

# JUDICIAL SELECTION REFORM: EXAMPLES FROM SIX STATES

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Any errors of omission or commission are our own.

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# INTRODUCTION

In the following chapters, we examine successful judicial selection reform efforts in six states. The changes accomplished in these states represent a range of reform possibilities—from changing the method of selection, to improving the tone and conduct of the existing process, to enabling voters to make more informed decisions in judicial elections. Specifically, reforms include moving from judicial elections to merit selection, making judicial elections nonpartisan contests, limiting the contributions that judicial candidates can accept, creating a watchdog committee to monitor judicial campaign conduct, disseminating a voter guide with information about judicial candidates, and providing voters with evaluations of judicial retention candidates' performance on the bench. These reforms took place in states that represent an array of regional and political cultures—from New York to Alabama, Mississippi to Arizona, and Washington to Texas—and the efforts were led by a variety of state actors, including governors, legislators, judges, professional associations, citizens' groups, and the media.

For each chapter, we discuss the nature of the reform and its implementation in other states. Then we consider the reform landscape in that state, including the events that provided the impetus for reform. We also describe the actors who initiated and sustained the call for reform and recount the strategies that brought the reform effort to fruition. Finally, we assess the impact of the reform based on the perceptions of the actors involved, the reactions of the media and the public, and the focus of additional reform efforts.

Judicial selection reform efforts have taken on heightened importance in recent years as judicial elections have become increasingly expensive and contentious and as voter participation in judicial elections has declined. It is our hope that reformers seeking to preserve public trust and confidence in the courts will learn from the examples of successful reform efforts presented here.

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# 1

## Campaign Finance Reform in Texas

*“Expensive judicial races, even if only a symptom of a deeper problem, are not likely to fade from the judicial landscape without broad, serious campaign finance reform.”<sup>1</sup>*

Until the late 1970s, judicial elections in Texas were unremarkable events. Democrats dominated the state’s judiciary to such an extent that the only notable judicial elections occurred during the Democratic primary. Even these races rarely inspired much notice because most judges resigned before the end of their terms, allowing governors to appoint their successors who then easily won re-election. As Anthony Champagne and Kyle Cheek note, “This arrangement was so common in the first 100 years of the 1876 constitution that one study concluded that the Texas judicial selection system was primarily appointive.”<sup>2</sup>

Although few could have predicted it at the time, the 1976 supreme court election of Don Yarbrough, a political unknown who had numerous ethical complaints in his background,<sup>3</sup> marked the advent of an era of increasingly expensive and noisy judicial elections in Texas. Yarbrough, who shared the name of a long-time Texas senator, defeated a well-respected incumbent. A similar situation

unfolded in 1978, when a little-known plaintiff lawyer named Robert Campbell was elected to the supreme court. Campbell’s cause was helped by the fact that University of Texas running back Earl Campbell had won the Heisman Trophy the previous fall.<sup>4</sup>

The year 1978 was also a notable one in Texas politics because William P. Clements was elected governor—the first Republican to hold the position since Reconstruction. As a result of Clements’s election, it would be a Republican governor who filled interim vacancies on the courts. Plaintiff lawyers, who thought Democratic judges were more sympathetic to their positions, became concerned.

In the early 1980s, the examples of Yarbrough and Campbell and the concern that an increasingly Republican state would have an increasingly Republican judiciary motivated plaintiff lawyers to seek ways to create the sort of name recognition that had propelled Yarbrough and Campbell to the supreme court. As one study of judicial selection in Texas points out, “name recognition might occur naturally, as with Yarbrough, but it can also be bought.”<sup>5</sup> Expensive campaigns provided the name familiarity that plaintiff lawyers desired.

As plaintiff attorneys became more active in supporting judicial candidates, business interests began to see the value of backing their own candidates. Enormous population growth during the same period increased the number of judicial offices in the state and reduced candidates’ opportunities to reach voters through

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1. Anthony Champagne and Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 *FORDHAM URB. L.J.* 907, 938 (2002).

2. *Id.* at 910.

3. Yarbrough had faced disbarment proceedings in which a total of 73 violations were alleged. Although he was not criminally indicted when tape-recorded evidence was discovered of his plans to murder and mutilate his enemies, he was later indicted for perjury in reference to a forged automobile title. He eventually resigned from the court and gave up his law license. *Id.* at footnote 24.

4. *Id.* at footnote 25.

5. *Id.* at 911.

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old-fashioned avenues like fairs and speeches to civic groups. In Texas, as in several other states during the last quarter century, expensive campaigns of mass mailings, yard signs, and television spots became typical.<sup>6</sup>

As elections in Texas became more expensive, there was an increased focus on the players behind the scenes who paid for pricey campaigns. More than in any other state, the perception developed in Texas that there was a direct connection between campaign contributions to judicial candidates and the decisions that those candidates later made as judges. Because of the perception that justice was for sale, and because a drawn-out Voting Rights Act dispute precluded any meaningful selection reform efforts in the late 1980s and early 1990s, Texas turned to campaign finance reform. In 1995, after a decade and a half of judicial elections so expensive that they attracted extensive national media attention, the Texas legislature enacted the Judicial Campaign Fairness Act, which imposed mandatory contribution limits and voluntary expenditure limits for judicial campaigns.

### CAMPAIGN FINANCE REFORM IN THEORY AND IN PRACTICE

In most states, the same campaign financing provisions apply to both judicial candidates and candidates for other offices.<sup>7</sup> In Texas, contributions from corporations and labor unions are prohibited, but prior to 1995, there were no limits on the amount that individuals and PACs could contribute to candidates for elective office. The Judicial Campaign Fairness Act (JCFA) set limits on contributions to judicial candidates from individuals, law firms, and PACs, and proposed voluntary expenditure limits.

Of the states that hold some form of election for judicial office, fifteen impose no limits on the amount of money that candidates may accept from individuals and PACs. Two states have individual contribution limits of \$10,000, eleven states have limits between \$1001 and

\$5000, and ten states limit donations to \$1000 or less.<sup>8</sup>

Since the early 1980s, the cost of running for judicial office has risen dramatically. Judicial campaign financing levels reached record highs in many states in the 2000 elections. Supreme court candidates in Alabama raised more than \$13 million, and, in Illinois, candidates raised more than \$8 million.<sup>9</sup> In Michigan, candidates, political parties, and interest groups spent a total of \$13 to \$15 million.<sup>10</sup> Judicial candidates around the nation raised more than \$45.6 million in 2000, a 61 percent increase from 1998.<sup>11</sup>

Although judicial elections were less costly in 2002, there is a growing concern that judicial elections as expensive as races for other offices will become the norm rather than the exception. One response has been to establish special campaign financing regulations for judicial elections, as the Texas legislature did with the Judicial Campaign Fairness Act. The Ohio Supreme Court chose this route as well. In 1995, the court set contribution and expenditure limits for judicial races. However, the constitutionality of spending limits was challenged by two Ohio judges in *Suster v. Marshall*. The federal district court ruled that spending limits violated the First Amendment,<sup>12</sup> and the court of appeals agreed.<sup>13</sup> The spending limits were repealed in 2001.

Campaign financing regulations must conform to the U.S. Supreme Court's decision in *Buckley v. Valeo*.<sup>14</sup> According to the Court, cam-

6. *Id.* at 909-917.

7. See <<http://www.fec.gov/pages/cflaw2000 .htm>> for information on campaign finance laws nationwide.

8. Deborah Goldberg, PUBLIC FUNDING OF JUDICIAL ELECTIONS: FINANCING CAMPAIGNS FOR FAIR AND IMPARTIAL COURTS 11 (Brennan Center: 2002).

9. Roy A. Schotland, *Judicial Selection at the Crossroads*, prepared for the 2003 Midyear Meeting of the Conference of Chief Justices.

10. *Id.*

11. Deborah Goldberg, Craig Holman, and Samantha Sanchez, JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 7 (February 2002).

12. *Suster v. Marshall*, 951 F.Supp. 693 (N.D. Oh. 1996).

13. *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998).

campaign contribution limits are permissible, but limits on expenditures are not. In *Buckley*, the Court ruled that contribution limits do not pose a First Amendment concern since they do not “in any way infringe the contributor’s freedom to discuss candidates and issues.”<sup>15</sup> However, spending limits “necessarily reduce the quantity of expression by reducing the number of issues discussed, the depth of their exploration, and the size of the audience reached.”<sup>16</sup> Until recently, some legal scholars believed that states’ interest in preserving the impartiality of their judiciaries might justify greater restrictions on speech during judicial campaigns than during campaigns for other offices. However, recent court rulings have rejected this argument.<sup>17</sup>

Other states have responded to the rising costs of judicial elections by pursuing public financing of judicial elections. Wisconsin offers

public financing for supreme court campaigns, but funding has declined steadily since the program was introduced in the late 1970s. In 2002, the North Carolina legislature adopted the Judicial Campaign Reform Act, which provides public funding for supreme court and court of appeals candidates if they raise qualifying contributions and agree to strict fund-raising and spending limits.

## THE ROAD TO REFORM

In the late 1970s, plaintiff lawyers in Texas began doling out substantial sums to elect the judicial candidates they preferred.<sup>18</sup> In 1980, Texas became the first state in which the cost of a judicial race exceeded \$1 million.<sup>19</sup> Between 1980 and 1986, contributions to candidates in contested appellate court races increased by 250 percent.<sup>20</sup> In 1987, the *Wall Street Journal* questioned the Texas Supreme Court’s integrity after the court refused to hear an appeal of a case involving Texaco and Pennzoil. The lower court had ruled in favor of Pennzoil, a company whose lawyers had given \$355,000 to the court’s justices between 1984 and 1987, over Texaco, whose lawyers had also contributed to the campaigns of supreme court justices but in far smaller amounts.<sup>21</sup> This case also received coverage in the *New York Times* and *Time*, and the CBS newsmagazine “60 Minutes” ran a scathing piece about Texas judicial politics entitled “Justice for Sale?”

The increasing amount of money spent in judicial elections and the accusations of favoritism toward the plaintiffs’ bar led to calls for dramatic reform. In 1986, Chief Justice John Hill, working with the speaker of the Texas House of Representatives and the lieutenant governor, appointed the Committee of 100 to study judicial reform in Texas. The group came up with a “merit election” plan for the state’s judiciary known as the Texas Plan.<sup>22</sup> In promoting the plan, the group cited not only the charges of favoritism toward large campaign contributors but also the tremendous growth in the state’s population and the

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14. *Buckley v. Valeo*, 424 U.S. 1 (1976).

15. *Id.* at 21.

16. *Id.* at 19.

17. See, e.g., *Suster v. Marshall*, 951 F.Supp. 693; *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002); and *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

18. Anthony M. Champagne & Kyle D. Cheek, *Texas Judicial Selection: Bar Politics, Political Parties, Interest Groups and Money*, 3 GOV’T, LAW & POL’Y J., 51 (Fall 2001).

19. Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391 (2001).

20. John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Selection*, 40 BAYLOR L. REV. 339 (1988).

21. Thomas Petzinger, Jr. & Caleb Solomon, *Quality of Justice: Texaco Case Spotlights Questions on Integrity of the Courts in Texas*, WALL ST. J., Nov. 4, 1987, at 1.

22. The Texas Plan, as originally proposed, called for 16 nominating commissions (one for the appellate courts, one in each of nine administrative regions, and one in each of the counties of Dallas, Harris, Tarrant, Bexar, El Paso, and Travis). Each nominating commission would consist of two lawyers and two non-lawyers chosen by the governor, two lawyers and one non-lawyer chosen by the lieutenant governor, two lawyers and one non-lawyer chosen by the speaker of the house, three lawyers chosen by the president of the state bar association, one non-lawyer chosen by the chair of the Democratic Party, and one non-lawyer chosen by the Republican Party chair. The appropriate commission would nominate three candidates in the case of a judicial vacancy. The governor would appoint one of the nominees, who would have to be confirmed by the senate and face a retention election after a year in office. The judge would then face a retention election every six years. See Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 153 (1988).

increasing lack of voter familiarity with judicial candidates. Between 1950 and 1985, the state had more than doubled in population from 7.7 million to 15 million.<sup>23</sup>

In spite of its support among governmental leaders, the Texas Plan, even with a modification that would have allowed rural counties to keep elections and a later compromise that would have restricted merit selection to appellate courts, encountered intense opposition from all sides.<sup>24</sup> Minorities and women complained that the plan seemed designed to limit their rise to judgeships at a time when their growing numbers made their election more likely than it had in the past. Many Democratic leaders, because they had a strong constituency among minority and women voters, objected to the plan. Democrats also feared that merit selection might limit their ability to put like-minded judges on the bench. Some Republicans opposed the proposal as well, citing gains at the polls during the early 1980s. Plaintiff lawyers came out against the Texas Plan, fearing that the gains they had won would be negated. Organized labor also voiced its disapproval. In response to the Committee of 100, the Committee of 250, which included six supreme court justices, formed. Hill's Texas Plan stirred up so much opposition from his colleagues on the supreme court that he eventually resigned over the issue, believing that he could better lead the reform movement as an outsider.<sup>25</sup> Hill founded Texans for Judicial Excellence (TJE) to lobby for merit selection.

Between 1986, when Hill first proposed the Texas Plan, and 1995, when the Judicial Campaign Fairness Act was passed, a number of events conspired to limit the prospects for judicial selection reform. Merit selection and retention, as embodied in the Texas Plan, took a beating in other states. Missouri, the first state to adopt merit selection, experienced a scandal in which the governor was accused of attempting to stack the supreme court with friendly judges. In California, the unseating of three

supreme court justices, including Chief Justice Rose Bird, showed that retention elections could be just as expensive and ideological as other judicial elections. Special interest groups, who targeted the three justices because of their opposition to the death penalty, spent more than \$6 million to campaign against them; the justices and their supporters spent more than \$3 million.<sup>26</sup>

A case brought against the state of Texas under the Voting Rights Act may have helped to increase resistance to both merit selection and nonpartisan elections as reform possibilities in the late 1980s and early 1990s. In 1988, ten individual voters and the League of United Latin American Citizens (LULAC) filed suit under Section 2 of the Voting Rights Act, claiming that the election of trial court judges on a countywide basis diluted the voting power of African-Americans and Hispanics. The federal district court sided with the plaintiffs and gave the state legislature an opportunity to fashion a remedy before the court imposed one.

In the special legislative session that followed, Governor Clements refused to support the single-member district remedy proposed by LULAC. Instead, Clements and the Democratic leaders of the house promised to push for merit selection in the next legislative session.<sup>27</sup> LULAC and other minority groups opposed this plan, citing Clements's poor record in choosing minorities when given the opportunity to do so.<sup>28</sup> The district court rejected both district-based judicial elections and merit selection, and instead issued an order for nonpartisan elections in the state's nine most populous

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23. *Id.* at 151.

24. *Id.* at 152-153.

25. Wayne Slater, *Chief Justice Hill Resigns*, THE DALLAS MORNING NEWS, Aug. 27, 1987, at 1A.

26. Roy A. Schotland, *Introduction: Personal Views*, 34 LOY. L.A. L. REV. 1361, 1362, footnote 4 (2001).

27. Debbie Graves, *Officials, Lawyers Demand Reform of Judicial Elections*, AUSTIN AMERICAN-STATEMAN, Nov. 29, 1989, at B2; *LULAC Opposes Plan to Appoint Judges*, AUSTIN AMERICAN-STATEMAN, Dec. 3, 1989, at B8.

28. Bruce Hight, *Minorities Criticize Judicial Merit Election Plan*, AUSTIN AMERICAN-STATEMAN, Dec. 4, 1989, at B1.

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counties.<sup>29</sup> Although the U.S. Court of Appeals for the Fifth Circuit later reversed the district court's decision, holding that Section 2 of the Voting Rights Act does not apply to judicial elections,<sup>30</sup> the U.S. Supreme Court rejected this ruling and returned the case to the court of appeals.<sup>31</sup> The Fifth Circuit then ruled that the plaintiffs had failed to prove a Section 2 violation.<sup>32</sup> After six years of litigation, the status quo was preserved.

For judicial reformers, this controversy revealed two points. First, minority voters were strongly opposed to merit selection because they did not trust governors, especially Republican governors, to appoint minorities. Second, many voters would remember nonpar-

tisan elections as a reform imposed by a federal court. Some minority groups also expressed dislike for nonpartisan elections, arguing that minorities had better chances through partisan elections.<sup>33</sup> The likelihood of either of these reforms achieving broad popular or legislative support decreased during and immediately after the Voting Rights Act controversy.

