Reform from Within: Positive Solutions for Elected Judiciaries

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Since my appointment to fill a vacancy on the Texas Supreme Court, I have been a candidate in three judicial elections, each introducing me to the problematic, often confounding, world of judicial politics. In a judicial campaign, the road to victory begins with the solicitation of money. The "ask" is undignified, and the "give" is fairly compelled. To illustrate, consider one common, if not unavoidable, scenario in the campaign of a state court judge:

Receptionist: I'm sorry, Mr. Jefferson, but Mr. Smith is on the phone with a client. May I take a message?

Chief Justice Jefferson: Would you let him know that I am Chief Justice Jefferson of the Supreme Court of Texas?

Mr. Smith: Good afternoon, Chief Justice Jefferson. I am so sorry to keep you waiting. My receptionist didn't recognize your name.

Chief Justice Jefferson: No need to apologize, Mr. Smith. I am calling because I am on the ballot this year, and I could really use your help.

Mr. Smith: Well, I did not intend to get involved in judicial elections this year, but you are doing a fantastic job as chief justice.

Chief Justice Jefferson: No one likes the politics in these elections, but we are compelled to engage. Now, you have appeared in my court many times. You would agree, I hope, that I am always prepared for oral argument?

Mr. Smith: Certainly.

[†] Chief Justice Wallace Jefferson was appointed to the Texas Supreme Court in March 2001 and won his first election in 2002. In 2004, he was appointed chief justice and was confirmed unanimously by the Texas Senate. He was elected to that position in 2006 and re-elected to a full term in 2008. In 2010, he will begin serving as elected President of the Conference of Chief Justices, an association of chief justices from each of the fifty states and the U.S. territories.

Chief Justice Jefferson: Have you noticed an improvement in the court's disposition rate and its expansion of efforts to give legal representation to the poor?

Mr. Smith: Yes, Your Honor. I have been impressed by the court's efficiency and outreach.

Chief Justice Jefferson: Mr. Smith, may I count on your financial support so that I may continue to serve the people of Texas?

Mr. Smith: Of course, Mr. Chief Justice. I will take care of that right away.

Chief Justice Jefferson: Thank you, Mr. Smith.

Realistically, what choice did Mr. Smith have? Some states attempt to mitigate this scenario by prohibiting judges from soliciting campaign funds directly or by imposing limits on contributions and expenditures.¹ But judges still know who has contributed, and lawyers are shrewd enough to avoid the risk of incurring a judge's disfavor. The public complains that donating money to judges corrupts the integrity of the judicial system.² Yet in Texas and other states, the public still insists on electing its judges. Recently, one such election attracted the United States Supreme Court's attention, and the resulting decision—that "the Constitution require[d] recusal" —will undoubtedly be debated for years to come.⁴

I. PUBLIC PERCEPTION AND RESISTANCE TO JUDICIAL REFORM

The most formidable obstacle to judicial reform remains the voters themselves. Even states that now enjoy merit selection can attest to the battle that inevitably precedes reform. Take California, for example. In

^{1.} See, e.g., Judicial Campaign Fairness Act, TEX. ELEC. CODE ANN. § 253.153-176 (2003).

^{2.} See American Judicature Society, History of Reform Effort: Opinion Polls and Surveys, http://www.judicialselection.us/judicial_selection/reform_efforts/opinion_polls_surveys.cfm?state (last visited Feb. 8, 2010). According to a 1997 poll by the Texas Supreme Court, 83% of Texas citizens, 69% of court personnel, and 79% of Texas attorneys believed that campaign contributions influenced judicial decisions "very significantly" or "fairly significantly." In addition, 48% of judges indicated that they believed that money had an impact on judicial decisions. Id.; ANNENBERG PUBLIC POLICY CENTER, PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS 3 (2007) available at http://www.law.georgetown.edu/Judiciary/documents/finalversionJUDICIALFINDING Soct1707.pdf. According to a 2007 survey by the Annenberg Center, 69% of the general public thought that raising money for elections affects a judge's rulings to a moderate or great extent. Id.

^{3.} See Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2265 (2009) (holding that a West Virginia Supreme Court justice, whose campaign received substantial donations from a litigant in a case before him, unconstitutionally refused to recuse himself from the case).

