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# The Selection and Election of Circuit Judges in Maryland: A Time for Change

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## ARTICLE

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### THE SELECTION AND ELECTION OF CIRCUIT JUDGES IN MARYLAND: A TIME FOR CHANGE

By: The Honorable Dana M. Levitz\* and Ephraim R. Siff\*\*

#### I. INTRODUCTION

Imagine the following: A bright lawyer with a stellar reputation is appointed to the bench. He began his career as a prosecutor, and then spent a few years in the public defender's office before founding a small civil litigation practice. He has an impeccable reputation for judgment, temperament, integrity, and intellect. He is well liked by members of the bar, as well as the judges before whom he regularly appears. He has excellent knowledge of the law and is always prepared. Soon after his investiture, this new judge begins an interesting routine. He starts attending breakfasts, luncheons, dinners, and assorted socials with an odd request. He asks his friends, associates, and anyone he meets to contribute to a fund to furnish his chambers. He asks for monetary contributions to buy a hardwood desk, a leather chair, a computer station, some bookshelves, a conference table with a few chairs, and a simple couch. He does not intend on using the couch but thinks it would look nice in the office. He has his own pictures to hang on the wall, so he does not ask for any; however, he would accept some artwork, above and beyond what he initially solicited.

An unintentional consequence of having been a trial lawyer is that most of his friends are trial lawyers as well. So, he goes about seeking out these friends for donations to his chamber fund. He knows that these friends will appear before him in criminal cases and civil matters. He knows that they will present him with motions to grant, while others will ask that he deny the presented motions. He knows that he is seeking donations from lawyers who will certainly appear before him in the near

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future. But he also knows that if he doesn't raise enough money to furnish his chambers, an unusual provision in the state constitution will require him to step down.

So, this otherwise competent and qualified judge finds himself in a compromising position where he must solicit contributions. He resents it, but knows that he must do it. He knows that after fifteen years on the bench, another odd provision in the state constitution will require him to refurbish his office again, with brand new furniture.

The judge has no intention of accepting these donations as bribes, but the state does not supply him with furnishings, and the constitution requires that a judge must step down if he or she cannot furnish his or her chambers in a satisfactory manner within two years. As uncomfortable with the process as he is, the judge knows that it will be worse the next time. For the next fifteen years, he will see these same friends as they practice before him. Many times, he knows that his rulings will upset them. He will meet other lawyers along the way; he can only hope that perhaps he will be able to reach out to them when he has to go through the process again.

## II. THE REALITY OF CIRCUIT COURT ELECTIONS

It goes without saying that no constitution requires a judge to furnish an office with contributions from lawyers. If this were to occur in any western society, there would be an uproar for reform. As a matter of fact, if this were to occur in the American judiciary, the judge would probably be immediately sanctioned, removed from office, and possibly face criminal charges. Yet in Maryland, something almost as outrageous as this occurs every time a circuit court judge is appointed. The Constitution of Maryland requires it. Few lay people know about it, hardly any lawyers are outraged by it, and state legislators have decided, up until now, to leave it the way it is.

The rigors of today's judicial elections have proven that open, contested elections do not produce the benign intentions of the process. Rather, they equate with the hypothetical that enticed you into reading this article thus far. By any standard, our system of electing circuit court judges in Maryland is seriously flawed and in desperate need of reform. To require judges to raise large sums of money from the very lawyers who will appear before them in contested trials is just not right. Yet, that is what currently happens every time a circuit court judge is appointed.

## III. THE APPOINTMENT AND ELECTION PROCESS

Judges of the circuit courts in Maryland must be elected by popular vote in open and possibly, contested elections in order to remain on the bench.<sup>1</sup> These elections take place after the Governor appoints someone to fill a vacancy on the court.<sup>2</sup> Unlike appellate judges, the appointee is not approved by the Senate or any other legislative body.<sup>3</sup> An appointee may be challenged in a contested election by any lawyer who resides in the county. This challenger does not have to have any particular experience as a trial lawyer or any experience in a courtroom at all.<sup>4</sup> A law degree, being thirty years of age, residency in the county where the position is sought, and the payment of a small filing fee<sup>5</sup> are the only requirements for any lawyer to challenge the appointed judge.<sup>6</sup> The challenger is not vetted by anyone or any group before appearing on the ballot.<sup>7</sup> If the challenger receives more votes in the election than the appointee, that challenger becomes the county's circuit court judge for the next fifteen years.<sup>8</sup>

Unlike legislators and executive branch officers, who choose a career in the political arena, most appointees to the circuit court have no interest in being politicians and fundraisers. They are interested in the law, not in the kinds of things that necessarily occupy the thoughts of politicians. Circuit court judges, like butterflies, begin their lives in one form, but then are transformed into something entirely different, bearing no resemblance to their former selves. They morph into creatures who are forbidden from having anything to do with politics and fundraising until their fifteen-year term is about to expire.<sup>9</sup> Then, for one year prior to their election, they must transform into consummate politicians and successful fundraisers.<sup>10</sup> If elected, however, they are forbidden to have anything to do with those activities.<sup>11</sup> It is truly a schizophrenic existence.

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<sup>1</sup> See MD. CODE ANN., CONST. art. IV, § 3 (2003).

<sup>2</sup> See MD. CODE ANN., CONST. art. IV, § 5 (2003).

<sup>3</sup> *Id.*

<sup>4</sup> See MD. CODE ANN., CONST. art. IV, § 2 (2003).

<sup>5</sup> The current filing fee for a lawyer to run for Judge of the Circuit Court is \$300 in Baltimore City and \$50 in all other counties in the State. Maryland State Board of Elections, Requirements for Filing Candidacy, <http://www.elections.state.md.us/candidacy/requirements.html> (last visited Nov. 24, 2009).

<sup>6</sup> See MD. CODE ANN., CONST. art. IV, § 2 (2003).

<sup>7</sup> *Id.*

<sup>8</sup> See MD. CODE ANN., CONST. art. IV, § 3 (2003).

<sup>9</sup> See Md. Rule 16-813 (2009) (Md. Code of Judicial Conduct Canon 5(a)).

<sup>10</sup> See *Id.* (Md. Code of Judicial Conduct Canon 5(b)).

