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Judicial Elections in West Virginia: By the People, for the People or By the Powerful, for the Powerful - A Choice Must Be Made

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JUDICIAL ELECTIONS IN WEST VIRGINIA: "BY THE PEOPLE, FOR THE PEOPLE" OR "BY THE POWERFUL, FOR THE POWERFUL?"A CHOICE MUST BE MADE

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I. INTRODUCTION

When voters in West Virginia head to the polls on election day and step into a ballot booth, not only do they select their future legislative representatives and executive officers, but they are also charged with the responsibility of selecting members of West Virginia's judicial branch. Sounds easy enough, right? Wrong! This process might seem simple or flawless, but over the years, it has drawn the attention of many critics who feel that the public should not be responsible for selecting the judiciary.[1]

[1] *See, e.g.*, John P. Bailey, *Selecting Judges*, THE W. VA. LAW., Jan. 2004, at 4 (advocating an appointment system for various reasons including: campaign finances and the selection of

It is important to address the fear that if a few individuals select our judiciary, their decisions will be heavily influenced by politics.[2] However, a judicial branch free from all political influences is impossible to attain. The ultimate goal is to find the perfect balance. Although this is probably an unattainable goal, we must constantly strive to reach that perfect balance even with the knowledge that in all probability we will never fully succeed. The escalating costs of financing a judicial campaign and the perceived influences that accompany these funds have left West Virginians at a crossroads. We must take measures to ensure that our judicial system remains fair, impartial, and balanced.

This note explores the history of some of the issues surrounding judicial selection and examines the future of the selection process, particularly in West Virginia. Part II of this note examines the history behind the various judicial selection methods and how each has evolved over time. Part III provides an overview of the three general types of judicial selection methods. Part IV brings to light many of the problems, questions, and issues of judicial selection. Part V focuses on the 2004 Supreme Court of Appeals of West Virginia election that brought the judicial selection method debate in West Virginia to the forefront. Ultimately, this note's goals are to provide the reader with a basic background of how judicial selection methods have evolved and to assess the current status of judicial selection in West Virginia.[3]

II. SELECTING JUDGES: A HISTORICAL PERSPECTIVE

The structures of the various judicial branches in the United States date back to the time of the original thirteen colonies.[4] Upon winning independence from England, the early founders struggled to find a balance between an independent judiciary and a judiciary representative of the democratic principles for

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female and minority candidates to fill judicial positions) [hereinafter Bailey]; ABA, JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 1, *available at* http://www.manningproductions.com/ABA263/finalreport.pdf [hereinafter JUSTICE IN JEOPARDY]; W. VA. DEF. TRIAL COUNSEL, CIVIL JUSTICE COMMITTEE REPORT ON THE STATE OF WEST VIRGINIA'S CIVIL JUSTICE SYSTEM 1, http://www.dtcwv.org/dtcwv1.pdf [hereinafter W. VA. DEFENSE TRIAL COUNSEL]; Gina Holland, *Lawyers Group Calls for Judicial Reform*, THE CHARLESTON GAZETTE, June 13, 2003, at 11A; *Problems in W. Va. Legal System Must Be Fixed Soon*, THE HERALD-DISPATCH (HUNTINGTON, WV), Sept. 13, 2003, at 12A.

2 Larry V. Starcher, *Choosing West Virginia's Judges*, 20 QUINNIPIAC L. REV. 767, 774 (2001).

3 For a more exhaustive review of the complex landscape of judicial selection, *see, e.g.*, CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 1 (1997) [hereinafter SHELDON & MAULE]; DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION, AND ATROPHY 1 (1995); Bradley A. Smith, *Symposium on Judicial Elections: Selecting Judges in the 21st Century*, 30 CAP. U. L. REV. 437 (2002).

4 *See generally* SHELDON & MAULE, *supra* note 3, at 2.

which the new nation yearned.[5] The United States federal government adopted an appointment system to select the members of its judicial branch. To be more precise, the President of the United States, upon approval from the Senate, appointed federal judges to their posts for lifetime tenure.[6] This federal appointment system began with the enactment of the United States Constitution.[7]

The underlying constitutional basis for the provision establishing the judicial branch of government rests on the ideals of judicial independence and separation of powers, as evidenced by comments made during the framing of the United States Constitution. For example, Alexander Hamilton stated, "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[8] Additionally, Hamilton concluded,

> *If then the courts of justice are to be considered as the bulwarks of a limited constitution, against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices*, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty.
>
> This independence of the judges is equally requisite to guard the constitution and the rights of individuals, from the effects of those ill-humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovation in the government, and serious oppression of the minor party in the community.[9]

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5 *See generally id.* (discussing the experience the colonies had with colonial governors ignoring judicial rulings and creating courts just to facilitate political favors to friends and supporters).

6 U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.").

7 *See* U.S. CONST. art III, § 1 ("The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

8 THE FEDERALIST NO. 78 (Alexander Hamilton).

9 *Id.* (emphasis added).

> *That inflexible and uniform adherence to the rights of the constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.* Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or the legislature, there would be danger of an improper complaisance to the branch which possessed it: if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, *there would be too great a disposition to consult popularity*, to justify a reliance that nothing would be consulted but the constitution and the laws.[10]

While the exact selection method was vigorously debated at many of the early Constitutional Convention meetings,[11] Hamilton's comments were representative of the consensus that judges should be appointed, and enjoy lifetime tenure in order to ensure judicial independence, a concept dear to all who had witnessed the problems with the English monarchy system.[12] The federal selection method (appointment by the President with approval from the Senate) remains in effect today with little alteration since its inception. The various state systems, however, have experienced a number of changes along the way.

Many of the original states allowed individual state legislatures to appoint judges, while others allowed gubernatorial appointment (with approval by a special council to serve as a check on the governor's choices).[13] Between 1776 and 1830 each state that joined the union adopted one of the two appointment methods.[14] As Alexander Hamilton and other Federalists began to see their political philosophy overtaken by that of Jeffersonian democrats, the Jacksonian period began, "emphasizing representative bodies and citizen participation."[15] Feeling that numerous courts had used judicial independence to take

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10 *Id.* (emphasis added).

11 SHELDON & MAULE, *supra* note 3, at 9-11.

12 *See generally id.* at 1-2.

