Maurice A. Deane School of Law at Hofstra University
Scholarship @ Hofstra Law

Hofstra Law Faculty Scholarship

10-2014

The Unconstitutionality of Electing State Judges

Monroe H. Freedman
Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation
Monroe H. Freedman, *The Unconstitutionality of Electing State Judges*, 20 Verdict (2014)
Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/398

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

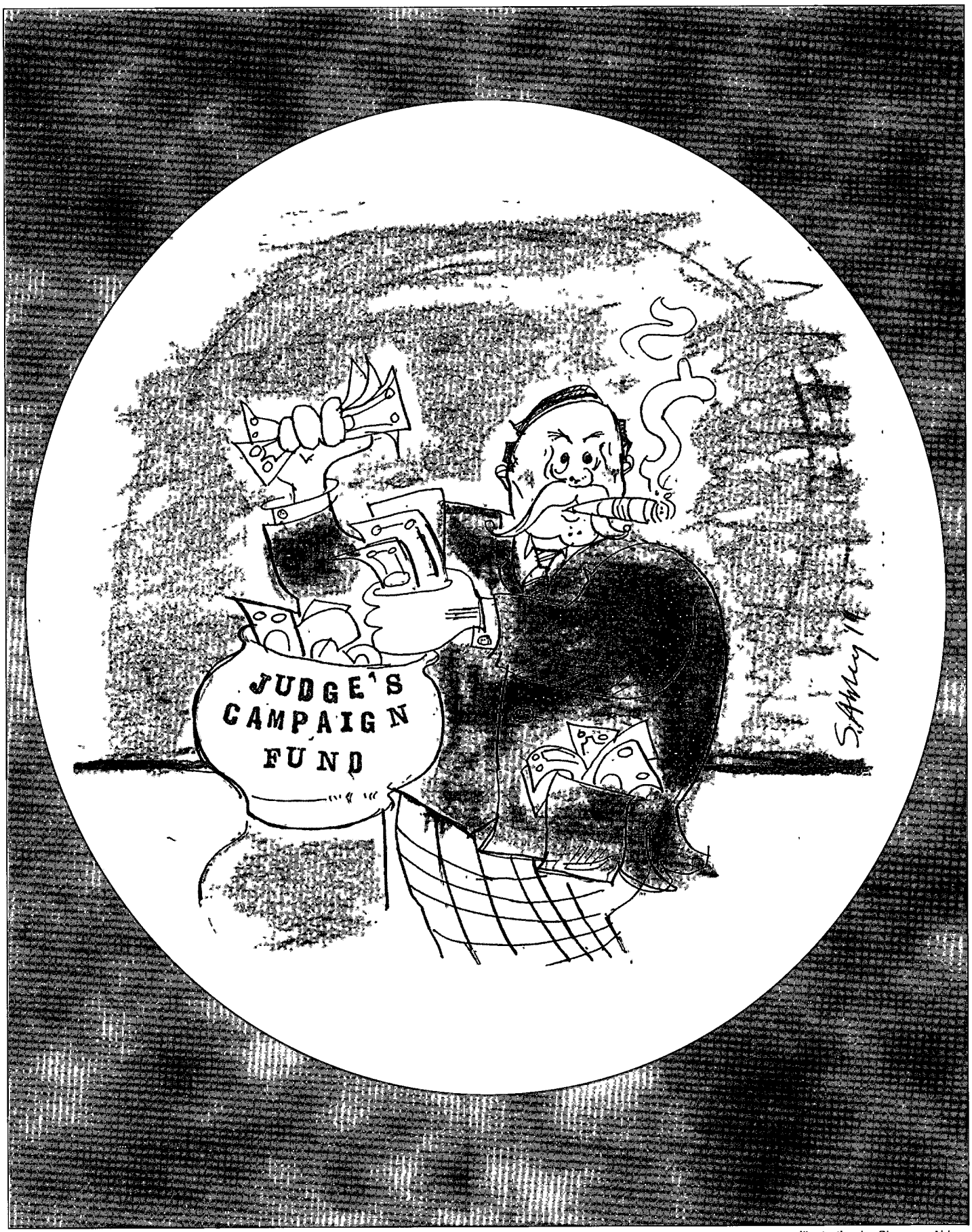
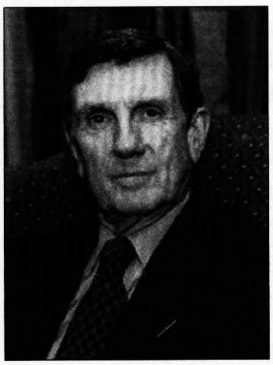


Illustration by Shannon Abbey

The Unconstitutionality of Electing State Judges

by Monroe H. Freedman, Esq.



