

No Independence, No Justice

Challenges to the American Judicial System

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Challenges to the American Judicial System

DRI Center for Law and Public Policy
Judicial Task Force
February 17, 2019



DRI Center for Law and Public Policy

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Foreword

The DRI Judicial Task Force was formed in June 2005 to examine issues and problems affecting the independence of American judges and to determine whether DRI might have a role in addressing these matters. In 2007 the Task Force published the first edition of the white paper *Without Fear or Favor*, which addressed a number of issues that threaten the critical independence of the third branch of government. Addressing new issues and updating continuing ones, the Task Force published a revised second edition of *Without Fear or Favor* in 2011.

In September of 2012, DRI launched its Center for Law and Public Policy to study issues of central importance to the defense bar and, where appropriate, advocate on behalf of changes to the civil justice system with relevant policy-makers. The Judicial Task Force was made a part of the Center.

Fast forward to 2019 and we find that the threat to the independence of the judiciary has grown and the issues and problems facing American judges today are even greater and, in some ways, more complex. However, today we have greater need for flexibility, timeliness, and economy. Fortunately, we have more technology choices to address those needs.

No Independence, No Justice: Challenges to the American Judicial System is the successor to *Without Fear or Favor* and offers numerous advantages to its users. First, it is offered in electronic form. Changes, additions, and enhancements can be made immediately so that the publication remains timely. Second, it is available 24/7 wherever you are with access to the internet. Third, it contains a plethora of valuable links at the end of each section to aid the user in facilitating their own research. All this is provided for a fraction of the cost of *Without Fear or Favor*.

We are grateful to our predecessors of the two editions of *Without Fear or Favor* upon whose excellent work we have built. We are also appreciative to the members of the Judicial Task Force whose names you will find listed elsewhere in this publication whose tireless volunteer work and intellectual contributions makes the work of the Center possible. We are also thankful for the leadership of DRI Presidents John Kuppens and Toyja Kelley, and DRI Executive Director John R. Kouris, who have guided us through to what we believe will be a more useful and dynamic product that will benefit not only DRI members but all who seek the preservation of a strong and independent civil justice system.

Steven Puiszis, Chair
DRI Center for Law and Public Policy

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Judicial Salaries and the Threat to Independence in the Federal Court System



Introduction: The Thin Black Line

The United States Constitution provides for the compensation of federal judges of both the Supreme Court and inferior courts. Article III contains two separate but related clauses intended to protect the independence of the federal judiciary, lifetime tenure and a guarantee against reduction in judicial pay.

The independence of the judiciary from the other branches of government, ensured by Article III's marriage of judicial compensation to lifetime tenure, was intended by the Framers to reaffirm that the federal judiciary could serve as the "thin black line" protecting against government encroachment on the Constitution and the rights of Americans.

However, the goal of lifetime tenure, and the objectives intended to be achieved from it, can be frustrated by a failure to provide adequate compensation to the federal judiciary.

The Compensation Clause

The Compensation Clause in Article III, Section I of the United States Constitution, states that federal judges "both of the Supreme and inferior Courts, shall hold their offices during good Behavior, and shall, at stated times, receive for their Services, Compensation, which shall not be diminished during their Continuance in Office."

In its original form, according to the notes of James Madison, the clause at first prohibited Congress from either *increasing* or decreasing compensation; however, the Framers ultimately allowed for periodic increases, and as stated by Benjamin Franklin in joining support for pay increases, "[m]oney may not only become plentier, but the business of the department may increase as the Country becomes more populous."

Since the Compensation Clause was finalized, courts have addressed whether failure to provide federal judges with a cost-of-living adjustment (COLA) would violate the clause. Generally, courts have ruled that failure to provide COLAs does not violate the Compensation Clause, but any attempt to roll back a COLA after it has taken effect would.

While Congress' repeated failures to maintain the value of federal judicial salaries through COLAs is not a Constitutional violation, the lack of any pay increases threatens the concept of judicial independence which Article III was designed to protect.

Current Levels of Judicial Compensation

2018 salary levels for the federal judiciary are:

Chief Justice	\$267,000
Associate Justices	\$255,300
Circuit Judges	\$220,600
District Judges	\$208,000

In 2012, federal judges suing for COLAs which Congress had denied in 1995, 1996, 1997, 1999, and 2000 won the right to pay raises in a decision by a specialized federal court which the Supreme Court refused to review. In 2013, then-Attorney General Eric H. Holder, Jr., announced that the Justice Department would consent to these pay adjustments.

Accordingly, on January 1, 2014, all federal judges received a 14 percent salary increase intended to compensate for the cost-of-living adjustments Congress had denied.

Inadequate Compensation, Lifetime Tenure and Judicial Independence

Lifetime tenure is compromised when inadequate judicial compensation drives a federal judge to leave the bench. Federal judges are compensated far less than their peers in the private sector and there is every indication this disparity will continue.

From 1991 to 2010, federal judicial compensation rose 39.1 percent while the cost of living rose 51.4 percent; during the same period, approximately 123 federal judges left the bench. The loss of federal judges because of income disparity is in conflict with the Constitution's intent to afford lifetime tenure to federal judges and thereby enable the judicial branch to operate independent of political influence. The failure of judicial compensation to keep pace with increased living costs increases the lure of "post judicial" employment and compromises the independence of the judicial branch.

Chief Justice Roberts warned, "[i]f judicial appointment ceases to be the capstone of a distinguished career and instead becomes a stepping stone to a lucrative position in private practice, the Framers' goal of a truly independent judiciary will be placed in serious jeopardy."

Conclusion and Recommendation

Judicial independence forms the "thin black line" that shields the judiciary from the influence of politics and the pressure of public sentiment. The judicial branch shields the Constitution from those same intrusions. Lifetime tenure forms the cornerstone of this "thin black line," and it cannot serve its intended purpose if economics compromise a judge's ability to remain on the bench.

The increased compensation allowed to federal judges in 2014 is reassuring. However, it is crucial that regular and reasonable increases in judicial compensation continue so as to preserve the independent judiciary envisioned by the Framers of the Constitution.