<sup>11</sup> Maryland Code of Judicial Conduct Canon 5 states, in relevant part: "A judge who is not a candidate for election or re-election to or retention in a judicial office shall not engage in

After his or her election, the judge serves a fifteen-year term.<sup>12</sup> If a judge dies during his or her term, resigns, or reaches the age of seventy, the Governor appoints a qualified individual as a seatholder until the next general election, at which time a successor is elected to complete a full fifteen-year term.<sup>13</sup>

At one time, judges on all Maryland courts were chosen in this manner.<sup>14</sup> The Maryland Constitution anticipated these judicial elections to be contested.<sup>15</sup> The appointee certainly was permitted to run for a full term in his or her own right, but the election was open to any lawyer.<sup>16</sup> The winner of the election was deemed the “successor” to the last elected judge and then served a fifteen-year term.<sup>17</sup> At a time when there were far fewer lawyers, and citizens actually knew the lawyers in their communities, this outdated system of electing judges was arguably appropriate.

These contested judicial elections, however, have clearly fallen out of favor given the realities of our modern legal system and the number of lawyers in our society.<sup>18</sup> Today, the only manner of initial appointment

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any partisan political activity.” Md. Rule 16-813 (2009) (Md. Code of Judicial Conduct Canon 5(a)(1)).

<sup>12</sup> See MD. CODE ANN., CONST. art. IV, § 3 (2003).

<sup>13</sup> If the appointment is to fill a vacancy caused by the expiration of a fifteen-year term, the appointee must run in the first election after the vacancy occurs. See MD. CODE ANN., CONST. art. IV, § 5 (2003). If the vacancy occurs by death, resignation or removal of the judge, the appointee runs in the first election following the one-year anniversary of the vacancy. *Id.*

<sup>14</sup> An amendment to the Maryland Constitution of 1867 was ratified on Nov. 2, 1976, removing contested elections of appellate judges in favor of continuance elections. See Act of May 15, 1975, ch. 551, 1975 Md. Laws 2638 (ratified Nov. 2, 1976) (codified as amended at MD. CODE ANN., CONST. art. IV, § 5A (2003)).

<sup>15</sup> Article 4, Section 12 of the Maryland Constitution of 1867 stated, in pertinent part: “If in any case of election or judges . . . the opposing candidates shall have an equal number of votes, it shall be the duty of the Governor to order a new election.” MD. CONST. of 1867 art. IV, § 21. Article 4, Section 21 of the 1867 Maryland Constitution stated, in relevant part: “If two or more persons shall be candidates for associate judge in the same county . . . that one only in said county shall be declared elected who has the highest number of votes in the circuit.” MD. CONST. of 1867 art. IV, § 21.

<sup>16</sup> See MD. CONST. of 1867 art. IV, § 2.

<sup>17</sup> See MD. CONST. of 1867 art. IV, § 5.

<sup>18</sup> The Constitutional Convention of 1967-68 and its proposed constitution did away with judicial elections in favor of a simpler scheme. See CONSTITUTIONAL CONVENTION OF MARYLAND OF 1967-1968, COMPARISON OF PRESENT CONSTITUTION PROPOSED BY CONVENTION 174-79, §§ 5.13-.22 (Constitutional Convention of Md. 1968) (hereinafter “PROPOSED CONSTITUTION”). The Proposed Constitution failed but the legislature implemented many of its suggestions. Governor Marvin Mandel tried especially hard to implement such suggestions and was successful with the passage of a constitutional amendment creating the District Court. See Act of May 24, 1969, ch. 789, 1969 Md. Laws 1696, 1697 (ratified Nov. 3, 1970) (codified as amended at MD. CODE ANN., CONST. art. IV, §§ 1, 2, 4A, 4B, 18, 41A-I (2003)). By Executive Order, he implemented the proposed Judicial Nominating Committee, suggested by the convention. Exec. Order No.

to an appellate court is by gubernatorial appointment with advice and consent of the Senate.<sup>19</sup> Judges of the district courts of Maryland are also appointed by the Governor with the advice and consent of the Senate, but unlike circuit court judges, they are not subjected to contested elections.<sup>20</sup> The election and appointment process of Maryland's circuit court judges is the last vestige of the contested elections of the past. There is no rational explanation for having a different system for selecting circuit court judges than for every other level in the Maryland Court System.

Although the Maryland Constitution implies that an appointee filling a vacant seat is a mere seatholder,<sup>21</sup> the practical result of this anomalous scheme is that judges of all the courts are appointed by the Governor, but circuit court judges have to run in open, popular, and sometimes, contested elections to retain their seats.<sup>22</sup>

#### IV. THE COSTS OF JUDICIAL ELECTIONS: FINANCIAL AND OTHERWISE

The very few benefits of contested judicial elections in the past should be acknowledged; however, I submit that, now, the arguments against such elections far outweigh any salutary effect of subjecting judges to an expensive political election.

##### *A. Qualifications and Integrity*

The Maryland Constitution mandates that judges must be "most distinguished for integrity, wisdom and sound legal knowledge."<sup>23</sup> Although one might also expect that legislators and executives should be distinguished for their integrity and wisdom, the Maryland Constitution makes no such requirement.<sup>24</sup> Although legislators are called upon to write laws, as citizen lawmakers, it would be unreasonable to require them to possess "sound legal knowledge."<sup>25</sup> This is because legislators

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01.01.1974.23, 2 Md. Reg. 45 (1975). For a more complete discussion of successful amendments and implemented legislation originally suggested by the Convention, see Dan Friedman, *Magnificent Failure Revisited*, 58 MD. L. REV. 528 (1999).

<sup>19</sup> See MD. CODE ANN., CONST. art. IV, § 5A(a)-(b) (2003).

<sup>20</sup> When the District Court was formed in 1971, it was formed with the plan of the constitutional convention. See Act of May 24, 1969, ch. 789, 1969 Md. Laws 1696, 1697 (ratified Nov. 3, 1970). Thus, judges on the District Court are appointed by advice and consent, and upon confirmation, serve for a term of ten years. See MD. CODE ANN., CONST. art. IV, § 41D (2003). The voters have no mechanism to accept or reject them.

<sup>21</sup> See MD. CODE ANN., CONST. art. IV, § 5 (2003).

<sup>22</sup> See MD. CODE ANN., CONST. art. IV, § 3 (2003).

