

Why Do We Elect Judges?

IN THE MIDST of my frustration and annoyance with the repetitive, uninformative, and often downright misleading campaign advertising this fall, I comforted myself with one redeeming fact: at least there were no ads for judicial candidates this year in my neighborhood.

My state, Pennsylvania, is one of the 38 states in which all or most judges face election by the voting public at some point.¹ In Pennsylvania, all judges—including trial judges and even local magistrate judges for small claims court and criminal arraignments—are normally elected to their initial term in office in a contested election and then are subject to a yes-or-no retention election in which no competing candidate is nominated. During the few days preceding any election day on which judges are on the ballot, I am (like most lawyers) besieged by relatives, friends, and even casual acquaintances asking me for whom they should vote in the judicial elections. My interrogators—though probably no less observant, curious, or civic-minded than the average citizen—generally have no idea who the candidates really are, what their professional qualifications are, or how they are likely to perform on the bench. Because some judicial candidates in Pennsylvania can cross-file on both major parties' ballots (in a purported effort to "take politics out of the judicial selection")², voters are not even aware of the most basic, if sometimes deceptive, information about the candidates' governmental philosophies.

Judicial campaign ads are seldom helpful in evaluating the candidates. After all, it is clear that all the candidates love their families and are beloved in return. Many of them (in a throwback to the days when all presidential candidates were born in log cabins) emphasize their sturdy working-class heritage, regardless of the level of their own current wealth and privilege. And they all promise to be tough on crime. I particularly enjoy the ads showing candidates for trial judge in my county slamming the cell door on criminals: the candidates and I share the knowledge that (except in very rare instances) they will begin their judicial careers with years in the trial court's Family Division, where their decisions will be limited to divorce and custody matters. Few of the candidates for trial judge who advertise how tough they are on crime will ever even see a criminal defendant during their terms in office.

As a consequence, judicial elections—especially at the trial court level—are frequently decided by the position of the candidate's name on the ballot (decided through a random draw), an individual's name recognition, or—my personal favorite—the similarity between the candidate's name and that of another individual who happens to be well known (whether or not the two are related).

Several problems are endemic to the system of electing judges. First, few voters know or understand what judges do and what skills are necessary or even helpful in performing well in the position. Even in an election regarding the retention of a sitting judge, only those few citizens who have appeared before him or her frequently have firsthand information on his or her qualifications. Even a judge's written opinions are reviewed by only a small percentage of the voting population. Moreover, candidates who have not previously served the public as a judge typically provide even less of a public record upon which the voters can evaluate the candidate's qualifications. And the electoral process is not well attuned to the presentation of objective information on qualifications like a candidate's objectivity, judicial temperament, or even knowledge of the law. Nor can candidates properly address the issues they are likely to be called upon to decide, because doing so would amount to prejudging litigants' cases.

The most troubling aspect of an elected judiciary, however, is the impact of campaigning on a successful candidate's objectivity. After a contested election, can any human being be truly impartial in any case that affects the interests of individuals or groups (whether as litigants or as counsel) who either opposed or supported the candidate in the election? Moreover, whether the election involved an opposing candidate or is merely a yes-or-no retention election, elections cost money and require candidates to solicit large amounts of contributions—either directly or indirectly. As Tom Hanks (in his role as Congressman Charlie Wilson in the movie *Charlie Wilson's War*) stated: "Voters don't elect congressmen; contributors elect congressmen." And for judges, contributions are synonymous with bias.

Judge Richard A. Posner, in his book *How Judges Think*, provides a more analytical explanation of how the need to raise campaign funds biases not only the outcome of individual legal cases but also the evolution of the law. A judge is naturally more receptive toward those lawyers or litigants who have contributed or are expected to contribute significantly to his or her campaign. If the campaign contributions from those on

opposite sides of a given issue are uneven, the judge is likely to exhibit a systematic bias. And there is no reason to expect that the bias will further the public interest. According to Posner, “there is no reason to think that altering the law in the direction indicated by the ratio of campaign contributions pro and con the change [in the law] would usually be an improvement.”³

