scarborough	$17,165	Teamsters	$5,000
		Smith	$9		
		Spector	$364,727	Vinson and Elkins TX PAC	$23,354
		Tyson	$302,438		
		Vanos	$187,707	Concerned Women for America COPE PAC	$18,250
		Westergren	$84,920		
West Virginia	Partisan	Albright	$99,395	AFL-CIO/WV Laborers District Council/ WV Building and Trades Council/ WV Fed. of Teachers (tie)	$1,000
		McCuskey	$140,102		
		McGraw	$112,603	Wetzel County Education Assn.	$1,000
		Yoder	$850		

* Based on reports compiled from the National Institute of Money in State Politics, 1998 Database. Only organizations contributing $1,000 or more are included in this list. If none is noted, none contributed $1,000 or more to a judicial candidate in 1998.

conclusions can be drawn about the effects of these contributions. First, better-financed candidates for judicial office appear more likely to win in all types of elections, regardless of whether they are partisan, nonpartisan or retention. Second, the endorsement of powerful interest groups has an impact on the outcome of judicial elections, since voters tend to have far less information about judgeship candidates than they have about candidates for the executive or legislative branches.[16] For example, in her study of Arkansas' politics and government, the late Diane Blair explained:

> [T]he AFL-CIO endorsement is eagerly sought in races for . . . the state Supreme Court. Labor-endorsed candidates for the supreme court have been much more successful than not in recent years, and at least one victory (John Purtle's in 1978 over Otis Turner, who had the backing of the bar) has been attributed to labor's active exertions.[17]

Likewise, organized labor has been important in many of Ohio's Supreme Court elections. Baum and Kemper note: "When party identification and other relevant factors are held constant, union membership increased the likelihood of voting for the Democratic candidates considerably in some contests."[18]

Despite the prevalence of interest groups in electoral methods of judicial selection, few states have taken steps to limit contributions or reduce conflicts of interest.[19] As a result, interest groups frequently borrow from their national strategies by using judicial elections as fund-raising opportunities or by contributing through their Political Action Committees, which often engage in bundling small, individual contributions together in order to maximize their impact.[20] Without conflict-of-interest laws in place, groups involved with current or future litigation efforts are free to offer contributions and candidates are free to accept them.

In addition to election-based selection systems, interest groups are able to exercise tremendous influence in merit-based systems, which are supposed to reduce patronage and politics in the judicial selection process. In merit-based systems, judges are usually nominated by the governor from a list compiled by the state's judicial selection committee, and then stand for retention election at regular intervals. However, many judicial-selection commissions are composed of representatives from state bar associations or legal organizations, which may also be active lobbying groups with policy preferences of their own. Moreover, Arizona State University political scientist David Berman notes that governors "usually have been able to find a way of suggesting the names to the commission that they eventually submit to him or her."[21] This is significant because, as public law professor Sheldon Goldman notes, the governor may be "taking the initiative or responding to group pressures."[22] Since these judges, once appointed, must stand for retention election, interest groups are free to engage in the same kind of independent campaigns against judges that they engage in during regular judicial elections. Their participation in turn causes state court judges to campaign for retention election, which often requires the mobilization of additional groups in support of the judge.

Finally, interest groups do not ignore judicial selection in states with gubernatorial or legislative appointment processes. In states that utilize executive and legislative appointment processes, interest groups employ the same direct and indirect lobbying techniques that they use to lobby on explicit policy matters to lobby governors and legislators on judicial selection. It is far more difficult to document the level of influence groups have in states that use gubernatorial and/or legislative appointment, but evidence from federal judicial selection indicates that interest groups view judicial selection as just another opportunity to influence elected policy-makers. This may be especially true in states that use legislative appointment selection procedures; in all three of the states that use legislative appointment—Connecticut, South Carolina and Virginia—interest groups are generally considered to be highly active in the policy-making process.[23] For example, political scientist John Whelan notes that in the 1990s in Virginia, "judicial aspirants typically sought bar association endorsements and the support of prominent community figures, especially ones with Democratic Party connections," since the Virginia General Assembly was controlled by Democrats.[24]

Conclusion: The Effects of Interest Groups in State Judicial Selection

Interest groups, long active in legislative, executive and judicial politics at both the national and state levels, have recently turned their attention to state courts. These groups use tried-and-true lobbying tactics to attempt to influence state judicial processes, often through the state judicial selection process. In many states, campaigns for judicial office differ very little from campaigns for the governor's office or for the state legislature. Even when judges are appointed, rather than elected, their appointments often reflect interest group pressures on governors, nominating commissions or legislatures. In the last 20 years, interest groups have mobilized both in support of and in opposition to candidates for judicial positions. State interest groups use strategies borrowed from the federal judicial appoint-

ment process to influence all aspects of state judicial selection. Their techniques include direct and indirect lobbying, campaign financing, the production of voter guides and "scorecards" and strategic use of the media to influence the outcomes of state judicial selection processes.

The results of interest group participation in state judicial selection are similar to the results of interest group participation in federal judicial selection. Most significantly, some state court judges are choosing to retire rather than face an interest group onslaught,[25] while others concede that there is pressure to conform to the wishes of the groups and the interests of the people on whose behalf they advocate.[26] Further, interest group participation in judicial selection may fuel citizen skepticism about state courts' impartiality.[27] All of these have the potential to affect state courts' abilities to fairly and impartially interpret laws and maintain credibility with state citizens and policy-makers.

"The results of interest group participation[:] . . . some state court judges are choosing to retire rather than face an interest group onslaught, while others concede that there is pressure to conform . . ."

It must be noted that interest groups are not universally successful in their attempts to remove judges in retention elections or to influence governors and legislatures to appoint their choices. For example, in 2000, an extensive campaign against Louisiana's State Supreme Court Chief Justice, Pascal Calogero, by the Louisiana Association of Business and Industry failed to remove Calogero from office.[28] Furthermore, Texas State Supreme Court Justice Rose Spector lost a partisan election in 1998 despite the endorsements of several organizations, including the Texas Medical Association.[29] Nevertheless, interest group participation in state judicial selection is likely to intensify, rather than dissipate, in light of victories or near-victories in California, Alabama, Arkansas, Oklahoma and other states.

Endnotes

1. Ronald J. Hrebenar, *Interest Group Politics in America* 224-25 (3d ed. 1997).
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4. Fialka, *supra* note 2, at A20.
5. Abdon M. Pallasch, *Judges Look to Reform Court Elections*, Chi. Sun-Times, Dec. 10, 2000, at A14.
6. Jeffrey Berry, *The Interest Group Society* (3d ed. 1997); Hrebenar, *supra* note 1.
7. Hrebenar, *supra* note 1, at 239.
8. *Id.*
9. Elder Witt, "State Supreme Courts: Tilting the Balance Toward Change" 235-36, *in State and Local Government and Politics: Essential Readings* (Harry A. Bailey & Jay M. Shafritz, eds., 1993).
10. Hrebenar, *supra* note 1.
11. Sheldon Goldman, "Judicial Selection" 587, *in* 2 *Encyclopedia of the American Judicial System* (Robert J. Janosik, ed., 1987).
12. Robert A. Carp & Ronald Stidham, *Judicial Process in America* (4th ed. 1998).
13. Goldman, *supra* note 11, at 587.
14. For state-by-state data on money in state judicial elections, see the National Institute for Money in State Politics' Web site.
15. Richard P. Jones, *Election '99: Abrahamson Fends Off Rose; Chief Justice Gets Over 60% of Vote in Contentious Race*, Milwaukee J. Sentinel, Apr. 7, 1999, at A1; Lawrence Baum & Mark Kemper, "The Ohio Judiciary," *in Ohio Politics* (Alexander P. Lamis, ed., 1994).
16. Diane D. Blair, *Arkansas Government and Politics: Do the People Rule?* (1988).
17. *Id.* at 201.
18. Baum, *supra* note 15, at 293.
19. David R. Berman, *State and Local Politics* 206 (9th ed. 2000).
20. Editorial, *Supreme Sideshow: Independent Campaigns Violate Spirit of Limits*, The Columbus Dispatch, Sept. 16, 1996, at 8A.
21. Berman, *supra* note 19, at 208.
22. Goldman, *supra* note 11, at 587.
23. Berman, *supra* note 19, at Thomas and Hrebenar 1998 table.
24. John T. Whelan, "Virginia's Judicial Selection Process: Still Unique Though its Partisan Stripes are Changing" 43, *in Government and Politics in Virginia: The Old Dominion at the 21st Century* (Quentin Kidd, ed., 1999).
25. Michael A. Riccardi, *Ford Elliot: I Won't Seek High Court Again*, Pa. L. Wkly. (1998).
26. James MacGregor Burns *et al.*, *State and Local Politics: Government by the People* 136 (10th ed. 2001).
27. *Supreme Sideshow*, *supra* note 20; *Caller Ideas*, Wis. St. J., Apr. 9, 2000, at 1B.
28. Mitch Landrieu, *Law Clinic Ruling Misrepresented*, The [New Orleans] Times-Picayune, Jan. 6, 2000, at 7B.
29. Janet Elliott *et al.*, *Judicial Sweep Shocking, Yet Expected; "60 Minutes" Report, Key Endorsements Don't Save Dems*, Tex. Law., Nov. 9, 1998 at 1.

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Texas Judicial Selection: Bar Politics, Political Parties, Interest Groups and Money

By Anthony M. Champagne and Kyle D. Cheek

I. Texas and the New Judicial Politics

Anthony M. Champagne

As late as the 1970s, judicial elections in Texas were low-key affairs that were seldom contested.[1] In the 1980s, however, the landscape of judicial selection in Texas underwent a dramatic change to intensely contested races. Judicial elections would begin to feature major campaign efforts by interest groups, large amounts in campaign donations and spending, and a general departure from the earlier norms that characterized these down-ballot races. The dynamics that emerged in judicial selection in Texas would ultimately portend changes in the nature of judicial races in other states that elect judges.[2] It is useful to consider these new politics of judicial selection in Texas, both their origins and effects and, hopefully, to learn from Texas' experience.

The Change from the Old Judicial Politics to the New Plaintiff-Defense Wars

In the century following Reconstruction, Texas justices, like the majority of elected state officials, were conservative Democrats. The sleepy, low-key affairs that were judicial elections and that resulted in the election of pro-civil defense Democratic judges did not begin to change until the late 1970s. At that time, plaintiff lawyers began pouring significant amounts of money into Texas Supreme Court campaigns, hoping to elect justices with favorable philosophies.

