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Judicial Campaign Financing: An Ever Present Threat to Judicial Independence

By: Sarah Jane Morath, Esq.

“Judicial independence doesn’t mean you decide the way you want. Independence means you decide according to the law and the facts. The law and the facts do not include deciding according to campaign contributions.”¹

-Justice Steven Breyer

The different processes by which state judges are selected is an increasingly popular topic for discussion amongst legal scholars and practitioners. While many law review articles and discussions advocate for one method of judicial selection over the other, this article addresses one specific and significant concern with the elective method: campaign financing.² As this article explains, campaign financing can impair judicial independence and inhibit fair and impartial decisions. Fortunately, the appointive system is insulated from the pressures and problems associated with campaign financing, a benefit which is all the more evident today when everyone, including judges, face difficult economic times. More importantly, however, because an appointive system does not involve campaign financing, judicial independence is best preserved in states like Maine where state judges are appointed, rather than elected.

Introduction

The American Bar Association (ABA) Model Code of Judicial Conduct states: “our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us.”³ Judges are required to avoid conduct that appears improper, and to perform their duties impartially, without bias or prejudice.⁴ While all judges strive to remain independent and guard against outside influences, judges who are elected to the bench

must be even more vigilant. The reason: these judges must partake in fundraising. Can a judge raise money for his or her campaign and remain an independent arbiter of the facts and law? The public seems to think no. A 2001 national survey found that 8 of 10 persons believe campaign contributions made to judges have a great deal or some influence on a judges' decision.⁵ When wealthy contributors can sway judicial decisions, judicial independence is in jeopardy.⁶

The Different Methods of Judicial Selection

The debate over which method of judicial selection is best is as old as this country itself. During the ratification of the Constitution, the founding fathers discussed the topic extensively. Alexander Hamilton believed that, "the complete independence of the courts of justice is peculiarly essential in a limited Constitution."⁷ In particular, the debate centered on which method, judicial elections or judicial appointments, would better preserve judicial independence. Perhaps the most vocal proponent for lifetime judicial appointments, Hamilton argued that citizens were maximally protected when judges were free from external influences. He stated:

"This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which...have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. . ."⁸

While Hamilton may have been speaking about the federal judiciary, judicial independence at the state level was also important. Regardless of the court, the appointive system was the clear preference and all of the original thirteen states adopted such a system for their state courts.⁹ Eight of these states gave the appointive power directly to the legislature, while in the other five, governors appointed judges, subject to confirmation by the legislature.¹⁰

The advent of Andrew Jackson's presidency saw a shift away from judicial appointments towards judicial elections. Jackson's populist message was very much at odds with the appointive system and judicial accountability quickly overtook its competing interest, judicial independence.¹¹ Every state entering the union after 1832 adopted constitutions that provided for judicial elections.¹² Today 87 percent of state appellate and trial judges are selected through an election process.¹³ Thirty-eight states have some type of judicial elections in their high state courts.¹⁴

Merit selection, or the "Missouri Plan," is a third alternative to the appointive and elective systems and combines aspects of both systems. This method was first adopted by Missouri in 1940¹⁵ and consists of the following: 1). selection of a nonpartisan judicial nominating commission; 2). a list of judicial nominees compiled by the commission and presented to the appointing authority, usually the governor; and 3). the selection and appointment of a nominee.¹⁶ After serving an initial term, a judge stands for a "retention election," an uncontested election where a 'yes' vote simply allows a judge to continue serving on the bench for a full term.¹⁷ There are some concerns with this method for its success depends on the composition and powers of the nominating commission and judges are still required to stand for election at some point.¹⁸ Still, twenty states use some form of merit selection in choosing judges.¹⁹

The pure appointment of judges is, in this author's opinion, the best way to maintain a truly independent judiciary; yet, only six states employ this method.²⁰ Coincidentally, these states, Maine, New Hampshire, New Jersey, Rhode Island, South Carolina and Virginia, were part of the original thirteen colonies. The appointing power, the legislature or the governor, varies amongst these states. For example, in New Jersey judges are appointed by the governor to serve

an initial seven-year term and confirmed by the senate. Judges can then be appointed for life.²¹ While in Virginia, judges are appointed to twelve-year terms through a majority vote of the members of each house of its General Assembly.²² Here in Maine, the governor appoints judges to a seven-year term. The appointment is subject to confirmation by a legislative committee whose decision can be reviewed by the senate.²³ After serving seven years, a judge may be reappointed by the governor to another seven-year term.