Another reason that judicial selection reform failed to progress during this time was that it did not have the strong gubernatorial support that has proven crucial in other states, such as New York. Texas governors let events lead them rather than taking initiative on the issue. Governor Clements was a late convert to merit selection and, at the time, seemed to support the reform primarily to prevent a federal court from imposing other remedies.<sup>34</sup> Governor Ann Richards, who served from 1990 to 1994, favored a switch to district-based elections as a means of preserving minority voting strength.<sup>35</sup>

In New York, as discussed in another chapter, the strong support of the state's top judge was an important factor in bringing about reform. Texas's chief justices have shown similar leadership but without as much success. Chief Justice Hill resigned from the court to focus his efforts on the fight for merit selection.<sup>36</sup> Hill's successor, Chief Justice Tom Phillips, has followed up on Hill's legacy by being a constant critic of the current system of judicial selection in Texas.<sup>37</sup> In Phillips's view, a system that includes gubernatorial appointment and retention elections<sup>38</sup> or "robust" public funding of judicial elections would be the best solution; however, according to the chief justice, those states that cannot achieve these ambitious measures should "make incremental reforms . . . by imposing reasonable contribution limits, proscribing outrageous campaign tactics, and mandating the full and timely disclosure of all campaign activities."<sup>39</sup>

Since the early 1990s, there have been two tireless advocates of judicial selection reform in the Texas legislature: Senator Rodney Ellis, a

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29. Lawrence E. Young, *Ruling Likely to Alter Judges' Campaigns*, THE DALLAS MORNING NEWS, Jan. 7, 1990, at 33A.

30. *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990).

31. *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991).

32. *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993).

33. For example, Demetrius Sampson of the J.L. Turner Legal Association, an African-American group, said that his group was opposed to nonpartisan elections because its membership believed that nonpartisan elections hurt voter turnout. Young, *supra* note 29.

34. After leaving office, Governor Clements joined Texans for Judicial Excellence and later Make Texas Proud, organizations founded by former Chief Justice Hill to fight for judicial selection reform. *Clements, Ex-Foes Cooperate on Judicial Election Reform*, THE DALLAS MORNING NEWS, Oct. 16, 1993, at 13F.

35. Christy Hoppe & Lori Stahl, *New Plan for Electing State's Judges Sought: Democrats, Minorities Who Are Upset with Ruling Vow to Fashion Strategy*, THE DALLAS MORNING NEWS, Jan. 20, 1994, at 23A.

36. Hill was not alone in leaving the supreme court because he hoped for a move away from judicial elections. In 1995, Justice Bob Gammage retired a year before his term ended, describing Texas's judicial selection process as one that "erode[d] public confidence and corrupt[ed] the courts." Gammage said that he hoped his resignation would draw attention to the need for reform. George Kuempel, *Retiring Justice Slams Texas System*, THE DALLAS MORNING NEWS, Aug. 25, 1995, at 22A.

37. Thomas R. Phillips, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 127 (1998).

38. One of the sticking points of Hill's merit selection plan was who would "pick the pickers," i.e., the nominating commission. Although Phillips has endorsed gubernatorial appointment and retention elections, he has not been a vocal proponent of a merit selection system that includes a nominating commission.

39. Phillips, *supra* note 37, at 138.

Democrat from Houston, and Senator Robert Duncan, a Republican from Lubbock.<sup>40</sup> Both senators introduce reform bills in every legislative session, but they face an uphill battle for two reasons. First, Texas's constitution discourages work on "secondary" issues such as judicial selection reform; the legislature only meets every two years and then for only 140 days. With the press of more urgent issues, it is difficult for judicial reform-minded legislators to get their colleagues to pay attention to their bills. Second, the house of representatives has traditionally been resistant to merit selection, with bills either dying in committee or failing to receive the votes of at least 100 members.

Given the obstacles that judicial selection reform faces in Texas, a number of factors made 1995 a good time for campaign finance reform. First, it was clear from events over the past decade that more far-reaching reforms were unlikely to succeed. The new governor, George W. Bush, had also announced his opposition to any plan that would do away with the direct election of judges, and the governor's opinion weighed heavily on Republicans.<sup>41</sup> Bush did not reject other reform possibilities, however.

Second, the 1994 elections had seen another expensive supreme court race between a plaintiff lawyers' candidate and a pro-business lawyers' candidate. In the Democratic primary, Rene Haas challenged conservative Raul Gonzalez, with the two candidates spending a total of nearly \$4.5 million.<sup>42</sup> Third, the distracting issue of district-based elections, which appeared likely to affect any judicial selection reform plan, had been settled by the courts. Fourth, the state had new Republican leadership in 1995—leadership that wanted to see tort reform legislation passed and that was willing to agree to judicial campaign finance reform if Democrats would agree to tort reform. Finally, Senator Ellis found a better strategy for pushing a campaign finance bill that had failed in 1993.

In 1993, Ellis had proposed a bill that

passed the senate but attained little support in the house. Representative Jerry Madden, a Republican freshman from Plano who served on the house elections committee, described the bill as "too bureaucratic"<sup>43</sup> and worked against it. In 1995, Ellis approached Madden about coming up with a bipartisan bill that would achieve more broad-based support. The 1993 bill had failed in the house in part because of opposition from judges.<sup>44</sup> Madden polled judges and unsuccessful judicial candidates to ask them what reforms they thought would improve judicial elections. Madden and Ellis also sought input from the League of Women Voters, Common Cause, and the leadership of both political parties. According to Madden, they had two main goals: figuring out which reforms would be feasible and restoring the public's faith in the judiciary.

The bill that was eventually proposed focused particularly on limiting individual and law firm contributions because candidate polling and discussions with parties and government reform groups indicated that enormous contributions from wealthy individuals and large law firms tainted the integrity of judicial elections. Plaintiff lawyers, who tend to come from small firms, also wanted law firm limits in addition to individual limits because they felt that they could not compete with the large Dallas and Houston corporate firms.<sup>45</sup>

According to Mark Hey, an aide to Representative Madden, Madden built support for the bill by seeking the opinions of others, especially judges. Reform advocates could point to their research as evidence that the

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40. In the Texas house, Representative Pete Gallego and former Representative Robert Junell have also been active in recommending judicial selection reform.

41. Ken Herman, *Bush Signs Judicial Campaign Reform Bill*, AUSTIN AMERICAN-STATEMAN, June 17, 1995, at B5.

42. Champagne & Cheek, *supra* note 18, at 52.

43. Telephone interview with Representative Jerry Madden (Jan. 8, 2003).

44. Telephone interview with Mark Strama, aide to Senator Ellis (Jan. 9, 2003).

45. Telephone interview with Mark Hey, aide to Representative Madden (Jan. 8, 2003).

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people most affected by the legislation wanted the recommended changes. Hey also believes that Ellis's decision to reach out to a house Republican on the elections committee helped ensure that the measure would achieve broader support than the 1993 bill.<sup>46</sup> Although Madden was a relatively junior representative, his Republican roots were strong because he had previously served as chair of the Republican Party of Collin County, a predominantly Republican suburban county north of Dallas.

Mark Strama, who was an aide to Ellis at the time, said that another key factor in garnering support in the house was getting the backing of Republicans who sought tort reform. Governor Bush had defeated Democrat Ann Richards after she had served only one term, and Republicans had made gains in the legislature. Tort reform was a key issue for the state's new political leadership, and a group called Texans for Lawsuit Reform had suggested a number of reform measures, including judicial campaign contribution limits. According to Strama, Ellis and other Democrats told the advocates of tort reform that Democrats could agree to some of the tort reform proposals if tort reform supporters were serious about campaign contribution limits.

Strama also maintains that both civil defense lawyers and plaintiff lawyers were willing to give campaign contribution limits a

chance because of the high cost of judicial elections. "It was interesting," Strama notes. "When I talked to lawyers from both sides who had been major contributors, each was convinced they were being outgunned by the other. So instead of fighting the legislation to curtail campaign spending, both were willing to try something that they hoped might lower their expenses."<sup>47</sup>

Both the house and the senate approved the Judicial Campaign Fairness Act in May, and on June 17, 1995, Governor Bush signed the bill into law.<sup>48</sup> The act limits individual contributions to statewide judicial candidates to \$5000;<sup>49</sup> individual contributions to other judicial candidates are limited to between \$1000 and \$5000, depending on the population of the district.<sup>50</sup> The law also limits contributions from law firms and members of law firms to \$50 if aggregate contributions from a firm and its members exceed six times the maximum individual contribution limit for that judicial office (\$30,000 for statewide candidates). Total contributions from PACs are limited to 15 percent of the voluntary expenditure limits for that office, so that candidates for statewide judicial offices may accept up to \$300,000 in PAC donations. The law requires that contributors be identified by name, address, and job title. The law also establishes voluntary expenditure limits, with a unique enforcement procedure: the opponent of any candidate who exceeds the expenditure limits is no longer bound by the contribution limits.<sup>51</sup>

## THE IMPACT OF REFORM

On the day Governor Bush signed the Judicial Campaign Fairness Act (JCFA), Chief Justice Phillips described the law as "an excellent first step in comprehensive campaign finance reform."<sup>52</sup> When asked his opinion of this statement in early 2003, Representative Madden, the house Republican sponsor of the measure, disagreed, saying judicial reform had gone "as far as it needs to go."<sup>53</sup> Between these

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46. *Id.*

47. Strama, *supra* note 44.

48. V.T.C.A. Election Code § 253.151-253.176.

49. Judges of the supreme court and court of criminal appeals are elected statewide.

50. If the population of the district is less than 250,000, the limit is \$1000. If the district's population is between 250,000 and one million, the limit is \$2500. The limit is \$5000 in districts that have a population greater than one million.

51. Expenditures by candidates for statewide office are limited to \$2 million. Expenditures by court of appeals candidates are limited to between \$350,000 and \$500,000, depending on the population of the judicial district. Expenditures by all other judicial candidates are limited to between \$100,000 and \$350,000, depending on the population of the judicial district.

52. Herman, *supra* note 41.

two opinions lies the present reality of judicial selection reform in Texas.

While the expense of judicial elections has eased somewhat in recent election cycles and the disclosure rules in the Judicial Campaign Fairness Act have made judicial elections appear “cleaner,” the perception that justice is for sale has lingered. Some argue that because Texans prefer to elect their judges, the only hope for further reform is to revisit the contribution limits of the JCFA or to adopt public financing of judicial elections. Organizations that continue to push for campaign finance reform in Texas include Campaigns for People, Common Cause, and Public Citizen. Their efforts are informed by a legal watchdog group founded in 1997, Texans for Public Justice (TPJ). Among other things, TPJ tracks campaign contributions to public officials in Texas, including supreme court justices, and has issued a number of reports that examine the relationship between campaign contributions to the court’s members and the decisions of the court.<sup>54</sup>

In 2000, Public Citizen and other nonprofit organizations filed a lawsuit in federal court challenging Texas’s judicial campaign finance system as a violation of a citizen’s constitutional right to due process of law. The suit alleged that judges cannot be impartial when they solicit and receive campaign contributions from lawyers who argue cases before them. In *Public Citizen, Inc. v. Bomer*, the trial court ruled that the issue should be resolved by Texas citizens and their legislators.<sup>55</sup> The court of appeals affirmed, holding that the plaintiffs lacked standing to bring the suit.<sup>56</sup>

In 1999, Governor Bush vetoed a bill that would have put judicial candidate information on the Internet. Although it had passed both houses with bipartisan support, Governor Bush rejected the measure because it called on the secretary of state to oversee the program. Bush believed that this would put the secretary of state in an “inappropriate role.”<sup>57</sup> In 2001, Governor Rick Perry signed a similar law. If

implemented by the secretary of state, the law would require judicial candidates to provide a statement that included their education, professional experience, and other biographical information. The guide would be available to the public at least 45 days before the election.

Figures like Chief Justice Phillips, former Chief Justice Hill, Senator Ellis, and other legislators remain steadfast in their pursuit of merit selection or gubernatorial appointment for at least the appellate courts, giving speeches and interviews on the subject, introducing or supporting legislation, and encouraging discussion. In the 1997 legislative session (the first session following the passage of the JCFA), legislators introduced various bills that called for a modified merit selection plan for appellate courts, nonpartisan judicial elections, and the elimination of straight-ticket voting in judicial elections. None of these measures passed. In the 1999, 2001, and 2003 sessions, bills calling for the appointment and retention of appellate judges passed the senate but stalled in the house. In 2003, Hill formed Make Texas Proud, a political committee dedicated to promoting an appointment-retention system.

Various opinion surveys conducted since the 1995 reforms reveal continued dissatisfaction among voters, lawyers, and judges with all aspects of the judicial selection process in Texas. One set of surveys indicated that 83 percent of voters, 42 percent of lawyers, and 52 percent of judges supported nonpartisan elections.<sup>58</sup> In another series of surveys, 55 percent

53. Madden, *supra* note 43.

54. The reports are *Pay to Play, Checks and Imbalances, and Payola Justice*. <<http://www.tpj.org/reports/>>.

55. *Public Citizen, Inc. v. Bomer*, 115 F.Supp.2d 743 (W.D.Tex. 2000).

56. *Public Citizen, Inc. v. Bomer*, 274 F.3d 212 (5th Cir. 2001).

57. Steve Brewer and Kathy Walt, *Bush Vetoes Public-Defense Bill, OKs Health-Care Fee Negotiations*, HOUSTON CHRONICLE, June 22, 1999, at 1A.

58. Texas Supreme Court / State Bar of Texas / Texas Office of Court Administration (1999) <<http://www.courts.state.tx.us/publicinfo/publictrust/execsum.htm>>; Campaigns for People (2002), discussed in Janet Elliot, *Ethics Rules Revised for Judicial Candidates*, HOUSTON CHRONICLE, Sept. 19, 2002, at 34.



of voters reported having little or no information on judicial candidates in the last election,<sup>59</sup> and 91 percent of judges said that “because voters have little information about judicial candidates, judges are often selected for reasons other than qualifications.”<sup>60</sup> According to a recent survey of Texas judges, 50 percent were dissatisfied with the tone and conduct of judicial campaigns, 69 percent felt that they were under pressure to raise money during election years, and 84 percent said that “special interests are trying to use the courts to shape policy.”<sup>61</sup> Finally, survey results showed that between 72 percent and 83 percent of voters,<sup>62</sup> and between 28 percent and 48 percent of judges,<sup>63</sup> believed that campaign contributions had at least some influence on judges’ decisions.

While the 1995 Judicial Campaign Fairness Act succeeded in placing some controls on expensive campaigns, the continued concerns about judicial elections indicate that more work could be done in Texas. The chief justice, public interest groups, and some lawmakers believe that judicial selection reform should go further. The question in the coming years will be whether state leaders and the public will push for change.

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59. Campaigns for People (2002), discussed in Bruce Davidson, *Low-Key Judicial Races Are Expected*, SAN ANTONIO EXPRESS-NEWS, Sept. 1, 2002, at 2G.

60. Justice at Stake Campaign (2001), <<http://www.justiceatstake.org/files/SurveyPullOutTexas.pdf>>.

61. *Id.*

62. Texas Poll (1997), discussed in Ken Herman, *Legislature Again Tackles Reforms for Election of Judges*, AUSTIN AMERICAN-STATEMAN, Mar. 9, 1997, at B1; Texas Supreme Court (1998), discussed in Warren Richey, *Justice for Sale? Cash Pours into Campaigns*, CHRISTIAN SCIENCE MONITOR, Oct. 25, 2000, at 2; and Campaigns for People (2002), *supra* note 59.

63. Texas Supreme Court (1998), *id.*; Texas Supreme Court / State Bar of Texas / Texas Office of Court Administration (1999), *supra* note 58; and Justice at Stake Campaign (2001), *supra* note 60.

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# 2

## Campaign Oversight Committees in Alabama

*“Campaign conduct oversight committees—some of which are official, some quasi-official, and some unofficial committees of diverse community leaders—can make a major difference in curbing inappropriate judicial campaign conduct.”<sup>1</sup>*

Judicial selection in Alabama takes place through partisan elections. During the 1980s and early 1990s, these elections became increasingly expensive and mean-spirited. Some voices in the state began calling for alternative means of selection, such as merit selection or nonpartisan elections, while others called for campaign finance restrictions for judicial elections. Motivated by particularly contentious elections in 1994 and 1996, the Alabama Supreme Court took steps to improve judicial campaign conduct. The court revised the canons of judicial ethics to prevent candidates from personally soliciting campaign contributions and to make candidates responsible for the content of statements made by their campaigns. The court also authorized the creation of a judicial campaign oversight committee for the 1998 elections to act as a resource for candidates with questions about appropriate campaign conduct. Based on the success of

the 1998 committee, a committee was also established for the 2000 races. These committees succeeded in restoring some measure of civility to judicial campaigns, although the price tag for a judgeship in Alabama continues to rise.

The 1998 committee consisted of twelve judges, attorneys, and private citizens.<sup>2</sup> The committee met with candidates, reviewed with them the canons of judicial ethics, and convinced most to sign a pledge demonstrating their “commitment to compliance with the ethical standards and goals of the Committee.”<sup>3</sup> It also handled more than 350 formal candidate inquiries regarding permissible conduct and countless informal requests for “non-partisan, practical advice about the ethics of judicial campaigning.”<sup>4</sup> The committee had no formal disciplinary power; it could only refer transgressions to the Alabama Judicial Inquiry Commission or to the state bar. However, it could issue general public statements about instances of appropriate and inappropriate campaign conduct. The committee viewed its role as that of a “neighborhood watch” for bad behavior among judicial candidates.<sup>5</sup>

Newspaper editorials, as well as lawyers and judges interviewed for this chapter, have stated that the 1998 committee’s work successfully prevented the intense negativity seen during the 1996 election. In its own assessment of its

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1. Barbara Reed and Roy A. Schotland, *Judicial Campaign Conduct Committees*, 35 IND. L. REV. 781, 783 (2002).