By 1983, justices with significant backing from the plaintiffs' bar had gained a majority on the Texas Supreme Court.[3] With the election of a pro-plaintiff court came the movement of Texas tort law in the predictable direction. But the creation of a pro-plaintiff court was not done without damage to the high court's reputation. Two of the justices' ties to plaintiff lawyers contributed to actions by the State Commission on Judicial Conduct to reprimand one of them[4] and to admonish another.[5]

Nor did challenges to the prestige and integrity of the court cease. The court declined to review an $11 billion judgment against Texaco just as large campaign contributions flowed into the justices' campaign coffers from both Texaco lawyers and particularly from the plaintiff and from plaintiff attorneys.[6]

Kyle D. Cheek

Confronted with a crisis on the Texas court, Chief Justice John Hill proposed merit selection of judges in 1986 and offered himself as the leader of a movement for judicial reform. That created a rebellion against Hill's leadership on the court and there was unprecedented intra-court conflict.[7] Fifteen months after proposing merit selection, Hill resigned from the court after serving only half of his six-year term. His replacement, appointed by a Republican governor, was Tom Phillips, a Houston trial judge and a Republican.[8]

The result of the scandal and Hill's reform movement was not only unprecedented conflict within the Texas Supreme Court, but also an opening wedge for Republican penetration into the Court. By 1988, it was time for an effective counter-attack by the civil defense forces. With the 1988 elections, two-thirds of the court was up for grabs.

The 12 major candidates for the Texas Supreme Court collectively raised $10,092,955. A Political Action Committee primarily funded by trial lawyers raised another $1.4 million in independent expenditures for television commercials and get-out-the-vote campaigns. Several, though not all, of the races were clearly divided between plaintiff lawyer funded candidates and candidates funded by civil defense interests. This was especially true of the race for chief justice between Tom Phillips and Ted Z. Robertson, where Phillips raised slightly over $1 million and Robertson raised nearly $1.9 million.[9]

The Texas Medical Association was heavily involved in that year's Supreme Court elections, having been angered by the recent pro-plaintiff bent of the court's decisions. Its Political Action Committee gave over $181,000 in direct contributions and encouraged individual doctors to give at least $250,000 more.[10]

One great advantage for the Republican candidates was that they could campaign against the plaintiff-backed candidates on the grounds that they were reformers who wished to bring integrity back to the court. Indeed, Chief Justice Phillips headed a bipartisan "Clean Slate" of candidates. They were opposed to the

incumbent Democrats, who were backed by the trial lawyers.[11]

It was the reform message, coupled with the financial backing from civil defense interests and the increasing strength of the Republican Party, that led to the defeat of all the plaintiff-backed incumbents. The only strongly pro-plaintiff justice elected was Lloyd Doggett, a non-incumbent who had run for an open seat. The cumulative result was the beginning of Republican domination of the court.[12] Civil defense interests learned that in head-on battles with heavily funded plaintiff-backed candidates such as Kilgarlin and Robertson, the civil defense candidates could win. The election of 1988 was also the beginning of the end of the pro-plaintiff court of the 1980s.

The last gasp of the plaintiff-civil defense wars was in 1994, when pro-civil defense Democratic Justice Raul Gonzalez was up for reelection. If a trial lawyer-backed Democrat could not beat a civil defense-backed Republican, then the venue for battle needed to change. In the Gonzalez case, it did. Gonzalez was challenged in the Democratic primary by trial lawyer—and trial lawyer financed—Rene Haas in a vicious judicial campaign. It was an effort by trial lawyers to defeat a conservative Democrat who was strongly supportive of civil defense interests.[13] That primary campaign turned into the most expensive judicial race in history. Candidate expenditures in that race totaled $4,490,000 in a battle that went in Gonzalez's favor.[14] When Gonzalez won the run-off primary against Haas, the Republican candidate conveniently withdrew from the race, in effect giving the office to Gonzalez.

In the aftermath of the Gonzalez-Haas primary, serious challenges for the Texas Supreme Court have no longer been mounted by trial lawyers. They evidently deem it fruitless to expend resources for those offices.

Interest Group Politics

In Texas, most interest group involvement in judicial races involves economic as opposed to ideological interests. Traditionally, the main interest groups in judicial elections have been the competing plaintiffs' and civil defense segments of the bar. In those states where unions are powerful, unions will often be aligned with plaintiff lawyers in backing judicial candidates perceived to be pro-plaintiff.[15] In Texas, plaintiff lawyers provide the main support for plaintiff-oriented judges because unions are quite weak. Civil defense lawyers and firms are aligned with business and professional interests in Texas. In 1988, one of the main reasons for the success of Republicans and conservative and moderate Democrats in the Texas Supreme Court races was the strong involvement of the Texas Medical Association (TMA). Not only did the TMA contribute substantial sums to preferred candidates for the court, it also encouraged individual members to contribute money and created a grassroots campaign through which physicians in Texas actively campaigned for the TMA slate.[16]

One study of seven Texas justices' campaign contributions provided a good indication of the interest groups with economic concerns. That study found that the Political Action Committees and the executives of 50 corporations contributed 15 percent of the money raised by the seven justices; the family of the head of a major tort reform group gave $60,000. The study also found that 9 percent of the justices' money came from the Political Action Committees of 30 trade groups, including the Texas Society of CPAs, the Texas Medical Association, the Texas Association of Realtors, the Texas Association of Defense Counsel and the Texas Restaurant Association.[17]

Involvement in judicial campaigns by interest groups has led to ethical issues in other states, and Texas has had its share of troublesome cases where interest groups have appeared to compromise judicial independence. For example, in Houston, victims' rights groups have frequently aligned with prosecuting attorneys to elect judges who are tough on crime. Thus, judges, well aware that their political futures may hang on their law-and-order image, have sometimes pandered to crime-control interests. One judge taped a picture of Judge Roy Bean's hanging saloon on the front of his bench with his name superimposed over Judge Bean's and referred to the high court's judges as "liberal bastards" and "idiots."[18]

Party Competition

Party label provides a significant political asset for candidates in low-visibility races such as those for judicial office. For voters, the party label is a crucial source of information, a partisan cue that voters rely on in casting their ballots.[19] One recent analysis of 140 articles written on the link between judges' party affiliations and performance on the bench confirmed that "party is a dependable measure of ideology on modern American courts."[20] While voters find party label voting useful, however, there is also a downside. Highly qualified judicial candidates can be defeated simply because, in a particular election year, they bear the wrong party label.[21] After Republican straight-ticket voting led to the defeat of 19 Democratic judges in Harris County (Houston) and led to Republican victories in 41 of 42 contested judicial races, one law school dean commented: "[I]f Bozo the Clown had been running as a Republican against any Democrat, he would have had a chance."[22]

Texas, like many Southern states, was once a one-party Democratic state. Any real electoral competition in judicial races was in the Democratic primary. Beginning in the late 1970s, the Republican Party grew dramatically. In some counties—initially Dallas County—the Republican Party gained such strength in the early

1980s that there was a massive movement of trial court judges from the Democratic to the Republican Party.[23] Soon, the only Democrat who could win election to the Dallas County trial courts was Ron Chapman, a judge who shared the same name as the most popular radio disk jockey in the area.[24] The Republican onslaught in statewide elections was less quick in coming, but it was just as overwhelming. None of the 18 judges elected statewide in Texas[25] is now a Democrat, and in the 2000 elections, no Democrat ran for any of the three seats on the Texas Supreme Court.

The Role of Money

Judicial elections, especially competitive judicial elections, require a great deal of money. In Texas, the first million-dollar judicial campaign—albeit largely self-funded—was in 1980.[26] In 1984, Texas had its first non self-funded million-dollar campaign and for several years thereafter, million dollar campaigns were commonplace.[27] Table 1[28] provides data on campaign contributions in competitive Texas Supreme Court races from 1980-1998. It shows that on average and adjusted for 2001 dollars, winning candidates needed considerably more than $1 million from 1984 through 1996. Even the average campaign treasury of Democratic and Republican candidates typically came to more than $1 million from 1984 through 1994.

Table 1

Average Contributions to Texas Supreme Court Candidates*

Year	Average for All Candidates**	Average for Winning Candidates
1980	$155,033 (332,832)	$298,167 (640,118)
1982***	$173,174 (317,456)	$332,998 (610,439)
1984	$967,405 (1,647,100)	$1,922,183 (3,272,700)
1986	$519,309 (838,191)	$1,024,817 (1,654,110)
1988	$859,413 (1,285,120)	$842,148 (1,259,300)
1990	$970,154 (1,313,080)	$1,544,939 (2,091,050)
1992	$1,096,001 (1,381,910)	$1,096,687 (1,382,780)
1994	$1,499,577 (1,789,980)	$1,627,285 (1,942,430)
1996	$656,190 (739,834)	$1,277,127 (1,439,930)
1998	$521,519 (565,992)	$829,794 (900,556)

* Averages are reported for candidates from contested races featuring both a Republican and a Democratic candidate.

** Averages reported without parentheses are for nominal dollar amounts received, while those in parentheses are in 2001 dollars.

*** The 1982 and 1984 elections each featured only one contested race with both a Democratic and Republican candidate.

Average campaign treasuries declined in the 1996 election cycle and even more so in 1998 for both the Democratic and Republican candidates and for the winning candidate. In the 2000 elections,[29] there was no Democratic opponent for any of the three incumbent Republican candidates for Texas Supreme Court. One incumbent spent less than $100,000. She had no primary opponent and only opposition in the general election from a Libertarian candidate who spent virtually nothing. Another incumbent spent nearly $320,000, but he had token opposition in the Republican primary and opposition in the general election from a Libertarian and a Green Party candidate, both of whom spent virtually nothing. The third Republican incumbent was the first Hispanic ever to run for the Texas Supreme Court in the Republican primary. Perhaps because of the element of uncertainty in being the first, he spent nearly $800,000. His primary opponent spent less than $5,000 and he had a Libertarian general election opponent who spent virtually nothing.[30]

As the days of real competition in statewide races have come to an end, the big money in Texas Supreme Court elections has also come to an end. But substantial sums do remain, perhaps because at least at times, some level of competition occurs in the Republican primary. But also, the existence of campaign money wards off opposition and provides protection for the incumbent from surprise electoral attacks. Notably, an incumbent Republican running for reelection for the Texas Supreme Court has many potential donors more than willing to give to someone seen as an obvious winner.

With funds available, candidates can buy television ads, a new and remarkably effective tool for low-visibility races such as judicial campaigns. One remarkably strong indicator of just how important television has become to judicial races is data on four Republican primaries in 1992, 1994, 1998 and 2000. In each of those primaries, there was an established candidate with financial resources and significant bar and interest group backing. There was also an insurgent candidate with almost no financial resources and with little bar or interest group support. The established candidate in each of the four primaries purchased television time in some, but not all, media markets. The insurgent candidate did not have the resources for any such purchases. As shown in Table 2, the established candidates received significantly higher shares of the votes where they did purchase television time than where they did not. Indeed, in markets where television time was not

Table 2

Television and Texas Supreme Court Election Outcomes

Year	Candidate	Established/ Insurgent	Vote in Media Markets with TV Buys by Established Candidate Only	Vote in Media Markets with No TV Buys
2000	Gonzales	Established	59% (497,611)	43.9% (26,372)
	Gorman	Insurgent	41% (345,536)	56.1% (33,680)
1998	Hankinson	Established	60.76% (264,579)	48.67% (26,385)
	Smith	Insurgent	39.24% (170,850)	51.33% (27,829)
1994	Hecht	Established	64.62% (231,045)	47.65% (46,477)
	Howell	Insurgent	35.38% (126,502)	52.35% (51,061)
1992	Enoch	Established	61.13% (354,592)	42.59% (16,957)
	Howell	Insurgent	38.87% (225,468)	57.41% (22,855)

purchased, the insurgent candidates did very well—actually defeating the established candidates in those markets collectively.