The Model Code of Judicial Conduct

The ABA Model Code of Judicial Conduct (Model Code) serves as a guide for all judges, whether appointed or elected. The Model Code sets forth several canons establishing the “standards for ethical conduct of judges.”²⁴ Canon 3 reads, “[a] judge shall perform the duties of judicial office impartially and with dignity.”²⁵ As stated in the preamble of the Model Code, “when the text uses ‘shall,’ it is intended to impose binding obligations the violation of which can result in disciplinary action.”²⁶ Thus, a judge must remain impartial and act with dignity.

In performing duties impartially and with dignity, a judge must act “without bias or prejudice.”²⁷ Commentary 2, further explains Canon 3 by stating that, “a judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.”²⁸

While most parties to a lawsuit assume the judge overseeing their case will be impartial, few know that this is a requirement. In *Ward v. The Village of Monroeville*, 409 U.S. 51 (1972), the Supreme Court held that litigants are constitutionally entitled to proceed before a “neutral and detached judge.”²⁹ A judge who will interpret and apply the law impartially and fairly is what the judicial system mandates, and Americans expect. Selecting judges by an elective

process, however, infringes on an independent judiciary. In particular, the financial aspect of judicial elections is making it increasingly more difficult for judges to remain impartial and fair, and therefore independent.

Campaign Financing

Judicial campaign financing affects judicial independence in several ways. First, the cost of running a judicial campaign is escalating into the millions of dollars. To be a viable contender, judicial candidates must rely on contributions from attorneys and litigants who may appear before them. Second, the expense of a judicial campaign excludes qualified candidates and limits the diversity of the bench. Third, the solicitation of funds by a judge not only gives the impression of impropriety, but can also result in impropriety.

The Million-Dollar Judge

The amount of money spent on judicial campaigns in recent years is staggering and million dollar campaigns now the norm. In 1994, a successful Michigan Supreme Court candidate raised \$180,000; in 1998 the winning candidate raised over \$1 million.³⁰ The highest amount spent in the 1998 North Carolina Supreme Court race was \$90,300; in 2001, the amount was up to \$1,000,000.³¹ In 1996, a candidate spent \$2.1 million to run for a seat on the Alabama Supreme Court; just ten years earlier the campaigning judge raised \$237,000.³² These statistics show a dramatic increase in campaign spending across the country.

Because very few judicial candidates have pockets deep enough to run a campaign on their wealth alone, most are forced to raise money. Outside contributions can come from lawyers, prospective litigants, or organizations with an economic or political interest in the outcome of cases. A study cited by the ABA, found that 28.1 percent of total contributions to state Supreme Court races came from lawyers and undifferentiated lobbyists.³³ 23.7 percent of

the contributions came from interest groups that included general business, real estate and insurance, energy and natural resources, construction, health, labor, transportation, agriculture.³⁴ A separate 2002 study conducted by the Brennan Center for Justice and the National Institute on Money in State Politics was able to ascertain the donors of 76 percent of the contributions to high court races between 1989 and 2000. The study revealed that lawyers were responsible for 29 percent of the contributions, while 19.8 percent came from general business.³⁵

Similarly, state studies reveal lawyers and businesses as significant sources of campaign contributions. One candidate in Illinois accepted \$80,000 from ten personal injury law firms, and another \$35,000 from a single real estate developer.³⁶ A California study found that in 1995, 45 percent of the contributions to Los Angeles County Superior Court races came from lawyers.³⁷ Because of their obvious interest in the outcome of litigation, it is not surprising that attorneys and businesses make large contributions to judicial candidates.

When contributions are insufficient, many candidates take out personal loans. 6.4 percent of the total funding for state Supreme Court races came from the candidates themselves.³⁸ A study of North Carolina trial court races found that 75 percent of women candidates and 67 percent of male candidates reported receiving personal loans from banks, family members, or personal finances.³⁹ Given the current state of the economy, one can only expect that those judges required to take out loans will increase.

In states with judicial elections, a little money will always be part of the mix; it is needed for advertising, staff salaries, and office expenses. An effective judicial campaign today, however, requires more than just a little money. A judicial candidate must have a combination of the following: independent wealth, the ability to solicit large contributions, and a willingness

to assume significant loans. Candidates who are either unable or unwilling to acquire excessive amounts of money for their campaign are severely disadvantaged.