Lawyer-author John Grisham paints a grim portrait of an elected judiciary in his recent novel, *The Appeal*. Grisham depicts a corporate chieftain whose company suffers a huge adverse verdict in an environmental toxic tort suit (one of many similar suits the company faces from the same pattern of years of blatantly illegal disposal of toxic pollutants). The man sets out to obtain a reversal of the verdict by clandestinely selecting and providing overwhelming financial support to a challenger to replace an unsympathetic sitting justice of the state supreme court (while simultaneously manipulating the price of his company’s stock in order to profit from the temporary setback generated by the adverse verdict). Equally cognizant of their own economic interests in continuing a litigation lottery (while incidentally preserving the right of recovery by those truly injured by improper behavior), the personal injury trial bar attempts to match the effort. Even though the corrupt capitalist (a *de rigueur* characterization these days) is the principal villain of the piece, neither contributors nor judges emerge unscathed from the story. At its best, fiction (like Upton Sinclair’s *The Jungle*) provides meaningful insight into reality, and Grisham’s *The Appeal* provides a detailed and insightful view of the adverse effects of electing the judiciary.

Any sense that Grisham has grossly exaggerated the potential problems in electing judges can be dispelled by a review of the case history of *Caperton v. A.T. Massey Coal Company*,⁴ a case in which the U.S. Supreme Court recently granted certiorari to decide whether due process mandates a recusal by a justice of a state supreme court whose electoral campaign a few years earlier had received substantial contributions from the chief executive officer of one of the litigants.⁵ In *Caperton*, the plaintiffs—direct and indirect owners of a coal mine—alleged in an action filed in West Virginia state court that the defendant companies had tortiously interfered with the plaintiffs’ existing and prospective contractual relations and had engaged in various forms of misrepresentation in connection with negotiations regarding a potential buyout of the mine by the defendants. The jury awarded the plaintiffs \$50 million, including punitive damages. The defendants filed an appeal of the verdict with the West Virginia Supreme Court.

While the *Caperton* case was before the trial court on motions for judgment as a matter of law or for remittitur, the chief executive officer of the defendant parent company made substantial contributions directly to the campaign of Brent Benjamin, who was a candidate seeking to unseat an incumbent justice of the West Virginia’s Supreme Court of Appeals, as well as to an independent expenditure group that was supporting Benjamin’s candidacy. The combined contributions from the chief exec-

utive officer allegedly totalled \$3 million.⁶ Plaintiffs had moved on several occasions to have Justice Benjamin recuse himself from the case, but he declined to do so.

On Nov. 21, 2007, the West Virginia Supreme Court rendered a 4 to 3 decision—in which Justice Benjamin joined in the majority—reversing the trial court’s award against Massey Coal Co. and directing that the case be dismissed with prejudice. The court held that the trial court should have dismissed the complaint on two grounds: (1) a forum selection clause in a coal sales contract that was related to some of the allegations in the complaint and (2) the doctrine of *res judicata* and an earlier contract action that had already been litigated in a Virginia court.

A few months later, the West Virginia Supreme Court decided to rehear the case after the publication of photographs showing Chief Justice Maynard and the defendant’s chief executive officer together in Monaco in 2006. Chief Justice Maynard, who had also voted in the majority, recused himself from the rehearing, as did Justice Starcher, who had previously dissented and had publicly made derogatory remarks about the chief executive officer.⁷ However, Justice Benjamin again declined to recuse himself. Instead, as acting chief justice, he followed West Virginia’s procedure by replacing the two recused justices with two circuit judges. Again the court decided by a vote of 4 to 3 to reverse the trial verdict on similar grounds.

This case clearly demonstrates that the troublesome issue of whether campaigning and campaign contributions (or other forms of campaign support or opposition) create actual bias or an appearance of bias, would be avoided if judges were not elected. Why then do a majority of states elect at least some of their judges, rather than following the example of the federal Constitution, under which the executive branch appoints judges with the consent of one house of the legislative branch? The theory seems to be that the electoral nature of the office makes judges more accountable to the people and less likely to pursue the judges’ own agendas or the agendas of the executive or legislative branches to whom an appointed judge may owe fealty.⁸

Although the practice of electing judges is often attributed to the Jacksonian era of populist democracy,⁹ the distrust of appointed judges dates back at least as far as Thomas Jefferson’s day. Referring to the federal Constitution’s exempting federal judges from the necessity of popular election, Jefferson wrote:

The exemption of the judges from [election] is quite dangerous enough. I know no safe depository of the ultimate power of the society but the people themselves; and if we think [the people] not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take [control] from them, but to inform their discretion by education.¹⁰

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The extent to which elections are effective at holding the judiciary accountable to the people appears questionable. Only the most egregious actions in cases of sufficient notoriety to receive public attention will be sufficient to attract public attention, unless the facts are publicized and perhaps distorted by a political adversary.¹¹ Most cases are simply too ordinary and too minimal in their impact on the general public to attract attention related to the quality of the judicial decisions. And even when a judicial decision attracts public scrutiny, the attention is often short-lived.