In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), 122 S.Ct. 2528 (2002), the United States Supreme Court held that a candidate in a judicial election has a First Amendment right to announce his or her views on disputed legal or political issues. Accordingly, the Court struck down the "announce" clause of the ABA Model Code of Judicial Conduct (1972), which states that (1) A candidate, including an incumbent judge, for a judicial office . . . (b) should not . . . announce his views on disputed legal or political issues. . . . [ABA Model Code of Judicial Conduct, Canon 7B(1)(b) (1972)]. The majority opinion was written by Justice Scalia, joined by Rehnquist, O'Connor, Kennedy, and Thomas. The dissenters were Stevens, Souter, Ginsburg and Breyer.

Due Process and Judicial Re-Elections

Even more important than the holding in *Republican Party of Minnesota*, however, is the opinion expressed in strong and extensive *dicta* by a majority of the Court, stating that due process is violated whenever a judge who is subject to reelection decides a controversial case. That conclusion was expressed by Justice Ginsburg, writing for the four dissenting Justices, and by Justice O'Connor, who parted from the majority to write a separate opinion addressing that issue.

In the context of the Ginsburg and O'Connor opinions, this essay will discuss: (1) the Supreme Court's cases that explain the relationship of due process to judicial independence and impartiality; (2) the adverse impact of reelection of judges on independence and impartiality; (3) the pernicious effects of campaign fund-raising on independence and impartiality; (4) the view of the framers of the Constitution, expressed in *The Federalist*, that reelection or reappointment of judges is incompatible with fidelity to the Constitution and laws; (5) some cases illustrating how reelection of judges has impaired independence and impartiality; and (6) the significant possibility that a majority of the Court will find that reelecting judges violates due process.

Beginning in 1927, in *Tumey v. Ohio*[1] the Supreme Court recognized, in an opinion by Chief Justice Taft, that due process is denied if there is a "*possible* temptation to the *average* ... judge ... which *might* lead him not to hold the balance nice, clear, and true...." *Tumey* was a misdemeanor prosecution in which the judge received $12 as his share of the $100 penalty assessed against the defendant. In vacating the conviction for violating due process, the Court held that unless the judge's interest is so "remote, trifling, or insignificant," as to be *de minimis*, the judge must be disqualified.[2]

Based on the *Tumey* line of authority, Justice Ginsburg in *Republican Party of Minnesota* concluded that a litigant is deprived of due process when the judge who hears his case has a "direct, personal, substantial and pecuniary" interest in ruling against him;[3] that the judge's interest is sufficiently "direct" if the judge knows that her "tenure in office depends on certain outcomes;"[4] and that due process does not require a showing that the judge is biased in fact as a result of her self-interest. Rather, the Court's due process decisions have "always endeavored to prevent even the probability of unfairness."[5] Ginsburg's remarks are applicable to any judge who "may be voted off the bench and thereby lose her salary and emoluments" if her decision displeases the voters.[6*]

In her separate opinion, Justice O'Connor agreed that judges who are subject to reelection "cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects,"[7] giving them "at least some personal stake in the outcome of every publicized case."[8] O'Connor approvingly cited the observation of a state supreme court judge who said that ignoring the political consequences of controversial cases is like "ignoring a crocodile in your bathtub."[9] She also relied on studies showing that judges who face elections are far

Continued on page 18

Monroe H. Freedman is a Professor of Law at Hofstra University Law School and an Honorary Member of the American Board of Criminal Lawyers. He received his A.B., LL.B. and LL.M. at Harvard University. He received the American Bar Association's Michael Franck Award in recognition of "a lifetime of original and influential scholarship in the field of lawyers' ethics," among numerous other awards.

The author is very proud to note that a report in his FBI file says: "Freedman has been a member of the National Association for the Advancement of Colored People and of the American Civil Liberties Union. He has been extremely outspoken, and his irresponsible mouthings have received an inordinate amount of publicity." The author, in fact, has the framed quote displayed on the wall of his office.

