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JUDICIAL INDEPENDENCE

Preserving a Fair and Impartial Judiciary

America's Judicial Selection Wars

By Rebecca Love Kourlis

In the fervor surrounding the recent presidential campaign, judicial races received relatively little national media coverage. Most citizens know that 35 Senate and 435 House seats along with the presidency were also hotly contested during the 2008 election, but how many voters were aware of the fierce battles waged by candidates closer to the bottom of the ballot? In 2008, fifteen states held contested elections for twenty-six supreme court seats. And, according to national watchdog groups the Brennan Center for Justice and Justice at Stake, nearly $20 million was spent on television advertising, an increase of 24 percent over the 2006 election.

Is this a problem? After all, raising vast sums of money and spending them on campaign advertising is commonplace in races for seats in the executive and legislative branches. We are a nation that believes in the right to vote and the accountability that goes with it. Why not apply these same standards to the judiciary?

Politicians are supposed to be aligned with an ideology; they choose a party and accept its platform. In contrast, judges must decide each case on its merits, not on the basis of political ideology or a campaign contribution. Judges must be impartial to be effective. There are two common methods for selecting judges: elections and merit selection. We have only to look at this past election season to understand how these methods support or undermine the ideal of an impartial American judiciary.

The Sad State of Judicial Elections

Last spring, Wisconsin held its election for the supreme court seat occupied by incumbent Justice Louis Butler. The tenor of the campaign was captured by television advertising so repugnant that broadcast stations eventually refused to air the ads. Ads run by Butler's challenger, Michael Gableman, featured references to a rapist, blood and crime scenes more reminiscent of a promotion for the latest *CSI* episode than a supreme court election. One ad alleged that "Louis Butler worked to put criminals on the street, like Reuben Lee Mitchell, who raped an eleven-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child." The ad failed to acknowledge that the Mitchell case arose while Butler was serving as a public defender—before he became a judge—and the crime occurred after Mitchell had served time in prison and was paroled. Several months after his win, these words have come back to haunt Gableman, who has become the only Wisconsin judge to face state Judicial Commission charges, alleging that he made false statements about his opponent. Yet he is not unique. According to the American Judicature Society, in the past fourteen years at least sixteen judges in various states have been disciplined for violating judicial ethics codes for campaign speech.

History has shown that negative ads—whether for politicians or judges—can be highly effective. With the help of such ads, Butler lost his seat, becoming the first incumbent in Wisconsin to do so in forty years. But this was not the only record set during the campaign. Nearly $6 million was raised to contest the seat—the biggest war chest the state had ever seen in a judicial election—and the lion's share of contributions came from outside groups. Under Wisconsin law, these contributors were not required to provide information about how they raised the money or spent it.

Although Wisconsin was initially dubbed by campaign watchers as the poster child for the worst election antics of 2008, a half dozen other states seemed to be vying for this dubious honor. In Alabama, spending for one supreme court seat exceeded $5 million,

Regardless of how they are chosen in your state, how do you think judges should be chosen? (2,315 U.S. adults surveyed online between September 15–22, 2008)

Non-partisan elections	**43%**
Appointed by the governor from candidates suggested by a citizen nominating commission	**19%**
Partisan elections	**12%**
Merit based	**1%**
Appointed by governor	**1%**
Other	**2%**
Not at all sure	**24%**

Note: Percentages don't add up to 100% because of computer rounding or the acceptance of multiple answers from respondents answering that question.

Source: Harris Interactive, www.harrisinteractive.com/harris_poll/index.asp?PID=960 (March 16, 2009).

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most of it going to sensational advertising so disturbing that both candidates were hauled before the state Judicial Campaign Oversight Committee. In Michigan, voters were treated to the spectacle of what more than $3.5 million will buy in advertising. Ads in support of the incumbent chief justice alleged that his challenger granted probation to a terrorist and gave a lenient sentence to a sex predator. Not to be outdone, his opponent aired a video reenactment alleging that the chief justice fell asleep during a case involving the deaths of six children in a house fire. This ad has been credited with the defeat of the chief justice, the first incumbent judge in that state to lose his seat in twenty-four years.

