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# What Have You Done for Me Lately? Lessons Learned from Judicial Campaigns

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## WHAT HAVE YOU DONE FOR ME LATELY? LESSONS LEARNED FROM JUDICIAL CAMPAIGNS

### The Honorable Judith Ann Lanzinger†

Those who watch *American Idol* know that candidates are expected to deliver great public performances before being rewarded with majority votes and the chance of a coveted career. Fortunately, judicial elections have not yet devolved to that point. In some states, candidates for the bench do not even have to take the public stage—they are vetted by nominating committees and are appointed by their governors or legislatures. Even though judicial appointment, or merit selection, as it is known, is favored by the American Bar Association and others,<sup>1</sup> a majority of states currently elect some of their judges at least some of the time.<sup>2</sup> I serve in one of these states,<sup>3</sup> as an Ohio

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† The Honorable Judith Ann Lanzinger was elected in 2004 as the 150<sup>th</sup> Associate Justice of the Supreme Court of Ohio. Justice Lanzinger is the only person ever to have been elected to every level of the Ohio judiciary. She has previously served on the Sixth District Court of Appeals, the Lucas County Court of Common Pleas, and the Toledo Municipal Court. She received a B.A., *magna cum laude*, from the University of Toledo and graduated, *cum laude*, from the University of Toledo College of Law. Justice Lanzinger is currently Chair of the Commission on the Rules of Superintendence for Ohio Courts and is an adjunct professor of law at the University of Toledo College of Law. She and her husband, Robert Lanzinger, live in Toledo and have a daughter, son, and son-in-law, who are all attorneys, and three grandchildren.

1. Even though the American Bar Association has a history of endorsing merit selection, the ABA also recognizes the reality that a majority of judges are elected. The Standing Committee on Judicial Independence is just one among forty-five judicial, legal, and citizen organizations named as partners in Justice at Stake, created on February 14, 2002, which bills itself as a “National Partnership Working for Fair and Impartial Courts.” For updates on the work of this nonpartisan group, see Justice at Stake Campaign, <http://justiceatstake.org/> (follow “What in Justice at Stake?” hyperlink) (last visited Oct. 27, 2008).
2. State judges are selected in a variety of ways: by appointment without a nominating commission; by merit selection through a nominating commission; by partisan election; by nonpartisan election; or by merit selection combined with other selection methods. A Web site sponsored by the American Judicature Society has compiled comprehensive information on judicial selection processes in each of the fifty states and the District of Columbia. American Judicature Society, Judicial Selection in the States, <http://www.judicialselection.us> (last visited Oct. 27, 2008); see also THE NATIONAL CENTER FOR STATE COURTS RESEARCH DIVISION, GAVEL TO GAVEL, FOCUS: JUDICIAL SELECTION LEGISLATION (2008), [http://ncsconline.org/D\\_Research/](http://ncsconline.org/D_Research/)

judge. I have served for twenty-three years, and was elected eight of nine times<sup>4</sup> to the four levels of the state judiciary.

Even a quick survey of law reviews shows that judicial selection continues to be a favorite academic topic.<sup>5</sup> The argument over judicial independence<sup>6</sup> and democratic accountability pits merit selection against the elective method. I do not intend to enter this debate; I merely offer my own thoughts about the practicalities of state judicial campaigning. These observations come directly from my own races for municipal, common pleas, appellate, and supreme court judgeships—the hand-shaking, question-dodging, vote-seeking experiences that they are. The elections have given me a chance to know the state judicial system from the inside and, as a result, to help voters understand the importance of the third branch of government.

Critics say that judicial elections have been dramatically transformed because of the increase in campaign spending, interest group involvement, and political speech.<sup>7</sup> Voters are indoctrinated to think that money plays a part in judicial decisions when opinion polls and studies purport to show relationships between case votes and

gaveltogavel/ (follow “Judicial Selection Special Edition (June 2008)” hyperlink [hereinafter GAVEL TO GAVEL] (covering current state legislation methods of judicial selection).

3. Section 6(A) of the Ohio Constitution provides that judges at all levels of the state judiciary shall be elected for terms of six years. OHIO CONST. art. IV, § 6(A).
4. My elections include: a successful challenge against the Governor’s appointee for an unexpired municipal court term in 1985, and re-election in 1987 to a full term; election to the general trial division in 1988, re-election with opposition in 1994, and re-election without opposition in 2000; a campaign for election to the intermediate appellate court in 1998, with a win in the primary and a loss in the general election and then a successful appellate campaign in 2002; and finally in 2004, election to the state supreme court.
5. See, e.g., George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543 (2008) (arguing the *White* decision [*infra* notes 19–20] should be narrowly construed); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008) (discussing the implications of the dramatic transformation of judicial elections); Richard B. Saphire & Paul Moke, *The Ideologies of Judicial Selection: Empiricism and the Transformation of the Judicial Selection Debate*, 39 U. TOL. L. REV. 551 (2008); Roy A. Schotland, *Fair and Independent Courts: A Conference on the State of the Judiciary: New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077 (2007).
6. It has been suggested that the term “fair and impartial courts” be used as opposed to “judicial independence” because it connects the American values and is more suitable for a wider American audience of all political stripes. JUSTICE AT STAKE CAMPAIGN, SPEAK TO AMERICAN VALUES: A HANDBOOK FOR WINNING THE DEBATE FOR FAIR AND IMPARTIAL COURTS 8 (2006), [http://www.justiceteaching.org/resource\\_material/JAS-SpeaktoAmValues.pdf](http://www.justiceteaching.org/resource_material/JAS-SpeaktoAmValues.pdf).
7. See, e.g., Pozen, *supra* note 5, at 265.

contributors at the supreme court level. Candidates who engage in negative advertising and misleading comments about opponents add to public cynicism by playing the money-grubbing, back-stabbing name game of ordinary politics. All of this is true.