Continued from page 15

more likely to override jury sentences of life without parole and impose the death penalty.[10]

Examples of Actions in Elections Undermining Judicial Independence

Those concerns were illustrated by the case of Tennessee Supreme Court Justice Penny White. In 1996, her retention was defeated by a campaign that relied upon her vote against the death penalty in a case in which she (and four other justices) had affirmed the defendant's conviction. That outcome was "twisted in inflammatory mass mailings,"[11] which denounced Justice White as wanting to "free more and more criminals and laugh at their victims."[12] After Justice White's loss, Tennessee Governor Don Sundquist asked, "Should a judge look over his shoulder about whether they're (sic) going to be thrown out of office?"[13] He answered his own question, "I hope so."[14]

...ignoring the political consequences of controversial cases is like "ignoring a crocodile in your bathtub."

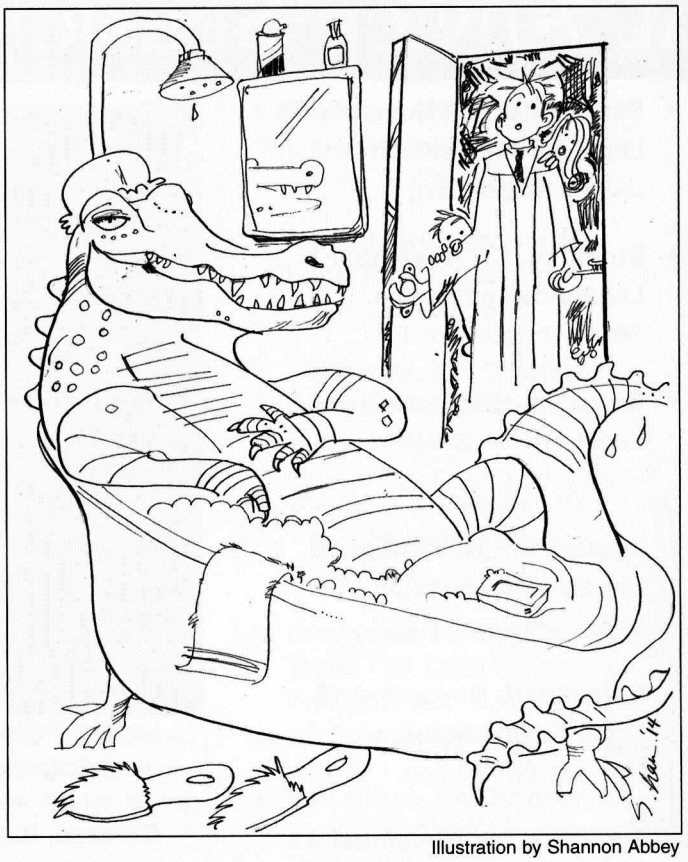


Illustration by Shannon Abbey

O'Connor's opinion then went further, to challenge "judicial elections generally,"[15] regardless of whether a particular case might be affected by the judge's concern about reelection. Referring to the state's claim of a compelling interest in "an actual and perceived ... impartial judiciary," she noted that "the very practice of electing judges undermines this interest."[16] That is, even when judges succeed in overcoming their concern with voters' displeasure, the public's confidence in the judiciary could be undermined "simply by the possibility" that judges would be unable to do so.

In addition, O'Connor noted the pernicious effects of campaign fund-raising in judicial elections.[17] Not surprisingly, lawyers and litigants who appear in court are among the major contributors to judges' campaigns,[18] and "relying on campaign donations may leave judges feeling indebted to certain parties or interest groups."[19]

When lawyers and litigants appear to be buying influence with campaign contributions, the appearance of partiality goes beyond the highly publicized case, tainting any case in which money may have passed to a judge's campaign by a litigant or lawyer in a case.[20] Thus,

TEL 212.962.1818
FAX 240.218.6456
CELL 212.321.3240
EMAIL *zimmny@attglobal.net*

LAW OFFICES OF
RICHARD A. ZIMMERMAN
233 Broadway • Suite 2202 • New York, NY • 10279

Stephen M. Murphy
ATTORNEY AT LAW

REPRESENTING EMPLOYEES
IN CIVIL RIGHTS LITIGATION

353 Sacramento St., Suite 1140
San Francisco, CA 94111
Tel: (415) 986-1338 Fax: (415) 986-1231
smurphy@justice.com www.stephenMmurphy.com

O'Connor's ultimate due process challenge is to the entire system of judicial election of judges, in cases of both major and minor public interest.