2. Two members were chosen by the supreme court, one by the court of criminal appeals, one by the court of civil appeals, four by the circuit judges’ association, and four by the district judges’ association.

3. Judicial Campaign Oversight Committee, REPORT OF THE SUPREME COURT OF ALABAMA, 11 (1998).

4. *Id.* at 13.

5. *Id.* at 11.

efforts, the committee saw its activities as successful until near the end of the campaign, when it felt it became unable to limit negative attacks by candidates.

In 2000, the supreme court created a new, larger committee of twenty-six members. The 2000 committee consisted only of lawyers and judges and operated slightly differently than the 1998 committee. According to Maury D. Smith, chair of the 2000 committee, there was a concern that the 1998 committee had overburdened a small number of committee members.<sup>6</sup> To remedy this, the new committee created a procedure that dispatched three subcommittee members to the region of the state where a dispute had arisen, allowing for efficient and prompt handling of complaints. The committee also brought candidates to forums at which they could ask questions about ethical behavior.

The 2000 committee had success similar to that of the 1998 committee in curtailing unethical behavior among candidates.<sup>7</sup> As one study of the 2000 elections noted, “Strikingly, although supreme court seats were contested with such intensity that over \$13 million was spent, and a major litigation arose over one campaign ad, Alabama was dramatically more decorous than Illinois, Michigan, and Ohio, which had similar hotly-contested races.”<sup>8</sup>

Despite the improvement in the tenor of judicial campaigns in Alabama, nothing the committees did could control the spiraling costs. While no single race in 1998 or 2000 reached the \$4.5 million level of the infamous 1996 race,<sup>9</sup> which will be discussed in detail below, candidates for three supreme court seats spent more than \$7 million in 1998<sup>10</sup> and candidates for five seats spent more than \$13 million in 2000.<sup>11</sup> These are among the most expensive judicial elections in history and rival the amount of money spent in races for the U.S. Senate.

Among the range of possible judicial selection reforms in a state with partisan elections, the creation of a watchdog committee to over-

see elections is a moderate step. It appears, however, that the committees of 1998 and 2000 effectively contained the worst excesses of previous elections. Surprisingly, despite the successes of the 1998 and 2000 judicial campaign oversight committees in preventing some of the outrageous ads and mailings of earlier campaigns, the supreme court did not establish an oversight committee for the 2002 election.

## CAMPAIGN OVERSIGHT COMMITTEES IN THEORY AND IN PRACTICE

Judicial campaign oversight committees operate in at least ten states nationwide. The activities of these committees vary from state to state, but, in general, their role is to promote ethical campaign conduct by educating candidates, advise candidates regarding proposed advertisements and other campaign materials, and, if necessary, make public statements about inappropriate conduct by candidates.<sup>12</sup> Oversight committees may be administered by the judiciary, the bar, or citizens’ groups. In some states, campaign oversight committees

6. Telephone interview with Maury D. Smith, chair of the 2000 judicial campaign oversight committee (Aug. 9, 2002).

7. The 2000 committee was not without its critics. It faced a controversy during its tenure unlike anything encountered by the 1998 committee when Justice Harold See accused his fellow Republican Roy Moore, an opponent for the position of chief justice of the supreme court, of being “soft on crime.” Moore filed a complaint with the oversight committee, but the matter became moot when Moore won the primary. Some members of the 2000 judicial campaign oversight committee think the committee could have handled the initial investigation of the complaint more efficaciously. One member, speaking off the record, said that he thought the committee dragged its feet in investigating Moore’s complaint because of a favorable disposition among committee members to See. A key omission of the 2000 committee was its failure to produce a report documenting its activities.

8. Reed & Schotland, *supra* note 1, at 789.

9. Pamela Willis Baschab, *Putting the Cash Cow Out to Pasture: A Call to Arms for Campaign Finance Reform in the Alabama Judiciary*, 30 CUMB. L. REV. 11 (1999-2000).

10. *Id.*

11. Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C. L. 849 (2001).

12. Reed & Schotland, *supra* note 1, at 783.

are an arm of the supreme court, or are operated by the court in conjunction with the state court administrative body and/or the state judicial disciplinary body.<sup>13</sup> In other states, oversight committees are run by state and local bar associations or by independent organizations such as the League of Women Voters.<sup>14</sup> Campaign oversight committees may also be classified according to whether they are official or voluntary. Official committees include those administered by a judicial body or a mandatory state bar association.<sup>15</sup>

The ways in which official campaign oversight committees operate vary, but most have similar procedures. Most committees request that candidates acknowledge in some way that they understand the state's judicial canons as they relate to campaigns. All have formal procedures to handle disputes between candidates and have enforcement mechanisms when candidates behave unethically. The biggest difference among official committees in different states is their makeup—some states only allow lawyers and judges to serve, while others include laypeople.

For the 2002 elections, there were judicially administered campaign oversight committees in five states: Georgia, Louisiana, Mississippi, Nevada, and South Dakota. In Florida and Ohio, rules are in place that are similar to some of those followed by official oversight committees. (Ohio's supreme court requires candidates to attend a two-hour course in campaign finance and ethics and employs an expedited version of its normal judicial disciplinary procedures to discipline or exonerate candidates accused of behaving unethically. Florida's judicial ethics advisory committee conducts candidate forums in every

circuit with a contested election and has an election practices subcommittee that provides quick responses to campaign questions.)

Committees run by voluntary state bar associations are active in two states: Ohio and New York. Candidates in Ohio are asked to sign an agreement that they will conduct their campaigns with a commitment to the judicial canons, take personal responsibility for their campaign materials, submit all materials produced by their campaigns to the committee at least forty-eight hours before public disclosure, and allow the committee to eliminate false or misleading materials.<sup>16</sup> The New York State Bar Association recently instituted a campaign conduct committee patterned after one that has operated in Erie County, New York, since 1985, creating model guidelines for committees at the county level and a model pledge for candidates. The bar is working to help each of its twenty most populous counties set up committees. To handle disputes in counties that do not establish committees and for less populous counties, the bar has a "backstop" oversight committee in place. In other states such as California and Florida, local or municipal campaign conduct committees are run by local bar associations in a manner similar to that of the larger state oversight organizations.<sup>17</sup>

The main advantage of official campaign oversight committees—those that are administered by the judiciary or by mandatory bar associations—is the strength of their enforcement procedures. Because their decisions have the authority of the state behind them, candidates are forced to modify their behavior or suffer censure or worse. At the same time, these committees can face charges that their efforts to clean up judicial campaigns violate the First Amendment. The constitutional issues that official committees confront lead many observers to endorse the voluntary committee model. Voluntary committees may also gain credibility from having a more diverse membership of individuals "who are selected precisely because they are respected and neutral

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13. Barbara Reed, Address at the Summer Campaign Meeting, Justice at Stake Campaign (July 22, 2002).

14. *Id.*

15. *Id.*

16. The 48-hour disclosure stipulation has met with opposition from candidates on the statewide level. In 2002, candidates refused to sign the pledge because of this provision.

17. Reed & Schotland, *supra* note 1.

voices” rather than “purely political appointees charged with protecting favorites.”<sup>18</sup>

Recommendations from the 2001 National Symposium on Judicial Campaign Conduct and the First Amendment, which was convened by a steering committee of several state chief justices, included the “establishment of both official and unofficial campaign conduct processes to help assure appropriate campaign conduct.”<sup>19</sup> The steering committee also recommended that both nonlawyers and retired judges be included as members of conduct committees and described unofficial, or voluntary, campaign conduct committees as “particularly well-positioned to help assure appropriate judicial campaign conduct.”<sup>20</sup>

## THE ROAD TO REFORM

Over the course of the 1980s and 1990s, Alabama went from being a one-party state to a state with a genuine two-party system. Democrats occupied every seat on the appellate courts from the end of Reconstruction until 1994, but Republicans slowly gained ascendancy. Following the 2002 elections, the party controlled all but three of the nineteen seats on the state’s appellate courts, while Democrats still dominated circuit and district judgeships. The rise of genuine contestation in appellate court elections attracted special interest money to judicial elections. In the 1994 and 1996 elections, groups representing trial attorneys and business interests spent \$11 million on judicial elections.<sup>21</sup>

As elections became more hotly contested, special interest groups began to keep score of judicial decisions, compiling lists of justices who favored or opposed their particular agenda. Judges began to be labeled as conservative or liberal and, accordingly, received the support of certain groups and the opposition of others. The policy area that has polarized the Alabama judiciary in recent years is tort reform.

During the 1980s, Alabama in general and

one county in particular became “nationally recognized as tort hell.”<sup>22</sup> In response, the legislature passed a tort reform package in 1987. When many of these laws were later declared unconstitutional by the supreme court, elections to that court took on a heightened significance. In turn, the increasing politicization of judicial races required increased fundraising on the part of judicial candidates. By the early 1990s, Alabama’s campaigns began to be noticed nationally for their expense and nastiness.<sup>23</sup>

By 1993, the supreme court had overturned the last of the 1987 tort reform laws. In the meantime, national media outlets began running such stories as the \$50 million awarded to a man who sued over a \$1,000 discrepancy in his used car loan, or the BMW owner whose payment for receiving a car with a damaged paint job was “reduced” from \$4 million to \$2 million. Alabama’s judicial elections attracted outside attention and money from business interests and associations of trial attorneys. The 1994 election for the chief justice’s seat would be the most hotly contested the state had ever seen.

The 1994 race for supreme court chief justice pitted Ernest “Sonny” Hornsby against Perry Hooper, Sr. Hornsby, a past president of the Alabama Trial Lawyers Association, had been chief justice since 1989. Early in the campaign, many observers thought Hornsby would win easily, given his experience and gregarious nature. Hooper seized on the tort reform issue, however, and made the race competitive. In

18. *Id.* at 790.

19. *The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct and the First Amendment*, 35 *IND. L. REV.* 649, 655 (2002).

20. *Id.*

21. Anne Permaloff & Carl Grafton, *Key Players Spent Over \$11 Million in Tort Fight*, *BIRMINGHAM NEWS*, Jan. 2, 1997, at 1A.

22. Gregory Jaynes, *Where the Torts Blossom: While Washington Debates Rules About Litigation, Down in Alabama, the Lawsuits Grow Thick and Wild*, *Time*, Mar. 20, 1995, at 38.

23. Hugh Maddox, *Taking Politics Out of Judicial Elections*, 23 *AM. J. TRIAL ADVOC.* 329, 332–34 (Fall 1999).



response, Hornsby unleashed a negative ad campaign accusing Hooper of releasing a burglar who later murdered a woman. Hooper responded with ads depicting Hornsby as a typical trial attorney, “exploiting victims in order to further [his] shallow political objective.”<sup>24</sup> The election ended in a dead heat, with both sides declaring victory. Eventually, the race came down to disputed absentee ballots that had not been properly signed. Hooper achieved victory when the U.S. Court of Appeals for the Eleventh Circuit threw out the absentee ballots.

This 1994 contest served as a prelude for a 1996 race that made Alabama’s judicial elections infamous nationwide.<sup>25</sup> Incumbent Justice Kenneth Ingram faced the Republican Harold See. Groups sponsored by trial lawyers produced ads opposing See, accusing him of having a “secret” past and of abandoning his wife and children. See responded with ads featuring his ex-wife and daughter from his first marriage saying that his opponent’s ad did not contain “a shred of truth.” Later, another group opposed to See produced an ad featuring footage of a skunk fading into a picture of See, with the message: “Some things you can smell a mile away.” See ultimately defeated Ingram in a race that cost more than \$4.2 million.

The 1996 election served as the impetus for the judicial campaign oversight committees of

1998 and 2000.<sup>26</sup> Newspaper articles and people interviewed for this chapter assert that it was the repeated showing of the skunk ad that led the supreme court to take action. A February 1997 poll revealed that the public had reached a high level of disgust immediately after the 1996 campaign.<sup>27</sup> Forty-nine percent of voters had an unfavorable opinion of judicial campaigns. Seventy-two percent of voters expressed dissatisfaction with judicial campaign contributions, and 63 percent said that judges were dependent on contributions to attain office. The poll revealed quite clearly that Alabama citizens disapproved of the 1996 judicial elections and that expensive judicial campaigns diminished confidence in the impartiality of the judiciary.

The legislature had attempted to address these concerns with a 1995 law that required judges to recuse themselves from cases in which one or more of the parties, including the attorneys, had made a substantial contribution to their campaign.<sup>28</sup> However, the supreme court committee charged with crafting rules to enforce this statute could not reach agreement. The recusal law remains unenforced.<sup>29</sup> Faced with criticism of Alabama’s judicial elections and aware that the recusal law had not been implemented, Chief Justice Hooper decided in 1997 to revise the canons of judicial ethics and to establish the judicial campaign oversight committee for the 1998 elections.

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24. Edward Felsenthal, *Justice Delayed: A Year After Election, Alabama’s Chief Judge and His Foes Battle On*, WALL ST. J., October 16, 1995, at A1.

25. See Dale Russakoff, *Legal War Conquers State’s Politics; In Tort Reform Fight, Alabama Court Race Cost \$5 Million*, WASH. POST, Dec. 1, 1996, at A01.

26. In 1995, Mark White, the attorney who would later chair the 1998 campaign oversight committee, planted the seed for an oversight committee in a presentation at Alabama’s Third Citizens’ Conference on the State Courts.

27. Marketing Research Institute, JUDICIAL SELECTION IN ALABAMA STATEWIDE VOTER SURVEY, (1997).

28. Ala. Code 1975 § 12-24-1. The amounts were to have been \$4000 for appellate court judges and \$2000 for circuit judges.

29. Telephone interview with Mark White, chair of the 1998 judicial campaign oversight committee (Jan. 29, 2003).

## THE IMPACT OF REFORM

The 1998 and 2000 judicial campaign oversight committees in Alabama achieved their primary goal of preventing campaigns as ugly as those in 1994 and 1996. If that were all they had accomplished, however, their record would not be very impressive. As Mark White, chair of the 1998 committee, notes, “the only way to go was up” after the 1996 election. The 1998 and 2000 committees are impressive because they changed the spirit of judicial campaigns in Alabama.

In an interview for this chapter, White pointed out the enormous need for ethical guidance that the 1998 committee filled. “There was an overwhelming demand from candidates just for knowledge. People wanted to do the right thing, and they wanted advice on civility. If I had known the extent of the need, I wouldn’t have given my home number out,” White said. According to White, the 1998 committee saw its primary purpose as providing guidance rather than instilling discipline: “We were trying to be helpful and to get candidates to operate at the highest ethical level. Because we knew some candidates might feel threatened by us and feel we were trying to prevent them from running a hard campaign, we took the attitude that we were trying to help everyone win. We wanted everyone we helped to win, but to win ethically.”<sup>30</sup>

Maury D. Smith, chair of the 2000 committee, pointed out that his group also was successful: “We curtailed actions that should have been curtailed.” According to Smith, the most effective element of both committees was their mere existence. Candidates, in general, behaved well because they knew the committee would act if they behaved badly. In Smith’s words, “just being in place made us effective.”<sup>31</sup>

A number of editorials both immediately after the 1998 elections and during the 2000 contests noted the improved atmosphere of those races compared to the 1996 campaigns. In a *Birmingham News* editorial published immediately after the 1998 elections, the paper noted that “much of the credit for this year’s relatively clean elections goes to the candidates themselves, but give a nod to the supreme court and the new judicial campaign oversight committee for helping them along.”<sup>32</sup> Another editorial in the same paper lauded Chief Justice Perry Hooper, Sr. for appointing another committee for the 2000 race: “[C]redit the retiring Alabama chief justice with working to make sure those judges who do run for re-election and their opponents keep their campaigns on the up and up.”<sup>33</sup> Circuit Court judge

William Shashy, who sought advice from the 1998 committee, described the committee as “very effective at stopping unfair advertisements.”<sup>34</sup> Rich Hobson, the director of Alabama’s administrative office of courts, believes that the 1998 and 2000 committees changed the atmosphere of judicial elections. According to Hobson, “there was a real good cleaning up of campaigns in those two elections. People know the rules now if they’re going to run.”<sup>35</sup>

Alabama’s judicial campaign oversight committees of 1998 and 2000 represented a moderate reform that succeeded in changing the tone of judicial elections in the state. Given their achievement, the compelling question that arises is: Why did the Alabama Supreme Court not create a committee for the 2002 campaign? The official answer, provided by Hobson as a spokesman for Chief Justice Roy Moore, is that Alabama did not create a committee in 2002 primarily for fiscal reasons. The state was facing a statewide hiring freeze, and the courts were under funded. Although the members of the past judicial campaign oversight committees were volunteers, the state provided the funds for committee staff. Hobson also points out that there were only three statewide judicial races in 2002, so the need was not as pressing.

