

# SUMMIT ON IMPROVING JUDICIAL SELECTION

## INTRODUCTION: PERSONAL VIEWS

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Sergeant Friday's approach—"Just the facts"—is an important step toward meeting our problems. A striking achievement of the Summit is its unprecedented assembly of information about judicial elections. This step alone will, we hope, begin the regularized collection of the most needed data about judicial elections; e.g., how many judges initially enter service by appointment, how many judicial elections are contested, campaign finance data, etc.

I believe that we need to clear away two myths that cloud the scene. The two myths compete: One is the "denial myth," trying to deny how hugely election systems dominate our selection of state judges. This myth competes against the "distortion myth," which tries to paint the candidates in these elections as panderers who care more about campaign contributions than about justice or integrity.

The denial myth frequently surfaces in media coverage of judicial elections. Following are two recent examples: In September 2000, *USA Today* gave half of its editorial page to a debate over whether "Campaign Contributions Corrupt Judicial Races."<sup>1</sup> The debate's context was a list of the "21 States [that] elect their judges and state Supreme Court justices."<sup>2</sup> It wasn't *USA Today*'s fault, but the fault of their myth-making source, that the list didn't include the little states of California, Florida, Indiana, or fifteen others. Or in

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1. *Campaign Contributions Corrupt Judicial Races*, USA TODAY, Sept. 1, 2000, at 16A.

2. *Id.*

October 2000 the *Washington Post*, in a major article about conduct in judicial campaigns, reported that eight states have partisan supreme court elections—because that same myth-making source is in denial that there aren't a mere eight, but eleven states with partisan supreme court elections—including the little states of Michigan and Ohio, and another six with partisan elections for lower courts.<sup>3</sup>

The denial myth aims at making us feel better about judicial elections by pretending that there isn't that much to them. The competing distortion myth aims at making us feel worse about judicial elections—much worse—by pretending that a great many of the people who run for the bench and who cannot avoid the unsavory work of raising campaign funds, are involved in what is damned as “Payola Justice” or “Justice for Sale,” to use two of the titles of so-called “studies” attacking entire supreme courts.<sup>4</sup> Of all such studies,

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3. See George Lardner, Jr., *Speech Rights and Ethics Disputed in Judicial Races*, WASH. POST, Oct. 8, 2000, at A13.

4. *Ohio Supreme Court Justice For Sale*, N.E. OHIO AM. FRIENDS SERV. COMM., at [http://www.afsc.net/1\\_b\\_5.htm](http://www.afsc.net/1_b_5.htm) (last visited Feb. 24, 2001). See also, T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, THE PLAIN DEALER, Feb. 15, 2000, at 1A (pointing to the correlation between favorable rulings and contributions to justices' political campaigns); *Payola Justice: How Texas Supreme Court Justices Raise Money from Court Litigants*, TEXANS FOR PUB. JUSTICE, at <http://www.tpj.org/reports/payola/intro.html> (last visited Feb. 22, 2001) (discussing the links between campaign contributors and the upcoming docket of the Texas Supreme Court).

The leading myth is probably about the California voters' 1986 denial of retention to Chief Justice Rose Bird and the two fine justices that she took down with her, Joseph Grodin and Cruz Reynoso. That election set the record for spending in a judicial election, \$11.5 million—or in 1999 dollars, \$17.5 million. See Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 995, 2002 (1988). Of that sum, \$6,001,708 was spent by committees opposed to retention, and \$3,195,336 was spent by the justices and independent committees supporting them. See 7/1/86-12/31/86 CAMPAIGN RECEIPTS AND EXPENDITURES, PART 2: SUPREME COURT JUSTICES, CAL. FAIR POLITICAL PRACTICES COMM'N. (Apr. 1987) [hereinafter CAMPAIGN RECEIPTS].

The myth is that “[t]he media campaign against the justices received heavy contributions from big business interests that were angry with the court's decisions protecting consumers', tenants' and employees' rights. The supporters of the incumbent justices, on the other hand, had less resources . . . .” Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 985, 986 (1988). “The majority of these funds [in opposition to the justices] came from small contributions from individuals, but agricul-

I know of only one that has the integrity to note that just because a

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tural and business interests contributed a large proportion, with one contribution in the amount of \$100,000.” Judge Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2038 (1988). See also Scott D. Weiner, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 195 n.63 (1996) (mentioning the agricultural interest in the election due to “Chief Justice Bird’s role as Secretary of Agriculture”).

In fact, seventy-seven percent of the opposition’s \$6,001,708 came from contributions of less than \$250; of their larger contributions, twenty-five were over \$10,000, fourteen of which were from individuals including: Clint Eastwood (\$30,000); and attorney Richard Riordan (who later became Mayor of Los Angeles), who was responsible for the largest contribution in the entire \$11.4 million: \$116,001. See CAMPAIGN RECEIPTS *supra*. No state in the union matches California’s FPPC for effective disclosure reports.