^{4.} It remains to be seen how judicial recusal might be further affected by the U.S. Supreme Court's most recent rejection of campaign finance restrictions in *Citizens United v. Fed. Election Comm'n*, No. 08-205, 2010 WL 183856 (U.S. Jan 21, 2010).

1967, Chief Justice Roger Traynor of the California Supreme Court delivered an address to the Virginia State Bar Association entitled *Who Can Best Judge the Judges?* Chief Justice Traynor deplored the "circus-like aspects of popular election of judges," and the "scofflaw spirit" that such elections bred.⁵ Praising the movement toward merit-based judicial selection, the chief justice declared that "a glacial force has been gathering momentum against the slag of years—the force of nationwide legal education now generally recognized as the best in the world." Despite the support of the state's highest judge, as well as that of then-governor Ronald Reagan, it took twelve years for California to adopt a judicial nominating commission. Since 1940, thirty-seven states have adopted some form of merit selection for their judges.⁷ Yet, the glacial force described by Judge Traynor has slowed its course. As his vision of inevitable progress has waned, public confidence in the rule of law has diminished.

What is it about judicial elections that so strongly resists the call for change? Instead we might ask: what do our citizens really know about the men and women behind the names printed on a judicial ballot? The majority of Americans continue to prefer a system in which they elect their judges, even though an even greater majority never casts a vote in a judicial election, and few can identify a single judicial candidate at the voting booth. We want our judges to be fair, yet 83% of Texans doubt that a judge who has received campaign contributions from a lawyer or litigant will remain neutral when deciding the donor's case. These paradoxes should prompt us to examine whether judicial elections actually promote accountability.

The electorate votes for judges by proxy. In states like Texas, for example, where judges run on a partisan ballot, an "R" or a "D" by the candidate's name can trump a lifetime of experience. Showy commercials attract more votes than a judge's reputation for careful rulings on complex matters of statutory law. A popular name is golden. Each of

^{5.} Roger J. Traynor, *Who Can Best Judge The Judges*?, 53 VA. L. Rev. 1266, 1276–77 (1967). 6. *Id.* at 1277.

^{7.} AMERICAN JUDICATURE SOCIETY, JUDICIAL MERIT SELECTION: CURRENT STATUS 3–6 (2009), available at http://www.ajs.org/selection/docs/Judicial%20Merit%20Charts%209-09.pdf.

^{8.} See AMERICAN JUSTICE PARTNERSHIP FOUNDATION SURVEY INITIATIVE, VOTER OPINION ON THE ELECTION OR APPOINTMENT OF STATE SUPREME COURT JUSTICES 1 (2008), available at http://www.legalreforminthenews.com/2008PDFS/State_Supreme_Court_Elected_vs._Appointed_7-8-08.pdf. In a nationwide voter opinion survey, 75% of voters favored election of state supreme court judges, while 21% favored appointment. *Id.*

^{9.} Charles Geyh, Why Judicial Elections Stink, 64 OHIO ST. L.J. 43, 52 (2003) ("Roughly 80% of the electorate cannot identify the candidates for judicial office.").

^{10.} TEXAS SUPREME COURT ET AL., PUBLIC TRUST AND CONFIDENCE IN THE COURTS AND THE LEGAL PROFESSION IN TEXAS 6 (1998), *available at* http://www.texasbar.com/Template.cfm? Section=Home&CONTENTID=12681&TEMPLATE=/ContentManagement/ContentDisplay.cfm.

these factors is a poor substitute for merit, yet they all drive judicial elections. Campaign contributions convert these inapt proxies into successful campaigns, and we wonder why the public is cynical. This is not the way to ensure accountability.¹¹

II. ATTAINING REFORM IN AN IMPERFECT SYSTEM

Justice Sandra Day O'Connor has shown how money in judicial elections undermines public confidence in our courts and that judicial campaigns infused with partisan politics denigrate America's ideal of judicial independence. We can eliminate most of that money, and much of the bitterness of the campaigns, by adopting a system in which the state's governor appoints a judge from an independent commission's list. The governor's appointee would serve for a period of years and then stand before the public in an election that tests the incumbent's performance in office. Politics will inevitably enter the process (as it does in all aspects of public life), but a judge's qualifications, temperament, and work ethic would be paramount.