Resources

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Funding Courts



The Great Recession's Lingering Impacts

The 2008 Great Recession packed a powerful punch. Economic contraction left state budgets reeling. Courts were not spared the budget blow. Belt-tightening and innovations blunted the impact. Even so, reports of reduced state courthouse hours, outright court closures, increased judicial vacancies, and reduced court services became common, as DRI's 2014 report *The Economics of Justice* observes.

In Los Angeles County, California, for example, the number of courthouses declined from 58 in 2002 to 38 in 2014. From 2008 through 2014 funding to the Los Angeles Superior Court decreased by \$160 million. Beginning in 2010, there were statewide furloughs. Clerical jobs were eliminated. The use of court reporters was reduced. In 2012, nearly 10 percent of state trial courtrooms closed.

In 2011, the American Bar Association Task Force on Preservation of the Justice System put the issue of state court underfunding in the national spotlight. Its report, *Crisis in the Courts*, found that even before the Great Recession, funding for the nation's courts was declining. Since 2008, most state courts have seen further declines of 10 to 15 percent. The task force noted that typically 90 percent of judicial budgets go to salaries and benefits. Significant cuts to judicial budgets often lead to furloughs and court closures that immediately impact court functions and the judiciary's treasured constitutional role.

By 2012, state court funding had reached a "crisis situation," cautioned the National Center for State Court's President Mary McQueen. She warned that "further cuts will undermine the ability of the courts to ensure access to justice and uphold fundamental rights."

A 2018 survey of the Conference of State Court Administrators gathering information from 33 states finds that some state courts (26.5 percent) are in better financial shape than a year ago. But others (20.6 percent) are in worse financial shape. Sixty percent are in better shape than nine years ago.

Court Funding Sources

Funding of state courts varies among the states. About 32 states mostly fund courts at the state level. In those states, the judiciary's budget represents only one to two percent of state general fund revenues, on average. The remaining 18 states chiefly fund courts at the county level. County funding offers greater local control. But it also contributes to inequality of resources across counties.

Businesses are heavy users of courts. Working courts are essential to business.

Some states increasingly rely on fines and filing fees to supplement court funding. But those sources, compared with state general funds, are unreliable. For example, statistics kept by the National Center for State Courts show that case filings declined steadily from 2007 to 2016. The cause of the decline has no simple explanation. Some speculate the reduced filings are due in part to fee increases imposed by law. Another example is Florida, where the legislature, responding to the foreclosure crisis, put a special filing fee on foreclosure cases to offset the burden on state courts. When filings declined courts went in the red.

Political Retaliation

The National Center for State Court’s Mary McQueen says that looking forward, “a key concern about court system budget cuts has less to do with continuing fiscal and revenue shortfalls within state governments and more to do with the potential for retaliation by legislatures and governors.”

Legislatures hold the “power of the purse.” By controlling the purse strings, legislatures and governors can punish the judicial branch for legally correct, but politically unpopular decisions.

Alexander Hamilton in *The Federalist No. 79* succinctly identified the problem when he wrote, “[i]n the general course of human nature, a power over a man’s subsistence amounts to power over his will.”

Kansas provides a case in point. Following a 2005 Kansas Supreme Court decision finding the state’s K-12 public school funding constitutionally inadequate, the 2006 legislature gave all judges in the state a salary increase, except Supreme Court justices.

Subsequently, a 2014 statute stripped the Kansas Supreme Court’s authority to appoint the chief judge of each district. It threatened the judiciary with a loss of funding if the courts did not uphold the statute. The Kansas Supreme Court held the statute violated separation of powers by infringing its administrative authority over the district courts. The legislature backed off its threat.

American judges often struggle with inadequate resources. Threats to further reduce court funds as political payback undermines the judiciary’s role as an effective and independent government branch.

Fully Funded Courts Make Good Economic Sense

Inadequate judicial funding affects public safety, basic rights and access to courts. Less obvious are the serious negative effects on the economy. The association between efficient working courts and economic growth is well-demonstrated, both theoretically and empirically, as DRI’s 2014 report *The Economics of Justice* notes.

Businesses are heavy users of courts. Working courts are essential to business. Court underfunding is “particularly problematic for the American business community,” according to the U.S. Chamber of Commerce, because businesses rely on courts to resolve disputes in a fair and expeditious manner. Underfunding courts also leads to delays in litigation

which “can be devastating for businesses, causing postponement of new hiring, restricted access to credit, and negative impacts on stock prices and business reputation,” notes the Chamber.

A 2017 Chamber poll of business leaders shows that 85 percent (up from 75 percent in 2015 and 70 percent in 2012) report that a state’s litigation climate affects important business decisions, “such as where to locate or do business.” As legislatures pare spending for courts, businesses watch with increasing concern.

Any savings from judicial budget cuts could be offset by economic losses from underfunding courts. In 2009, for example, the research firm Microeconomics, Inc. studied planned budget cuts for the Los Angeles Superior Court of between \$79 million and \$140 million from 2009 through 2013. Microeconomics found the cuts would result in lost court days, courtroom closures, and reductions in operating capacity. Those cuts would produce declines of \$13 billion in business activity due to decreased utilization of legal services, \$15 billion in economic losses associated with increased uncertainty among litigants, damage to the Los Angeles and California economies amounting to 150,000 lost jobs and lost local and state tax revenue of \$1.6 billion.

In 2009, a study of Florida’s court funding by the Washington Economic Group, concluded that a backlog of mortgage foreclosure cases alone cost \$9.9 billion in additional legal fees, interest lost by financial institutions, and reductions in property values. The study found the court-related delays resulted in direct annual costs to the economy approaching \$10.1 billion and adversely affected 120,219 permanent jobs.

In 2009, a study of Florida’s court funding... concluded that a backlog of mortgage foreclosure cases alone cost \$9.9 billion.

