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Thoughts About Enriching Judicial Independence by Improving the Retention Vote Phase of Appointive Selection Systems[1]

Hon. John F. Irwin and Daniel L. Real

"At the core of public trust [in the judiciary] is the belief that judges are impartial."[2]

In August 1979, *Time* magazine featured an article titled, "Judging the Judges."[3] In that article, nearly 30 years ago, was a discussion about a number of problems facing the judiciary as well as a discussion about potential reforms to address the problems. One of the problems discussed at some length was public perception that the judiciary lacked sufficient impartiality. While recognizing the emergence of judicial discipline systems to address partiality problems of sitting judges, the article also noted "a convincing argument for getting better judges to begin with."[4] The article also recognized that, at that time, "half the states [had] turned to so-called merit selection for at least some judges" utilizing some type of a selection committee or nominating commission, a "selector" who chooses from candidates forwarded by the committee, and a "retention ballot" process of retention elections.[5]

As the *Time* article noted, one problem with voters going to the polls and having a say in choosing the people who resolve their disputes and enforce the law is that "most voters do not know much about the candidates for whom they are voting."[6] As discussed below in this article, the same could be said about voters going to the polls and having a say in deciding whether sitting judges should remain on the bench. Further complicating the process and the difficulties of ensuring both independence and competence is that "[d]efinitions of a good judge read like recommendations for sainthood: compassionate yet firm, at once patient and decisive, all wise and upstanding."[7] The difficulty in finding the best possible process for locating and retaining judges who can live up to such lofty standards makes examining judicial selection and retention an especially meaningful undertaking.

In 2005, almost three decades after these very issues were being raised and discussed in *Time*, we examined them as part of a symposium on Judicial Independence at Fordham Law School in Manhattan, New York.[8] The present article is derived from an article, written for the symposium (and published in *Fordham Urban Law Journal*), that contains specific information about the merit selection system that exists in Nebraska.[9] The present article notes a number of examples of what appear to be steps in the right direction toward improving judicial selection processes as a whole and judicial retention processes as a part.

I. POTENTIAL PROBLEMS WITH RETENTION VOTES IN APPOINTIVE SYSTEMS

Many states currently use a basic nonpartisan elective retention system.[10] Sitting judges stand for periodic retention votes,

Footnotes

1. This article derives from a previous article originally published in the *Fordham Urban Law Journal* as Judge John F. Irwin and Daniel L. Real, *Enriching Judicial Independence: Seeking to Improve the Judicial Retention Vote Phase of an Appointive Selection System*, 34 FORDHAM URB. L. J. 453 (2007).
2. *Judging the Judges*, TIME, Aug. 20, 1979, http://www.time.com/time/magazine/article/0,9171,947362-1,00.html.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* In this respect, the article quoted Daniel Webster: "There is no character on earth more elevated and pure than that of a learned and upright judge. He exerts an influence like the dews of heaven falling without observation."
8. Symposium, *Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges,* 34 FORDHAM URBAN L.J. 1 (2007). *See also* http://www.abanet.org/judind/pdf/fordham_symposium.pdf. Videos of the various panels presented at that symposium can be viewed at: http://video.google.com/videoplay?docid=5656379188749882220; http://video.google.com/videoplay?docid=7203689873046760924; http://video.google.com/videoplay?docid=-5802659044171916 074; and http://video.google.com/videoplay?docid=429690852 4674977612.
9. John F. Irwin & Daniel L. Real, *Enriching Judicial Independence: Seeking to Improve the Judicial Retention Vote Phase of an Appointive Selection System*, 34 FORDHAM URB. L.J. 453 (2007).
10. See the American Judicature Society's webpage detailing judicial selection and retention procedures in the various states at http://www.ajs.org/selection/sel_stateselect.asp.

and their names appear on general election ballots, although the retention election is not a partisan political event. The current system in states employing elective retention systems, however, does suffer from some basic deficiencies that prevent the system from fully ensuring the purposes of judicial quality and public participation. The deficiencies overlap greatly and can generally be divided into problems associated with non-participation by the public and problems associated with ineffective participation by the public.

