Bert Brandenburg & Roy A. Schotland

Keeping courts impartial amid changing judicial elections

That's obscene for a judicial race.... What does it gain people? How can people have faith in the system?
– Justice Lloyd Karmeier, Illinois Supreme Court, Election Night 2004[1]

More than 89 percent of America's state judges must stand for election to sit on the bench or retain office.[2] Judicial contests have traditionally been different from other elections because judges historically haven't had to raise huge war chests, cater to interest groups, make sound-bite promises, or respond to hardball attacks. Judicial election politics have stayed cooler in part because Americans don't want courtroom decisions to be influenced by political pressure.

But Justice Karmeier's race encapsulates a troubling transformation. He issued his warning after winning the most expensive contested judicial election in American history. In a rural district, the two candidates raised more than $9.3 million – more than was raised in eighteen out of thirty-four U.S. Senate races that year. Trial lawyers wrote six-figure checks to the state Democratic Party and teamed up with labor leaders to funnel money into the race through a political action committee. On the other side, the U.S. Chamber of Commerce and the American Tort Reform Association poured in millions more through the state Republicans, the state Chamber, and a friendly political action committee.[3]

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1 Ryan Keith, "Republican Lloyd Karmeier Wins Supreme Court Seat," Associated Press, November 3, 2004.

2 The ideas in this essay were first presented at the 2007 conference on The Debate over Judicial Elections and State Court Judicial Selection, convened by the Sandra Day O'Connor Project on the State of the Judiciary at Georgetown University Law Center. A modified version of this essay appears in *The Georgetown Journal of Legal Ethics* 21 (4) (Fall 2008).

3 See Jesse Rutledge, Deborah Goldberg, Sarah Samis, Edwin Bender, and Rachel Weiss, *The*

Costly and corrosive court campaigns have fast become the new norm. Across America, attorneys, partisans, and special interests with cases in court are pouring millions into judicial contests, mostly for high-court but increasingly for appellate- and even district-court contests. Broadcast television ads seek to push wedge-issue politics into our courts of law. Aggressive questionnaires from special-interest groups seek to pressure judges to take stands on controversial issues. As Justice Sandra Day O'Connor recently warned, "In too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution."[4] The new politics of judicial elections is dangerous because it seeks to promote ideology and special-interest agendas over accountability to the law.

Considered nationally, judicial election systems are a patchwork. Our states have three main types of judicial election systems: partisan, nonpartisan, and retention elections, in which incumbents stand for reelection without an opponent. Taking into account different jurisdictions and levels of courts, there are no fewer than sixteen different combinations of these types of elections.

Unlike other political contests, judicial elections must strike a balance between assuring that judges are accountable and protecting their ability to be fair and independent. This ongoing tension has led to widespread, long-standing disagreement on what method can best meet that challenge. As one Texas chief justice is reported to have said years ago, "No method of judicial selection is worth a damn." (Indeed, elections for judges occur *only* in America, except for a few small cantons in Switzerland and retention elections for Japan's high-court judges.[5])

Several attributes of judicial elections combine to diminish media coverage and voter interest. Candidates for the bench are constrained by canons of campaign conduct and by professional tradition from campaigning with claims to pursue a particular policy. They cannot offer favors, or do constituent casework. They are often unknown since they are rarely active in groups that are engaged politically. Judicial races are typically relegated to the bottom of the ballot, encouraging many reliable voters to skip over them. Judicial elections sometimes occur at times bound to produce low turnout, like April in Wisconsin, August in Tennessee, or in odd-numbered years, as is the case with Pennsylvania's spring primaries. Puzzled voters are often left to parse political party cues or make their choice based on name familiarity or ethnic identity. This information vacuum also heightens the role of purchased advertising – which in turn fuels the race for campaign funds.

The breakthrough year for big-money court campaigns was 2000, when supreme court candidates raised a record $45.6 million – a 61 percent increase over the previous election cycle – and political parties and interest groups spent at least $10 – $16 million more on independent TV ads.[6] Although the growth in to-

New Politics of Judicial Elections 2004 (Washington, D.C.: Justice at Stake, 2005), 18, 26 – 27.

