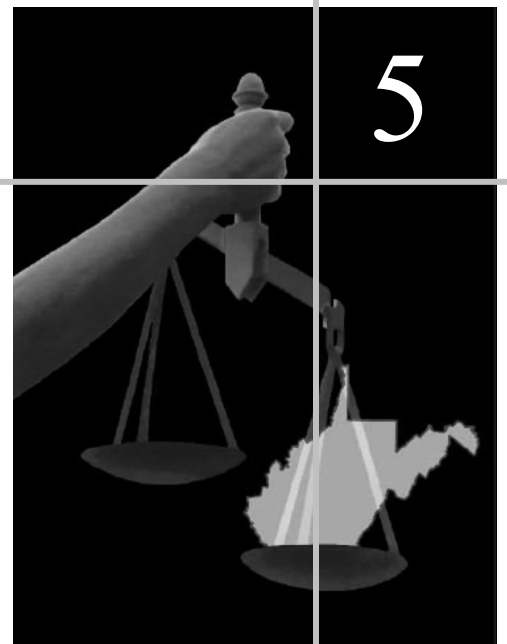


CHAPTER 5



HOW TO CHOOSE JUDGES: WEST VIRGINIA'S DIFFICULT PROBLEM

by Aman McLeod

The Rule of Law

5

HOW TO CHOOSE JUDGES: WEST VIRGINIA'S DIFFICULT PROBLEM

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INTRODUCTION

West Virginia has recently been rocked by revelations that the chief justice of its Supreme Court of Appeals, Elliott “Spike” Maynard, had been photographed vacationing with Don Blankenship, who is the Chairman and CEO of coal mining giant, Massey Energy Company.¹ The furor surrounding the revelation of their relationship ultimately lead Maynard to recuse himself from two cases involving Massey Energy.²

Concerns that campaign contributions and the rancor and partisanship of recent judicial campaigns³ in West Virginia are compromising the real or perceived independence of the judiciary, have led the West Virginia legislature to consider how the judicial selection process could be changed so as to better protect judges’ independence.⁴ Between the 2000 and 2004 election cycles, the amount contributed to state supreme court candidates who were running in those years increased by 52 percent from \$1,376,534 to \$2,838,905.⁵ Furthermore, the 2004 election was noted for the efforts of independent advocacy groups to influence the campaign, especially And for the Sake of the Kids, which successfully spent millions to defeat incumbent supreme court Justice Warren McGraw.⁶

¹ Paul Nydon, *Coal Operator Says Photos Show Maynard Should Not Hear Appeal*, CHARLESTON GAZETTE, Jan. 15 2008, at 1A.

² Tom Breen, *Legislators Debate Judicial Elections GOP, Business Lobby Say State Should Move to Nonpartisan Balloting*, CHARLESTON DAILY MAIL, Jan. 30 2008, at 9A.

³ E.g., Editorial, *Let's Change Judicial Selection, West Virginians Certainly Deserve a Better Way of Shaping Courts*, CHARLESTON DAILY MAIL, Nov. 8 2004, at 4A; Scott Wartman, *Court Race Muddled by Attacks*, THE HERALD-DISPATCH, Nov. 1 2004, at 1A.

⁴ Breen, *supra* note 2.

⁵ National Institute on Money in State Politics, data available at <http://www.followthemoney.org/index.phtml> (last visited Sept. 19, 2008).

⁶ Brad McElhinny, *McGraw sues over TV ads: Case targets spots that led to justice's defeat*, CHARLESTON DAILY MAIL, Dec. 2, 2004.

West Virginia is one of only ten states that use partisan elections to select its judges at the trial or appellate level,⁷ and it is one of only eight state that use partisan elections to select supreme court justices.⁸ West Virginia has used this method of judicial selection for both its trial and appellate courts since 1862,⁹ and although it was one of many states that used partisan elections in the Nineteenth Century, it has stayed with partisan elections as many other states have abandoned partisan elections in favor of nonpartisan elections and appointment combined with retention elections.¹⁰ The fact that West Virginia has stayed with partisan elections while other states have chosen different systems could be interpreted as a sign of its people's attachment to this system as a means of judicial selection.

As legislators consider how to change West Virginia's judicial selection system, discussion has focused on changing to nonpartisan elections and about adopting a system of public financing for judicial campaigns.¹¹ This chapter will evaluate these proposals, and consider alternatives for solving some of the problems that critics of West Virginia's current system of partisan judicial elections have pointed out.