The decision to forego a campaign oversight committee in 2002 may have destroyed a barely begun tradition. According to Judge Shashy, who was helped by the 1998 committee and served on the 2000 committee, “It’s unfortunate that there may not be an oversight committee in future elections. We need one.”<sup>36</sup>

30. Telephone interview with Mark White (July 31, 2002).

31. Smith, *supra* note 6.

32. *A Nicer Election in Judicial Races, No Repeat of 1996’s Tacky Campaign*, BIRMINGHAM NEWS, Nov. 9, 1998, at A6.

33. *Cleaner Campaigns, Judicial Elections More Civil Thanks to Oversight Committee*, BIRMINGHAM NEWS, Aug. 2, 1999, at A6.

34. Telephone interview with William Shashy, circuit court judge (Aug. 14, 2002).

35. Telephone interview with Rich Hobson, director of Alabama’s administrative office of courts (Aug. 2, 2002).

36. Shashy, *supra* note 34.



Alabama may have gotten through the 2002 election cycle without attracting as much national attention as it did in 1996, but the prospect for clean campaigns in future elections is uncertain.

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# 3

## Merit Selection in New York

*“Although no system of judicial selection eliminates political considerations completely, a merit selection system minimizes the effects of partisan politics on the judicial selection process and allows judges to concentrate on the business of the courts.”<sup>1</sup>*

In 1977, New York changed the way it selected judges for its highest court, the court of appeals, from partisan elections to a merit selection system.<sup>2</sup> Under the change, voters no longer elect judges for the court of appeals, but instead the governor appoints judges from a list submitted by the commission on judicial nomination.<sup>3</sup> The commission consists of twelve people: four chosen by the governor, four chosen by the chief judge of the court of appeals, and one each chosen by the president pro tem of the senate, the speaker of the assembly, the minority leader of the senate, and the minority leader of the assembly. Of the members chosen by the governor and the chief

judge, only two may be from the same political party, and only two may be members of the bar. After the governor appoints a nominee from the commission’s list, he or she must then be confirmed by the senate.

Unlike most merit selection systems, New York has no retention election. Instead, at the end of their terms, judges must reapply to the commission on judicial nomination and be considered along with other applicants for the position. Essentially the selection process, including nomination, gubernatorial appointment, and senate confirmation, begins all over again.

The legislature approved merit selection in 1976 and 1977, and the measure was submitted to the voters in the 1977 elections. Although a Gannett News Service poll had shown that four out of five voters statewide favored the continued election of court of appeals judges, merit selection passed in November 1977, mainly because of overwhelming support in New York City. Voters in the city favored merit selection by a two-to-one margin; this strong showing helped overcome a slightly negative vote among upstate New York voters.<sup>4</sup>

This victory for merit selection in New York followed a series of rancorous elections in the early 1970s. These elections prompted concern among citizen groups, the leadership of the New York State Bar Association, the editorial writers of the *New York Times*, and, most impor-

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1. Samuel Lathan Grimes, “Without Favor, Denial, or Delay”: Will North Carolina Finally Adopt the Merit Selection of Judges?, 76 N.C. L. REV. 2266, 2311 (1998).

2. The change was part of a thorough reform of New York’s judiciary that also included the creation of the New York State Commission on Judicial Conduct and the centralization of New York’s court administration. New York’s current system for selecting court of appeals judges is labeled merit selection although it differs from the American Judicature Society’s model merit selection process in that there are no retention elections.

3. In New York, the commission on judicial nomination submits a list of seven names. Under AJS’s model merit plan, the judicial nominating commission submits a list of two to five names.

4. Elizabeth Hubbard, who was with the New York League of Women Voters during this time, said that the outcome was uncertain until the end. She remarked, “Waking up the morning after the election, it was surprising to see that the measure had passed. We had not expected it.” Telephone interview with Elizabeth Hubbard (February 13, 2003).

tantly, the governor, key senators, and the chief judge of the court of appeals that elections to the court were becoming too “expensive and demeaning.”<sup>5</sup> One senator summed up the worries by saying, “There is a strong feeling that we’re not attracting the right type of individual to the bench.”<sup>6</sup>

A quarter century later, merit selection for the court of appeals has had the desired effect of putting judges of New York’s highest court above the fray of elections. Proponents of merit selection also believe that it minimizes the role of politics in the selection process and leads to the selection of a higher caliber of judges. Whether either of these results has been achieved in New York is the subject of some debate.

## MERIT SELECTION IN THEORY AND IN PRACTICE

Although there is no standard form of merit selection, there are some common features among states with merit plans. Under merit selection, a governor appoints a judge from a list submitted by a nominating commission usually composed of both lawyers and non-lawyers. After an initial term of office, the judge must run unopposed in a retention election or be reappointed by the commission.

How did states come to choose judges in this manner? Among the first states, either the chief executive or the legislature determined the makeup of the judiciary, and the public had no direct role.<sup>7</sup> In the early nineteenth century, states switched to the election of judges in a fervor of Jacksonian democracy. It was thought that judges were instruments of the upper classes and that only popular election would reform the judiciary. By the turn of the twentieth century, however, popular election led to political machines selecting and controlling judges. States began to tinker with the election formula, starting with the introduction of nonpartisan judicial elections. By 1927, nonpartisan elections were held in twelve states.<sup>8</sup>

During the same period, Albert M. Kales, one of the founders of the American Judicature Society (AJS), devised an initial version of a merit selection plan that called for the popular election of a supreme court chief justice who would, in turn, appoint the other justices. By the 1930s, this proposal had evolved into the more familiar merit selection plan that includes a nominating commission, gubernatorial appointment, and retention elections.

In 1940, Missouri became the first state to institute a merit selection plan along the lines suggested by AJS. Over the next half century, a number of states adopted merit selection for some or all of their courts. These states and the date they adopted merit selection include:<sup>9</sup> Kansas (1958), Alaska (1959), Oklahoma (1961; 1967), Iowa (1962), Nebraska (1962), Colorado (1966), Vermont (1967), Indiana (1970), Tennessee (1971; 1994), Wyoming (1972), the District of Columbia (1973), Florida (1973), Arizona (1974), New York (1977), Hawaii (1979), South Dakota (1980), Utah (1984), Connecticut (1986), New Mexico (1988), and Rhode Island (1994).<sup>10</sup> In addition to these states, a handful of other states have established merit selection by executive order, and several elective states use merit plans to fill interim vacancies.<sup>11</sup>

5. Linda Greenhouse, *State Senate Urges New Way to Select Judges*, N.Y. TIMES, Mar. 23, 1976, at 43.

6. *Id.*

7. Vermont, which had popular elections for its probate judges, is an exception. In some states, including Maine, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, and Vermont, an elected executive council had to approve gubernatorial appointments. For historical information on state judicial selection methods, see Evan Haynes, THE SELECTION AND TENURE OF JUDGES, NATIONAL CONF. OF JUDICIAL COUNCILS 101-135 (1944).

8. For a concise summary of judicial selection trends in the United States, see Larry C. Berkson, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT (AJS:1999) <<http://www.ajs.org/js/berkson.pdf>>.

9. A state is included in the list if it uses merit selection for any level of court.

10. It is noteworthy that since moving to merit selection, none of these states has returned to an elective system.

11. For detailed information on merit plans in each state, see JUDICIAL MERIT SELECTION: CURRENT STATUS (AJS: 2003) <<http://www.ajs.org/js/JudicialMeritCharts.pdf>>.

The case against judicial elections has been made repeatedly in states that have opted for merit selection. Reformers can point to a number of problems with elective judicial systems, whether partisan or nonpartisan. Because of the necessity of campaign contributions, judicial elections create the impression of judges who can be controlled by special interests. Voters frequently know little about judicial candidates, and codes of judicial conduct may place restrictions on candidate speech. Elections may also discourage those who are reluctant to enter the political arena from seeking judicial office. Given the negative aspects of judicial elections and the concerns engendered by New York's campaigns of the early 1970s, it was not surprising that New York sought to change its method of selecting judges for its highest court.

It is important to acknowledge that the merit selection process is not free from political and other external influences. Studies of judicial nominating commissions have shown that politics can play a part in both the selection of commission members and in their deliberations.<sup>12</sup> Likewise, retention elections, which are a feature of most merit plans, are not always free from the involvement of special interests and expensive, negative campaigns.<sup>13</sup> Nonetheless, two thirds of states use merit selection to choose some or all of their judges.

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12. See Richard A. Watson & Rondal G. Downing, *THE POLITICS OF BENCH AND BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* (1969); Beth M. Henschen, Robert Moog, & Steven Davis, *Judicial Nominating Commissions: A National Profile*, 73 *JUDICATURE* 328 (1990); and Joanne Martin, *MERIT SELECTION COMMISSIONS: WHAT DO THEY DO? HOW EFFECTIVE ARE THEY?* (ABA, 1993).

13. See Traci V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 *JUDICATURE* 68 (1999).

14. For a complete account of the acquisition and loss of party control of the selection process, see Luke Bierman, *Legal Development: Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 *ALBANY L. REV.* 339, 343-345 (1996).

## THE ROAD TO REFORM

It took very few contentious elections in New York to motivate reformers to push through merit selection for the state's highest court. Until the 1970s, New York had not seen many contested elections for seats on its highest court. Unpleasant elections for the position of chief judge of the court of appeals in 1913 and 1916 had motivated the major parties to cross endorse the senior associate judge in elections for chief judge when a vacancy in the position occurred. Over time, the parties began to cross endorse candidates in associate judge races as well. It was the replacement of this system with contested elections that led New York's high court races to become noisier and nastier.

In 1967, New York changed its election laws to allow candidates to challenge party choices in primaries and to seek access to the ballot through petition. By the early 1970s, the new rules led to unconventional candidates appearing on the ballot for the court of appeals. In 1972, for example, Nannette Dembitz became the first woman candidate for the high court when she won the Democratic primary without the party's support. In 1974, a wealthy lawyer with no judicial experience named Jacob Fuchsberg defeated Harold Stevens in the Democratic primary. Stevens, the first African-American on the court of appeals, had been appointed to fill a midterm vacancy. Both the Association of the Bar of New York City and the Democratic Party opposed Fuchsberg, but he defeated Stevens again in the general election, in which Stevens ran as a Republican. The new rules also gave rise to elections of unaccustomed rancor.<sup>14</sup>

Although a change to New York's constitution required legislative approval, the legislature took little action on judicial selection reform even after the media and the public began to show interest following the elections of 1972 and 1974. The advocacy of several political forces created support for the 1977 reform.

These forces included the governor, the chief judge of the court of appeals, the state senate, editorial writers, civic groups, and bar associations. Among these groups and individuals, Governor Hugh L. Carey and Chief Judge Charles D. Breitel were key galvanizing forces.

Governor Carey prodded the legislature to act on the proposed constitutional change as part of a larger reform of New York's judiciary that included centralizing the state's court system.<sup>15</sup> To change the constitution, the merit selection amendment needed to be passed in two consecutive legislative sessions. Governor Carey gained initial passage of the legislation in 1976 by calling a special session of the legislature to take up the issue of judicial reform. According to one observer, by holding a session devoted to this single issue, Carey "really held [the legislators'] feet to the fire and made them pay attention to the issue."<sup>16</sup> In 1975, Carey had established by executive order judicial nominating commissions for interim vacancies on the state's trial courts and the court of appeals and for all vacancies on the appellate division of the supreme court (New York's intermediate appellate court).<sup>17</sup> Carey's support for merit selection was so strong that he expected the measure to be extended quickly to judges of the lower courts, as well.<sup>18</sup>

Carey was elected governor in 1974. His tenure came at a very difficult time for the state of New York. In his first two years in office, Carey had to tackle the near-bankruptcy of New York City. He also had to bring the state's budget into solvency after a period of expansive budgets. Carey played a critical role in saving New York City from financial ruin. By the time he began to push for the court reform package in 1976, he had achieved a great deal of popularity throughout the state for his handling of the fiscal crisis.<sup>19</sup> The support of a governor at the height of his popularity would prove an asset of immeasurable value in attaining merit selection.

Carey's call for reform was bolstered by civic organizations and editorial writers and by

task forces established by the state senate and the New York State Bar Association. The bipartisan senate task force drafted the initial court reform package that was submitted for legislative approval. The task force found that the state was split between upstate voters who opposed merit selection and voters in New York City who supported the idea. The task force, which included senators from all regions, proposed merit selection for the high court and local referendums to determine whether trial court judges would be elected or appointed. One aspect of the reform package that ensured senate support was the provision providing for the advice and consent of the senate in judicial appointments. The Association of the Bar of the City of New York and the New York State Bar Association also threw their support behind merit selection for the court of appeals with local referendums.<sup>20</sup>

In addition, several civic organizations came out in favor of the change including the League of Women Voters, the Citizens Union, and the Committee for Modern Courts, which was a coalition of thirty-eight civic and legal groups. The League of Women Voters and the Committee for Modern Courts, in particular, spent time in Albany, button-holing legislators and explaining the importance of the issue.<sup>21</sup>

Chief Judge Breitel, who first began advocating for merit selection in 1973 during his own election to the court, also continued to argue for the measure. Richard Bartlett, former chief administrative judge of New York,

15. *Id.*

16. Telephone interview with Richard Bartlett, former chief administrative judge of New York (Aug. 28, 2002).

17. Judges of the appellate division of the supreme court, which was created by constitutional amendment in 1894, have always been chosen through gubernatorial appointment. Governors Cuomo and Pataki have continued to use nominating commissions to select appellate division judges.

18. *Amendment Victory Spurs Court Change*, N.Y. TIMES, Nov. 11, 1977, at A1.

19. Daniel C. Kramer, *THE DAYS OF WINE AND ROSES ARE OVER: GOVERNOR HUGH CAREY AND NEW YORK STATE* 40-120 (University Press of America:1996).

20. Greenhouse, *supra* note 5.

21. Bartlett, *supra* note 16.



and Fern Schair of the Fund for Modern Courts both point out how pivotal Breitell's leadership on the issue was. According to Bartlett, "It was Breitell who kept up the steady drumbeat for court reform from 1974 to 1977."<sup>22</sup>

Schair also points to the important role played by Cyrus Vance, who then served as president of the Association of the Bar of New York City. From 1974 to 1976, Vance presided over the gubernatorial task force that came up with many of the recommendations that were eventually included in Governor Carey's reform package. Schair points out that Vance's behind-the-scenes fundraising work was also crucial to the effort. These funds allowed Schair to travel to radio stations throughout the state to be interviewed about court reform. Schair says that there was falloff on the referendum vote because many voters did not understand the issues involved, but that "because of Cy Vance, we got the message out to the type of people who would care about court reform and who then voted for the referendum."<sup>23</sup> Elizabeth Hubbard, who headed the New York League of Women Voters' efforts in the lobbying campaign, suggests that the bar was able to raise so much money for the campaign because the leadership of the bar became convinced that nontraditional judges like Fuchsberg and others would harm the court of appeals' strong reputation.<sup>24</sup> Schair believes that winning over more voters outside of New York City than would have otherwise taken an interest in the referendum was critical to its final passage.<sup>25</sup>

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22. *Id.*

23. Telephone interview with Fern Schair of the Fund for Modern Courts (Aug. 28, 2002).

24. Hubbard, *supra* note 4. Hubbard says that the League had been working for merit selection since 1955, but 1977 was the one time "everyone seemed to be paying attention."

25. Schair, *supra* note 23.

26. *A Chance for Justice*, N.Y. TIMES, May 24, 1976, at 27.

27. Tom Goldstein, *Proposal to Name Judges is Opposed*, N.Y. TIMES, Nov. 3, 1977, at 35.

28. *Id.*

29. *Id.*

The proposed reform also received strong support from editorial writers, especially those of the *New York Times*. In throwing the prestige of that institution behind the effort, the newspaper used the traditional rhetoric of those who argue for merit selection. A 1976 editorial urging the legislature to pass Governor Carey's judicial reform package during the special session argued that the reforms "would permit New York to catch up with half the states in the nation that ha[d] restructured their judicial systems along modern lines."<sup>26</sup>

Despite the heft of the individuals and institutions that supported merit selection, it was not clear that the measure would achieve popular support. There were a number of influential organizations opposed to the measure. More than 100 judges across the state formed an organization called the Ad Hoc Committee for the Preservation of an Elected Judiciary, and its leader Justice Frank D. O'Connor referred to the reform proposal as "elitist and undemocratic."<sup>27</sup> The National Association for the Advancement of Colored People joined in the opposition, suggesting that merit selection would lead to the selection of fewer minority judges.<sup>28</sup> A number of smaller bar groups also dismissed the reform, saying it was merely an attempt by "the Brahmins of the bar" to reassert control over judicial selection that had been lost with the election reforms of 1967.<sup>29</sup>

In spite of these detractors, the measure passed the state legislature in 1976 and 1977 and won popular approval in 1977. Judges of the court of appeals began to be selected under the new system in the next year. The passage of merit selection for the court of appeals did not presage a change to merit selection at all levels, however. Although subsequent governors and New York City mayors have established judicial nominating commissions by executive order, there has been no movement toward a constitutional change to merit selection for New York's lower courts.