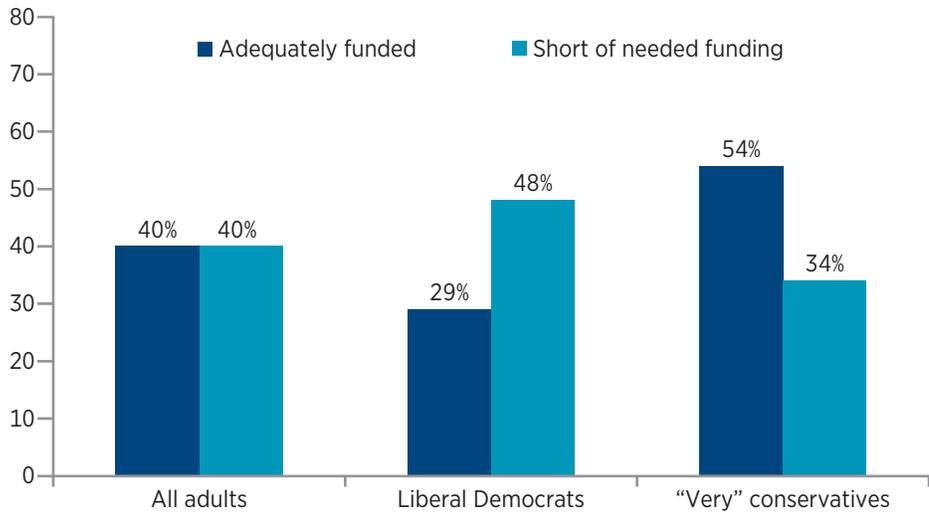
A Needed Strategy to Educate the Public and Policymakers

A stumbling block to increased court funding is the public’s lack of knowledge. Voters have more confidence in the courts than other branches of government. But the courts’ requests for greater funding are viewed with the same skepticism as funding requests made by other government agencies.

Courts have no natural public constituency. Thus, a 2012 national opinion survey for Justice at Stake and the National Center for State Courts shows that substantial portions of the public want to spend more money on schools (66 percent), roads (52 percent), health care (49 percent), public transportation (43 percent) and public safety (41 percent), and that only 17 percent believe courts need more money.

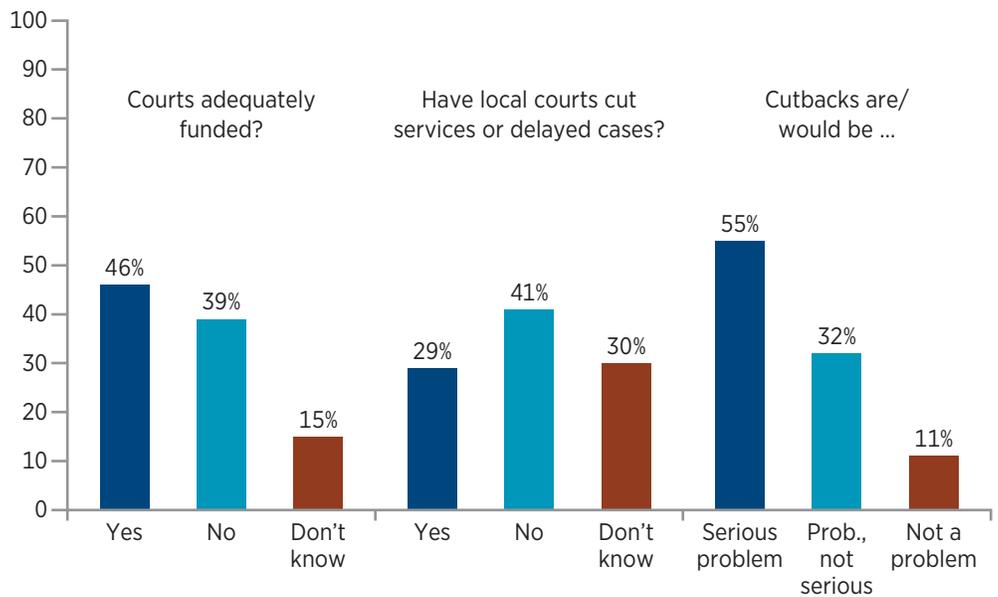
A 2013 DRI national survey shows how little most Americans understand about court funding. Forty percent believe the civil courts in their state are adequately funded, 40 percent believe the opposite and the rest are unsure. Ironically, the same survey finds that 75 percent reject as unacceptable the idea of a temporary suspension of civil jury trials for budget reasons.

Funding of State Civil Courts



A 2014 DRI national survey reveals further evidence of public misperception. Forty-six percent think the courts have all the funding they need to do their work, while 39 percent think the courts are underfunded. Twenty-nine percent say the courts in their area have reduced services or delayed cases because of budget problems, but 41 percent think the opposite is true and 30 percent have no opinion.

Funding of State Civil Courts



A National Center for State Courts' 2016 national survey confirms that most Americans assume there is a much higher level of funding than the courts actually receive. The survey finds the public does not associate increasing case backlogs with inadequate funding. Instead, the public perceives that backlogs result from antiquated procedures and inefficiencies. Those perceptions undermine calls for greater court funding.

In the long term, more civic education is needed about how courts work, how budget cuts threaten access to justice and fundamental rights, and how investments in courts will result in efficiency and savings.

In the long term, more civic education is needed about how courts work, how budget cuts threaten access to justice and fundamental rights, and how investments in courts will result in efficiency and savings. But it is equally important that courts show their commitment to increased efficiency, and technological innovation.

In the short term, court advocates and court leaders need to build relationships. Budget policymakers are likely to hold the same opinions as the public about court funding. They likely feel little political pressure for greater court funding and are overwhelmed with budget requests. Advocates need to start by understanding and respecting the budget process and those who run it. They need to meet year-round with legislators, especially lawyer-legislators and make the best case to policymakers, by proposing credible budgets based on data, metrics and plans to save taxpayer's money. They need to build broad-based coalitions using partners outside the legal profession who have earned the trust and respect of decision-makers.

Courts are the cornerstone of American constitutional government. Preserving this priceless gift needs the legal profession to advocate for greater court funding and show political will. The progress made since emerging from the Great Recession is not enough.

