Ronald M. George

Why state courts – and state-court elections – matter

The vast majority of law cases in our nation are filed, heard, and determined in the courts of the various states.[1] Yet the attention paid to the role of state courts in our society – and threats to that role – often has lagged behind that accorded the federal courts in both public and scholarly notice. The study of state tribunals is complicated because the judicial systems in the fifty states often are structured very differently from one another. The division of labor among the courts of any given state, the scope of a particular court's jurisdiction, the manner of selection and retention of judges or justices, and even the names of analogous courts, to cite a few significant areas, are far from uniform and often reflect unique aspects of the history and development of the individual state.

This lack of uniformity at the state level, and the attendant difficulties in tracking and comparing court cases, should not, however, mask the substantial role of state courts in advancing our nation's interest in providing fair and impartial adjudication to the public. The steadily increasing focus over the past few years on the impartiality of state courts, as well as on the improper pressures that have been applied to courts on both the state and federal level, reflects a growing awareness that the fate of state courts and the public's respect for their rulings have significant implications for our democratic system, both locally and nationally. At risk is not only the judicial process, but also the basic political structure of our nation. And the word *political* is used here in both its broadest and its most partisan senses.

The issues revolving around our third branch of government are varied and complex. Even the shared meaning of common catchphrases no longer may be taken for granted. A few years ago, for example, Judge Mary Schroeder, former

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1 This paper is taken from a talk given at the 225th Annual Meeting and 1902nd Stated Meeting of the American Academy of Arts and Sciences held on May 10, 2006. Upon reviewing those remarks for inclusion in this volume, I concluded that the growing interest and body of material relating to judicial elections in state courts required that substantial revisions be made, and I have done so. The result is a continuation of some of the themes contained in that initial address. I deeply appreciate the invaluable assistance of my Principal Attorney Beth J. Jay in preparing this article.

chief judge of the U.S. Court of Appeals for the Ninth Circuit, described how, in her home state of Arizona, the long-standing and seemingly unobjectionable concept of "independence of the judiciary" was being employed with new caution. Some members of the public had construed the phrase as an invitation for courts to act in disregard of popular preferences – not only independent of, but without "accountability" to, the public. Today, growing segments of the public likewise seem to have concluded that greater accountability is needed because, in their view, judges presently may do whatever they wish, untethered from popular opinion. What once may have seemed an unexceptionable axiom of good government may now be under scrutiny, or may have taken on new and unfamiliar connotations.

This essay focuses on a few key developments in a very dynamic area. My purpose is to whet the reader's appetite for further exploration of the role state courts should be expected to play, of the impact of increasing numbers of expensive and hard-fought campaigns for individual judicial positions, and of the consequences of overt political and other pressures on state courts. It is apparent that what happens in state courts will profoundly affect the public's respect for the rule of law in our nation, and thus the fundamental stability of our democratic system.

Several recent developments – two involving judicial selection and a third involving the Terri Schiavo case – provide context. The U.S. Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*[2] casts a strong – and sometimes harsh – light on judicial elections in several states. In *White*, the high court held that Minnesota's Code of Judicial Conduct, which barred candidates for judicial office from "announcing" their views, violated the First Amendment right to free speech. The court majority rejected the notion that there is any substantial difference between judicial and legislative elections, asserting that judges too have the power to make law – not only by developing the common law, but by shaping each state's constitution.[3]

Some thirty-nine states presently elect at least some of their judges.[4] Some hold contested partisan elections, others nonpartisan contests, and yet others retention elections. Many states have systems combining a variety of selection mechanisms. The length of the term of office at issue varies.[5] Regardless of the selection method, however, where previously

2 *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); hereafter *White*.

3 Ibid., 784.

4 American Judicature Society, Judicial Selection in the States: Appellate and General Jurisdiction Courts, http://www.ajs.org/selection/sel_stateselect.asp; Dorothy Samuels, "The Selling of the Judiciary: Campaign Cash 'in the Courtroom,'" *The New York Times*, April 15, 2008.

