CAMPAIGN CONTRIBUTIONS IN JUDICIAL ELECTIONS:

SEPARATING MONEY FROM THE DECISION-MAKING PROCESS

By

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Abstract

This thesis examines campaign contributions in judicial elections. Increasing campaign costs have created a perception that judges' decisions may be biased by the contributions they receive. Regardless of actual bias, perceived bias is enough to warrant concern because it threatens the legitimacy of the judiciary. Though money presents a problem for the judiciary, elections serve as a beneficial method of selecting judges. Additionally, money is an important aspect in elections and cannot simply be eliminated. Publicly funded elections have been proposed to counteract the problem; however, the findings in this thesis demonstrate that they are no longer a viable option. Recent court cases and a lack of funding have made publicly funded elections unworkable. Instead, this paper proposes a system of judicial disqualification. Disqualifying judges who have a perceived bias due to contributions eliminates the threat to legitimacy. The proposal also takes this decision out of the judge's hands and allows an independent panel to decide possible bias. The paper demonstrates the ability of a disqualification system to eliminate the negative effects of contributions without harming the positives associated with elections.

Introduction

Judicial selection has been a topic of much debate for scholars and those involved in the legal field. Recently, reformers have devoted much effort to ending judicial elections. The belief is that a reliance upon the electorate, as well as campaign contributions, harms judicial independence. Despite these claims, research has shown the many benefits of judicial elections. One problem, which is a call for great concern, comes from the campaign contributions judicial candidates receive. A majority of contributions candidates receive come from attorneys and other individuals who deal directly with the court. This creates doubt in the eyes of the public as to whether a judge is able to truly be impartial because the individuals trying cases before them have donated to the judge's election efforts. While several options have been offered to counteract this problem, only two options serve to keep the benefits of elections. The two possible arguments to reduce possible bias from campaign contributions are publicly funded elections or judicial disqualification. I will argue that recent Supreme Court cases and a lack of funding have created an environment unsuitable for publicly funded elections. Instead, I argue a recusal system is a far better measure to deal with possible bias. I will design a plan for determining judicial disqualification as it relates to campaign contributions.

Judicial elections have grown more costly in recent years and as the cost increases, so does the concern about judicial impartiality. It is immensely important for the judiciary to appear impartial in order to maintain its legitimacy. While the actual effect of campaign contributions on judicial impartiality may be debatable,

there is considerable evidence to suggest that the public perceives there to be a serious conflict of interest. This is by no means evidence to completely eliminate judicial elections or the money involved in them. Elections serve an important purpose in democracy and in judicial selection. Elected judges are no worse than their appointed counterparts, and in fact may be better than judges whose positions were received through appointment. Money also serves an important purpose in elections by motivating voters and encouraging competition.

The problem in judicial elections is the perception that judges are unable to decide fairly when they accept contributions from individuals participating in cases. Reasonable people see judges accepting large sums of money from individuals dealing directly with the court as potentially biasing the outcomes of the case. Given that the majority of contributions to judicial elections come from lawyers, serious consideration of potential bias is warranted. Thus, a solution is needed which will allow judges to still participate in elections, have significant financing to ensure competition, and also remove the possible biases associated with campaign contributions.

One option that has been pursued is publicly funded elections. Having a campaign funded with public monies rather than private contributions effectively removes the opportunity for private parties to sway decisions with their money. There is recent evidence to suggest these programs could be successful under the proper circumstances. However, recent Supreme Court cases and the political climate in the United States have made these publicly funded elections a topic for history rather than current events. I will argue publicly funded elections can no

longer function in the United States. Instead, states should pursue a policy in which judges are not permitted to hear cases wherein there is significant evidence to suggest a possible bias. I will design a system in which bias can be sorted out and an outside panel can decide whether a judge should be disqualified from hearing a case.

The following pages will begin by providing a brief history of judicial selection. It is important to understand what has transpired previously so that the current situations can be put in proper contexts. Next, I will review the literature on the topic of judicial elections. While state courts are not as well studied as the United States Supreme Court, there has been a growing body of literature on them as a result of contention over judicial elections. The literature review will provide support for many of the assumptions I will establish in the next section. The subsequent sections will address my hypotheses regarding publicly funded elections and a disqualification system respectively. I will argue publicly funded elections were once a viable option, but they are no longer a workable solution to campaign contributions. The final substantive section of the paper will discuss my plan for a disqualification system. While there have already been pushes to enact stricter recusal laws, my plan differs in that it displaces the authority to require disqualification from the judge in question to an outside, unbiased panel.

A Brief History of Judicial Selection

Judicial selection is a greatly varied topic with a complicated history. The selection process for state supreme court justices has undergone many changes and still varies greatly across the states. From appointments and retention elections to

partisan and nonpartisan elections, judicial selection has been a journey states have embarked upon to try and find the best way of selecting judges. In order to understand judicial selection processes, it is necessary to first understand the history of state judiciaries. The history of the states may have interesting implications on the ways in which judicial selections have evolved in the states. From gubernatorial appointments to partisan elections, state judiciaries have varied greatly in the ways they are selected. These differences are due to the states attempting to find the most effective selection method of finding the best and most qualified judges.

At the founding of the United States, the founders feared having any form of government similar to the monarchy from which they broke free. For this reason, the Constitution laid out a judiciary that could be independent from the other branches. They feared having judges that were not independent and answered to another individual, as England's judiciary did to the king of England. To ensure independence of the judiciary, the original states followed the federal model of judicial selection and allowed the legislatures or governor to appoint judges. This kept judges from having to campaign for their office; a practice that many believed would take away judicial independence because they would have to pander for votes. However, unlike the federal system, these appointments were not life tenure.