In response to the due process arguments in the O'Connor and Ginsburg opinions, Justice Scalia suggested that election of judges cannot violate due process because the practice coexisted with the 14th Amendment since its adoption.[21] However, that is not an adequate response for several reasons.

The first reason is the intent of the framers with regard to elected judges.[22] In The Federalist No. 78.[23] Alexander Hamilton explained that fidelity to the Constitution and laws, and to the rights of individuals is "indispensable in the courts of justice." He cautioned, however, that the requisite fidelity cannot be expected from judges who hold their offices subject to reelection.[24] Regardless of who might exercise the power of retention, Hamilton wrote, the judges' fear of displeasing that authority would be "fatal to their necessary independence." Specifically, if the power of retention were to reside in the people, or to persons chosen by them for that purpose, "there would be too great a disposition to consult popularity" rather than assuring that "nothing would be consulted but the constitution and the laws."[25]

Due Process Made Applicable to the States

Hamilton was referring only to federal courts, but the 14th Amendment made due process applicable to the states. This was recognized by the Supreme Court in *Brown v. Board of Education of Topeka*[26] (invalidating *de jure* school segregation under the Equal Protection Clause of the 14th Amendment) and, particularly, *Bolling v. Sharpe*[27] (reaching the same result under the Due Process Clause of the 5th Amendment). Moreover, the Supreme Court held in 1991 that if a trial judge is not impartial, there is a "structural defect" in the trial, and reversal is required without the need to demonstrate specific harm.[28] Indeed, because the right to an impartial tribunal is essential to fundamental fairness, it is one of those "extraordinary" rights that cannot be waived. [29]

In addition, the factual premise for a due process attack on elected judges is significantly different from the circumstances at the time of either the 5th or the 14th Amendment. A significant part of Justice O'Connor's concern is the advent of fund-raising in judicial elections in exorbitant amounts, reaching into millions of dollars.[30] Fund-raising for judicial office [did] not exist in 1789 or 1868. The demeaning effect of the practice was expressed by Ohio Supreme Court Justice Paul Pfeifer, who said, "I never felt so much like a hooker down by the bus station as I did in a judicial election."[31]

More important, multi-million dollar fund-raising profoundly undermines judicial independence and impartiality. In the millennia-old epigram, "Gifts are like hooks"[32] — or, in modern parlance, gifts are chits or counters. The appearance of corruption and partiality is clear.

Role of Single-Interest Political-Action Organizations

Another relatively recent phenomenon is negative campaigning against sitting judges by single-interest political-action organizations. This is illustrated in Utah, where judges have been voted off the bench in retention elections after vociferous opposition by such disparate groups as the Gun Owners of Utah,[33] the National Organization of Women,[34] and the Gay and Lesbian Utah Democrats, and by a coalition group organized by the pastor of the First Baptist Church of Tooele and calling itself Utahns for Judicial Reform.[35]

One tactic of these groups (and even of contending judicial candidates themselves) is to focus on a sensationalized or distorted version of the underlying facts of a case, while ignoring controlling legal issues, and then, in effect, to identify the judge with the criminal and/or the crime. This is illustrated by former Judge Penny White's case, discussed above, where Judge White was characterized as wanting to "free more and more criminals and laugh at their victims."[36]

In that case, Judge White had not voted to free the appellant, who had been sentenced to death. Rather, she

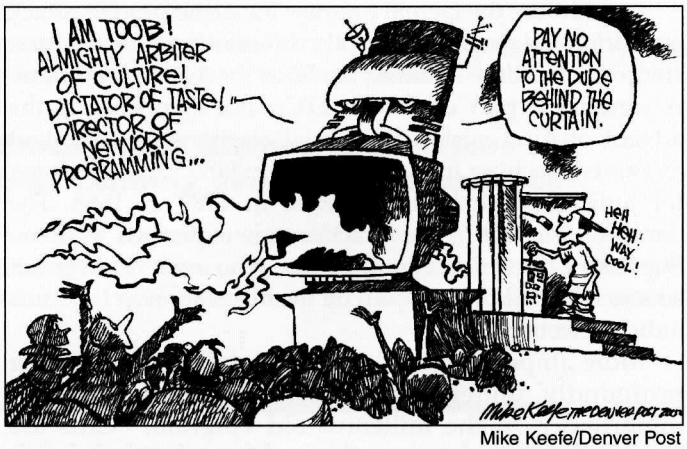
Mark A. Gloade, Esq.

supports
Coalition of Concerned
Legal Professionals'
Know Your Law sessions.