NONPARTISAN ELECTIONS: OUT OF THE FRYING PAN AND INTO THE FIRE

The West Virginia Constitution stipulates that the judges of both the appellate and circuit courts must be chosen in elections, but it gives the state legislature the power to decide by statute whether judicial elections are partisan or nonpartisan.¹² The relative ease of switching to a system of nonpartisan elections makes this option attractive, since switching to an appointive system would require a constitutional amendment. Furthermore, the proponents of nonpartisan elections argue that this system would promote judicial impartiality and prevent judges from considering the political implications of their decisions when they are considering a case.¹³ As one state senator put it "Nobody appearing before a judge should have to worry about whether they're going to get fair justice because of their party registration. Justice should be blind."¹⁴

The central problem with this argument, however, is that in many circumstances, knowing judges' party affiliations can help to predict how they will decide a case, regardless of the system that is used to select the judges.¹⁵ The current theory among social scientists is

⁷ According to the American Judicature Society, the other nine states are Alabama, Illinois, Louisiana, Michigan, New York, Ohio, Pennsylvania, Tennessee, and Texas. AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS: "INITIAL SELECTION, RETENTION, AND TERM LENGTH" 4-10 (2008), available online at http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts1196376173077.pdf.

⁸ The other seven states to use partisan elections to select their supreme courts are Alabama, Illinois, Louisiana, Michigan, Ohio, Pennsylvania and Texas. *Ibid.*

⁹ AM. JUDICATURE SOC'Y, METHODS OF JUDICIAL SELECTION: WEST VIRGINIA, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=WV (last visited Sept. 20 2008).

¹⁰ F. Andrew Hanssen, *Learning about Judicial Selection: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 442 (2004).

¹¹ Ben Fields, *Interest Growing in Court Reform*, THE HERALD-DISPATCH, Feb. 7 2008, at 1A.

¹² W. Va. Const. Art. VIII, §§ 2,5 (2008).

¹³ Fields, *supra* note 11.

¹⁴ *Id.*

¹⁵ See, e.g., PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 231-41 (1980); CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 1-45 (2006); Melinda Gann Hall & Paul Brace, *Toward an Integrated Model of Judicial Voting*

that political party affiliation reveals something about a judge's political ideology, and that a judge's political ideology shapes how that judge interprets a law when that law is open to several plausible interpretations.¹⁶ It follows from this theory that partisan elections give citizens easy access to important information about a how a judicial candidate will decide cases if elected. Removing judicial candidates' party affiliations from the ballot and preventing the candidates from openly associating with political parties will make it much harder for voters to understand the policy implications of supporting a particular candidate. Research shows that in low profile elections like judicial elections, voters' primary source of information about the candidates comes from the ballot,¹⁷ and that if information about partisan affiliations is removed from the ballot the odds that a voter will cast a vote in a judicial election are reduced.¹⁸

Research also suggests that removing party affiliations from the ballot and preventing judges from associating from political parties will also affect the competitiveness of judicial elections and the probability that an incumbent judge will be challenged. For example, a nationwide study of state supreme court elections between 1980 and 1995 found that 61 percent of all judges in partisan election states faced challengers when they came up for reelection, whereas only 44 percent of judges in nonpartisan election states faced challengers,¹⁹ and that supreme court races tended to be closer and incumbents had a higher probability of losing in partisan elections versus nonpartisan elections.²⁰ This evidence suggests that by listing party affiliation on the ballot and by allowing parties to be formally involved in election campaigns, states help voters hold judges accountable for their decisions, since the likelihood of electoral competition encourages judges to consider their constituent's desires when deciding cases, and the greater likelihood of an incumbent being challenged means that voters are more likely to have a choice in elections.

Note, too, that switching to nonpartisan elections might actually increase the need to raise money, since, on average, candidates tend to raise more in nonpartisan state supreme court races than in partisan races, all other factors being equal.²¹ This might be because the candidates feel they the need to raise more money to get their messages out to voters, since the candidates cannot as easily rely on party affiliations to inform and mobilize voters.²²

One final argument against nonpartisan elections is that the state actually has very little power to remove the influence of political parties or partisan politics from judicial elections. Of course, the state can remove partisan affiliations from the ballot, but the Constitution places serious restrictions on states' ability to limit the political speech of

Behavior, 20 AM. POL. Q. 147, 158-65 (1992); Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843, 845-46 (1961); Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals*, 43 W. POL. Q. 317, 323-30 (1990); S. Sidney Ulmer, *The Political Party Variable in the Michigan Supreme Court*, 11 J. PUB. L. 352, 360-62 (1962).