The appointment system was fraught with its own problems. Since the judges were not required to stand the trials of an election, many perceived there to be a shortfall of accountability. Judicial elections thus became a topic of discussion in order to address this issue. In 1832, Mississippi became the first to fully adopt

the practice of judicial elections and required all state judges to be chosen by election. Among many other reasons, controversial federal court cases and a belief that the judiciaries should be more independent from the legislatures created a movement away from appointment schemes and into an era of judicial elections. Elections were believed to be more democratic; and thus, people believed their voices could be heard in the form of electing judges.

These new judicial elections created a seemingly even greater problem. Since partisan elections were the most familiar and easy to implement, the new method of selecting judges was primarily through partisan elections. Party politics drove elections at the time and knowing the right people was often what it took to be elected. This created an aura of corruption around state judiciaries. The belief was that these partisan elections had forced judges to become politicians that campaigned and needed to identify with a particular political ideology in order to have an opportunity to be successful in the elections.

The next solution to address this problem was to move towards nonpartisan elections. This was intended to remove the large political organizations associated with political parties. Ideally, if candidates were not able to run as a party's candidate, then they would be forced to use their merits to earn votes. Unfortunately, this did not remove the parties from the scene and they often still supported certain candidates in nonpartisan elections. It also created a problem for voters who were not sure which candidates to vote for when the easiest way to make a decision is along party lines. While some states continued to switch to

nonpartisan elections, others switched back to partisan elections. Thus, judicial elections were still plagued with issues.

In 1940, Missouri believed they had solved the problem of creating a selection system that provided accountability while giving the judiciary enough independence from both the electorate and the legislature. The merit plan, also known as the "Missouri Plan", is selection system that utilizes appointments then retention elections. The appointment is intended to ensure that only highly qualified individuals can be selected as judges and then the retention election is intended to keep them accountable to the public. This method became popular and is now the most common selection method for state judges. However, more recent elections have shown the effect that interest groups and money can influence even retention elections. Although the plan still has support, there is much criticism and many call for a complete switch away from all forms of elections.

Review of the Literature

Judicial elections are an extremely controversial issue for many legal scholars and those associated with the courts. Selection of judges is greatly varied throughout the states and range from gubernatorial appointments to partisan elections. The major issue with judicial elections is one of impartiality. For many, the courts are thought to be above politics and this allows them to be fair and just in their decision-making. However, as elections have risen as a form of judicial selection, many have suggested the sanctity of the courts is threatened. Campaigning for elections has been thought to harm, or at the very least appear to harm, a judge's ability to make impartial decisions. In comparison to the Supreme

Court, research on state courts is fairly limited. The following literature review will delve into some of the key pieces of research related to judicial elections. The research of judicial elections has done much to combat the allegations of those who endeavor to end judicial elections. While much of the literature puts to rest the arguments of whether the people can elect highly qualified judges, the information on the effect of campaign contributions is more inconclusive. Campaign contributions then become a two-fold issue: do contributions lead to decisions and regardless of actual bias is there a perception of bias that can harm the courts?

Perhaps the most important duty for a judge is to make fair and impartial decisions. In order to understand why impartiality is of such importance, it is first necessary to understand from where the judiciary gleans its authority. The executive branch garners its authority from force. It can use police powers to enforce its will. For the executive, the power of the sword is most important. The legislative branch harnesses money, or the power of the purse, to garner political power. They can raise money or spend it in order to impose their will upon the people. The judiciary on the other hand, has neither the power of the sword nor the purse to gain the support or obedience of the people. Thus, the judiciary relies on legitimacy as its source of power. Therefore, anything that could harm the judiciary's legitimacy is potentially problematic. For this reason, opponents of judicial elections have criticized campaign contributions and the possible implications they may have for a judge's impartiality.

A limited body of research has found conflicting results as to whether campaign contributions have an actual impact on judicial decision-making. Looking at judicial elections in Alabama, Stephen Ware found a correlational link between campaign funding and the way in which a judge decides a case (Ware 1999). The article differentiates two types of possible campaign contributions: one in which a lawyer contributes in an effort to sway a judge for a specific case and another in which an interest group donates in an effort to influence decisions on a range of cases dealing with a particular issue. The first is wrong because it causes a judge to treat similar cases differently while the second is acceptable because it simply changes the way all cases are looked at by the court (Ware 1999). This is an important distinction because judges do have their own views and it is reasonable to believe individual would contribute to candidates whose views are aligned with their own.

Therefore, in order for campaign contributions to be considered wrong, they must effect individual cases and cause a judge to make different decisions on similar cases. In Alabama there is correlational evidence of a link between business-funded judges and pro-business decisions; as well as a link between judges funded by lawyers that sue businesses and anti-business decisions (Ware 1999). However, this result is highly suspect as to directionality and certainly does not provide enough evidence for a causal statement. The pro-business or anti-business judges make similar decisions whether it is a low level case or a high profile case (Ware 1999). Given this information, it seems more likely that the contributions are coming as a result of the contributor realizing the ideological leanings of the judge.

The judge is given money because they decide a particular way and the people giving money agree with those decisions. This seems more of an instance of campaign contributions made to influence the court across all cases rather than to gain favor in particular cases.

A more recent look into campaign contributions creates more of a cause for concern than Ware's study. Damon Cann's study of the Georgia Supreme court unearthed startling results. Unlike his earlier study of Wisconsin, the decisions made by Georgia Supreme Court justices seem to be influenced by campaign contributions (Cann 2007). Most striking is the finding that "a contribution of $2,000 essentially secur[ed] the outcome of the case" (Cann 2007). An important distinction between this study and Ware's study is the fact that there was a link discovered that goes beyond ideologies. With these Georgia judge's having roughly the same ideologies, the explanation of their differing votes cannot be that they were simply predisposed to vote a certain direction and thus the contributions are in anticipation of those decisions. This more recent study is cause of great concern because it is an example of contributions affecting certain cases in which contributors are one of the parties. Unfortunately, the narrow range of this study allows little to be said of judicial elections as a whole. In fact, Cann found opposite results when he conducted a study of the Wisconsin court in 2002. The Georgia study encompasses data from only one state and only one year and thus cannot be generalized to judicial elections overall. However, the strong link between money and decisions in the study is certainly enough evidence to suggest there is potential danger in campaign contributions to judges.