First, elective retention systems suffer from the problem of non-participation by the public. "Voter roll-off," or the phenomenon of a voter casting votes for higher profile issues on the ballot, such as executive and legislative offices, but not casting votes on matters of judicial retention, is widely recognized.[11] Studies reveal that judicial retention elections are "generally characterized by low voter turnout" and that "judicial retention elections attract the smallest turnout of all the types of judicial elections."[12] Voter roll-off appears to be increasing; it averaged approximately 36% between 1976 and 1984, 32.4% between 1986 and 1996, and 29.5% in 1998.[13] Both the absolute numbers and the pattern of fewer citizens voting are signs of the decreasing effectiveness of the elective retention system.

Inasmuch as an effective judicial retention system should strive to achieve a good balance of promoting judicial quality and impartiality on the one hand and promoting public participation and accountability on the other hand, non-participation by the voting public can seriously undermine the desired balance. For example, if a significant portion of the voting public chooses not to participate in a judicial retention election, then sitting judges arguably have less imperative to act impartially and to strive for high standards of competence and temperance because a significant portion of the voting public will be choosing not to exercise any public accountability of the judges' performance. If a judicial district comprises 1,000 voters, but only 700 cast votes on a particular judge's retention, then the judge might actually need approval from only 351 voters, or slightly more than one-third of the voting public; effectively needing approval from only one-third, rather than one-half, of the voting public certainly undermines the balance of judicial impartiality/quality and public participation/accountability.

Second, elective retention systems also suffer from the problem of ineffective participation by the public. Even among the voting public that participates in judicial retention elections, some percentage of voters traditionally will vote "yes" or "no" on judges, either for no discernible reason, or for the "wrong" reason. For example, some voters will simply vote "no" on retention for any judge, either because of a generalized distrust of public officials, as a reaction to crime rates, or because of a negative experience with the judicial system, rather than discerning specific judges who should not be retained. Similarly, some voters will simply vote "yes" on retention for any judge without considering whether each individual judge should or should not be retained. Discussion at the Fordham Symposium suggested that as many as 25 to 30% of participating voters always vote "no" on retention, regardless of judicial performance evaluation recommendations.[14]

Even among the voting public that participates in judicial retention elections, some percentage of voters traditionally will vote "yes" or "no" on judges, either for no discernible reason, or for the "wrong" reason.

Ineffective voter participation also disrupts the desired balance of judicial impartiality/quality and public participation/accountability, and arguably does so in an even more damaging manner than non-participation. Take, for example, the hypothetical scenario above where only 700 of the 1,000 voters in a particular district choose to participate in the judicial retention election. Not only is the determination of whether a particular judge should remain on the bench being left to a smaller voting public, but the determination is potentially severely skewed by the portion of those 700 voters who participate with either no discernible reason for casting a particular vote or with improper motivating forces driving a particular vote.

II. POSSIBLE UNDERLYING REASONS FOR THE PROBLEMS

Both non-participation and ineffective participation result in similar disruptions to the desired balance of judicial impartiality and competence on one hand and public participation and accountability on the other hand. However, simply recognizing the goals of an effective judicial retention system and recognizing that the current system has problems that undermine those goals is not enough. It is also necessary to consider the possible underlying reasons for non-participation and ineffective participation by the voting public, so that suggestions can be made to address the underlying causes and, it is hoped, address the ultimate problems and make the elective retention system more effective.

Several of the major underlying reasons for the voting public's non-participation or ineffective participation in judicial retention elections fall under the broad umbrella of "education." These "education" related issues include the public's

11. *See* William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Election Have Told Us,* 70 JUDICATURE 340, 342 (1987) [hereinafter Hall & Aspin, *Twenty Years*,]; William K. Hall & Larry T. Aspin, *The Rolloff Effect in Judicial Retention Elections*, 24 SOC. SCI. J. 415, 415 (1987).
12. Hall & Aspin, *Twenty Years*, *supra* note 11, at 342.
13. Larry Aspin, *Trends in Judicial Retention Elections, 1964-1998*, 83 JUDICATURE 79, 79 (1999).
14. *See also* Thomas F. Whelan, *Symposium on the Best Appointive System for the Selection of State Court Judges*, 22 SUFFOLK LAWYER 24 (2006).

[M]edia . . . generally provide very little coverage about particular judges standing for retention, and then usually provide only negative coverage about a particular judge who has been targeted for non-retention.

general lack of understanding about the judicial branch in general and about retention elections in particular, the lack of available resources to inform the public about judicial independence and performance, and the efficacy of the resources that are available. Each of these issues contributes both to voter non-participation and ineffective participation.

