



**Judges Under Attack:
Ethically Appropriate Activity in Retention Elections
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**The Foreboding National Trends in Judicial Elections
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The winds of change are blowing in judicial elections.

Today, fourteen states and the District of Columbia use a merit selection process. Another seven states have opted to appoint their state judiciaries. Eight states use partisan elections and thirteen use nonpartisan elections. The other nine states use a combination of methods, and are often referred to as “hybrid” systems.² In total, 39 states use some form of judicial election. For state trial courts, 76% of judges are elected to their initial term, and 88% face the voters for subsequent terms on the bench. For state appellate courts, 53% of judges are elected to their initial term, and 89% face the voters for subsequent terms on the bench.³ It’s important to realize just how many judges will be affected by today’s trends in judicial elections – the changes that are happening right now will have consequences. Those consequences are not isolated in a few particularly egregious states – the consequences will be seen across the country.

So, what are the trends in judicial elections? I’d like to address four interrelated trends: (1) more money; (2) more organized interests; (3) more attacks; and (4) more political speech after *White*.

First, over the past several years, the costs of judicial elections have risen dramatically. Pennsylvania (an anomaly of sorts, since it’s the only state to hold judicial elections in odd-numbered years) has served as a type of guinea pig. Every two years, we watch Pennsylvania to see what will happen a year later in other states. In 2003,

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² American Judicature Society. Judicial Selection in the States: Appellate and General Jurisdiction Courts. Chicago, IL: American Judicature Society, 2003.

³ Schotland, Roy A. “Should Judges Be More Like Politicians?” Court Review Spring 2002.

Pennsylvanians elected one Supreme Court justice and three Superior Court judges. The Pennsylvania Supreme Court race attracted more money than any other judicial contest in the '02-03 election cycle – a combined \$3.34 million.⁴

Indeed, Pennsylvania showed us the trend. During the 2004 election cycle, state Supreme Court candidates raised over \$42 million dollars for their campaigns.⁵ That's a significant increase from the 2002 total of \$29 million.⁶ Total spending in Supreme Court races, however, peaked in 2000, when candidates spent a total of \$45 million nationwide.⁷

In Illinois, West Virginia, and Alabama, 2004 was the most costly judicial campaign cycle in their history.⁸ Among the 14 other states that held Supreme Court elections in 2004 (after eliminating the outliers of Illinois, West Virginia, and Alabama), a study of candidate spending finds that from 2000-2002, spending increased 167%. Between 2002 and 2004, spending increased an additional 163% on average.⁹ There's no doubt that judicial elections over the past decade have seen unprecedented amounts of money.

As Michael Sherer put it in a September 2002 issue of *The Nation*, “the flood of money is driven by a fierce battle over judicial philosophy that has pitted trial lawyers, consumer advocates and unions against corporations, their attorneys, and their trade associations.”¹⁰

This brings us to the second part of the story – the increased involvement of organized interests.

⁴ Pennsylvanians for Modern Courts. “As Pennsylvania Goes, So Goes the Nation: A Case Study of a Supreme Court Election in the Post-White Era.” Pennsylvanians for Modern Courts, 2004. Available at: <http://www.pmconline.org/pagoesthenation.htm>.

⁵ Justice at Stake Campaign. “2004 State Supreme Court Election Overview.” Washington, D.C.: Justice at Stake Campaign, March 9, 2005.

⁶ Justice at Stake Campaign. “2004 State Supreme Court Election Overview.” Washington, D.C.: Justice at Stake Campaign, March 9, 2005.

⁷ Common Cause of Ohio. “The Politicization of the Judiciary.” Common Cause of Ohio, 2005. Available at: <http://www.commoncause-ohio.org/ccause/page1.htm?ccause/issues-judiciary.htm>. See also National Center for State Courts. “Call to Action: Statement of the National Summit On Improving Judicial Selection” Williamsburg: National Center for State Courts, 2002.

⁸ Justice at Stake Campaign. “Justice at Stake Assesses Highs and Lows From 2004 State Supreme Court Election Campaigns.” Washington, D.C.: Justice at Stake Campaign, November 23, 2004.

⁹ Caufield, Rachel Paine. “In the Wake of White: Reevaluation and Revision of State Codes of Judicial Conduct and its Effects on Candidate Speech and Campaign Costs.” Paper presented at the 2005 Annual Meeting of the Midwest Political Science Association, Chicago, IL.

¹⁰ Scherer, Michael. “State Judges for Sale” *The Nation* Sept. 2, 2002.

