

No Way to Choose

Big money and special interests are warping judicial elections.

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“That’s obscene,” said Justice Lloyd Karmeier of the Illinois Supreme Court on the night of his electoral victory, two years ago. “How can people have faith in the system?”

Karmeier was referring to the breathtaking amounts of money raised by candidates in the 2004 elections for his state’s high court. The candidates for one seat raised \$9.3 million—more money than was raised in 18 of 34 U.S. Senate races that year.

Illinois was not alone. Eight other states broke fund-raising records in 2004. And this fall 16 states will hold elections to choose their supreme court justices.

Over the past decade a perfect storm of millions in campaign contributions, increasingly hardball TV ads, and bare-knuckled special interest demands has descended on a growing number of state supreme court campaigns. The new politics deters good lawyers from becoming judges and increases voter cynicism. In August the states’ Conference of Chief Justices voiced “grave concern” over the changing nature of judicial elections and called for meaningful reforms.

At stake is nothing less than the fairness, impartiality, and independence of courts in the 38 states that use elections, in some form or fashion, to select or retain their high court judges.

NASTY AND COSTLY

Since 1999, candidates for state supreme courts have raised \$123 million in their efforts to win or keep seats. More than half that amount was raised by candidates in just four states with particularly contentious judicial politics—Alabama, Illinois, Ohio, and Texas. This year the candidates in each of the states of Alabama, Ohio, Oregon, and Washington swept past the million-dollar mark before Labor Day.

Pushed to raise money like big-time politicians and wary of the demands of special interests, a growing number of judges feel trapped. As former California Justice Otto Kaus eloquently put it, “It

is difficult to ignore a crocodile in your bathtub when you’re shaving in the morning.”

Television ads are the canary in the coal mine: When they appear, the rest of this nasty and costly new politics is not far behind.

In 2000 only one in four states with contested supreme court elections saw television ads. Just four years later ads ran in four of every five states with contested high court races. And these ads are appearing earlier in the campaign cycle. Ads have special potency in judicial elections: Because of media indifference and low voter turnout, interest groups can use ads to mobilize their bases just enough to tip the results.

The informational value of these ads is frequently dubious. In 2004 fewer than one in three ads focused on traditional judicial themes of qualifications, experience, and integrity. Instead, high-stakes TV campaigns tempted judicial candidates to come perilously close to making promises about how they will rule from the bench. In recent years, candidates have run on being “pro-choice and proud of it,” “tackling the medical-malpractice crisis,” and believing that “the rights of victims are just as important as the rights of defendants.” Watching such ads, voters might forget that judges rule based on the facts and the law, not on whatever campaign slogan their consultants urged them to adopt.

Third-party ads offer even less information, often oversimplifying complex legal issues and vilifying judges who handled headline-generating criminal cases. Moreover, many groups interested in tort-liability issues run attack ads based on criminal justice themes in which they have no interest (presumably because they think “he’s soft on crime” is more likely to win votes than “he’s soft on tort reform”). Consider just one ad run this fall against the chief justice of Washington state: A woman whose son was murdered says, “The *Andress* decision let my son’s killer walk free. . . . [I]f Justice Alexander hadn’t voted for this decision, this wouldn’t have happened.”

YES ON ABORTION?

Four years ago special interests gained another tool in their efforts to weed out the judges they don’t like.

In *Republican Party of Minnesota v. White* (2002), the U.S.

Supreme Court struck down a state ethics rule barring candidates for judicial office from announcing their views on legal or political issues. Freed by the *White* decision, interest groups began pressuring judicial candidates to announce their views on a laundry list of hot-button issues long before they hear the facts of any particular case in court. For example, the Florida Family Policy Council's questionnaire this year asked about abortion, same-sex marriage, assisted suicide, homosexual adoption, school vouchers, and the candidate's favorite U.S. Supreme Court justice. It even demanded that judicial candidates divulge how many children they have.

Judicial candidates find themselves pushed to play by a new set of rules: Take sides on controversial issues that may come before the courts and make political commitments, or watch the interest groups get behind someone who will play their game.