5 In California, for example, most judges and justices initially are appointed by the governor to a vacant seat; California Constitution, article VI, section 16, subdivisions (c), (d)(2). Open seats, in which there is no incumbent at the superior-court level (the trial-court level in California), and seats in which a challenger has filed to run against a sitting judge seeking a new six-year term, are listed as nonpartisan positions on the ballot; ibid., section 16, subdivisions (b), (c). Uncontested seats in which the judge has filed to retain his or her position do not appear on the ballot. Appellate and supreme court justices serve for twelve-year terms and appear on the ballot (without the possibility of any challenger) solely for a vote on whether they should be retained once appointed by the governor and at the end of the applicable

judicial selection was seen in many jurisdictions as removed from everyday political activities, partisan pressures and the growing influence of special-interest groups recently appear to have assumed a new importance in many of these contests.

The impact on the state and federal judiciaries often takes different forms. The senatorial confirmation hearings for Chief Justice John Roberts in 2005 and for Associate Justice Samuel Alito in 2006 generated widespread discussion concerning the relevance of a judicial candidate's political beliefs to the Senate's exercise of its constitutional obligation to render advice to the president and consent concerning such appointments. The year before, the tragic case involving Terri Schiavo and her husband's suit to permit the removal of her feeding tube illuminated some of the tensions existing between executive, legislative, and judicial power at the state level. The Schiavo case also provided a lively display of the varieties of interaction between federal and state government, including the uniform rejection of Congress's eleventh-hour attempted intervention by every court to have considered the issue, including the U.S. Supreme Court.

House Majority Leader Tom DeLay then called for an investigation to determine whether the judges who had participated in the series of decisions rejecting the various challenges to the order allowing removal of Schiavo's feeding tube should be investigated with the possible objective of impeachment. He asserted, "The time will come for the men responsible for this to answer for their behavior." He later moderated some of his statements that had been construed as potentially threatening, and instead referred to Congress's "power of the purse" – suggesting that if impeachment or even more direct methods were not invoked, then cutting off court funding was a perfectly acceptable alternative.[6]

While those events played out on a national stage and generated widespread media coverage and strong responses, local developments recently have demonstrated that conflicting views about the role of the judicial branch in our government continue to clash in ways that once may have garnered only local concern, but that cumulatively give grave and widespread cause for alarm.

The judicial branch, at both the federal and the state level, occupies a place in government distinct from that of its sister branches – not only because the judicial branch lacks the power of the purse, but also because the judicial function obliges courts to interpret the federal and state constitutions and review, apply, and (in some instances) invalidate provisions enacted by the other branches. To the extent judges are expected to speak through their opinions, the role of a judge for the past century traditionally has been removed from the political arena in most jurisdictions. Indeed, the chorus of commentators, politicians, and academics who assert that the role of the judge is simply a variation on the familiar political theme played in the legislative and executive branches con-

term; ibid., article VI, section 16, subdivisions (a), (d).

6 Associated Press, "Reid Pokes DeLay Over Ethics," CBSNews.com, April 9, 2005, http://www.cbsnews.com/stories/2005/04/09.politics/main687008.shtml; Associated Press, "DeLay Apologizes for Schiavo Rhetoric," Msnbc.com, April 14, 2005, http://www.msnbc.msn.com/id/7500988.

trasts with some of the fundamental assumptions that guided this nation's founders.[7]

Although afforded lifetime tenure, federal judges obviously are not guaranteed complete insulation from political pressure. Nevertheless, the available option of impeachment has been used only rarely in the past century. As noted, other means to affect or even punish federal judges have surfaced recently. Members of Congress and others have denounced particular decisions by individual courts or judges and have threatened legislatively to restrict the jurisdiction of the federal district courts (the federal trial courts). Some see the creation of sentencing guidelines and statutory limitations on certain types of lawsuits as methods to curb judicial "overreaching." Others have embarked upon case-by-case oversight of individual judges, with the intent of taking some action if the judge in some manner "strays" from the approach considered proper by the monitoring group.

Thus far, at the federal level the realization of these threats has been limited. Nevertheless, the contentiousness between the federal system's executive and legislative branches over the appointment and confirmation of judges – and the portrayal of the judicial selection process as an extension of the political process – increasingly has dominated the federal judicial selection process and has had consequences for state judicial selection as well.

In state settings, where few judges have the protection of lifetime appointment, direct challenges to court authority and individual judges increasingly are being mounted. The history of judicial elections in the states is instructive: when first instituted in the mid-nineteenth century, judicial elections were viewed as a method to avoid the influence of special interests on appointments made by the executive or legislative branch. This shifted influence to the political parties and special interests, and the next wave of reform – seeking to insulate judicial officers from improper influences – resulted in a switch to nonpartisan or retention elections in the early part of the twentieth century. Efforts to abandon judicial elections completely have not met with great success.[8]

7 Alexander Hamilton observed: "This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppression of the minor party in the community"; The Federalist No. 78.