The group best known for its role in judicial elections is the U.S. Chamber of Commerce and its state affiliates. Prior to the 2000 elections, the Chamber of Commerce had never intervened in state judicial elections.¹¹

But in 2000, the Chamber spent over \$10 million in judicial races in eight states, focusing the majority of their attention on Ohio and Mississippi.¹² According to reports from the Associated Press, the Chamber spent a combined \$6 million on races in Alabama, Michigan, Mississippi, and Ohio in 2000.¹³ In Alabama, all of the Chamber's preferred candidates were elected. In Mississippi, Chamber candidates won two of the four races.¹⁴

Since 2000, the Chamber's involvement in judicial elections has increased steadily. The Chamber has regularly created alliances with dozens of organizations around the country in their efforts to elect pro-business judges. In 2002, the Chamber gave \$2.6 million to the American Taxpayers Alliance to run ads attacking a democratic Supreme Court candidate in Illinois.¹⁵ Also in 2002, the Chamber gave funds to a group called Mississippians for Economic Progress to run ads attacking a Democratic Supreme Court Justice in Mississippi, Chuck McRae.¹⁶

What is particularly noteworthy about the participation of organized interests in judicial elections is their spending on television advertising. In 2004, television advertising in judicial elections spread to 15 states (remember that a total of 17 states had Supreme Court elections in 2004), costing a combined total of \$21 million.¹⁷ That's a significant increase from what we saw in 2000, when television advertising was only used in four states, and 2002, when a combined \$10 million was spent on television advertising by organized interests.¹⁸

Third – attacks.

The increase in money and organized interests, particularly business interests, has paved the way for more contentious judicial elections. Today's judicial elections are about more than candidates' qualifications. Instead, judges are being attacked in ways

¹¹ Common Cause of Ohio. "The Politicization of the Judiciary." Common Cause of Ohio, 2005. Available at: <http://www.commoncause-ohio.org/ccause/page1.htm?ccause/issues-judiciary.htm>.

¹² Common Cause of Ohio. "The Politicization of the Judiciary." Common Cause of Ohio, 2005. Available at: <http://www.commoncause-ohio.org/ccause/page1.htm?ccause/issues-judiciary.htm>.

¹³ Rizzo, Katherine. "Chamber Ads Failed in Ohio, Worked Elsewhere." The Associated Press, November 8, 2000.

¹⁴ Rizzo, Katherine. "Chamber Ads Failed in Ohio, Worked Elsewhere." The Associated Press, November 8, 2000.

¹⁵ Public Citizen. "Overview: U.S. Chamber of Commerce." Public Citizen 2005. Available at: http://www.stealthpacs.org/profile.cfm?print=print&org_id=43

¹⁶ Public Citizen. "Overview: U.S. Chamber of Commerce." Public Citizen 2005. Available at: http://www.stealthpacs.org/profile.cfm?print=print&org_id=43

¹⁷ Justice at Stake Campaign. "Justice at Stake Assesses Highs and Lows From 2004 State Supreme Court Election Campaigns." Washington, D.C.: Justice at Stake Campaign, November 23, 2004.

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that were previously reserved for legislative and executive campaigns. Often, the attacks are focused on one or two politically unpopular decisions. Consider, for example, the case of Justice Alice Robie Resnick in Ohio's 2002 Supreme Court race. Resnick was targeted for defeat by the Chamber of Commerce. Although both Resnick and her opponent, Terrence O'Donnell abided by a voluntary \$500,000 spending limit established by the Ohio Supreme Court, groups affiliated with and funded by the Chamber of Commerce poured millions of dollars into radio and television advertising attacking Justice Resnick's voting record, but also making claims that she allowed improper campaign contributions from trial lawyers and labor unions to sway her votes.¹⁹

The Chamber's media war against Justice Resnick was carried out by a Chamber-affiliated group called "Citizens for a Strong Ohio." The group ran TV ads in favor of Judge O'Donnell. But the group also sponsored two anti-Resnick advertisements that were widely condemned as "among the most demeaning ever witnessed in an Ohio Supreme Court contest."²⁰ One of these TV spots, known as "Lady Justice," used an image of piles of money showered on one side of the scales of justice while the voiceover charged that Justice Resnick had accepted \$750,000 in campaign contributions from trial lawyers and labor unions in exchange for her vote. The question was raised, "Is justice for sale in Ohio?"²¹

In another ad, the group suggested that Justice Resnick had switched her vote in a case involving wages for construction workers after an influential contributor complained. Justice Resnick managed to win reelection in spite of these attack ads, in large part because the Ohio Bar Association and many of the state's major newspapers publicly condemned the ads. Justice Resnick was "clearly dispirited by the campaign," according to Mark Kozlowski, "and noted that advertising such as that run by the Chamber would have the likely effect of making people 'think judges are politicians, that seats can be bought on courts."²²

More money and more organized interests equal more politically motivated attacks on judges and judicial candidates. Further exacerbating each of these trends is U.S. Supreme Court's ruling in *Republican Party of Minnesota v. White*. In declaring a portion of Minnesota's Canon 5, commonly referred to as the "announce clause," unconstitutional under the First Amendment, the Supreme Court opened the door for more politically contentious campaigns. By allowing judicial candidates to speak

¹⁹ Common Cause of Ohio. "The Politicization of the Judiciary." Common Cause of Ohio, 2005. Available at: <http://www.commoncause-ohio.org/ccause/page1.htm?ccause/issues-judiciary.htm>.