The results of studies such as Ware's and Cann's provide a look into whether or not there is an actual link between money and judicial decisions; however, this may not be the most prudent question to determine the damage contributions can cause. James Gibson demonstrates the role public perception may play in his book *Electing Judges*. Through an experiment portraying three different levels of contributions, Gibson determines the effect of campaign contributions on perceived impartiality. Judges that accept contributions from individuals that appear in the court are seen to be least able to make fair and impartial decisions (Gibson 2012). If it is true that courts derive their power from legitimacy, then this finding is of particular importance. It does not matter whether or not there is an actual causal link between campaign contributions and judicial decisions. The more important issue is whether the public perceives there to be a link between contributions and decision-making. The same research also finds a similar level of doubt of the impartiality of state legislators accepting contributions from those that do business with the legislature (Gibson 2012). However, this finding does not jeopardize the legislature in the same way it does the judiciary. If the public believes accepting contributions from lawyers that appear in the court makes it impossible for the judge to be impartial; which empirical research shows is the case, then the legitimacy of the court, and therefore its power over the people, is in danger. Legitimacy is not as important to the legislature as it is to the judiciary, owing to the fact that the legislature has other ways, particularly with the use of money, to obtain power over the people.

Despite evidence of the negative effects associated with campaign contributions, money is an important and valuable part of elections. While many believe limiting the amount of money is a worthy endeavor, perhaps encouraging spending is more suitable to improve elections. A major concern of judicial elections is the limited number of people that vote in them. By analyzing campaign spending and ballot roll-off, the number of voters who do not vote in the judicial race despite already being at the polls and voting in other races, it can be seen that increased spending leads to more participation from the electorate (Bonneau and Hall 2009). In order to encourage more citizens to vote there needs to be an increase in spending. The greater spending results in a more information being presented and allows the public to make an informed decision on Election Day as well as encourages them to vote (Bonneau et. al 2009). If the goal is to encourage informed participation, then cutting spending will not be beneficial to judicial elections.

Public participation is not the only reason to discourage limits on campaign contributions. In order for the most qualified judges to be elected and to hold those judges accountable, competition is needed. Unfortunately, placing limitations on funding has detrimental effects on a challenger's ability to be competitive in the election (Bonneau and Cann 2013). A criticism of judicial elections is that they do not truly serve their purpose of accountability; however, with competition this purpose will be fulfilled. Thus, there should not be limits placed on contributions. Without limits, challengers will be able to mount a campaign capable of being competitive in the election. Furthermore, the campaigns will reach their own

natural limits of beneficial fundraising. Research shows that as spending increases, the effect of more money on the election decreases and this happens at a faster rate for incumbents (Bonneau et. al 2013). Therefore, if the campaigns are simply allowed to spend as much as they would like, they will reach a point at which it no longer makes sense to spend more money. Because the return decreases faster for incumbents, limiting the money in elections will increase the advantage incumbents have and decrease the level of competition.

If money is critical to elections and there is also a loss of legitimacy due to the actual and/or perceived inability of judges to be impartial when receiving contributions, then why not eliminate elections overall? Firstly, judicial elections are effective in holding judges accountable. Given that judges in effect create policy with their decisions and these decisions are often based on ideologies, there was a push to allow the public to hold judges accountable to the public. Evidence has been found that elections do as they set out to do. Elections provide an opportunity to remove unpopular or ineffective judges from the court and being ineffective and/or unpopular greatly increases the chances of there being a challenger and of that challenger winning (Bonneau et. al. 2009). In short, judicial elections do provide a measure of accountability. This accountability affords an additional level of legitimacy to the courts. The act of elections creates legitimacy and thus electing judges is one way the courts build their legitimacy (Gibson 2012). Perhaps what the courts gain from elections outweighs what it loses from the campaign contributions. In fact, that is the argument seen in both Bonneau and Hall's book as well as

Gibson's book. Elections are admittedly imperfect; however, the benefits outweigh the negatives.

Many reform advocates suggest that judges elected in partisan elections are not as qualified as those that receive their seat by appointment and then face voters in retention elections. However, their criticisms seem to be based on conjecture rather than on research. Evidence shows that elected judges work harder and decide more independently than appointed judges (Bonneau et. al. 2009). Therefore, criticisms of judicial elections based on quality of judges, at the very least, lack empirical support. Furthermore, there is significant evidence to suggest that the public takes into account qualifications when making their decisions. Challengers were more successful at taking votes from incumbents when they had prior experience as a judge and appellate judgeships convinced the public more than trial judgeships of a candidate's qualifications (Bonneau et. al. 2009). The public is voting for qualified candidates and making decisions based upon the qualifications a challenger possesses. Clearly, judicial elections provide an effective method of selecting qualified judges.

While evidence shows that elections net a positive result for the courts, this does not mean we are doomed to continue with the negative effects of campaign contributions. The threat needs to be addressed in some form. The research thus far simply illustrates why it should not be through elimination of elections or a complete elimination of money. Elections and the money put into them provide an important benefit to the courts and democracy overall. Different measures have

been proposed to address the problem of campaign contributions without eliminating elections. The first, strict contribution limits, has already been shown to have some negatives, such as decreasing a challengers ability to mount a competitive campaign. A second, which has some support for being an effective measure, is publicly funded elections.