8 California's history reflects the national trends. A report on judicial selection prepared for the California Judicial Council briefly tracks this history; Judicial Council's Working Group on Judicial Selection, *Report on ACA 1 (Nation): Superior Court Elections*, June 7, 2001, which discusses a proposed constitutional amendment. California's first constitution in 1849 adopted a system of popular elections to fixed terms for judges. As concerns grew about the increasing control by partisan interests over governmental institutions and positions, including courts and judges, the trend changed toward nonpartisan elections. This "progressive" change, occurring early last century, coincided with Dean Roscoe Pound's delivery to the American Bar Association in 1906 of his very influential address, "The Causes of Popular Dissatisfaction with the Administration of Justice," *ABA Reporter* 29 (1906): 395. Pound observed that the politicization of the courts, and the requirement that judges be politicians, had "almost destroyed traditional respect for the bench." His thoughtful comments on the state of the system of justice still hold relevance for today's discussions.

As part of California's progressive movement to revise much of its constitutional structure,

The 2002 decision by the U.S. Supreme Court in *White* – holding that candidates in state judicial elections cannot be prohibited from announcing their views on legal and political issues – has served as an important catalyst in the growing movement that purports to hold state judges "accountable" and asserts that knowing a judge's individual and personal views on disputed questions is appropriate, if not essential, to informed voting. James Bopp, Jr., lawyer for the Republican Party in the *White* case and general counsel of both the James Madison Center for Free Speech and the National Right to Life Committee,[9] described this approach succinctly when discussing legal proceedings he had brought in four states on behalf of conservative and anti-abortion organizations challenging limitations on the speech and activities of judicial candidates: "The litigation is meant to pressure judicial candidates, said Bopp. 'No more hiding,' he said. 'You have views and we know they influence you. Voters have . . . the power to select you. It's time for you to let them in on the secret.'"[10]

A number of federal cases at the trial and appellate levels have expanded the reach of *White* to canons of judicial ethics, such as those prohibiting personal solicitation of campaign contributions, misrepresentation, and participation in political activities.[11] And the U.S. Supreme Court's action in declining to accept review in *Dimick v. Republican Party* left standing the decision by the U.S. Court of Appeals for the Eighth Circuit, sitting *en banc* on remand from the Supreme Court from its decision in *White*.[12] That court held unconstitutional under the First Amendment a judicial canon that prohibited judicial candidates from personally soliciting contributions for campaigns, as well as another canon that prohibited judicial candidates from identifying themselves as members of "political organization[s]," attending political gatherings, or seeking political endorsements.

In the wake of these decisions, challenges to limitations on speech in the context of judicial elections have been launched in several states, with varying success. These challenges often come in the form of attacks on a judicial disciplinary body's enforcement of canons of ethics that preclude judicial candidates from responding to questionnaires seeking their views on specific issues or that otherwise attempt to limit their speech or engagement in political activities.

Initially, the impact of the *White* decision and its like-minded progeny did not seem to attract widespread attention. As an increasing number of state judicial elections have been transformed into high-cost quasi-political contests, however, a growing number of individuals and organizations have begun tracking contested state judicial elections and

including reserving the initiative power to the people, in 1911 its electorate enacted measures to change judicial elections from partisan to nonpartisan. In 1934, another ballot measure was passed providing that court of appeal and supreme court justices run only for retention, not for election; *Report on ACA 1 (Nation)*, 5 – 7.

9 http://www.jamesmadisoncenter.org.

10 Emily Heller, "Judicial Races Get Meaner," *The National Law Journal* (October 25, 2004).

11 See, for example, *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002); *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005).

12 416 F.3d 738, cert. denied sub nom. *Dimick v. Republican Party of Minnesota*, 546 U.S. 1157 (2006).

court challenges to provisions in codes of judicial conduct, discussing both the adverse impact of such elections and rulings on the judicial process and possible means to mitigate these trends. For example, the Brennan Center for Justice at New York University School of Law[13] focuses on helping states maintain effective canons of judicial conduct that balance the free-speech rights discussed in *White*, judicial independence, and the due-process rights of litigants to a fair tribunal. Its website provides useful updates on issues arising out of campaign conduct, as well as links to papers and studies addressing developing trends. The nonpartisan Justice at Stake Campaign[14] focuses on public education about the importance of fair and impartial courts, and works with local partners across the nation on a variety of related projects. Its website also provides access to a variety of resource material online.