Certified Specialist in Criminal Law

Peter Swarth
ATTORNEY AT LAW

6520 Platt Ave. #557
West Hills, CA 91307
(818) 887-8800



Mike Keefe/Denver Post

had concurred in a majority opinion affirming the conviction and remanding the case for re-sentencing.

Current Makeup of the Court

Since *Republican Party of Minnesota* was decided, Rehnquist and O'Connor have been replaced on the Court by Chief Justice Roberts and Justice Alito. If either of them adopts Justice O'Connor's views, there would still be a majority in favor of invalidating judicial elections on due process grounds. Moreover, it appears that Justice Kennedy could be persuaded to adopt that position. It is true that he did not refer to due process in *Republican Party of Minnesota*, but there he joined an opinion based on the First Amendment, which made it unnecessary to reach the Due Process Clause.

However, Justice Kennedy has demonstrated a particularly strong concern with the appearance of impartiality. For example, he joined the majority opinion in *Liljeberg v. Health Services Acquisition Corp.*,[37] in which the Court quoted from an opinion by Justice Frankfurter. Explaining why he was recusing himself from a case, Frankfurter said: "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."[38]

In that case, Justice Frankfurter did not base his recusal on the Due Process Clause, but on what "[t]he judicial process demands."[39] However, Justice Kennedy, in his concurrence in *Liteky v. U.S.*,[40] relied on cases involving due process in explaining that "In matters of ethics, appearance and reality often converge as one,"[41] and in referring to the importance of "the appearance of fairness and neutrality."[42]

Thereafter, in *Caperton v. A.T. Massey Coal Co., Inc.*,[43] Kennedy explained for the Court that "the Due Process Clause has been implemented by objective standards that do not require proof of actual bias."[44] He added that the Court elaborated its concern with conflicts resulting from financial incentives in *Ward v. Monroeville*,[45] where, "unlike in *Tumey*, the mayor received no money; instead the fines the mayor assessed went to the town's general fisc."[46] The principle requiring reversal on due process grounds, he said, "turned on the 'possible temptation' the mayor might face" because of his executive responsibilities of village finances. Kennedy added that the Court had reiterated in yet another case that "the [judge's] financial stake need not be as direct or positive as it appeared to be in Tumey."[47]

Projection for the Future

There is reason to believe, therefore, that a majority of five justices can be persuaded that the practice of electing judges, and, particularly, of re-electing judges, violates due process. The Supreme Court's cases have established

Colby
Attorneys Service Co.

Serving Attorneys Since 1939

SPECIALIZING IN
- Corporate Filings
- UCC Filings/Searches/Copies
- Franchise Tax Searches
- Document Retrieval
- DMV Searches
- Service of Process

Call us *first* when you need fast, reliable support service!
800-832-1220
www.colbyservice.com

111 Washington Ave., Suite 703
Albany, NY 12210
(518) 463-4426
Fax (518) 434-2574

Keep up the good work, CCLP!

from

Michael Chambers, Esq.

San Francisco

that due process is denied if there is a "*possible* temptation to the *average* ... judge ... which *might* lead him not to hold the balance nice, clear, and true...."[48] Also, the "crocodile in the bathtub" impact of reelecting judges on independence and impartiality has been recognized by judges, litigators, and scholars. In addition, campaign fund-raising raises at least the appearance that judges will feel beholden to their financial contributors and be partial to their interests. Moreover, as shown in The Federalist, the Framers of the Constitution recognized that reelection or reappointment of judges is incompatible with fidelity to the Constitution and laws. Finally, despite the departure from the court of Justice O'Connor, who was one of the five who denounced election of judges on due process grounds, she will likely be replaced by Justice Kennedy, who has expressed similar views in other cases. I conclude, therefore, that the practice of electing judges, and, particularly, of re-electing judges, will be found by the Supreme Court to violate due process of law.