<sup>23</sup> MD. CODE ANN., CONST. art. IV, § 2 (2003).

<sup>24</sup> Aside from residency, the only qualifications for delegates and senators are that they be of age: twenty-one years old for delegates and twenty-five years old for senators. See MD. CODE ANN., CONST. art. III, § 9 (2003). Likewise, a candidate for Governor must satisfy the residency requirement and be thirty years of age. See MD. CODE ANN., CONST. art. II, § 5 (2003).

<sup>25</sup> See MD. CODE ANN., CONST. art. IV, § 3 (2003).

come from diverse backgrounds. They may be farmers, utility workers, medical doctors, or teachers—many have no formal legal training at all. The reason judges must have higher qualifications is obvious: Judges are required to rule on the constitutional propriety of the laws passed by the legislature and the enforcement techniques of the executive branch. In addition, settling disputes requires legal knowledge, wisdom, impartiality, high moral values, and keen intellect.

This high standard to which judges are held is trivialized by the judicial election process, which most often results in the public voting for people with whom they have no familiarity. Certainly, most have no idea as to the relevant qualifications of the candidate for whom they vote. Perhaps at a time in our history when there were fewer lawyers, and the citizens of a county were familiar with the potential judicial candidates, the present system might have assured that only the most qualified candidates would be elected.

While it is theoretically possible for the lay citizen to perceive wisdom and character, the voter is not expected to be educated as to what makes a candidate a qualified judge insofar as legal knowledge, judicial temperament, intellect, trial experience, or other subjective qualifications. These are characteristics that are specific to the legal profession.<sup>26</sup> It is analogous to people being asked to vote for the chief surgeon at the county hospital; the individual who will operate on their family should the need arise. How can ordinary citizens possibly know who would be the most skilled surgeon in a particular specialty?

The reality is that most people have absolutely no understanding of the qualifications of the judges for whom they vote. Even very educated and informed people often know little about a judicial candidate's qualifications. Gender, name familiarity, perceived race of the candidate, and position on the ballot are much more influential than qualifications.<sup>27</sup> It is argued that an elementary principle in democracy is that the people should appoint and be able to recall someone who sits in judgment of the people. On a daily basis, based on a strict construct of facts and law before them, judges make decisions that are unfavorable to one or another

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<sup>26</sup> Recognizing the unique qualifications of judges, and the high stakes of incompetent judges, the Constitutional Convention of 1967-68 recommended a judicial nominating committee to recommend appointments to the Governor. See Friedman, *supra* note 18, at 574-75. When that proposed constitution failed, Governor Marvin Mandel signed an executive order binding creating such a commission and binding himself to make appointments based on their recommendations. See *id.* at 575. Every governor since Mandel has signed such an order, although the composition of the nominating committees have been changed and, in some ways, weakened. See *id.*

<sup>27</sup> For examples of other authors arguing this point, see Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643, 644 (2002); Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 96 (1986).

party. Circuit court judges are not generally called upon to mediate a dispute in a fashion favorable to all parties, and quite often this is an impossible task.

Popularity, charisma, flamboyance, and overall political connections contribute to the election of local officials, legislators, and executives. Many qualified judges are not necessarily electable by these criteria; nor should they be. Judges should be selected solely based on their “integrity, wisdom and sound legal knowledge.”<sup>28</sup>

### *B. Just or Popular*

Contested elections allow a dissatisfied party to wage a campaign against a judge for the most unjust of reasons; that is, the judge’s correct interpretation and application of the law. Judges who make correct, albeit unpopular, decisions are the very judges who most benefit the public. Likewise, judges are often called upon to render a verdict or ruling that is not in accordance with the judge’s own view of what a particular law ought to be. Unlike legislators, who can and need only defend their own actions and not the actions of others, judges are called upon to defend the actions of the legislature in non-constitutional matters, and higher courts, whose interpretation of the law they are bound to apply. Few voters would be persuaded, in the face of a sensational ruling, by the challenged judge’s explanation that he was bound by an archaic principle or loophole in sloppy legislation that even members of the bar would not understand. To put judges in the position that they need to defend their unpopular rulings in order to keep their jobs, especially their decisions based upon laws with which they personally disagree, is detrimental to an independent and dignified judiciary.<sup>29</sup> In addition, it is simply not fair.

### *C. Recall Elections Do Not Serve to Recall Judges*

An argument that contested elections provide a mechanism for recall is equally weak. After initial appointment, a judge runs either in the next election or the first election after completing one year on the bench.<sup>30</sup> Thus, at a judge’s first election, he could have been on the bench for as short as one day or as long as two years. After this initial election, the next opportunity to recall the judge comes when, perhaps, he or she stands for election after completion of a fifteen-year term.<sup>31</sup>

Practically, the length of the judicial term makes recall a weak argument for judicial elections. Is recall by failing to re-elect a judge an

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<sup>28</sup> MD. CODE ANN., CONST. art. IV, § 2 (2003).

<sup>29</sup> The Maryland Judicial Canons state: “A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.” Md. Rule 16-813 (2009) (Md. Code of Judicial Conduct Canon 3(B)(2)).

<sup>30</sup> See MD. CODE ANN., CONST. art. IV, § 5 (2003).

<sup>31</sup> See *id.*

effective mechanism to redress an unpopular decision made more than a decade earlier? If an individual or group feels that an appointee is unfit, the initial yes/no election after appointment would allow a challenge to be made. When a particular judge is the subject of a contested election, however, his highly qualified colleagues on the ballot become targets as well.<sup>32</sup>

#### *D. Fundraising*

The fundraising efforts required to compete successfully in a contested election are improper by any standard. The most fundamental qualities that a judge must possess and maintain are integrity and neutrality.<sup>33</sup> It is, therefore, incumbent upon a judge to actively avoid impropriety and avoid even the mere appearance of impropriety.<sup>34</sup> The vast majority of the commentary and case law interpreting judicial canons are spent spelling out how a judge should avoid the appearance of impropriety.<sup>35</sup> The most basic impropriety, beyond any mere appearance, is the receipt of financial gifts to a judge and to causes that he or she supports. It is impossible for any rational, thoughtful, and intellectually honest person to believe that receiving gifts, without which the judge would lose his or her job, is anything but improper, and certainly a perfect instance of the appearance of impropriety. Such monetary gifts to judges for financing their campaigns are much more significant than contributions to a judge's furniture fund.<sup>36</sup>

A district court judge raised nearly \$60,000 to finance his successful election to the circuit court in 2000.<sup>37</sup> In 2002, a respected attorney raised over \$55,000 to finance his successful bid,<sup>38</sup> and in 2006, a challenger to

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<sup>32</sup> Because the voter is instructed to vote for the same number of candidates as vacancies that exist, all candidates are competing for votes. Unlike a single vacancy, challengers can cost votes to not only the intended target but to all who appear on the ballot with them.