13 *Id.* at 3. Connecticut, Delaware, Georgia, New Jersey, North Carolina, Rhode Island, South Carolina, and Virginia all used legislative appointment, while judges in Maryland, Massachusetts, New Hampshire, New York, and Pennsylvania were chosen by each state's governor. *Id.*

14 *Id.* Alabama, Illinois, Mississippi, Ohio, and Tennessee followed the legislative approach and Indiana, Kentucky, Louisiana, Maine, Missouri, and Vermont all employed gubernatorial appointment. *Id.*

15 *Id.* (citing JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 140 (1950)).

policy making out of the hands of legislators, some states began shortening judicial terms and selecting judges through popular election, as corrective devices.[16]

These popular elections soon turned into partisan battles with heavy influence from political sectors.[17] Many of the corruptive vices of politics began to creep into the judicial branch, causing a wave of reform beginning around 1913.[18] Two main reform methods rose to the forefront: nonpartisan elections and what came to be known as the Missouri-plan.[19] All of the previously mentioned methods for selecting judges have survived in some form or another in various states. For example, as examined in Part III.A, West Virginia is one of only six states still using partisan elections to select the judges for its highest court and one of only eight states that selects its trial court judges by partisan election.[20]

III. OVERVIEW OF THE VARIOUS METHODS OF SELECTING JUDGES

A. West Virginia's Method: Partisan Elections

The constitution of West Virginia specifically outlines the powers of West Virginia's judicial branch.[21] The selection of the various levels of West Virginia's judicial branch is done by election, as described in the state constitution.[22] More specifically, the constitution states that the Supreme Court of Appeals of West Virginia "shall consist of five justices . . . . The justices shall be elected by the voters of the State for a term of twelve years, unless sooner removed or retired as authorized in this article."[23] Circuit court judges and magistrates are selected in largely the same fashion.[24] While the constitution provides general guidelines and minimum requirements that individuals must meet before

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16 *Id.* at 4. In 1846, just over half of the 29 states used popular election and all states entering after 1846 adopted this method to some degree. *Id.* The states that resisted the move towards popular election chose to shorten judicial terms to maintain control of their judiciary. *Id.*

17 *Id.* at 5.

18 *Id.*

19 *Id.* at 5-6; (discussed *infra* Parts III.B & III.C respectively).

20 ABA, JUSTICE IN JEOPARDY: FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, *at* http://www.manningproductions.com/ABA263/FactSheet.htm (last visited Oct. 27, 2003).

21 *See generally* W. VA. CONST. art. VIII.

22 *Id.*

23 *Id.* § 2.

24 W. VA. CONST. art. VII, § 5 (stating that "[t]he judge or judges of each circuit court shall be elected by the voters of the circuit for a term of eight years, unless sooner removed or retried as authorized in this article."); W. VA. CONST. art. VIII, § 10 (stating that "[t]he legislature shall establish in each county a magistrate court . . . . The legislature shall determine the qualifications and the number of magistrates for each such court to be elected by the voters of the county . . . .").

being qualified to serve in any of the state's judicial capacities, the voters of the state still ultimately determine who will serve as their judges.[25] Thus, depending on the judicial position (ranging from magistrate to state supreme court justice), the voting population locks the judiciary into place for anywhere from four to twelve years.[26]

Partisan elections have always been a hotly debated topic, especially within the legal community. Opponents of partisan judicial elections cite the appearance of impropriety, lack of the appearance of judicial independence, and campaign financing among the many problems that arise when popular vote is used to select judges.[27] Problems with judicial elections as well as problems under other judicial selection methods will be discussed *infra*, but first it is necessary to examine the alternative methods used by other states: nonpartisan elections and merit selection.[28]

B. The Nonpartisan Election

Despite language in the West Virginia constitution allowing for nonpartisan judicial elections,[29] partisan elections are used to select West Virginia's judiciary. Many states, however, use a system of nonpartisan elections to select judges.[30]

The movement away from partisan elections and towards nonpartisan elections began in the late nineteenth century when politics was seen as "all but

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25 W. VA. CONST. art. VIII, § 7.

26 W. VA. CODE § 3-1-16 (2002) (regarding terms for state supreme court elections and stating: "At the general election to be held in the year one thousand nine hundred sixty-eight, and in every twelfth year thereafter, there shall be elected one judge of the supreme court of appeals, and at the general election to be held in the year one thousand nine hundred seventy-two, and in every twelfth year thereafter, two judges of the supreme court of appeals, and at the general election to be held in the year one thousand nine hundred seventy-six, and in every twelfth year thereafter, two judges of the supreme court of appeals.); W. VA. CODE § 3-1-17 (2002) (regarding terms for circuit judges and magistrates and stating: "There shall be elected, at the general election to be held in the year one thousand nine hundred ninety-two, and in every eighth year thereafter, one judge of the circuit court of every judicial circuit. . . ; and at the general election to be held in the year one thousand nine hundred ninety-two, and in every fourth year thereafter, . . . the number of magistrates prescribed by law for the county. . . .").

27 Potential problems with judicial elections discussed *infra* Part IV.A.

28 *See infra* Parts III.B and III.C respectively.

29 W.VA. CONST. art. VIII, §§ 2, 5, 10.

30 *See* Bailey, *supra* note 1, at 5 (listing Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, and Wisconsin as states using a non-partisan election to select judges). *See also* ABA, JUSTICE IN JEOPARDY: FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, *at* http://www.manningproductions.com/ABA263/FactSheet.htm (last visited Oct. 21, 2004).

destroy[ing] the integrity of the bench."[31] In fact, the following comment became indicative of the attitude towards partisan elections by many in the legal community:

> [A] party judiciary becomes an evil intolerable to be borne . . . . The second great evil of the partisan selection of judges . . . is the corporate influence in the courts . . . . Day by day, year after year, here a little and there a little, these soulless and breathless creations of the genius of modern enterprise are extending their influence, their demands and their greed. They never die; they never tire; they never sleep. [Finally], the manner in which a political nomination convention . . . is organized makes it impossible to secure decent judicial nominations.[32]

Therefore, with fears of judicial corruption and corporate influence on the judiciary among other considerations, nonpartisan elections were seen "as a means for involving voters directly in the government [(namely the judiciary)] without being distracted by parties and special interests."[33]

Many variations of nonpartisan systems are used today by individual states.[34] Some states hold judicial elections at times separate from other partisan elections in an effort to remove political influences from judicial races.[35] Other states merely remove the party affiliations of judges from ballots.[36] Regardless of the exact method by which nonpartisan elections are conducted, many of the elections still experience political influence whether it be in the form of campaign contributions or public endorsements of certain "nonpartisan" candidates by political groups.[37] This begs the question: can an election truly be "nonpartisan?" Some states have answered this question with an emphatic "no" leading to an approach to judicial selection that more closely resembles the federal method.

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31 SHELDON & MAULE, *supra* note 3, at 43 (stating that "[p]olitical pay-offs and cronyism often had more to do with being nominated subsequently elected judge than qualifications"). Often, party loyalty meant one would be selected to run for a judicial position and "[j]udgeships sometimes became the dumping ground for political 'has-beens.'" *Id.*

32 *Id.* at 43-44 (citing a quote contained in CHARLES H. SHELDON, A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT 61 (1988)).