The apparent effectiveness of television advertising in judicial races and its high cost is a guarantee that even with lessened party competition and with the near abandonment of Supreme Court races by the plaintiffs' bar, significant sums of money will continue to be raised.

II. Texas Judicial Politics Now and its Lessons for Judicial Elections Elsewhere

Since the advent of its new judicial politics, Texas has been a bellwether for emerging trends in other states that maintain elected judiciaries. The most telling lesson from Texas' recent experience with judicial selection is that those interests most affected by court decisions are willing to exert a great deal of influence in an attempt to shape the composition of those courts. In states with elective modes of judicial selection, influence on court composition is most easily achieved through campaign finance. So long as the perception—and reality—exists that money buys electoral advantage, deep pocket interests will donate heavily to their favored candidates. Even in the absence of real competition in a judicial race, there will be those who will continue to contribute, if for no other reason than to show their support for one judicial philosophy over another. On the other hand, so long as judges face the electorate for the right to serve on the bench, they will feel compelled to accept campaign contributions—even from those who have interests before their court. For judicial candidates who face no real competition in an election, a large campaign treasury may deter future challengers, who will face formidable odds. Even in an electoral environment dominated by one political party, a large campaign war chest may serve to stave off primary challengers. Given the cost of television and its apparent effectiveness, large campaign funds are needed to mount a credible campaign.

Party affiliation, of course, provides a critical cue to many voters.[31] Even in the absence of party labels on the general election ballot, candidates may enjoy partisan identification from primary elections.[32] But the importance of party affiliation can change quite dramatically. The change of fortune for Republican judicial candidates in Texas is a dramatic example. As a result of this change since the late 1980s, there are currently no Democrats on the Texas Supreme Court.

"So long as the perception—and reality—exists that money buys electoral advantage, deep pocket interests will donate heavily to their favored candidates."

The Texas experience with expensive judicial races shows the deep institutional damage an entire judiciary can suffer as a result of electoral politics. While instances such as the public disciplining of two Texas Supreme Court justices in 1987 may be rare, their existence only adds to the public sense that the electoral selection system renders justice to those who are able to gain influence by contributing to judges' campaigns.

Because judicial reform will invariably impact some strong interests adversely, meaningful change in the way judges are chosen presents a formidable problem. Even in the wake of scandal and the national scrutiny

of the Texas judiciary in the late 1980s, wholesale reform efforts were never a serious prospect.[33] In fact, an important lesson from the Texas experience is that reform may best be pursued in incremental steps. Wholesale reform efforts may pose major threats to established interests, but incremental reform may temper the severity of that threat, making reform somewhat more feasible.

"Despite criticisms of popular judicial elections, mistrust of judicial campaign finance and low voter knowledge of judicial candidates, Texans still hold fast to voting for judges."

A final lesson from Texas is that voters can be profoundly committed to selecting their judges through popular elections. Despite criticisms of popular judicial elections, mistrust of judicial campaign finance and low voter knowledge of judicial candidates, Texans still hold fast to voting for judges. This, together with the other obstacles to reform, renders it unlikely that Texas will abandon its elective process. It also serves to underscore the importance of incremental reform efforts.

In short, Texas' history of judicial elections illustrates vividly many of the oft-repeated criticisms of the popular election of judges. Certainly, no other state wants to repeat the Texas of the 1980s. However, close attention to what happened in Texas provides an outline for other states to consider as they find themselves emerging into a new era of judicial election politics.

Endnotes

1. Roy Schotland, *Statement of Roy A. Schotland before the Joint Select Committee on the Judiciary of the Texas Legislature Austin, Texas,* March 25, 1988, 72 Judicature 154 (1988).
2. Election is a common method for selecting judges in the United States. Thirty-nine states have some judicial elections. Of the nation's 1,243 state appellate judges, 47% are appointed for their initial terms, 40% face partisan elections and 13% face nonpartisan elections. Of the nation's 8,489 general jurisdiction state trial judges, 24% are appointed for initial terms, 43% face partisan elections and 33% face nonpartisan elections. *See* Roy A. Schotland, *Personal Views*, Loyola Univ. L.A. L. Rev. (forthcoming 2001).
3. Texans for Public Justice, *Payola Justice: How Texas Supreme Court Justices Raise Money from Court Litigants*, at http://www.tpj.org/reports/payola/intro.html.
4. State Commission on Judicial Conduct, *Findings, Conclusions and Public Reprimand Relating to Certain Activities of Justice of C. L. Ray of the Supreme Court of Texas* (1987). Ray was disciplined for the appearance of favoritism in the transfer of cases, for the improper receipt of air transportation, for the receipt and consideration of *ex parte* communication, for the improper solicitation of funds, for the *ex parte* disclosure of confidential information to a litigant and for the initiation of an *ex parte* private communication.
5. State Commission on Judicial Conduct, *Findings, Conclusion and Public Admonishment Relating to Certain Activities of Justice William Kilgarlin of the Supreme Court of Texas* (1987). Two of Justice Kilgarlin's briefing attorneys had accepted a weekend trip to Las Vegas from Pat Maloney, Jr., a member of a well-known plaintiffs' firm. Kilgarlin was admonished to "make certain in the future that all staff working under him be required to observe the standards of fidelity and diligence that apply to him." Kilgarlin was also "admonished that solicitation of funds by a judge to prosecute a suit against a former attorney who had testified before the House Committee is violative of the Code of Judicial Conduct." Interestingly, Justice Kilgarlin blamed the sanction on the civil defense bar. Robert Elder wrote, "Kilgarlin placed the blame for the sanctions on Larry Thompson, who in 1985 formed the Supreme Court Justice Committee. Thompson has said the group was set up to counter the success of the plaintiffs' bar. . . . Kilgarlin called the pro-defense committee '19 lawyers who hate my guts' and said 'one of the expressed purposes of that group was to create a scandal involving me.'" *See* Robert Elder, Jr., *Sanctions Spark More Feuding*, Texas Law., June 15, 1987, at 1, 17.
6. "Lawyers representing Pennzoil contributed, from 1984 to early this year, more than $355,000 to the nine Supreme Court justices sitting today. . . . Lawyers representing Texaco have also been contributors, but they have given far less." Thomas Petzinger, Jr., & Caleb Solomon, *Texaco Case Spotlights Questions on Integrity of the Courts in Texas*, Wall St. J., Nov. 4, 1987, at 1.
7. Anthony Champagne, *Judicial Reform in Texas*, 72 Judicature 146, 151-52 (1988).
8. *Id.* at 158.
9. Other heavily funded races involving clear differences between plaintiff and civil defense-backed candidates included the William Kilgarlin-Nathan Hecht race, where Kilgarlin raised over $2 million and Hecht raised about $650,000, and the Lloyd Doggett-Paul Murphy race, where Doggett raised about $660,000 to Murphy's $438,000. Anthony Champagne, *Campaign Contributions in Texas Supreme Court Races*, 17 Crime, L. & Soc. Change 91, 95 (1992).
10. *Id.* at 99.
11. *Id.* at 94-96.
12. *Id.* at 96-99.
13. Walt Borges, *Gonzalez-Haas Fight Pushes Others Aside*, Texas Law., Mar. 14, 1994, at 1.
14. The Haas-Gonzalez primary election is, however, just barely the record holder for judicial campaign expenditures. In 1996, in Alabama, there was a Supreme Court race where the two candidates spent $4,488,504. We are grateful to Roy Schotland for providing us with these figures, which are part of an article he is currently preparing.
15. One newspaper article described the political battle lines in judicial elections in this way:

> This ugly transformation of judicial politics has come as some of the nation's most divisive disputes have come before the courts. State Supreme Courts now decide the future of school funding; policies affecting guns, tobacco and the environment; and the rules that make it easy, or difficult, to sue corporations and doctors for damages. With such enormous stakes, the battle lines are stark: Trial lawyers and unions seek judges who will side with individuals and embrace new legal theories. Businesses want judges who'll protect them and the status quo.

See Campaign Contributions Corrupt Judicial Races, USA Today, Sept. 1, 2000, at 16A.

16. Champagne, *supra* note 9 at 99.
17. Texans for Public Justice, *supra* note 3.
18. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 760 at 813 (1995).
19. Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L.J. 31, 44 (1986).
20. Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 Just. Sys. J. 219, 243 (1999).
21. Anthony Champagne, *Political Parties and Judicial Elections*, Loy. L.A. L. Rev. (forthcoming, 2001).
22. Bright & Keenan, *supra* note 18 at 780.
23. Anthony Champagne, *The Selection and Retention of Judges in Texas* 40 Sw. L. J. 53 at 79 (1986).
24. Anthony Champagne and Greg Thielemann, *Awareness of Trial Court Judges*, 75 Judicature 271, 272 (1991).
25. Texas is unusual in having two high courts: the Texas Supreme Court for civil cases, and the Texas Court of Criminal Appeals for criminal cases. Each court has nine judges and all judges are elected in statewide elections.
26. That wealthy candidate was Will Garwood, who had been appointed to the Texas Supreme Court by Republican Gov. Bill Clements and who then ran as the Republican nominee against C.L. Ray, a Democrat and an intermediate appellate judge who received substantial trial lawyer backing.
27. John Hill, a former Texas secretary of state, former attorney general and unsuccessful Democratic candidate for the governorship in 1978 (defeated by Republican Bill Clements), successfully ran for the chief justiceship in 1984 with a campaign treasury of over $1.4 million. His Republican opponent, John Bates, was not well known and had only about $12,000 in contributions. Bates was able, however, to garner about 46% of the vote, probably because he ran as a Republican with Ronald Reagan at the top of the ticket. *See*, Champagne, *supra* note 23 at 91.
28. Kyle Cheek & Anthony Champagne, *Money in Texas Supreme Court Elections: 1980-1998*, 84 Judicature 2, 22 (2000). The data in this article has been readjusted from 1998 to 2001 dollars.
29. Expenditures reported for the 2000 election are in 2000 dollars (unadjusted for one year's inflation). We are grateful to Professor Roy Schotland of Georgetown Law Center for providing us with the 2000 expenditure data from an article of his that is in preparation.
30. Al Gonzales did win the primary by a huge margin of 59%. Still his primary victory margin was less than the other incumbent Republican who had a primary opponent.
31. *See generally* Phillip Dubois, *From Ballot To Bench: Judicial Elections and the Quest for Accountability* (1980).
32. Kathleen L. Barber, *Ohio Judicial Elections—Nonpartisan Premises with Partisan Results*, 32 Ohio St. L.J. 762-789 (1971).
33. *See generally* Champagne, *supra* note 7.