Editor's Afterword: To demonstrate how alive the issue raised by Professor Freedman is, on August 7, Tennessee Supreme Court Justice Sharon Lee narrowly defeated a challenge in a retention election with 56% of the vote. She faced opposition from political action committees, including Americans for Prosperity, the conservative organization backed by the billionaire brothers Charles and David Koch, who spent over a million dollars to unseat her. Alan Binder stated in an article in The New York Times *that "The experts said conservatives might view the results as proof that, even in the absence of a ruling on a controversial issue, judicial races can be made competitive through sharp-elbow and shrewd political messaging." (See, "Despite Failure, Campaign to Oust Tennessee Justices Keeps Conservatives Hopeful," August 9, 2014).*

The explanation of constitutional due process problems engendered when judges are elected or at least re-elected to office should be viewed in the context of current-day elections of members of the other two branches of government in this age of overweening corporate influence. An article in the Nation *March 10-17, 2014 entitled "Where Have All the Lobbyists Gone?" quoted American University professor James Thurber, stating that "most of what is going on in Washington is not covered" by the lobbyist-registration system and that the actual number of working lobbyists is close to 100,000. While the official figure puts the annual spending on lobbying at $3.2 billion in 2013, Thurber estimates that the industry brings in more than $9 billion a year.*

Imagine the effect of billions of dollars invading state judicial processes. On the other hand, appointed judges may be subject to similar influences since they must please their bosses who themselves can be controlled by large donors to their campaigns. It follows, perhaps, that insuring the integrity and independence of the judiciary may be no easy task, especially given the traditional role elections play in our society. In the federal system, the problem is ameliorated by mandatory life tenure for judges.

As Joseph Stiglitz noted in an article entitled "Inequality is not Inevitable," The New York Times, *June 29, 2014, "The American political system is overrun by money. Economic inequality translates into political inequality, and political inequality yields increasing economic inequality." Stiglitz summarized his article by referring to "political inequities and policies that have commodified and corrupted our democracy." These problems will increase until we unite to stop them, no matter how lawmakers, judicial or otherwise, tinker with its machinery.*

1. 273 U.S. 510, 47 S.Ct. 437 (1927). See also In re Murchison, 349 U.S. 133 (1955); Commonwealth Coatings v. Continental Casualty Co., 393 U.S. 145 (1968); Ward v. Village of Monroeville, 409 U.S. 57,

GKL

GKL is proud to support the efforts of **CCLP**

Document Filing and Retrieval Service Nationwide

(800) 446-5455

Registered Agent Services

(888) 682-4368

One Capitol Mall, Suite 660
Sacramento, California 95814

www.gklcorpsearch.com

Jeffrey A. St. Clair

Attorney and Counselor at Law

St. Clair & Associates

16 Court Street, Suite 2901
Brooklyn, New York 11241
Tel: (718) 596-4466
Fax: (718) 237-1393

93 S.Ct. 80 (1972); 273 U.S. at 532, 47 S.Ct. at 444 (emphasis added).

2. Id. at 531-532 and 444. In Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80 (1972), the Court vacated a traffic conviction on due process grounds. There, the mayor who acted as judge received no share in the petitioner's fines of $100, but such fines were a substantial part of the village's revenues. Under state law, petitioner could have had a trial de novo before a judge, but the Supreme Court held that due process entitled him to a "neutral and detached judge in the first instance." 409 U.S. at 62, 93 S.Ct. at 84.

3. 536 U.S. 765, 814 (2002) (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)).

4. Id. at 815, citing Ward v. Monroeville, 409 U.S. 57, 60.

5. Id., quoting In re Murchison, 349 U.S. 133, 136.

6. Id. at 816, 122 S.Ct. at 2556.

7. Id. at 789, 2543.

8. Id. at 788-789, 2543.

9. Id. at 789 (quoting Julian N. Eule, Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal, 65 U. Colo. L. Rev. 733, 739 (1994)).

10. Stephen B. Bright and Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U.L. Rev. 759, 793-794 (1995). See also Ronald J. Tabak, Why an Independent Appointing Authority is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases, 31 Hofstra L. Rev. 1105, 1106-1108 (2003).

11. Joanna Cohn Weiss, "Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights", 81 N.Y.U. L. Rev. 1101, 1104 (2006).

12. Id., (citing Stephen B. Bright, "Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?", 72 N.Y.U. L. Rev. 308 app. A at 332) (reprinting mass mailing).