33 *Id.* at 44.

34 *See generally, e.g.*, SHELDON & MAULE, *supra* note 3.

35 *Id.* at 45.

36 *Id.*

37 *Id.*

C. *Merit Selection: The Missouri-Plan*

A "compromise" arose out of the struggle to find a method for selecting judges that would provide an independent judiciary without the perils accompanying popular elections while simultaneously involving the public in the process. The process to find this "compromise" first originated in 1906 when a young law professor told the American Bar Association "popular judicial elections were a major cause of public dissatisfaction with the administration of justice."[38] Former United States President William Howard Taft agreed when, in 1913, he "declared that even the nonpartisan judicial ballot was a failure . . . [because] such a system permitted unqualified persons who were incapable even of political support to become elected through a vigorous campaign."[39] These views coupled with others led to the establishment of the American Judicature Society ("AJS").[40] This society sought to establish a merit selection system "that would maximize the benefits and minimize the weaknesses of both the appointment and election processes."[41]

The system that the AJS came up with has long been referred to as the "Missouri-Plan" because, after being approved by the American Bar Association in 1937, Missouri was the first state to accept this selection method.[42] The Missouri-Plan consists of three primary components: (1) a "non-partisan nominating commission of lawyers and non-lawyers to identify and evaluate candidates for judicial positions"; (2) an "appointing authority (usually the governor), who chooses [which candidates] to appoint to the bench"; and (3) "retention" votes which allow the general public to participate in nonpartisan, noncompetitive elections to evaluate a judge's record during his tenure.[43]

While the details of the various merit selection systems vary, the basic premise is as follows: First, a nominating commission is chosen.[44] These individuals, usually consisting of both legal professionals and others, collaborate and decide on a list of potential candidates to fill judicial vacancies.[45] Then,

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[38] ALLAN ASHMAN & JAMES J. ALFINI, THE AMERICAN JUDICATURE SOCIETY, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS 10 (1974) (relaying the sentiments of Roscoe E. Pound, University of Nebraska, law professor regarding the popular election of judges) [hereinafter ASHMAN & ALFINI].

[39] *Id.* at 10-11.

[40] *Id.* at 11.

[41] *Id.*

[42] *Id.*

[43] Tillman J. Finley, Note, *Judicial Selection in Alaska: Justifications and Proposed Courses of Reform*, 20 ALASKA L. REV. 49, 52 (2003) [hereinafter Finley].

[44] *See generally, e.g.*, ASHMAN & ALFINI, *supra* note 38; Finley, *supra* note 43, at 52.

[45] *Id.*

after narrowing down the candidates, the nominating commission presents its choices to the appointing authority.[46] The appointing authority is usually the governor or another member of the executive branch, but can in some instances be the state's legislative body.[47] Finally, the chosen judge serves a specific term before coming under voter review.[48] At this point, the voters get to decide whether the nominating commission and appointing authority have made the correct decision in appointing the particular judge by voting either to retain the judge or replace the judge with a new nominee.[49]

Although this "compromise" sounds like a way to keep everyone involved in the judicial selection process while ensuring a qualified, independent judiciary, it has seen its share of problems just as the popular election methods have.[50]

IV. JUDICIAL SELECTION: NO STRANGER TO CRITICISM

A. *Problems Arising Under an Election System*

1. Actual and Perceived Impropriety

Judges are viewed as the voice of reason and fairness in our society, the ones who are able to put aside their personal beliefs in order to decide difficult questions with the utmost degree of impartiality and integrity. At first glance, it may seem easy for judges to put everything else aside and decide cases on the merits alone, but this process is more complicated. Regardless of how hard a judge may try to suppress emotions and decide a case based on the law only, sometimes it is difficult. Therefore, in an effort to provide judges with some assistance and guidelines on how to perform their duties, the American Bar Association issues a *Model Code of Judicial Conduct* ("*Model Code*").[51] The *Model Code* is broken down into the following five basic canons, which all judges should tailor their behavior towards:

> (1) A judge shall uphold the integrity and independence of the judiciary;
> (2) A judge shall avoid impropriety in all of the judge's activities;
> (3) A judge shall perform the duties of judicial office impartially and diligently;

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46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *See infra* Part IV.B (discussing problems under merit systems).

51 ABA, MODEL CODE OF JUDICIAL CONDUCT (2000).

> (4) A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations; and
> (5) A judge or judicial candidate shall refrain from inappropriate political activity.[52]

Canon Two[53] plays a prominent role in the context of judicial elections. Judicial candidates who might succumb to the pressure and act in a manner that would bring the judge's integrity into question are certainly not our first choice for the bench. For example, would we select a judge who knowingly used his position in the judiciary to attempt to avoid prosecution for a traffic violation?[54] No, this type of actual impropriety, while arguably insignificant, is certainly unacceptable. However, the question becomes much more blurred when looking at instances where there is only a mere appearance of impropriety.

"The test for the appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired."[55] Combine this test with an impending judicial election and many difficulties arise: public perception and campaign contributions being just two such examples.

Allegations of judicial impropriety, regardless of whether the allegations hold any truth, affect public perception.[56] For instance, imagine a situation in which a judge is presiding over a case involving a group of retirees alleging improper denial of pension benefits by their former employer, a large international corporation. If the judge crafts a ruling favoring the retirees will he lose campaign funding from the corporate sector? What if the judge sides with the company, does the judge lose valuable votes with those individuals of retirement age in the community? These thoughts should not be a factor in the judge's decision, and most likely are not a factor. However, the suspicion or appearance of impropriety, especially if the ruling is controversial, can warp the public's perception of the judge and the judicial system as a whole.

These are the types of unfortunate situations that popular judicial elections can breed. Abandoning judicial elections certainly would not eliminate all instances of actual or perceived impropriety, but it would reduce the possibility. Anything that can be done to reassure the public that "judges are fair and keep

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52 *Id.*

53 *Id.* ("A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.").

54 *See id.* at 6 (providing useful commentary containing examples of acts that would constitute actual judicial impropriety).

55 *Id.* (contained in the commentary related to Canon 2A).

56 Kara Baker, Comment, *Is Justice For Sale in Ohio? An Examination of Ohio Judicial Elections and Suggestions for Reform Focusing on the 2000 Race for the Ohio Supreme Court*, 35 AKRON L. REV. 159, 170 (2001).

the justice system functioning effectively"[57] is worth trying. Additionally, if "[t]he Framers of the Constitution considered impartiality and its appearance to be essential enough to remove the judiciary from popular elections,"[58] states that have not done so should consider doing the same.

