

# Judicial Elections: A Broken System, Part 2

By Jack D'Aurora

In the first installment of this article, published in the summer, I dealt with two issues that make judicial elections unworkable—the political parties' lack of concern for a candidate's qualification and voter reliance on name recognition. I also reviewed a third issue, the failed 1987 referendum which would have put into place an appointment/retention election system and a 2010 poll. Here are the fourth and fifth reasons why the system is broken.

#### 4. Judicial Races might become more political.

In 2002, the U.S. Supreme Court held in *Republican Party of Minnesota v. White*<sup>1</sup> that judicial candidates cannot be precluded from stating their views on legal issues. The case concerned the state's Code of Judicial Conduct, which prohibited both judges and candidates from announcing their views on disputed legal and political issues. The court found the clause to be unconstitutional.

Based on *White*, Ohio's Code of Judicial Conduct may be subject to attack. As it stands, Ohio judges and candidates are prohibited from making "any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court." Judges and candidates are also prohibited from making or committing themselves to positions in connection with cases or issues that are likely to come before the court that are "inconsistent with the impartial performance of the adjudicative duties of judicial office."<sup>2</sup>

Is the purpose of the Ohio Code to ensure that judges and candidates will be impartial? If so, this goal has already failed to impress the U.S. Supreme Court: "A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law."<sup>3</sup> Moreover, "there is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."<sup>4</sup>

When running for the Ohio Supreme Court in 2002, then-Hamilton County Municipal Judge Tim Black referred to the seat vacated by Justice Andrew Douglas as "labor's seat."<sup>5</sup> This freely expressed political opinion came just months after *White* was decided. We have not seen many candidates taking advantage of the freedoms that comes with the *White* decision, but that might be attributed to the reticence on the part of candidates.

The Ohio Code of Judicial Conduct was modified in March 2009 to allow judicial candidates to state their political affiliation at any time. Previously, judges could identify their political affiliation only until the primaries ended.<sup>6</sup> The Court of Appeals for the Sixth Circuit in *Carey v. Wolnitzek* struck down as unconstitutional Kentucky's judicial canons that prohibited judicial candidates from identifying themselves as members of a political party.<sup>7</sup>

Last year, judicial candidates were given somewhat more leeway in campaigning. Based on the holding from *In Re Judicial Campaign Complaint Against O'Toole* that part of Jud.Cond.R. 4.3(A) violates the First Amendment, the rule has been amended.<sup>8</sup>

The rule previously read as follows:

During the course of any campaign for nomination or election to judicial office, a judicial candidate \*\*\* shall not knowingly or with reckless disregard do any of the following:

(A) Post, publish, broadcast \*\*\* information concerning the judicial candidate or an opponent, either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person.

The last 13 words in Rule 4.3 (A)—"or, if true, that would be deceiving or misleading to a reasonable person"—have been eliminated.

Advocates of elections will argue that greater freedom in campaigning will help voters be better informed. Perhaps this is true, but greater freedom in voicing opinions during elections brings about some troubling consequences. Judges and judicial candidates may become recognized more for the positions they advocate than for their ability to competently handle the work of judges. As candidates become vocal on their positions, judicial elections could become more of a forum for how judges should be deciding issues and the matter of judicial qualification would further diminish.

#### 5. Money has no place in judicial elections, but it's there.

In last November's Ohio Supreme Court elections, Common Pleas Court Judge John P. O'Donnell accused Justice Judi French of "pocketing" campaign contributions from American Electric Power and being "in the pocket of big utilities."<sup>9</sup> O'Donnell was referring to a case before the Ohio Supreme Court—and AEP's campaign contributions to Justice French—where the court ruled that AEP could retain some \$368 million in charges that were questioned by consumers. Was this a cheap shot? Yes. Could money take on a bigger role in public perception of the Ohio Supreme Court and the practice of law before the court? Absolutely.

The U.S. Supreme Court's 2009 decision in *Caperton v. A.T. Massey Coal Co., Inc.*<sup>10</sup> paves the way, and the facts in that case are disturbing. After a \$50 million verdict was rendered against A.T. Massey Coal, its CEO, Don Blankenship, decided that to prevail on appeal, he had to change the composition of the West Virginia Supreme Court.<sup>11</sup> He did this by supporting Brent Benjamin against incumbent Chief Justice Warner McGraw.

