

## PERSPECTIVES

### JUDICIAL SELECTION PRINCIPLES: A PERSPECTIVE

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We commend the *Albany Law Review* for focusing attention on the critical issues involved in judicial selection. Our country prides itself, justifiably, on being a nation of laws. But history tells us that the rule of law cannot survive without an independent judiciary. No matter how magnificent a court's building, no matter how dedicated its staff, and no matter how skilled the advocates who appear, if judges make their decisions for reasons other than as a faithful application of the law, the rule of law as we know and revere it does not exist. Judges must be free to apply the law without prejudice and without favoritism, free of improper outside or political influences, and unencumbered by the threat of removal from office when a decision required by the law does not meet with public or political approval. Our institutional framework, including the methods we use to select our judges, must assure our judges the freedom to render unbiased decisions.

The principle that judges must be protected from improper political and outside influences is not new to us. Indeed, our founding fathers recognized that the judiciary must be independent of the political branches of government. To that end, they drafted a federal Constitution designed to assure that Article III judges, who are appointed by the President and confirmed by the Senate, are not beholden to the political branches of government with respect to their tenure and salary. Emerging democracies across the globe

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\* Since their respective retirements, Sandra Day O'Connor, Associate Justice (Ret.), Supreme Court of the United States, and Ruth V. McGregor, Chief Justice (Ret.), Arizona Supreme Court, have spoken and written often about the importance of adopting a judicial selection method that assures the appointment of impartial, qualified judges and advances public trust and confidence in our courts. Justice O'Connor serves as honorary chair and Justice McGregor serves as chair of the O'Connor Advisory Committee to the Quality Judges Initiative at IAALS—the Institute for the Advancement of the American Legal System at the University of Denver.

have adopted this once-revolutionary approach, which structurally restrains the political branches from impulsive abuses of power that might otherwise occur.

The history of judicial selection in the states, on the other hand, reveals considerable experimentation. Today, states use various methods to select their judges: partisan and nonpartisan elections; appointment by legislatures or by governors, with and without legislative confirmation; and “merit selection,” usually combined with retention elections in which the voters decide whether a judge should be retained on the bench. Most of these variations were unknown at our country’s founding. Each original state adopted a judicial appointment approach designed to insulate judges from the political process; no original state selected judges through a popular elective process. In the nineteenth century, however, many states, impacted by the teachings of the populist movement, chose to elect some or all of their judges. Unlike other democratic innovations devised in the United States, the decision to elect judges has not found broad acceptance in other countries.

Popular election of judges, which introduced campaign cash to the courtroom, soon spawned questions about the impartiality and qualifications of judges chosen through an electoral process. In response to a series of bitter judicial elections that were accompanied by charges of patronage politics and corruption, a number of states adopted the approach referred to as merit selection, under which an independent, nonpartisan commission nominates the best qualified applicants for consideration by the appointing authority. Other states, however, retained the elective process. In our view, experiments with electing judges have not proved successful and should be abandoned in favor of merit selection and retention elections.

Choosing judges through popular elections always presented the danger that money and campaigning skills, rather than ability and merit, would determine who served as a judge. The last decade, however, has raised that danger to new heights. Today’s judicial elections pose a real and increasing threat to the fair and impartial courts on which this country has relied to maintain its democratic government and to ensure the rights of its citizens.

If a modern Rip Van Winkle character had slept through the last decade, he would awaken to find judicial elections unrecognizable from prior elections in both character and cost. The amount spent in state judicial elections skyrocketed during the first decade of this century. Campaign fundraising in state supreme court races

between 2000 and 2009 more than doubled from the prior ten years, moving from 83 million dollars to 207 million dollars.<sup>1</sup> Both 2007 and 2008 saw new state records set for the amount spent in high court elections.

But another factor, as dangerous to selecting impartial judges as the high cost of elections, has become increasingly evident. During recent years, a few “super spender” groups have exerted ever greater influence in judicial campaigns. Not long ago, candidates and their campaign committees raised most of the money spent in judicial campaigns. While judicial candidates’ fundraising poses its own serious concerns, at least voters knew, as a result of finance disclosure laws, who contributed money to a campaign. That picture is changing rapidly.

Between the 2005–2006 and 2009–2010 election cycles, independent expenditures rose from eighteen percent of total expenditures to nearly thirty percent.<sup>2</sup> As a result, voters saw more attack ads and, because lax state disclosure laws do not require the disclosure of contributors to “issue ads,” voters knew less about who contributed money. In the 2010 Michigan Supreme Court elections, for instance, half of the more than forty million dollars spent came from unreported sources.<sup>3</sup>

In addition, spending has become ever more concentrated among a few powerful special interest groups. In the 2005–2006 election cycles, the ten groups that spent the most money accounted for 26.7% of all monies spent.<sup>4</sup> In the 2009–2010 election cycles, in contrast, ten groups accounted for 38.7% of the monies spent. Surely even those who favor judicial elections must be concerned about the growing influence of a small number of unaccountable special interest groups.

These changes in the character and cost of judicial elections do affect the public’s view of the impartiality of the courts. Survey after survey reveals that the public simply does not believe that elected judges are free from the outside influence that results from the vast amounts of money raised and spent in judicial elections. A recent survey by the Harris Group, for instance, showed that

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<sup>1</sup> JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUST. ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE* 8 (2010), [http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE\\_8E7FD3FEB83E3.pdf](http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf).

<sup>2</sup> ADAM SKAGGS ET AL., BRENNAN CTR. FOR JUST. ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2009–2010*, at 3 (2011), [http://brennan.3cdn.net/23b60118bc49d599bd\\_35m6yyon3.pdf](http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf)

<sup>3</sup> *Id.* at 10.