2. Campaign Speech

Another area that gives rise to conflict in judicial elections is the campaign speech of candidates for the judiciary. While "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance,"[59] it is the opinion of many of those in the legal realm that "'[i]t is the business of judges to be indifferent to popularity,'"[60] and that "[t]heir mission is to decide 'individual cases and controversies' on individual records."[61] The basic feeling among many in the legal profession is that candidates for judicial office should not be allowed to discuss their personal opinions on disputed legal issues.[62]

Members of the United States Supreme Court, in a five to four vote,[63] used a strict scrutiny analysis to reject restrictions on judicial speech during judicial campaigns.[64] The Court determined that Minnesota's "announce clause"[65] violated the First Amendment of the United States Constitution because it was not narrowly tailored to serve a compelling state interest.[66] The respondents asserted two interests that the Court failed to see as compelling: (1)

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57 *Id.* at 174.

58 *Id.* at 169.

59 Wood v. Georgia, 370 U.S. 375, 395 (1962).

60 Chisom v. Roemer, 501 U.S. 380, 401 n. 29 (1991) (quoting Stevens, *The Office of an Office*, CHICAGO BAR RECORD 276 (1974).

61 Republican Party of Minn. v. White, 536 U.S. 765, 804 (2002) (Ginsburg, Stevens, Souter, Breyer, JJ., dissenting) (citing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 266 (1995) (Stevens, J., dissenting)).

62 *See* Baker, *supra* note 46, at 176 n. 130; *see also*, ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2) cmt. (2000) (stating: "[M]erit selection of judges is a preferable manner in which to select the judiciary." This is exemplary of the ABA's general attitude disfavoring judicial elections for numerous reasons including campaign speech.)

63 *See Republican Party of Minn.*, 536 U.S. at 788-92 (O'Connor, J., concurring).

64 *Id.* at 765. For a general overview and discussion of the case, *see* Gaston de los Reyes, Student Note, *Appearance of Impartiality in the* Republican Party v. White *Court's Opinion*, 83 B.U. L. REV. 465 (2003).

65 *Republican Party of Minn.*, 536 U.S. at 768 (citing MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i) (2000) ("'candidate for a judicial office, including an incumbent judge,' shall not 'announce his or her views on disputed legal or political issues.'")).

66 *Id.* at 788.

"preserving the impartiality of the state judiciary," and (2) "preserving the appearance of the impartiality of the state judiciary."[67] The court suggested many reasons why impartiality (or the appearance of impartiality) was not a compelling state interest, including: (1) "the clause . . . does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*;"[68] (2) the impossibility of finding judges who do not have preconceptions about the law (due to the wealth of legal experience that should have been enjoyed by any qualified applicant for a judicial post);[69] and (3) "the announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms."[70]

Although some limits on campaign speech are perhaps permissible,[71] the ruling in *Republican Party of Minnesota v. White*[72] certainly makes it much more difficult to impair the speech of judicial candidates. The majority admitted that "[t]here is an obvious tension between the article of Minnesota's popularly approved Constitution, which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause which places most subjects of interest to the voters off limits."[73] The Supreme Court of Minnesota believed that the current judicial election system warranted some change to ensure judicial impartiality in enacting the "announce clause."

However, now that the United States Supreme Court has declared the clause unconstitutional Minnesota is left with the same concerns as before with little or no help. Justice O'Connor's concurring opinion suggests that perhaps the only solution is for Minnesota to abandon its current judicial election system when she states,

> Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing so the State has voluntarily taken on the risks to judicial bias described above. As a result,

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67 *Id.* at 775.

68 *Id.* at 776 (stating: "[t]o be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. Any party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly."). *Id* at 776-77.

69 *Id.* at 777-78.

70 *Id.* at 783.

71 *Id.* at 780 (suggesting that Minnesota's separate limit on what the Court referred to as a "prohibition on campaign 'pledges or promises,'" is perhaps constitutional).

72 *Id.* at 765.

73 *Id.* at 787.

> the State's claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.[74]

These struggles over judicial campaign speech further justify why many states have switched to at least a partial appointment system for selecting judges.

3. Perception of Voter Ignorance and Disinterest

What do voters think about when they go to the polls to select their elected officials? Just which races warrant the attention of the voting public? Can voters adequately assess the competency and other qualifications of judicial candidates to the degree necessary to select the right person for the job? These and other questions lead to yet another difficulty encountered all too often in judicial elections: the perception of voter ignorance and disinterest. Voters are often overwhelmed by the majority of information available about potential candidates for political office. When election time rolls around, it seems as if you cannot pick up a newspaper, open the mailbox, or turn on the radio or television without being bombarded with political advertisements endorsing candidates.

Conversely, voters have not traditionally been bombarded with political messages in judicial elections because of restrictions placed on judicial campaign speech. As a result, many voters "go to their polling place without having assimilated much (or any) information about these [judicial] contests."[75] A lack of information about judicial candidates can lead to the casting of votes for reasons entirely unrelated to a judicial candidate's qualifications. For example, "Kansas and West Virginia provide the candidates' cities or counties of residence" on ballots which can lead to what is known as "friends and neighbors" voting resulting in candidates fairing much better at polling places near their homes.[76] "Rolloff" is also fairly common in judicial elections.[77] This phenomenon occurs when voters abstain from voting for any candidate because of lack of information.[78]

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74 *Id.* at 792 (O'Connor, J., concurring).

75 Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 19 (2003), *available at* http://moritzlaw.osu.edu/lawjournal/baum.htm [hereinafter BAUM].

76 *Id.* at 21-23.

77 *Id.* at 19.

78 *Id.*

Yet another trend that occurs when voters have a lack of information about a candidate is voting along party lines. In fact, most individuals tend to identify with one of the two major parties,[79] and it has been suggested that "[a]s the volume of other information declines, party identification is likely to become increasingly important as a basis for choices between candidates."[80] Therefore, it is not all that uncommon for a voter to choose a far less qualified candidate in favor of one that belongs to the political party that a particular voter supports.

After the decision in *Republican Party of Minnesota v. White*[81] more information about judicial candidates is likely to become available to voters. This decision will no doubt lead to more information getting into the hands of the voting public, but the question is, what kind of information? Will judges merely state their qualifications and political beliefs, or will they go as far as simply running ad campaigns to achieve a higher degree of name recognition or perhaps campaigns attacking the "qualifications or off-the-bench behavior" of their competitors?[82] It is uncertain, but the decision in *Republican Party of Minnesota*[83] seems likely to "increase the frequency with which candidates state explicitly how they stand on issues" thereby "facilitat[ing] issue-based attacks on incumbents by challengers."[84] For example, "creating the impression that a judge is soft on crime can have great electoral impact."[85] This motive is often achieved (as was done in California in 1986)[86] by demonstrating an incumbent judge's unwillingness "to impose or uphold death sentences."[87] What may result is voters being "talked into" electing a judge with meager qualifications in order to rid the court of a highly competent and highly qualified individual who is simply more lenient when it comes to imposing the death penalty. One may not wholly disagree with this result, but if the court deals only with a few capital cases per year while it hears thousands of medical malpractice disputes, what good does having a less qualified judge who favors the death penalty really do

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79 *Id.* at 24 (citing as support for this proposition HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AM. POL. 2001-2002, at 114 (2001)).