## THE IMPACT OF REFORM

According to those involved in the reform efforts that led to merit selection, the success of Governor Hugh Carey's judicial reform package seemed to herald the beginning of a reform period that would eventually lead to merit selection at the trial court level. After the success of the constitutional referendum, Chief Judge Charles Breitel said of extending merit selection to all judges, "it won't happen tomorrow, but it will come eventually."<sup>30</sup>

Merit selection has not been extended to trial court judges by statute or constitutional amendment in New York, despite the expectations of Governor Carey and Chief Judge Breitel. Governor Mario Cuomo did not display the same commitment to trial court reform that Governor Carey had. According to Bartlett, "Governor Cuomo believed the only way to finish court reform was to have a constitutional convention."<sup>31</sup> Short of a constitutional convention, Cuomo was willing to let judicial reform remain on the backburner, although he supported merit selection bills as they came through the legislature. In 1988, when a merit selection bill was proposed in the legislature, one legislator joked that he had "a better chance of growing wings and flying over the courthouse" than merit selection for New York's trial courts had of passing.<sup>32</sup> Elizabeth Hubbard of the League of Women Voters says that Cuomo's aides convinced the League to separate the issue of court merger,<sup>33</sup> another court reform measure considered during the 1980s, from merit selection because "merit selection was too hard to sell."<sup>34</sup>

And how have supporters of the reform assessed the differences between judges chosen before and after the reform? Soon after the change, the *New York Times* expressed some disappointment in the nominating commission's first choices for the position of chief judge when Breitel retired in 1978. According to a 1978 editorial, the "undiscovered excellence" promised by merit selection proponents

"turn[ed] out to be easier for reformers to promise than for a real-life commission to produce."<sup>35</sup> Although it considered the nominating commission's recommendations to be acceptable, the *Times* noted that the names were familiar ones that "all could have been produced by the old system, though even political slate-makers might have tried for more variety."<sup>36</sup>

In terms of quality of performance, the figures interviewed for this chapter who were active in the merit selection reform movement have found no radical differences between court of appeals judges chosen before and after the introduction of merit selection. However, in their opinion, there may be personality differences between the judges who came before and after the reform. Bartlett believes that some of the judges who have been appointed would not have been elected to the court because they are not temperamentally suited to running in statewide elections.<sup>37</sup>

Almost all of the candidates recommended by the nominating commission have had previous judicial experience. While this change certainly promotes more seasoned judges, it also means that the nominees have had contact with local party leaders.<sup>38</sup> Because most supreme court judges are elected in New York,<sup>39</sup> judges

30. *Amendment Victory Spurs Court Change*, N.Y. TIMES, Nov. 10, 1977, at A1.

31. Bartlett, *supra* note 16.

32. Richard Barbieri, *Judges Back Merger, Oppose Merit Selection*, MANHATTAN LAWYER, Apr. 12-18, 1988, at 5.

33. "Court merger" would have merged trial courts to clean up jurisdictional overlaps, eliminating the trial courts below the supreme court. The proposed reform has not passed, although it has garnered more support than merit selection.

34. Hubbard, *supra* note 4.

35. *How—and What—to Name Judges*, N.Y. TIMES, Dec. 26, 1978, at 18.

36. *Id.*

37. A good example of a judge who may not have been electable was Joseph Bellacosa, who at his swearing in said that he "considered his appointment 'a miracle,' because he had never aspired to it." Ron Davis, *Cuomo Appoints 7th Appeals Judge*, NEWSDAY, Jan. 6, 1987, at 04.

38. See Dorothy Samuels, *New York's Long and Sorry Tradition of Judicial Elections*, N.Y. TIMES, Nov. 14, 2002, for a discussion of the political connections of supreme court judges.



have experience working the same rooms as politicians. The professionalization of candidates for the high court, therefore, may come at the cost of the exclusion of talented political outsiders.<sup>40</sup>

The court of appeals has become more diverse in the period since merit selection. In 2003, there were four women, one of whom was of Latino descent, and an African-American man on the court. This diversity is a stark contrast to the record before the 1977 reform. No woman had been elected to the court of appeals. Harold Stevens, the first African-American on the court, was appointed to fill an interim vacancy but was defeated in the 1974 elections. Governors Cuomo and George Pataki have deliberately created diversity on the court through their appointments. While the vast majority of the candidates recommended by the nominating commissions have been white men, these governors have opted for diversity.<sup>41</sup> Whether elections would have created a similarly diverse court is open to debate.

In recent years, some observers have expressed concern about the low number of applications for open positions on the court of appeals. When a vacancy occurred in 2002, such a small number of candidates applied for the position that the commission on judicial nomination extended the application deadline. Some potential candidates said that they “did not bother to apply because it appeared that only a couple of candidates with close connections to the Pataki administration had any real chance of being selected.”<sup>42</sup> Whether this concern will prove a lasting one remains to be seen.

How successful merit selection has been in New York depends on one’s criteria of success.

If the goal of merit selection is to achieve the appearance of a judiciary that stands apart from the rest of the political system and spares judges from being involved in contentious elections, New York’s switch to merit selection for its court of appeals seems to have succeeded. If the goal of merit selection is to eliminate politics from the process of selecting judges, New York may have had less success. If the goal of merit selection is to produce a judiciary that is patently superior to an elective one, there is little empirical evidence to support this assertion, although the court of appeals has become more diverse under merit selection.

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39. Not all supreme court judges are elected. Court of claims judges, who are appointed by the governor, are frequently made “acting” supreme court justices.

40. Bierman, *supra* note 14, at 354-356.

41. *Id.* at 349.

42. John Caher, *Read Tapped for Court of Appeals*, N.Y.L.J., Jan. 7, 2003, at 1.

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# 4

## Partisan to Nonpartisan Elections in Mississippi

*“A first step toward improving the current electoral process is to eliminate partisan contests.”<sup>1</sup>*

In 1994, the Mississippi legislature adopted a sweeping reform of the state’s judiciary. The changes, which did not require amendment of Mississippi’s constitution, increased the size of the newly created court of appeals to reduce a backlog of cases before the state’s supreme court, added new judgeships and redistricted existing jurisdictions, and switched most judicial elections from partisan to nonpartisan contests. The change from partisan to nonpartisan elections was not the preferred option of the lawmakers who introduced the judicial reform legislation. The package, when first introduced in 1993, envisioned a merit selection plan for judges of the new court of appeals and the eventual adoption of a similar system for the Mississippi Supreme Court.

Many in the reform camp thought the reform legislation had the necessary votes to pass until a “crusty, rural lawmaker”<sup>2</sup> introduced an amendment changing the method of selection for members of the court of appeals to elections. The legislator remarked, “If we in this house have to go around ‘tending all these speakings and eat cold sweet ‘taters to keep our offices, then [the court of appeals judges]

ought to also.”<sup>3</sup> As Mike Mills, who was then chair of the house judiciary committee, has pointed out, the argument of the legislation’s opponents boiled down to this: “The democratic process is nearly intolerable for us. So it must be good for judges.”<sup>4</sup> This reasoning proved persuasive to Mississippi lawmakers and led to the creation of a new slate of judicial elections in Mississippi.

This anecdote reveals both the desire for and the difficulty of judicial selection reform in Mississippi. Legislative reform of Mississippi’s judiciary had been pursued for over a decade before the passage of the 1994 legislation, but sweeping changes in judicial selection would prove difficult to achieve. The switch to nonpartisan elections represented a compromise between reformers, who hoped for a more far-reaching change such as merit selection for the appellate courts, and legislators, who preferred the elective system.

### PARTISAN TO NONPARTISAN ELECTIONS IN THEORY AND IN PRACTICE

In the United States, there have been two trends toward the adoption of nonpartisan judicial elections. The first took place in the Progressive Era among western and midwestern states, in which switching from partisan to nonpartisan judicial elections was a reaction to perceived faults of partisan elections. States that had introduced partisan elections to

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1. JUSTICE FOR HIRE: IMPROVING JUDICIAL SELECTION, A STATEMENT BY THE RESEARCH AND POLICY COMMITTEE FOR ECONOMIC DEVELOPMENT 5 (2002).

2. Bill Minor, *Judicial Election Reform Thwarted by Cold Taters*, SUN HERALD, Nov. 8, 2001, at C3.

3. *Id.*

4. Michael P. Mills and Lee Waddle, *Judicial Independence in Mississippi*, 20 QUINNIAC L. REV. 709, 712 (2001).

ensure accountability among judges found to their dismay that party machines and powerful interest groups came to dominate judicial elections. California, for example, switched from partisan to nonpartisan elections in 1911 to reduce the influence of the political parties and the railroad conglomerates that had dominated the state's politics since the 1860s.<sup>5</sup> In making the switch, California was part of a larger movement. Washington was the first state to introduce nonpartisan elections of judges in 1907, and by 1917 twelve states, mainly in the West and Midwest, had done the same.<sup>6</sup> A second trend toward nonpartisan elections has taken place in the South over the last thirty years. Florida, Kentucky, Georgia, Louisiana, Mississippi, North Carolina, and Arkansas have all introduced nonpartisan judicial elections for some or all of their judges in the past three decades. Currently, twenty-two states have nonpartisan elections for some level of court.<sup>7</sup>

Several of the midwestern and western states that initially tried nonpartisan elections, such as Iowa, Kansas, and Colorado, subsequently changed to merit selection. Nonpartisan elections seem to have found the happiest home among a northern tier of states (Minnesota, North and South Dakota, Oregon, and Washington<sup>8</sup>) that made the change during the Progressive Era<sup>9</sup> and have not changed their systems since, and in the modern South.

The primary argument for nonpartisan judicial elections is that they remove partisan considerations from the selection process while promoting accountability. Judges may then be selected based upon their qualifications rather than their party affiliation. In this regard, nonpartisan elections succeed, at least to the extent that they "make the party affiliation of the judge a less important determinant of the election outcome."<sup>10</sup> Nonpartisan elections are said also to reduce the frequent turnover on the bench that occurs in some partisan election states since, according to some observers, "[i]n nonpartisan election states, good judges are

usually unopposed."<sup>11</sup> A recent study of state supreme court elections confirms that there tend to be lower turnover rates in nonpartisan election states, with more incumbent judges running unopposed and fewer judges being defeated when they do face opponents.<sup>12</sup> A third rationale offered for nonpartisan elections is that judges in nonpartisan election states will feel less compelled to adopt ideologically extreme positions in order to appeal to strong partisans.<sup>13</sup>

In spite of the arguments in their favor, nonpartisan elections are described by some commentators as "possess[ing] all of the vices of partisan elections and none of the virtues."<sup>14</sup>

5. John H. Culver & John T. Wold, *Judicial Reform in California*, in JUDICIAL REFORM IN THE STATES 140 (Anthony Champagne & Judith Haydel, eds., 1993).

6. Robert Darcy, *Conflict and Reform: Oklahoma Judicial Elections 1907-1998*, 26 OKLA. CITY U. L. REV. 519, 524 (2001). The first jurisdiction in which judicial candidates appeared on the ballot without party labels was Cook County, Ill.

7. This figure includes all states in which judicial candidates are listed without party affiliation on the general election ballot. In some of these states, however, judicial elections are nonpartisan in name only, since the nomination process—if not the selection process—is dominated by political parties. In Michigan, supreme court candidates are nominated at party conventions, and, in Ohio, judicial candidates are nominated in partisan primary elections. Some commentators believe that the selection process in Idaho should also be described as partisan because of the tone of the 1998 and 2000 elections. See, e.g., *Selection of State Judges Symposium Transcripts, Judicial Elections and Campaign Finance Reform*, 33 U. TOL. L. REV. 335, 338 (2002).

8. Michigan and Ohio also adopted nonpartisan elections during this period, but see *id.*

9. Three other northern states, Montana, Idaho, and Wisconsin, could be added to this list, but they did not adopt nonpartisan elections during the Progressive Era.

10. Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L. J. 53, 63 (1986).

11. Thomas E. Brennan, *Nonpartisan Election of Judges: The Michigan Case*, 40 SW. L. J. 23, 26 (1986).

12. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315 (2001). Hall compares nonpartisan and partisan elections for state supreme court judges nationwide between 1980 and 1994 and shows that, overall, judges in nonpartisan elections are more likely to run unopposed and less likely to be defeated.

13. Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L. A. L. REV. 1391, 1427 (2002).

14. Peter D. Webster, *Selection and Retention of Judges: Is There One 'Best' Method?*, 23 FLA. ST. U. L. REV. 1, 26 (1995).

One criticism leveled against nonpartisan elections is that they deprive voters of an important source of information about judicial candidates—their party affiliation. In the absence of the party cue, voters tend to base their decisions on name recognition and incumbency.<sup>15</sup> Voters in nonpartisan elections may also rely on other factors to determine their candidate choice, such as their perceptions of the candidate’s ethnicity, sex, or religious background, an “eye-catching nickname,” or even ballot position.<sup>16</sup> The lack of party affiliation as a source of information may also affect voter turnout. As one scholar of judicial elections notes, “the party label on the ballot has been found to stimulate voter participation in the absence of specific information about the candidates and the issues.”<sup>17</sup> As a result, “partisan judicial elections are far better attended by voters than nonpartisan and merit retention elections.”<sup>18</sup> Critics of nonpartisan elections also maintain that judicial campaigns in nonpartisan election states can be more expensive than their counterparts in partisan election states because, without party assistance, candidates must spend large amounts of money to reach voters.<sup>19</sup>

Perhaps the most serious charge made

against nonpartisan elections is that “political parties, whether reflected on the ballot or not . . . continue to impact judicial campaigns.”<sup>20</sup> In some states, judicial elections are nonpartisan only to the extent that candidates appear on the ballot without party affiliations; there are no proscriptions against political parties endorsing judicial candidates or making contributions to their campaigns. In other states, party endorsements and/or contributions to judicial candidates are prohibited by state law, or court rules restrict judicial candidates from seeking or using party endorsements, accepting contributions from political parties, and/or identifying themselves as members of political parties. Yet even in some of these states, parties may be active in the selection process.

The constitutionality of regulating party involvement in judicial elections has been questioned. In 1990, a federal appeals court struck down California’s ban on party endorsements of candidates for nonpartisan offices,<sup>21</sup> and a federal district court in 2002 invalidated a Mississippi provision that barred political parties from contributing to and endorsing judicial candidates.<sup>22</sup> Although a federal appeals court upheld provisions of Minnesota’s judicial canons that restrict candidates from identifying themselves as members of political parties and using party endorsements,<sup>23</sup> other restrictions on judicial candidate speech have been found to violate the First Amendment. In *Weaver v. Bonner*,<sup>24</sup> the U.S. Court of Appeals for the Eleventh Circuit struck down Georgia’s ban on judicial candidates personally soliciting campaign contributions and publicly stated support, and in *Republican Party of Minnesota v. White*,<sup>25</sup> the U.S. Supreme Court invalidated Minnesota’s proscription against judicial candidates announcing their views on disputed legal or political issues.

In general, courts are rejecting the argument that differences between the roles of judges and other elected officials necessitate differences in the regulations that govern their election campaigns. With each court decision,

15. Philip L. Dubois, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 79-81 (1980). The use of incumbency as a cue in nonpartisan elections may be the reason that fewer incumbent judges are defeated in these states. See Hall, *supra* note 12.

16. *Id.* at 81.

17. Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L. J. 31, 43 (1986).

18. *Id.*

19. Champagne, *supra* note 10, at 63.

20. Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J. L. & PUB. POL’Y 273, 298 (2002).

21. *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990). California has nonpartisan elections for its superior court judges.

22. *Mississippi Republican Party State Executive Committee v. Musgrove*, unreported (S.D. Miss., Oct. 21, 2002).

23. *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2000).

24. *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

25. See *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

the long-term viability of efforts in nonpartisan election states to insulate judicial elections from political influences grows increasingly uncertain.

### THE ROAD TO REFORM

Throughout its history, Mississippi has experimented with all methods of judicial selection. The state's original constitution of 1817 left the selection of judges to the legislature. In 1832, Mississippi became the first state in the nation to establish popular elections of all judges, and, in 1868, it became one of the first elective states to move away from the election of judges when it adopted gubernatorial appointment with senate confirmation. Popular elections were reinstated in 1910 and 1914 and have been maintained ever since. The 1994 change from partisan to nonpartisan election of judges came about as a compromise between those who supported merit selection of the judges of the new court of appeals and those who favored judicial elections.