So far, many judges are standing up to this political pressure. In response to the Florida questionnaire, Judge Peter Webster wrote: "[Q]uestionnaires such as that which I have received from your organization are ill-conceived. Over the long term, their impact cannot be anything but bad . . . for the judiciary . . . for the rule of law . . . and bad for the people of Florida."

VENOM RISING

Understandably, this new politics of judicial elections is sapping public confidence in the courts.

Money matters. Surveys commissioned by the Justice at Stake Campaign show that more than three out of four Americans believe that campaign contributions affect the outcome of cases. Just as chilling is the fact that one in four state judges agrees that campaign money changes decisions in the courtroom.

Words matter, too. Candidates for legislative and executive offices campaign by making promises about what they will do. To some degree, they keep to their word once elected. But judges are supposed to decide cases one at a time, based only on the facts and the law, without regard to anything they said to anyone in the past. As Justice James Nelson of the Montana Supreme Court puts it, "If my personal views are going to be irrelevant then [when hearing cases], why are they relevant now?"

Special interest efforts to sow anger over controversial decisions are also contributing to the rise of anti-court venom across America. A veritable industry of outrage has arisen to stoke anger over unpopular decisions and paint judges as tyrants in black robes in order to raise money, turn out voters, intimidate and even impeach judges, and roll back the power of the courts to protect people's rights.

Impeachment threats against state judges have almost doubled during the past four years. This year, egged on by cable and radio talk-show hosts, legislators in Ohio and Vermont dabbled with the idea of firing state judges over individual sentencing decisions.

In its way, the 2005 Terri Schiavo episode represented a brief light of hope as Americans rejected political tampering with our courts of law. But the steady drumbeat of attacks on the legitimacy of the courts still emboldens legislators in Washington, D.C., and around the country to try to curb access to justice by stripping courts of the power even to hear certain cases. Court-bashing won't be fading away any time soon.

THE FIGHT BACK

What can be done? In a number of states, farsighted citizens,

judges, legislators, and bar leaders are banding together to break the link between money and justice.

In 2004 a new public financing system debuted in North Carolina, giving judicial candidates an alternative to raising money from interested parties who appear before them in court. It was a resounding success, and judges have lined up to participate in both 2004 and 2006. Before the system was enacted, lawyers who appeared before the judges provided nearly half of all campaign money. Now those lawyers account for barely one in 10 dollars.

Other traditional campaign-reform tools—meaningful contribution limits, stronger restrictions on electioneering communications, better disclosure, and regulation of political action committees and 527 groups—can also deter interest groups from treating judicial elections as their playground.

At the same time, the voters must be engaged in a positive way. It's voter apathy that leads to low turnout, and low turnout is what allows special interests to win elections with small groups of determined supporters.

Many voters say they would stop skipping over judicial races if they just had some basic background information and a few words from the candidates. That's why nonpartisan voter guides are now part of the solution in several states. If federal lawmakers were to let voter guides be sent postage-free, even more Americans would get the information they need to participate meaningfully in judicial elections.

When individual campaigns get nasty and judicial candidates are pressured to adopt hardball tactics to fight back, they need support. Committees of respected figures can be organized to speak out when campaign techniques cross the ethical line, thereby helping candidates run campaigns that take the high road. In August a group of civic and legal leaders, organized under the auspices of the National Center for State Courts, urged judicial candidates to help educate interested voters but to refrain from filling out special interest questionnaires that seek to hem them in.

In many states with judicial elections, legal and civic leaders are considering switching to some form of the "Missouri Plan" for nonpartisan judicial selection. Sixteen states already use some form of the plan: A judicial nominating commission screens candidates and recommends a short list of potential nominees for their high courts. Justices are appointed to a brief initial term by the governor. Thereafter they must stand for re-election in uncontested retention elections.

It's instructive to note that special interest groups have recently tried to undo these merit-based selection systems. Clearly, they see contested elections as a better means for getting "their" judges on the bench.

The bottom line is that we can't leave judicial elections to the partisans and politicians. It's time for everyone—judges, lawyers, and civic leaders—to enter the national debate over our courts. Americans want and need judges who are accountable to the law and the Constitution, not to special interests.

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