80 *Id.* (citing Barbara Hinckley et al., *Information and the Vote: A Comparative Election Study,* 2 AM. POL. Q. 131, 143-45 (1974); Stephen D. Shaffer, *Voting in Four Elective Offices: A Comparative Analysis,* 10 AM. POL. Q. 5, 13-19 (1982)).

81 Republican Party of Minn. v. White, 536 U.S. 765 (2002); (discussed *supra* Part IV.A.2).

82 BAUM, *supra* note 67, at 34.

83 *Republican Party of Minn.*, 536 U.S. 765.

84 BAUM, *supra* note 67, at 34.

85 *Id.* at 35.

86 *Id.* (citing as support for this proposition John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability,* 70 JUDICATURE 348, 353-54 (1987)).

87 *Id.*

for the public? These are examples of the kinds of troubling issues that voter ignorance and disinterest raise and ones that could be somewhat alleviated with the abandonment of popular judicial elections.

4. The Financing Behind Judicial Campaigns

Campaign finance is continually a hot topic in the political realm. Members of Congress, presidential candidates, and others with political aspirations fight the constant battle over ethical financing of political campaigns. How much money should a candidate raise in order to run a successful campaign? Should there be a limit on campaign spending, and if so, what should that limit be? Who can contribute to a candidate's campaign, and how much? These are among the many questions that arise when discussing campaign finance. Unfortunately, the judicial branch of our government is no stranger to these same concerns when it comes to judicial elections. In fact, opponents of judicial elections cite the financing of judicial campaigns as the major reason that a change in selection method is urgently necessary.[88]

Judicial candidates typically raise campaign funds in a slightly different fashion than other political candidates due to the need for separation from their contributors. For example, the ABA has suggested the following general limitation on judicial candidates dealing with campaign financing:

> A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than [one year] before an election and no later than [90] days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.[89]

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[88] *See, e.g.*, W. VA. DEF. TRIAL COUNSEL, *supra* note 1, at 19-21; Bailey, *supra* note 1, at 4; Gina Holland, *Lawyers Group Calls for Judicial Reform*, THE CHARLESTON GAZETTE, June 13, 2003, at 11A.

[89] ABA, MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2) (2000) (citation omitted).

This provision keeps judicial candidates from directly soliciting funds, but the harsh reality is that judicial candidates still receive massive amounts of campaign contributions, a phenomenon which can lead to the appearance of impropriety. Figures indicate that the cost of judicial campaigns is rising dramatically.[90] For example, the ABA found that in Pennsylvania, "two candidates for a [s]upreme [c]ourt seat in 1987 raised a total of $523,00 [sic] between them," but "by 1995, that figure [had increased] to $2.8 million."[91] This increase pales in comparison to the figures the ABA discovered in Ohio, which saw an increase from $100,000 to $2.7 million for a single supreme court seat over the six-year period from 1980 to 1986.[92] These figures are indicative of judicial elections throughout the United States. In fact, one report indicates that "[d]uring the 2000 election cycle, more than a million dollars was spent on supreme court races in each of nine states, including[:] Alabama, Illinois, Michigan, Mississippi, Nevada, North Carolina, Ohio, Texas, and West Virginia."[93] However, the real problem with "big money" being spent on judicial elections is not the sheer amount of funds being expended, but the sources of these funds.

One of the ABA's major concerns with judicial elections is that judges accept funds from contributors who may appear before them or who may have an interest in a case that is before a particular judge.[94] The fact that judicial candidates are spending millions of dollars to finance their campaigns is one thing, but when big businesses, special interest groups, and attorneys play a role in the financing of judicial campaigns, many critics begin to take notice and express concern. An example uncovered during an ABA investigation indicated that an Alabama Justice raised $35,000 from the Business Council of Alabama, $10,000 from the Alabama Forestry Association, $5,000 from political action committees, and $5,000 from insurance lobbyists.[95] Receiving campaign financing in these amounts from such special interest and politically grounded groups can easily lead the public to question a judicial candidate's impartiality. Think about this situation: a judge receives a large percentage of campaign funds from labor unions, and subsequently rules against large corporations in several cases involving employment issues. This scenario could certainly lead to the perception (thus the appearance of impropriety and impartiality) that the judge is finding ways to protect campaign interests and supporters.

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90 *See generally* ABA, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 9 (2002).

91 *Id.* at 10-11.

92 *Id.* at 10.

93 JUSTICE IN JEOPARDY, *supra* note 1, at 22.

94 ABA, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS 11 (2002).

95 *Id.* at 12.

Another major concern regarding the financing of judicial election campaigns involves contributions from attorneys. The ABA studied contribution levels to high court races between 1989 and 2000 and was able to trace 76% of the total contributions to an original source.[96] Of these contributions, 29% came from attorneys.[97] The main concern with attorney contributions to judicial campaigns is the public's perception that the contributions might, in some way, influence a judge who may have to decide a case that involves one of his contributors. Of course, contribution limits are placed on the amount a judge can receive from any one attorney[98] and campaign fundraising committees[99] attempt to isolate judges from the fundraising efforts, but, nevertheless, the appearance of possible impropriety still exists in the eyes of the public.

West Virginia has seen its share of attorney contributions to judicial campaigns throughout the years. Of the five-justice panel that comprises the Supreme Court of Appeals of West Virginia, four of the justices have received the largest amount of their campaign funding from personal injury attorneys.[100] In fact, it is reported that contributions from personal injury law firms (which are in no way equal to the total amount of contributions made by attorneys) have in the aggregate, among the five current justices, totaled over a half million dollars.[101]

The amount of money flowing into judicial campaigns often leads to the perception that judicial decisions are being influenced. For example, a survey in Texas revealed that "83% of Texas adults, 69% of court personnel, and 79% of Texas attorneys believed that campaign contributions influenced judicial decisions 'very significantly' or 'fairly significantly,' while 48% of judges indicated that money had an impact on judicial decisions."[102] The Defense Trial Counsel

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96 JUSTICE IN JEOPARDY, *supra* note 1, at 24.