Exclusion of Qualified Candidates

Judicial candidates are expected to demonstrate “a competent mastery of the law, good moral character, intelligence, impartiality, emotional stability, courtesy, decisiveness, and administrative ability.”⁴⁰ The ability to raise money, which has no relation to these qualities, has become an additional “must have” trait of today’s elected judge. Donors play an important part in campaign funding, and those without connections to the wealthy cannot rely on this sector for contributions.

Studies show that those with limited connections to the wealthy are often people of color. An ABA Commission Hearing found that “‘ten wealthy and largely white’ [Wisconsin] zip codes generated 43.3 percent of all contributions, while ten zip codes ‘where people of color comprised the majority’ were responsible for only 1.8 percent.”⁴¹ The result is an elected bench that is unrepresentative of America’s diverse population. In fact, elected state judiciaries are less diverse than their appointed federal counterparts.⁴² As of 1997, only 3.8 percent of state court judges were African-American, while as of 1999, only 2 percent of state court judges were Hispanic.⁴³

While there are many reasons for the lack of diversity on the bench, wealth is certainly a contributing factor. The ABA summed up the problem when it stated “there is a legitimate cause for concern that privately funded campaigns may limit access to judicial office for all candidates, of color or otherwise, who derive their support from less affluent communities that are unlikely to make significant financial contributions to judicial races.”⁴⁴ Qualifications, not connections, should provide the foundation of a successful judicial campaign.

Some judges, while able to solicit the necessary campaign funds, chose not to do so. Many feel that it is unethical to accept contributions from individuals and groups that might appear before him or her and abstain from doing so. Concern over the appearance of impropriety has caused judges to leave the judicial profession altogether. For example, former Texas Supreme Court Justice Bob Gammage quit after one term because he believed campaigning corrupts an independent judiciary. It was his experience that “[p]eople don’t go pour money into contributions because they want fair and impartial treatment...They pump money into campaigns because they want things to go their way.”⁴⁵ If judges believe the election process compromises impartial and unbiased results, perhaps this method of selection is not the best.

The ABA recognizes that “the size of a judicial candidate’s campaign war chest is an imperfect indicator of that candidate’s qualification...the war chest, nevertheless exerts an often decisive impact on election results.”⁴⁶ Due to the size of today’s war chest, capable and competent candidates cannot run for judicial office or choose not to. An independent judiciary requires more than just wealthy and well-connected judicial candidates.

Perception of Judges

In addition to eliminating qualified judges, campaign financing undermines the public’s confidence in the objectivity of the judicial system. The public perception is that campaign contributions sway judges.⁴⁷ A 2001 national survey conducted by Justice at Stake, a nonpartisan campaign focused on keeping courts fair and impartial, found that 76 percent of those polled believed that campaign contributions have a great deal or some influence on judicial decisions.⁴⁸ This same organization found that 85% of African American’s polled believe there are “two systems of justice--one for the rich and powerful and one for everyone else.”⁴⁹

Surveys conducted by individual states offer similar opinions. In a Louisiana survey, 56 percent of voters thought campaign contributions influenced judicial decisions, and only 33 percent thought that judges for the most part rule impartially.⁵⁰ Nine out of ten Ohio residents believed that campaign contributions influenced judicial decisions.⁵¹ A poll conducted in Pennsylvania found that nine out of ten voters believed that judicial decisions were influenced by large campaign contributions.⁵² 85 percent of the respondents of an Illinois survey agreed that campaign contributions influenced the decisions of judges.⁵³ The prevailing public opinion is that justice is based on monetary contributions, rather than the law.

The perception that judges are influenced by contributions exists within the judicial profession, as well. A national survey of state judges conducted by Justice at Stake found that 35 out of 73 (almost 48 percent) state supreme court judges polled believe that campaign contributions have a great deal or some influence on judicial decisions.⁵⁴

While most judges are able to remain impartial when supporters come before them, the temptation to do otherwise still exists. One Los Angeles trial judge stated, “it is always in the back of my mind who gave me...a large contribution and who didn’t.”⁵⁵ This judge goes on to state that while he tries not to let contributions influence his judgment, “it offers the appearance that perhaps judges are for sale.”⁵⁶ Echoing this sentiment, a Maryland judicial candidate stated, “[t]here is a perception that if you contribute money, there’s a payback down the road.”⁵⁷ When the public believes that judges are likely to be influenced by contributions, and judges must make a concerted effort to remain impartial, the “independent spirit” of American judiciary has been lost.