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Communicating with Voters: Ethics, Independence and Judicial Campaign Speech

By Cynthia Gray

Introduction

In the past, judicial candidates took the "high ground" and avoided the rhetoric, promise-making and distortion typical of campaigns for other offices. Indeed, provisions in the code of judicial conduct that apply to judicial candidates as well as incumbent judges require dignity and restraint. Recently, however, judicial campaigns across the country have become increasingly strident and occasionally indistinguishable from other campaigns.

To justify this change in practice, judicial candidates have raised First Amendment challenges to the code standards for campaign speech. Those arguments have met with mixed success. This article will discuss some of the First Amendment cases and identify the weaknesses in the attacks on the restrictions and the benefits of maintaining ethical standards during judicial campaigns.

Background

The cases addressing First Amendment challenges to the provisions regarding judicial candidates' speech apply a strict scrutiny test because the restrictions impinge on the right of judicial candidates to advocate their own election and the right of voters to obtain information that may be relevant in making their electoral choices. Thus, the cases consider whether the state has demonstrated a compelling interest behind the restrictions and whether the restrictions have been narrowly drafted to avoid unnecessary abridgment of constitutional rights.

All the cases recognize that judges differ in key respects from legislators and executive officials, even when all are elected, and that a state may regulate judicial campaigns with those differences in mind. As the Indiana Supreme Court explained:

> [W]hile officeholders in all three branches serve their constituents as voters, judges serve their constituents in another, equally important way: as litigants and potential litigants . . . entitled to due process of law before they may be deprived of life, liberty or property. . . . Voters elect mayors, city councilmen, governors, state legislators, presidents and members of congress to pursue certain public policies. But voters elect judges to "listen and rule impartially on the issues brought before the bench."[1]

Therefore, the cases, even those that find a restriction unconstitutional, concede that the state interest in the integrity, impartiality and independence of the judiciary promoted by the restrictions on judicial campaign speech, is a compelling one.

"Recently, however, judicial campaigns across the country have become increasingly strident and occasionally indistinguishable from other campaigns."

Disputed Legal and Political Issues

The code provision that has been challenged most often is the prohibition on discussion of a judicial candidate's views on "disputed legal or political issues." The "disputed legal or political issues" restriction was adopted by the American Bar Association in Canon 7B(1)(c) of the 1972 Model Code of Judicial Conduct and, in turn, established as the standard in most state codes.

In First Amendment challenges by judicial candidates, the U.S. Courts of Appeal for the Third and Eighth Circuits have construed that provision to prohibit candidates only from expressing opinions on issues that might come before them as judges.[2] The court concluded that such a narrow prohibition "does not violate the First Amendment because the limitation does not unnecessarily curtail protected speech, but does serve a compelling state interest."[3]

However, several courts have refused to narrowly construe the restriction and, as a result, have held that the "disputed legal and political issues" provision violates the constitutional free speech rights of judicial candidates.[4] For example, in *A.C.L.U. v. The Florida Bar*, the U.S. District Court for the Northern District of Florida stated that how a judicial candidate will choose to exercise discretion is "of much concern to the litigants,

lawyers, and the public alike" and is revealed by the candidate's views on disputed legal and political issues.[5] Those cases hold that the prohibition "underestimates the ability of the public to place the information [about a candidate's views on disputed legal or political issues] in its proper perspective."[6]

Assuming the correctness of those decisions, the ABA omitted the "disputed legal or political issues" language when it revised the Model Code in 1990, to "be more in line with constitutional guarantees of free speech."[7] Instead, the 1990 Model Code prohibits a judicial candidate from "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court." That restriction has so far withstood constitutional scrutiny despite two challenges.[8]

The prohibition on judicial candidates making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" (from the 1972 and 1990 ABA model codes and most state codes) has also been declared unconstitutional in one case.[9]

"[T]he speech restrictions stop far short of silencing judicial candidates and leave them sufficient opportunity to educate voters about their qualifications and what kind of judges they would be."

Gag Rule Argument

The cases holding judicial campaign speech restriction unconstitutional are based in part on the premise that the restriction imposes a "gag rule" on judicial candidates. For example, in *Buckley v. Judicial Inquiry Board*, the Seventh Circuit concluded: "[T]he only safe response to [the campaign speech restrictions] is silence. . . . It is basically only during the campaign that judicial aspirants have an audience, and literal compliance with [the campaign speech restrictions] would deprive the audience of the show."[10] The court in *A.C.L.U. v. The Florida Bar* opined that the restriction requires the electorate to "choose its judges based upon little more than biographical data."[11]

However, contrary to that assumption, the speech restrictions stop far short of silencing judicial candidates and leave them sufficient opportunity to educate voters about their qualifications and what kind of judges they would be. In *Republican Party of Minnesota v. Kelly*, the Eighth Circuit rejected the argument that the restriction on discussions of disputed legal and political issues prohibits judicial candidates from discussing virtually every topic related to their campaigns. The court recognized that, despite the restriction, candidates can discuss many subjects "highly relevant to a candidate's qualification for office" such as "character, fitness, integrity, background . . . education, legal experience, work habits, and abilities."[12] The court noted that candidates may also state how they would handle administrative duties, discuss appellate court decisions and a wide range of issues and explain their judicial philosophy.[13] As the district court opinion held, "contrary to the finding of the court in *Buckley*, the Judicial Codes do not prevent candidates from discussing more than their name, rank and serial number."[14]

Under the code, judicial candidates are not restricted to simply parroting that they will "faithfully and impartially uphold the duties of the office" but may give that pledge meaningful content by discussing specific matters relating to judicial organization, administration and court management. Although candidates may not make statements expressly or impliedly signaling what decisions they would make on issues, they may, for example, pledge to dispose of a backlog of cases, to avoid favoritism in appointments and hiring, to start court on time, to improve conditions for jurors and to increase efficiency. Candidates may discuss matters such as what they would do outside the courtroom to improve the justice system, how to improve public confidence in the courts and how to implement the recommendations of racial and gender bias task forces.

A judicial candidate may even criticize an opponent if the criticism is scrupulously truthful and does not relate to the opponent's decisions in specific cases. For example, a candidate may criticize an opponent's work habits and lack of experience, as long as the criticism does not use half-truths or distortions, and does not create unjustified expectations to mislead the voters.

The code allows debate on crucial issues facing the judiciary and of interest to the public. The kind of debate allowed by the code provides candidates with sufficient opportunity to educate voters about their qualifications and to differentiate themselves from other candidates.

Misleading Statements

Compounding the error of assuming the restriction on discussion of issues renders judicial candidates speechless has been the extension of the free speech argument to permit misleading statements in judicial campaigns. However persuasive the argument that voters are aided by knowing a judicial candidate's views on disputed legal or political issues when they vote, misleading statements can only hinder voters trying to

make an intelligent choice among candidates at the polls.

Despite that contradiction, the Michigan Supreme Court relied on *Buckley* and similar cases and held that a code provision prohibiting misleading judicial campaign ads was facially unconstitutional.[15] In *In re Chmura*, the court was reviewing a recommendation of the Judicial Tenure Commission that a judge be sanctioned for misleading ads used during his election campaign.

At the time of the judge's campaign, the Michigan code of judicial conduct provided that a judicial candidate:

> [S]hould not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.

The court acknowledged that the canon served the compelling state interests of preventing fraud and libel, preserving the integrity of the election process from distortions caused by false statements, preserving the integrity of the judiciary and preserving public confidence in the judiciary.[16]

However, finding that the canon "greatly chills debate regarding the qualifications of candidates for judicial office," the court noted it applied to all misleading statements and factual omissions, not merely those that bear on the impartiality of the judiciary or are false.[17] Concluding that to avoid the risk of discipline, "a judicial candidate will merely state academic credentials, professional experience, and endorsements received," the court stated that the canon precludes meaningful debate "concerning the overall direction of the courts and the role of individual judges in contributing to that direction," impeding "the public's ability to influence the direction of the courts through the electoral process."[18] The court concluded that "the preferred First Amendment remedy for misstatements and misrepresentations during the campaign is to encourage speech, not stifle it."[19] The court narrowed the canon to prohibit candidates only from knowingly or recklessly using forms of public communication that are false and remanded the case to the Commission for a determination whether the judge violated the narrowed canon.[20]

The effect of the court's reasoning is that candidates have a right to knowingly make misleading statements during their election campaigns. Under that rule, voters have no protection from distortions that would mislead them when making their decisions at the polls and against candidates who would knowingly use that tactic to gain votes.

Moreover, the opinion in *Chmura* contains several substantial flaws. For example, contrary to its analysis, the rule the court overturned did not prohibit judicial candidates from candidly debating their ideas about judicial organization, administration and reform. By definition, ideas and opinions cannot be misleading, and, therefore, by its terms, the rule did not apply to such debate. Moreover, the former rule allowed discipline only if a candidate knew or reasonably should have known a statement was misleading, and therefore did not punish inadvertent mistakes. Before the court's decision, a scrupulous candidate intent on proving his or her integrity to the voters had nothing to fear from the rule and could accurately and fairly discuss character, background and experience.

The *Chmura* court put its trust in corrective speech as the preferred First Amendment remedy for misstatements during a campaign. However, a favorite strategy in political campaigns is to save the most negative advertising for the last few days before voting takes place, when the short time remaining before voters decide makes an adequate response impossible. The court's remedy, therefore, leaves opposing candidates and voters vulnerable to last-minute attacks and misinformation. Moreover, there is no way of ensuring that the "corrective speech" would be heard by the same voters who were intentionally misled in the first place. Finally, the court's corrective speech cure means the attacked candidate will have to respond to dishonest advertising with more advertising, particularly television advertising, adding to the already skyrocketing cost of judicial campaigns and the pressures on judicial candidates to raise more money from lawyers and special interests.

It is not inconsistent with the First Amendment for the code of judicial conduct to assume that a candidate for judicial office is a reasonably intelligent person capable of communicating with voters in a way that is not false, fraudulent, misleading or deceptive, particularly as he or she will be required to interpret laws with similar wording when holding that office. Permitting misleading statements in judicial campaigns indicates to the public that judges do not need to have a commitment to the truth that begins with their campaigns for office.