97 *Id.*

98 *See generally* ABA, MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(2)-(3) (2000). The commentary following Canon 5(C)(2) expressly mentions that merit selection is favored over popular election of judges for the simple reason that attorney contributions to judicial campaigns raise issues of impartiality, especially when the judge has knowledge of the contributions and when the contributions "by virtue of their size or source, raise questions about a judge's impartiality." *Id.* The comment goes on to note that these types of situations can be grounds for disqualification. *Id.*

99 *Id.*

100 Statistics available at http://www.wvjusticewatch.org/money/index.html (last visited July 5, 2004). In campaigns from 1996-2000, the lowest percentage that any justice received in terms of campaign contributions from personal injury attorneys was 20% (Justice Spike Maynard in 1996) and the largest was 78% (Justice Warren McGraw in 1998 and Justice Joe Albright in 2000). If Justice Maynard's 20% figure is excluded the average percentage of judicial campaign funds coming from personal injury attorneys in elections for the Supreme Court of Appeals of West Virginia is 71%. *Id.*

101 *Id.*

102 John P. Bailey, *supra* note 1 at 4 (citing a survey sponsored by the Texas Supreme Court).

of West Virginia ("DTCWV") conducted a similar survey, questioning attorneys in West Virginia about their views of the judicial system in West Virginia.[103] Although the DTCWV survey only questioned a small number of defense attorneys, the results clearly show that the attorneys were uncomfortable with many facets of West Virginia's judicial system and its method for selecting judges.[104] The fact that any number of attorneys and judges feel that judicial campaign contributions have an effect on judicial decisions raises a red flag. If judges are unable to separate their campaigns from their business in the courtroom, then is it not about time to find a better way to select our judiciary?

B. *Problems Arising Under Appointment Based Systems*

1. The Few Making Decisions for the Many

States that utilize either pure judicial appointment (similar to the Federal appointment process) or some form of merit selection process (such as the Missouri-Plan) to choose the judiciary branch rely on a small number of individuals to select candidates for judicial positions.[105] Proponents of these selection methods often cite the ability to avoid voter ignorance and disinterest, the ability to select a more qualified judiciary, and the removal of "big money" from the judicial selection process as reasoning for their support.[106] However, opponents view elections as the key to keeping the public involved in the judiciary. The Honorable Larry V. Starcher, Justice on the Supreme Court of Appeals of West Virginia, contends, "the competitive election process results in just as able or 'qualified' a judiciary as the appointment process."[107] He further states it is his experience that

> it is widely found that there are substantial social and political virtues associated with the competitive election of judges. These virtues include the accountability, independence, legitimacy of the judicial branch of government, and the selection of persons as judges who are involved in and attuned to their communities. A competitively elected judiciary has been said

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103 W. VA. DEF. TRIAL COUNSEL, *supra* note 1, at 89-98.

104 *Id.* For example, many of the attorneys surveyed felt that West Virginia's courts (in particular the Supreme Court of Appeals) did not always decide cases in a fair and objective manner and that some judges were often disrespectful to attorneys during oral arguments. *Id.*

105 *See generally* SHELDON & MAULE, *supra* note 3, at 105-46.

106 *See generally* JUSTICE IN JEOPARDY, *supra* note 1, at 24-26.

107 Starcher, *supra* note 2, at 768-69.

> to result in a more well-rounded, responsive, and enlightened bench.[108]

Justice Starcher makes a valid point when he argues that removing politics altogether from judicial elections would be "unrealistic."[109] The main point of his argument can be summed up in the following statement: "[T]he selection of judges always has been and always will be political. . . . [T]he issue is what sort of politics will be involved in the judicial selection process? The politics of the few or the politics of the many?"[110] Starcher's point is essentially one of letting the people who might come in front of the judge decide who the judge will be rather than allowing a few elite lawyers or politicians decide for the people.

Justice Starcher attempts to redefine the word "qualified" as it relates to judicial candidates. His version of "qualified" is a candidate who has suffered through the trials and tribulations of the campaign trail in his local community rather than a well-established defense attorney that is being groomed for the bench.[111] Adopting Starcher's argument, the question still remains whether popular elections actually serve to ensure that the most "qualified" candidates become judges. With the influence of campaign financers such as big corporations and attorneys, can elections take place that ensure that the most qualified candidate is selected, or are the voters merely selecting the most "qualified" politician, or neither? Justice Starcher argues, "campaign finance committees insulate judicial candidates from fundraising" and that "the issues of campaign costs and financing are distinct and different from the issue of judicial selection methods."[112] Many others take an alternate view and almost concede that elections would serve as an acceptable method for selecting judges, absent the campaign financing issues that arise.[113] Thus far, West Virginia has yet to act and has left the selection of judges in the hands of its voters, but for how long this will continue is unknown, especially considering the growing concern regarding judicial campaign financing.

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108 *Id.* at 769-70 (footnotes omitted).

109 *Id.* at 773.

110 *Id.* at 774.

111 *See generally id.* at 775-77.

112 *Id.* at 775.

113 *See* Gina Holland, *Lawyers Group Calls for Judicial Reform*, THE CHARLESTON GAZETTE, June 13, 2003, at 11A; *Problems in W. Va. Legal System Must Be Fixed Soon*, THE HERALD-DISPATCH (Huntington, WV), Sept. 13, 2003, at 12A.

2. Judicial Accountability and Misconduct

As discussed *supra* in Part II, pure judicial appointment has long been the judicial selection method of choice for the Federal government. However, lifetime tenure tends to raise concerns about how a judge would ever be removed from the bench if it became necessary. The solution advocated at the federal level is impeachment,[114] but this process has been heavily criticized for (1) being a "cumbersome and time-consuming process,"[115] (2) only being used "in cases of egregious judicial misconduct,"[116] and (3) being an "'all-or-nothing' solution to the problem of judicial misconduct."[117] In response to critics of the federal appointment system and in an effort to reach a compromise, supporters of appointment-based judicial selection often suggest that if lifetime tenure is the reason for holding onto the idea of electing judges, then merit selection is the proper approach.

The argument for merit selection is essentially that many of the improprieties accompanying partisan judicial elections are eliminated, and the lack of judicial accountability is remedied by allowing retention election voters to vote against judges accused of judicial misconduct. On the surface this seems like a compromise that might solve the perceived lack of judicial accountability that arises when judges are appointed. However, studies have shown that in retention elections it is almost impossible to remove an incumbent judge.[118] One study, covering retention elections in ten states from 1964-1994, found that 99% of all incumbent judges are successful in reelection bids in retention elections.[119] This appears to be in part due to the lack of a physical opponent in retention elections, where judicial incumbents only face opposition in the form of negative ad campaigns from "bar associations, citizen groups, or newspa-

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114 U.S. CONST. art. II, § 4.