²⁰ Common Cause of Ohio. "The Politicization of the Judiciary." Common Cause of Ohio, 2005. Available at: <http://www.commoncause-ohio.org/ccause/page1.htm?ccause/issues-judiciary.htm>.

²¹ Common Cause of Ohio. "The Politicization of the Judiciary." Common Cause of Ohio, 2005. Available at: <http://www.commoncause-ohio.org/ccause/page1.htm?ccause/issues-judiciary.htm>.

²² Common Cause of Ohio. "The Politicization of the Judiciary." Common Cause of Ohio, 2005. Available at: <http://www.commoncause-ohio.org/ccause/page1.htm?ccause/issues-judiciary.htm>.

freely about political and legal issues, it is easy to understand WHY judicial campaigns are looking more and more like campaigns for the legislative and executive branches.

I want to be very clear about the fact that the trends we're witnessing pre-date *White*. After all, the most expensive round of state Supreme Court elections occurred in 2000, before *White*. And, the Chamber of Commerce began their coordinated push to elect business-friendly judges in 2000, before *White*. Nonetheless, *White* will certainly aggravate an already bad situation.

Interest groups are using the *White* decision to advance their interests in judicial campaigns. Consider, for example, the Family Trust Foundation, based in Lexington, KY. In September of 2004, this conservative group filed a lawsuit in Federal District Court alleging that the state's "commit clause," which bans candidates from statements that "commit or appear to commit candidates with respect to cases, controversies or issues that are likely to become before the court," is unconstitutional under the First Amendment guarantees to freedom of speech and freedom of association. The suit began when the group sought to collect and distribute information about judicial candidates' political views. Sending out surveys that asked candidates about a wide variety of issues, including cloning, pornography, and public displays of the Ten Commandments, they got few responses. Most judicial candidates declined to respond because they believed that they would be violating Kentucky's Code of Judicial Conduct if they did so. The District Court granted an emergency injunction, ruling that the "commit clause" (Canon 5B(1)(c)) did violate the U.S. Constitution, and the Federal Appeals Court upheld the decision on October 28, 2004.²³

Similar cases have been brought across the country, most notably in North Dakota, Indiana, and Alaska. Emily Heller notes a new trend of multi-state litigation, whereby groups that want to use surveys attempt to challenge judicial campaign restrictions in several states at once.²⁴ In fact, one man, James Bopp, Jr is lead counsel in all of the four cases – arguing that the Supreme Court's reasoning in *White* should be extended to "commit clauses" in the states.

What is particularly troubling about post-*White* environment is the rhetoric that is used in group appeals to further undermine restrictions on judicial campaign speech. Far from preserving the integrity of the courts, many groups are openly attacking judicial independence.

Here's just one example: An anti-tax group that calls itself the Nevadans' Judicial Information Committee (NVJIC) has urged voters to "look for candidates who are

²³ Musgrave, Beth. "Judicial Candidates Get OK to Express Political Opinions." Lexington Herald Leader Oct. 29, 2004.

²⁴ Heller, Emily. 2004. "Judicial Races Get Meaner." National Law Journal October 25, 2004. Available at: <http://www.law.com/jsp/article.jsp?id=1098217051328>.

courageous enough to answer the NVJIC questionnaire and not hide behind the...judicial canon prohibiting speech on issues of interest to the voters.”²⁵

Here’s another: The Christian Coalition of Georgia distributed a survey to all statewide judicial candidates asking them to provide their positions on homosexuality, abortion, prayer at public school graduation ceremonies, parental choice in education, and access to educational support for theology majors at the state’s universities. Only two of seven candidates responded to the survey. The Chairwoman of the Christian Coalition of Georgia said that “We hope we have more judicial candidates in the future who are willing to come forward with their judicial beliefs.”²⁶ She added that “We have increasing tensions between the people and the courts.”²⁷