Conclusion

If the speech restrictions for judicial campaigns are lifted by courts in the name of free speech and candidates do not voluntarily practice restraint, the differences between the judicial office and other political offices will be lost in the clamor of campaign commitments and promises. Once the public can no longer distinguish between judicial campaigns and other campaigns, it may no longer be willing to accord the judiciary the independence that is justified by the differences between judges and other government officials. Therefore, to preserve the independence of the judiciary, judicial candidates must resist the pressure to change the nature of judicial campaign speech and to make pronouncements of personal positions on issues such as abortion, the death penalty and the exclusionary rule.

"If the speech restrictions for judicial campaigns are lifted by courts in the name of free speech and candidates do not voluntarily practice restraint, the differences between the judicial office and other political offices will be lost in the clamor of campaign commitments and promises."

Instead, confidence must be placed in the candidates' ability, consistent with the code, to stimulate robust public discussion on issues of legitimate interest to the voters and, thereby, prove their capacity to fulfill the judicial role. To comply with the code of judicial conduct while running effective campaigns, a judicial candidate does have to act with thoughtfulness and imagination that does not rely on the usual strategies of political campaigns such as negative generalizations, inflammatory terms and buzzwords. By demonstrating intelligence, vision and restraint during a campaign, a judicial candidate begins to demonstrate to voters the kind of judge he or she will be.

Endnotes

1. *In re Bybee*, 716 N.E.2d 957, 959-60 (Ind. 1999) (*quoting* Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059, 1077 (1996)).
2. *Stretton v. Disciplinary Bd. of the Sup. Ct. of Pa.*, 944 F.2d 137 (3rd Cir. 1991); *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001).
3. *Stretton*, 944 F.2d at 144. *See also Republican Party*, 247 F.3d at 880-83.
4. *Beshear v. Butt*, 863 F. Supp. 913 (E.D. Ark. 1994); *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Kentucky 1991); *A.C.L.U. v. The Florida Bar*, 744 F. Supp. 1094 (N.D. Fla. 1990) (permanent injunction order (May 22, 1991)).
5. *A.C.L.U.*, 744 F. Supp. at 1099.
6. *Id.*
7. Milord, *The Development of the ABA Judicial Code* at 50 (1992).
8. *Deters v. Judicial Ret. & Removal Comm'n*, 873 S.W.2d 200 (Ky. 1994), *cert. denied*, 513 U.S. 871 (1994); *Ackerson v. Kentucky Judicial Ret. & Review Comm'n*, 776 F. Supp. 309 (W.D. Ky. 1991).
9. *Buckley*, 997 F.2d 224 (7th Cir. 1993).
10. *Id.* at 228.
11. *A.C.L.U.*, 744 F. Supp. at 1098.
12. *Republican Party*, 247 F.3d at 883.
13. *Id.*
14. *Republican Party of Minnesota v. Kelly*, 63 F. Supp. 2d 969, 985 (D. Minn. 1999).
15. *In re Chmura*, 608 N.W.2d 31 (Mich. 2000). The court did reject as inappropriate the subjective "actual malice" standard employed in defamation cases and held that the determination whether a candidate recklessly disregarded the truth or falsity of a public communication is an objective one. *Id.* at 43-44.
16. *Id.* at 40.
17. *Id.* at 42.
18. *Id.* at 42-43.
19. *Id.* at 43. The Michigan Supreme Court's analysis in *Chmura* was adopted by a federal court considering a similar provision in the Georgia code of judicial conduct. *Weaver v. Bonner*, 114 F. Supp. 1337 (N.D. Ga. 2000).
20. On remand, the commission concluded that the judge's campaign communications, individually and collectively, revealed a "conscious effort [by the judge] to use false statements and to use them with reckless disregard for their truth or falsity as part and parcel of his campaign strategy." Rejecting the commission's recommendation that a judge be suspended for 90 days, the court held: "A review of the four exhibits reveal that the communications were either literally true, substantially true despite their inaccuracies, or communicated mere rhetorical hyperbole." *In re Chmura*, 626 N.W.2d 876, 897 (Mich. 2001).

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Ethical Limitations on Judicial Campaigning

By Vincent R. Johnson

Attacks on the Judiciary

It is increasingly common for jurists, rather than their allegedly erroneous rulings, to be the target of wrath by disappointed partisans. Not long ago, for example, in the pleadings and correspondence of lawyers, justices on various Texas appellate courts were compared to "Pestilence, Death, [and] Famine," mocked as "bought and paid for employees of the Wall Street rich . . . and the country club set," and lambasted for rendering "pro-rapist, pro-big-insurance-defense firm" decisions.[1] These derogatory taunts by attorneys are part of a broader attack on the independence and integrity of the judiciary.[2]

"It has always been important for judges to observe high ethical standards. But in the combative atmosphere that now prevails, judges at all levels need to be especially vigilant to avoid ethical improprieties that may unnecessarily provoke bad publicity."

Of course, criticism of the judiciary is not new. One thinks of past attacks leveled against the lower federal court judges who worked to make the civil rights movement's promise of racial equality a reality,[3] or attacks against U.S. Supreme Court justices, such as Chase,[4] Taney,[5] Warren[6] and Douglas.[7] But the recent spate of criticism has a harder edge to it, and surprisingly, it is sometimes more willingly tolerated. For example, intemperate language that just a few years ago would have caused a court to reject the filing of a motion, may today go unchallenged.[8] Moreover, recusal motions, which used to be rare, now have become routine.[9] At a minimum, it can safely be said that if a judge today is subject to harsh attacks for conduct no more grievous than rendering an incorrect decision, it seems likely that one who engages in ethically questionable conduct will be even more severely taken to task, producing greater harm to public confidence in the courts.

It has always been important for judges to observe high ethical standards. But in the combative atmosphere that now prevails, judges at all levels need to be especially vigilant to avoid ethical improprieties that may unnecessarily provoke bad publicity.

Negative Campaigning that Impugns the Integrity of the Judicial System

Can the angry temper or negative tone of campaign statements by itself warrant discipline? If a statement is not provably false, can it be challenged on the ground that it is unduly vitriolic or contentious? Put differently, are judges and judicial candidates obliged to observe an elevated tone of debate in the pursuit of an electoral victory? Many writers and courts have suggested or taken this approach.[10] Thus, the American Bar Association's Code of Judicial Conduct cautions in mandatory terms that "a candidate for a judicial office: . . . shall maintain the dignity appropriate to judicial office."[11] In a recent case, which is illustrative, the New York Commission on Judicial Conduct wrote in imposing discipline:

> Even in his or her own campaign, a judge faces constraints. A judicial candidate must 'maintain the dignity appropriate to judicial office.' Even in the face of provocation by an opponent, a judge must adhere to this standard. Respondent's political advertisements, suggesting that his opponent would be biased as a judge and was not respected in his profession and comparing him to comic characters, lacked the dignity required of judicial candidates.[12]

It is easy to posit examples of negative campaigning. Consider, for instance, whether it would be permissible for a judicial candidate for the Texas Supreme Court to make statements like those quoted at the beginning of this article, painting the incumbents as the judicial equivalent of pestilence, death, and famine or as "captive pets" of the insurance industry.[13] Or take the recent case where a judicial candidate labeled the incumbent a "judicial reactionary" and accused him of having a "campaign treasury heavily laden with lavish contributions by politically influential lawyers and lobbyists, power brokers for liability risk insurance companies, finances, environmental polluters and a heavy handed law enforcement establishment of this community."[14] Of course, harsh statements make for easy cases. But there are also mild forms of negative campaigning, such as those contained in a recent fund-raising letter which said only that the candidate was running "to restore fairness, respect and experience" to the bench

and urged voters to "give justice a chance."[15] Even if such statements can be labeled "negative," how they should be dealt with as a matter of judicial ethics is far from clear.

In the field of lawyer advertising, disciplinary authorities at one time insisted that communications by lawyers about their availability or services had to be restrained and dignified.[16] It is now clear that the constitutionality of restrictions on commercial speech by attorneys turns not on whether the ad is tasteful, but whether it is false or misleading. Thus, in *Zauderer v. Office of Disciplinary Counsel*, the Supreme Court rejected a rule which, for the purpose of ensuring that attorneys advertised "in a dignified manner," restricted the use of illustrations.[17] The Court wrote:

> [W]e are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case, we are unpersuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule. . . . [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.[18]

However, other courts have focused on the impact that judicial campaign language has on the administration of justice. They have reasoned, in effect, that lawyers and judges have special obligations because of their professional status, and that important state interests justify according them a diminished scope for free expression, even in the context of a political race. For example, in *In re Riley*, the Supreme Court of Arizona wrote in 1984:

> Even if not a candidate for judicial office, a lawyer is held to a narrower standard of free speech than a non-lawyer when discussing the judiciary:
>
> > A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics; and if he wishes to remain a member of the bar he will conduct himself in accordance therewith.
>
> A lawyer may be disciplined if his public comments threaten a significant state interest. The good standing of the judicial system is such a significant interest. Generally, and also during a judicial campaign, *a lawyer may accurately criticize a sitting judge, but may not impugn the integrity of the judicial system or question the decisions of the judge*.[19]

Elaborating on this view, the court stated:

> Freedom of speech does allow fair comment even by a lawyer candidate concerning a judge opponent:
>
> > A candidate for non judicial office is free to announce his stand on the issues he must pass upon in office, and to pledge his vote on those issues; the judicial candidate is forbidden to enter this customary campaign arena. Hence, unless the election is to be a pure popularity contest based on name recognition alone, the only legitimate area for debate is the relative qualifications of the candidates. *In our view, the health, work habits, experience and ability of the candidates are all matters of legitimate concern to the electorate who must make the choice.*
>
> * * *
>
> *We believe that candidates for judicial office have a First Amendment right to criticize an incumbent judge for such matters as intemperate behavior, injudicious actions, lack of judicial temperament, unpredictability, and unnecessary delay in rendering decisions.* We are aware that the line between fair comment and impermissible comment is indistinct and also that judges are relatively helpless to defend themselves from such attacks. Nevertheless, in jurisdictions that require the election of judges, such comment must be allowed.