115 Alex B. Long, *"Stop Me Before I Vote For This Judge Again": Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 W. VA. L. REV. 1, 17 (2003) (citing Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1210 (1991)).

116 *Id.* In support of his statement, Professor Long cites authority supporting the fact that "[o]nly thirteen federal judges have been impeached by the House of Representatives in the nation's history, and only seven of those were convicted by the Senate." *Id.* He goes on to say that "[f]ive of these convictions came in the twentieth century, and the judges in each instance were charged with offenses that, if committed, would have constituted crimes." *Id.*

117 *Id.*

118 *See* BAUM, *supra* note 67, at 28 (citing Larry Aspin et al., *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 8-12 (2000)).

119 *See id.* (citing Larry Aspin et al., *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 8-12 (2000)). The article goes on to state that "[a]bout half of the defeats occurred in one state, Illinois, and all but one of the Illinois defeats resulted from the state's unique requirement of a 60% affirmative vote for retention." *Id.*

pers."[120] In fact, numbers indicate that only 13% of judicial incumbents in retention elections even bothered formally campaigning to retain their spot on the bench.[121] It is important to note that the study ended in 1994, so there is a possibility that judicial incumbents in retention elections face more opposition and are removed more often today.[122]

V. WEST VIRGINIA'S STRUGGLES WITH JUDICIAL SELECTION: THE 2004 SUPREME COURT OF APPEALS ELECTION

** Author's Note: Neither this section nor any other part of this Note is in any way an effort to criticize West Virginia's current judiciary or any of its decisions. This Note merely suggests that if popular elections continue as West Virginia's judicial selection method, the integrity of our judiciary as we know it is in serious jeopardy of being undermined.*

West Virginia has chosen to use partisan elections to select the judges who will serve on its highest court.[123] The West Virginia constitution states that the five justices of the Supreme Court of Appeals of West Virginia "shall be elected by the voters of the State for a term of twelve years, unless sooner removed or retired . . . ."[124] In 2004, West Virginia's voting public will be called upon to choose someone to sit on the bench until 2016 (barring removal, retirement, etc.). Current Supreme Court of Appeals Justice Warren McGraw's seat is up for grabs, and although he is running for reelection, he is not without opposition, both in the form of other candidates and in the form of political enemies.[125] Justice McGraw has been characterized in the media as pro-plaintiff, insensitive to the needs of businesses, and adored by trial lawyers.[126] Many,

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120 *Id.* at 29 (citing Larry T. Aspin & William K. Hall, *Campaigning for Retention in Illinois*, 80 JUDICATURE 84 (1996); Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 308 (1994).

121 *See id.* According to the retention election survey, 13% becomes 2% if Illinois, with its 60% affirmative vote requirement for retention, is excluded. *Id.*

122 *See generally id.* at 13 (citing, e.g., William Glaberson, *Fierce Campaigns Signal a New Era for State Courts*, N.Y. TIMES, June 5, 2000, at A1, for the proposition that judicial campaigns are becoming much more highly contested, and also to point out that interest groups have begun to take a more serious interest in the outcome of state judicial elections).

123 *See generally* W. VA. CONST. art. VIII.

124 *Id.* § 2.

125 *See* Lawrence Messina, *Supreme Court Race Could Be Hardest Fought*, THE CHARLESTON GAZETTE, Aug. 4, 2003, at C1 (discussing the anticipation regarding the 2004 race for the Supreme Court of Appeals of West Virginia paying particular attention to political struggles surrounding the court and possible opponents to the incumbent Justice Warren McGraw).

126 *See generally id.*; Robert Lenzner and Matthew Miller, *Buying Justice*, FORBES, July 21,

including Justice McGraw himself, give these allegations little if any merit, but many groups are paying close attention to the race for Justice McGraw's seat on the court. In fact, the United States Chamber of Commerce has spent over 100 million dollars supporting the campaigns of judicial candidates since 2000, and is now reportedly willing to contribute to a campaign opposing Justice McGraw's reelection bid.[127] Reports allege that the "prime objective" of the Chamber is "to vote out judges supported by trial lawyers, labor unions and the Democratic Party and install new judges sympathetic to insurance companies, multinational corporations and the Republican Party."[128] This "secret war on judges"[129] is particularly troubling because it brings politics to the forefront of the one branch of government that should be free from political influence.

Further evidence of politics invading the judiciary exists in press releases from various labor organizations announcing Justice McGraw as the candidate of choice in 2004.[130] The argument has become so heated that lawyers have organized to formally examine the civil justice system,[131] and a current member of the West Virginia Supreme Court of Appeals has come out publicly in support of retaining elections as West Virginia's judicial selection method.[132] In addition, the Honorable John McCuskey, a former member of the Supreme Court of Appeals of West Virginia, publicly stated that the Court is the "key in determining West Virginia's economic future."[133]

In fact, the debate over judicial selection in West Virginia has escalated to the point that the West Virginia State Bar has highlighted judicial selection reform as an item on its agenda for change in the state.[134] The immediate past president of the West Virginia State Bar, John P. Bailey, characterized the 2004 election as follows, "I predict that the present supreme court election will con-

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2003, at 64, 66-67.

127 Lenzner & Miller, *supra* note 126, at 64-65.

128 *Id.*

129 *Id.*

130 *See Business Briefs: AFL-CIO Endorses McGraw for Court*, THE CHARLESTON GAZETTE, Nov. 4, 2003, at D1 (reporting West Virginia's largest labor union's endorsement of Warren McGraw); *UMW Endorses McGraw for Court*, CHARLESTON DAILY MAIL, Oct. 18, 2003, at 5C.

131 W. VA. DEF. TRIAL COUNSEL, *supra* note 1; Juliet A. Terry, *New State Bar President Favors Appointing* Judges, STATE J., July 11, 2003, at 22, *available at* http://www.statejournal.com; Gina Holland, *Lawyers Group Calls for Judicial Reform*, THE CHARLESTON GAZETTE, June 13, 2003, at 11A.

132 Larry V. Starcher, Editorial, *Choosing Judges: Elections Will Result in Qualified Judiciary*, THE CHARLESTON GAZETTE, June 9, 2003, at 5A.

133 *See generally* George Hohmann, *Supreme Court Seen as Key to State's Economic Future, Former Justice Says Court Can Undo Reforms*, CHARLESTON DAILY MAIL, Aug. 12, 2003, at C1.