<sup>33</sup> The Preamble to the Maryland Code of Judicial Conduct reads, in relevant part: "It is fundamental to our legal system that our laws be interpreted by a competent, fair, honorable, and independent judiciary. Such a judiciary is essential to the American concept of justice." Md. Rule 16-813 (2009) (Md. Code of Judicial Conduct Canon, Preamble).

<sup>34</sup> "A judge shall avoid impropriety and the appearance of impropriety." Md. Rule 16-813 (2009) (Md. Code of Judicial Conduct Canon 2).

<sup>35</sup> See, e.g., Md. Rule 16-813 (2009) (Md. Code of Judicial Conduct Canon 2) and accompanying commentary; *In re Lamdin*, 404 Md. 631, 651-52, 948 A.2d 54, 66 (2008) (finding that a judge's use of vulgar language in the courtroom undermined the public perception of the judiciary).

<sup>36</sup> See *supra* Part I.

<sup>37</sup> University of Maryland, Maryland Elections Center, Campaign Finance, 2000 Campaign of Judge Robert N. Dugan, <http://www.mdelections.org/campaign-finance/advanced-search/contributions?acctno=A1550> (last visited Nov. 24, 2009).

<sup>38</sup> University of Maryland, Maryland Elections Center, Campaign Finance, 2002 Campaign of Judge Patrick Cavanaugh, <http://www.mdelections.org/campaign-finance/advanced-search/contributions?acctno=A2312> (last visited Nov. 24, 2009).

the incumbent judges, raised nearly \$111,000 in an unsuccessful bid to gain election to the bench.<sup>39</sup>

Obviously, the sitting judges had to raise comparable funds to help them retain their seats. Between February 2006 and May 2008, the Campaign Finance Account for the incumbent judges of the Circuit Court for Baltimore County raised nearly \$400,000.<sup>40</sup> Comparable amounts were raised in the preceding election cycle.<sup>41</sup> The campaign committee spent close to that amount in their successful elections.<sup>42</sup> A review of the election reports showed that a vast majority of these donations came from attorneys who regularly appeared before the judges seeking election.<sup>43</sup>

### *E. Abbreviated Honey moons*

Judicial elections serve as discouragement to would-be judges. Appointees who are focused on beginning successful judicial careers are at the same time facing elections. It can be argued that the first few years of experience are most important to the judge's evolution from advocate to arbiter. Having to campaign during the first few years—or even months—of appointment creates a rocky beginning for new judges. Instead of studying the new areas of the law with which they must become familiar, a new appointee is out most nights and weekends shaking hands and kissing babies at political clubs, community association meetings, bull roasts, charity events, or anywhere groups of people assemble. This schedule hampers a judge's ability to study and prepare for the cases over which he or she will preside. Quite frankly, in many cases, it affects the judge's personal life and relationships with his or her family.

There are many lawyers and judges on the District Court who would, by all accounts, make terrific circuit court judges, but decline to seek appointment because of the arduous election process. Not only is there campaigning and fundraising to worry about, but, in a lawyer's case, if the appointee loses the election, he or she is without a job, having given

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<sup>39</sup> University of Maryland, Maryland Elections Center, Campaign Finance, 2006 Campaign of Attorney Arthur Frank, <http://www.mdelections.org/campaign-finance/advanced-search/contributions?acctno=A4253> (last visited Nov. 24, 2009).

<sup>40</sup> University of Maryland, Maryland Elections Center, Campaign Finance, Baltimore County Sitting Judges Campaign Between February 2006 and May 2008, <http://www.mdelections.org/campaign-finance/advanced-search/contributions?acctno=A4600> (last visited Nov. 24, 2009).

<sup>41</sup> University of Maryland, Maryland Elections Center, Campaign Finance, Baltimore County Sitting Judges Campaign in the Preceding Election Cycle, <http://www.mdelections.org/campaign-finance/advanced-search/contributions?acctno=A1555> (last visited Nov. 24, 2009).

<sup>42</sup> See *supra* note 40 & 41.

<sup>43</sup> See *supra* note 40 & 41.

up practice to accept the judgeship.<sup>44</sup> Government lawyers and district court judges might return to their previous posts, but lawyers in private practice do not have that security. In a matter of months, a law practice that has taken years to develop can be gone. Many of the most qualified lawyers view this as a risk not worth taking.

#### *F. Minority Representation*

For years in Maryland, everyone thought that the only way for minorities to be represented on the circuit court was through the contested election process. While it must be acknowledged that, in the past, this was the surest route to the bench for many qualified candidates, who would not otherwise have been appointed; however, in recent years, the election process has generally stifled minority representation. Many qualified minority candidates appointed by various governors have not won election to a fifteen-year term.<sup>45</sup> It is now generally conceded that contested judicial elections hinder diversity on the bench rather than promote it.

#### *G. Personal Security Considerations*

Campaigning puts a sitting judge's personal safety at risk. While in the courthouse, significant consideration is given to the judge's personal security. All criminal courtrooms have armed sheriffs present. Additionally, when the judge decides a contested domestic case, security can also be present in the courtroom. Furthermore, every courtroom has special security alarms that will summon an immediate response at the touch of a button. Judges also have protected and monitored parking areas. They do not ride on public elevators and are encouraged to remove all personal information from databases that are accessible to the public. Their chambers are not accessible to the public. The need for this is obvious: Judges routinely hear cases involving serious violence—both civil and criminal. In some instances, the decision made by a judge in a contested domestic case can be even more dangerous to the judge's personal security than his or her decision in a criminal case. The losing

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<sup>44</sup> Judicial canons require a judge to give up the practice of law. Md. Rule 16-813 (2009) (Md. Code of Judicial Conduct Canon 4(g)(1)).