But those of us who have campaigned for judgeships know that facing the public is not always a bad thing. In spite of the shortcomings involved in electing judges, judicial campaigning provides an opportunity for candidates, particularly judicial incumbents, to explain to the public what state judges do, why they are unlike other elected officials, and the importance of the choice that voters make in the ballot box. As Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court said, “the time to educate the public is all the time,” not just during elections.<sup>8</sup> If we want voters to choose good judges, candidates bear a responsibility to make the process better.

After briefly reviewing the rules that confine our state judicial campaigns, I would like to reflect on my own judicial races and then offer a few comments regarding the challenges and potential rewards of state judicial elections.

## I. RULES FOR JUDICIAL CAMPAIGNS

A judicial candidate, whether an attorney running for the first time, an incumbent judge trying to retain a seat, or a judge seeking a position on another court, does not have total freedom to campaign as does someone campaigning for another elective office. Like many states that use the American Bar Association’s Model Code as a starting point,<sup>9</sup> Ohio has adopted its own Code of Judicial Conduct. Canon 7 provides guidance on acceptable conduct for judicial campaigning.<sup>10</sup> Those who expect to be on the ballot are first

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8. Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 993 (2001).

9. Based on recommendations from the Task Force on the Code of Judicial Conduct, the Supreme Court of Ohio has approved the publication for comment of the proposed Ohio Code of Judicial Conduct. The proposed Code follows the format and much of the content of the 2007 Model Code of Judicial Conduct promulgated by the American Bar Association. THE SUPREME COURT OF OHIO, TASK FORCE ON THE CODE OF JUDICIAL CONDUCT, <http://www.sconet.state.oh.us/boards/JudConduct/TF/default.asp> (last visited Oct. 14, 2008).

10. Canon 7 of the Ohio Code of Judicial Conduct covers limits on political activity, speech restrictions and campaign financing requirements, and proposed Ohio Canon 4 largely represents a reorganization of current Canon 7 into the ABA Model Code format. OHIO CODE OF JUDICIAL CONDUCT Canon 7 (2000) [hereinafter Canon 7]; PROPOSED OHIO CODE OF JUDICIAL CONDUCT Canon 4, at 78–97 (2008),

required to attend a course that updates them on the current standards.<sup>11</sup> The candidate is charged with ensuring that all regulations are followed by the campaign.<sup>12</sup>

There are bans against publicly endorsing or opposing other candidates for public office,<sup>13</sup> acting as a leader or holding any office in a political organization,<sup>14</sup> making speeches on behalf of a political party or other candidate for public office,<sup>15</sup> and soliciting for or making an expenditure of campaign funds to a political party or other candidate for public office.<sup>16</sup> Judicial candidates are allowed to participate in party-sponsored fundraising events and appear in party-sponsored advertisements such as slate cards and sample ballots with non-judicial candidates.<sup>17</sup>

There are speech restrictions as well. One rule bars the making of “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office” and “statements that commit or appear to commit the judge or judicial candidate with respect to cases or controversies that are likely to come before the court.”<sup>18</sup> This pledge or promise rule has been revised since *Republican Party of Minnesota v. White*,<sup>19</sup> the Supreme Court’s decision that struck down Minnesota’s announce clause in 2002.<sup>20</sup>

Canon 7 also prohibits inclusion of party affiliation in campaign materials that appear after the primary election, although political endorsements may be shared any time.<sup>21</sup> Even during the general

<http://www.sconet.state.oh.us/boards/JudConductTF/ProposedJudCond/completeCodejuly08.pdf> [hereinafter PROPOSED Canon].

11. Canon 7(B)(5); PROPOSED Canon 4.2(A)(4).
12. Canon 7(F); PROPOSED Canon 4.2(A), 4.4(A).
13. Canon 7(B)(2)(b); PROPOSED Canon 4.1(A)(3).
14. Canon 7(B)(2)(a); PROPOSED Canon 4.1(A)(1).
15. Canon 7(B)(2)(b); PROPOSED Canon 4.1(A)(2).
16. Canon 7(C)(7)(b)–(c); PROPOSED Canon 4.1(A)(4).
17. Canon 7(B)(2)(g); PROPOSED Canon 4.2(C)(3)–(4).
18. Canon 7(B)(2)(c)–(d). Proposed Canon 4.1(A)(7) states that a judge or judicial candidate may not “[i]n connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the *impartial* performance of the adjudicative duties of judicial office.” This provision is similar to the standard found in Canon 7(B)(2)(c)–(d), with the primary difference being that the phrase “appear to commit” is not retained in the proposed rule.
19. 536 U.S. 765 (2002).
20. *Id.* A full discussion of the impact of this case is beyond my scope.
21. Canon 7(B)(3)(a)–(b). Proposed Canon 4.2(C)(5)–(6) allows a judicial candidate to seek, accept, and use endorsements from any person or organization and to state party affiliation, membership, nomination, and endorsement at any time in campaign communications. Although the use of party affiliation would be permitted, other