Blankenship contributed \$2.5 million to "And For The Sake Of The Kids," a political action committee that characterized McGraw as too soft on crime and too dangerous for kids, and spent half a million on advertising. Altogether, Blankenship alone spent three times what Benjamin's own committee spent. A year before Massey's case came before the court, Benjamin was seated as its new chief justice. Caperton asked Benjamin to recuse himself, but he declined, and Caperton's case was dismissed by a 3-2 vote. You can probably guess who the swing vote was.

Caperton argued that Benjamin's failure to recuse himself violated the Due Process Clause of the 14th Amendment.

The U.S. Supreme Court agreed. In his dissent, Chief Justice Roberts stated that challenges based on the *Caperton* decision will “bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.”<sup>12</sup> I’m not sure Chief Justice Roberts has it right. Are we to stay silent about a critical issue—the possibility of money influencing judges, which already creates the appearance of impropriety—so as to avoid scandal?

Asserting that the integrity of judges should be presumed ignores human nature. Twenty-seven state justices filed amicus briefs in support of Caperton’s position, stating that financial support “can influence a judge’s future decisions, both consciously and unconsciously.”<sup>13</sup> After all, “every judge is first and foremost a human being, not a detached and unemotional law machine.”<sup>14</sup>

In 2012, Ohio was among five states that had the most expensive state high court elections, with just under \$3.5 million going to Supreme Court candidates.<sup>15</sup> Try explaining to the average American worker how \$3.5 million in campaign funds doesn’t influence candidates.

How do judicial candidates feel about this? Ask Ohio Supreme Court Justice Paul Pfeifer. Putting things in his own inimitable style: “I never felt so much like a hooker down by the bus station in any race I’ve ever been in as I did in a judicial race. Everyone interested in contributing has very specific interests.”<sup>16</sup>

Regrettably, the fact is that studies show a strong correlation between campaign donations and decisions made by state high courts. A New York Times study found that Ohio Supreme Court justices “routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time.”<sup>17</sup> A study published by the American Constitution Society for Law and Policy made similar findings in all states where judges are elected.<sup>18</sup>

What precludes someone from duplicating in Ohio what Blankenship did in West Virginia? What precludes a litigant in Ohio from presenting a *Caperton*-type challenge? Are these scenarios we want to see in Ohio?

**Moving forward.**

The threshold question is, how do most lawyers feel? I suspect most are concerned about the current state of judicial

elections. If I’m right, then the next question is, what can be done?

The Ohio State Bar Association has favored an appointment/retention election system since 1987 but hasn’t done much to promote change. I think it’s time to inquire if the OSBA wants to take up the challenge.

1. 536 U.S. 765, 122 S. Ct. 2528 (2002)
2. Ohio Code of Judicial Conduct, Rule 4.1(A)(6) and (7)
3. 536 U.S. at 777
4. 536 U.S. at 772
5. “Justice hopefuls: Don’t assume” [www.enquirer.com/editions/2002/09/23/loc\\_justice\\_hopefuls.html](http://www.enquirer.com/editions/2002/09/23/loc_justice_hopefuls.html) (Sept. 23, 2002).
6. Compare Jud.Cond.R. 4.2(C)(6), with Canon 7(B) in the prior code.
7. 614 F.3d 189, 204 (6th Cir. 2010).
8. 141 Ohio St.3d 355, 2014-Ohio-4046
9. “O’Donnell finally hits TV with French attack ad,” Columbus Dispatch (Oct. 26, 2014)
10. 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009).
11. West Virginia does not have an intermediate appellate court.
12. 556 U.S. at 902.
13. Brief of Amicus Curiae 27 Former Chief Justices and Justices in Support of Petitioners at 5.
14. Id. at 6.
15. “Do campaign donations in judicial races influence court decisions?” Stateline, The PEW Charitable Trusts (June 11, 2013)
16. “Campaign cash mirrors a high court’s ruling,” New York Times (Oct. 1, 2006)
17. Ibid.
18. Joanna Shepherd, “Justice at risk, an empirical analysis of campaign contributions and judicial decisions,” American Constitution Society for Law and Policy (June 2013)



*Jack D’Aurora, Esq.  
The Behal Law Group  
Blogger, Considerthisbyjd.com*

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