For those states whose citizenry is wedded to elections, the prospect for change is daunting. Texas came close in 2002, when a proposal for a merit and retention system passed the Texas State Senate, but the reform stalled in the House of Representatives Judicial Affairs Committee. For elected judges weary of their states' system of judicial selection, it is time to consider how best to salvage the ideals of accountability that initially inspired Americans to demand judicial elections over a century ago.

On the spectrum of political engagement, the elected judge is uniquely situated between the appointed judge and the legislator. No less than federal judges, elected judges have a duty to uphold independence and impartiality, but like legislators, they are necessarily exposed to the partisan politics of the campaign trail. Unlike federal judges, who are rarely seen or heard outside the courtroom, elected judges are driven into the community, traveling across the state to make themselves known, forging alliances with community leaders, businesses, and interest groups. The elected judge maintains a democratic role, which creates an opportunity to build a rapport with the legislature, to advocate for greater access to justice, and to promote community education and civic involvement.

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^{11.} See generally, Wallace B. Jefferson, Op-Ed, Why Not Elect Judges on Merit, Not Whim?, DALLAS MORNING NEWS, Mar. 12, 2009, available at http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-jefferson_13edi.State.Edition1.2212195.html.

^{12.} See, e.g., Sandra Day O'Connor, Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction, 86 DENV. U. L. REV. 1 (2008).

These elements combine to provide the elected judge with two notable assets over her state- or federally-appointed counterpart. First, the elected judge has an indirect voice in the legislature, not only because she shares the support of the electorate, but also because her campaign will have sought to engage voters in a discussion on improvements to the justice system that often require legislative support. Second, the elected judge has a direct link to the community and an incentive to nurture this link.

I am well aware that what I call "assets" are no less riddled with limitations—the risk of political influence, monetary incentives, and unseemly campaign tactics, to name a few. But given that these are the realities of today's elected judiciaries, and until the public is willing to embrace a merit-based system, it seems prudent to explore opportunities within the existing electoral system. The following two sections address these assets.

A. The Role of the Elected Judge in the Legislature

One of the notable differences between an appointed judge and an elected judge is the latter's role in the legislature. In the current system of judicial elections, state court judges, by necessity, are familiar with the engines of policy and the people who drive them. Armed with this knowledge, and bolstered by the electorate, elected judges have the tools to advocate for reform. We have not only the means, but also an obligation, to advance judicial policy and civic awareness. In some states, as in Texas, a position on the supreme court is one of the few offices elected on a statewide ballot. As such, the legislature has reason to heed the high court's recommendations, as a common electorate voted both the legislators and the judges into office.

To be clear, when I speak of having a "voice in the legislature," I do not propose that judges meet with lobbyists, engage in partisan issues, or participate in political activities that are frowned upon—rightly so—by the codes of judicial conduct. Rather, given the elected judge's and the legislature's shared attributes, the elected judge may use this connection to illuminate inadequacies in the justice system. A primary example of the way in which state judges already do this is through annual State of the Judiciary Addresses delivered by the chief justice in many states, including my own. The State of the Judiciary Address is an opportunity for the high court to highlight pressing judicial issues, while educating the public on recent progress made and lingering obstacles that lie ahead. It is generally covered in the local press and commands the attention of the governor and the state legislature. Chief justices around the country have used the occasion to denounce shortfalls in their court systems and

to praise advances secured through the combined efforts of the three branches of government.¹³

State judges also provide testimony before legislative committees and may oversee the work of court-appointed commissions. In Texas, as in many other states, we have created commissions and judicial councils that improve upon our state's system of justice. In 2001, our court founded the Texas Access to Justice Commission to develop and implement policy initiatives designed to expand access to and enhance the quality of justice for low-income Texas residents. In 2007, Supreme Court Justice Harriet O'Neill successfully launched a Permanent Judicial Commission for Children, Youth and Families, which now actively serves to improve judicial handling of child-protection cases through advancements in technology, training, and pilot projects.