election campaign, judicial candidates are permitted to identify themselves as the nominee of a political party, include party endorsements in their campaign materials, and have their names appear in party-sponsored slate cards, sample ballots, and publications that identify all candidates.<sup>22</sup> The party identification rule has an Alice-in-Wonderland quality, with candidates able to label themselves Republican or Democrat until the primary, and then afterwards magically becoming “nonpartisan.”<sup>23</sup> The often-stated rationale for the rule is that a candidate should be permitted to identify with a party for the purpose of seeking the nomination, but because general election ballots do not include party labels, such information is not appropriate for general elections. This party identification rule has been suspended since January 2005 by the Supreme Court of Ohio<sup>24</sup> due in part to pending litigation. However, the states remain free to craft reasonable restrictions. Even Justice Scalia noted, “we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”<sup>25</sup> Fortunately, judicial elections are not yet no-holds-barred.

Special rules also regulate the solicitation and receipt of campaign funds. Candidates or public employees under the candidate’s direction and control may not personally solicit or receive campaign contributions.<sup>26</sup> Unless a judicial candidate is able to underwrite the entire cost of the campaign, a campaign committee must be created to accept contributions. Contributions may not exceed the specified limits for individuals, organizations, or political parties.<sup>27</sup> Successful judicial candidates must file copies of their campaign finance reports

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existing prohibitions related to partisan political activity by judges and judicial candidates would be retained in the proposed Code. PROPOSED Canon 4.2(B)(1)–(3).

22. Canon 7(B)(2)(g), (B)(3)(a)(iii)–(iv).
23. See Canon 7(B)(3)(b) (“After the day of the primary election, a judicial candidate shall not identify himself or herself in advertising as a member of or affiliated with a political party.”).
24. SUPREME COURT OF OHIO, MISCELLANEOUS ORDERS: IN RE ENFORCEMENT OF CANONS 7(B)(3)(A)(IV), 7(B)(3)(B) AND 7(D)(2) OF THE CODE OF JUDICIAL CONDUCT (2005), [http://www.supremecourtfohio.gov/Judicial\\_Candidates/fed\\_lit\\_canon7/canon7\\_order\\_020205.pdf](http://www.supremecourtfohio.gov/Judicial_Candidates/fed_lit_canon7/canon7_order_020205.pdf); see also SUPREME COURT OF OHIO, NOTICE TO JUDICIAL CANDIDATES (2008), [http://www.supremecourtfohio.gov/Judicial\\_Candidates/default.asp](http://www.supremecourtfohio.gov/Judicial_Candidates/default.asp).
25. Republican Party of Minn. v. White, 536 U.S. 765, 783 (2002).
26. Canon 7(C)(1)–(C)(2)(a); PROPOSED Canon 4.4(B).
27. Canon 7(C)(5); PROPOSED Canon 4.4(J)–(K) (limiting contributions based on judicial seat, identity of the contributor, and population of the territorial jurisdiction).

with the clerk of the court<sup>28</sup> to make these statements accessible to the public. In supreme court races, all finance reports of all candidates are available at the Web site of the secretary of state.<sup>29</sup>

Ohio law may seem surprising with respect to who may run for judicial office. A candidate simply must be a member of the Ohio bar and have practiced as an attorney for at least six years.<sup>30</sup> Special training for the job begins to take place only after an election is won.<sup>31</sup>

## II. CAMPAIGN REALITIES

Now I want to talk a bit about how judicial elections actually work in general and then what it is like to run for a specific judgeship.

Because of the minimal qualifications for judges in Ohio, I could have run for the supreme court back in 1985, before ever sitting on a case, or for that matter, before even setting foot in a courtroom since “practice as an attorney” is not defined as requiring trial experience. It is also noteworthy that candidates for judicial office do not have to complete any courses, hand over a writing sample, take a psychological test, or pass any type of examination before placing their names on the judicial ballot.

Although judicial elections in Ohio are officially nonpartisan, nominations occur through the filing of a declaration of candidacy and, if multiple candidates have filed, winnowing through the partisan primary election.<sup>32</sup> Theoretically, an independent candidate can run in a judicial election, but political parties actively recruit candidates and provide financial, in-kind, and other forms of support to their endorsed candidates. So it is rare that the “nonpartisan” candidate does not have party backing. Judicial candidates are also routinely identified by party affiliation in newspapers and other publications. Ultimately, party identification can be a mixed blessing; depending on a party’s strength in the geographical area of

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28. Canon 7(C)(8).

29. See Ohio Secretary of State, Candidate Information File Transfer Page, [http://www2.sos.state.oh.us/cf\\_ftp/Rac\\_ftp\\_disclaimerV2](http://www2.sos.state.oh.us/cf_ftp/Rac_ftp_disclaimerV2) (agree to terms and conditions before downloading data from the database) (last visited Oct. 15, 2008).