The American Judicature Society[15] also has been a strong and consistent voice for the independence and integrity of the courts, and has provided educational and other material for the benefit of judges, lawmakers, and the public. Among its activities are collecting information concerning judicial disciplinary systems, judicial ethics, and judicial independence. The society has created a website dedicated to judicial elections that compiles information on the selection practices in the fifty states, reform efforts, and polls reflecting public and judicial attitudes.[16]

The Sandra Day O'Connor Project on the State of the Judiciary at Georgetown University Law Center[17] was launched in February 2007, reflecting the leadership role played by the former associate justice of the Supreme Court in efforts to preserve a fair and impartial judiciary. Since leaving the court, Justice O'Connor has been a strong voice for judicial independence and impartiality on both the state and federal levels, holding national conferences, sometimes in conjunction with her former colleague, Justice Stephen Breyer, to explore recent developments and address ways to maintain strong and effective judicial systems.

In California, I appointed the Commission on Impartial Courts last fall.[18] Its four task forces are engaged in studying judicial selection and retention, campaign conduct, campaign finance, and public information and education. Drawing from lessons learned from other jurisdictions, the Commission's goal is to develop a comprehensive plan to avoid some of the problems caused by increased partisan participation in judicial selection and retention. California has seen attempts to affect judicial conduct and judicial elections, ranging from legislative threats to decrease court funding because of a decision unpopular with our sister branches, to attempts to recall individual judges based on individual cases. As some may recall, in 1986 a retention election for supreme court justices resulted in three incumbents losing their seats on the bench. California presents some unique issues because of its size and the cost of media and other efforts, but we are aware our judiciary is not immune from the challenges arising in other jurisdictions.

13 See http://www.brennancenter.org.

14 See http://www.justiceatstake.org.

15 See http://www.ajs.org.

16 See http://www.judicialselection.us.

17 See http://www.conferenceonthejudiciary.org.

18 See http://www.courtinfo.ca.gov/jc/tflists/commimpart.htm.

The American Bar Association's Model Code of Judicial Conduct has served as the basis for codes of judicial conduct in all the states. Indeed, the canon discussed in the *White* case was based on a superseded provision of the Model Code. In response to the *White* decision, in which the majority observed that the term *impartiality*, although frequently used, had not been defined in the lower court's opinion, in the Minnesota Code of Judicial Conduct, or in the briefs, the ABA Model Code has been amended. It now defines *impartiality* as an "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."[19]

In addition, the news media and, in consequence, the public have become more aware of the increase in partisan and special-interest participation in judicial elections, as well as the growing incidence of well-funded campaigns fueled by business interests, trial lawyers, and others. Some commentators have focused on what happens once a judge elected with substantial campaign contributions from a particular source assumes office and must decide cases in which the interests of those contributors are in dispute.[20] A recent *Wall Street Journal* opinion piece described three such contests in Illinois, Wisconsin, and West Virginia.[21] In Illinois, a state supreme court justice cast a vote ending legal action on a multimillion-dollar claim against an insurer who, directly or through employees and others closely associated with it, had contributed $350,000 to the justice's campaign for a seat on the court. The insurer also was a member of organizations and groups that had added another $1 million to the justice's campaign. In Wisconsin, a supreme court justice declined to recuse herself from a case involving a group that had spent more on outside advertisements favoring her than had been spent by that justice's own campaign. In West Virginia, the chief justice cast the deciding vote overturning a $76-million judgment against companies owned by a coal industry executive who had contributed between $3 – $4 million to the justice's campaign three years earlier, and with whom the justice had vacationed while the appeal was pending.

In each of those cases, there was public and media scrutiny of the judge's actions. In Wisconsin, the Wisconsin ethics board initiated an investigation that result in substantial fines; a three-judge panel was convened to examine violations of the code of judicial conduct, and editorial boards throughout the state commented on the nexus between campaign activities and judicial decision-making. Significantly, the Wisconsin Supreme Court sent a letter to the

19 "Terminology," ABA Model Code of Judicial Conduct (American Bar Association, 2007), 4.