134 *See* John P. Bailey, *Remarks at the 2004 Annual Meeting*, THE W. VA. LAW., Apr. 2004, at 4; Charles M. Love, III, *Acceptance Speech*, THE W. VA. LAW., May 2004, at 4.

clude with the largest amount of money ever being spent in a judicial race and the hardest campaign ever waged. It will undoubtedly leave a bad taste in the mouths of citizens throughout the State."[135] The current president of the West Virginia State Bar, Charles M. Love, III, stated,

> I firmly believe that when we get through the primary and general election process this year for the position on the West Virginia Supreme Court, there will be a consensus of lawyers, judges and the general public [sic][,] [t]hat in order to enhance respect for the judiciary and our justice system, we need to make changes in our judicial selection process.[136]

Love has even established a West Virginia State Bar committee to investigate the manner in which West Virginia selects its judiciary.[137] The fact that the last two presidents of the West Virginia State Bar feel that West Virginia's judicial system is in need of image enhancement to increase respect is alarming. West Virginia needs to take this debate out of the newspapers and put it before the legislature so that a change can begin.

Justice McGraw was successful during the May 2004 primary election in his bid for reelection, winning the democratic nomination.[138] Much was written about the heated battle between McGraw and his main opponent Jim Rowe,[139] as well as the amount of money spent on the race, in the days following the primary election.[140] Since then, West Virginia's struggle with judicial campaigns has only intensified.[141] November's general election has seen an all-out-war between Justice McGraw and his republican opponent Brent Benja-

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135 Bailey, *supra* note 134, at 4.

136 Love, *supra* note 134, at 4.

137 Charles M. Love, III, *Board of Governors at Work*, THE W. VA. LAW., Aug. 2004, at 4 (listing the chair and members of the newly formed committee). The committee will officially begin meeting following November's general election. *Id.*

138 Chris Wetterich, *Supreme Court: McGraw Overcomes Negative Ads to Defeat Rowe*, THE CHARLESTON GAZETTE, May 12, 2004, at A1. With special interest groups spending $1.6 million on the primary election and $1.4 million being spent by the two main democratic candidates, this was the most expensive judicial election race in West Virginia history. Toby Coleman, *Court Race Attracted Big Money: The $3 Million Spent on McGraw-Rowe Match Made it the Priciest Court Primary in State History*, CHARLESTON DAILY MAIL, July, 21, 2004, at A1.

139 Wetterich, *supra* note 128, at A1. Jim Rowe has served as a judge in the Circuit Court of Greenbrier County, West Virginia since 1997. *Id.*

140 *See, e.g., id.*; Coleman, *supra* note 128; and Chris Wetterich, *Campaign 2004: McGraw Wins Battle, but Business War Rages*, THE CHARLESTON GAZETTE, May 13, 2004, at C1.

141 *See e.g.*, Brad McElhinny, *High Court Ad War Intensifies*, CHARLESTON DAILY MAIL, October 22, 2004, at 1A; Paul J. Nyden, *Massey CEO's Political Donations Questioned*, THE CHARLESTON GAZETTE, October 21, 2004, at 1C.

min.[142] For example, advertisements, while not always endorsed by the opposing candidate, have become so controversial that the West Virginia State Bar actually asked the candidates to "tone it down."[143] The downside to this type of campaign is that the victorious candidate's judicial tenure may be tainted by questions regarding his integrity, which should never be the case.

In conclusion, efforts to improve the system are far more useful and worthwhile than mud-slinging and public insults, which have no place in our judiciary. Regardless of who's side you take, the ultimate point is this: West Virginia needs to take a long, hard look at its method of selecting judges to ensure the most *qualified* judiciary is chosen in our state.

VI. CONCLUSION

Taking into account the recent publicity surrounding West Virginia's judicial election process, including public struggles over our judicial selection method[144] and the increasing role that finances are playing in judicial selection,[145] reform is inevitable. As this Note discusses, every type of judicial selection method has its problems, but the most disturbing and prevalent problem in West Virginia today is the financing of judicial campaigns and the appearance of impropriety that accompanies it. West Virginia must change its judicial selection process before the public loses faith in West Virginia's judiciary.

The question now becomes what should West Virginia do? There is no one right answer and the decision is not an easy one, but it is a decision that must be made and soon. There are many possible reforms that West Virginia could make to its judicial selection process that would help curb the appearance of impropriety associated with the large contributions being made to judicial campaigns. For example, West Virginia might go to a pure appointment system or a merit-based system to select its judges, approaches advocated by defense lawyers in West Virginia, the American Bar Association, and legal scholars.[146] Another option is to keep an election system, but use campaign finance reform to help alleviate the large amounts of money exchanging hands in judicial elec-

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142 *See id.*

143 *State Bar Urges Cleaner Supreme Court Race: Benjamin Attack Ads Fueling 'Nastiest' Contest in the Nation, Group Says,* CHARLESTON DAILY MAIL, October 19, 2004, at 5A.

144 *Compare* Larry V. Starcher, Editorial, *Choosing Judges: Elections Will Result in Qualified Judiciary,* THE CHARLESTON GAZETTE, June 9, 2003, at 5A, *and* Larry L. Rowe, *West Virginia Judicial Selection Process: "Merit" in the Eye of the Beholden Versus Election Financial Reform,* THE W. VA. LAW., December 2003, at 14, *with* W. VA. DEF. TRIAL COUNSEL, *supra* note 1, *and* Juliet A. Terry, *New State Bar President Favors Appointing* Judges, THE STATE JOURNAL, July 11, 2003, at 22, *available at* http://www.statejournal.com, *and* Gina Holland, *Lawyers Group Calls for Judicial Reform,* THE CHARLESTON GAZETTE, June 13, 2003, at 11A.

145 *See supra* Part IV.A.4.

146 *See generally* W. VA. DEF. TRIAL COUNSEL, *supra* note 1; JUSTICE IN JEOPARDY, *supra* note 1; Larry L. Rowe, *supra* note 144, at 14.

tions. Perhaps West Virginia could set strict limits on the amount legal professionals and corporations can contribute to judicial campaigns, or even develop a system to publicly finance judicial elections. Everyone seems to have an opinion about what the proper method is for selecting West Virginia's judges, so why not let the legislature hear the arguments and decide what is best for the people of West Virginia?

An examination of these various alternatives warrants a great deal of discussion and further study, thereby removing it from the scope of this note, but West Virginia has to seriously consider taking the steps necessary to conduct this examination. If our state continues to stand still and take a stubborn approach to the hotly debated topic of judicial selection, eventually West Virginia may come to the point where labor unions, public interest groups, political lobbying organizations, and large corporations will cause the bidding war for judges to escalate to a point where the voice of voters will be virtually eliminated. Is it better to let elected officials appoint judges instead of allowing the almighty dollar to control our judicial branch? That is the question that the elected representatives of the West Virginia Legislature must address unless West Virginia intends to allow its judges to become the servants of a few powerful groups rather than the servants of justice for all West Virginians.

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