In contrast to California’s undeniable flood of grassroots opposition to the justices, only thirty-two percent of the contributions to the justices and the independent committees supporting them, were small contributions. They did enjoy thirty-one over-\$10,000 contributions, eleven of which came from lawyers, law firms, or legal PACs. See *id.*

The myth about the money in the Rose Bird election is both distortion and denial: distortion to the extent that it blames corporations and the wealthy when seventy-seven percent of the funds came from the grassroots; and denial that there could be genuine, strong, and widespread outrage at a justice who put herself above the law. See generally Linde, *supra*, at 2002 (arguing that the California judicial campaign was both “exceptional” and “disturbing”).

May I add that I would have voted for Rose Bird, but before the election, I would have done all that I could to get her to resign. No one, I believe, has ever done as much damage to judicial independence in America as she did.

Whatever one’s view of the Rose Bird debacle, Tennessee’s 1996 denial of retention for Justice Penny White was unfair. The attack on White involved her vote in only one case, not an unyielding course of conduct. See *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996). That case involved a death sentence in which White had joined a strong majority of her court. See *id.* The Governor, Don Sundquist, and others who sought to defeat White in order to secure a vacancy on the court, exploited her vote in that one capital case as a weapon, and succeeded with a low-cost (of only about \$25,000) campaign of direct mail and mass faxing. See Stephen B. Bright, *Is Fairness Irrelevant? The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 11-13 (1997). Sundquist and the others who misled Tennessee’s voters damaged judicial independence. After Justice White was removed, Sundquist stated, “should a judge look over his shoulder about whether they’re going to be thrown out of office? I hope so.” Pamela Wade, *White’s Defeat Poses Legal Dilemma; How is a Replacement Justice Picked?*, COM. APPEAL (Memphis, Tenn.), Aug. 3, 1996, at A1.

justice received a contribution from a lawyer or a party and later voted on a case involving that lawyer or party—to use the scholarly words—“correlation is not causation.”<sup>5</sup>

Let me give one example of the distortion myth, the “Justice for Sale” attack on the Ohio Supreme Court by the American Friends Service Committee of Northern Ohio.<sup>6</sup> Brought out early this year and winning significant local press coverage—but not a mite of analysis—this “study” took the moral high road to report what it called the “compliance ratings” of the Ohio justices: that is, how often that each justice voted for the lawyers who had contributed to that justice’s campaigns; for example, Chief Justice Tom Moyer had a “compliance [with donors who are law firms] rating” of 74.8%.<sup>7</sup> The media coverage seemed to assume that such an analysis from such a source, about people who are so low as to engage in campaign fundraising, must be sound.

But consider just two facts about that study, and you decide whether you agree with me that the attackers lack integrity far more clearly than do their targets: First, for example, the study’s method gives Moyer a fifty percent compliance rating if, say, he got a fifty dollar contribution from one lawyer and voted for that lawyer’s side in a case, while at the same time voting against the other side which was represented by a lawyer who had given him \$5000—after all, Moyer had voted for a contributor half of the time. Is this honest muckraking or mudslinging? Just one other fact about that study needs mentioning: The most frequent contributor on the study’s list of contributing law firms was “AttyGen”—apparently (though not explicitly, and my efforts for clarification were unsuccessful), this “firm” consists of the members of the office of Ohio’s elective attor-

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5. Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. (forthcoming 2001). The most thorough study “docket-linked contributions” came out in May 2001, on the Wisconsin Supreme Court over 10 years and 481 cases; it “did not show any link between campaign contributions and the court’s decision.” The study was done by the National Institute for Money in State Politics, for Wisconsin Citizen Action. See *Personal Wealth Fueled Campaigns, Study Says; Lawyers Account for Second-Largest Source of Funds to Justices’ Races*, MILWAUKEE JOURNAL-SENTINEL, May 16, 2001, at 2B.

6. N.E. OHIO AM. FRIENDS SERV. COMM., *supra* note 4, at tbl.B.

7. *Id.*

ney general who, unsurprisingly, made some contributions to justices. Since the AttyGen firm participated in about one-third of that court's cases, and since, inevitably, the justices often voted for the side represented by AttyGen, that sharply boosted their compliance ratings. Such an attack on judges is not mere distortion, it is contemptible.

The people of thirty-nine states have chosen to have their judges face the voters. Of the nation's total 1243 state appellate judges, for initial terms, 47% are appointed, 40% face partisan elections, and 13% face nonpartisan elections.<sup>8</sup> Of our 8489 state trial judges (general jurisdiction), for initial terms, 24% are appointed, 43% face partisan elections, and 33% face nonpartisan elections.<sup>9</sup> For subsequent terms, if one includes retention elections, 87% of our state appellate and trial court judges face elections.<sup>10</sup>

If judges and judicial candidates face elections, they will often need to raise campaign funds, and in that way and other ways, they are forced to try to reach the voters. The denial myth and the distortion myth converge in where they come out: Since nothing can be done about judicial elections, we must eliminate them or at least eliminate competitive elections.