13. Id., (citing Paula Wade, "White's Defeat Poses Legal Dilemma: How Is a Replacement Justice Picked?" Com. Appeal (Memphis, Tenn.), Aug. 3, 1996, at A1.

14. Id.

15. Republican Party of Minn. V. White, 536 U.S. at 788-89 (2002).

16. Id. (Emphasis added).

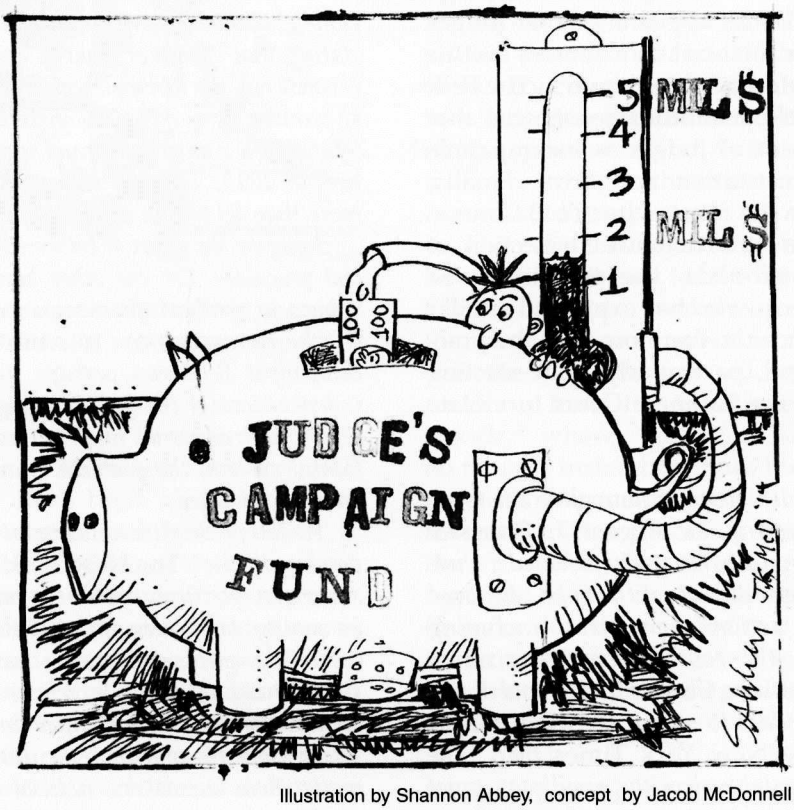


Illustration by Shannon Abbey, concept by Jacob McDonnell

17. Id. at 789-790 (O'Connor, J. concurring) (citing Roy Schotland, Financing judicial Elections, 2000: Change and Challenge, 2001 L. Rev. Mich. State U. Detroit College of law 849, 866 (reporting that in 2000, the 13 candidates in a partisan election for five seats on the Alabama Supreme court spent an average of $1,092,076 on their campaigns); American Bar Association, Report and Recommendations of the Task Force on Lawyers' Political Contributions, Pt. 2 (July, 1998) (reporting that in 1995, one candidate for the Pennsylvania Supreme court raised $1,848,142 in campaign funds, and that in 1986, $2,700,000 was spent on the race for Chief Justice of the Ohio Supreme Court).

18. Id. at 790, (citing David Barnhizer, "'On the Make': Campaign Funding and the Corrupting of the American Judiciary," 50 Cath. U.L. Rev. 361 (2001); Thomas, National L.J., March 16, 1998, p. A8, col. 1; Greenberg Quinlan Rosner Research, Inc., and American Viewpoint, National Public Opin. Survey Frequency Questionnaire 4 (2001) (http: //www.justiceatstake.org/ files/ JASNationalSurvey Results.pdf) (indicating that 76 percent of registered voters believe that campaign contributions influence judicial decisions).