4 Justice at Stake Press Release, May 17, 2007.

5 Herbert M. Kritzer, "Is the Rule of Law Waning in America?" *DePaul Law Review* 56 (2007): 423, 431.

6 See Deborah Goldberg, Craig Holman, and Samantha Sanchez, *The New Politics of Judicial*

tal spending was sudden and dramatic, at that point the problem seemed confined to battleground states like Alabama, Illinois, Michigan, Mississippi, and Ohio. But since 1999 candidates for America's state high courts have raised over $157 million, more than double the amount raised by candidates in the four cycles prior.[7]

Fund-raising records in at least fifteen states have been broken. In 2006, for example, high-court candidates in Alabama combined to raise $13.4 million, smashing the previous state record by more than a million dollars. Supreme court candidates in Alabama, Ohio, Oregon, and Washington broke the million-dollar mark before Labor Day.[8] Meanwhile, two candidates for an Illinois Court of Appeals seat raised more than $3.3 million, quadrupling the state record. Candidates in an Illinois circuit court campaign raised more than $750,000.[9] In 2002, Florida trial judges raised $16 million for their nonpartisan elections; two years earlier they raised over $8 million.[10]

Most of this money comes from attorneys and political interests who view campaign spending as a litigation investment. Of the $157 million raised by judges from 1999 to 2006, more than a third came from businesses and business groups, more than a quarter from attorneys (plaintiff and defense), 11 percent from political parties, and 7 percent from the candidates themselves.[11]

Because of the complicated nature of judicial decision-making, there are little clear data available examining potential linkages between campaign contributions and decisions from the bench. A 2006 *New York Times* review of twelve years of decisions made by the Ohio Supreme Court – which has experienced a series of costly and brutal campaigns – found that "its justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time."[12]

Once independent expenditures are factored in, these dollar figures climb much higher. Since 1999, third-party, interest-group spending for television airtime and other expenses totaled anywhere from $17 – $25 million.[13] Indeed, since third-party groups face few requirements to disclose their campaign spending, these estimates are almost certainly low.

Elections (Washington, D.C.: Justice at Stake, 2002), 7; also, John C. Green, ed., *Financing the 1996 Election* (Armonk, N.Y.: M. E. Sharpe, 1999), 13.

7 Jesse Rutledge, James Sample, Lauren Jones, and Rachel Weiss, *The New Politics of Judicial Elections 2006* (Washington, D.C.: Justice at Stake, 2007), 15.

8 Thomas J. Moyer and Bert Brandenburg, "No Way to Choose: Big Money and Special Interests are Warping Judicial Elections," *Legal Times*, October 9, 2006.

9 Data supplied upon request by the Illinois Campaign for Political Reform.

10 Roy A. Schotland, "Judicial Elections: Change and Challenge," unpublished white paper (California Judicial Council, 2005), 14.

11 Tabulations provided by the National Institute on Money in State Politics.

12 Adam Liptak and Janet Roberts, "Tilting The Scales?: The Ohio Experience," *The New York Times*, October 1, 2006.

13 See *The New Politics of Judicial Elections* 2000, 2002, 2004, 2006; also, Roy A. Schotland, "Financing Judicial Elections," in *Financing the 2000 Election*, ed. David B. Magelby (Washington, D.C.: Brookings Institution Press, 2002).

The escalating race for cash has left many judges feeling trapped in a bad system, forced to raise money from the attorneys and parties appearing before them and constantly looking over their shoulders at interest groups and those groups' demands. This worries the public: a number of opinion surveys have shown that three in four Americans think that campaign contributions to judges affect the outcome of cases in the courtroom.[14] Even more chilling is a poll showing that one in four state judges agreed.[15] "You cannot forget the fact that you have a crocodile in your bathtub," said former California Justice Otto Kaus, referring to controversial cases at election time. "You keep wondering whether you're letting yourself be influenced, and you do not know. You do not know yourself that well."[16]

What triggered the rise in contests and spending? The evidence suggests a combination of factors: changes in elections generally (like the spread of television and consultants in major races), combined with increased public awareness of the impact of court decisions; growing interest-group focus on courts and their makeup; and unusual events in particular states. As an Ohio AFL-CIO official put it in 1990, "We figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators."[17]

14 See http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf.

15 See http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf.

16 D. Morain, "Kaus to Retire from State Supreme Court," *Los Angeles Times*, July 2, 1985.

17 Quoted by J. Christopher Heagarty, "The Changing Face of Judicial Elections," *North Carolina State Bar Journal* 19 (2002): 20–21.

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Much of this new money is spent on expensive television advertising, which has quickly become prominent in the vast majority of state supreme court elections. In 2000, television advertisements ran in fewer than one quarter of states with contested supreme court elections, compared to more than 90 percent in 2006. Candidates have spent more than $35 million on these ads since 1999. Special interests have spent at least $16 million more, typically on battles between rival camps: business against labor, plaintiffs against business, pro-development against pro-conservation.[18]

Altogether, candidates, special-interest groups, and political parties combined to spend more than $51 million on TV advertising in high-court campaigns from 1999–2006. In 2006 almost $16.1 million was spent, with Alabama, Georgia, and Ohio breaking the $2-million mark. The TV ads in the primaries of 2006 amounted to one-third of all judicial ads in high-court campaigns and cost $4.6 million – almost forty-eight times the $96,000 spent airing TV ads for primaries in 2002.