20 See, for example, Adam Liptak, "Looking Anew at Campaign Cash and Elected Judges," *The New York Times*, January 29, 2008, which describes a recent study of Louisiana Supreme Court and statistical correlation between contributions to high-court justices' campaigns and the justices' later decisions; Adam Liptak and Janet Roberts, "Campaign Cash Mirrors a High Court's Rulings," *The New York Times*, October 1, 2006, which reports on the results of a study of statistical correlation between contributions to high-court justices' campaigns in Ohio and the justices' later decisions.

21 James Sample, "Justice for Sale," *The Wall Street Journal*, March 22, 2008; at http://online.wsj.com/article/SB120614225489456227.html?mod=googlenews_wsj.

governor unanimously supporting the concept of public financing for judicial elections. In West Virginia, the chief justice recused himself after photographs and details of his vacation with the coal industry executive were circulated, and in the ensuing weeks at least two more justices recused themselves. A bill was introduced in the West Virginia legislature to govern requests for recusal.[22] (On May 13, 2008, the chief justice lost his bid for reelection.)

The high price of judicial elections nonetheless shows no sign of abating. Recently, "[a] little-known county judge . . . narrowly defeated a Wisconsin Supreme Court justice with a law-and-order message and a barrage of third-party ads in a race that will go down as one of the state's nastiest."[23] The contentiousness of some judicial elections continues to increase, while determining when recusal is appropriate after such an election has become increasingly urgent.

Having once professed a specific view on an issue, will a judge be considered "unaccountable" to the public if he or she later decides cases in a manner not in accord with that view – because the law requires otherwise? Should judges be measured solely by the end result of the vote they cast – as legislators generally are evaluated – or should the legal analysis leading to that result be considered? What are the implications of applying a political yardstick to measure the judicial process? If judges are expected to decide cases in accordance with the law and precedent, what is the relevance of their personal beliefs? What are the consequences to the administration of justice if the public expects judicial decisions to reflect those stated personal beliefs?

Expecting judges to profess their views may, as a practical matter, undercut the orderly processing of cases. The increased politicization of judicial decision-making may profoundly affect the ability of judges, once they have assumed office, to hear cases that come before their courts. The present ethical constraints leading to recusal – the self-disqualification of a judge – require a judge to step down from hearing a case if he or she previously has announced a view favoring or opposing the claims that are before the judge for resolution. What should be inferred about the effect of substantial contributions and connections made during a judicial election campaign?[24] When is recusal necessary? The majority opinion in the *White* case, and the actions of some U.S. Supreme Court justices subsequent to that decision, seem to suggest that generally, unless the judge publicly has expressed bias relating to the outcome of an individual lawsuit or to the specific

22 Ibid.

23 Scott Bauer, "Wisconsin Justice Ousted in Nasty Race," Associated Press, April 2, 2008; at http://www.boston.com/news/nation/articles/2008/04/02/Wisconsin_justice_ousted_in_nasty_race.

24 The American Judicature Society's website on judicial selection contains a list of opinion polls and surveys in the various states on judicial campaigns and selection methods. These polls and surveys consistently reflect belief by a significant segment of the public that campaign contributions influence the decisions of judges. Perhaps most troubling, in some states polls revealed that a substantial percentage of *judges* had a similar belief. For example, in Florida, 30 percent of the judges who responded to a 2001 survey stated they believed contributions had at least some influence on their decisions. In a poll conducted in Texas in 2001 by the Justice at Stake Campaign, 28 percent of the responding Texas judges shared the view of their Florida colleagues; www.judicialselection.us/judicial_selection/reform_efforts/opinion_polls_surveys.cfm?state=.

parties involved in the pending case, recusal is unnecessary. (It is of interest in this context that there is no formal code of judicial conduct governing federal judges, nor a judicial disciplinary body to oversee them, as there is for most state judiciaries.) State judicial disciplinary bodies may take a different approach. The newly amended ABA Model Code of Judicial Conduct reflects carefully crafted restrictions on the conduct of judicial candidates, while affording appropriate free-speech protections – and added commentary expressly distinguishes the role of judges from that of legislators and officers of the executive branch.[25]

The relevance of the dispute over recusal becomes even greater when one considers the types of interests promoted by the principal participants in increasingly partisan state judicial contests. Political partisanship, as embodied by Democrats and Republicans, is only one part of the equation. One commentator has characterized interest groups as falling into "two broad categories. The first involves cultural and social issues – the 'God, gays and guns' groups . . . pressuring judicial candidates to commit themselves on issues such as abortion and capital punishment. . . . The other interest-group battle centers around tort liability."[26] According to that writer, the U.S. Chamber of Commerce reportedly spent approximately $120 million over the previous four years on judicial elections nationwide, and in 2004, the winner of every judicial election in which the Chamber of Commerce participated was the candidate supported by the Chamber.