The Texas Judicial Council also plays an integral part in the functioning of the court system and its interplay with the legislature.¹⁴ Chaired by the chief justice, the Texas Judicial Council was created by the legislature to "consider advice from judges, public officials, members of the bar, and citizens concerning remedies for faults in the administration of justice."¹⁵ This mandate is an appropriate vehicle through which judges can affirmatively advocate for reforms that, ultimately, serve the public's interest in a vital judiciary.

An elected judge's interaction with the policymaking arm of government, then, can significantly advance legitimate aims of the judiciary. Elected judges have the insight and experience to engage politicians, and they have the added credibility of having the imprimatur of the voting public.

B. The Elected Judge's Link to the Community

Perhaps the more obvious outcome of judicial elections, and the second "asset" of the elected judge, is her accountability to the electorate. This link between the elected judge and her community is fostered through both the judge's incentive to earn the voters' support and the broad speech protections guaranteed to elected judges since the United States Supreme Court decided *Republican Party of Minnesota v. White.* ¹⁶

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^{13.} See, e.g., Chief Justice Wallace Jefferson, The State of the Judiciary in Texas (Feb. 11, 2009), available at http://www.supreme.courts.state.tx.us/pdf/2009StateoftheJudiciary.pdf; Chief Justice Jean Hoefer Toal, South Carolina State of the Judiciary (Aug. 20, 2009), available at http://www.judicial.state.sc.us/whatsnew/displaywhatsnew.cfm?indexID=570; Chief Justice Leroy Rountree Hassell, Sr., 2009 Virginia State of the Judiciary Address (2009), available at http://www.courts.state.va.us/courts/scv/state of the judiciary address.html.

^{14.} See generally, TEX. GOV'T CODE ANN. § 71 (2005).

^{15.} Tex. Gov't Code Ann. § 71.032 (2005).

^{16. 536} U.S. 765 (2002).

Unquestionably, *White* gives judges and judicial candidates greater latitude to speak about issues that may come before them in court. Like many people, I worry that this development may give voice to the view that judges improperly engage in policy debates that should remain the province of the legislature and other elected officials. Viewed more optimistically, however, *White* permits judges to engage in discussions that have entirely apolitical, but salutary purposes—to increase resources to the courts, to reform the justice system, and to protect those in our society whose access to justice is at risk. In this sense, *White* provides elected judges with tools to positively engage the community.

So while I sympathize with those who lament the politicization of the courts, I believe that we can also employ *White* as authority for judges to educate the public about the need for judicial reform. Elected judges can meet with businesses, law firms, and legislators to promote greater participation in pro-bono lawyering, seek additional technological resources that promote efficiency, and bring attention to issues affecting access to justice. Having chosen "to tap the energy and the legitimizing power of the democratic process," leected judges can utilize the First Amendment protections *White* offers as a means to educate, rather than as a means to politick.

The debate over *White* epitomized the elected judge's struggle to maintain both independence and accountability—competing norms that have dominated the discussion over elected judiciaries. On the one hand, voters are entitled to know the judicial candidates' credentials and beliefs. On the other hand, interest groups will try to lure the judge into political debates that could undermine his neutrality on matters that will ultimately land in court. The judge who is sensitive to the judiciary's role in our system of government will not be drawn into these partisan debates. Instead, she will use her status for a greater purpose—"the efficient administration of justice"—through the pulpit she is given on the electoral stage.

III. CONCLUSION

The battle to dispense with an elected judiciary is a worthwhile endeavor. Judicial elections force judges to raise money from lawyers and litigants; they give voters the false impression that party affiliation or persuasive television commercials are an adequate substitute for merit; they undermine the Founders' concept that judges rule not according to popular will, but to advance the rule of law. Yet as we continue to urge states to appoint judges by merit, we should salvage from the current sys-

^{17.} Id. at 788 (quoting Renne v. Geary, 501 U.S. 312, 349 (1991)).

tem those attributes that have the potential to improve the administration of justice. The elected judge may legitimately exploit her connection to the voters to press for enhanced judicial resources, to reduce the cost of litigation through technological innovations, to enhance access to justice through legislative remedies, and even to promote merit selection as an alternative to partisan judicial elections. Political skills honed in a campaign can thus be used to improve the lives of those engaged in litigation and to promote a judiciary that serves not only litigants, but society at large.