Meanwhile, one of the candidates who did respond to the Christian Coalition’s survey was Grant Brantley (who agreed with the Coalition on all five issues).²⁸ Brantley’s aggressive campaign against incumbent Leah Ward Sears had already generated attention. Sears had signed an ethics pledge to voluntarily refrain from committing to a position on issues that could come before the court.²⁹ In one piece of campaign mail, Brantley said that Sears supported gay and lesbian marriage, despite the fact that the issue of gay and lesbian marriage had never come before the Georgia Supreme Court and Sears had never publicly commented on the issue. Brantley made the claim based entirely on the fact that Sears had been endorsed by Georgia Equality (a group supporting gay rights) and had complimented the Stonewall Bar Association (a group of gay lawyers). Responding to the controversy, a Brantley aide said that “I think all these things, even though she has not said ‘I support gay marriage,’ it’s clear she’s going in that direction.”³⁰

The lesson here is simple: looser campaign speech restrictions don’t just mean that a judicial candidate gets to *choose* whether or not to discuss their views on controversial legal and political issues. *All* judicial candidates can expect to encounter more and more issue-based campaigning – by groups or by other candidates – that undermines the independence of the judiciary.

As candidates and groups continue to challenge state restrictions on judicial candidates’ speech, and court decisions force the states to loosen their Codes to permit more candidate speech, the states will need to develop new tools to

²⁵ Nevadans’ Judicial Information Committee. “Questionnaire Responses: NVJIC Hints for Analyzing Candidate Responses.” Nevadans’ Judicial Information Committee, 2004. Available at: http://www.nvjic.com/artman/publish/article_60.shtml.

²⁶ “Christian Coalition Releases First Judge Survey.” Atlanta: The Associated Press, 2004.

²⁷ “Christian Coalition Releases First Judge Survey.” Atlanta: The Associated Press, 2004.

²⁸ “Christian Coalition Releases First Judge Survey.” Atlanta: The Associated Press, 2004.

²⁹ Pollack, Steven H. “Christian Coalition Tests Judicial Candidates.” *Fulton County Daily Report* May 14, 2004. Available at: <http://www.law.com/jsp/article.jsp?id=1084316026302>

³⁰ “Christian Coalition Releases First Judge Survey.” Atlanta: The Associated Press, 2004.

preserve the impartiality of the judiciary. As they sort through the judicial decisions that have shaped a new post-*White* electoral environment, states face difficult decisions about how to satisfy the public's demands for electoral accountability while still insulating the judiciary from overt political influence that would undermine the unique functional role of the courts.

Clearly, we're seeing a convergence of money and interest groups – and when you consider the full implications of *White*, we can expect continuing attacks.

I want to end by commenting on an often-quoted piece of Justice O'Connor's opinion in *White*. She writes that:

Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. ... If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.³¹

But O'Connor is missing one critical point: these trends are not unique to partisan and nonpartisan elections – increasingly the politics of judicial elections are being seen in retention elections as well (just ask Justices David Lannan and Penny White³² -- or, for that matter, Iowa's own Judge Neary or Judge Scieszinski).

This point is not missed by those on the front lines of today's judicial selection debate. In a paper that addressed the possibility of adopting a merit selection system in Minnesota, Stephen C. Aldrich (a judge in Minnesota's 4th Judicial District, Hennepin County, MN) argues that using retention elections would not fix the problem, instead, he contends that:

When nobody pays any attention to judicial elections, they provide stability. Once single-issue groups and moneyed interests discovered them, retention elections have been used successfully to attack judges for their controversial decisions. Big money and whisper campaigns show up at the last minute to target a particular judge without comparing that judge to a potential replacement. That happened to Supreme Court judges in California and Tennessee who issued controversial decisions in death penalty cases. Their records were distorted by special interest groups with

³¹ *Republican Party of Minnesota v. White* 536 U.S. 765 (2002).

³² Reid, Traci V. "The Politicization of Judicial Retention Elections: The Defeat of Justices Lannan and White." Research in Judicial Selection. Chicago: The American Judicature Society, 1999.

big money behind them.

Even worse, retention elections mean that every judge has to worry about opposition at every election. When no one is required to file as an individual challenger, no judge knows if there is a move to replace him or her until too late.³³

Already polls find that 71% of respondents believe that campaign contributions from interest groups are affecting judges' decisions. Among African-Americans, over 80% express concern about the role of campaign money in judicial elections.³⁴

Clearly, we need to think carefully about the proper balance between judicial independence and accountability – in any and all judicial elections – and consider how to best address the problems that we see. Hopefully, you will participate in that discussion.

³³ Aldrich, Stephen C. "Minnesota Judicial Elections: Better Than the 'Missouri Plan.'" Bench and Bar of Minnesota October 2002. Available at: <http://www2.mnbar.org/benchandbar/2002/oct02/lawyer-at-large.htm>.

³⁴ Justice at Stake Campaign. "Justice at Stake Assesses Highs and Lows From 2004 State Supreme Court Election Campaigns." Washington, D.C.: Justice at Stake Campaign, November 23, 2004.