<sup>45</sup> Rodney Warren of the Circuit Court for Anne Arundel County, Judge Alexander Wright of the Circuit Court for Baltimore County, and Donna Hill Staton of the Circuit Court for Howard County all were defeated by challengers to the sitting judges. See Michael Dresser, *Black Candidate Gets 2nd Chance at Judgeship Wright is Reappointed After Defeat Last Year in Circuit Court Vote*, BALT. SUN, Jan. 16, 2001, at 1B; Andrea Siegel, *Circuit Judge's Defeat Leaves All-White Bench; Warren Third Black Ousted; Fellow Appointee Also Loses; 2 GOP Attorneys Capture Spots; Election 2004; Anne Arundel*, BALT. SUN, Nov. 4, 2004, at 1B.

party in an ugly domestic matter often holds the judge personally responsible.

While judges can avoid situations that would likely expose them to personal contact with disgruntled litigants, judges running for election cannot. As stated above, judges who are running to retain their position in a contested election are out most nights and weekends at any event where they are likely to find groups of voters. While they have extensive security during the day, there is no security provided while campaigning. Often, they attend campaign events by themselves, without anyone even going with them. Because of general security concerns, Maryland judges have received special training on personal security considerations.<sup>46</sup> This training, however, did not even attempt to address the significant security concerns of a sitting judge's campaign. While it must be recognized that no judge has been harmed by an encounter with an angry litigant while campaigning, it is a real fear among judges. Under the current election system, it is only a matter of time before that fear is realized.

#### *H. Ballot Design and Multiple Candidates*

When there is more than one vacancy, the voter is instructed to vote for the number of candidates equal to the number of existing vacancies. Assuming that three sitting judges are on the ballot, and one is the focus of a challenge, all three are at risk of losing the election. Very qualified judges have been removed from the bench by efforts to unseat others on the ballot.<sup>47</sup> Another problem is that judges appear in alphabetical order on the ballot. In a recent election, the three sitting judges running for election had three challengers.<sup>48</sup> The incumbent judges' last names began with 'R', 'T' and 'W';<sup>49</sup> they were challenged by candidates whose

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<sup>46</sup> The Maryland Judicial Conference has held a special training session on personal security considerations for judges. For an overview of the Maryland Judicial Conference and its subcommittees, visit <http://www.courts.state.md.us/mjc.html>.

<sup>47</sup> For example in 2002, three sitting judges on the Circuit Court for Baltimore County ran and were challenged by a respected attorney. Election activists considered the challenge to be based on qualifications. The result, however, was that the challenger and the presumed target succeeded in winning full terms, and a judge who was on a ticket with the challenger ended up losing his seat as an unintended casualty. See Stephanie Hanes, *Wright Finishes Last in Bid to Retain His Circuit Court Seat; Judge, 53, is Unseated for 2<sup>nd</sup> Time in Two Years; Baltimore County; Election 2002*, BALT. SUN, Nov. 6, 2002, at 10B. In 1996, many pointed to a new judge's association with another judge on the ballot as reason for her loss to a challenger. See Norris West, *Hill Staton Refuses to be Bitter About Loss*, BALT. SUN, Nov. 10, 1996, at 4B.

<sup>48</sup> In 2006, Judges Gale Rasin, John Themelis and Barry Williams of the Circuit Court for Baltimore City were challenged by Attorneys Nicholas Delpizzo and Rodney Jones and Judge Emanuel Brown, then of the District Court for Baltimore City. See Maryland State Board of Elections, Official 2006 Gubernatorial Primary Election Results, Judge for Baltimore City, Judge of the Circuit Court Results, [http://www.elections.state.md.us/elections/2006/results/primary/county\\_Baltimore\\_City.html](http://www.elections.state.md.us/elections/2006/results/primary/county_Baltimore_City.html) (last visited Nov. 24, 2009).

<sup>49</sup> Judges Gale E. Rasin, John C. Themelis, and Barry G. Williams.

names began with 'B', 'D' and 'J'.<sup>50</sup> The incumbent judges ran a campaign to vote bottom up.<sup>51</sup> A newspaper article covering this election humorously pointed out: "Not since grade-school seating charts have last names been so important."<sup>52</sup>

The perception that voters vote for the first three candidates is not without merit.<sup>53</sup> There is no political affiliation indicated for any candidate, and rightfully so. Perhaps a notation as to whether the judge is an incumbent, who was approved by the nominating commission, would give the voter some frame of reference as to qualification, just as political affiliation provides a frame of reference for candidates to other offices.

### *I. Primary Elections: A Second Bite at the Apple*

To appear on the ballot in the general election, a candidate must, within the number of seats vacant, be the highest vote-getter in the Democratic or Republican Party's primary election.<sup>54</sup> This means that if there are three vacant seats, the top three vote-getters in each party appear on the ballot in the general election.<sup>55</sup> Recognizing the fact that judges are supposed to be apolitical, judges are allowed to run in more than one primary.<sup>56</sup> A challenger to the appointed judge may also appear on the primary election ballot of both parties.<sup>57</sup> An independent or third-party<sup>58</sup> candidate, however, need not run in any primary.<sup>59</sup> Being nominated by the third-party's central committee in that county assures a place on the general election ballot.<sup>60</sup> Thus, a candidate could win in both major

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<sup>50</sup> Nicholas DelPizzo, Rodney Jones, and Judge Emanuel Brown.

<sup>51</sup> Julie Bykowicz, *For 3 Judges on City Ballot, Primary Isn't Easy as A-B-C*, BALT. SUN, Sept. 9, 2009, at 1A.

<sup>52</sup> *Id.*

<sup>53</sup> Judge Alexander Wright, then of the Baltimore County Circuit Court, Judge Donna Staton, then of the Howard County Circuit Court, and Judge Rodney C. Warren, then of the Anne Arundel County Circuit Court, all lost their seats in contested elections. Although race was considered a factor because the candidates were all African-American, the names of all three of those judges appeared after their challenger's names on the ballot. *See Dresser, supra* note 45; Siegel, *supra* note 45.

<sup>54</sup> *See* MD. CODE ANN., ELEC. LAW § 5-705 (2003).