Nevertheless, the power of public outrage and its effect on judicial elections was apparent in the fall 2005 election in Pennsylvania. Voters were generally incensed because, at 2:00 A.M. on July 7, 2005, the Pennsylvania General Assembly had passed, without floor debate, legislation that not only raised the salaries of the state's judiciary, members of the General Assembly, and certain high-ranking government executives but also provided automatic future raises by linking state salaries to changes in federal salaries. The state's governor signed the legislation the same day that it was passed by both houses of the legislature. Particularly provocative was a feature of the bill that bypassed a Pennsylvania constitutional provision that prohibits increasing legislators' salaries during the same term in which the legislature voted for the increase. To avoid this restriction, the legislature immediately increased its "unvouchered expense" reimbursement by the amount of the prohibited salary increase.¹² As the Pennsylvania Supreme Court dryly observed: "There was a negative public response to the legislation, focusing upon its timing and method of passage and upon a provision providing for an increase in unvouchered expenses, which applied exclusively to the legislative branch."¹³

Public reaction to the episode—popularly known as the "Pay Grab"—was so strong that legislation rescinding the pay increase was passed just four months later, on Nov. 15, 2005, and signed by the governor the same day.

Pennsylvania held its municipal elections four months after the Pay Grab legislation was passed but one week before it was rescinded,¹⁴ and Pennsylvania's constitution requires that all judicial elections be held simultaneously with municipal elections, when there are no other statewide offices up for election. Thus in the general election held Nov. 8, 2005, the two state Supreme Court justices up for retention elections were the only statewide candidates on the ballot. Although judges typically are returned to office by very comfortable margins in retention elections, Justice Russell Nigro was defeated and Justice Sandra Schultz Newman was re-elected by an unusually thin margin. The results of these elections were generally attributed to the public's indignation over the Pay Grab.¹⁵

Although the incident may reflect the power of the electorate's outrage, it also demonstrates the shortcom-

ings of the system of judicial elections. Even though the voters' rage was directed at the justices, the only statewide candidates for office on the ballot (and justices did benefit from the pay raise legislation), up to that time the judicial branch had played virtually no role in the action to which the voters objected. Although the state's chief justice had publicly defended the need to raise judicial salaries, only the legislative and executive branches had been responsible for enacting the pay raise. In addition, public outrage was sufficient to defeat one of the judicial candidates but not sufficient to defeat the other, even though the level of involvement of both was equal.

Finally, aside from being misdirected and indiscriminate, the public response was not very durable, despite the further provocation that ensued. After the 2005 election, various judges in several county courts of common pleas and the Philadelphia Municipal Court filed suits challenging the constitutionality of the November 2005 legislation that rescinded the pay raise. These judges alleged that the repeal of the judges' pay increase violated the provision of § 16(a) of the state's constitution, which states that judges' "compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth."¹⁶

In September 2006, the Pennsylvania Supreme Court ruled that the withdrawal of the pay increases was unconstitutional only as it applied to the judiciary.¹⁷ Thus, the court held that, unlike executive branch officers and members of the legislative branch, judges must continue to benefit from the legislation that had precipitated the public outcry. The court reasoned that, even though the legislation passed in November that had taken the pay increase away from every executive, legislative, and judicial officer who had benefited from the original pay raise, the repeal did not qualify for the exception provided for in § 16(a) of the constitution for laws applying "generally to all salaried officers" of the commonwealth. Because there were other "salaried officers" who had not received a pay increase under the original legislation and whose pay had not been reduced by the repealer, according to the court, the legislation that had repealed the salary increase did not apply to "all salaried officers." The court declared that the objective of the contribution provision—to maintain the independence of the judiciary and protect it from encroachment by the other branches of government—had been guaranteed by the adoption of a provision that precluded the reduction of judicial compensation except in circumstances where the solvency of the Commonwealth of Pennsylvania is endangered by "a period of economic stress." The justices ruled that Pennsylvania was not threatened with economic collapse, and therefore the judges were entitled to continue receiving the increased salaries that the legislation had awarded them for a period of about four months,

even though voter dissatisfaction had forced the withdrawal of the increases for all other legislative and executive officers.