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Other Resource Links

American Bar Association

Standing Committee on the American Judicial System, https://www.americanbar.org/groups/committees/american_judicial_system/subcommittee-on-state-courts.html

ABA Tort and Insurance Practice Section, Fair Funding for Courts Initiative, https://www.americanbar.org/groups/tort_trial_insurance_practice/court_funding.html

ABA Tort and Insurance Practice Section, Toolkit for Fair Court Funding, https://www.americanbar.org/groups/tort_trial_insurance_practice/court_funding1.html



Brennan Center for Justice, at New York University School of Law

Resource page, <http://www.brennancenter.org/issues/fair-courts>

Assaults on Courts, <https://www.brennancenter.org/assaults-courts>

Legislative Assaults on State Courts—2018, <https://www.brennancenter.org/analysis/legislative-assaults-state-courts-2018>

Resources from Justice at Stake, <https://www.brennancenter.org/resources-justice-stake>

DRI

DRI National Poll Highlights, <http://www.dri.org/advocacy/center-for-law-and-public-policy/poll>

DRI Judicial Task Force, <http://www.dri.org/advocacy/advocacy-detail/judicialtask>

National Center for State Courts

Civics Education Resource Guide, available at <https://www.ncsc.org/education-and-careers/civics-education/resource-guide.aspx>

Judicial Independence Resource Guide, available at <https://www.ncsc.org/Topics/Judicial-Officers/Judicial-Independence/Resource-Guide.aspx>

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Defending Courts Against Political Attacks

“[i]n recent years... issue-oriented organizations and political action committees have spent millions of dollars opposing the reelection of judges whose decisions do not toe a party line or are alleged to be out of step with public opinion.”

The Public’s Trust and Confidence in Courts

Courts cannot perform their role in government without the public’s trust and confidence. The courts’ legitimacy depends on their reputation as fair and impartial, nonpartisan forums to resolve disputes.

As Justice Ruth Bader Ginsberg noted in her concurrence to the Supreme Court’s 2015 decision in *Williams-Yulee v. Florida Bar*, “[i]n recent years... issue-oriented organizations and political action committees have spent millions of dollars opposing the reelection of judges whose decisions do not toe a party line or are alleged to be out of step with public opinion.” Chief Justice John Roberts’ majority opinion, affirming Florida’s rule barring judges and judicial candidates from personally soliciting funds for their election campaigns, also notes that “[j]udges are not politicians, even when they come to the bench by way of the ballot. And a State’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigns for political office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.”

Americans have confidence in courts, even though most Americans know very little about the government’s third branch. A 2018 national survey by the National Center for State Courts finds that confidence in state courts is at a seven-year high, with three-quarters saying they have a great deal or some confidence in state courts. This confidence holds across party lines. The survey, as compared to a 2017 survey, finds a seven percent increase in the public’s trust that state courts are “fair and impartial.”

DRI’s 2013 national poll showed that most Americans, 56 percent, are very or somewhat confident in the justice system. Polls consistently show the judiciary is the most trusted branch of government.

While most Americans understand the importance of fair and impartial courts, the independence of the judiciary, and, equally important, the legitimacy of courts suffer when the public believes that judges cater to political interests or depend on, or fail to reflect, majority approval. A National Center for State Courts’ 2015 poll, found the “public worries that politics undermines the impartiality of the court system.” Some politicians and special interest groups capitalize on this concern to challenge courts and judges.

It is in state courts that partisan politics is most prevalent. Most Americans personally experience the justice system in state courts. Ninety-five percent of all cases are filed in state courts. State trial court caseloads exceed 86 million cases. State courts touch almost every part of a person’s life from birth to death.

Eighty-six percent of America's state court judges are elected. Thirty-nine states elect their highest court judges, either in contested elections or retention elections. State court judicial elections have taken on many characteristics of regular competitive elections. They have become well-funded, hard-fought contests featuring partisan and special-interest criticism of sitting judges and judicial candidates.

Political Attacks Condemning Court Decisions

Fair criticism serves an important purpose in improving courts. But, politically motivated attacks that highlight a few unpopular court cases and imply the results are “out-of-step” with what the public wants, are incompatible with the rule of law and the judiciary's distinct role in our constitutional architecture.

Politically motivated attacks on the judiciary ask voters to evaluate judicial candidates by the same political criteria as candidates for legislative or executive offices, often use misconceptions about the meaning or result of judicial decisions, and ask voters to hold sitting judges accountable for unpopular decisions.

In 2010, for example, voters in an Iowa judicial retention election sent shock waves across the country. They removed three sitting state supreme court justices based solely on a campaign that attacked the justices for a 2009 decision that struck down Iowa's same-sex marriage ban.

Judges are especially vulnerable to “soft on crime” attacks. Crimes and criminals are hot-button topics. By design, judicial attack advertisements exploit crimes to easily grab the public's attention and arouse their worst fears. When a court reverses a conviction in a well-publicized case, even when the decision is solidly based upon the law, the evidence and the Constitution, it is easy to persuade the public the judge is “soft on crime.”

In the waning days of the 2014 Kansas general election, the governor's race was a dead heat. In an October 2014 memorandum to the incumbent governor's campaign, a polling firm noted that the challenger's support for Kansas' Supreme Court justices “creates an opportunity for moving a significant number of voters.” The memo advised, “polling shows that when voters are informed of [the challenger's] relationships with supreme court justices and reminded of that court's decision to overthrow the conviction and sentencing of the [] [b]rothers, they break against [the challenger] by better than five-to-one ratio.” (In the referenced decision, the Kansas Supreme Court upheld two brothers' convictions for scores of crimes, including capital murder, carrying a life sentence, but reversed the death sentences.)

The Kansas governor launched a television advertisement reminding voters of the brothers' horrific crimes and saying “liberal judges” overturned the death sentences. The advertisement claimed the governor's challenger was a “liberal defense lawyer” who “supported these judges who let the [] brothers off the hook.”

The same death penalty case reappeared in advertisements during the 2016 judicial retention election, challenging five of the seven Kansas Supreme Court justices who were on the ballot. Television advertisements for the vote “no” campaign retold the grim details

When a court reverses a conviction in a well-publicized case, even when the decision is solidly based upon the law, the evidence and the Constitution, it is easy to persuade the public the judge is “soft on crime.”