<sup>55</sup> *See id.* at § 5-705(b)(3)-(4).

<sup>56</sup> *See id.* at § 5-203(b)(1). *See also* Suessmann v. Lamone, 383 Md. 697, 709, 862 A.2d 1, 8 (2004) (noting that, under Section 5-203, a judicial candidate officially registered in one party may be a candidate in another party's primary election, or in the primary elections of both parties at the same time).

<sup>57</sup> *See* MD. CODE ANN., ELEC. LAW § 5-203(b)(1) (2003).

<sup>58</sup> The Green Party, Libertarian Party, Independent Party, and Constitutional Party are recognized third-parties in Maryland. Maryland State Board of Elections, *How to Register*, [http://www.elections.state.md.us/voter\\_registration/index.html#Parties](http://www.elections.state.md.us/voter_registration/index.html#Parties) (last visited Nov. 24, 2009).

<sup>59</sup> *See* MD. CODE ANN., ELEC. LAW § 5-703.1(b) (Supp. 2009).

<sup>60</sup> *See id.* at § 5-703.1(e).

parties' primaries but lose in the general election to an independent or third-party candidate.

### *J. Political Affiliation*

The strongest argument by proponents of judicial elections is the difficulty of gaining appointment when one is not within the Governor's party. Qualified candidates for the judiciary, who are members of the minority party, have felt that they are unable to gain appointment to the bench due to their political affiliation or persuasion, and an open election is the only means possible to assume a judgeship.

Political affiliation should never be a factor considered for appointment. The Maryland Constitution sets forth on a broad scale the sole criteria for a judicial appointment: "[I]ntegrity, wisdom and sound legal knowledge."<sup>61</sup> When political qualifications are considered in making an appointment, fine candidates are denied an opportunity and the citizens of the state are denied the most qualified judge. The very sorry reality is that politics undoubtedly play a role in judicial appointments. This is especially disturbing when a single party holds a large majority of offices in the state.<sup>62</sup>

This strong argument, however, does not justify the much higher costs of contested elections. If a governor abuses his constitutional duty to appoint qualified judges and uses that duty to make political appointments, he has committed a serious breach of the oath he took,<sup>63</sup> and judicial elections are not going to resolve that.

On the federal level, the President, with the advice and consent of the Senate, appoints judges for life.<sup>64</sup> In reality, when appellate and district court judges are appointed in Maryland, the Maryland Legislature gives very little debate to the appointments. Unlike the process in the Maryland Senate, vigorous debate takes place in the United States Senate on many judicial appointments.<sup>65</sup> The result is that, although presidents

<sup>61</sup> MD. CODE ANN., CONST. art. IV, § 2 (2003).

<sup>62</sup> For example, 33 of the 47 State Senators in Maryland are affiliated with the Democratic Party. Maryland State Archives, Senators by Political Party, Democrats, <http://www.msa.md.gov/msa/mdmanual/05sen/html/sendem.html> (Feb. 5, 2008). Additionally, 104 of the 141 State Delegates in Maryland are affiliated with the Democratic Party. Maryland State Archives, Delegates by Political Party, Democrats, <http://www.msa.md.gov/msa/mdmanual/06hse/html/hsedem.html> (Jan. 4, 2008).

<sup>63</sup> See MD. CODE ANN., CONST. art. I, § 9 (2003) ("I will, to the best of my skill and judgment, diligently and faithfully, *without partiality or prejudice*, execute the office of [Governor] . . .") (emphasis added).

<sup>64</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>65</sup> See, e.g., *Hearings on the Nomination of Sonia M. Sotomayor to be Associate Justice to the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2009); *Hearings on the Nomination of Robert H. Bork to be Associate Justice to the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 100th Cong. (1987).

usually appoint members of their own political party or philosophical ideology, the debate that takes place when a radical appointment is made and the arduous confirmation that appointees face, temper fringe appointments and encourages the President to make reasonable appointments. Such balance of powers and the debate it creates is the pinnacle of the democratic process. Such a system could serve the citizens of Maryland well.

## V. RECOMMENDATIONS

### *A. Abolish Contested Elections*

The Constitutional Convention of 1967-68 recommended that, like appellate judges who appear on the ballot without opposition in a yes/no vote to continue in office, judges of the circuit courts<sup>66</sup> be appointed with the advice and consent of the senate and then continue in office after a yes/no vote by the public.<sup>67</sup> At the time of the convention, the Maryland Constitution was already amended to provide such elections for appellate judges.<sup>68</sup> It is time for such an amendment to be passed for the circuit court judges of Maryland as well. After appointment, the judge would be required to appear on the ballot for continuance in office and then serve a ten-year term, whereupon the Governor could appoint the judge again or decline to do so.

Abolishing the contested election would remove the many conflicts outlined above. A judge would be able to concentrate on his or her work and have no need to be a successful politician and fundraiser. Potential judges would not be dissuaded by the rigorous election process. Additionally, the advice and consent of the senate would create a healthy check on the appointments of the Governor and limit the Governor's ability to make radical appointments. The undignified process of having judges run for election does not serve the people of Maryland well.

### *B. Abolish Contested Elections for Subsequent Terms*

If, however, contested elections are to remain, contested elections should definitely be eliminated for a judge's second fifteen-year term. A vote for or against continuation in office protects the public from a judge who has gained a reputation for being out of touch or incompetent. Subjecting qualified, experienced judges with a fifteen-year track record to another contested election discourages those experienced judges from seeking a second term. For proof of this statement, one need look no

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<sup>66</sup> The proposed Constitution called the trial court of general jurisdiction the Superior Court. See PROPOSED CONSTITUTION, *supra* note 18, at 179 (§ 5.22).

<sup>67</sup> *Id.*

<sup>68</sup> See MD. CODE ANN., CONST. art. IV, § 5A (2003).

further than the current situation in Baltimore County, where two very experienced and respected members of the circuit court bench have announced that they will retire rather than face another contested judicial election.<sup>69</sup> Neither of these judges are near the mandatory retirement age and both have said they would definitely have stayed on the bench were it not for the contested election process.<sup>70</sup>

Judges are presently being appointed to the circuit court at a younger age than they were traditionally. Many judges see the judiciary as a career, as opposed to a place to spend time at the end of one's legal career. Accordingly, many judges are required to participate in more than one election in their judicial careers, if they choose to remain on the bench until the mandatory retirement age of seventy.<sup>71</sup> Some of these would-be two-term judges forgo a second term because they do not want to face the indignity of a second election. Unfortunately, many of these judges are the most serious and experienced judges in Maryland. They have developed a track record over their first fifteen years on the bench, sufficient for the public, if interested in investigating their performance, to make an informed decision as to their continuation in office. Therefore, it is difficult to understand the logic of the argument that these judges should be subject to a contested election.