The cost of judicial elections has been skyrocketing, suggesting that an effort is being made to cultivate a politically responsive judiciary along the lines of the other two branches of government – the political branches. This is not to say that the efforts have been aimed solely at partisan political issues, rather that the special interests often found actively involved in partisan political campaigns are participating with increasing regularity, and apparent effect, in judicial elections as well.

A study by James Sample and Lauren Jones outlined some of these trends.[27] In 2006, television advertisements were used in ten out of eleven state elections for supreme court seats, as compared to four out of eleven in 2000. Donors from the business community contributed $15.3 million to high-court candidates, as opposed to $7.4 million only six years earlier. Third-party interest groups spent an additional $8.5 million on such campaigns. In states in which there were contests that were entirely privately financed, five out of ten campaigns set spending records. Nor is this trend limited to state high courts. The spending record for the intermediate appellate court in Michigan quadrupled when business interests and trial lawyers spent a total of $3.3 million on two candidates for a seat on that court.

At a time of increasing concern about the impact of these changes in judicial campaign practices, it has become apparent that recusal as it exists will not serve as a simple curative solution. Stan-

25 ABA Model Code of Judicial Conduct, Canon 4 cmt., 2007.

26 Zach Patton, "Robe Warriors," Governing .com, March 2006, http://www.governing.com/articles/0703judges.htm.

27 James Sample, Lauren Jones, and Rachel Weiss, *The New Politics of Judicial Elections 2006* (Washington, D.C.: Justice at Stake, 2007); www.justiceatstake.org/files/NewPoliticsofJudicialElections2006.pdf.

dards vary, and the mechanisms for determining whether recusal is appropriate are not always clear. In the U.S. Supreme Court, such a determination is solely up to the individual justice, and there is no requirement that the reason for a particular recusal be announced.

In the California Supreme Court, each justice maintains a list of potential bases for recusal, relating typically to investments and familial relationships. Additional grounds may give rise to a decision not to sit on an individual case. The justices alone determine whether recusal is appropriate, guided by the California Code of Judicial Ethics.[28] Trial-court judges may be disqualified "peremptorily" under defined circumstances[29] or may disqualify themselves voluntarily.[30] A mechanism also exists under which, if a challenged judge does not agree that recusal is necessary or appropriate, another judge, either agreed upon by the parties or selected by California's chief justice in his or her role as chair of the Judicial Council, shall hear the matter.[31]

A recent publication by the Brennan Center for Justice describes some of the difficulties caused by uncertain recusal procedures and standards and provides a list of proposed reforms. Only time will tell whether new and effective reforms will be implemented – and what effect they will have on the administration of justice. The interrelationship between contested elections and recusal procedures is complex and merits close examination. It is argued that voters should be entitled to learn about a judicial candidate's views so that the electorate may anticipate how he or she will vote on issues of interest to the voter. Individuals and institutions who share the views of a judge on certain issues, such as tort law or abortion, are more likely to be among those who will make contributions to a judicial campaign supporting that judge. Those contributions, based upon shared values, ultimately and necessarily may result in the disqualification of the judge whose views the contributor wishes to advance. At the same time, what is the impact on the judge of anticipating the next electoral contest and the need to engage in fund-raising? It is time to reinforce the notion – imperfect though it may be – that although judges bring their predispositions and their experience and history with them when they join the bench, they should aspire to employ an open mind that decides cases based on the law and the facts presented to them in the matter at hand.