A recent report on North Carolina's publicly funded judicial elections reveals the degree to which publicly funded elections may have been a viable solution to the negative effects of campaign contributions. The program was effective in many ways. It reduced the amount of private funding, party funding, and the amount of personal funds used in campaigns (Voss 2014). The main problem with money in judicial elections is that the majority of it comes from private individuals, many of whom have business with the court. North Carolina's publicly funded elections decreased the amount of private money and therefore decreased the potential for bias in decision-making. Furthermore, the program was very popular with the candidates as 75 percent of the candidates chose to participate (Voss 2014). Given the participation rate and the fact that private money was greatly reduced in the elections, it is clear that at least for a time, publicly funded judicial elections were a reasonable measure to combat the negative effects of campaign contributions. On the surface, having campaigns paid for by public funds without receiving large contributions from donors sounds like a good idea. However, I will argue that given recent events, publicly funded elections are no longer feasible and incapable of being effective.

A third and better option, for which I will argue its implementation, is a recusal policy. By requiring judges to disqualify themselves from cases in which there is a possible threat to impartiality, the perception that money is linked to judicial decision-making will be reduced, if not nearly eliminated. The American Bar Association has pushed to make campaign contributions a stronger consideration for judicial disqualification. They have suggested the need for a specific amount or percentage at which a judge should be required to recuse himself or herself (Gray 2015). Despite pressure from the ABA to enact these changes, there has only been limited success in enacting change. Five states have set up a system similar to that which the ABA suggested while ten others used the principles to create a recusal system without the use of specific numbers (Gray 2015). Clearly, not everyone is convinced that campaign contributions should necessarily invoke a judicial disqualification. Wisconsin went as far to put in a rule that explicitly says a judge is not required to recuse himself if the only reason to do so is the receipt of a lawful campaign contribution (Gray 2015). With such opposition it seems that perhaps strict numbers are not the only option for a system of judicial disqualification. The numbers simply gloss over other contributing factors that may impact whether judicial disqualification is actually necessary due to the contributions.

The link between campaign contributions and the ability to make impartial decisions cannot simply be ignored. There is sufficient evidence to believe that elections are beneficial and should be continued as a method of selecting evidence. Furthermore, money is convincingly shown to have an important and beneficial role in elections by mobilizing more voters and allowing challengers to be competitive.

What is not clear is how to keep all the benefits associated with elections while eliminating the negatives that come from campaign contributions? The system for recusal I will argue for is an option that satisfies those two elements while overcoming some of the shortfalls associated with the American Bar Association's recusal plan. It would not require a move away from elections or money in elections; but rather, it would eliminate possible biases arising from campaign contributions to judges.

Assumptions

A question may arise as to whether or not a recusal system is a proper proposal to address the problems ailing the state judiciaries. Firstly, the very idea that there is a problem creates some contention. Some may believe that campaign contributions in fact do not have a negative effect on state judiciaries. However, the research does not support this belief. There is certainly conflicting evidence as to whether or not campaign contributions result in actual biased decision-making. Studies conducted in different states show that there may be some actual bias exhibited while other states seem to show no connection between campaign contributions and the decisions made by elected judges. Regardless of the actual bias, there is sufficient evidence to suggest that the public perceives campaign contributions to harm a judge's ability to decide cases fairly. This in turn harms the legitimacy of the court and in turn harms the overall institution.

Legitimacy is of great importance to a judiciary. It has been cited by many people, including the U.S. Supreme Court, as being the source of power for the judicial branch. The legislature is able to gain power through the manipulation of

financial policies. The executive branch is able to use force to ensure that its power is maintained. The judiciary on the other hand is unable to harness the financial powers or the force of police powers in a quest for political capital. Therefore, the judicial branch relies solely on its legitimacy as the source of its power. Legitimacy is possibly the greatest form of political capital because it is not coercive in nature. However, it is also the most fragile since an institution relying on legitimacy is only powerful if the people answering to it regard it and its decisions as legitimate. If campaign contributions threaten legitimacy; which they have been shown to do, then they must be regarded as a problem for the judiciary.

Once contributions are accepted as constituting a problem, many may suggest doing away with judicial elections all together in favor of some other selection method such as an appointment scheme. This would be an unfortunate step in the wrong direction. It is widely accepted that judges on the highest courts make policy with their decisions in many cases. Given a judge's role in shaping policy, he or she should be held accountable to the voters in much the same way the members of legislatures are held accountable. Furthermore, considerable research into judicial elections demonstrates that elected judges are equally qualified and possibly more effective and harder working than the judges who receive their post through an appointment scheme. Elections serve an additional purpose in democracy as well. Legitimacy can be enhanced in an institution if its members are chosen by the public in competitive elections.

Since elections are beneficial to the judiciary overall, a possible proposal to combat the campaign contributions would be to enact strict limits on donors. Strict

limits would actually have a negative effect on the electoral process. Significant research into elections in general, as well as specifically judicial elections, shows the importance of money in elections. Elections only serve to produce accountability, and therefore better candidates, when they are competitive. Limiting the money in elections would serve to diminish the level of competition in judicial elections. It is already difficult for a challenger to defeat an incumbent in an election. Money is one of the tools a challenger may use to increase his or her chances of success. More money in a campaign provides the voters with more information and in turn more of the electorate choose to vote in the election. Eliminating money from judicial elections would not have the net positive result proponents of this solution hope it would.

Given the positives associated with elections and the necessity of money in elections, it seems separating campaign contributions from judicial decisions in the eyes of the public is a difficult task. This does not mean that the people should settle for the status quo; but rather, there is a need for another option. One such proposal is publicly funded elections. However, this may be an option better suited for the past and no longer feasible given the status of politics today. Another option, an overhaul of the recusal system for elected judges, is a plausible idea to combat the perception of bias arising from campaign contributions in judicial elections.

Publicly Funded Judicial Elections

One proposal to eliminate the corruption of money in judicial elections is to publicly fund them. While there are many variations of this plan, the idea is that the candidates raise a relatively small amount of seed money from small donations and

then the government will give a lump sum of money to fund the campaign. The seed contributions are to demonstrate that the candidate is plausible and has some support in the public. This ensures that the government isn't simply handing out money to anyone saying they want to run for a seat on the bench. Without relying on large contributions from others, the candidates should be able to remain independent. Furthermore, since they did not need to obtain large contributions, the judges should be perceived as impartial and fair in all their judgments. After all, it was the government that bankrolled the campaign, not the lawyers who appear in front of the judge.