> Lawyers who are candidates for judicial office may not impugn the integrity of the judicial system or question the decisions of the judge. *Lawyers may make fair comment on the judge's fitness so long as the comment does not call into question decisions of the court or question the integrity of the judicial system*. For example, a lawyer may criticize a judge for unnecessary delay in reaching a decision, but may not question the decision itself except on appeal. This is not to say, however, that a lawyer may not publicly disagree with a judge's decision. Proper avenues for questioning a decision include the appellate route and disciplinary proceedings where appropriate. What we condemn is conduct which denigrates the judicial system as a whole and undermines the public's confidence in it."[20]

Aside from questions of constitutionality, the distinction proposed in *Riley*—between speech which criticizes a judge's actions or qualifications, on the one hand, and speech which criticizes decisions of the judge and the integrity of the judicial system, on the other hand[21]—can be challenged on the ground that it is unworkable in practice. Is it possible to impugn a judge's actions or qualifications without adversely reflecting upon the judge's decisions? Doesn't revelation of the fact that a judge is incompetent, lazy or corrupt necessarily cast a dark shadow on the integrity of the judicial process? It can be plausibly argued that the ruling in *Riley* renders the First Amendment rights of judicial candidates illusory by providing that they can criticize a sitting judge only if the statements about the judge do not undermine confidence in the judicial system.[22]

In *Riley*, the candidate in question (who was successful in winning a judgeship) had criticized the incumbent judge by telling reporters that a contempt order was "crazy," "absolutely insane," and "motivated by revenge on the part of [the incumbent]," stating that the incumbent was "vindictive" and "partial," and alleging that the "state simply doesn't get a fair trial in his court."[23] The court found that these comments, and "particularly the statement that '[t]he state simply doesn't get a fair trial in his court,' questioned the decisions of the court and the administration of justice."[24] The candidate's actions, the court ruled, constituted "conduct prejudicial to the administration of justice,"[25] and therefore discipline in the form of public censure was imposed.[26] In dissent, the Chief Justice of the Arizona Supreme Court noted the impracticality of the standard articulated by the majority, observing that "[o]ften the only way the deficiencies or prejudices of a judge can be shown is by referring to specific cases or categories of cases decided by that judge."[27]

The constitutional uncertainty of restrictions on negative campaigning strongly suggests that judges and judicial candidates must chart a cautious course unless they wish to become embroiled in disciplinary proceedings. Indeed, even if such limitations on political speech during the course of a judicial campaign run afoul of the First Amendment, such statements should be avoided, if for no other reason than that they place the speaker in a bad light if there is a debate over the truth or falsity of the charges made by the speaker. That is, the negativity or tastelessness of a statement made during a judicial campaign may be taken into account by a fact finder in determining whether the speaker acted with knowledge that the statement was false, or with reckless disregard for the truth, and is therefore subject to discipline on that independent ground.

"Is it possible to impugn a judge's actions or qualifications without adversely reflecting upon the judge's decisions? Doesn't revelation of the fact that a judge is incompetent, lazy, or corrupt necessarily cast a dark shadow on the integrity of the judicial process?"

Support for Other Campaigns and Political Parties

A judge or judicial candidate can do very little to advance directly the electoral chances of another candidate running for public office.[28] Rules of judicial ethics ordinarily prohibit a judge from "authoriz[ing] the public use of his or her name endorsing another candidate,"[29] and from lending the prestige of judicial office to the advancement of private interests.[30] These provisions have been construed in Texas to prohibit a judge or judicial candidate from verbally recommending another candidate or even asking the voters to consider the candidate.[31] Undoubtedly, more active forms of endorsement will be found to run afoul of these precepts. In *In re Ovard*, the Texas Commission on Judicial Conduct publicly reprimanded a judge for endorsing, in several pieces of campaign literature, a candidate to succeed himself as justice of the peace following the expiration of his term.[32] In one instance, the judge's endorsement was contained in the candidate's paid political "valentine," in another it was part of the candidate's four-page "Notice of False Endorsements," and in other instances the endorsement was included in let-

ters paid for by the candidate or the judge.[33] The Commission found that this conduct constituted "willful and flagrant" violations of the provisions of Canon 7.[34]

There is authority to similar effect in other jurisdictions. In other states, authorities have held that it is improper for a judge to aid a candidate by sending out letters of support,[35] hosting a barbecue,[36] assisting in the formulation of campaign strategies,[37] purchasing advertisements,[38] or even influencing a political party's choice of primary candidates.[39]

"The ethical limitations applicable to political campaigns, perhaps more than ever, need to be followed and enforced with the same passion that accompanies other aspects of the political process."

For essentially the same reasons, a judge or judicial candidate may not hand out campaign materials for another candidate or for a political party, regardless of whether the materials are accompanied by a verbal endorsement or whether an advertisement for the judge or judicial candidate appears in the materials.[40] In addition, joint campaign activity by two judges is deemed to be impermissible,[41] such as mailing sample ballots which give the impression that each judge endorses the other.[42] Thus, two or more judges running for judicial office at the same time may not jointly sponsor a fundraising event or have a politically active group do that for them.[43]

Care must also be exercised with respect to political contributions to other campaigns. In general, a contribution is appropriate only "when the judge is satisfied that neither the contribution nor the public record thereof will receive public attention before the election."[44] Presumably, this means that the best course for a judge or judicial candidate is to avoid making such contributions.[45] In addition, a judge cannot display on the judge's vehicle a bumper sticker supporting a political candidate.[46] The same rule also likely applies to the erection of yard signs endorsing other candidates.[47]

One advisory ethics opinion has taken the position that judges may "support a county bond election, designated a 'law and order election,' to fund an expanded and improved jail facility, a new county criminal courts building, and renovation and improvement of civil district and family courts facilities."[48] Perhaps this is not surprising since judges are permitted to engage in activities to improve "the law, the legal system, [and] the administration of justice"[49] and because, strictly speaking, on the posited scenario, the judges would not be lending "the prestige of judicial office to advance the private interests of the judge or others."[50] However, judicial involvement with other types of ballot issues may be improper, particularly where the actions "cast reasonable doubt on the judge's capacity to act impartially as a judge"[51] or amount to an expression of opinion on any issue that may be subject to judicial interpretation.[52] Accordingly, a judge may not "actively support a bond election to raise funds to develop a city water project."[53]

Conclusion

A candidate for judicial office faces a daunting array of obstacles. First, he or she must identify a race which, because of the existence of a vacancy or the weakness of the incumbent, it is possible to win. Then, the candidate must rally supporters, raise contributions, comply with financial disclosure requirements, attract favorable attention, achieve name recognition and cajole potential voters at what often seems to be an endless array of public events. Finally, the candidate must persuade the electorate to turn out at the polls and to mark the right box or pull the right lever in numbers sufficient to surpass all opponents. To add to this host of obstacles a tangle of ethical restrictions, which limit what the candidate may say on his or her own behalf or what types of support others may provide, might strike some as unfair. But that is the American way, and, in general, the system works. The tradition of the American judiciary, on the whole, has been one of honor, integrity, hard work and fairness. The ethics rules that preclude judges and judicial candidates from engaging in inappropriate political activity make an important contribution to continuing that tradition and, through it, to advancing the administration of justice. The ethical limitations applicable to political campaigns, perhaps more than ever, need to be followed and enforced with the same passion that accompanies other aspects of the political process. If they are, the judiciary will take an important step toward weathering the current storm of judicial criticism that recently has attracted so much attention and threatened public confidence in the courts.

Endnotes

1. Robert Elder, Jr., *The Art of the Brief, Disrespectfully Submitted*, Tex. Law., Aug. 11, 1997, at 2. Elder goes on to say:

> Whatever else one can say about them, [attorneys] Robert Hilliard, Michael Shore and Marynell Maloney do possess a certain rhetorical flair:

> "Outlined against a hazy July sky, the four horsemen rode again last Wednesday, July 9, 1997. You know them: Pestilence, Death, Famine and this Texas Supreme Court," Hilliard wrote in a July 24 motion for rehearing of a Bendectin birth-defect case.
>
> "You are now considered bought and paid for employees of the Wall Street rich, the insurance conglomerates and the country club set you fawn over," Shore wrote in a letter to the Supreme Court after reading its opinion in a hospital licensing case in which he wasn't even involved. "Defense lawyers I work with are laughing at you, considering you their captive pets."
>
> "No wonder the court has elected not to publish its opinion in this matter! It must be embarrassing to take such a decidedly pro-rapist, pro-big-insurance-defense-firm position with so appallingly nonexistent legal or logical basis," Maloney wrote in a motion for rehearing to the 4th Court of Appeals after it had ruled against her client in a nursing home case.
>
> These items aren't just inflammatory passages highlighted to make a point—the writings of all three lawyers are shot through with this type of rancor and passion.

Id.; *see also* "Captive Pets" at Supreme Court, Tex. Law., July 21, 1997, at 2.

2. *See* N. Lee Cooper, *President Ends Term with Call for Resistance to Legal Services Cuts and to Attacks on Judiciary*, Nat'l L.J., Aug. 4, 1997, at C1, C18 (" The biggest challenge to the legal profession and to the justice system as the new century approaches is the continuing attack upon the federal judiciary."). *See also Federal Writ Frees Lawyer*, San Antonio Express-News, Oct. 4, 1997, at 2B. After a lawyer was sanctioned by the Texas Supreme Court and ordered to pay $1,000 to the lawyers on the other side of a case, he sent a check to the court, which was made "payable to any Texas Supreme Court Justice." *Id*. The Supreme Court found the lawyer in contempt. *See id.* He was arrested, placed in jail then later freed by a federal court writ. *See id.*

3. *See, e.g.*, Robert F. Kennedy, Jr., *Judge Frank M. Johnson, Jr.: A Biography* (1978) (discussing Judge Johnson's role in federal civil rights litigation in Alabama).

4. Justice Samuel Chase was not only widely criticized, but also impeached and tried, though not convicted. *See generally* William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1992), *reviewed in* Vincent R. Johnson, *The Moderate Rehnquist*, 17 Vt. L. Rev. 267, 268 (1992).

5. *See* William H. Rehnquist, *The Supreme Court: How It Was, How It Is* 149 (1987).

6. *See* Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography* 124 (1983).

7. *See* David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 97-99 (1986).

8. *See* Theodore Mack, *Court Disrespect Distasteful*, Tex. Law., Aug. 25, 1997, at 26. Mack states that the Texas Supreme Court's "apparent decision to benignly ignore attacks is a fairly recent one" and notes that, 15 years ago, a motion for rehearing was rejected for filing because of its intemperate tone. *Id*. The more recent motion said that the court's denial of a writ was "'unprincipled' and that the court could not maintain its 'intellectual integrity' and allow the decision of the [lower court] to stand." *Id*. Of course, not all courts are inclined to ignore abusive language. *See In re Maloney*, 949 S.W.2d 385, 386 (Tex. App. 1997) (stating that an attorney's assertions, in a motion for rehearing and in response to an order to show cause, were direct attacks on the integrity of the justices of the court and warranted the forwarding of the matter to the State Bar for disciplinary proceedings). Some bar associations are redoubling their efforts to defend judges from unfair criticism. *See* Richard L. Fruin, Jr., *Defending Judicial Independence and Opening Up Courts*, Nat'l L.J., Aug. 4, 1997, at C10 (discussing ABA efforts).