There may be some promising signs among the negative developments described above. In November 2006, a measure entitled the Judicial Accountability Initiative Law[32] on the South Dakota ballot was defeated. The initials, of course, spelled out the not-too-subtle acronym JAIL, and the measure was referred to as "jail for judges." This measure would have imposed civil and criminal penalties on judges for broadly defined judicial "misconduct." Although the campaign for the proposal started with a strong showing in the polls, a concerted effort by both political parties in the legislature, government and

28 See California Constitution, article VI, section 18, subdivision (m).

29 California Civil Procedure Code, section 170.6.

30 Ibid., section 170.1.

31 Ibid., section 170.1, subdivision (c).

32 Proposed South Dakota Judicial Accountability Act, section 2; at http://www.calbar.ca.gov/calbar/pdfs/sections/litigation/callitvol19n3_south-dakota_constitutional-amendment-e.pdf.

community leaders, and leading news sources contributed to its overwhelming defeat.

This development offers hope that efforts to educate the public about the role of the courts may be successful. Other recent events suggest that the search for methods to ensure fair and impartial courts also may not be in vain. For example, in May 2008 the U.S. Court of Appeals for the Fourth Circuit upheld a North Carolina system of public financing for elections to seats on the state court of appeals and supreme court.[33] In April 2007, New Mexico also began a fully publicly funded system for judicial elections.

But challenges remain. As a jurist for more than half my life, I function within the reality of a judicial community in which there exists a true reverence toward, and commitment to, the judicial process. Scholars may argue about the true influences affecting judicial decision-making (including a judge's background and education) but in my experience, on a day-to-day basis, with markedly few exceptions, judges do their best to be fair, to bring objectivity to their application of the law, and to abide by the precepts of the law. It also is apparent that no matter how long and how well one has served as a judge, a single decision – or lack of decision – disliked by a segment of the population willing to make enough noise, can threaten to terminate the career of a jurist.

Glimpses into some of the challenges currently facing judges can leave one with a disorienting sense of "damned if you do and damned if you don't." In the course of judicial election campaigns, sitting judges have been accused of breaking the law, improperly making law, and even failing to prevent a law from being enacted, all based upon the bottom line of their decisions, no matter how compelled those decisions may have been by applicable law. But perhaps most significantly, there seems to be a growing disconnect between two irreconcilable currents. On the one hand is the aspiration for a judicial system free of partisan or otherwise inappropriate pressures – a system revered by most of those serving in the judicial branch and the bar, and a fundamental precept of the founding fathers of our nation. On the other is a desire by a segment of the public for a system in which judges mirror the current (and sometimes shifting) views of the population.

There have been complaints about the decisions and the role of judges for as long as I have served on the bench – and for many years before. Court decisions are criticized as too deferential to our sister branches, to the governor who initially appointed us, or to the legislature that provides our budget. Others assert that courts are in the pocket of business interests, social engineers, trial lawyers, or any group on the side they oppose.

Criticism is part of the process. But it should be a matter of concern to everyone that the recent conduct of many judicial campaigns can only heighten the perception that state courts function as no more than just another political arm of our three-pronged system of government; that state judges will come to be viewed, like legislators and elected state executive officers, through the lens of the political party to which they belong; and that in deciding cases, courts will be expected to look not to the constitution, to the laws, and to precedent, but instead to pay heed to the public will of the moment. More than 95 percent of court cases are filed in the state courts.

33 *North Carolina Right to Life v. Leake*, No. 07-1454, 2008 U.S. App. Lexis 9413 (4th Cir. May 1, 2008).

The entire notion of a fair, impartial system of adjudication available to all those who need its services – whether for a marital dissolution, to settle a parking ticket, to determine rights under a contract, to protect one's civil rights, or to award compensation for injuries caused by the wrongs of another – will be diminished if election to judicial positions becomes no different from election to legislative or executive branch positions.

The perception of political influence on state judiciaries will affect not only the state courts, but the administration of justice on the federal level as well. Once the public becomes accustomed to viewing state judges and their decisions in the context of public campaign rhetoric or the identity of the political forces and special-interest groups backing particular jurists, it is inevitable that public confidence in the impartiality of its judges – state and federal – will decline. In short, state-court elections matter – not simply to individual candidates, courts, and states. They matter to all of us who are interested in the rule of law and in the importance of impartial courts.

As new procedures evolve to guide judicial candidates and to govern judicial elections, recusal, and disqualification, it is vital that we engage the public at large in the discussion of these topics. In doing so, we must reinforce the principle that a partisan judiciary will not serve the interests of our nation – and that we are all best served by a strong, impartial judicial branch.