The list goes on. Supreme Court races in Mississippi, Louisiana, and Texas saw new highs in advertising dollars spent and new lows in the level of rhetoric. One Mississippi justice alleged that his opponent was a deadbeat dad; the accused fired back with an ad depicting judges with dollar signs on their chests, with the inference that justice came with a price tag. Another justice was the subject of an ad claiming he ruled in favor of two baby killers.

A Disturbing New Trend

The 2008 elections are only the latest manifestation of a trend that began with the new millennium. Although evidence of costly judicial campaigns began to surface in the 1990s, full-blown judicial selection wars are really a twenty-first century phenomenon. Anecdotal indicators of money flowing from the nation's legal and business sectors into judicial campaign coffers morphed into hard statistical data as the boom in television advertising became widespread. In 2000, candidates used television ads in contested supreme court elections in only four states. By 2006, they were used in ten of eleven states. The significant sums required to underwrite this surge in advertising can be seen in the staggering increase in overall contributions raised from 1999 to 2007. During this period, $165 million was raised nationwide, in sharp contrast to the $62 million raised from 1990 to 1998, according to Justice at Stake.

The high drama and megadollars that have come to characterize America's election of judges has attracted the attention of media and scholars on both sides of the Atlantic. Following the Wisconsin Supreme Court election, *The Economist*, a British news magazine, dubbed it "*habeas* circus," and in a story in the *New York Times*, Mitchel Lasser, an expert on international judicial systems, observed that "the rest of the world is stunned and amazed at what we do, and vaguely aghast." *See Life, Liberty, and the Pursuit of a Fair Judiciary*, The Economist, Apr. 10, 2008, www.economist.com/PrinterFriendly.cfm?story_id=11017644; Adam Liptak, *Rendering Justice, With One Eye on Re-Election*, N.Y. Times, May 25, 2008, www.nytimes.com/2008/05/25/us/25exception.html. Outside of the United States, judges must often pass rigorous tests and are selected based on technical skill. They are also generally appointed by an executive branch official.

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Retired U.S. Supreme Court Justice Sandra Day O'Connor has also spoken out against America's increasingly money-ridden and politicized judicial elections. Participating in a 2008 conference that focused on the judicial selection debate, O'Connor revealed a conversation she had with a group of "top-notch" lawyers in Texas. The lawyers admitted to a policy of researching the opposing counsel's campaign contributions to the judge they had been assigned; they then matched the donations dollar for dollar. O'Connor lamented, "Judicial independence is a bedrock principle of our court system, and we're losing it." *Two Supreme Court Justices Speak at Fordham Law*, http://law.fordham.edu/ihtml/news-2details.ihtml?id=612&nid=741. She went on to observe, "We've put cash in the courtroom, and it's just wrong." *Id.*

Despite the sensational spectacle of these high court elections, twenty-one states still choose to elect their judges. According to a 2007 survey by the Annenberg Public Policy Center, Americans who live in states that hold partisan elections are more likely to believe that "judges are just politicians in robes" than those who live in states with some other selection method. The same survey found that 69 percent of citizens believe that raising campaign contributions affects a judge's rulings from a moderate to great extent. And investigative reports by the media in 2006 provided sobering evidence that justice may, indeed, be for sale in parts of the nation.

In an examination of the Ohio Supreme Court, the *New York Times* found that one justice voted in favor of his contributors 91 percent of the time, with the remaining justices voting 70 percent of the time for their contributors. The report also found that the justices virtually never disqualified themselves from hearing the cases of campaign contributors; disqualification occurred in only 9 out of 215 cases involving possible conflicts. Published the month before the 2006 Ohio Supreme Court election, the *Times* story included comments by a judge who refused to accept contributions in his race to unseat an incumbent justice: "We have to stop selling seats on the Ohio Supreme Court like we sell seats on the New York Stock Exchange." Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, www.nytimes.com/2006/10/01/us/01judges.html. Despite the nobility of his gesture and the negative publicity

for the incumbent, the challenger lost.