Another important aspect of publicly funded elections is matching funds. Since it is not required that candidates use public funding, situations in which a privately funded candidate greatly outspends the publicly financed candidates may present a problem with publicly funded elections. Matching funds are funds meant to overcome these situations. It is additional money offered to publicly funded candidates who have been greatly outspent by their privately funded opponent. This essentially maintains a level playing field for all candidates. It also takes away the incentive to privately fund your campaign because even if you raise more money than the public funds offered, your opponent will receive roughly the same amount of money.

North Carolina adopted a full public funding program in 2002. This program seems to have been effective during its use. One concern often offered for publicly funded elections is that since participation is not required, most people will opt for private funding which can raise greater sums of money. However, 75% of the

candidates participated in the public funding from 2004-2012 (Voss 2014). Clearly the program was able to garner support from those running for North Carolina's supreme court. These candidates were also very successful because no privately funded candidate ever won a race in which a publicly funded candidate was competing (Voss 2014). The people of North Carolina seem to have positively responded to the public funding program. Similar to Gibson's finding of perceived unfairness in decisions, a 2002 poll conducted by the North Carolina Center for Voter Education found that "84% of voters expressed concern that lawyers are some of the biggest contributors to judicial candidates" (National Center for State Courts). With this information, it is unsurprising that the voters would respond well to candidates whose candidacy is publicly funded.

One of the concerns raised by Bonneau and his colleagues is the competitiveness of elections and they have suggested the need for funding to be more balanced, not necessarily decreasing the overall amount. In this measure, the North Carolina publicly funded judicial elections were also very successful. The number of elections that were financially competitive increased from 25% to 78% after the implementation of the program (Voss 2014). With a greater balance in campaign funding, the elections are able to be very competitive. Given that the majority of candidates were publicly financed, they were essentially running on equivalent sums of money. As was demonstrated in Bonneau and Hall's work, when elections are monetarily competitive, the challengers are able to garner more support and make the overall election competitive. This then makes the judges

more accountable to the electorate and serves to further legitimize the judiciary overall.

With the success of North Carolina's publicly funded elections, it seems that public funding would be an effective measure to install across the nation to ensure judicial elections are not affected by judges accepting campaign contributions which appear to the electorate to have a corruptive force on decision-making. However, there are two main problems that have caused publicly funded judicial elections to no longer be a viable option. The first of the problems is simply the funding required to enact such a policy. In order to have publicly funded elections, a state must have the money necessary to pay for the candidates' campaigns. Campaigns are expensive and a major complaint against judicial elections is that they are becoming increasingly more expensive. With this considered, it seems that publicly funded elections would be a great toll on a state's budget.

The expense of campaigns is one contributing factor to the downfall of North Carolina's publicly funded judicial elections. During the period the program was in place, 2004-2012, $3,245,700 of public funds was poured into the elections for the state supreme court (Voss 2014). Given that many, if not most, state legislatures are facing budget problems, the money given to candidates for the state supreme court could be seen as a frivolous expense to many state lawmakers. The problem does not solely sprout from the amount of money required; but also, there is a limited sum of money available to the programs. Some states use a system in which the people are able to check off a box on their taxes to go towards publicly funded campaigns. Unfortunately, this check-off system is quite ineffective at generating

sufficient funds. In some states this is possibly a reason for which candidates do not participate, they fear the government lacks sufficient funds to pay for their campaigns. Even if the funds for the campaigns are available, publicly funded elections are still faced with a seemingly insurmountable problem.

A key part of making publicly funded elections appealing and successful is the use of matching funds. This creates a system in which there is no incentive to utilize private funding because your opponent will receive the same amount of money without having to acquire it from private sources. Unfortunately, matching funds are faced with their own problems. Firstly, it can be very expensive to match a privately funded candidate. If the state has been able to find the money for the initial component of publicly funded elections, they must now find additional funds to match that of a candidate who may go to any source for funding. This greatly increases the possible expense to the state for a program of publicly funded elections.

Once the issue of finding enough money for all aspects of publicly funded elections, the Supreme Court of the United States has created additional problems for matching funds in recent decisions. The first comes from the notorious *Citizens United v. FEC* case in which the court decided that corporations could give endless amounts of money to candidates in the form of Super PACs that were not allowed to coordinate with candidates (2010). This freedom of speech ruling creates one major issue with matching funds. Even if both candidates participate in the public funding, outside groups may spend enormous sums of money for one candidate. This situation would not call for matching funds because the candidate did not

spend the money; but rather, an outside group is responsible. Therefore, an imbalance in money spent on a campaign is created without any solution provided to the other candidate.

A second case decided by the Supreme Court furthered undermined publicly funded elections. In a 5-4 decision of the *Arizona Free Enterprise Club's Freedom Club Pac v. Bennett* case, the court decided that public matching funds undermined the First Amendment because certain groups had to limit their contributions in order to ensure that the matching funds were not provided to the other candidate (2011). This essentially eliminated all provisions for matching funds in publicly funded elections. By considering money an extension of speech, publicly funded candidates were no longer able to receive funds to match those that privately funded candidates are able to raise. Without the matching funds, publicly funded elections become less appealing to candidates who now know that if their opponent does not opt for public financing then they will be able to raise endless amounts of money above that which they receive.