19. Id. At 790 (citing Kate Thomas, "Are Justices in Texas Getting Bought," Nat'l L. J. Mar. 16, 1998, at A.8, col 1).

20. Id.

21. Id. at 783.

22. Scalia himself recently said, with regard to original intent: "Here is a document that says what the Framers of the Constitution thought

Robert M. Ginsberg
Martin Wolf
Ginsberg & Wolf, PC, Attorneys at Law
225 Broadway, Suite 3105
New York, NY 10025
(212) 227-0640
Personal Injury Litigation
Sub Specializing in Police Misconduct Cases
Many Million Dollar Verdicts

Press of Fremont Payne, Inc.
Appellate Printers Since 1890
Typesetting and Duplicating of Briefs, Records and Appendices. Serving and Filing in all New York State and Federal Appellate Courts
55 Broad Street, 3rd Floor • New York, NY 10004
(212) 966-6570 • Fax: (212) 941-0956

they were doing." Considering the Role of Judges Under the Constitution of the U.S. Before the S. Comm. on the Judiciary, 112th Cong. 6 (2011) (statement of Scalia, J.).

23. Hamilton wrote: "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 [subject to reelection]. 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 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 [rather than assuring] that nothing would be consulted but the constitution and the laws." J. R. Pole, American Constitution for and Against 308 (1987) (citing The Federalist, No. 78 (Alexander Hamilton).

24. Id.

25. Id.

26. 347 U.S. 483 (1954).

27. 374 U.S. 497 (1954).

28. Arizona v. Fulminante, 111 S.Ct. 1246, 1265 (1991).

29. United States v. Fay, 300 F.3d 345, 350-351 (2d Cir. 1962).

30. Republican Party of Minn. v. White, 536 U.S. at 789-790 (supra Note 17).

31. Adam Liptak and Janet Roberts, Campaign Cash Mirrors a High Court's Rulings, The N.Y. Times, Oct. 1, 2006, available at http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all.

32. See, Marcus Valerius Martialis, Epigrams of Martial 299 (Henry Bohn Trans., 1859).

33. Lisa Rosetta, "Third District Judge Leslie Lewis Ousted," The Salt Lake Tribune (Nov. 8, 2006), available at http://archive.sltrib.com/article.php?id=4621589&itype=NGPSID.html.

34. Stephen Hunt, "Judge's Job Again in Jeopardy," The Salt Lake Tribune (Oct. 27, 2002) at B1.

35. Id. The group is concerned with what it views as leniency with sex offenders and drunk drivers. Regarding criticism that a judge had been unduly lenient in a case of sex abuse of a twelve-year-old girl, the Deputy Tooele County Attorney wrote a lengthy letter defending the judge's sentence.

36. Id., (citing Bright, supra at note 10, app. A at 332 (reprinting mass mailing).

37. Liljeberg v. Health Serv. Acquisition Corp., 486 U.S. 847 (1988).

38. Id. at 869, (quoting Public Utilities Comm'n of D.C. v. Pollak, 343 U.S. 451, 466-467, 72 S.Ct. 813, 822-823 (1952) (Frankfurter, J., in chambers)).

39. Pub. Utils. Comm'n of D.C. v. Pollak, 343 U.S. at 451, 466 (1952).

40. Liteky v. United States, 510 U.S. 540 (1994).

41. Id. at 565, (citing Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13-14, 99 L.Ed. 11 (1954) ("[J]ustice must satisfy the appearance of justice"))

42. Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980) (noting the importance of "preserv[ing] both the appearance and reality of fairness," which "generat[es] the feeling, so important to a popular government, that justice has been done") (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

43. Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

44. Id. at 2263, citing inter alia Tumey v. Ohio, 273 U.S. 510, 532 (1927). At the oral argument in Caperton, "When Massey's counsel argued ... that Due Process cannot rest on appearances, Justice Kennedy replied: 'But our whole system is designed to ensure confidence in our judgments.... And it ... seems to me litigants have an entitlement to that under the Due Process Clause'." Caperton Transcript, (quoted in James Sample, "Democracy" at the Corner of First and Fourteenth: Judicial Campaign Spending and "Equality," 66 New York University Annual Survey of American Law 727, 770 (2011)).

45. Ward v. Vill. Of Monroeville, 409 U.S. 57 (1972).

46. Caperton at 2260.

47. Id., (citing Gibson v. Berryhill, 411 U.S. 564, 579 (1973)).

48. Tumey, 273 U.S. at 532, 47 S.Ct. at 444 (emphasis added).

CitiStorage

A full service records management company

5 North 11th Street
Brooklyn, New York 11211
(718) 782-1100
www.citistorage.com

- Secure facility under 24-hour camera surveillance
- Next day, same day or 3-hour rush delivery available
- Access your account via our website
- Open 24 hours, 7 days/week
- Competitive pricing