It is interesting to note that, even though Pennsylvania's Supreme Court justices had protected their own salaries from the results of the voter outrage and had frustrated the legislative and executive bow to the popular will, the Pay Grab ceased to be an issue in judicial elections. Not only did 2007 see the re-election of the only justice who dissented from the Supreme Court's partial invalidation of the repeal, but only one of the 68 judges up for retention in 2007 was voted out of office—and that judge faced the political problem of having a wife who had embezzled hundreds of thousands of dollars from a municipal authority. The Pay Grab was simply no longer an issue.¹⁸ The chief justice of the Pennsylvania Supreme Court, who, at the time of the original legislation and before the repeal, had publicly defended the judicial pay increases as beneficial to the public because the higher salaries could attract and retain qualified public servants, had recused himself from the pay raise case when it reached his court. He then retired and thus did not face another retention election. In announcing his retirement, he declared that the controversy surrounding the pay raise played no role in his decision to step down.¹⁹ Whether or not the issue played a role in the chief justice's decision, the current lack of interest in the issue suggests that, absent deliberate provocation, even incidents that incite intense and widespread visceral reactions among the voters are unlikely to stimulate sustained interest among the electorate.

Maintaining or re-igniting public interest in an issue requires the publicity that accompanies a political campaign, with its attendant issues of bias. Moreover, because few citizens are sufficiently interested in the daily workings of the judicial system to be learned about judges' cases and their actions in them, campaign advertising for judicial positions is often sensational or misleading.

A further problem with electing judges is that, in some instances, the purpose of judicial review is to restrain the will of both the electorate and the political branches of government, which are responsive to public opinion. When popular political pressure produces laws or government actions that infringe on the basic constitutional rights of the minority, the purpose of judicial review is to create a refuge from such political pressures. The independence required of a competent judiciary in such circumstances is the inverse of the accountability that is the intended purpose of judicial elections.²⁰ Judges who are concerned about re-election or election to a higher-paid appellate panel are less likely to court problems with the electorate by protecting individual rights through unpopular decisions in which the judges have no vested interest.

The current scandal over Illinois Governor Rod Blagojevich's efforts to auction the appointment of an individual to fill the U.S. Senate seat vacated by Ba-

rack Obama in return for the deal most favorable to Blagojevich's personal interest, on the other hand, illustrates that the selection of judges through a nomination process is not devoid of problems. Although judicial nominations are seldom likely to generate sufficient interest to stimulate the kinds of rewards Blagojevich was overheard discussing in connection with the Senate seat, such nominations certainly can be and have been used to cement political alliances and to procure other forms of personal or political favor. Someone like the villain in John Grisham's *The Appeal*, for instance, certainly would have been willing to make a sizable donation to the governor's campaign committee as a way to influence his judicial nominations. And so-called merit selection panels used to generate a slate of candidates from which the executive branch is required to select a nominee are only as good as the quality and diversity of viewpoints of the majority of the members of the panel.

Perhaps there is little practical difference between electing judges and appointing them. An academic study purported to find empirical evidence that the performance of elected judges is roughly equivalent to that of appointed judges in terms of level of effort, skill, and independence—although the study found that appointed judges wrote higher-quality opinions and elected judges made up for the difference in quality by writing

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process of performing requisite mathematical calculations without the aid of a computer or any other device, mentally identifying those transactions that the calculations revealed would hedge one another's risks, and performing the post-solution step of consummating those transactions. The attempt to pre-empt competition was basically for the fundamental principle of hedging risks and using mathematical calculations inherent within hedging itself. As such, without any transformative process—not to mention without the requisite need of a machine or device to make specific calculations that would enable one to practice the claimed method—there was nothing that was eligible to be patented.