30. OHIO REV. CODE ANN. §§ 2301.01, 1901.06, 2501.02, 2503.01 (West 2004) (governing courts of common pleas, municipal courts, appellate courts, and the Supreme Court, respectively).

31. The Supreme Court of Ohio, Judicial College (for Acting Judges), <http://www.sconet.state.oh.us/judcoll/AJschedule.pdf> (detailing required courses for acting judges).

32. OHIO REV. CODE ANN. §§ 3513.08, 3501.38 (governing declaration of candidacy and nominating petitions, respectively).

the campaign, a party affiliation might be better suppressed than trumpeted if the candidate happens to belong to the “wrong” party.

Voters always expect something from a candidate—if not the answer to, “Are you a Democrat or Republican?” then at the very least an answer to, “Why should I vote for you?” The voter who asks an incumbent judge, “What have you done for me lately?” presents an opportunity to explain what state court judges really do. The answer to the question, “What *will* you do for me?” is a bit trickier. Before the *White* case,<sup>33</sup> candidates sidestepped the question by saying, “I will follow the law.” Ohio’s prohibition is that a candidate shall not “make statements that commit or appear to commit the judge or judicial candidate with respect to cases or controversies that are likely to come before the court.”<sup>34</sup> Even after the U.S. Supreme Court struck down Minnesota’s announce clause, which stated that a judicial candidate shall not “announce his or her views on disputed legal or political issues,”<sup>35</sup> some judicial candidates continue to avoid speaking on issues, since they may be called to rule on them in court. Let me give a common example. No matter which court I was running for at the time, I was asked for my views on the death penalty. Even though the final decision is made from the common pleas bench and state appellate review is solely in the hands of the supreme court, voters want every judge to answer this important question, which has more important questions hidden within: “Do you have what it takes to sentence someone to death?”; “Can you be ‘tough on crime’ where it really counts?”

My gender and religion have been interpreted to signify a predetermined point of view in capital cases even though I gave the answer to the death penalty question that all judges were expected to give before the U.S. Supreme Court changed the rules on announcing one’s views on substantive issues.<sup>36</sup> I would follow the law, no matter how I personally felt about the death penalty. Voters had to be satisfied with that. Yet, to be honest, I often wondered what I would do when actually tested.

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33. Republican Party of Minn. v. White, 536 U.S. 765, 783 (2002).

34. Canon 7(B)(2)(d).

35. MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000), *invalidated by White*, 536 U.S. 765.

36. *See White*, 536 U.S. 765.

As it turns out, I was assigned twelve capital cases during my tenure on the common pleas court.<sup>37</sup> I imposed the death penalty only once. The crime had been committed before the effective date of two amendments that would have allowed the jury to consider a sentence of life without parole.<sup>38</sup> Seven years later, the defendant was granted a conditional writ of habeas corpus by a federal court.<sup>39</sup> On remand, the defendant entered a plea of guilty to a charge of aggravated murder and is now serving a sentence of thirty-three years to life imprisonment. In hindsight, I wonder what the jury and I would have done in the matter if a sentence of life without parole had been available. I can candidly say I am relieved that my role in that case is over and that the death sentence was not carried out. Yet as a supreme court justice in a state with the death penalty, I am still called upon to review capital cases and determine whether the letter of the law has been followed. I have participated in cases where the death penalty was upheld,<sup>40</sup> and where it has been overturned.<sup>41</sup>

The point is that personal views, when acknowledged, can be set aside, so that elected judges can still carry out the obligation to fairly and impartially hear cases. Personal views are also affected by experience. Now as a supreme court justice it is somewhat easier to consider legal principles in the abstract, for we review cases from a distance. But my years as a trial judge remind me that the consequences of legal decisions affect human beings: the victims, the accused, and their families in criminal cases, as well as the litigants in civil cases. The background of a judge-to-be can suggest how that person may be able to perform the duties of office.

I would argue, however, that judicial elections themselves do not give the public a true picture of how a candidate may perform as a judge if elected, because campaigning calls for characteristics unrelated to a particular judicial position. Qualities needed for a successful campaign are not necessarily qualities one needs in a good judge. Although the voters may assume that a candidate has the

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37. My service on the Lucas County Court of Common Pleas spanned from 1989 to 2002. Eleven of the twelve cases with defendants who were indicted with capital offenses, all concluded in penalties other than death.
  38. OHIO REV. CODE ANN. § 2929.03 (West 2006); 1995 Ohio Laws 7136, 7454–56; 1996 Ohio Laws 10752, 10926–27.
  39. *Madrigal v. Bagley*, 276 F. Supp. 2d 744, 810 (E.D. Ohio 2003), *aff'd*, 413 F.3d 548, 552 (6th Cir. 2005).
  40. *E.g.*, *State v. Were*, 890 N.E.2d 263 (Ohio 2008); *State v. Davis*, 880 N.E.2d 31 (Ohio 2008); *State v. Johnson*, 858 N.E.2d 1144 (Ohio 2006).
  41. *State v. Brown*, 873 N.E.2d 858 (Ohio 2007); *State v. Tenace*, 847 N.E.2d 386 (Ohio 2006).