Wisconsin is another state in which publicly funded elections were pursued in an attempt to remove the possible corruptive forces of private money in campaigns. The Wisconsin program, like many of the other publicly funded election programs, did not solely pertain to judicial elections. The Wisconsin version was quite different from the program in North Carolina. In addition to having a lengthier history, there were substantial differences to the design of the program. Firstly, the program was funded solely by a check-off on taxes. The money provided to candidates was conditioned upon abiding by spending limits; however, if the

opposing candidate chose not to participate then the publicly financed candidate no longer was required to abide by the spending limits (Geyh 2001). This provision parallels the matching funds provision in other policies such as North Carolina's. However, unlike matching funds, the additional money comes from private sources and thus may not fall victim to the rulings in the *Arizona Free Enterprise* case. Unfortunately, the same reason for which the program could survive that ruling potentially causes the program to be ineffective. If one candidate does not participate, then both candidates are able to receive large sums of money from outside sources.

The problem of paying for a program of publicly funded elections was particularly prevalent in Wisconsin. Initially, the public financing provide to the candidates was over $97,000; however, due to a lack of funding, the two candidates participating in the program in 2000 received only $13,500 (Geyh 2001). With such little incentive provided to candidates, it is not surprising that many candidates would opt out of the program. North Carolina's program was funded throughout its existence and seemed to be much more effective in curbing the negative effects of money in judicial elections. Unfortunately, budget cuts in both Wisconsin and North Carolina eventually led to the complete elimination of both programs.

The publicly funded elections of North Carolina demonstrate that for a time, it was a viable option to combat the public perception of money corrupting judicial decision-making. However, the massive financial cost to the state paired with recent Supreme Court decisions have undermined the longevity of such policies. Without an ability to fund the extremely expensive campaigns in a political climate

where states are struggling to balance their budgets, publicly funded elections do not seem a viable option. Furthermore, the recent Supreme Court decisions have made it nearly impossible for these systems to function as they were intended. The only option for publicly funded elections to combat the issue of matching funds would be to make the initial funds provided to candidates so great that no privately funded candidate could match it. However, the fact that states already struggle to provide the amounts currently offered does not bode well for increasing the funds to the necessary level. Furthermore, privately funded Super PACs that may spend essentially limitless sums of money in whatever way they see fit present an issue which states have little control over. Barring a miraculous influx of money to state governments or a Constitutional Amendment overturning the Supreme Court decisions, publicly funded judicial elections are infeasible and doomed to fail.

A Recusal System

Hope is not lost for those looking to enact change in regards to how money is perceived in judicial elections. There is one option that should provide all the positives with limited negative effects. A well-designed recusal system would allow judicial elections to be privately funded while ensuring the money they have received would not affect a judge's decision. While all judges are already expected to recuse themselves when a case in which they believe they will be unable to provide an impartial view comes before the court, it is clear that this is not adequate in preventing perceived, and possibly actual, bias from impacting judicial decisions. In many states, the decision whether a judge should recusal him or herself is up to the discretion of the judge whose impartiality is in question.

The problems associated with a judge deciding their own level of bias are revealed by a decision made by the Supreme Court of Appeals of West Virgina. The Supreme Court of the United States eventually overturned the state court's decision in *Caperton v. A.T. Massey Coal* because of a "risk of bias" (2009). In the case, a justice of the Supreme Court of Appeals of West Virginia, Justice Brent Benjamin, had received a substantial amount of support from the C.E.O of the coal company with whom he was also a friend. Despite a request that he recuse himself, he heard the case and decided in favor of the coal company. This extreme case demonstrates the reasons behind many voters belief that judges cannot truly be impartial when they receive money from those involved in cases before them. Whether or not Justice Benjamin's decision was actually affected by the campaign contributions is not the most important decision when you consider the effects his hearing of the case had on the public's trust of the judiciary. Most reasonable people would consider his judgment to be biased by the extreme amount of support he received from Massey Coal in his quest for a seat on the Supreme Court of Appeals of West Virginia.

While the Supreme Court's decision shows that actual bias is not necessary for recusal, it does not set forth clear guidelines for when recusal is required. The American Bar Association has attempted to address campaign contributions by urging state courts to adopt recusal rules based on a time frame and specific monetary amount provided to the judge by a party involved in the case (Gray 2015). Despite the efforts of the ABA, only five states have specific numbers as laid out by the model while an additional ten have incorporated parts of the model without the

inclusion of exact numbers (Gray 2015). Clearly there is some contention over whether judges need to disqualify themselves when there is a perception that campaign contributions may bias their opinions. In fact, a couple states have rejected measures to require judicial disqualification when a judge has received substantial campaign contributions from a party to a case. The Wisconsin Supreme Court went as far as to say that no judge will be required to recuse himself or herself because of lawful campaign assistance provided by a party to the case (Gray 2015). Some courts believe their campaign activities should not have any impact on their ability to hear cases. However, as demonstrated by research on the perception of campaign contributions and a U.S. Supreme Court decision, even a perception of bias should be enough to disqualify a judge from hearing a case.

A Different Approach

Although the American Bar Association is correct in urging for recusal rules to deal with campaign contributions in judicial elections, their model is not the best system to address the problem. Certainly a judge should be allowed to recuse him/herself on his or her own; however, upon a motion to recuse a judge, the judge whose bias is in question should not be the one to deny the motion. Many believe the judge in question is the only person capable of determining whether there is a possibility of bias because they are the only ones with knowledge of their own thoughts. However, this argument does not carry much weight for two reasons. Firstly, despite whether there is actual bias present, a perception of bias is detrimental to the court. If the public perceives the court to be biased, then the legitimacy and therefore the power of the court is threatened. The U.S. Supreme

Court agreed with this view when the reversed the decision of the Supreme Court of Appeals of West Virginia in *Caperton v. A.T. Massey Coal* (2009). Furthermore, it is human nature for an individual to believe that they are not biased. Judges are human and naturally would be subject to overconfidence in their ability to separate themselves from bias. This is not to say judges are acting with harmful intentions; but rather, even a judge operating with the best intentions can still be subject to bias whether or not they are consciously aware of this fact.