Too few of these ads focus on the traditional themes of qualifications, experience, and integrity. Far more often, judicial campaign ads misrepresent facts and scare voters. Complicated decisions are reduced to slogans, and fealty to the law is subordinated to sound bites. Consider an ad from the 2006 Alabama Republican Primary, featuring a hand holding a knife and a voiceover that said:

> Convicted of rape and murder, Renaldo Adams was sentenced to death, but now Adams is off death row thanks to Chief Justice Drayton Nabers and the Alabama Supreme Court using a 5 to 4 decision

18 See *The New Politics of Judicial Elections* 2000, 2002, 2004, 2006.

based on foreign law and unratified UN treaties.[19]

In 2004, in Illinois, the Justice For All Political Action Committee, a trial lawyer and labor group, ran an ad criticizing Republican Judge Lloyd Karmeier as "lenient" because he "gave probation to kidnappers who tortured and nearly beat a 92-year-old grandmother to death."[20]

In the wake of the Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*,[21] and subsequent lower-court decisions striking down more regulation of judicial campaign speech, more candidates have been feeling pressured to run ads featuring nearly promissory language about how they will rule on the bench:

- In Illinois, Judge Lloyd Karmeier stated that he was "tackling the medical malpractice crisis."
- In New Mexico, Justice Edward Chavez said: "Violent criminals don't belong on our streets. To stop violent crime punishment must be swift and certain.... That's the kind of justice I believe in."
- In Mississippi, Judge Samac Richardson said that he stands for "traditional Mississippi values," including the belief that "the words 'under God' belong in our Pledge of Allegiance" and that "the rights of victims are just as important as the rights of defendants."[22]
- In Alabama, Chief Justice Nabers said, "Abortion on demand is a tragedy. And the liberal judicial decisions that support it are wrong. I believe in traditional marriage and I will always support it."[23]

The judicial ad wars are likely to grow only worse in the near-term, as lower-court decisions further loosen judicial ethics codes and the psychology of the arms race takes hold. This will fuel the vicious circle of ever-more campaign fund-raising and edgier ads, making judicial campaigns more and more like other campaigns. When candidates were restrained to issues like qualifications and docket management, TV didn't fit. For better or worse, that day is gone.

Questionnaires are an increasingly popular tool for interest groups seeking to pressure candidates into making statements about issues before they land in court. Many give only a passing glance to a candidate's legal experience, education, or approach to the administration of justice – information that could be highly valuable to voters trying to pick a candidate. Instead, they seek to box in candidates on hot-button legal and political issues. They usually call on judicial candidates to distill complex legal issues down to a simple check in a box, and rarely seek a narrative response from the candidates. Would-be judges know that their answers could trigger significant money, political ads, and grassroots campaigns for or against their candidacy.

19 *The New Politics of Judicial Elections* 2006, 8 – 9.

20 *The New Politics of Judicial Elections* 2004, 10.

21 536 U.S. 765 (2002). By a 5 – 4 vote, the Court struck down Minnesota's Announce Clause, which prohibited a candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues." Since *White*, thirteen lower federal courts have stricken other limits on judicial campaign conduct.

22 *The New Politics of Judicial Elections* 2004, 9.

23 *The New Politics of Judicial Elections* 2006, 35.

For example, interest-group questionnaires in 2006 pressed more judicial candidates than ever to "announce" their position on issues, such as abortion, school choice, and same-sex marriage. North Carolina Right to Life and Kentucky Right to Life both asked judicial candidates to agree or disagree with the following statement: "I believe that *Roe v. Wade* was wrongly decided." The Independent Voters of Illinois-Independent Precinct Organization circulated a questionnaire insisting that judicial candidates announce their positions on the death penalty, "the right of a woman to have an abortion," mandatory minimum sentences, and other hot-button social issues.[24]

As questionnaires become increasingly aggressive, a growing number of judges are being advised to treat them warily.[25] Some candidates are refusing to play along, either by ignoring the questionnaires or responding with letters written on their own terms. It's worth quoting from a response written by Florida Judge Peter D. Webster to the Florida Family Policy Council:

> I have spent a good portion of my life thinking about issues related to the judiciary. My experiences lead me to conclude without reservation that questionnaires such as that which I have received from your organization are ill-conceived. Over the long term, their impact cannot be anything but bad – bad for the judiciary as an institution; bad for the rule of law; and bad for the people of Florida. I say this because such questionnaires create the impression in the minds of voters that judges are no different from politicians – that they decide cases based on their personal biases and prejudices. Of course, nothing could be further from the truth.[26]

What can be done to insulate our state courts better from interest-group pressure? As the judicial elections have increased, more state legislators and civic groups are championing reforms. Fortunately, there is a good-sized menu to choose from.