Ohio is not alone. Richard Neely, a former elected justice of the West Virginia Supreme Court, wrote that: "As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me." Richard Neely, The Product Liability Mess: How Business Can Be Rescued from the Politics of State Courts 4 (1988).

Partisan elections may place even the most sincere judicial candidates in positions where impartiality may be compromised. The U.S. Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), opened the door for judicial candidates to speak freely about their personal positions on controversial social issues, increasing pressure on candidates to make their views known even when they do not wish to do so. Special interest groups sent questionnaires to judicial candidates in Iowa in 2006 and Florida in 2006 and 2008, asking for their positions on such issues as same-sex marriage, abortion, and assisted suicide. At worst, candidates answer the questionnaires in a manner that implicitly commits them to decide cases a certain way. At best, a refusal to answer the questionnaire might spawn speculation that could undermine the candidate's capacity to be an effective judge.

A Reform Movement Gathers Speed

Given the national attention that many of these judicial elections have received, it is no surprise that judicial, legal, and legislative leaders have called for reform of the system. Merit selection—increasingly identified as the strongest alternative to the election of judges—is currently being used to select some or all judges in eighteen states. The process typically involves the initial appointment of a judge by the governor, who chooses from a candidate pool developed by an independent nominating commission. The nominating commission is typically composed of a bipartisan cross-section of the community, including attorneys and nonattorneys. When a vacancy arises, the commission vets the candidates based on their overall credentials rather than political philosophy. At the end of a judicial term, the public decides whether the judge should be retained; the judge is running on his or her record. In several states, merit selection is also coupled with strong judicial performance evaluation programs that provide the public with valuable information about the strengths and weaknesses of the judges.

While advocates of merit selection recognize that no system for choosing judges is completely apolitical, the absence of campaigns, fundraising, and television advertising reduces politicization of the process exponentially. Citizens are spared the sideshows described above, and some researchers have concluded that the process yields a higher quality bench overall. A 2008 survey conducted by Harris Interactive for the U.S. Chamber of Commerce found that judges chosen through a merit selection system rank among the highest in the nation. The survey reported that seven of the top ten states, in rankings of judicial competence and impartiality, use merit selection to pick their judges. Conversely, four out of the bottom six states ranked in these categories use a partisan election system.

Given the advantages of merit selection, it would be logical to assume that the American public would overwhelmingly support a switch from election of judges to this process. Unfortunately, this is not yet the case. In fact, a 2008 Harris Poll found that two-thirds of citizens still prefer direct election of judges over any other method.

However, it seems that the onslaught of down-and-dirty campaigning during the past few years has finally taken its toll. Judicial election fatigue has prompted decision makers throughout the United States to take steps to reform their selection systems. Since 2006, half a dozen states have evaluated a move from elections to merit selection. More recently, the process was endorsed on the local level by voters in Missouri and Kansas. Other initiatives include campaign finance reform and calls for stronger recusal standards. In the wake of an election season that many believe tarnished the political reputation of the state, citizen groups and the media have asked Wisconsin lawmakers to pass legislation that would strengthen their campaign finance laws. A number of states are also working to establish performance standards for their judges, to help mitigate public concerns about judicial accountability.

An announcement by the U.S. Supreme Court will also put the judicial selection debate on America's front burner. On March 3, 2009, the Court heard arguments in *Caperton v. Massey*, No. 33350, 2008 WL 918444 (W. Va. Apr. 3, 2008), *cert. granted*, 77 U.S.L.W. 3051, 3292, 3295 (Nov. 14, 2008) (No. 08-22), a case involving a West Virginia Supreme Court justice who received more than $3 million in campaign contributions from a corporate executive but refused to disqualify himself from cases involving the donor's company.

At the end of the day, the debate over how America chooses its judges boils down to one very simple question: what kind of judges do we want? Millions of citizens and thousands of businesses find themselves in U.S. courts every year. Anyone who enters a courtroom should have confidence that the judge is experienced, respectful, fair, and, most importantly, impartial. The notion that a judge who accepts substantial campaign contributions, or who takes positions in advance of hearing cases that may raise those very issues, is somehow immune to tainted decision making is a gamble that no American should have to take.

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