Having limited familiarity with the Constitution and judicial reasoning, voters have little understanding of how to assess a judge’s performance.

of the brothers’ crimes, noting “the Kansas Supreme Court overturned the [] brother’s death sentences on a technicality... The Kansas Supreme Court is out of control.”

While all five justices were retained by the voters, the 2016 general election produced the most expensive retention election in Kansas history.

Trial court decisions are not immune from this type of political criticism. A California state trial judge’s sentencing decision in a sexual assault case ballooned into a judicial recall movement. Over a million people signed a recall petition, and the voters ousted the judge in a June 2018 recall election.

A recent report noted that 56 percent of television advertisements in 2013 through 2014, either criticizing or supporting judges, focused on the candidate’s criminal justice “record.”

These attacks perpetuate misunderstandings about courts by confusing the institutional roles of the judiciary and legislative branches of government. Judges must be governed by the law rather than public opinion. Judges decide cases based on the evidence they receive in court after applying the law to the facts, not on perceptions of an electoral mandate or the public’s will.

Nonetheless, arguing that voters should rein in judges who are “out-of-step” with popular opinion appeals to the public’s understanding of democratic ideals.

Favorable Public Opinions of Courts Are Soft

Surveys show most voters view courts favorably. But the electorate is malleable. A significant percentage of voters have no opinion. And, studies show the public’s favorable opinions of courts can shift quickly based on external reasons or high-profile media stories, especially if the attack touches one of the electorate’s core values, such as the death penalty.

Judicial elections are low information contests. Judges typically have low public name recognition. Most voters have little contact with judges. Having limited familiarity with the Constitution and judicial reasoning, voters have little understanding of how to assess a judge’s performance.

Moreover, negative attacks are a proven method of mobilizing increased voter participation. Repeated negative attacks may make up much of the information available to voters about the candidates. Those attacks may trump voters’ favorable impressions of the courts.

Criticizing a judge as “out-of-step” with the voters undermines the courts’ important constitutional role, described by Justice Hugo Black as “havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are... victims of prejudice and public excitement.”

Asking the people to decide if a judge is loyal to a political party’s agenda can create public doubt about a judge’s capacity to avoid political biases in the courtroom. Ousting or punishing a judge in response to an unpopular decision leads voters to doubt whether they can trust courts to administer justice without fear or favor.

Judges are Ill-Equipped to Respond to Political Criticism of Unpopular Decisions

Often, judges are reluctant candidates—and understandably so. In the judicial role, judges are and should be indifferent to popularity.

When a court's decision is criticized in a political forum, judges do not have the tools to effectively respond. By design, judicial codes limit judges from taking part in political discussions about court decisions. Judges speak about cases in court or in their written decisions.

Those who lob political attacks at judges exploit these limitations. By publicly responding to political criticism of a decision, the judge actively, and perhaps improperly, takes part in politics. But if the judge does not respond, some may believe the criticism is valid.

Telling voters to ignore unpopular decisions and to focus instead on the entire body of the judge's work may only reinforce the criticism underlying the political attack—that judges feel free to ignore what the people want.

The Legal Profession Must Step Up

The solution to preserving fair and impartial courts cannot be that judges become more skilled politicians. Instead, the solution is a robust defense of courts.

The solution to preserving fair and impartial courts cannot be that judges become more skilled politicians. Instead, the solution is a robust defense of courts. It calls for educating the public about the basics of what courts do and stressing commonly held values of fairness, impartiality, separation of powers and the need for courts to be free from popular opinion or political pressure. The goal must be to build the public's knowledge of the judiciary and reinforce support for the courts.

The defense of the judiciary starts by organizing a diverse group of bipartisan advocates from the legal profession and beyond who are passionate about fair courts. The advocates must show political will. They must speak out in the political arena, refuting deceptions or distortions, challenging political attacks and efforts at intimidating judges, and exposing the motives behind the attacks. The advocates must also take responsibility for fundraising.

Here are a few practical tips:

- Stay on message.
- Avoid the temptation to preempt the attack on an unpopular decision, engage in lengthy discussions of individual decisions or debate slogans like “judicial activism.” Repeating the attack frames the opponent's message and gives it air time. Pivot from the attack to commonly held values of fairness, impartiality, separation of powers and the need for courts to be free from popular opinion or political pressure.
- Acknowledge that there will always be decisions that politicians reject. That is the reason for separation of powers and checks and balances. Courts should be able to fend off political interference in order to do their job of protecting the rights of

People want courts to be accountable—but to the Constitution and the law, not to politicians and special interests.

all Americans and upholding the Constitution. Remind the public that the main threats to the independence of the judiciary are politicians and political influence.

- Do not shy away from embracing accountability. People want courts to be accountable—but to the Constitution and the law, not to politicians and special interests.
- Anticipate the fabled “October Surprise.” This is an incendiary or emotional attack shortly before election day when there is little time either to respond, fundraise, fact check opposing claims or allow voters to weigh the truth and importance of the information.
- Recognize the importance of early voting, which is available in 37 states. In some states, the electorate casts two-thirds or more of the votes before election day. Early voting changes how and when the campaign releases information. It may be necessary to fund ads for a longer cycle than in years past.
- Choose words wisely. Say “fair and impartial courts,” not “judicial independence”; “upholding the Constitution,” not “interpreting the Constitution”; “politicians, political intimidation,” not “governor” or “legislature”; and “courts,” not “judges.”
- Own the media story with effective messaging. Make contacts, often and early, with media outlets. Promote coverage of campaign events. Write editorials explaining the campaign and why it matters. The goal is to insert the campaign’s message in the media every day.

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Educating the Public About Courts

The Problem: Civic Illiteracy

Ideas define America's judiciary. America's founders created fair and impartial courts, not under the thumb of the government's political branches, not beholden to party interests and public opinion and solely accountable to the Constitution and the Rule of Law. Those ideas are not self-perpetuating. Thomas Jefferson famously warned that "no nation" can expect to be "both ignorant and free."

In 1944, federal judge Learned Hand, speaking to a group in New York City, said: "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes... Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it."