Organizations like the American Judicature Society have long advocated "Missouri Plan" systems, adopted by more than thirty states in some fashion. Under these systems, sometimes called merit selection or merit-based selection, a judicial nominating commission screens potential candidates and recommends a short list of potential nominees. The governor consults this list in deciding whom to nominate; in some states he or she must pick from the list. After serving an initial term, the appointee must thereafter stand for reelection in an uncontested retention election, in which she or he must win at least a majority of the votes to stay in office.

Merit selection/retention systems result in dramatically less expensive campaigns than nonpartisan or partisan contestable elections. But merit selection is the most difficult judicial selection reform to achieve, although rising judicial election woes appear to be winning it new converts. It's also interesting to note a countertrend: partisan and special interests have been pushing to dismantle merit/retention systems in sev-

24 See *The New Politics of Judicial Elections* 2006, 30 – 34.

25 See "How should judicial candidates respond to questionnaires?" Advisory memorandum issued by the Ad Hoc Committee on Judicial Campaign Conduct, August 28, 2006; available at http://www.judicialcampaignconduct.org/Advice_on_Questionnaires-Final.pdf.

26 *The New Politics of Judicial Elections* 2006, 33.

eral states, including Arizona, Kansas, Indiana, Missouri, Tennessee, and Utah.

Other structural reforms worth considering are the use of merit commissions for filling interim appointments, longer terms of office, timing of elections, judicial qualification commissions, and candidate training. Longer terms directly reduce campaign finance problems by reducing the frequency of campaigns.

The full panoply of campaign reforms from other kinds of contests is also worth considering in judicial elections: contribution limits, speedy and meaningful disclosure of contributions and expenditures, regulation of electioneering communications, stronger enforcement and noncompliance penalties, and even adjustments to the timing of judicial elections. Public funding has drawn considerable attention, deservedly. It reduces dependence on private funding, helps level the playing field for candidates, and supports the emergence of candidates who otherwise would either not even try or would be unable to gain viability.[27]

Another reform gaining increasing attention – as campaign fund-raising explodes and constraints on campaign conduct shrink – is to assure, for cases in which a sitting judge's fairness is reasonably in question, that judges be recused or disqualified where appropriate (and that recusal requests be independently adjudicated).[28]

Because turnout in judicial elections is so low, allowing interest groups to dominate them by turning out their base, serious reform should include measures to boost voter participation. Exit polls consistently show that voters rank voter pamphlets as their favorite source of information. State and local governments should prepare and disseminate judicial candidate voter guides by print and electronic means to all registered voters before any judicial election (without charging an entry fee to judicial candidates). Indeed, Congress ought to provide a free federal mailing frank to any voters' guide sponsored by a state or local government.

Another important reform is the establishment of state and local judicial campaign conduct committees to monitor and comment on judicial campaign conduct. The ideal committee is composed of well-respected civic, political, and legal leaders, balanced and diverse. Conduct committees can educate candidates regarding appropriate campaign conduct, advise candidates on the appropriateness of specific advertisements, help candidates reach agreement about campaign behavior, and criticize inappropriate conduct by candidates.

Above all, the public needs to be better engaged in efforts to protect the courts that protect their rights. In 2006, voters across America signaled that they will vote to keep courts insulated from political pressure when they understand the stakes. They rejected several measures designed to make courts accountable to partisans instead of the law and the Constitution. In South Dakota, a measure called JAIL for Judges, which would have exposed judges to lawsuits and even dis-

27 For additional and sometimes differing views on public funding, see Bert Brandenburg and Roy A. Schotland, "Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns," *The Georgetown Journal of Legal Ethics* 21 (4) (Fall 2008).

28 James Sample, David Pozen, and Michael Young, *Fair Courts: Setting Recusal Standards* (New York: Brennan Center for Justice, 2008); Thomas R. Phillips and Karlene Dunn Poll, "Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-*White* World," *Drake Law Review* 55 (2007): 101.

missal for unpopular decisions, was rejected 9 – 1 by South Dakota voters. A Colorado ballot proposal to impose retroactive term limits on judges failed. Oregon voters rejected a measure to oust Portland-area judges for their political views by switching from statewide to district-based supreme court elections. In Hawaii, voters rejected an effort to repeal the mandatory retirement age for judges, after it was attacked as an effort by the Democratic legislature to deny judicial appointments to a Republican governor. And Missouri voters empowered a commission to set salaries for judges. As Chief Justice Roberts has said, the severe erosion of judges' pay is a "direct threat to judicial independence." Missouri's voters may have been casting their vote for good government, but in so doing they stood up for the role of America's courts.

Finding the appropriate balance between electoral accountability and the demands of impartial justice will never be easy. But the threat to fair courts is growing too rapidly to ignore. Every state in which judges face elections needs to consider how it will meet the challenges.