potential to be a good judge or he or she would not be allowed to run, as already mentioned, there is no real gatekeeper to prevent a candidate who files petitions with sufficient signatures to place his or her name on the ballot. The situation is different when judicial appointments are made by the governor to fill vacancies between elections. Many judges first arrive on the bench in this way and usually these judges have been vetted according to a process which normally includes input by relevant bar associations.<sup>42</sup>

A person may have wonderful personal qualities and yet be ill-suited for a particular position. Judgeships are not interchangeable, despite the popular misconception that a judge is a judge. Even the distinction between federal and state judges is not well-understood. While academic writing generally focuses on the federal judiciary,<sup>43</sup> more state judges are fictionalized on television.<sup>44</sup> Accurate information, however, is becoming more available for the public through Web sites maintained by the federal and state courts themselves.<sup>45</sup> In Ohio, municipal court judges need the ability to process a high volume of cases, and the general trial courts, known as common pleas courts, with the exceptions of the probate or domestic or juvenile divisions, do not specialize but have unlimited jurisdiction in both civil and criminal matters within a county.

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42. Governor Ted Strickland created the Ohio Judicial Appointments Recommendation Panel (OJARP) in 2007 to assist him in his constitutional authority to fill vacant judicial posts occasioned by retirement or resignation. OJARP evaluates the qualifications of applicants and then makes nonbinding recommendations to the governor. Nine major headings are considered within the Personal and Professional Standards for Appointment: “Good Health/Suitable Age”; “Impartiality”; “Industry/Diligence”; “Integrity”; “Professional Skills/Legal Experience”; “Public and Community Service”; “Judicial Temperament”; “The Court Should Reflect the Community It Serves”; and “Ability to Retain Their Seat.” OHIO JUDICIAL APPOINTMENTS RECOMMENDATION PANEL, PERSONAL AND PROFESSIONAL STANDARDS FOR APPOINTMENT, <http://ojarp.org/Documents/OJARP+Personal+and+Professional+Standards.pdf>.
  43. Many comments offered on the general concepts of “judges” or “judging” are written about federal judges alone. See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* (Harvard Univ. Press ed., 2008) (describing in the introduction the author’s intent to focus on federal courts and federal judges); Patricia M. Wald, *Some Real-Life Observations About Judging*, 26 IND. L. REV. (1992) (commenting on her appellate experience on the United States Court of Appeals for the District of Columbia).
  44. Shows like *Boston Legal*, of course, do not pretend to portray the legal profession accurately. Apparently, state courts are considered more entertaining than are federal courts.
  45. See, e.g., The Supreme Court of the United States, <http://www.supremecourtus.gov> (last visited Oct. 27, 2008); The Supreme Court of Ohio, <http://www.ohiosupremecourt.gov> (last visited Oct. 27, 2008).

Judges on the courts of appeals, which are regional, review cases with the luxury of time for research and reflection. The supreme court, the court of last resort, controls its own docket and accepts only a fraction of cases for review. These judicial jobs are distinct. Until judges let the public know what judges do, how they do it, and why, the idea will remain that all judges are the same. The distinct differences among different court levels should be recognized by candidates and the public alike so that any selected individual will be well-matched to a given position.

This leads me to what have I learned over the course of my campaigns.

### *A. Municipal Court*

I remember contacting the heads of my political party, saying that I would like to run for Toledo Municipal Court, would be glad to challenge the incumbent, and would have support within the legal community. As a member of the nondominant party in the area, I was not “jumping the line” in asking for the opportunity to be a candidate since not many then wished to campaign for election. If the governor had been able to fill the seat by appointment, the number of judicial aspirants would have multiplied.<sup>46</sup> The law firm that employed me as an associate graciously allowed me time and a temporary reduction in expected billable hours to attempt what most believed was a long shot.

During this first election I learned how important it is to have family and friends who were willing to volunteer for a shoestring operation during the four months of campaigning. We were political novices, and when we ignored conventional wisdom, veterans shook their heads. Volunteers posted yard signs throughout the city, wore T-shirts to all the summer festivals, and waived banners and signs on election day—trying to overcome the handicap of a candidate with an unknown name. A campaign committee was established to collect the money needed, and television advertisements were produced even though we were running a municipal court election. The first real shock was how easily campaign money could be spent.<sup>47</sup>

The bigger shock, of course, was winning and discovering just what it was like to become a judge in a high volume court. Both my opponent and I had referred to our common goal as “the People’s

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46. As may be expected, the Governor generally appoints from applicants who are members of the Governor’s political party.

47. A single thirty-second TV commercial for Wheel of Fortune (the highest rated show in a desired time-slot in 1985) cost \$1500.

Court” during our electioneering. Indeed it was—and I fondly recall many cases where the monetary amount in dispute was not high, but principle and emotions certainly were. The human foibles on view in municipal court occasionally cause a smile—and as any judge will tell you, the best cocktail party stories come from municipal court.

### *B. Common Pleas Court*

In the Lucas County Court of Common Pleas General Division, where there is no upper limit on the jurisdictional amount and where an accused faces serious consequences to life and liberty, there is much less chance of humor. Unlike the weekly rotation in municipal court through assignments of felony arraignment, civil pretrials, and the like, common pleas judges are solely responsible for cases from the time they are assigned until they are concluded. They handle diverse subject matter covering both criminal and civil cases. The entire county makes up the voting base for this court.