A major focus of the ABA's call for recusal is on specific numbers and time frames. While there are certainly numbers that would justify immediate recusal, it is also highly possible that the same numbers may call for different actions for certain cases. In this respect, the ABA's recusal system is not flexible enough to deal with the growing complexity of campaigning and the cases heard by judges. There is no doubt that any case in which a judge's campaign is almost entirely funded by a party to the case the judge should be disqualified from hearing the case. Justice Benjamin's campaign is a great illustration of this principle. Regardless of any other facts, the C.E.O. of Massey Coal provided more funds to the election of Brent Benjamin than his opponent received from all sources combined. It is difficult to imagine any instance in which these numbers would not have called for a disqualification of the judge.

For this reason, there should be an automatic call for disqualification when a party to the case has donated a sum of money equal to or greater than 40% of the expenditure of his opponents campaign in a competitive election. Competitive means there must be an opponent and the opponent must mount an effort to obtain

the seat through fundraising which reaches a minimum of 25% of the average sum of money spent in that state's judicial elections. It is important to differentiate instances of an opponent being present and an opponent being competitive. It is possible that an opponent may get his or her name on the ballot and then essentially sit the race out and not engage in campaigning or acquire contributions. In these instances, the race is largely uncontested and thus a campaign contribution of $1000 may be more than half of the total funds raised by the uninvolved opponent. A donation of $1000 does not seem as much of an egregious encroachment on impartiality as $1,000,000 would seem to be in a truly competitive election.

Occasions in which a party to a case donates over 40% of the total contributions to the judge's opponent do not capture all cases of excessive donations that are clear reasons for disqualification. In many states, judicial races are extremely expensive and both candidates raise massive amounts of money. For instance, in state supreme court races from 1990-2004 and using 1990 dollars, the average cost of a campaign in Alabama, Illinois, and Pennsylvania was over $1,000,000 (Bonneau and Hall 2009). Clearly an average person would not require a contribution to be above $400,000 in order to be seen as exceeding a cutoff for mandatory disqualification. Therefore, there is a need to create a cutoff for a dollar amount at which the contributions become too great to be seen in any way other than possibly affecting a judge's impartiality. This number is more difficult to generate, as there will always be an argument that the number is either too low or too high. Because this number is to be used as a basis of automatic disqualification, it seems better to err on the side of being too high. After all, if a judge is not

automatically disqualified, there is still ample opportunity for a review to see whether he or she should in actuality be required to sit the case out. In an attempt to make the number less arbitrary and adjust for state differences, median household income for states would serve as an effective cutoff at which a judge would automatically be disqualified. If a party to a case has contributed a sum of money equal to or greater than the median household income of the state, the judge who was the beneficiary of the contributions should be automatically disqualified from hearing the case. It seems reasonable to assume that average citizens would find that a donation of more money than half the households in the state make in a year would seem to affect a judge's ability to decide a case fairly.

These cutoff numbers serve only to deal with cases that are black and white. If an individual passes one of these numbers, they must recuse themselves. Furthermore, barring some other conflict of interest, if a judicial candidate accepts no contributions from any party to the case they will not be disqualified from the case. However, the question remains: what is to be done with cases that fall in the grey space? In cases for which the automatic disqualification measures have not been met but there is still a question of the judge's impartiality, an independent panel should review the facts and determine whether there are grounds to disqualify the judge or judges in question. While the panel will ultimately be making the decisions, they will be basing those decisions on criteria to determine the possible bias rather than simply deciding on a whim.

A panel review of a motion of disqualification would be held when one or both attorneys submit a motion for recusal, the judge does not recuse him/herself

upon receipt of the motion, and there is not sufficient evidence to call for an immediate disqualification of the judge. In order to expedite the process, the attorney submitting the motion must submit all evidence of all contributions made by all parties to the case to all judges hearing the case. The judges and opposing counsel may provide additional evidence of contributions if they view the evidence being submitted as one-sided. Additionally, a report of the ramifications of the case should be submitted. For instance, the possible outcome may result in one side having to pay large sums of money or cause some other financial cost to a party in the case. All possible outcomes should be provided to the panel reviewing the motion to disqualify the judge. The facts of the actual case are not necessary for the disqualification panel. They are only reviewing the ability of a judge to hear a case impartially and decide fairly. However, any other information a party deems important to this purpose may be submitted as long as they state why it is important and point to specific evidence rather than submitting a filing cabinet of evidence.

It is important to select a panel that is reasonable and completely unbiased. If they are to determine the appearance of bias in the court, then they must be above reproach when it comes to having their own biases entering into the equation. A decision of great importance such as this should not be left to one individual and thus the panel will consist of three individuals. This mirrors the federal appellate system in which the judges sit in panels of three to hear cases. In any instance of the slightest possible perception of bias by a member of the panel, he or she will step down and a substitute will participate in the panel. The only instance in which possible perceived bias would be allowed in the panel is when all available

substitutes would exhibit the same level of bias. Out of necessity, the panel would then continue despite the possible perception of bias. While selecting individuals for this panel is of great importance, it would also be quite difficult to select the panel without incurring some type of bias upon the individual selected. For this reason, the members of the panel will be chosen by three separate sources. The governor, the legislature, and the highest court will all be responsible for selecting one member and one alternate member to the panel. Those selected should be reasonable in their perception of bias and have some type of legal understanding to help deal with the complexities of what they will be seeing as evidence as a panel member. Being chosen by different sources should help to create more balance and bring different viewpoints to the panel in an effort to be as fair as possible.

Upon receipt of the evidence, the disqualification panel should review evidence in search of certain criteria. Firstly they must consider the sum of money that was contributed to the judge in question. They will look at the individual contributions from parties to the case as well as aggregate sums from both the plaintiff's side and the defendant's side. The larger the sum of contributions to the judge is, the greater the suspicion directed towards the judge's impartiality should be. If the sum of money is quite low, the panel may need to skip to the additional evidence as to why a motion to disqualify the judge was submitted. If there is not sufficient additional evidence, the panel will likely find that the small sums of money contributed do not warrant a disqualification. However, if the sums are quite large, this is not necessarily grounds for immediate disqualification.