As in other states, concerns began to develop in the late 1980s and early 1990s regarding the increasing cost of judicial campaigns in Mississippi and the effect that this could have on perceptions of the independence and impartiality of the judiciary. These concerns were expressed by a variety of groups. In 1990, the Mississippi Commission on Judicial Performance began recommending to both the governor and the legislature that Mississippi judges be chosen in nonpartisan elections. The commission reiterated its support for nonpartisan elections in its 1993 annual report, noting that it had received more complaints regarding judges' political activity between 1990 and 1993 than it had in its first ten years of operation combined (1980-1989).<sup>26</sup> The Mississippi Judicial Council also urged the legislature to adopt a nonpartisan election plan. In 1992, the president of the Mississippi Bar Association wrote that "serious problems . . . in the method, financing, conduct and the future

of judicial elections . . . must be addressed before they become more serious and contribute to any further erosion of our judiciary."<sup>27</sup> A 1994 report by the Mississippi Economic Council described partisan elections of appellate judges as a threat to judicial independence and endorsed a merit selection and retention plan, arguing that the "highest courts of appeal must be independent and free to apply the law without political consideration."<sup>28</sup> In his 1995 "State of the Judiciary" address, Chief Justice Armis Hawkins cited the high cost of judicial campaigns in states such as Texas and Alabama and encouraged the legislature to act to prevent this from occurring in Mississippi.

Despite the concerns in some circles regarding the judicial selection process, the primary motive for the 1994 judicial reform package was the inability of the courts to meet the needs of Mississippi's citizens. A 1993 study by the Mississippi Bar's Commission on the Courts in the 21st Century had concluded that the judiciary's fundamental problems were the backlog of cases before the state's supreme court, the inefficiency of the trial courts, the inadequate salaries of Mississippi judges compared to neighboring states, and the outdated information technology used in the courts.<sup>29</sup> The 1994 reform package's expansion of the recently established court of appeals from five to ten judges,<sup>30</sup> creation of two new circuit districts, and addition of fourteen new circuit and chancery court judgeships addressed the backlog and inefficiency issues.

26. Letter from Luther T. Brantley, III, Executive Director, Mississippi Commission on Judicial Performance, to Senator Hainon Miller (Apr. 19, 1994).

27. Alex A. Alston, Jr., *Sanctity of the Courts*, MISSISSIPPI LAWYER, Apr./May 1992.

28. Mississippi Economic Council, *JUSTICE FOR SALE? SELECTING MISSISSIPPI'S APPELLATE JUDGES 7* (April 1994).

29. Mississippi Bar, *LAYING THE GROUNDWORK FOR COURT REFORM: A REPORT OF THE MISSISSIPPI BAR'S COMMISSION ON THE COURTS IN THE 21ST CENTURY* (July 1993).

30. A court of appeals composed of five judges had been created in 1993. Under the legislation that created the court, the judges were to be elected by the voters in November 1994.



The change from partisan to nonpartisan elections was not the most preferred option of those who pushed the 1994 legislation. The original proposal called for merit selection of judges of the new court of appeals, which reformers hoped would eventually be extended to the supreme court, but, after the “cold ‘taters” speech, the adoption of merit selection appeared unlikely. An amendment calling for nonpartisan judicial elections was introduced in the house of representatives and passed by a vote of 90-32.

Mike Mills, former chair of the house judiciary committee,<sup>31</sup> says that making judicial elections nonpartisan “was absolutely a compromise between merit selection and partisan elections.” According to Mills, the desire of reformers was “to break the judiciary away from partisan politics,” and, after it became clear that legislators would not accept merit selection, nonpartisan elections seemed the only way to attain the larger objective.<sup>32</sup>

The main opponent of the switch to nonpartisan elections was the black caucus. These legislators felt that blacks had made gains through the political party process, and they feared that the elimination of party primaries would negate these advances. The reformers addressed this criticism by redistricting judgeships and chancellorships to create more majority-black districts. They estimated that fifteen to twenty blacks could win circuit and chancery judgeships in the new districts. At the time, only four of forty circuit court judges and two of thirty-nine chancellors were African-Americans. Based on the creation of additional majority-black districts, one African-American legislator

reported that the bill would “allow[] minorities to put their imprint on the judiciary.”<sup>33</sup> A number of black lawmakers wrote letters to the Justice Department in support of the reform package and particularly nonpartisan elections.

In April 1994, the Nonpartisan Judicial Election Act, along with the rest of the judicial reform legislation, was approved by the house of representatives, the senate, and the governor. The legislation was then submitted to the U.S. Department of Justice for pre-clearance under the Voting Rights Act. After a request for additional information, the Attorney General’s office approved the changes in September 1994. The Nonpartisan Judicial Election Act<sup>34</sup> prohibits judicial candidates from “campaigning or qualifying for such an office based on party affiliation” and stipulates that the names of judicial candidates will appear on the ballot with “no reference to political party affiliation.”

Because it was the result of a compromise rather than an organized reform effort, because it was one aspect of a larger reform package, and because it required only legislative rather than popular approval, the Nonpartisan Judicial Election Act was passed with less fanfare than judicial selection reforms in other states. There was also a sense that a less than dramatic change had been achieved. Judicial elections in Mississippi since the reform have reinforced this sentiment in the minds of many observers.

## THE IMPACT OF REFORM

Judicial elections in Mississippi since 1994 have led some to question whether moving from partisan to nonpartisan elections was an effective response to reformers’ concerns about the selection process. The reform did not address the financing of judicial elections, and the cost of campaigns continued to rise. In 1996, eleven candidates for four seats on the Mississippi Supreme Court spent a total of more than \$1.4 million,<sup>35</sup> with substantial contributions coming from trial lawyers and the business community.<sup>36</sup> The level of PAC involve-

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31. Mills was later appointed, then elected, to the Mississippi Supreme Court and now serves as a federal district judge.

32. Telephone interview with Mike Mills, former chair of the house judiciary committee (Sept. 26, 2002).

33. *Id.*

34. Miss. Code Ann. § 23-15-974 - 23-15-985.

35. Mary Libby Payne, *Mississippi Judicial Elections: A Problem Without a Solution?*, 67 Miss. L.J. 1 (1997).

36. *Business Exerts Influence in Supreme Court Races*, CLARION-LEDGER, Feb. 11, 1996, at 1.

ment in these elections directed the legislature's attention to the need for regulation of judicial campaign financing.<sup>37</sup>

In late 1996 and early 1997, both the legislature and the Mississippi Bar held public hearings to discuss remedies for expensive judicial campaigns. Following the hearings, legislative proposals were introduced to set limits on contributions to judicial candidates and to strengthen disclosure requirements. The bills that were eventually approved by the legislature in April 1998 limited individual and PAC contributions to candidates for the supreme court and court of appeals to \$5000 and capped contributions to candidates for all other courts at \$2500.<sup>38</sup> The legislation also mandated more extensive disclosure of campaign contributions and expenditures.

Unfortunately, the campaign finance regulations that were eventually enacted in 1999 have had little impact on money in judicial races. In 2000, nine candidates for four seats raised nearly \$3.4 million,<sup>39</sup> and the 2002 election saw the most expensive campaign in the state's history for a single seat on the Mississippi Supreme Court.<sup>40</sup> In addition, the 1999 legislation could not curb independent spending by special interest groups. In 2000, the U.S. Chamber of Commerce spent nearly \$1 million on television advertising favoring four Mississippi Supreme Court candidates.<sup>41</sup> Expenditures by trial lawyer groups brought the total in "soft" money in the 2000 judicial elections to an estimated \$1.5 million.<sup>42</sup> In the 2002 elections, the Chamber itself did not sponsor any advertisements, but some commentators speculate that it financed the more than \$500,000 worth of television ads presented by a group called the Law Enforcement Alliance of America.<sup>43</sup> Nine other groups also ran ads in 2002, most of them devoted to tort reform advocacy or opposition.<sup>44</sup> According to some observers, taking parties out of the selection process in Mississippi—at least to the extent that judicial candidates appear on the ballot without party affiliation—has led to

increased involvement by special interest groups and single-issue organizations who are closely aligned with the parties.

In addition to addressing the financing of judicial campaigns, another provision of the 1999 legislation amended the Nonpartisan Judicial Election Act to prohibit political parties from contributing to or endorsing judicial candidates. Governor Kirk Fordice vetoed the legislation because of his concern that the ban on party contributions and endorsements violated the First Amendment, but the legislature overrode the veto in January 1999. In 2002, a federal district judge agreed with Fordice, striking down the ban as unconstitutional.<sup>45</sup>

Reformers in Mississippi have sought to address problems with judicial elections from other angles. In 2001, Chief Justice Edwin Pittman proposed changes to the code of judicial conduct that were eventually adopted in 2002. A new disqualification provision allows a party to file a motion to recuse a judge when an opposing party or attorney is a major donor to the judge's election campaign.<sup>46</sup> A "major donor" is defined as someone who, in the

37. Reed Branson, *Campaign Reform Measure Receives Approval in House*, COMMERCIAL APPEAL, Feb. 1, 1997, at A12.

38. Miss. Code Ann. § 23-15-1021.

39. Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C. L. 849 (2001).

40. Three candidates for a single seat raised nearly \$1.7 million. Beverly Pettigrew Kraft, NATIONAL CENTER FOR STATE COURTS, 2002 APPELLATE COURT RACES IN MISSISSIPPI: THE CANDIDATES, THE ISSUES, AND THE BACKDROP (Nov. 22, 2002).

41. The Chamber refused to file reports as to how much it spent or who its contributors were, asserting that its expenditures were for issue advocacy rather than in support of particular candidates. A federal district court disagreed, but the court of appeals ruled that the Chamber did not need to file disclosure statements. *Chamber of Commerce of U.S. v. Moore*, 288 F.3d 187 (5th Cir. 2002).

42. *Judicial Elections: Longer Term Should be OK'd* Nov. 5, CLARION-LEDGER, Oct. 25, 2002, at 10.

43. Michael Orey, *Business Targets Judicial Race in 'Tort Mecca'*, WALL ST. J., Oct. 30, 2002, at B1.

44. Elizabeth Amon, *Courting the Vote*, NAT'L L. J., Oct. 28, 2002, at A1.

45. See *supra* note 22.

46. Code of Jud. Conduct, Canon 3E(2).



judge's most recent election campaign, contributed more than \$2000 in the case of appellate judges or more than \$1000 for other judges.<sup>47</sup> The rule change also limits the period during which candidates' campaign committees can accept contributions,<sup>48</sup> creates the special committee on judicial election campaign intervention to address allegations of campaign misconduct,<sup>49</sup> and requires judicial candidates and their election committee chairpersons to take a two-hour course in campaign practices, finance, and ethics.<sup>50</sup>

In addition to the amendments to the judicial canons, a constitutional amendment on the ballot in 2002 would have lengthened the terms of circuit and chancery court judges from four to six years. Longer terms mean that judges are not required to campaign for election as often. In spite of active support from Pittman and the Mississippi Bar Association, the measure failed by a 61-39 margin.

As observed in the introductory quote to this chapter, nonpartisan elections can be an important first step in depoliticizing the judicial selection process. However, as the Mississippi experience illustrates, additional measures such as campaign finance reform may be required, and new problems such as the increased involvement of special interest groups may arise. With the 1999 legislation, Mississippi lawmakers demonstrated a willingness to consider incremental reforms. In amending the supreme court rules that govern judges' behavior during campaigns, Pittman showed reform leadership as well. The tone and conduct of future elections will determine whether stronger measures are required to preserve the perception of judicial independence in Mississippi.

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47. Note that these amounts are lower than the contribution limits established in the 1999 legislation.

48. Code of Jud. Conduct, Canon 5C(2). Contributions are prohibited "earlier than 60 days before the qualifying deadline or later than 120 days after the last election in which the candidate participates during the election year."

49. Code of Jud. Conduct, Canon 5F.

50. Code of Jud. Conduct, Canon 5F(7).

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# 5

## Retention Evaluation in Arizona

*“Judicial retention evaluation programs are a key component of efforts to make judicial retention elections more meaningful contests by providing objective, survey-based information on the performance of judges standing for retention.”<sup>1</sup>*

Arizona is a state with a long history of trying to find the best way to evaluate the performance of its judges. The State Bar of Arizona began to evaluate appellate level judges in 1958. In 1974, the state switched to merit selection for its appellate and trial courts in its two most populous counties, Maricopa and Pima.<sup>2</sup> The switch to merit selection increased the sentiment among the state’s lawyers and legislators that a judicial retention evaluation program was necessary. The legal community wanted retention elections to function precisely as advocates of merit selection believe they should—as a means of making judges accountable to the electorate. Francis J. Slavin, chair of Arizona’s committee on judicial evaluation at the time of the switch to merit selection, maintained that “merit selection without judicial evaluation is like one hand clapping without the other—it’s the flip side of the coin.”<sup>3</sup>

In 1974, at the time of the merit selection reform, the state bar decided to make its performance evaluations of judges more profes-

sional.<sup>4</sup> In consultation with judges and with assistance from the Survey Research Laboratory of Arizona State University, the bar asked its members for their opinions about judges. The surveys asked lawyers to assess judges’ age, health, and judicial integrity and to rate judges in various categories. They also asked lawyers to decide whether the judges deserved to remain in office. The polls reviewed all judges every two years, whether they faced a retention election or not. The only change in the survey took place in 1992, when the question regarding whether the judge should be retained in office was omitted because the bar decided this question should be left to the voters. Lawyers filled out these surveys in every election cycle from 1974 to 1992.

For several reasons, Arizona’s legislators, judicial officials, and the public found the bar surveys wanting. All lawyers could fill out questionnaires on any judge, regardless of whether a respondent had spent any time in a judge’s courtroom. The public also treated the advice of lawyers with skepticism because of inherent distrust of the bar. Some judges disliked the surveys, believing that the polls boiled down to a popularity contest. Finally, because of budget constraints, the results of the surveys were not widely publicized. Because most of the surveys were positive and because the public was frequently unaware of their results, no judges were voted out of office between 1978 and

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1. Seth Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1376, 1376 (2001).

2. The county population cutoff for merit selection is 250,000. Counties with populations less than 250,000 have the option of adopting merit selection.

3. Quoted in A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 655 (1998).

4. Before 1974, the bar surveys were informal and the results were not tabulated by a professional research organization such as the Survey Research Laboratory.

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1992. Some cynical observers referred to Arizona's judicial selection system as "merit protection."<sup>5</sup>

With this background, both the supreme court and the legislature began to investigate better methods of evaluating the performance of Arizona's judges. In 1991, after studying the issue for three years, the supreme court began a pilot project on judicial performance review. Yet the committee assigned to the project disagreed about the best way to organize a judicial performance review program. While the judges dickered over the details, the Arizona legislature, faced with the complaints of women's groups and Latinos that merit selection treated them unfairly, came up with its own solution. The legislators passed a resolution proposing amendments to Arizona's constitution that made several changes to the merit selection system, including requiring judicial retention evaluation, enlarging the judicial nominating commissions that recommended candidates for selection, and making the discovery of qualified minority and female judicial candidates a priority of the commissions. The resolution, which had to be approved by the electorate, passed as Proposition 109 in the 1992 general election. As a result, Arizona is the only state with a constitutionally mandated retention evaluation program.<sup>6</sup>

## RETENTION EVALUATION IN THEORY AND IN PRACTICE

In 1985, the American Bar Association established its Guidelines for the Evaluation of Judicial Performance.<sup>7</sup> Partly in response to these guidelines, six states that use merit selection have officially instated judicial retention evaluation programs to improve the judiciary and to provide voters with more information about judges.<sup>8</sup> In 1976, Alaska became the first state to conduct judicial performance evaluations. Five other states—Arizona, Colorado, New Mexico, Tennessee,<sup>9</sup> and Utah—have since adopted similar programs. The composi-

tion of the evaluation commission and the structure of the evaluation process vary from state to state, but the programs share the same goals.

Arizona's commission on judicial performance review (CJPR) can be used as an example of how the commissions work in the six merit selection states.<sup>10</sup> The Arizona Supreme Court appoints the thirty members that make up the CJPR, based on applications and recommendations from the public. A majority of the commission's members must be non-lawyers, and a maximum of six can be judges. Arizona's commission is the largest of the six. Alaska's commission, by contrast, has only seven members: three lawyers, three non-lawyers, and the chief justice. Members of the Arizona CJPR serve four-year staggered terms, which is typical of all six commissions,<sup>11</sup> and may serve up to two terms.

The CJPR reviews judges both midway through their tenure on the bench and before retention elections. The midterm evaluations are confidential and used primarily for the ben-

5. Pelander, *supra* note 3, at 661.

6. See Pelander, *supra* note 3, for an in-depth discussion of the events leading up to the adoption of judicial performance review in Arizona.

7. A.B.A. Special Comm. on Evaluation of Judicial Performance, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (1985).

8. All six programs have been established by law or court order and therefore maintain official status. Andersen, *supra* note 1. Other states perform judicial performance reviews not intended for the electorate. For example, New Jersey, whose governor appoints and reappoints all judges, uses judicial performance review only to improve the performance of judges.

