

Nashville Bar Journal

June 2014 - VOL 14, NO. 5



The Challenge of Unmanned Aerial Systems (UAS) Law

James Mackler

**The Importance of a Fair & Impartial Judiciary
(or Why Every Lawyer Should Vote on August 7, 2014)**
Liz Sitgreaves

**Pay It Forward:
Tennessee's New Lawyer Mentoring Program**
Kelly Frey

The Importance of a Fair & Impartial Judiciary (or Why Every Lawyer Should Vote on August 7, 2014)

by: Liz Sitgreaves

Law Day 2014's theme—American Democracy and the Rule of Law: Why Every Vote Matters—holds true for the upcoming retention election of Tennessee's appellate court judges. On August 7, 2014, Tennesseans decide whether to retain or replace three Tennessee Supreme Court justices (Justice Connie Clark, Justice Sharon Lee, and Chief Justice Gary Wade) as well as the appellate court judges who sit on the Court of Appeals and the Court of Criminal Appeals. Each of the justices and judges on the ballot were placed on the bench under a form of merit selection and the Tennessee Judicial Performance Evaluation Commission has recommended each of them for retention. The August 7th election, however, is about more than the justices and judges on the ballot; it is about the importance of maintaining a fair and impartial judiciary. The focus of the election should be on the quality of the judiciary rather than on any single issue or single opinion.

The system of merit selection of judges, which began more than 74 years ago, permits judges to be selected based on their qualifications.¹ The additional critical component of merit selection is the subsequent retention election of the judges, which follows a review by a performance evaluation commission. The benefits of this system of selecting judges is to insulate judges from political pressure and permit judges to make decisions in accordance with the law, also known as "decisional independence."² As the American Judicature Society has stated regarding merit selection: "An independent judiciary is one of the hallmarks of American democracy. For our judicial system to function independently and effectively, it is imperative that qualified judges be free to make appropriate decisions under the law."³ As a result of the judiciary functioning independently and effectively, decisions that are in accordance with the law will not necessarily be popular.⁴

In recent years, attacks on the judiciary, which focus on a single issue or a single opinion, have increased. Prior to 2010, only four justices in the United States have ever been removed from the bench as a result of a retention election.⁵ In November 2010, three justices of the Iowa Supreme Court were removed after receiving less than 50% of the vote in the retention election.⁶ The campaign to unseat the justices focused on the Iowa Supreme Court's decision invalidating the state's ban on same-sex marriage.⁷ Similar campaigns to unseat judges occurred in Florida, Colorado, and Kansas.⁸

Campaigns against the judiciary have caused increased spending in judicial elections. Between 1990 and 1999, only \$83.3 million was contributed to state supreme court candidates.⁹ This number rose to \$206.9 million between 2000 and 2009.¹⁰ In the recent North Carolina Supreme Court primary race, spending exceeded \$1.3 million, with 90% of the money spent by two groups that opposed the incumbent candidate.¹¹ Notably, a comprehensive study by a team of independent researchers on the effect of campaign contributions on judicial behavior found that there was no statistically significant relationship between money and judicial decisions in retention election systems.¹² Costly elections harm the public's perception of the court by fostering the notion that campaign's contributions impact the decision-making of the court.¹³

Continued on Page 14 ➞

In his May president's column, Nashville Bar President Charles Grant encouraged lawyers to defend the courts from unfair attacks, which undermine the public's respect for the courts.¹⁴ On May 27, 2014, the Board of Directors of the Nashville Bar Association passed a resolution resolving to officially support the retention of the judges on the Tennessee Supreme Court, the Court of Appeals, and the Court of Criminal Appeals in the August 7, 2014 retention election. The Resolution further encouraged the members of the Nashville Bar Association to vote in favor of retaining the Supreme Court justices and encourage others to vote in the August 7, 2014 retention election.

Voter actions, coalitions, and other educational efforts in the 2012 judicial elections in Iowa and Florida proved successful in combatting unfair attacks on the judiciary. Lawyers in Tennessee have the ability to become engaged in these elections. The Coalition for Fair Courts started by the Lawyers' Association for Women is a coalition of various bar associations and community groups committed to voter education and participation in the August 7th retention election. The Coalition's webpage¹⁵ provides information on the retention election, profiles of the judges on the ballot, and resources including explanatory handouts and sample letters to the editor. Lawyers can use this information to educate friends and family on both the retention election and the importance of a fair and impartial judiciary.

Justice Sandra Day O'Connor, when discussing the current trend of politicizing judicial elections, stated: "In too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution." Maintaining the impartiality of our appellate judiciary and maintaining the public's respect for the courts in Tennessee are two important reasons that every lawyer, whether practicing in litigation, intellectual property, transaction, or probate, should vote on August 7, 2014. Every lawyer should also encourage non-lawyers to vote because fair and impartial courts benefit all citizens of Tennessee. ■



Liz Sitgreaves is an associate at the law firm of Dodson, Parker, Behm & Capparella, PC., and former law clerk to the Honorable Frank G. Clement. She is also co-chair of the Nashville Bar Association's Appellate Practice Committee and is spearheading the Coalition for Fair Courts on behalf of the Lawyers' Association for Women-Marion Griffin Chapter.

(Endnotes)

¹ Edward W. Najam, Jr., *Merit Selection in Indiana: The Foundation For a Fair and Impartial Appellate Judiciary*, 46 IND. L. REV. 15 (Symposium 2013).

² *Id.* See also ABA Task Force on Int'l Rule of Law Symposia, Report to House of Delegates, Principles on Judicial Independence and Fair and Impartial Courts (Aug. 2007), available at http://apps.americanbar.org/rolsymposium/docs/aba_resolution_hundredtend.pdf.

³ Najam, *supra* note 1 (quoting Brief for Am. Judicature Soc'y, Amicus Curaie, in Support of Appellees & Affirmance of the Judgment of the District Court at 3, *Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010) (No. 09-35860)).

⁴ Melissa S. May, *Judicial Retention Elections After 2010*, 46 IND. L. REV. 59 (Symposium 2013) (citations omitted).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 63.

⁸ *Id.*

⁹ Joanna Shpherd, *Justice At Risk, An Empirical Analysis of Campaign Contributions and Judicial Decisions*, AM. CONST. SOC'Y L. & POL'Y 5 (June 2013), available at [http://www.acslaw.org/ACS%20Justice%20at%20Risk%20\(FINAL\)%206_10_13.pdf](http://www.acslaw.org/ACS%20Justice%20at%20Risk%20(FINAL)%206_10_13.pdf).

¹⁰ *Id.*

¹¹ Brennan Center for Justice, *North Carolina Judicial Primary Spending Exceeds \$1.3 Million, Breaks Record*, (May 7, 2014), <http://www.brennancenter.org/press-release/record-breaking-nc-judicial-primary-spending-exceeds-13-million#.U2uVm-fEia90.facebook>.

¹² Shepherd, *supra* note 9, at 5.

¹³ *Id.* at 1 (finding 76% of voters believe that campaign contributions have some influence on judges' decisions).

¹⁴ Charles Grant, From the President, *Lawyers Must Lead Against Unfair Attacks on the Tennessee Supreme Court*, NASH. B.J. 2-3 (May 2014), available at <http://nashvillebar.org/Publications/NBJ/Archives/2014/May.pdf>.

¹⁵ The webpage is located at www.law-nashville.org/Coalition_for_Fair_Courts.