Conclusion

An independent judicial system is essential to a healthy state judiciary. But, judicial independence is severely compromised in states where judicial candidates must engage in fundraising activities. As one critic surmised, “judicial independence declines in direct proportion to a judge’s dependence on others for financial support and other assistance needed to gain and retain the judicial office.”⁵⁸

Judicial candidates are left with few options and must solicit funds from individuals and groups seeking favors in return and take out loans, or avoid running all together. The result is a bench lacking diversity and a public whose confidence in the judicial system is declining. Restoring an independent judiciary in those states, at a minimum, requires a change in the way judicial campaigns are currently financed.

Attempts have been made to curtail the cost of elections through the use of public funding and the implementation of fundraising limits. North Carolina, for example, provides full public funding for judicial candidates who accept funding and fundraising limits.⁵⁹ Texas has enacted the Judicial Campaign Fairness Act, limiting campaign contributions from individuals, law firms, and political action committies.⁶⁰ While public funding and contribution limits are helpful, the best alternative is the abandonment of the elective system altogether and the adoption of an appointive judicial selection process.

Maine is fortunate to have an appointive system already in place. An impartial and independent judiciary is better maintained and the appearance of impropriety easier to avoid. Maine judges are not forced to raise huge sums of money, and they are not distracted by campaign contributions. In addition, this method is immune from changes in the economic climate. Maine citizens can be confident that judicial decisions are made according to the facts

and the law, and not the wishes of some large donor. An independent judiciary in Maine is not only aspirational, it is achievable.

¹ <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html> (last visited June 30, 2008).

² For example, the cost of judicial elections for a seat on the Montana Supreme Court has doubled. The average in 1996 was \$138,460, up from \$63,647 in 1984. See American Bar Association Standing Committee on Judicial Independence, *Report of the Commission of Public Financing of Judicial Campaigns* 12 (February 2002) [hereinafter *Judicial Campaigns*], available at www.abanet.org/judind/pdf/commissionreport4-03.pdf (last visited June 30, 2008).

³ Model Code of Judicial Conduct, Preamble [1], [hereinafter Model Code] available in Thomas D. Morgan & Ronald D. Rotunda, *2005 Selected Standards on Professional Responsibility* 587 (Foundation Press ed., 2005).

⁴ Model Code, Canon 2, Commentary [1] and Canon 3 Commentary [2]; see also Morgan & Rotunda at 591 & 594.

⁵ National Center for State Courts, *Call to Action: Statement of the National Summit on Improving Judicial Selection* 59 (2002) [hereinafter *Call to Action*], available at www.ncsconline.org/D_Research/CallToActionCommentary.pdf (last visited June 30, 2008).

⁶ See William H. Pryor, Jr., *Judicial Independence and the Lesson of History*, 68 ALA. LAW. 389, 390 (2007) explaining two kinds of judicial independence: decisions independence and institutional independence. Decisional independence concerns a judge's ability to decide cases fairly and impartially, relying on the facts and law. Institutional independence is the ability of the judiciary, as a separate branch of government, to remain independent. When the author of this article refers to judicial independence, she is referencing the decisional independence of a judge.

⁷ THE FEDERALIST NO. 78, at 226-27 (Alexander Hamilton) (Roy P. Fairfield ed., 2nd ed., John Hopkins Univ. Press 1981).

⁸ *Id.* at 23; see also <http://www.pbs.org/wgbh/pages/frontline/shows/justice/howdid/hamilton.html> (last visited June 30, 2008).

⁹ Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 12 (1995).

