JUDICIAL CAMPAIGNS AND VOTERS' EXPERIENCE

WILLAMETTE LAW REVIEW

Volume 39:4 Fall 2003

PUBLIC OPINION AND AN ELECTED JUDICIARY: NEW AVENUES FOR REFORM

J. CHRISTOPHER HEAGARTY*

I. INTRODUCTION

> To get the bad customs of a country changed and new ones, though better, introduced, it is necessary to first remove the prejudices of the people, enlighten their ignorance, and convince them that their interests will be promoted by the proposed changes; and this is not the work of a day.[1]

What was true in 1781, at least in this regard, is certainly true today.

The concept of judicial independence is not new to American political thought. However, in recent years there has been a renewed movement to protect the judicial branch of government at the state level from undue political pressure and from the inappropriate influence of money over judicial elections. Evidence of this movement can be seen in the attention given it by the American Bar Association (ABA),[2] the formation of a national organization, "Justice at Stake"[3] (which is dedicated to this cause) and the frequent

---

* Executive Director, North Carolina Center for Voter Education, former lobbyist and campaign consultant. BA, Multi-Disciplinary Studies/Political Communication, North Carolina State University, 1992. This commentary was prepared specifically for the *Willamette Law Review Symposium*. Special thanks are extended to Center staff and friends who helped in the shaping of this Article—particularly Jesse Rutledge, Sam Watts, and Paul Ridgeway. The views expressed in this commentary are those of the author and do not necessarily reflect the views or opinions of the Open Society Institute or the Z. Smith Reynolds Foundation. The judicial reform work of the North Carolina Center for Voter Education is supported (in part) by grants from the Program of Law & Society of the Open Society Institute and the Z. Smith Reynolds Foundation.

1. Benjamin Franklin, 1789, *in* EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS 1 (3d ed. 1983).

2. The ABA Standing Committee on Judicial Independence, *About the ABA Standing Committee on Judicial Independence*, American Bar Association, *available at* http://www.abanet.org/judind/aboutus/home.html (last visited Mar. 6, 2003). In 1997, the ABA formed the Standing Committee on Judicial Independence to promote public awareness about the values of an independent, accountable, and efficient judiciary, including the exploration of reforms to judicial selections methods at the state level. *Id.* In addition, Alfred P. Carlton, Jr., President of the ABA, was appointed in August 2002 a Presidential Commission to study, report, and make recommendations with regard to various aspects of state judicial systems to ensure continued fairness, impartiality, and accountability, including various proposals for reform. *Id.* at *Judicial Independence in the 21st Century*, *available at* http://www.manningproductions.com/ABA263/ABA263_Overview.htm (last visited Mar. 6, 2003).

3. Justice at Stake Campaign, *available at* http://faircourts.org (last visited Mar. 6, 2003). The Justice at Stake organization was created in 2000, as a new partnership of state and national organizations dedicated to countering threats to judicial independence through a coordinated strategy of public education, civic engagement, and reform. *Id.*, *available at*

introduction of judicial reform bills in state legislatures around the country.

I worked extensively in North Carolina as part of a coalition dedicated to improving our judicial selection process and campaign reform. Our efforts culminated in the passage of the North Carolina Judicial Campaign Reform Act of 2002,[4] which transformed our state elections for appellate judicial offices from partisan to nonpartisan affairs, developed a public financing program for appellate level judicial campaigns, created a state-produced voter guide for appellate judicial elections, and enacted voluntary campaign spending and fundraising limits.[5] As Franklin said, this was not the work of a day.

The voters of North Carolina elect trial court and high court judges, and did so in partisan elections until recently.[6] This change leaves only six remaining states that elect high court judges in partisan elections.[7] Not only are partisan elections an uncommon practice in the majority of states, they are uncommon elsewhere among the world's democratic governments. Critics cite numerous problems inherent in judicial elections, recognizing it as a "bad custom"; but efforts to move away from judicial elections to a merit selection system have been foiled in state after state, including North Carolina. Indeed, no state that elects judges has abandoned that practice in almost twenty years.[8]

How did North Carolina's Judicial Campaign Reform Act become law when so many proposals for merit selection could not? The campaign organized for passage of the North Carolina bill did not mirror more traditional campaigns for judicial reform. By "traditional campaigns," I refer to various campaigns around the country to adopt a merit selection system in states with an elected judiciary. I observe most of these campaigns to be very similar: they are organized primarily through state bar associations, utilize arguments that an appointive process will improve judicial independence, and are met with resistance from nonattorneys. Much has been written on the topic of judicial selection, and it is not the purpose of this commentary to summarize the history of the issue or debate various judicial selection methods. Rather, I examine public opinion as it relates to basic voter understanding of judicial elections and public support for traditional

---

http://www.faircourts.org/contentviewerasp?breadcrumb=8 (last visited Mar. 6, 2003). In their own words, "The Campaign's 41 partners work to reduce the power of money and special interests in choosing judges, shield our courts and judges from excessive partisan pressure, and give Americans more information so they can work together to safeguard, fair, impartial and independent courts." Interview with Bert Brandenburg, Communications Director, Justice at Stake (Feb. 4, 2002).

4. 2002 N.C. Sess. Laws 158.

5. *Id*.

6. The superior court was made nonpartisan (effective for elections conducted in 1998 and thereafter) by 1996 N.C. Sess. Law 9-24; the district court was made nonpartisan (effective Jan. 2002) by 2001 N.C. Sess. Law 403.1. Both are codified at: N.C. GEN. STAT. § 163-321 (2001).

7. *Fact Sheet on Judicial Selection Methods in the States*, American Bar Association, *available at* http://www.abanet.org/leadership/fact_sheet.pdf (last visited Mar. 6, 2003). Before enacting its Judicial Campaign Reform Act, North Carolina, like the following states, elected high-court judges in partisan elections: Alabama, Illinois, Louisiana, Pennsylvania, Texas, and West Virginia. *Id.*

8. American Judicature Society, *Judicial Merit Selection: Current* Status tbl. 1 (1995). No state that elects judges has abandoned that practice in almost twenty years, though New Mexico did move to a system of combining partisan elections and appointments in 1988. *Id.*

Since 1995, no constitutional amendments to replace judicial elections with an appointive system of merit selection and/or retention elections have been adopted in any state.

Most recently, voters of the state of Florida defeated a referendum for a constitutional amendment allowing for merit selection and retention election of Florida trial court judges. Florida Department of State, Division of Elections, *2000 General Elections Results*, *available at* http://election.dos.state.fl.us/elections/resultsarchive/ (last visited Mar. 22, 2003). The referendum asked: "Shall the method of selecting circuit judges in the sixth judicial circuit be changed from election by a vote of the people to selection by the judicial nominating commission and appointment by the Governor with subsequent terms determined by a retention vote of the people?" Yes, to approve: 188,277, 38.76%; No, to reject 297,414, 61.24%. Anita Kumar, *Referendum—Judicial Selection: Floridians Keep Right to Elect Judges*, ST. PETERSBURG TIMES, Nov. 8, 2000, *available at* http://pqasb.pqarchiver .com/sptimes/index.html?ts=1052159653.

reform proposals. The results help explain why past efforts may have failed and suggest an alternative strategy for reform.