Justice Stephen Breyer, speaking at a 2011 Holocaust remembrance ceremony in Washington, remarked, "we need only look around today's world to understand that rights, rules, the obligations that the law sets forth, all of them, are no more powerful than the human will to enforce them."

America must teach anew the ideas defining its courts to each generation. The public's understanding and appreciation of those ideas will shape courts, for better, or for worse.

National surveys show that courts remain the government's most trusted branch. The National Center for State Court's 2017 survey finds that 71 percent of the respondents are confident in their courts, compared with 61 percent confidence in governors and 57 percent confidence in state legislatures.

A September 2017 Gallup survey finds that trust in the federal judiciary is at 68 percent, compared with 45 percent trust in the executive branch and 35 percent trust in Congress.

National surveys also reveal a disturbing lack of civic literacy. Immigrants who want to become citizens are expected to pass the U.S. Citizenship Test. Only one in three American citizens can pass that test by correctly answering at least 60 percent of the questions, according to a 2018 survey by the Woodrow Wilson National Fellowship Foundation. 74 percent of native-born senior Americans passed the test. But only 20 percent of Americans under the age of 45 met this minimal requirement. By contrast, the government reports that as of September 2018, the pass rate for naturalization applicants was 91 percent.

A 2018 survey by the Annenberg Public Policy Center of the University of Pennsylvania finds that only one-third of Americans can name all three branches of government and one-third could not name any branch. A 2017 Annenberg survey finds that more than a third of those surveyed cannot name any right guaranteed under the First Amendment and

nearly two-thirds cannot name all three branches of government. And their 2015 survey shows that 12 percent of Americans think the Bill of Rights includes the right to own a pet.

In a 2015 DRI survey, 40 percent of respondents believe public opinion has “too little” influence on courts.

A 2012 survey by Xavier University’s Center for the Study of the American Dream finds that 75 percent of respondents did not correctly answer, “What does the judicial branch do?”

Only 29 states now require teaching civics or government as part of the public school curriculum. This marks a notable decline over the past number of years.

Only 23 percent of 8th grade students scored “proficient” on the 2014 National Assessment of Educational Progress civics test.

Students do not learn what schools and parents do not teach. Only when the people know and embrace the defining ideas of our courts can society pass on the priceless constitutional gift it has inherited. National surveys of civic literacy reveal severe cracks in that foundation.

Civic Illiteracy Threatens Courts

Almost 200 years ago, James Madison plainly framed the problem in a letter to W.T. Barry: “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”

Justice Stephen Breyer warns, “a public that does not understand the judiciary, its role in protecting the Constitution, and the related need for judicial independence may act in ways that weaken the institution.”

A 2018 Annenberg survey finds a significant relationship between basic knowledge about the government’s three branches and wanting to protect impartial courts. But it is worrisome that one in five respondents agreed that, “If the Supreme Court started making a lot of rulings that most Americans disagreed with, it might be better to do away with the Court altogether.” One in four agreed that, “When Congress disagrees with the Supreme Court’s decisions, Congress should pass legislation saying the Supreme Court can no longer rule on that issue or topic.”

In many states, political and popular interests threaten the courts. The independence that allows judges to decide cases based on the Rule of Law, without fear of removal or reprisal for an unpopular or mistaken opinion is critical. Ousting or punishing judges for controversial decisions interferes with the fair and impartial judiciary central to the nation’s democracy.

Proposed state legislation further threatens the courts. According to the Brennan Center for Justice of the New York University School of Law, in 2018:

- Twenty-three bills in eight states would inject greater politics into judicial selection;

- Four bills in four states would increase the likelihood of judges facing discipline or retribution for unpopular decisions or would politicize court rules or procedures;
- Six bills in three states would cut judicial resources or set up more political control over courts in exchange for resources;
- Four bills in three states would manipulate judicial terms, either immediately removing sitting judges or subjecting judges to more frequent political pressures; and
- Four bills in four states would restrict the courts’ power to find state legislative acts unconstitutional.

In 2018, four Pennsylvania Supreme Court justices were threatened with impeachment after ruling the state’s congressional map unconstitutional. The National Center for State Courts notes that this marked the fifth time in seven years that state high court judges have been threatened with impeachment or removal from office over their rulings.

A Call to Action

In the face of these threats, courts are doing more to earn the public’s trust and confidence. In 2017, for example, the National Center for State Courts launched a national campaign to reduce the cost, time and complexity of court cases, build trust among minorities and the poor, offer more online services, and give court leaders needed skills.

More importantly, America needs civic education to repair the foundation of government and defend the courts. At the heart of the problem is the public’s limited knowledge of the Constitution and judicial decision-making. Politicians and hot-button political issues dominate the public’s thinking. The public gives little thought to judges until they receive news about a decision they do not like. Even then the public does not understand how to evaluate judges. Their political frame of reference tells them to assess a judge based on party affiliation or ideology.

A deficient understanding of democratic ideals may prompt the public to demand that a judge be held accountable for a decision they do not like. Educating the public, however, requires multi-year commitments to continually reach the people, not just when a controversial decision comes down or during an election when many interests are competing for the public’s attention.

Educational tactics in each state will be different. But the goals will be similar—to connect with the public on their commonly held values of fairness, impartiality, separation of powers and the need for courts to be free from popular opinion or political pressure.

Civics education must reach broadly, and include those who will never again pass through a schoolhouse door. It must be a priority for school officials and parents, public officials, community groups, civic institutions and advocates for a wide range of causes.

Part of the answer must involve the legal profession raising the sense of urgency for improved civics education and building connections with court leaders and other stakeholders. The legal profession should lead the discussion about the role of courts and the need for an independent judiciary.

America needs civic education to repair the foundation of government and defend the courts.

The messaging needs to be simple and must connect people to commonly held values, rather than try to convince them that their values are out-of-step with democratic ideals.

- The messaging should remind people of their civic duty. To keep courts fair and impartial people have a duty to elect, or help select, judges who will decide cases after honestly reviewing the facts and applying the law. The rights of all people are at stake if courts are not fair and impartial.
- Social media, though inexpensive and easily accessed, may not be the best tool to use. Increasingly, messages must be edgy or outlandish to catch attention. But such messages do not reflect the dignity and integrity of the institution the messages seek to protect.
- Traditional outreach programs may work best. Print advertising, radio, billboards, and earned media efforts, coupled with speaking engagements and school lectures permit multiple public contacts and multi-layering of information.