The next stage will be to look at the contributions to other judges hearing the case. If the other side has contributed roughly equivalent amounts of money to another judge, there may be a reason to dismiss the motion. If the contributions were thought to have biased a judge, the judge who received equivalent sums of money would be expected to have an equal amount of bias in the opposite direction. Two judges biased in opposite directions would in effect balance each other out and maintain the fairness of the court. However, there may also be other factors that impact the judge's perceived ability to decide impartially. Therefore, it is important for the panel to review all evidence and make a decision base on a totality of the circumstances.

Another consideration the panel should make is in regards to the possible outcomes of the case. What are the possible costs, financial or other, which may be incurred by one party or the other as a result of this case? In *Caperton v. A.T. Massey Coal*, the possible costs would have been quite large because the controversial decision by the Supreme Court of Appeals of West Virginia essentially would have saved Massey Coal $50 million had the U.S. Supreme Court not overturned the decision (2009). Any case in which there is a risk of significant costs to one party should call for more scrutiny. There is more of a risk that parties may attempt to influence decisions that have significant possible costs to the parties if the decision does not go in their favor. Therefore, the disqualification panel should pay particular attention to possible biases when the possible outcomes involve extreme costs to one of the parties.

Finally, the panel may review the other materials submitted to them. This is the chance for the judge in question to submit materials in which he or she defends why disqualification is not necessary for an appearance of impartiality in the court. Also, this would be a place where the timing of contributions may be considered. If contributions are made in line with a time frame for the anticipation of a case appearing before the court, the contributions should be treated with more suspicion. Whether it be funds provided for the past election cycle or an upcoming election, if the timing lines up with the anticipation of a case being heard in the court, it is likely that the panel should find disqualification to be necessary. While this last section is somewhat of a catchall for other information, it is important that the panel have all relevant information to determine whether disqualification of a judge is necessary.

Opposition may rise to this overhaul of the system to disqualify judges from hearing cases. One possible line of critique is that in cases in which two judges have demonstrated that there may be a perception of bias in opposing directions, there is not a call to disqualify both judges. Though bias is never a good thing, balance is a more accurate measure of fairness. Opposite biases would serve to balance each other and maintain a fair court. Furthermore, requiring both judges to be disqualified could result in a major issue. There are multiple judges on the Supreme Court in order to provide multiple viewpoints in an effort to make just decisions. The more members of the court that must be disqualified, the narrower the viewpoints on the bench will become. A large range of opinions facilitates the best justice and as such, disqualification of a judge should never be taken lightly.

Certainly disqualification of multiple judges should be avoided if it is at all possible to do so without harming the fairness of the court. Therefore, if the possible biases were balanced against each other, having two judges sit a case out would have an overall negative effect on justice.

Putting weight into the potential costs associate with the outcome of cases may receive some criticism as well. Opponents may argue that justice should not depend upon the amount of money to be awarded upon the finality of the case. However, if a judge's decision truly could be swayed by campaign contributions, it seems reasonable that such contribution could only work for a certain amount of decisions. The amount of sway a contribution has would likely diminish the more the contributor calls on that judge to assist them in some way. With this knowledge, it is likely that a contributor would attempt to save up his or her earned favors for those cases in which the most is at stake. Thus, cases in which the potential costs are greater should be cause greater concern and be looked at very closely in order to ensure the court is being as fair and impartial as possible.

While this system of judicial disqualification is designed to be very effective at combatting the influences of campaign contributions, it says nothing of other sources of bias. This is not to suggest that they could not be incorporated into the criteria that the panel reviews. Instead, the focus of this entire work has been on the effects of campaign contributions in judicial elections. To discuss the other potential biases a judge may possess would go beyond the scope of this work. However, it would seem that minor adaptations could allow this system to fully evaluate all forms of potential judicial biases. The duty of the judiciary is to deliver justice in a

fair and impartial manner. The disqualification panel would assist the judiciary in ensuring that all judges hearing the cases are as free of potential bias as possible. The panel should also serve to revive the public's confidence in the court. Judges may accept campaign contributions from lawyers that try cases before the court; however, the disqualification panel will ensure that if potential biases arise from such contributions, then that lawyer will gain no advantage because the judge in question will be disqualified from hearing the case.

Conclusion

Judicial elections are, for at least the near future, here to stay and for good reason. They provide the public with a chance to hold the judiciary accountable. Elections have shown to be a very effective method of selecting highly qualified and effective judges. The problems in the judiciary are not due to elections. Nor is money necessarily a source of evil in elections. In fact, money serves an important purpose in elections by allowing the electorate to participate and make informed decisions about candidates in competitive elections. However, there is the problem of perceived unfairness when judges decide cases in which a party has contributed to getting the judge elected.

I have argued that while several options have been proposed to eliminate this bias, the only workable solution is a comprehensive system to determine judicial disqualification. This system should alleviate public concerns because the judges will not be permitted to hear cases in which there may be elements of possible bias. A disqualification system is the best solution because it would allow the best aspects of elections and money in elections to persist while eliminating the

perception that judges are trading decisions for campaign contributions. A major issue with current recusal rules is the fact that the individual deciding the motion is usually the judge whose impartiality is being questioned. The plan I have discussed would eliminate this issue while also taking into account many factors that may make a contribution more or less likely to have influence over a judge's decision.

Although I have created a system to disqualify judges as a result of campaign contributions, I have not addressed the many other possible biases that can arise in a case. The scope of this work has been to discuss judicial elections and the campaign contributions that create a perception of bias. Though there are certainly other possible biases such as personal relationships or investments, those factors are present in all courts, not just courts whose members were chosen in elections. The disqualification program discussed in this work is designed to eliminate the negatives associated with elections while allowing the positive aspects to thrive. Further work may allow the disqualification system outlined in the preceding section to be adapted to incorporate these many other sources of bias.

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