9. Tennessee uses the retention evaluation program for its appellate courts, the only courts in the state that use a merit selection system.

10. There are differences among the commissions in terms of the numbers of commissioners, whether diversity is required among commissioners, who is surveyed (Utah, for example, does not survey non-lawyers) and how often, and when surveys are conducted. See Kevin M. Esterling & Kathleen M. Sampson, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS 23-29 (AJS, 1998), on the differences between the Alaska, Arizona, Colorado, and Utah programs. Andersen, *supra* note 1, at 1381-1382, includes information on New Mexico and Tennessee, as well, but only discusses evaluation procedures.

11. Andersen, *supra* note 1, at 1383.

efit of each judge as a self-improvement tool. The public evaluations done before retention elections are published and distributed to voters to provide them with information about each judge standing for retention. According to the supreme court's rules, the CJPR must "disseminate its findings and recommendations in an election year to the public no later than three days after the primary election."<sup>12</sup>

A feature that makes Arizona unique among the six states with retention evaluation programs is the conference team.<sup>13</sup> Before evaluation results are published and distributed to voters, they are released to the judge, who then has the opportunity to discuss the results with a conference team. Conference teams consist of a lawyer, a non-lawyer, and a judge appointed by the supreme court.<sup>14</sup> If the judge being evaluated has concerns about the results, he or she can address them at this time. The conference team also works with each judge to devise a self-improvement plan.

The CJPR surveys those who come into contact with judges on a regular basis, including jurors, litigants, witnesses, attorneys, and court staff. Respondents rank judges on a scale of zero to four, with "zero" being unsatisfactory and "four" being superior, in several different areas: legal ability, integrity, judicial temperament, communication skills, and administrative performance. Those completing surveys may opt to write narrative comments about each judge. The narrative comments are not made public but may be shared with the judge during the conference team process. As in other states with retention evaluation programs, surveys sent to lawyers differ from those sent to non-lawyers. Questions for lawyers focus more on legal ability, whereas questions for lit-

igants, witnesses, and jurors focus on temperament and court administration.<sup>15</sup> To ensure anonymity, a third-party data center processes the responses collected and transcribes the narrative comments before the CJPR receives the results. The CJPR then publishes the survey results and reports whether judges meet or do not meet performance standards.

All states with retention evaluation programs face their "most daunting task"<sup>16</sup> after the surveys are finished—getting the results to the public. In Alaska and Utah, evaluation results are included in the voter information pamphlets sent to all voters, and in Arizona and Colorado, evaluation results are sent to voters along with information about ballot proposals. Alaska, Colorado, New Mexico, and Tennessee also publish commission reports in the states' newspapers. In all six of the states that evaluate judges standing for retention, the evaluation results are available online and in public places such as libraries, courthouses, and county clerk offices. As we shall see, Arizona has spent the decade since the institution of its retention evaluation program working to ensure that the results reach as many voters as possible.

## THE ROAD TO REFORM

From the time of its passage in 1974 until the passage of judicial performance review in 1992, the merit selection system in Arizona was under an almost constant barrage of criticism.<sup>17</sup> In 1978, legislative opponents of merit selection attempted to pass a bill that would have returned the state to judicial elections. In 1981, there was a petition drive, supported by the Maricopa County Republican Committee, to reinstate judicial elections. The effort failed in 1982 after attaining only 70,000 of the 83,000 signatures needed to put the measure on the ballot. In both 1982 and 1984, legislative efforts to replace merit selection with elections failed. In 1986, two bills were introduced that would have made the appointment of judges subject to senate confirmation, but the bills died in

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12. R. P. JUD. PERF. REV. ARIZ. 6(e).

13. Andersen, *supra* note 1, at 1385.

14. The judge being evaluated may peremptorily challenge one member of the proposed conference team.

15. Andersen, *supra* note 1, at 1384.

16. *Id.*

17. John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 885-90 (Winter 1990).

committee. In 1987, a legislative proposal that came closer to passage than any of the previous bills would have mandated senate confirmation and would have increased the number of lay members of the nominating commissions. In 1988, a victims' rights group called on voters to reject all judges up for retention.

During the same period, dissatisfaction with bar polls prompted Arizona's judiciary to look at other ways to rate the performance of judges. Many observers before 1992 considered the bar surveys "the weak link in the merit selection system."<sup>18</sup> The main problem was that the public seemed unaware of the surveys' results. In 1988, an Arizona judge, who was arrested for misdemeanor marijuana possession in Texas, was re-elected despite not being recommended by the bar. In 1990, another judge who received a negative rating was also re-elected. A 1989 task force on the Arizona courts concluded that "most voters never learn[ed] the results of the bar poll."<sup>19</sup>

In this context, Chief Justice Frank Gordon appointed the commission on the courts in 1988 to study the public's relationship to the courts. The commission, made up of thirty-four lawyers, judges, and citizens, recommended that a committee composed of both lawyers and non-lawyers study how to establish an effective retention evaluation program. The supreme court agreed and set up the committee on court reform, which established the subcommittee that developed a pilot project on judicial performance evaluation in 1991.

The subcommittee, called the committee on judicial performance review, came up with a plan that called for county-level committees to survey lawyers and the public about judges every two years. The committees would then tabulate the responses and make recommendations to the public regarding whether voters should retain the judges. This plan did not sit well with many judges, who disapproved of the secrecy of the committees' operations and thought that the survey results should be made public. The judges opposed to the plan feared

that, unless the results were made public, the evaluation system would be used "to punish" judges. The Arizona Republic agreed with the judges who were critical of the plan, saying, "It is easy to see how these closed-door panels might turn into star chambers, criticizing judges for no good reason . . ."<sup>20</sup>

There was so much dissent within the group that the committee could not agree on guidelines for assessing judges before the 1992 elections. The primary issue concerned how much of the evaluations' results to reveal to the public. Members of the committee at first only wanted to release survey information regarding whether a judge should be retained. Later, at another vote, the committee agreed to reveal both numerical results and narrative comments about judges. The votes had razor-thin ten-to-nine margins. The legislature, facing various concerns about merit selection, decided to create its own judicial performance review initiative.

The legislature felt compelled to act because Arizona's merit selection system had again come under attack in the 1992 legislative session. The complaints of legislators who believed that merit selection was undemocratic were familiar, but supporters of merit selection also faced the growing disaffection of Latino and women legislators who felt that merit selection prevented their constituencies from attaining judgeships. A senate committee had approved a bill that would have returned Arizona's two most populous counties, Pima and Maricopa, to an elective system.

To fine-tune the merit selection system, the legislature came up with three reforms. These reforms were put into the language of Proposition 109, which became an amendment to the Arizona Constitution. The nominating commissions that recommended names to the governor would be expanded from three lawyers and five non-lawyers to five lawyers and

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18. Pelander, *supra* note 3, at 660.

19. *Id.* at 661.

20. *Evaluating Judges: The Corcoran Plan*, ARIZONA REPUBLIC, Nov. 6, 1992, at A18.



ten non-lawyers. The commissioners chosen would “to the extent feasible, represent the diversity of the state.”<sup>21</sup> The commissions would also “consider the state’s diversity” in selecting nominees; “however the primary consideration [would] be merit.”<sup>22</sup> The third reform provision was the establishment of a judicial retention evaluation program.

Because a mandate to seek out more minorities and women and judicial retention evaluation are separate issues, it may seem surprising that the two concerns were dealt with as part of the same reform package. Arthur Garcia, an Arizona senator at the time, explains that the bill garnered the support of both conservatives and minority and female legislators. According to Garcia, every group concerned about the judiciary got something it wanted: “Hispanics wanted to see more of their own chosen as judges; conservatives wanted accountability and wanted performance review; and supporters of merit selection thought they had diminished the threat to merit selection.”<sup>23</sup> Proposition 109 became law after 58 percent of voters supported the measure in the general election of 1992, making Arizona the only state

with a judicial retention evaluation program mandated by its constitution.

## THE IMPACT OF REFORM

The goals of judicial retention evaluation programs are enhancing voter knowledge of judges, improving judicial performance, increasing citizen confidence in the judiciary, and acting as a counterweight to political attacks on merit selection.<sup>24</sup> One of the most unique features of the CJPR in Arizona is the extensive effort it has made to reach out to the broader public. In sharp contrast to bar association polls, which usually survey attorneys only, the CJPR surveys a broad spectrum of individuals who interact with judges, including litigants, jurors, and witnesses. By surveying more than one constituency, the CJPR can make a more credible analysis of a judge’s performance.<sup>25</sup> Arizona also provides access on the state supreme court website to public input surveys and to applications for membership on the CJPR and on conference teams. On the same website, the state offers an overview of the judicial performance evaluation process and a Guide to Reading Data Reports.<sup>26</sup>

The CJPR has struggled to find the best distribution method for the results and recommendations that the survey produces. Arizona shares this dilemma with states that have similar programs. In 1994, the commission issued pamphlets in English, Spanish, and seven Native American languages.<sup>27</sup> The commission saturated the state with pamphlets that contained so much information that many citizens reported, “it was too much, I didn’t read it.”<sup>28</sup> The next election year, 1996, found the commission trying a different approach to distributing information. This time the pamphlets included only the bottom-line recommendation about each judge. A telephone number was given and a website created as a means for voters to obtain more information about survey results. This dissemination effort was largely unsuccessful. An exit survey of Phoenix-area

21. ARIZ. CONST. art. 6 § 36 (A).

22. ARIZ. CONST. art. 6 § 36 (D).

23. Telephone interview with Arthur Garcia, former Arizona state senator (Oct. 18, 2002).

24. Esterling & Sampson, *supra* note 10, at 5. According to one observer in Arizona, merit selection in that state is under less threat than it was before 1992 because of Proposition 109’s mandate to put minorities and women on the bench. According to Arthur Garcia, (*see* Garcia, *supra* note 23) conservative Republican legislators in every session have drafted a bill calling for a return to judicial elections but, unlike the situation in 1992, have not received the support of Hispanic or female legislators because more women and minorities are gaining seats on the bench under merit selection. Judicial retention evaluation appears to have made little difference in terms of legislators’ satisfaction with merit selection; some legislators oppose it on principle, and for others, the goal of diversity matters more than performance evaluation.

25. David Brody and Nicholas Lovrich, Jr., *Judicial Performance Evaluations and Judicial Elections: Informing the Voter and Protecting the Judiciary*, 3 GOV’T L. & POL’Y 37 (Fall 2001).

26. <http://www.supreme.state.az.us>.

27. Esterling & Sampson, *supra* note 10, at 94.

28. *Id.* at 96.

voters during the 1996 elections revealed that only 30 percent were aware of the performance evaluation program and the information on judges that was available to them.<sup>29</sup>

In the 2000 and 2002 election cycles, the CJPR seemed to find the right recipe for the content and distribution of its reports. The 2000 elections were the first for which the CJPR recommendations were included in the publicity pamphlets about ballot propositions, which the state mails to voters.<sup>30</sup> The Arizona Supreme Court website also provided links in 2000 and 2002 to CJPR recommendations. The 2002 online pamphlet was a 24-page, easy-to-read document that provided the recommendation of the CJPR for each judge standing for retention and included a brief description of survey responses from attorneys, jurors, litigants, and witnesses. The pamphlet also profiled each judge, giving educational background and professional experience.

The basic conundrum for states reforming their judicial selection systems is finding the appropriate balance between judicial accountability and independence. Judicial retention evaluation programs have been criticized in the media for failing to provide accountability since most candidates are recommended for retention. On the other hand, some judges worry that the programs can be a threat to judicial independence.

In an editorial published after the 1996 retention elections—for which the commission had found that 55 out of 56 candidates met judicial performance standards—*Phoenix Gazette* columnist Mark Genrich accused Arizona's commission of performing a "farcical analysis that protects incumbent judges and tells the public nothing of the important rulings or qualifications other than the judge 'meets' or 'does not meet' judicial performance standards."<sup>31</sup>

It is true that the CJPR in Arizona, like its counterparts in other states, recommends that most judges be retained in office. The commission began to operate in the 1994 election

cycle, but it was not until 1998 that it determined a judge "did not merit" retention. Despite critics' complaints that the CJPR protects even the weakest judges,<sup>32</sup> there is some evidence that the prospect of retention evaluation motivates unsuitable judges to retire. In 1994, for example, Maricopa County's judicial performance review commission evaluated Judge Stanley Goodfarb. Before the state commission received his file, however, Goodfarb decided not to stand for retention. Goodfarb had a somewhat checkered career—he was suspended for uttering a racial slur in 1989 and investigated for ethical violations in 1994. Also in 1994, a judge who had received poor marks from an independent group called Citizens for Judicial Integrity decided not to seek retention before being reviewed by Pima County's commission.

In response to criticisms that evaluation programs undermine judicial independence, some proponents of judicial retention evaluation have encouraged states to provide judges with adequate opportunities to discuss evaluation results.<sup>33</sup> Arizona provides this opportunity through its conference team process. Others have advised evaluation commissions simply to remain within the mandate they have been given. According to one observer of the Arizona process, "so long as the focus of Arizona's JPR program remains on the articulated standards and related survey topics, and so long as the commission's role is limited to

29. *Id.*

30. Inger Sandal, *Retain All Judges, Panel Says*, ARIZONA DAILY STAR, Oct. 9, 2000.

31. PHOENIX GAZETTE, Oct. 23, 1996, at B7.

32. Critics of the commission's overwhelmingly favorable impression of Arizona's judiciary can point to certain notorious cases. In 1996, Judge Lawrence Fleischman received a high performance evaluation even though the state commission on judicial conduct had suspended him without pay for ethical violations. Voters kept Fleischman in office despite widespread media coverage of his difficulties. Also in 1996, the CJPR did not evaluate Judge William Scholl, a judge being tried for federal tax evasion charges, because he was suspended during the period when reviews were being performed. Scholl won his retention election as well. Pelander, *supra* note 3, at 718-20.

33. Andersen, *supra* note 1.

making and publicizing findings as to whether judges meet or fail to meet the relevant standards, JPR should not seriously interfere with judicial independence in Arizona.”<sup>34</sup> There is evidence that judges who are more familiar with judicial retention evaluation may view it as less of a threat to their independence. A 1996 survey of judges in the four states that had retention evaluation programs at that time reported that judges in states that had recently instituted such programs (Arizona and Utah) felt more threatened than judges in states with a longer history of evaluation programs (Alaska and Colorado).<sup>35</sup>

Although surveys of judges regarding retention evaluation programs reveal a fair amount of skepticism about the process, the Arizona CJPR appears to be doing a better job than commissions in other states of convincing judges that the process can be beneficial to them. A 1996 poll of judges in Alaska, Arizona, Colorado, and Utah found that more Arizona judges considered the appeals process to be satisfactory. More than 70 percent of judges in Colorado and Utah and more than 80 percent of judges in Alaska were dissatisfied with the appeals process, while only 50 percent of Arizona judges were dissatisfied.<sup>36</sup> While this figure is still very high, the emphasis on collaboration with judges in the review process seems to have reduced judicial resistance. As one observer has noted, “Most Arizona judges subject to retention have come to accept JPR as a fact of life.”<sup>37</sup>

One concern raised by judges in every state

with judicial retention evaluation is the validity of the survey results. Some judges complain that a low response rate can skew their results. In Colorado in 2002, a judge who had received only 18 evaluations—six of them negative—felt that he was unfairly reviewed because he had a reputation of severely punishing drunk drivers.<sup>38</sup> Arizona deals with this issue by indicating clearly the number of surveys filled out on each judge. How to get more lawyers, jurors, and others to respond, however, is an issue that deserves more attention—“with a low response rate, the statistical analysis becomes more likely to be based on responses from those who have an ax to grind.”<sup>39</sup>

Perhaps the biggest danger facing judicial performance review programs in Arizona or any other merit selection state is public apathy. Voters sometimes vote for the retention of judges who do not meet minimum performance standards. The voters seem uninterested in learning more about candidates in retention elections, even when elaborate efforts have been made to reach them. This apathy should not be a criterion for judging the success of judicial performance review, however. As one observer of Arizona’s program has noted:

[T]he adage that “you can take the horse to water but you can’t make it drink” applies to JPR as well. All that can reasonably be asked or expected of the JPR Commission is for it to conduct a full and fair evaluation of judges standing for retention, and timely disseminate its factual findings in a manner and mode that make them readily accessible, helpful, and comprehensible to the average voter. If the electorate chooses to disregard or ignore that information, neither the Commission nor the JPR process should be faulted.<sup>40</sup>

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34. Pelander, *supra* note 3, at 706.

35. Esterling & Sampson, *supra* note 10. Thirty-three percent of Arizona judges and 50% of Utah judges saw performance review as a threat to judicial independence, but only 22% of Alaska and 15% of Colorado judges did.

36. *Id.*

37. Pelander, *supra* note 3, at 718.

38. *Keep Judge Ruddick*, DENVER POST, Oct. 31, 2002. A similar case occurred in Colorado in 1996; see Kevin M. Esterling, *Judicial Accountability the Right Way: Official Performance Evaluations Help the Electorate as Well as the Bench*, 82 JUDICATURE 206 (March/April 1999).