This decision will most assuredly provide much-needed guidance to the Patent and Trademark Office—at least in terms of handling the influx of business method patent applications that have been filed since 1998 (it is interesting to note that *Bilski et al.* filed their application in 1997). Patent eligibility is now apparently a threshold question during examination of business methods, and there is strong precedent against many abstract inventions that have already been claimed and possibly already patented. Business method patents that have already been issued have proven problematic to financial institutions that were potentially subjected to infringement claims regarding previously standard busi-

ness practices. The Federal Circuit has thus generated an opinion that may be considered one way of realizing that the “business methods” bandwagon that began 10 years ago required refinement. It is unknown how many of the applications for business method patents that were filed for and/or issued in the last decade will be affected by this decision. Suffice it to say that the future of such types of financial services patents does not look bright, at least from a breadth perspective. Specific incorporated devices—or at least particular limitations on the utility of such types of patent claims—will be necessary in order to meet the threshold patent eligibility issue, an abrupt departure from the attempts at patenting business methods this last decade.

Indeed, with the *State Street Bank* decision, the Federal Circuit not only gave the financial sector a gift but also created a boon in the business method patent community. With the *Bilski* ruling, it appears that the same court has now taken much of that gift away. **TFL**

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more opinions.²¹ Nevertheless, if elected judges are prejudiced by the electoral process and appointed judges are not sufficiently accountable to the public to prevent them from going off on an ideological frolic of their own, perhaps there is something to the old jest about picking names at random from the telephone book. At least that system of selecting judges would spare society from the expense of elections and spare me from judges' campaign advertisements. **TFL**

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Endnotes

¹Richard A. Posner, *HOW JUDGES THINK* at 134.

²25 Pa. Cons. Stat. Ann. § 2870.

³POSNER, *op. cit.*, at 135–36.

⁴2008 WL 918444 (W. Va., April 3, 2008).

⁵*Caperton et al. v. A.T. Massey Coal Co., Inc.*, Case No 08-22, Statement of Questions presented (Petition for Certiorari Granted, Nov. 14, 2008).

⁶*West Virginia Dispute Goes to High Court*, PITTSBURGH POST-GAZETTE (Nov. 15, 2008); Len Boselovic, *Are Campaign Contributors Buying Justice*, PITTSBURGH POST-GAZETTE (Sept. 21, 2008).

⁷Lawrence Massina, *Maynard Admits Meeting, Denies Impropriety. Justice Did Not Say He Would Recuse Self, But Will Respond Later In Writing*, CHARLESTON DAILY MAIL (Jan. 16, 2008); Andrew Clevenger, *West Virginia Court Before U.S. Court; Federal Justices To Hear Harman-Massey Case Regarding Benjamin Non-recusal,*

CHARLESTON GAZETTE (Nov. 15, 2008); Lawrence Massina, *Massey Energy Is Back In Court; Appeal of Ruling In Harman Case Has Faced Much Scrutiny*, CHARLESTON DAILY MAIL (Mar. 13, 2008).

⁸POSNER, *op. cit.* at 135–37; Frank J. Kopecky, *Should Judges Be Elected or Appointed?* available at www.lib.niv.edu/1977/ii771214.html; David Barton, *Judges: Should They Be Elected or Appointed?* available at www.wallbuilders.com/LIBprinterfriendly.asp?id=107

⁹E.g. Adam Liptak, *Rendering Justice, With One Eye on Re-election*, N.Y. TIMES (May 25, 2008).

¹⁰Thomas Jefferson, *THE WRITINGS OF THOMAS JEFFERSON*, Albert Ellery Bergh, ed. (1904), Vol. XV, p.276–77 to William Charles Jarvis (Sept. 28, 1820).

¹¹See POSNER, *op. cit.* at 135.

¹²*Stilp v. Commonwealth*, 588 Pa. 539, 551, fn. 4, 905 A.2d 918, 925 fn.4 (2006).

¹³*Id.* at 551, 902 A.2d at 925.

¹⁴*Id.* at 552–53; 905 A.2d at 926.

¹⁵*Id.* at 552–53; 905 A.2d at 926.

¹⁶Pa. Const. Art. V, § 16(a).

¹⁷*Stilp*, 588 Pa. 539, 905 A.2d 918.

¹⁸Brian O'Neill, *Here Stays Da Judge—The Voters Revolt Takes a Breather*, PITTSBURGH POST GAZETTE (Nov. 13, 2007).

¹⁹*Id.*

²⁰POSNER, *op. cit.* at 137.

²¹Stephen J. Cho, C. Mitu Gulati, Eric A. Posner, *PROFESSIONALS OR POLITICIANS; THE UNCERTAIN EMPIRICAL CASE FOR AN ELECTED RATHER THAN APPOINTED JUDICIARY* (2007).