In 1996, I survived a grueling contested race during which the area’s major newspaper took a strong negative position against me for a decision made in 1992. Very close to trial in an aggravated murder case, the prosecutor and defendant both had asked me to dismiss the death penalty specification for aggravated murder in exchange for the defendant’s plea of guilty. I agreed, accepted the plea, convicted the defendant, and sentenced accordingly. In spite of the negative press during my re-election campaign four years later, due to the strong support of the legal community and many others, I was allowed another term.

I have already mentioned that courts differ from one another. The biggest distinction among state courts occurs between the trial and appellate levels. More than one judge, happy on a trial bench, has been known to suffer after a “promotion” to the appellate level because the skills used in the jobs are so different. Trial judges are the monarchs of their courtrooms. They manage their own court proceedings and decide cases alone. Some decisions, such as evidentiary rulings at trial, must be made very quickly. The pressure of the docket can mean little time for deep reflection and exhaustive legal research. A jury trial itself involves multi-tasking on a grand scale. The judge with extrovert preferences can thrive in such an atmosphere, but burnout can occur faster if the judge is overwhelmed with difficult or high-profile cases. The appellate bench may then appear rather enticing.

### *C. Court of Appeals*

After thirteen years as a trial judge, I was ready to attempt the more cloistered atmosphere of the appellate bench. Judges already there warned me that the work would be different—slower, quieter, more academic, isolating—perhaps, even a bit boring. My first court of appeals campaign involved a primary, which I won, and a general election, which I lost. Formerly, I had always encouraged judicial aspirants to first imagine losing the election before filing nominating petitions and then go ahead only if they felt they could endure the potential loss. I realized afterwards that you never truly imagine what losing is like. Fortunately, the outcome four years later was better.

The Sixth District Court of Appeals is one of twelve intermediate appellate courts that hear all appeals from trial courts in the eight northwest counties of the state.<sup>48</sup> The appellate races were the first time I had relied on eight county coordinators. I discovered that it was impossible to know every single one of my volunteers personally. The idea that strangers would devote time and energy to helping elect one they did not actually know was very humbling. I firmly believe that people who run for office should cultivate a deep sense of gratitude for their volunteers.

### *D. Supreme Court*

Two years after reaching the intermediate appellate bench and after seventeen years as a trial judge, I was contacted by the party to run for a seat on the Supreme Court of Ohio. During this 2004 campaign, I felt like I had been dropped onto another planet. No longer primarily a family and friends adventure, this professionally-run statewide campaign covered eighty-eight counties and attempted to reach over seven million<sup>49</sup> registered voters.

I came to understand the value of having a party endorsement, as I ran in one of three contested races. Campaign contributions crested over seven figures.<sup>50</sup> Six major media markets<sup>51</sup> gobbled the lion's

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48. The eight northwest counties that make up the Sixth District Court of Appeals are Erie, Fulton, Huron, Lucas, Ottawa, Sandusky, Williams, and Wood. Lucas County, The Sixth District Court of Appeals, <http://www.co.lucas.oh.us/Appels> (last visited Oct. 6, 2008).

49. See Ohio Secretary of State, Election & Ballot Issues, Voter Turnout: November 2, 2004, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2004ElectionsResults/04-1102VoterTurnout.aspx>.

50. According to reports my campaign committee filed with the secretary of state, \$1.2 million was contributed to this campaign. See Ohio Secretary of State, Candidate

share of that amount with television advertising. This leads to the biggest arguments currently raging over the ability of judges to be impartial—can this amount of money raised by judicial campaigns be anything but a problem?

First of all, there are polls offered to show, at a state supreme court level at least, that the public believes that money drives votes in particular cases.<sup>52</sup> Of course the form of the poll question may help drive the answer. But as a matter of reality, during the deliberations that I have been part of, no justice has ever suggested that he or she was voting a specific way because of a campaign contributor. Because attorneys are permitted to contribute subject to the appropriate limitations,<sup>53</sup> there are times when both sides to a case may have contributed to a judge's election campaign. But we never consult campaign reports before considering and deciding how to vote for the identities of parties are irrelevant to the determination of the legal issues before us. The public needs to understand this.

### III. CONSIDERING THE PROBLEMS

There are several common reasons to criticize the selection of judges by election: the impact on judicial independence due to accountability to the majority, the perceived bias related to campaign financing, and an uninformed electorate. But the personal toll taken on the candidate is rarely raised and is the first point I would like to mention.

#### *A. Effect on the Candidate*

Any campaign is exhausting, and it takes a great deal of mental as well as physical energy to get into campaign mode. Each day requires a renewal of motivation—to be positive in spirit so as not to

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Information, Search Results for Candidate Cover Page, Lanzinger Campaign Financial Disclosure, <http://www.sos.state.oh.us/SOScampaign%20Finance/disclosure.aspx> (Follow "Search Candidate and Committee Information" hyperlink; then follow "Candidate Cover Page" hyperlink; Search "Lanzinger" under "Candidate Last Name" hyperlink) (last visited Oct. 27, 2008).