<sup>4</sup> *Id.* at 3.

seventy-one percent of voters believe that campaign expenditures significantly impact courtroom decisions.<sup>5</sup> Indeed, twenty-six percent of judges believe that campaign contributions have at least some influence on judges' decisions.<sup>6</sup> We also know that voters in states that elect judges are more cynical about the courts and less likely to believe that judges are fair and impartial.<sup>7</sup> If we are serious about maintaining the rule of law and an independent judiciary, we cannot ignore the fact that judicial campaigns and elections, supported by an ever-increasing river of money from an ever-more concentrated group of contributors, conflict fundamentally with the promise that a judge's only constituency is the law.

The flood of money into our courtrooms through increasingly volatile campaigns poses a uniquely American threat to judicial independence. To respond to that threat, we must challenge the notion that a small number of well-funded, well-organized special interest groups with strong preferences about how issues should be resolved should be allowed to exert undue influence on the election of state court judges. Fortunately, for voters and for our judicial system, alternatives to judicial elections exist.

One alternative is the federal system. No state has proposed in recent times, however, to combine an appointment system with the essential protection of life tenure that our federal Constitution guarantees to Article III judges. Although the federal system has worked well in many instances, its adoption for state court judges does not seem to be a viable alternative.

A merit commission/appointment system, now used by twenty-three states to select most or all of their judges, has proved itself as an answer to the threats posed by judicial elections.<sup>8</sup> Properly structured, a merit selection system can maintain or restore the

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<sup>5</sup> Press Release, Justice at Stake Campaign, Solid Bipartisan Majorities Believe Judges Influenced by Campaign Contributions (Sept. 8, 2010), [http://www.justiceatstake.org/newsroom/press\\_releases.cfm/9810\\_solid\\_bipartisan\\_majorities\\_believe\\_judges\\_influenced\\_by\\_campaign\\_contributions?show=news&newsID=8722](http://www.justiceatstake.org/newsroom/press_releases.cfm/9810_solid_bipartisan_majorities_believe_judges_influenced_by_campaign_contributions?show=news&newsID=8722).

<sup>6</sup> Letter from Stan Greenberg, Chairman & CEO, Grenberg Quinlan Rosner Research, & Linda A. DiVall, President, American Viewpoint, to Geri Palast, Exec. Director, Justice at Stake Campaign (Feb. 14, 2002), [http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults\\_EA8838C0504A5.pdf](http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf).

<sup>7</sup> *Public Understanding of and Support for the Courts*, ANNENBERG PUB. POL'Y CTR. 2 (Oct. 17, 2007), <http://www.law.georgetown.edu/judiciary/documents/finalversionJUDICIALFINDINGSoc1707.pdf>.

<sup>8</sup> LARRY C. BERKSON, RACHEL CAUFIELD & MALIA REDDICK, AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT 2 (Apr. 2010), [http://www.judicialselection.us/uploads/documents/Berkson\\_1196091951709.pdf](http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf).

impartiality of our judges, minimize partisan politics in judicial selection, largely eliminate the undue influence of special interest groups, produce a well-qualified judiciary, and give voters an opportunity to make a reasoned, informed choice when voting in a retention election. To reach these goals, a merit selection system should incorporate several characteristics.

To reach its greatest potential, a merit selection system should include a nominating commission that creates a climate that encourages highly qualified applicants to apply and provides the appointing authority with a pool of highly qualified candidates. The commission is best structured to reach these goals if it is politically, demographically, and ideologically balanced, independent of the political branches of government, and comprised of a majority of public members. To increase public trust and confidence, the commission should adopt procedures that make its processes fully transparent. Our home state of Arizona has adopted such procedures. Transparency begins with making the applications of all candidates and contact information of all commissioners available to the public. The nominating commission then conducts all phases of its work in public sessions, each of which begins with hearing comments from members of the public. Commissioners' reports of the results of investigations of the candidates, their discussion of the candidates, and their votes to determine whose names should go to the Governor all occur in public meetings. Such transparency assures not only that highly qualified applicants will be recommended for appointment, but also that a decision to nominate a particular person results from open, transparent discussions rather than from "back-room" politics.

Merit selection systems also can be structured to permit voters a direct voice in choosing their judges. Most states that use a merit selection/appointment process allow the voters to decide who should continue as a judge through retention elections, in which a judge runs against her record rather than against an opponent. Voters, by indicating whether a judge should remain in office, exercise their voice in selecting judges without subjecting the judicial selection process to the aggressive, negative, costly campaigns we often see in contested elections.

Merit selection systems also lend themselves well to the formal evaluation of judges' performance in office. To assist voters in making an informed decision about whether a judge should be retained, several states utilize judicial performance evaluations, under which those who appear before or work with a judge evaluate

his ability to perform his duties. Typically, evaluations rate and therefore hold judges accountable on factors such as level of preparation for hearings, integrity, fairness, demeanor, timeliness of decisions, performance of administrative duties, and clarity of decisions or opinions.

And aren't these the factors that matter for judges and for those who appear before them, rather than the judge's ability to marshal large campaign chests or special interest support? Don't we all want to appear before a judge who is well-qualified and impartial rather than a judge who is or appears to be beholden to campaign supporters?

If we wish to continue meaningful adherence to the rule of law, our states must select impartial, well-qualified judges who are not dependent upon or beholden to any political or special interest group. We believe that a well-designed merit selection/appointment system can assure the appointment of qualified persons—and only qualified persons—as judges who, once appointed, will act in a fair and impartial manner and will be accountable to the public they serve. Surely the public and the justice system deserve no less.