¹⁶ See Sunstein et al., *supra* note 15.

¹⁷ Lawrence Baum, *Judicial Elections and Judicial Independence: A Voter's Perspective*, 64 OHIO ST. L.J. 13, 18-19 (2003).

¹⁸ *Id.* at 19-20.

¹⁹ Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 317 (2001).

²⁰ *Id.* at 318-29.

²¹ Chris Bonneau, *Campaign Fundraising in State Supreme Court Elections*, 88 SOC. SCI. Q. 68, 80 (2007).

²² *Id.*

candidates in judicial election campaigns,²³ which means that states probably cannot prohibit candidates from openly associating themselves with political parties or announcing where they stand on hotly disputed political issues like abortion. Accordingly, it is hard to keep parties or politics out of judicial elections, even in states that have nonpartisan elections.²⁴

In light of the foregoing, it seems unlikely that switching to nonpartisan elections will help to prevent either the perception or the reality of politics exercising influence in the judiciary.

THE INFLUENCE OF CAMPAIGN CONTRIBUTORS

However, those who support changing West Virginia's current system for choosing judges also point to campaign contributions as a justification for changing the way that judges are selected. A national survey has shown that the public believes that contributors to judicial campaigns can buy influence,²⁵ and empirical evidence exists showing that campaign contributions might affect judicial decision-making.²⁶

While the Constitution prohibits states from placing mandatory limits on how much a candidate can spend in an election,²⁷ a number of states have instituted systems of public financing for elections for various offices that are designed to limit the influence of contributors by making public funds available to qualifying candidates to fund their campaigns.²⁸ All of these systems are intended to entice candidates to voluntarily limit how much they raise for their campaigns with the promise of public money, however, candidates remain free to reject the public funds in order to maintain the freedom to raise and spend as much as they like. Each of these systems works in essentially the same way. Candidates must raise a certain qualifying amount in small donations from a minimum number of registered voters.²⁹ Once the candidates have reached the qualifying number of contributors and amount of contributions, most systems force the candidates to rely entirely on public funds, although

²³ See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, at 788 (2002); *Republican Party of Minn. v. White*, 416 F.3d 738, at 756, 763-66 (8th Cir.2005).

²⁴ See, e.g., Lewis Kamb, *Justices' Election Dilemma: Can They Be Fair? P-I Review Finds Many Potential Conflicts of Interest on High Court*, SEATTLE POST-INTELLIGENCER, Mar. 14, 2005, at A1; Conrad deFiebre, *Republican State Convention -NOTEBOOK- GOP Delegates Want Voter OK on Stadium Tax*, STAR TRIBUNE, Jun. 3, 2006, at 8A; Steven Walters, *Roggensack Elected to High Court-Silence on Issues Called Key*, MILWAUKEE JOURNAL SENTINEL, Apr. 2, 2003, at B1.

²⁵ JUSTICE AT STAKE CAMPAIGN, FREQUENCY QUESTIONNAIRE, OCTOBER 30 – NOVEMBER 7, 2001, 6 (2001), <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf>.

²⁶ Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. & POL'Y Q. 281, 288-90 (2007); Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994-1997*, 31 POL. & POL'Y 314, 326-31 (2003); Eric Waltenburg & Charles Lopeman, *Tort Decisions and Campaign Dollars*, 28 SE. POL. REV. 241, 250-58 (2000); Aman McLeod, *Bidding for Justice: A Case Study about the Effect of Campaign Contributions on Judicial Decision-Making*, 85 U. DET. MERCY L. REV. 385, 398-400 (2008).

²⁷ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 12-23 (1976).

²⁸ The following states have currently or in the past enacted systems of public financing: California, Hawaii, Idaho, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, North Carolina, Oklahoma, Oregon, Rhode Island, Utah, and Wisconsin. Jason B. Frasco, Note, *Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States*, 92 CORNELL L. REV. 733, n.19 (2007).