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- ¹⁰ The Federalist Society, *Judicial Selection White Papers: The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 357 (2002) [hereinafter *Judicial Selection White Papers*].
- ¹¹ *Judicial Campaigns*, *supra* note 2, at 4-5.
- ¹² *Judicial Selection White Papers*, *supra* note 10, at 358.
- ¹³ National Center for State Courts, *Call to Action: Statement of the National Summit on Improving Judicial Selection* 7 (expanded ed. 2002) [hereinafter *Call to Action*], available at http://www.ncsconlin.org/D_Research/CallToActionCompendary.pdf (last visited June 11, 2008); *see also Judicial Campaigns*, *supra* note 2, at 1.
- ¹⁴ <http://www.abanet.org/judind/jeopardy/fact.html> (last visited June 30, 2008). Alabama, Illinois, Louisiana, Pennsylvania, Texas, and West Virginia have partisan elections. Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Washington and Wisconsin have nonpartisan elections. Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah and Wyoming have uncontested retention elections after initial appointments; *see also* 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, 277 (2002).
- ¹⁵ Samuel Latham Grimes, "Without Favor, Denial, or Delay": Will North Carolina Finally Adopt the Merit Selection of Judges, 76 N.C. L. REV. 2266, 2273 (1998).
- ¹⁶ Behrens & Silverman, *supra* note 14, at 301.
- ¹⁷ *Id.*
- ¹⁸ *Judicial Selection White Papers*, *supra* note 10, at 363.
- ¹⁹ Grimes, *supra* note 15, 2273.
- ²⁰ Webster, *supra* note 9, at 12.
- ²¹ *See* N.J. Const. art. VI, 1.
- ²² *See* Va. Const. art VI, 7.
- ²³ *See* Me. Const. art V, 8.
- ²⁴ Model Code, Preamble [1]; *see also* Morgan & Rotunda, *supra* note 3, at 587.
- ²⁵ *Id.* Canon 3.
- ²⁶ *Id.* Preamble [2].
- ²⁷ *Id.* Canon 3B(5).
- ²⁸ *Id.* Canon 3, Commentary [2].
- ²⁹ David Barnhizer, *On the Make: Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 371 (2001) citing to *Ward v. Village of Monroeville*, 409 U.S. 51, 52 (1972).
- ³⁰ Alfred P. Carolton, *Preserving Judicial Independence—An Exegesis*, 29 FORDHAM URB. L.J. 835, 846 (2002).
- ³¹ *Id.*
- ³² *Id.* at 847.
- ³³ *Judicial Campaigns*, *supra* note 2, at 13.
- ³⁴ *Id.*
- ³⁵ American Bar Association Commission on the 21st Century Judiciary, *Justice in Jeopardy* 24 (July 2003) [hereinafter *Justice in Jeopardy*], available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf> (last visited June 30, 2008).
- ³⁶ *Judicial Campaigns*, *supra* note 2, at 13.
- ³⁷ *Id.* at 14.
- ³⁸ *Id.* at 16.
- ³⁹ Traciell V. Reid, *Judicial Elections Versus Merit Selection: The Competitiveness of Female Candidates in Judicial Elections: An Analysis of the North Carolina Trial Court Races*, 67 ALB. L. REV. 829, 837 (2004).
- ⁴⁰ Behrens & Silverman, *supra* note 14, at 287.

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- ⁴¹ *Judicial Campaigns*, *supra* note 2, at 25.
- ⁴² James Andrew Wynn & Eli Paul Mazur, *Judicial Elections Versus Merit Selection: Judicial Diversity: Where Independence and Accountability Meet*, 67 *Alb. L. Rev.* 775, 787-788 (2004).
- ⁴³ *Id.* at 781, n.24.
- ⁴⁴ *Judicial Campaigns*, *supra* note 2, at 25.
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*
- ⁴⁷ *Id.* at 20.
- ⁴⁸ <http://www.justiceatstake.org/contentViewer.asp?breadcrumb=5,128,254> (last visited July 1, 2008).
- ⁴⁹ *Justice in Jeopardy*, *supra* note 35, at 41.
- ⁵⁰ *Judicial Campaigns*, *supra* note 10, at 21.
- ⁵¹ *Id.* at 22.
- ⁵² *Justice in Jeopardy*, *supra* note 35, at 25.
- ⁵³ *Id.*
- ⁵⁴ <http://www.justiceatstake.org/contentViewer.asp?breadcrumb=5,128,253> (last visited July 1, 2008).
- ⁵⁵ *Judicial Campaigns*, *supra* note 5, at 20.
- ⁵⁶ *Id.* at 21.
- ⁵⁷ *Justice in Jeopardy*, *supra* n. 35 at 25-26.
- ⁵⁸ Barnhizer, *supra* note 29, at 370.
- ⁵⁹ *Call to Action*, *supra* note 5, at 61.
- ⁶⁰ *Id.* at 63.