For public forums and editorial pages, discussion topics could include:

- What is the Constitution and what does it include?
- What is important about separation of powers and checks and balances?
- How does the judiciary differ from the government's legislative and executive branches?
- What is the Rule of Law?
- How do judges decide cases?
- Why are judges not punished for unpopular or mistaken decisions?
- How do courts correct errors made by judges?
- How do we select, elect or retain judges?
- What qualities do we want in judges?
- What issues threaten fair and impartial courts?
- How can we make courts more efficient and effective?
- How can we make courts more accessible?

Building relationships with other advocacy organizations such as the League of Women Voters is important. Such organizations often have an IRC 501(c)(3) education arm and may have a 501(c)(4) advocacy project. Connecting with these organizations provides access to their typically large and engaged member bases and social media followings.

Several organizations have ready-to-use court education resources such as The National Association of Women Judges' *Informed Voters—Fair Judges* project, a non-partisan, national education effort. The project's website is a resource for service projects, presentations to civic groups, schools and colleges, and Law Day and Constitution Day talks. Posted there are alerts, presentations, talking points, radio and television public service announcements, state specific information and a five-minute film produced by the Discovery Channel and narrated by retired Justice Sandra Day O'Connor. Listed below are other resources.

Asking people to support fair and impartial courts presumes that they know what they have and why they have it. Civics literacy matters.

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Public Trust and Confidence Resource Guide, <http://www.ncsc.org/Topics/Court-Community/Public-Trust-and-Confidence/Resource-Guide.aspx>

Court Statistics Project, <http://www.courtstatistics.org/>

State of the State Courts Survey, <https://www.ncsc.org/2017survey>

Our Courts Colorado, <http://www.ourcourtscolorado.org/>

Street Law Inc., <https://www.streetlaw.org/>

Developments in Judicial Selection Methods and Campaign Financing

Introduction

Controversy over how state court judges are selected and challenges to judicial independence continue. Campaign spending on state judicial elections continues to negatively alter the public's perception of our judicial system, and increase the influence of special interest groups in states that elect their judges.

The Rising Tide of Judicial Campaign Contributions

Judicial campaign contributions have grown substantially in recent years. In the states holding contested judicial elections between 2000 and 2016, fundraising totaled approximately \$430 million. As of January 2017, one-third of all elected state supreme court justices had run in at least one \$1 million-plus election contest.

The concern is that those making large-scale campaign contributions are not always entirely altruistic. Contributors to judicial campaigns may be attempting to buy an ideological perspective on a bench or influence on a court. Indeed, many contributors to judicial candidates also frequently appear before those very same candidates as litigants and litigators. In one survey of state court judges, nearly half said they thought campaign contributions affected judges' decision-making.

Campaign contribution strategies that have become commonplace in executive and legislative elections are becoming the norm in judicial elections.

Spending on television advertising for contested judicial elections continues to reach new heights. For example, in 2015–2016 candidates, parties, and outside groups spent an estimated \$36.9 million on TV ads. Weak or nonexistent campaign finance disclosure laws make it difficult to identify the source of campaign contributions in judicial elections.

A number of states have enacted reporting requirements for independent campaign expenditures. However, lack of information and loopholes in state campaign-finance disclosure laws result in substantial expenditures by special interests that go unreported to the public. The Brennan Center found that only 18 percent of interest groups' outside expenditures to judicial campaigns during 2015–2016 could be easily traced to transparent donors. The remaining donors were either undisclosed ("dark money") or buried behind donations from one group to another, making it difficult to discern the original funding source ("grey money").

The Supreme Court's *Citizens United* decision raises concern over the financing of judicial elections. *Citizens United* held that limits on corporate and union funding of indepen-

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dent political broadcasts violate the First Amendment. Since there was no special exception carved out for judicial elections, unlimited funding of judicial campaigns by third parties is entirely permissible. In the 2015–2016 election cycle, nonparties made up 40 percent of overall supreme court election spending, a substantial increase from 29 percent in 2013–2014. Overall, *Citizens United* has weakened the effect of public finance laws designed to ensure the apolitical nature of judicial elections.

The rising tide of campaign contributions in judicial elections has the potential to erode the public’s perception of the fairness of our court systems, leaving judicial independence to hang in the balance. The Supreme Court’s decision in *Caperton v. A.T. Massey Coal Company* recognized that judicial elections create an opportunity for special interests to invest heavily in campaigns in the hope of influencing subsequent decisions. Fundraising success has been highly correlated with success at the ballot box, meaning that candidates who raised the most money were more likely to win the election.

The Changing Face of Judicial Elections

The tone, tenor, and manner of judicial campaigns have materially changed as special interest money and advertising have flowed into judicial campaigns. Voter apathy and lack of information about judicial candidates in understandable formats means that states that elect their judges are especially vulnerable to the unique ability of political action committees and ideological groups to influence voters. Because voters typically know little about state judicial candidates, a series of attack ads may be the only information a voter has about a judicial candidate.

Harsh attack ads targeting the removal of judges based on their vote in controversial cases hit the air waves around the country. As a result, judicial elections quickly evolve into referendums on political causes, rather than a vehicle for selecting the best judicial candidate based on the candidate’s background, experience, and temperament. Many attack ads have a tenuous relationship to their sponsors. For instance, business groups regularly run ads criticizing candidates for being soft on crime simply because they believe crime resonates with voters.

Attack ads diminish judicial independence and harm the public’s perception of our judicial system because they focus on the outcome of controversial decisions rather than on the court’s legal analysis in arriving at its holding. This type of “outcome-determinative criticism suggests that judges are free to ignore the law in favor of the perceived will of the majority.”