9. *See* John Council, *Recusal Roulette*, Tex. Law., Sept. 1, 1997, at 1. Council quotes the presiding judge for the First Administrative Judicial Region in Dallas, who now hears an estimated 100 recusal hearings a year, as saying: "[W]e didn't use to have this problem 25 years ago. . . . Most are absolutely frivolous. . . . I think it kind of shows the decline in collegiality of the bar and the respect for judges." *Id.*

10. *See, e.g.*, *In re Donohoe*, 580 P.2d 1093 (Wash. 1978). The Washington Supreme Court concluded that, "[i]f running for judicial office, a lawyer may criticize an incumbent judge who is his opponent but the criticism must be well founded, on a high plane, factual, and not personal." *Id*. at 1097 (citing R. Wise, Legal Ethics 21 (1966)). In the same vein, the old Texas Code of Professional Responsibility, which was superseded by the current Texas Disciplinary Rules of Professional Conduct on January 1, 1990, *see* Tex. State Bar R., art. XII, § 8 (Tex. Code Prof'l Resp.), 34 Tex. B.J. 758 (1971, superseded 1990), articulated a similar aspirational goal for lawyer criticism of judicial candidates. Also, Ethical Consideration 8-6 provided in relevant part:

> Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. . . . While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticism, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

Model Code of Professional Responsibility EC 8-6 (1980).

11. Model Code of Judicial Conduct Canon 5(A)(3)(a) (1990). The Texas Code of Judicial Conduct contains no parallel language.

12. N.Y. Com. Jud. Cond., Jan. 27, 1994, *available at* 1994 WL 897478 (citing Canon 7B(1)(a) of the Code of Judicial Conduct).

13. *See* Elder, *supra* note 1, at 2.

14. *In re Hopewell*, 507 N.W.2d 911, 913-14 (S.D. 1993). The court suspended the attorney-candidate from practice based in part on its finding that the quoted statements violated provisions of the state code of judicial conduct requiring a judge or judicial candidate to promote confidence in the judiciary. *See id*. at 914-15, 918.

The court noted, however, that the attorney had abandoned his initial plan to defend his conduct on the ground that it was protected by the First Amendment's guarantee of free speech and that, therefore, the court did not address that issue. *See id.* at 917 n.11.

15. This language appeared in a fund-raising letter used in San Antonio in fall of 1997. A copy is on file with the author of this article.

16. *See* Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. Pitt. L. Rev. 1, 23-25 (1988) (discussing the rules once applicable to the announcement of a lawyer's move from one firm to another).

17. 471 U.S. 626, 648 (1985).

18. *Id.*

19. 691 P.2d 695, 703 (Ariz. 1984) (citations omitted) (emphasis added) (quoting *In re Woodward*, 300 S.W. 2d 385, 393-94 (Mo. 1957)).

20. *Id.* at 704 (citations omitted) (emphasis added).

21. *See In re Riley*, 691 P.2d 695, 704 (Ariz. 1984).

22. *See id.*

23. *Id.* at 703-04

24. *Id.* at 704.

25. *Id.* Disciplinary Rule 1-102(A)(5) of the Arizona ethics code prohibits an attorney from engaging in "conduct prejudicial to the administration of justice." *Id*. That same language was contained in the old Texas Code of Professional Responsibility, Tex. State Bar R., art. XII, § 8, (Tex. Code Prof'l Resp.), 34 Tex. B.J. 758 (1971, superseded 1990), which was replaced by the current Texas Disciplinary Rules of Professional Conduct on January 1, 1990. *See* Tex. Disciplinary R. Prof'l Conduct, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon Supp. 1998) (Tex. State Bar R. art. X, § 9); Robert P. Schuwerk and John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A Hou. L. Rev. 1, 468 (1990) (discussing Tex. State Bar R., art. XII, § 8, DR 1-102(A)(5) (Tex. Code Prof'l Resp.), 34 Tex. B.J. 758 (1971, superseded 1990)). The Texas Rules do not carry forward the "conduct prejudicial to the administration of justice" language, but instead have replaced it with a very different standard which prohibits attorneys from engaging in conduct "constituting obstruction of justice." The "obstruction of justice" standard is "substantially narrower" than the "prejudicial to the administration of justice" rule, and it is doubtful that the language at issue in Riley could be found to violate the new Texas formulation. "The drafters did not intend this new standard to be triggered by conduct significantly less egregious than that involved in the federal criminal offense of obstruction of justice or its state counterparts." Schuwerk & Sutton, *supra,* at 475. It is therefore interesting to speculate what provision of the Texas Rules or the Texas Code of Judicial Conduct, if any, a Texas court could rely upon if it were inclined to embrace a position similar to the one taken by the Arizona Supreme Court in *Riley*. As noted above in the text, Canon 2(A) of the Texas Code of Judicial Conduct provides that "[a] judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Tex. Code Jud. Conduct, Canon 2(A). Canon 6(G)(3) of the judicial code further provides that "[a]ny lawyer who is a candidate seeking judicial office who violates Canon 5 or other relevant provisions of this Code is subject to disciplinary action by the State Bar of Texas." *Id*. Canon 6(G)(3). It seems reasonable that a judge who makes statements during a campaign impugning the integrity of the judicial system could be disciplined by the Commission on Judicial Conduct for violating Canon 2(A) and that a lawyer guilty of the same conduct could be disciplined by the state bar because whether Canon 2(A) is an action that would survive review under the First Amendment is presently unresolved.

26. *See Riley*, 691 P.2d at 704-05. Interestingly, the court also criticized the candidate for having publicly revealed that the incumbent judge had engaged in improper *ex parte* communication. The court wrote:

> Any grievance a lawyer may have concerning ethical misconduct by a sitting judge should be submitted to the Commission on Judicial Qualifications. "Going public" by a member of the Bar is not the appropriate method to redress misconduct by a judge. As the South Dakota Supreme Court has noted: "That respondent sought instead to voice his complaints in precisely the manner and forum that would most likely cast doubt upon the competence and integrity of the member of the judiciary without the slightest possibility that any constructive, remedial actions would result from those remarks belies respondent's assertions that he made the statement in good faith and in the spirit of constructive criticism."

Id. at 705 (quoting *In re Lacey*, 283 N.W.2d 250, 252 (S.D. 1979)).

27. *Id.* at 709-10 (Holohan, C.J., dissenting). The Chief Justice further wrote:

> If the court's opinion had limited itself to statements by the lawyer candidate which were false, misleading, or concerning pending litigation, I could have joined in that portion of the opinion. The holding that a lawyer as a candidate for judge may not criticize the decisions of a sitting judge, however, is neither in harmony with the First Amendment nor with the necessities of a free society.
>
> Judges are not unique in the realm of public officeholders. The record books regretfully show that some have been dishonest, incompetent, and prejudiced. A ruling that a lawyer as a candidate for the judiciary cannot bring such facts to the public notice, if such be the facts, is a threat to our constitutional system.
>
> * * *
>
> Under the freedom guaranteed by the Constitution, we must begin with the proposition that "[l]ike other citizens, attorneys are entitled to the full protection of the First Amendment, even as participants in the administration of justice." A review of the cases in which attorneys were disciplined for campaign comments directed at an incumbent judge strongly suggests that, absent misrepresentation, courts should be most reluctant to impose discipline upon an attorney for comments during a judicial campaign except in egregious circumstances where a candidate seriously denigrates the judicial system, impugns the reputation of an incumbent judge, or in any way interferes with an ongoing proceeding. . . . Campaign criticism of an incumbent judge's decisions, voting record, courtroom demeanor, or work habits, however, should be considered fair comment.
>
> * * *

> While misstatement of fact by an attorney universally warrants sanction, the law is equally clear that an attorney may criticize the legal decisions of a judge without sanction, so long as these comments do not interfere with ongoing proceedings.
>
> * * *
>
> The broad general statements in the majority opinion serve to stifle honest and truthful discussion about the decisions of a judge or court. As I read the majority opinion, a lawyer may appeal a case, but the lawyer may never comment after the case is finally resolved that the case made bad law, poor policy, or resulted in an injustice. Such a position is not only contrary to the Constitution, but it also deprives the public of necessary information to make an informed decision about the performance of their judges.

Id. (citations omitted) (quoting *In re Hinds*, 449 A.2d 483, 489 (N.J. 1982)).

28. *See* Jeffrey M. Shaman *et al*., *Judicial Conduct and Ethics* 356, 365 (2d ed. 1995) ("Although a nonincumbent candidate has never been found in violation of ethical standards regulating endorsements, a number of sitting judges have been disciplined for participating in and supporting other persons' campaigns for judicial office.").
29. *See, e.g.,* Tex. Code Jud. Conduct, Canon 5(3). Prior provisions of the Texas Code of Judicial Conduct were construed to reach the same result. *See* Comm. on Jud. Ethics, State Bar of Tex., Op. 73 (1984), reprinted in 56 Tex. Jud. Council & Off. Ct. Admin. Tex. Jud. Sys. Ann. Rep. 85-86 (1984). Finding that a judge could not publicly endorse a candidate for public office, the committee noted that "the public endorsement of another person's candidacy, of necessity, involves the use of the prestige of the judge and the prestige of his office" and that "a judge's involvement in another person's political race places the judge in a partisan posture and gives the public cause to question the judge's independence." *Id.* The ABA Model Code of Judicial Conduct draws a distinction not found in the Texas code. The ABA code permits some limited forms of endorsement. Thus, Canon 5(A)(1)(b) states the general rule that "a judge or a candidate for election or appointment to judicial office shall not . . . publicly endorse or publicly oppose another candidate for public office," Model Code of Judicial Conduct Canon 5(A)(1)(b) (1990), but Canon 3(C)(1)(b)(iv) states the exception that a "judge or a candidate subject to public election may, except as prohibited by law . . . when a candidate for election . . . publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running," *Id.* Canon 3(C)(1)(b)(iv).
30. *See, e.g.,* Tex. Jud. Code Conduct, Canon 2(B).
31. *See* Comm. on Jud. Ethics, State Bar of Tex., Op. 170 (1994), *reprinted in* 66 Tex. Jud. Council & Off. Ct. Admin. Tex. Jud. Sys. Ann. Rep. 126 (1994). *See also In re Troy*, 306 N.E.2d 203, 234-36 (Mass. 1973) (discussing a judge disbarred for numerous ethical infractions, including arranging and attending political gatherings and serving as a toastmaster at a testimonial for another candidate); *In re Decker*, 1994 WL 897478 at *4-5 (N.Y. Com. Jud. Cond.) (admonishing a judge for publicly supporting a county executive's campaign and for improper advertising in his own campaign).
32. *See* Tex. Comm. on Jud. Conduct (Dec. 27, 1994) (copy on file with the Texas Tech Law Review).
33. *See id*.
34. *See id.*
35. *See Office of Disciplinary Counsel v. Capers*, 472 N.E.2d 1073, 1073-74 (Ohio 1984).
36. *See In re Martin*, 434 S.E.2d 262, 263-64 (S.C. 1993) (*per curiam*).
37. *See In re DeFoor*, 494 So. 2d 1121, 1121-23 (Fla. 1986) (*per curiam*).
38. *See In re Steady*, 641 A.2d 117, 119 (Vt. 1994); Martin, 434 S.E.2d at 262-64.
39. *See In re Katic*, 549 N.E.2d 1039, 1039-40 (Ind. 1990) (*per curiam*).
40. *See* Comm. on Jud. Ethics, State Bar of Tex., Op. 170 (1994), *reprinted in* 66 Tex. Jud. Council & Off. Ct. Admin. Tex. Jud. Sys. Ann. Rep. 126 (1994).
41. *See id*. (citing with approval Comm. on Jud. Ethics, State Bar of Tex., Op. 100 (1987), *reprinted in* 59 Tex. Jud. Council & Off. Ct. Admin. Tex. Jud. Sys. Ann. Rep. 78 (1987)).
42. *See In re Pratt*, 508 So. 2d 8, 9-10 (Fla. 1987) (*per curiam*); *In re Kay*, 508 So. 2d 329, 329-30 (Fla. 1987) (*per curiam*).
43. *See* Comm. on Jud. Ethics, State Bar of Tex., Op. 100 (1987).
44. Comm. on Jud. Ethics, State Bar of Tex., Op. 145 (1992), *reprinted in* 65 Tex. Jud. Council & Off. Ct. Admin. Tex. Jud. Sys. Ann. Rep. 126 (1993).
45. *See id*. Whether similar restrictions apply in Texas to contributions made to a political party, rather than to a specific candidate, is unclear. The American Bar Association's Model Code of Judicial Conduct contains language not found in the Texas Judicial Code of Conduct. The ABA code provides, in relevant part: "(1) a judge or a candidate subject to public election may, except as prohibited by law: (a) at any time (i) purchase tickets for and attend political gatherings; (ii) identify himself or herself as a member of a political party; and (iii) contribute to a political organization . . . ." Model Code of Judicial Conduct Canon 5 (1990).
46. *See* Comm. on Jud. Ethics, State Bar of Tex., Op. 136 (1990), *reprinted in* 62 Tex. Jud. Council & Off. Ct. Admin. Tex. Jud. Sys. Ann. Rep. 125 (1990).
47. *See In re Martin*, 434 S.E.2d 262, 262-64 (S.C. 1993) (*per curiam*).
48. Comm. on Jud. Ethics, State Bar of Tex., Op. 82 (1986), *reprinted in* 58 Tex. Jud. Council & Off. Ct. Admin. Tex. Jud. Sys. Ann. Rep. 80 (1986).
49. Tex. Code Jud. Conduct, Canon 4(B).
50. *Id*., Canon 2(B) (emphasis added).
51. *Id.*, Canon 4(A)(1).
52. *See id*., Canon 5(1).
53. Comm. on Jud. Ethics, State Bar of Tex., Op. 82 (1986).