39. Esterling, *id.* at 213.

40. Pelander, *supra* note 3, at 713.

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# 6

## Voter Guides in Washington

*“Voters’ guides have proven effective in ensuring that voters are informed about judicial candidates.”<sup>1</sup>*

As a means of informing the electorate in an unbiased, nonpartisan manner, voter guides have had a long history in the state of Washington. Since 1914, voter pamphlets have been made available to the public by the secretary of state’s office. The initial voter pamphlets contained information solely on ballot measures to provide voters with different perspectives on the measures proposed. Voter pamphlets began to include candidate statements and photographs in 1959. Judicial candidates did not appear in the voter pamphlets until 1972. However, these pamphlets did not include all judicial positions, did not require disclosure of judicial candidates’ professional qualifications, and were prepared only for the general election. Providing information on judicial candidates for the primary elections is particularly important since many judicial races are settled in the primaries. In Washington, as in a handful of other states that hold nonpartisan judicial elections, if a candidate receives a majority of the vote in the primary election, that candidate is elected.<sup>2</sup>

For the first time, Washington distributed in 1996 a judicial voter pamphlet for the primary elections that included a full range of

information about judicial candidates and basic information about the judiciary. The production and distribution of a voter pamphlet for the primary elections was one of the recommendations made by the Walsh Commission, a 24-member task force of judges, attorneys, and citizens. The commission was formed in 1995 to study the judicial selection process in Washington and to suggest improvements. One of the commission’s central findings was that “voters want more information about the judges they elect.”<sup>3</sup> According to the Walsh Commission report, “In any given election, as many as 50 percent of those voting choose not to vote for judicial candidates.”<sup>4</sup> The commission attributed voter roll-off to a lack of complete and timely information about judicial candidates. To address this need, the commission recommended that the supreme court authorize the publication of a judicial voter pamphlet. The court did so in the summer of 1996.

### VOTER GUIDES IN THEORY AND IN PRACTICE

Voter guides are intended to provide voters with the necessary information to decide whether judges appearing on the ballot should be elected, re-elected, or retained. Only five states—Alaska, California, Oregon, Utah, and Washington—routinely produce voter guides that contain information on judicial candidates along with information on candidates for other offices and ballot issues.<sup>5</sup> Interestingly, these

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1. *The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct and the First Amendment*, 35 IND. L. REV. 649, 656 (2002).

2. District court races are an exception. If there are two or fewer candidates for a district court seat, a primary election is not held for that office.

3. Walsh Commission, THE PEOPLE SHALL JUDGE: RESTORING CITIZEN CONTROL TO JUDICIAL SELECTION, A REPORT OF THE WALSH COMMISSION 8 (1996).

4. *Id.* at 6.



are all states that hold either nonpartisan judicial elections or retention elections. Perhaps because the cue of party affiliation is absent in these types of elections, these states have recognized that voters need other sources of information in order to make educated choices. In Alaska and Utah, the lieutenant governor is responsible for publishing and disseminating voter information pamphlets. In California and Oregon, it is the secretary of state who produces voter guides. In Washington, it is usually the office of the administrator for the courts (OAC) that produces judicial voter pamphlets for the primary elections; the secretary of state's office produces voter guides for the general election.

The judicial councils of Alaska and Utah—two states in which judges run in retention elections—evaluate judges' past performance and provide voters with evaluation results and recommendations regarding whether each judge should be retained. Voter pamphlets in these states also include photographs and biographical information about each retention candidate. California also holds retention elections for its appellate judges, but there is no state-authorized process for evaluating judicial performance. The California guide simply provides information about the education and professional background of judges standing for retention. Oregon and Washington, the only two judicial voter guide states with competitive judicial elections, prepare guides for both the primary and general elections. Oregon's voter guides offer photographs, personal statements, and biographical information. In Washington, the judicial voter pamphlets produced for the primary elections by the OAC contain a biographical statement, a personal statement, and a photograph;<sup>6</sup> the pamphlets produced by the secretary of state for the general election include candidate photographs and personal statements.<sup>7</sup>

The states that provide voter guides make extensive efforts to reach voters with the information. All of the states post their voter guides

online. In most states, pamphlets are published in the major newspapers and are mailed to every household in the state or to all households with a registered voter. Many states also make them available at libraries, post offices, courthouses, county election offices, and other public places.

Regardless of the differences across these states in the content and means of distribution of the voter guides, they share the common purpose of enabling voters to make informed decisions in judicial races. A survey of Spokane County, Washington, voters indicated that knowledge of judicial candidates is "of primary importance" in both participation and voters' satisfaction that they are making an informed decision.<sup>8</sup> In going to the lengths they have to inform the public, the states that prepare voter guides for judicial elections have taken an important step toward responding to voters' concerns.

## THE ROAD TO REFORM

In early 1995, a random sample of Washington voters was asked, "How do you vote

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5. Alaska and Utah are two of the six states that conduct performance evaluations of judges standing for retention. The other four states—Arizona, Colorado, New Mexico, and Tennessee—provide voters with the results of these evaluations and recommendations regarding whether each judge should be retained. In Arizona and Colorado, evaluation information on judicial retention candidates is published along with information on ballot proposals. In New Mexico and Tennessee, performance evaluation reports comprise stand-alone pamphlets. This information is made available to voters in a variety of ways, including on the Internet, in newspapers, and by mail.

6. Biographical statements are limited to 100 words, must include information about the candidate's judicial, legal, or other related experience, and may include information on the candidate's involvement with professional and community organizations and the candidate's personal interests. Candidate statements are also limited to 100 words and may include information on the candidate's qualifications, endorsements, ratings, reasons for seeking judicial office, and any other relevant information.

7. Personal statements from judicial candidates are limited to 200 words.

8. Nicholas P. Lovrich, John C. Pierce, & Charles H. Sheldon, *Citizen Knowledge and Voting in Judicial Elections*, 73 JUDICATURE 28, 33 (1989).



for a judge?” Two thirds of those responding said they seldom had enough information on which to base rational electoral decisions for judges.<sup>9</sup> Perhaps because of this lack of information, between 30 and 50 percent of those who cast ballots for other candidates failed to vote in judicial races.<sup>10</sup> The Walsh Commission was formed in 1995 to examine “a system in which the people [were] largely excluded from meaningful participation in decisions about judicial selection and tenure.”<sup>11</sup>

Chief Justice Barbara Durham, Governor Mike Lowry, and legislative officials appointed the Walsh Commission to study “all aspects of judicial selection” in Washington and to recommend improvements.<sup>12</sup> Named for its chair, Seattle journalist Ruth Walsh, the twenty-four-member commission consisted of legislative, judicial, education, and community leaders. The commission focused on four aspects of the judicial selection process: judicial qualifications, judicial selection, judicial performance, and voter information.

The Walsh Commission took extensive steps to gather the information and opinions that would determine their recommendations.<sup>13</sup> It examined research materials and took testimony from a broad spectrum of interest groups, including the business community, labor and education groups, minority bar associations, federal and state judges, the media, and others. Because the commission was particularly conscious of the role that the media can play in selecting judges, a survey was mailed to media groups to request their suggestions for improving the selection process. The commission also hosted a town hall meeting that was broadcast statewide and that

allowed citizens to phone, fax, and mail their comments. Additional citizen input was sought through focus groups conducted in Seattle, Spokane, and Vancouver. Finally, the commission spoke with leaders from other states that had adopted alternatives to selecting judges by contested election.

The Walsh Commission’s recommendations, which were published in a 1996 report, included establishing citizen-based nominating commissions to screen candidates for interim appointments, setting campaign contribution and expenditure limits for judicial candidates, imposing experience requirements for judicial candidates, developing a process for evaluating judicial performance, and disseminating voter pamphlets for the primary elections that would provide information about judicial candidates and a basic overview of the judicial system. The only recommendation of the commission that has been implemented to date is the one regarding judicial voter pamphlets for the primaries.

In addition to judicial voter pamphlets, which are aimed at increasing voter participation by improving voter knowledge, other reforms have been suggested to address the problem of low voter turnout in Washington’s primary elections. One reform proposal is to use the primary elections to narrow the field to two candidates, who would then compete in the general election.<sup>14</sup> Another proposal—and one that was considered by the Walsh Commission—is to have all judicial races decided in the primary elections. Since it is typically the “most informed, most civic-minded citizens” who participate in primary elections, these voters may be the most likely to select qualified judicial candidates.<sup>15</sup> In the end, the commission recommended the publication of a judicial voter guide.

The Walsh Commission left the details of the process for gathering candidate information and disseminating the guide to voters to the supreme court. The court formed a judicial voter pamphlet advisory committee, which

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9. REPORT OF THE COURTS OF WASHINGTON (1995).

10. WALSH COMMISSION, *supra* note 3, at 12.

11. *Id.* at 3.

12. *Id.* at 7.

13. *Id.* at 7-8.

14. Charles H. Sheldon & Nicholas P. Lovrich, Jr., *Voter Knowledge, Behavior and Attitudes in Primary and General Judicial Elections*, 82 JUDICATURE 216 (1999).

15. *Id.* at 218.

released its recommendations in June 1996. The committee was composed of judges from all court levels, a representative from the state League of Women Voters, and two attorneys. Based on the committee's report, the supreme court ordered the publication of a judicial voter pamphlet for the September primary elections. The voter pamphlet would include biographical data and position statements for all candidates facing contested judicial elections, along with basic court organization and election information.

The pamphlet was prepared and distributed through a public/private partnership between the office of the administrator for the courts (OAC) and Washington's numerous daily newspapers. Through the agreement, hard copies of the pamphlets were distributed to all daily newspaper subscribers, which included 1.2 million readers. With the assistance of the secretary of state, the pamphlets were also available on the department's website and at special kiosks in supermarkets, malls, and other public places, and a video voter guide aired on the statewide public affairs cable network.

## THE IMPACT OF REFORM

The 1996 effort to provide voters with information on judicial candidates for the primary elections was deemed a success. A poll conducted immediately following the primary elections asked those who had voted for judicial candidates to compare the voter pamphlet as a source of information to other sources such as newspaper articles and editorials, bar polls, candidate mailings, and discussions with family and friends.<sup>16</sup> Seventy-one percent of those who voted for judicial candidates considered the voter information pamphlet to be an important source of information.<sup>17</sup> It was also the most commonly used source of information, with nearly half of those who voted for judges using the voter pamphlet as an information source.<sup>18</sup> According to another poll conducted for the

OAC by a market research firm, "voters across the state acknowledged [that] the Judicial Voters' pamphlet is helpful to them . . . [and they] would like to continue to receive this type of guide for future judicial elections."<sup>19</sup>

The distribution of the pamphlet was not without problems, however. According to one post-election survey, 57 percent of voters never found the pull-out pamphlets in their newspapers,<sup>20</sup> and the additional means of providing information about judicial candidates—the secretary of state's website, the cable videos, and the kiosks—were rarely used by voters.<sup>21</sup> The survey attributed these findings to a lack of voter awareness that these sources were available and suggested that voters' familiarity with these outlets would increase over time.<sup>22</sup>

Based on the success of the 1996 efforts, the supreme court and the OAC received \$175,000 from the legislature to fund the publication of a judicial voter pamphlet for the 1998 primary elections. The pamphlet featured a new "eye-catching" design and an easier-to-read format.<sup>23</sup> In addition, Chief Justice Durham and Allied Daily News Executive Director Rowland Thompson wrote to newspaper publishers and requested that articles, editorials, and "house" advertisements be run to call readers' attention to the upcoming pamphlet.<sup>24</sup> With the cooperation of Allied Daily Newspapers and the Washington (weekly) Newspaper Publishers' Association, the 1998

16. An immediate post-election mail survey was conducted by the Division of Governmental Studies and Services of the Department of Political Science at Washington State University. A random sample of registered voters in King and Spokane Counties was polled.

17. Wendy K. Ferrell, *1998 Judicial Voters Pamphlet*, OAC REPORTS, Aug. 14, 1998.

18. Sheldon & Lovrich, *supra* note 14.

19. Wendy K. Ferrell, *For '98 Elections: Second, Statewide Judicial Voter Pamphlets Planned*, OAC REPORTS, Feb. 9, 1998.

20. Ferrell, *supra* note 17.

21. Charles H. Sheldon & Nicholas P. Lovrich, *Preliminary Report on Judicial Voters in King and Spokane County 1996 Primary Judicial Elections*, available at <[http://www.tomphillips.com/sj77\\_appa.htm](http://www.tomphillips.com/sj77_appa.htm)>.

22. *Id.*

23. Ferrell, *supra* note 17.

24. *Id.*

pamphlet reached more than 1.3 million daily and weekly newspaper subscribers. An additional 26,000 pamphlets were sent to local libraries, courts, and county auditors. An electronic version was available on the Washington State Courts' website, and the OAC encouraged employers and law firms to hyperlink the pamphlet on their internal networks.

According to a press release issued by the Washington State Courts after the 1998 elections, judicial elections were "gaining a higher profile," as evidenced by increased media coverage and an examination of turnout rates in the 1994, 1996, and 1998 primary elections.<sup>25</sup> In the 1994 primary elections, less than 60 percent of those who voted cast ballots in contested supreme court races. In the 1996 primaries—the first year that a voter information pamphlet was published for the primary elections, this figure had increased to nearly 70 percent. In 1998, 72 percent of voters participated in the supreme court elections. This trend cannot be tied directly to the publication of judicial voter guides, but it is surely more than a coincidence that there is a decline in voter roll-off from 1994 to 1996 and 1998.

The OAC, while committed to publishing the judicial pamphlets, thought that the job might best be handled by the secretary of state's office, the "election experts."<sup>26</sup> Pamphlets published by the secretary of state's office would also reach a larger audience, since they would be mailed to every household in the state. However, a statutory change was required before the secretary of state could assume this responsibility. In the 1999 and 2000 legislative sessions, bills were introduced in both the

house of representatives and the senate that called on the secretary of state to publish a voter guide when "at least one statewide measure or office is scheduled to appear on the primary or general election ballot."<sup>27</sup> The bills were never voted on for final passage, but in 2000, the secretary of state produced an official voter information pamphlet for the primary elections—the first in the state's history.

In spite of the 2000 effort, there was still no statutory requirement that the secretary of state produce a voter guide for the primary elections. The 1999-2000 bills were reintroduced in the 2001-2002 session.<sup>28</sup> Secretary of State Sam Reed spoke in support of the bills, describing a primary voters' pamphlet as "essential to ensuring that citizens have the tools they need to make informed choices,"<sup>29</sup> but no final vote was ever taken on the bills. For the 2002 elections, the judicial voter guide for the primary elections was again published by the OAC, with the assistance of the state's newspapers. As in the past, the guide was available on the Washington State Courts' website, and a video version featuring supreme court candidates was aired on the state's public television network.

The neutral tone of the candidate statements in the 2002 voter information pamphlets met with some criticism. One judicial candidate promised that he would "write straightforward opinions that provide clear guidance on the law," while another described herself as "committed to ensuring that the legal system is responsive to the citizens of [the] state."<sup>30</sup> Some commentators<sup>31</sup> had expected judicial candidates to be more forthcoming in light of the U.S. Supreme Court decision in *Republican Party of Minnesota v. White*.<sup>32</sup> In *White*, the Court struck down a Minnesota canon that prohibited a judicial candidate from "announc[ing] his or her views on disputed legal or political issues." Washington's code of judicial conduct does not contain an "announce" clause, so its code was not directly affected by the decision, but Canon 7 does state that judicial candidates

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25. *Judicial Races Gaining in Profile*, Washington Courts press release, Nov. 4, 1998.

26. Ferrell, *supra* note 19.

27. SB 5644, HB 1847, 1999-2000 Biennium.

28. SB 5616, HB 1721, 2001-2002 Biennium.

29. *House Panel Approves Primary Voters Pamphlet Bill*, Secretary of State press release, Feb. 20, 2001.

30. Peter Callaghan, *Wanna-be Judges Expound Pure Pablum*, TACOMA NEWS, Sept. 1, 2002, at B01.

31. *See, e.g., id.*

32. 536 U.S. 765 (2002).

should not “make statements that commit or appear to commit [them] with respect to cases, controversies or issues that are likely to come before the court.”<sup>33</sup> In *White*, the Supreme Court expressly declined to rule on the constitutionality of the “commit” clause, but the Court’s finding that restrictions on candidates’ speech impinge on their First Amendment rights could have a broad impact on the conduct of future judicial elections. It will be interesting to see how the *White* decision will affect the content of judicial voter guides in Washington and other states over time.

It appears, on balance, that one of the Walsh Commission’s goals—to increase the amount of information available to voters about judicial candidates—has been accomplished through the publication of judicial voter guides for the primary elections, whether by the secretary of state or the OAC. The judicial voter pamphlets seem to have become an accepted, and appreciated, part of the election landscape in Washington.

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33. Wa. R. CJC 7, 7(C)(2).

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