While scholarly commentary expresses skepticism about judicial elections, some argue that relying on the electorate is preferable to the pitfalls of an appointments-type merit selection process and frequently cite the greater accountability elections provide. Critics also suggest a merit-based judicial selection system may vest too much power in the hands of attorneys. Advocates of merit selection, however, worry that the elective process distracts a judge by diverting substantial energy to campaigning, and argue that judges have greater independence under a merit selection method.

The two sides of the debate contrast a judiciary theoretically accountable for their decisions to the voters against an appointment process that theoretically eliminates the effects of campaigning on judicial independence, but creates an isolated judiciary out of touch with the voters.

Recommendations to Improve Merit Selection and Judicial Election Approaches

Options that can improve the judicial selection process include:

- Improve the merit system for judicial selection by ensuring the qualifications of a judge through the use of a screening committee for candidates and appointees.
- Avoid a nomination process dominated wholly by insiders with a selection panel composed of non-lawyers whose deliberations are open to the public for comment.
- Improve the judicial evaluation process through the use of neutral benchmarks and process-oriented standards addressing judicial performance issues at all levels of our state court systems.
- Better equip voters through the use of judicial performance evaluations that distribute information to the voting public.
- Change the judicial election process from partisan to non-partisan elections.
- Lengthen the term of elected judges so that with more time between them, judges will encounter less special interest and fundraising pressure.
- Implement publicly financed judicial campaigns.
- Require judges or judicial candidates involved in retention or contested elections to publicly disclose all campaign contributions that exceed a specific threshold.
- Require the automatic disqualification of judges in cases involving parties whose campaign contributions exceed a specific dollar threshold.

America's court system has been regarded around the world as a model of fairness. While there is no perfect system, preventing any further politicization of the judiciary and limiting the influence of special interests in our courts should be the goals of all stakeholders in our system of justice, including the defense bar.

Resources

DRI—The Voice of the Defense Bar is an international organization of defense attorneys and corporate counsel. Its Judicial Task Force has authored two reports—*Without Fear or Favor* (2007) and *Without Fear or Favor* (2011)—which identify and address issues that threaten the independence of state court judges. Both reports are available at [http://www.dri.org/docs/default-source/dri-white-papers-and-reports/dri-judicial-task-force-report---without-fear-or-favor-\(2007\)-\(1\).pdf](http://www.dri.org/docs/default-source/dri-white-papers-and-reports/dri-judicial-task-force-report---without-fear-or-favor-(2007)-(1).pdf), and [http://www.dri.org/docs/default-source/dri-white-papers-and-reports/without-fear-or-favor-\(2011\).pdf](http://www.dri.org/docs/default-source/dri-white-papers-and-reports/without-fear-or-favor-(2011).pdf), respectively.

The Brennan Center for Justice is a nonpartisan law and policy institute at NYU School of Law that focuses, in part, on voting rights and campaign finance reform. Through inde-



pendent research, policy development, public education, and litigation, the Brennan Center promotes measures to protect judicial independence, achieve a diverse bench, and guard against political pressure and special interest influence on the courts. Below is a partial list of their resources on judicial selection and campaign finance:

Legislative Assaults on State Courts—2018, Brennan Center for Justice (Feb. 6, 2018) available at <https://www.brennancenter.org/analysis/legislative-assaults-state-courts-2018>.

Alicia Bannon, *et al.*, *Who Pays for Judicial Races?: The Politics of Judicial Elections 2015–16*, Brennan Center for Justice (Dec. 14, 2017) available at <http://www.brennancenter.org/publication/politics-judicial-elections>.

Million Dollar Courts in 2016, Brennan Center for Justice, available at <https://www.brennancenter.org/million-dollar-courts-2016>.

Brent Ferguson & Chisun Lee, *Developing Empirical Evidence for Campaign Finance Cases*, Brennan Center for Justice (Oct. 20, 2016) available at <http://www.brennancenter.org/publication/developing-empirical-evidence-campaign-finance-cases>.

Alicia Bannon, *Rethinking Judicial Selection in State Courts*, Brennan Center for Justice (June 6, 2016) available at <http://www.brennancenter.org/publication/rethinking-judicial-selection-state-courts>.

John F. Kowal, *Judicial Selection for the 21st Century*, Brennan Center for Justice (June 6, 2016) available at <http://www.brennancenter.org/publication/judicial-selection-21st-century>.

Kate Berry, *How Judicial Elections Impact Criminal Cases*, Brennan Center for Justice (Dec. 2, 2015) available at <http://www.brennancenter.org/publication/how-judicial-elections-impact-criminal-cases>.

Scott Greytak, *et al.*, *Bankrolling the Bench: The New Politics of Judicial Elections 2013–2014*, Justice at Stake, Brennan Center for Justice, & National Institute on Money in State Politics (Oct. 28, 2015) available at <https://www.brennancenter.org/publication/bankrolling-bench-new-politics-judicial-elections>.

Williams-Yulee v. The Florida Bar, Brennan Center For Justice (Apr. 29, 2015) available at <https://www.brennancenter.org/legal-work/williams-yulee-v-florida-bar>.

Adam Skaggs, *Buying Justice: The Impact of Citizens United on Judicial Elections*, Brennan Center For Justice (2010), available at http://www.brennancenter.org/content/resource/buying_justice_the_impact_of_citizens_united_on_judicial_elections/.

Caperton v. Massey, Brennan Center For Justice (June 8, 2009) available at http://www.brennancenter.org/content/resource/caperton_v_massey/.

The Campaign Finance Institute, a division of the National Institute on Money in Politics is a nonpartisan, nonprofit that promotes accountable democracy by compiling a comprehensive online archive of contributions to political campaigns in all 50 states, including for state supreme courts and intermediate appellate courts. Available at <https://www.followthemoney.org/>.

Recent Law Review Symposia

23rd Annual Clifford Symposium on Tort Law and Social Policy, The Impact of Dark Money on Judicial Elections and Judicial Behavior. *See* accompanying articles in Volume 67, Issue 2 of the *DePaul Law Review*.

2017 University of Arkansas at Little Rock Law Review Symposium, Dark Money and Related Issues: New Factors in the Debate on Judicial Appointment versus Election. *See* accompanying articles in Volume 39, Issue 4 of the *University of Arkansas at Little Rock Law Review*.