### C. Challenging One Judge

It should be recognized that any number of judges may run at the same time to retain the seat on the circuit court to which the Governor has appointed them. If, for whatever reason, only one judge is the focus of an election challenge, all the judges are at risk of losing their positions in a contested election. For example, if there are three judges facing election, and there is one challenger who campaigns on the statement that he is

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<sup>69</sup> Judge Lawrence R. Daniels informed the Baltimore County Bar Association by email that he would not seek another term, stating: "As much as I enjoy my service as a judicial officer, I must confess I have no desire to spend the next 16 months campaigning for office." Danny Jacobs, *Judge Daniels Won't Run for Re-Election*, DAILY REC. (Balt., Md.), June 22, 2009, at 3B. Judge John O. Hennegan informed the Governor that he would not seek another term because he doesn't have a "burning desire" to campaign for another term. Danny Jacobs, *Second Judge Opts Out of Baltimore County Race*, DAILY REC. (Balt., Md.), June 26, 2009, at 3B.

<sup>70</sup> Judge Daniels has 20 years of judicial experience, first on the District Court, and for the past seventeen years, on the Circuit Court for Baltimore County. He will not reach the mandatory retirement age of seventy until 2017. See Biography of Judge Lawrence R. Daniels, Maryland Manual Online, <http://www.msa.md.gov/msa/mdmanual/31cc/html/msa11732.html> (last visited Nov. 24, 2009). Judge Hennegan has eighteen years of experience on the Circuit Court for Baltimore County, and, like Judge Daniels, Judge Hennegan will also reach the mandatory retirement age of seventy in 2017. See Biography of Judge John O. Hennegan, Maryland Manual Online, <http://www.msa.md.gov/msa/mdmanual/31cc/html/msa11777.html> (last visited Nov. 24, 2009).

<sup>71</sup> See MD. CODE ANN., CONST. art. IV, § 3 (2003).

more qualified than Judge A, the voters in that election are not given the opportunity to vote for Judge A or the challenger; instead, the voter is instructed to vote for three judges. The result often is that both Judge A and the challenger are elected, and Judge C, who everyone agreed was highly qualified, loses his or her seat.

A reasonable alternative is to place each seat up for election on the ballot independently. A challenger can decide which seat they are seeking. Essentially, the challenged judge can focus his or her attention on the challenger, leaving the other incumbents free from risk of losing their seats. The public, by its vote, expresses its opinion as to who is more qualified: Judge A or the challenger.

#### *D. District Court Judges as Candidates*

The judicial canons do not permit fundraising and political activity by judges unless they are candidates for judicial office.<sup>72</sup> This is sensible because the need to be elected in a contested election is a system in which they are forced to participate if appointed to a circuit court judgeship. The appearance of impropriety in fundraising is an unintended consequence of being forced to win an election after they are appointed. Conversely, district court judges are not required to run in *any* election. The only time they must fall back on the safe harbor, which allows for political activity and fundraising, is by declaring themselves a candidate for judicial election to a circuit or appellate court.<sup>73</sup> District court judges should not be able to rely on the safe harbor provisions permitting political activity. The appearance of impropriety caused by fundraising is completely of their own doing.

If a district court judge intends to seek election to the circuit court, he or she should be required to resign from the bench prior to engaging in the campaign. Currently, district court judges are allowed to challenge circuit court judges appointed by the Governor without risk. Even if they lose the election for the circuit court, they retain their district court judgeship.<sup>74</sup> The appearance of impropriety when a sitting district court judge raises funds for a contested election is obvious. The impropriety of having one active member of the Maryland judiciary challenging another active member of the judiciary is equally obvious.

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<sup>72</sup> Compare Md. Rule 16-803 (2009) (Md. Code of Judicial Conduct Canon 5(a)) (“[a] judge who is not a candidate for election or re-election . . . shall not engage in any partisan political activity”), with Md. Rule 16-803 (2009) (Md. Code of Judicial Conduct Canon 5(b)) (“[a] judge who is a candidate for election or re-election . . . may engage in partisan political activity”).

<sup>73</sup> See Md. Rule 16-803 (2009) (Md. Code of Judicial Conduct Canon 5(b)).

<sup>74</sup> See MD. CODE ANN., CONST. art. IV, § 41D (2003).

*E. Eliminate Party Primary Election for Judges*

Under the current system, a candidate who wins in both the Democratic and Republican primary could lose his or her seat on the bench to a candidate who did not have to run in any primary. At the same time, a third-party candidate would not have to spend a penny in a contested primary election. That third-party candidate could devote all of the funds raised for the judicial campaign to the general election by merely getting the approval of the central committee of the county for that party. Often this amounts to getting the approval of twenty or fewer voters. For instance, by the end of 2008, the Constitution Party, a recognized political party in Maryland, had fewer than fifteen registered voters in Baltimore County.<sup>75</sup> It must be remembered that judicial candidates appear on the general election ballot without party affiliation.<sup>76</sup> Therefore, the public has no way of knowing whether the name they see on the general election ballot for Judge of the Circuit Court is the candidate of the Libertarian, Green, Constitution, Democratic or Republican Party. Since all candidates for Judge of the Circuit Court appear on each election ballot without party affiliation, if primary elections are to remain for judges, all candidates for judge should appear on the primary election ballot as well. This will eliminate the chance that a candidate could win the general election without having appeared on any primary ballot at all. More importantly, if the same candidates are the top vote-getters in all primaries, they would not have to run in a general election.