We will meet at the Summit to bring out the realities, to dispel myths that undermine confidence in our state courts and to find steps that will bolster public confidence in those courts. Some possible steps would need official action, such as assuring that judges will withdraw from cases in which counsel or a party has made an excessive contribution—i.e., an amount above what that jurisdiction believes is an appropriate sum; or such as assuring that judges will not retain surplus campaign funds as war chests for future campaigns.<sup>11</sup>

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8. All statistics are derived from the survey in U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 1998, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco9802.pdf>. (last visited Feb. 23, 2001) [hereinafter BUREAU].

9. See *id.* For subsequent terms: 11% of appellate judges are appointed and 43% face retention elections, 32% face partisan and 13% face nonpartisan elections; of trial judges, 12% are appointed, 25% face retention elections, 28% face partisan and 35% face nonpartisan elections. See *id.*

10. See *id.*

11. See generally REPORT OF THE TWENTIETH CENTURY FUND WORKING GROUP ON CAMPAIGN FIN. LITIG., BUCKLEY STOPS HERE: LOOSENING THE

In almost every state, many steps forward can be taken by rules promulgated by the supreme court.<sup>12</sup> Some possible steps would call for legislative or constitutional action, such as when one wanted to change the length of judges' terms.

It is crucially important to note at the outset that some steps call for nonofficial action by members of the bar and citizens who share our concern to assure a juster justice. For example, if inappropriate conduct in judicial campaigns is to be controlled, it is clear that official action faces major hurdles from the First Amendment and due process guarantees. Whatever official action can do to protect judicial independence from campaigns that make judges seem like merely more elected officials, it is clear that groups of distinguished and diverse citizens can serve invaluable to promote appropriate campaigning in judicial elections.

Judicial elections exist to assure accountability in our pluralist democracy by putting the choice to the voters. No one can be surprised that democracy is not problem-free. Nor is it any surprise that among the best answers to such problems are more active pluralism and more informed democracy.

Perhaps some people would like to give some of our time in Chicago to comparing judicial elections with other selection systems. Certainly everyone cares about that, but I hope you share my view of it: First, it is hard to imagine saying anything new on that subject. *No* subject in American law has gotten as much ink, and as much sweat, over so many years. Second, unlike the heavily plowed arguments about judicial selection systems, judicial election problems have received remarkably little attention, although they have become disturbingly acute.

The third and last reason: this is where the action is. And the "action" has so many aspects that, as one chief justice said, our Summit agenda puts five days' topics into two days. The judicial selection controversy is less lively. For almost a century—starting in 1906 with a landmark speech to the ABA by Roscoe Pound—the

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JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM (1998) (discussing the need for a strategic effort directed at campaign finance reform).

12. See, e.g., *In the Matter of Maney*, 510 N.E.2d 312, 313 (N.Y. 1987) (holding that political activity by judges in New York is governed by the Rules Governing Judicial Conduct and the Canons of Judicial Ethics).

Bar, and so much more than the Bar, has given enormous energy to getting rid of competitive elections.<sup>13</sup> Back in 1900, roughly 14% of our judges did not face competitive elections.<sup>14</sup> Today, after that century of major effort, we boosted that 14% to 23% of our trial judges of general jurisdiction and 47% of our appellate judges.<sup>15</sup> That's a shift of 1% per decade for the trial judges, and 3-4% per decade for appellate judges. At that rate we'll end contestable elections for trial judges in only another 770 years, and for appellate judges in only another 160 years.<sup>16</sup> That great Chief Justice Arthur T. Vanderbilt of New Jersey said that "judicial reform is no sport for the short-winded,"<sup>17</sup> but I hope you won't think me shortsighted in urging that we focus on, say, the next few decades.

I hope we are all committed to doing all we can, as soon as we can, to assure that judicial elections bring an appropriate balance between judicial accountability and judicial independence.

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13. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

14. See BUREAU, *supra* note 8.

15. See *id.*

16. The above was written before last year's election. Florida's dramatic election events have overshadowed a major development in judicial reform: Florida voters defeated a ballot proposition that would have replaced, for their trial judges, nonpartisan contestable elections and instead put those judges into the same system as Florida's appellate judges: merit appointment and retention elections. See Howard Troxler *Merit Based Judge Selection Didn't Fly with Voters*, ST. PETERSBURG TIMES, Nov. 20, 2000, available at [wysiwyg/http://www.sptimes.com/news\\_\\_pf/TampaBay/Merit\\_based\\_judge\\_sel.shtml](http://www.sptimes.com/news__pf/TampaBay/Merit_based_judge_sel.shtml).

In 1998, Florida voters strongly supported a statewide ballot proposition to have each judicial circuit and county vote separately in 2000 on another ballot proposition. Between 1998 and last year's election, the legislature made the wording of the proposition for this year's ballots less favorable to the proposed change. See *id.*

This year, the change was voted down in every one of the twenty circuits and sixty-seven counties; the affirmative vote on the change for circuit judges averaged 32%, and for county judges (sixty-seven counties) 26%. See *id.*

17. Thomas E. Baker, *A View to the Future of Federalism*, 45 CASE W. RES. L. REV. 705 n.629 (1995) (citing MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION xix (Arthur T. Vanderbilt ed., 1949)).