²⁹ *Id.* at 743-87.

some allow candidates to continue to raise and spend private funds subject to certain limits.³⁰ These public finance programs are funded through a variety of methods, including state appropriations, attorney bar fees, and voluntary income tax allocations.³¹

The record of these campaign finance schemes is uneven. Some appear to have attracted a significant number of candidates, and reduced their reliance on campaign contributions,³² while others have been less successful.³³ One lesson that can be drawn from these states' experiences with public financing of campaigns is that the amount of funding available to qualifying candidates is a critical factor in the success of these programs.³⁴ Unless candidates feel that the state will provide adequate funding to win an election, they are not likely to accept the contribution and spending limits tied to the receipt of such funds. For example, the availability of funds has been credited with the relative success of public campaign financing in Arizona, Maine, and North Carolina,³⁵ and with its failure in Wisconsin.³⁶ The use of multiple funding sources appears to be an effective way to create a reasonably sufficient and stable pool of funds to finance campaigns.³⁷

While public financing might solve some of the problems associated with campaign contributions, its effectiveness in removing the real and perceived influence of contributors would ultimately depend on how many candidates used it, and on how much money it required candidates to raise in order to qualify for the funding, with relatively low qualifying amounts based on many small contributions being preferable.³⁸ That said, any attempt to pass a public financing bill would have to overcome arguments that there are far better uses for scarce government funds than political campaigns.³⁹

CONCLUSION

This chapter has discussed several of the alternatives that the legislature and others are considering that are aimed at remedying problems associated with West Virginia's use of partisan elections to choose its judges. Although switching to nonpartisan elections is an unattractive option for many reasons, adopting a system of public financing for judicial elections might be effective in reducing any unfair influence that contributors to judicial campaigns might gain if enough money were made available to qualifying candidates. One option that would solve problems associated with partisan elections and campaign contributions would be to switch to an appointive system, in which judges would be appointed by the governor with or without the recommendation of a selection commission,

³⁰ See *id.* at 783-86; Aman McLeod, *If At First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA L. REV. 499, 517-19 (2005).

³¹ See Frasco, *supra* note 28, at 743-87.

³² *Id.* at 747-48, 757-59, 771-72.

³³ *Id.* at 785-87; McLeod, *supra* note 30 at 518-19.

³⁴ Frasco, *supra* note 28, at 789-90.

³⁵ *Id.* at 789.

³⁶ McLeod, *supra* note 30 at 518-19.

³⁷ Frasco, *supra* note 28, at 790.

³⁸ Another reason to ensure an adequate level of public funding for campaigns is that spending in judicial campaigns appears to be linked to the level of information that voters have about candidates. See Baum, *supra* note 17, at 26.

³⁹ See, e.g., Editorial, *No on Question 3*, BANGOR DAILY NEWS, Oct. 29, 1996; Editorial, *Supporters of Public Financing Hope As Maine Goes, So Goes N.C.*, WINSTON-SALEM JOURNAL, Apr. 21, 2001; George D. Brown and Thomas R. Kiley, *Vote No on Public Funding*, BOSTON GLOBE, Nov. 2, 2002, at A15.

subject to legislative confirmation. Judges could be further insulated from political influence by giving them life tenure or by mandating that they could not serve more than a single term on the bench.⁴⁰ These options, however, would require a constitutional amendment, and would certainly be very difficult to achieve, given that no state has completely eliminated judicial elections since the mid-Nineteenth Century.⁴¹

Going forward, West Virginia legislators must consider what levels of impartiality and public accountability they wish to build into the state's judiciary. Partisan elections have tilted the West Virginia judiciary in favor of accountability, because they leave judges open to influence from public opinion, contributors and party leaders. Adoption for a system of partial public financing for judicial campaigns or of an appointive system of judicial selection would decrease the level of accountability in the judiciary, and enhance the possibility that judges will impartially decide the cases before them. What seems certain is that for any change to occur and be workable, it must be supported by bipartisan political consensus and broad public support which, given the nature of the issues involved, will not be easy to achieve.

⁴⁰ A system where judges would serve a single, lengthy, non-renewable term as been suggested by the American Bar Association's Commission on the Twenty-First Century Judiciary. See AMERICAN BAR ASSOCIATION, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 67-73 (2003), available at <https://www.abanet.org/judind/jeopardy/pdf/report.pdf> (last visited Sep. 28, 2008).

⁴¹ McLeod, *supra* note 30 at 518-19.

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