*F. Reform of the Judicial Nominating Commission*

With the elimination of contested judicial elections, confidence must be restored to the judicial selection process. Such reform was indeed suggested by the Constitutional Convention of 1967-68.<sup>77</sup> The convention suggested a Judicial Nominating Commission that would recommend candidates to the Governor.<sup>78</sup> There was to be one commission for the appellate courts and one for the trial courts.<sup>79</sup> The Trial Courts Nominating Commission was to be comprised of no fewer than six members, consisting of an equal number of lawyers and lay members.<sup>80</sup> The lay members were to be appointed by the Governor and the lawyer members were to be elected by secret ballot by the lawyers in

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<sup>75</sup> See Maryland State Board of Elections, Maryland Voter Registration, 2008 End-of-Year Report, [http://www.elections.state.md.us/pdf/vrar/2008\\_year.pdf](http://www.elections.state.md.us/pdf/vrar/2008_year.pdf) (last visited Nov. 24, 2009).

<sup>76</sup> MD. CODE ANN., ELEC. LAW § 5-203(b)(1) (2003).

<sup>77</sup> See PROPOSED CONSTITUTION, *supra* note 18.

<sup>78</sup> *Id.* at 176 (§ 5.15).

<sup>79</sup> *Id.* at 177-78 (§§ 5.16-17).

<sup>80</sup> *Id.* at 178 (§ 5.17).

the circuit where the vacancy existed.<sup>81</sup> The members would serve a term of years, giving them independence from the executive who appointed them.<sup>82</sup> Additionally, the Governor was required to appoint a judge from the candidates forwarded by the committee.<sup>83</sup> If the Governor failed to appoint a candidate from the list within a given time frame, the Court of Appeals would make the selection.<sup>84</sup> The overall objective of the proposed formula was to de-politicize the process and limit the ability of a governor to directly manipulate the commission.<sup>85</sup>

When the constitution failed to pass, Governor Mandel issued an Executive Order, establishing the commission introduced by the Convention, composed of the lawyers elected by the bar and lay members appointed by the Governor.<sup>86</sup> Since then, each governor has issued a similar order.<sup>87</sup> As time evolved, so have the orders establishing the nominating commissions. Today's commission, after years of modification, barely resembles the commission proposed by the convention and implemented by Mandel. In today's form, the nominating committee is comprised of nine lay members and four lawyer members.<sup>88</sup> The lay members are appointed by the Governor and the lawyer members are appointed by the Governor upon recommendation of the local bar president.<sup>89</sup> Governors are permitted to modify those committees as they see fit.<sup>90</sup>

Prior to the creation of the nominating committee, the Governor had free reign in appointing judicial candidates.<sup>91</sup> The design of the original commission was for the bar to elect the commission who would recommend candidates known to the members of the bar for their qualifications, integrity, and ability.<sup>92</sup> Only the most respected lawyers would be nominated. Who better to know the qualifications of candidates for appointment than their colleagues at the bar? Under the current system, with the commission appointed and removable at will by the Governor, the commission is a pretense and the Governor essentially has free reign in appointing judges. The Governor is able to communicate

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<sup>81</sup> *Id.* at 178 (§ 5.18-.19).

<sup>82</sup> *Id.* at 178 (§ 5.19).

<sup>83</sup> PROPOSED CONSTITUTION, *supra* note 18, at 176 (§ 5.15).

<sup>84</sup> *Id.*

<sup>85</sup> *See* Friedman, *supra* note 18, at 574.

<sup>86</sup> Exec. Order No. 01.01.1974.23, 2 Md. Reg. 45 (1975).

<sup>87</sup> *See* Friedman, *supra* note 18, at 575.

<sup>88</sup> Exec. Order No. 01.01.2008.04, 36 Md. Reg. 954 (2008) (rescinding orders 01.01.2007.08 and 01.01.2007.11).

<sup>89</sup> *Id.* at (C)(2)(a)-(b).

<sup>90</sup> MD. CODE ANN., CONST. art. II, § 24 (2003).

<sup>91</sup> *See* Friedman, *supra* note 18, at 574-75.

<sup>92</sup> *Id.* at 574.

with commission members who are beholden to him for their appointment. At best, this gives the appearance of impropriety.

A nominating committee more comparable to the commission intended by the Constitutional Convention of 1967-68, and Mandel's Executive Order, would be a more appropriate means to appointing qualified judges in an apolitical process. Eliminating the commission would be better than retaining the current commission as it currently stands. This is the only means to resolving the strongest legitimate argument of proponents of judicial elections, which is, that politics unfortunately play too large a role in the appointment of circuit judges.

## VI. CONCLUSION

Contested judicial elections for the Circuit Court in Maryland need to be abolished. They do not serve the people of the state and do not assure that their circuit court judges are the most qualified. They require judges to participate in political activities that demean their office. Proponents of the current system argue that judges should spend time meeting the people, which is something that contested elections facilitate. It is argued that this is helpful to the judge as well as to the people whose cases the judge will have to decide, because it allows the people to become more familiar with the judge, which, in turn, makes the judge's adverse decisions more acceptable. Unfortunately, in reality, this is not the case. If anything, people resent the fact that the judge comes around, prior to the election, pleading for their support, and then disappears for the next fifteen years. They do not understand that, after the election, the judge is prohibited from participating in the same activities as before. Although there certainly is some advantage to the judge learning about the various parts of the county and its citizens, the disadvantages of campaigning far outweigh any beneficial effect.

Proponents also argue that contested elections facilitate minority representation on the circuit court. As demonstrated above, although that argument may have had validity in the past, in the last decade, contested elections have had the opposite effect.<sup>93</sup> The truth is that, recently, contested elections have prevented qualified minority judges from serving on the circuit courts of this state.

Contested elections require judges to do things that appear improper to the informed observer. Moreover, they prevent qualified lawyers from seeking a judgeship, while allowing lawyers with questionable qualifications to assume the position. To make circuit court judges the only judges required to run in contested elections is impractical, especially when judges of the courts below and above the circuit court are

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<sup>93</sup> See *supra* note 45 and accompanying text.

not subjected to this system. Readers should not be confused by the fact that other recommendations were made in this article regarding judicial election reform. The one recommendation that is paramount is that Maryland do away with this antiquated system of choosing circuit court judges in contested elections, where the most adept fundraiser and politician is elected to sit in judgment and is authorized to dispense justice. If that necessary reform is accomplished, most of the other recommendations are moot. Only if contested judicial elections are to remain should the other recommendations be considered.