51. Cincinnati, Columbus, Cleveland, Toledo, Dayton, and Youngstown. See, e.g., Ohio Secretary of State, Expenditures Made by Candidate Committees, [http://www2.sos.state.oh.us/pls/portal/portal\\_cf.cf\\_qry\\_cand\\_expand.show](http://www2.sos.state.oh.us/pls/portal/portal_cf.cf_qry_cand_expand.show) (last visited Oct. 27, 2008).
52. See generally Rachel Caufield, *Judicial Election: Today's Trend and Tomorrow's Forecast*, JUDGES' J., Winter 2007, at 4 (discussing the influence of money in recent elections).
53. See Canon 7(C)(5); PROPOSED Canon 4.4(J)–(K) (limiting contributions based on identity of the contributor).

fail the small corps of volunteers, and to be alert to the opportunity to meet and greet, shake hands, and make small talk with voters. Not everyone is comfortable doing this. Many judges are inclined to introversion and have a more difficult time than do exuberant extroverts. Running a campaign is entirely different from deciding cases. Campaign control can be delegated—public appearances, fund-raisers, event scheduling, advertising and media relationships, volunteers, yard signs, T-shirts, endorsements, reporting requirements—but in the final analysis, the organization and responsibility of the entire enterprise is the candidate's sole responsibility. Campaigning becomes a full-time activity for anyone already employed.

Yet the mere fact that judges are elected does not mean that an officeholder automatically faces an opponent at the end of a six-year term. Some incumbents never attract opposition; others rarely avoid it. In certain parts of the state, many candidates battle over the few judicial positions available. Challengers to incumbents or those running for an open seat have all the ordinary difficulties of electioneering. Judges who are defending their positions have it worse. Those already on the bench anticipate that every six years, sooner if they have been appointed, an opponent may surprise them by filing by the deadline. Then they face the emotional turmoil and sleepless nights of waiting to see whether the voters have turned them out of their jobs. Meanwhile, the opposed incumbent is still expected to manage case dockets and keep his or her temperament even-keeled. Even the most well-balanced judge can succumb to the particular paranoia of campaign season now and then.

### *B. Campaign Expenses and Financing*

Campaigns are expensive—it takes time and money to brand your name. Radio spots, billboards, yard signs, T-shirts for volunteers, campaign tchotchkes and written material—all can add up to thousands of dollars; but the big gorilla of campaign expense is television, particularly when a race is statewide. Production costs for commercials are a fraction of the amount spent on airing them. During my twenty years of campaigning I have seen how the golden days of network television advertising begins to dim. With the advent of cable and satellite, 24/7 entertainment cycles and the fractured viewing habits created by TiVO and DVRs, fewer eyeballs can be guaranteed for the airing of a commercial spot. The Internet has become the new frontier. My first election Web site in 1998 was considered an oddity. Now a candidate who does not have an interactive Web presence is far behind his or her opponents.

Commentators have decried the increased costs of judicial campaigns,<sup>54</sup> and a full discussion here is beyond my scope. With alternatives such as public funding being suggested,<sup>55</sup> the obvious question becomes—Where exactly does that money come from and how much is available? And of course, there are First Amendment issues that prevent rules from hampering the spending of personal funds during an election. Nonetheless, the idea of public financing is now being pursued by several states and bears watching.

It is common to think that if the public perceives the system to be broken, then it must be. Media surveys of cases in which a party is a former financial supporter of a judge's campaign also question a judge's ability to hear these cases without bias.<sup>56</sup> More liberal recusal rules are also being discussed.<sup>57</sup>

### C. Accountability to the Majority

The majority elects us and yet we are also sworn to uphold the rights of the minority—a paradox. This has been called the majoritarian dilemma—how can judges who are accountable to the majority at election time be independent enough to guard the rights of the minority?<sup>58</sup> Elected judges are aware that at any time an

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54. A television commercial, which criticized the large campaign contributions given to a judicial candidate of the 2002 Ohio Supreme Court race, asked the question, "Is justice for sale in Ohio?"
  55. Most recently, it has been reported that Georgia and West Virginia have authorized legislative committees to examine public financing and to report in 2009 the results of their study. See *GAVEL TO GAVEL*, *supra* note 2.
  56. See, e.g., Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at 1. The authors of that article criticize Ohio Supreme Court justices for purported linkage of their votes with those who contributed to their campaigns based on a single survey. The methodology used is questionable, however, since only nonunanimous cases were initially selected among the total number decided by the court since 1992. Based on its correlation of votes in favor of a party or group filing a supporting brief who had also made a \$1000 contribution (an amount legally allowed), the report suggests that the justice's vote was caused by that contribution. Even \$1000 is a small contribution, however, in the context of campaigns that often cost more than \$1 million. *The New York Times* has acknowledged this criticism. See *How Information Was Collected*, N.Y. TIMES, Sept. 30, 2006.
  57. See, e.g., JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, *FAIR COURTS: SETTING RECUSAL STANDARDS* (BRENNAN CTR. FOR JUSTICE 2008), available at [http://brennan.3cdn.net/1afc0474a5a53df4d0\\_7tm6brjhd.pdf](http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf); Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-White World*, 55 DRAKE L. REV. 691 (2007).
  58. See Abrahamson, *supra* note 8, at 978–87 (discussing this point as it relates to judicial independence).

