



Justice at Stake
c a m p a i g n

Judicial Campaign Fundraising and Public Confidence in the Courts

Written Testimony Submitted Dec. 3, 2009 Regarding House Bills 1621 and 1619

The Justice at Stake Campaign is pleased to provide written testimony for the scheduled hearing on merit selection, by the Courts Subcommittee of the Pennsylvania House Judiciary Committee. Justice at Stake is a national partnership of more than 50 organizations working to keep courts fair and impartial. Our partners include leading national advocates, legal and business groups, and civic reform organizations. Our board of directors and partners include Republicans and Democrats, liberals and conservatives, along with business and civic leaders, defense, corporate and trial attorneys, and judges. Although we don't support any one system for selecting judges in every state, Justice at Stake works with partners on behalf of reform measures, including merit selection, designed to reduce special interest pressure on the courts. We are pleased that the Committee is studying a potential remedy to the troubling rise of political and special interest pressure in judicial contests.

Across America, attorneys, partisans, and special interests with cases in court are pouring millions into judicial contests, mostly for high-court but increasingly for appellate- and even district-court contests. From 2000-2008, candidates for America's state high courts raised \$200.8 million, more than double the amount in the previous four cycles. Fundraising records in 19 of 21 states with competitive Supreme Court elections were broken in that period, including in Pennsylvania. Most of this money comes from attorneys and political interests who view campaign spending as a litigation investment. Once independent expenditures are factored in, these dollar figures climb much higher. Broadcast television ads are seeking to push wedge-issue politics into our courts of law, and aggressive questionnaires from special interest groups are pressuring judges to take stands on controversial issues. As Justice Sandra Day O'Connor recently warned, "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."

The trend of skyrocketing spending on state Supreme Court elections has, of course, touched Pennsylvania. In the 1999-2008 decade, Pennsylvania ranked fifth nationally in Supreme Court fundraising, with \$16.1 million. This includes the nation's most expensive race of the 2007-08 election cycle, when candidates raised \$9.5 million, including the primary and Justice Thomas Saylor's retention election. In addition, based on conservative estimates, two non-candidate groups (the Center for Individual Freedom and the state Republican Party) spent a total of \$1 million more on election-related

advertising, bringing the cost of Pennsylvania's 2007 election to at least \$10.5 million.

The changing politics of judicial elections has had a corrosive effect on public confidence in the courts. Public opinion surveys from 2001-04 find that more than 70 percent of Americans believe that campaign contributions influence judges' decisions; only 5 percent believe that contributions have no influence. Little has changed since then. In 2008, 78 percent of voters in Wisconsin said they believed that campaign contributions influence outcomes in the courtroom.

Many judges feel trapped in a bad system, forced to raise money from the parties appearing before them and looking over their shoulders at interest group demands. In 2002, 46 percent of state court judges surveyed said they believe that campaign contributions have at least "a little influence" on courtroom decisions. In 2004, after two Illinois candidates raised \$9.3 million, the winner, Justice Lloyd Karmeier, called it "obscene" on election night. "How can people have faith in the system?" he asked.

Ohio Supreme Court Justice Paul Pfeifer was even blunter in his assessment of runaway spending on judicial elections: "I never felt so much like a hooker down by the bus station ... as I did in a judicial race," he told the New York Times in 2006. "Everyone interested in contributing has very specific interests. They mean to be buying a vote."

Since September 2008, when Pennsylvania's Senate Judiciary Committee held a hearing on merit selection, a widely publicized U.S. Supreme Court case, *Caperton v. Massey*, brought home the damaging effect of special interest money on public trust in the courts. As the Supreme Court noted in its ruling, which forced a West Virginia justice to recuse himself from a case involving a coal executive who spent \$3 million to help elect him: "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the other parties' consent—a man chooses the judge in his own cause."

In a brief in that case, the Conference of Chief Justices, which represents the top jurist in every state and U.S. territory, wrote: "As judicial election campaigns become costlier and more politicized, public confidence in the fairness and integrity of the nation's elected judges may be imperiled.... The quaint notion that 'judicial campaigns must focus their solicitations for funds on members of the bar' ... has given way to high-dollar free-for-alls marked by dueling campaign salvos by organized interest groups, often located outside the State of the election."

Heavy judicial fundraising was seen again in Pennsylvania this past year. Pennsylvanians for Modern Courts has estimated Judge Jack Panella's fundraising at \$2.3 million, with more reports yet to be filed, and Justice-elect Joan Orié Melvin's at \$734,000. In addition, a significant number of TV ads were aired on Melvin's behalf by the state Republican Party.

Moreover, the question of whether this flood of campaign money is affecting judicial impartiality was raised by a candidate for Pennsylvania's Supreme Court, when Justice-elect Melvin argued that heavy donations from trial lawyers to Judge Panella's campaign

raised questions about whether he could deliver impartial justice.

In an October campaign forum, Justice-elect Melvin said: “Is it pay-to-play? Is it justice for sale? I don’t know, but it sure sounds suspect.” When the state Supreme Court’s newest member voices concerns about runaway campaign spending, and its potential to create ethical conflicts, it is understandable that the public might harbor similar doubts Pennsylvania’s current election process, and the pressures it is exerting on judges and justices.

There is evidence that such concerns are renewing public interest in, and support for, merit selection as one of several strategies gaining consideration to protect the integrity and reputation of state courts. After a long period in which voters had not been presented with any ballot measures concerning merit selection, voters in two conservative Midwest counties supported merit selection last November. In Greene County, Mo., voters repealed the existing system of electing local trial judges, instituting a merit selection system in its place, while in Johnson County, Kan., voters soundly defeated an attempt to end merit selection for local trial judges. And legislative efforts to undo or weaken merit selection have failed in several states.

“Why should state legislators consider a reform such as merit selection? Briefly, every American deserves a fair day in court, without fear that the other side can “buy” favorable treatment by spending freely to elect the judge.

The 24 states that use nonpartisan commissions and periodic retention elections experience vastly lower levels of election spending than the 21 states that choose Supreme Court justices through competitive elections. Of the \$200.8 million raised by Supreme Court candidates in 1999-2008, retention elections accounted for just \$2.2 million—a little more than 1 percent of the total. Nonpartisan elections, used by 13 states, accounted for \$50.6 million, or 25 percent. Partisan elections, which are used by nine states including Pennsylvania, accounted for almost \$148 million, or 73 percent.

While many Pennsylvania newspapers already have editorialized in favor of merit selection, such support also has been voiced by some of the nation’s biggest papers. On March 3, 2009, the same day the U.S. Supreme Court heard oral arguments in *Caperton v. Massey*, the Washington Post said, “States should consider abolishing judicial elections in favor of an appointment system that distances jurists from politics and fundraising.”

The same day, a USA Today editorial also said merit selection was one of several reforms that would protect state courts from a special-interest takeover. The editorial concluded: “Every system has drawbacks. But nothing could be worse than putting ‘for sale’ signs on the doors of the nation's courts.”

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