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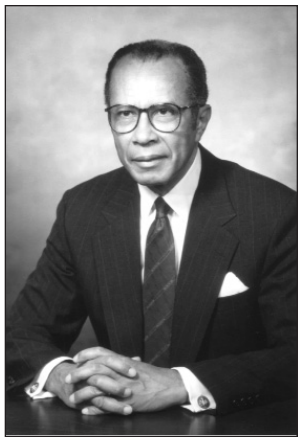
This article is based on a lengthier version published in the Texas Tech Law Review. See *Ethical Campaigning for the Judiciary*, 29 Tex. Tech L. Review 811 (1998).

In Memoriam: Archibald R. Murray



On September 16, 2001, the legal profession lost one of its most treasured members—Archibald R. Murray, at the age of 68. Murray was considered by all who knew him to be a pioneer who lead with grace, a selfless advocate who set a new standard in providing legal services to the poor, and a gentle individual who touched the lives of countless people.

Among his many accomplishments, he served as: the first Black-American president of the New York State Bar Association from 1993-94, attorney-in-chief and executive director of The Legal Aid Society from 1975-94, chair of the Association of the Bar of the City of New York Executive Committee from 1981-82, and assistant counsel to Gov. Nelson A. Rockefeller from 1962-65. Murray is an alumnus of Fordham Law School, class of 1960. He also served as a trustee of Fordham.

"Arch Murray preferred consensus over confrontation, reconciliation over rhetoric. He was a man of quiet confidence who served our Association with diligence, duty and distinction," said NYSBA President Steven C. Krane of New York (Proskauer Rose, LLP).

The NYSBA presented its Root/Stimson Award to Murray at its June 2000 House of Delegates meeting, Murray and his wife, Kay, accepted the award, which recognized his lifetime commitment to public service and the improvement of justice. The following comments were shared by a few of Mr. Murray's colleagues at the time of this award.

"Quietly, without seeking the limelight, Archibald Murray strove to make the world a better place. Whether for The Legal Aid Society, the Episcopal Diocese of New York, or any other of the many organizations and causes he has worked for, Murray worked with a strong sense of purpose, never wavering from his principles," commented Dean John Feerick of Fordham Law.

Mr. Murray's name graces fellowships to be offered by The Legal Aid Society. Alexander D. Forger, former NYSBA President (1980-1981), explained why the Murray Fellowships are being created. "Mr. Murray has been most instrumental in promoting a diverse legal staff, and he is anxious to provide opportunities not only for minorities, but for those who might otherwise have to enter the private sector in order to make more money," said Forger. "The Murray Fellowships are designed to enable minority students at the low end of the economic scale to work at The Legal Aid Society and receive some financial assistance doing that."

His 20 years of service to The Legal Aid Society is testament of his dedication to others. Susan B. Lindenauer is counsel to the president and attorney-in-chief of The Society. She said, "His commitment to ensuring that minority lawyers and other members of the minority community have a place at the table is extraordinary. Also, his commitment to ensuring equal access to the justice system for people—access with dignity and high quality representation—was absolute and remains that way. He is a person of extraordinary integrity, compassion and strength."

Murray possessed an ability to take control of complex situations. Chief Judge Judith S. Kaye, who spent more than a decade on the Board of Directors of The Legal Aid Society, has seen Murray exercise that ability. She wrote, "Arch …was the very able leader, the attorney-in-charge, through all those years, and he performed that role magnificently. A large group would gather for Board meetings, representing many divergent and strongly held views. It was nothing short of a miracle that, month after month and year after year, Arch got us all through those meetings, and The Legal Aid Society through some very difficult times. He built a great organization."

Murray's leadership style also made an impression on Conrad Harper, the first African-American president of the Association of the Bar of the City of New York, whom Arch preceded as chancellor of the Episcopal Diocese of New York.

"His leadership at The Society was simply masterful," said Harper. "It is always difficult to govern any significant institution, especially in a tumultuous place like New York City, and Arch was remarkable in his ability to inspire the staff, to get along with the union representing the lawyers on the staff and in obtaining consistently significant funding from the private bar and from the city of New York."

Even if Arch Murray gained only a small fraction of what he gave, the returns and personal satisfaction would be enormous. Murray's sense of fairness and his concern for those members of society who might otherwise be neglected, has set a very high standard. Although he has been recognized with many awards, he has never failed to recognize those who have worked beside him. Each night, without fail, he told his secretary, "thank you." Now the time has come for us to say the same. Thank you, Arch Murray. Thank you.

(Excerpted from State Bar News, September/October 2001, article by Tammy Korgie)

Legal Careers in New York State Government—
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Editors

Patricia E. Salkin, Esq.
Director of the Government Law Center of Albany Law School

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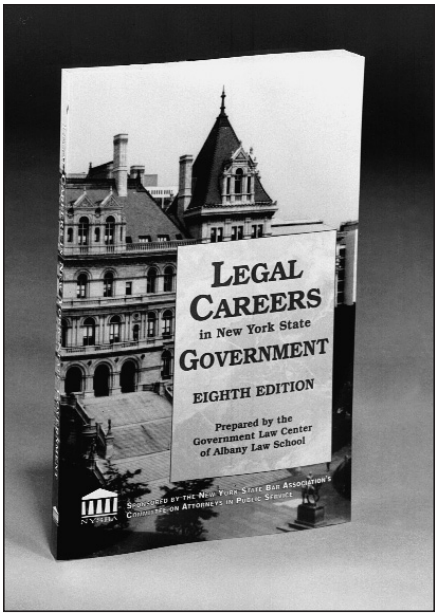

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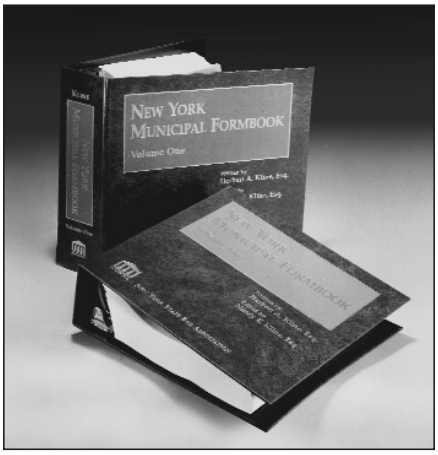

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GLC Endnote

Patricia E. Salkin

Rose Mary K. Bailly

On behalf of the Government Law Center, we extend our sincere appreciation to each of the authors who contributed thoughtful and timely articles on the theme of judicial selection for this issue of the *Government Law & Policy Journal*. In addition, we are grateful to the members of the Committee on Attorneys in Public Service who have given the Government Law Center the opportunity to facilitate communication and dialogue with attorneys who are committed to the practice of law in the public sector—either as a full-time career or in the provision of important legal services from the private sector on behalf of the public interest. Congratulations again to Albany Law School Professor Vincent Bonventre who makes difficult production of the GLP *Journal* look easy time after time.

Keeping with the theme for this issue of the *GLP Journal*, we would like to draw your attention to a recently published book authored by one of our distinguished colleagues, Professor Stephen E. Gottlieb. In *Morality Imposed*, Professor Gottlieb explores the Rehnquist Court and the question of liberty in America. The book examines the thinking of the current members of the U.S. Supreme Court. In a recent presentation about his book that was subsequently aired on C-SPAN2, Professor Gottlieb enumerated discrepancies between what the conservative side of the Court says it believes and what it has ruled. The Rehnquist Court, in his opinion, has been one of the most activist courts in a comparable period of time. Published by NYU Press, Professor Gottlieb's book is a "must read" for those interested in law and public policy and the U.S. Supreme Court.

The Government Law Center, along the faculty and students of Albany Law School, is proud to continue to serve the public sector. According to the most recent statistics from our Office of Career Planning, an unprecedented 25 percent of the class of 2000 has secured full-time employment in the public sector. The Government Law Center works with individual students interested in careers in government, and through our Alumni in Government, Government Law Network and other programming, we continue to service the public sector bar. We are pleased to announce a new program beginning in January 2002 entitled the "**Government Lawyer in Residence Program**." This unique program allows retiring or transitioning government lawyers to spend up to one year under this designation working with the faculty, staff and students at the Government Law Center. This program makes the Center's programs full-service, from the beginnings of public sector careers through retirement or transitions. For more information about the program, please contact the Government Law Center at 518-445-2329.

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