unpopular decision may be revived and then emphasized during a later campaign. The most upright and independent among us are tested when even the smallest case can turn into a time bomb if the media or an opponent chooses to ignite it. Many judges appointed initially will likely never face contested elections as incumbents. But there is always the risk that at the last moment an opponent will materialize, bringing an unexpected early retirement. The idea of ignoring the political consequences of decision or the “crocodile in the bathtub” as it has been termed, is very difficult.<sup>59</sup>

I resist the arguments of critics who cry that judicial independence dies in states where judges are democratically elected instead of selected by an elite group. It is easier indeed for judges who do not have to look over their shoulders, anticipating the next election. But judges seated by a majority of the electorate, although accountable to the public, still swear an oath of office that agrees to uphold the rule of law “without respect to persons.”

Justice Ginsberg declared in *White* that judges are not political actors: “They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency.”<sup>60</sup> There is no “business seat” or “union seat” on a particular bench; there is no special interest group who has priority in a courtroom.<sup>61</sup> The members of the judiciary have an obligation to be impartial and fair judges for all who appear in the courts of the state.

If those within an identifiable group consider a judge to be “their” judge, and their representative, they want to hear about issues of the day, such as abortion, capital punishment, and gun control. Not surprisingly, they want to know what a candidate intends to do after being elected. I have always tried to emphasize that it is more important for a judge to set aside personal views and try to decide cases based on legal principles as opposed to personal opinion. Unfortunately, intelligent dialogue is not always available during the campaign season.

#### *D. The Uninformed Electorate*

Who determines that a person is ready to be a judge? In an election, it is the voters, but unfortunately the frivolity and irrationality of the electorate sometimes can be disheartening. For example, after my first judicial race, I was very pleased when a

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59. The famous speech of the California Supreme Court Justice is recounted in Gerald F. Uelman, *Otto Kaus and the Crocodile*, 30 *LOY. L.A. L. REV.* 971, 973–74 (1997).

60. *Republican Party of Minn. v. White*, 536 U.S. 765, 806 (2002).

61. *See id.*

woman congratulated me on the outcome and disclosed that she had voted for me. I was ready to thank her, but almost choked when she continued that yes, after she had considered both women running for the office she decided to vote for me since I was the blonde. Call it superstition, but I have never changed my hair color, and never intend to.

Even when judicial candidates provide substance about their backgrounds and to the extent they can, discuss their judicial philosophies or the approaches they will take to meet the challenges of the position, some voters will choose, not on the basis of qualifications, but on the most familiar name, the most attractive smile or most relatable personality. My sobriquet of “Judge Judy” was very useful in every election, although slightly embarrassing too. When a voter would laughingly raise the name, I would respond that I was a real Judge Judy and certainly did not earn the salary of the television celebrity. Usually, I then had the opportunity to explain that real judges try to be fair and respectful to people before them, rather than insulting and provocative, and that real court cases are not entertainment.

If judicial campaigning is approached with an adventurous spirit and an open mind, the campaign can be invigorating, particularly if family members or friends are involved. My campaigns have let me discover my city, county, region, and entire state, and the differing viewpoints within them. To my knowledge I am the only judge who has ever been elected to all four levels of our state court system. As a result, I have been privileged to learn about our court from my view on all these benches. No one can attend festivals, judge county fairs, march in parades, and remain arrogant or haughty for long. Winning an election provides the comfort of knowing that at least the majority was persuaded, for whatever reason, to vote for you. Then, of course, there is the security of another six-year term.

Popular election is our present method of choosing state judges. But is it the best way? Justice Sandra Day O’Connor has tartly observed, “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.”<sup>62</sup> Ohio soundly rejected merit selection in 1987 and Chief Justice Thomas J. Moyer continues to champion an appointive system as the superior method of choosing judges. I do not complain about the status quo, since I have been fortunate enough to benefit by it.

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62. *Id.* at 792.

As Justice Anthony Kennedy stated in a concurring opinion,

A judicial election system presents the opportunity, indeed the civic obligation, for voters and the community as a whole to become engaged in the legal process. Judicial elections, if fair and open, could be an essential forum for society to discuss and define the attributes of judicial excellence and to find ways to discern those qualities in the candidates.<sup>63</sup>

#### IV. CONCLUSION

The question, “What have you done for me lately?” might be answered this way:

I’ve tried to explain what judges do, so you can make an informed decision when you choose to cast your vote. You can review what I’ve already done since my record is out there. Here’s what I intend to do if I am elected judge. I will try to be impartial and fair, no matter who stands before me. It won’t matter if that litigant has contributed to my campaign or not. I can promise that I will do my best to live up to my oath of office<sup>64</sup>—to uphold the federal and state constitutions and protect your rights along with the rights of all people in this state.

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63. *N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring).

64. “I do solemnly swear that I will support the Constitution of the United States and the Constitution of Ohio, will administer justice without respect to persons, and will faithfully and impartially discharge and perform all the duties incumbent upon me . . . according to the best of my ability and understanding.” OHIO REV. CODE ANN. § 3.23 (West 2004).