Although American public education includes significant instruction in government, including the three branches of government, the actual workings of the judicial system are not a prominent part of most curricula.[15] With respect to national government, students are taught: (a) details about the electoral college, including presidential succession and other details about the executive branch; and (b) details about how legislation is crafted, debated, and passed; (c) and details about the composition and election of senators and representatives. Students are taught comparatively very little about the Supreme Court justice nomination process, Congress's advise-and-consent powers, or the process through which the Supreme Court chooses, hears, or decides cases. With respect to state government, students are similarly taught details about the selection and workings of the executive and legislative branches of government, but very little about the judicial branch, other than its existence as a third branch. Beyond the general lack of education about the judicial branch, the voting public is generally entirely uneducated about what a judicial retention election is or what its purposes and goals should be.

It is reasonable to assume the lack of education about the judiciary and retention elections results in ignorance about the public's role in ensuring judicial independence, judicial impartiality, and judicial quality, and a related reluctance for voters to seek out the kind of information that would allow meaningful participation in a retention election. Even those voters who are informed and do desire such information, however, will encounter another obstacle: The lack of available resources to inform the voter.[16] Currently there are very few resources available to inform voters about judicial independence, judicial retention, or specific judicial performance. For example, in Nebraska the State Bar Association's website contains links to pertinent resources; however, the information available about judicial performance is nonetheless limited.[17] Moreover, there is no evidence that a significant portion of Nebraska's voting public is even aware of the website or the resources contained therein. Other sources outside the bar association and its website, such as print, television, and radio media, generally provide very little information about most judicial retention elections. While traditional print, television, and radio media devote significant time to coverage of executive and legislative elections, they generally provide very little coverage about particular judges standing for retention, and then usually provide only negative coverage about a particular judge who has been targeted for non-retention. As such, rather than providing their audiences with meaningful information about the judicial branch of government, retention elections, and the information that voters need to make informed decisions about particular judges, these media tend to largely overlook judicial retention elections.

Finally, even those voters who are able to overcome the general lack of education about the judiciary, take a personal interest in learning about the judiciary and understanding retention elections, and make an effort to seek out available information from sources such as traditional media or the bar association will face the additional difficulty that the few available resources are generally inadequate to truly foster a meaningful decision. To return to the Nebraska example, the state bar association circulates judicial performance surveys for completion by attorneys. The surveys, however, ask only a handful of questions about each particular judge (ranging from less than ten questions for appellate court judges and less than fifteen questions for trial court judges), are typically extremely general in nature (such as asking for a rating from "excellent" to "very poor" on "Legal Analysis," "Judicial Temperament and Demeanor," or "Trial Management"), and provide very little opportunity for any meaningful explanation of an attorney's answers.[18]

In addition to the education-oriented issues that contribute to retention elections being less effective than possible, retention elections also suffer from being particularly susceptible to influence by political agendas. Partly because of voter drop-off and the underlying education-oriented problems already discussed, retention elections can be vulnerable to special interest

15. This statement, as well as the general observations that follow in this paragraph, are largely matters of the authors' personal observation bolstered by personal discussions with educators and citizens in the authors' local community. The general observations, however, are illustrated and confirmed by observing sources such as Social Studies Help, http://www.socialstudieshelp.com, a site that provides assistance for, inter alia, high-school advance-placement government students. A review of that site reveals that, although there is information provided on a variety of theoretical and practical topics, there is no information about the process of judicial selection or retention. *See* the Social Studies Help Center, http://www.socialstudieshelp.com.
16. *See, e.g.*, David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 LOY. L.A. L. REV. 1369, 1371-72 (2001) ("Starting as long as forty-five years ago, exit polls and other polls have shown a startling lack of voter awareness of even the names of [judicial] candidates."); Hall & Aspin, *Twenty Years*, *supra* note 11, at 342 ("Some voters do not vote in judicial retention elections because they lack enough information to cast an informed vote.").
17. *See* Nebraska State Bar Association's website, http://www.nebar.com.
18. *See* Nebraska State Bar Association, Public Information: Judicial Evaluation, http://www.nebar.com/publicinfo/judicial_eval.htm (containing links to past judicial evaluation questionnaires and results).

groups furthering political agendas that may or may not even relate to anything a judge has actually done.

One example of this phenomenon was the non-retention of Nebraska Supreme Court Justice David Lanphier in 1996. In the political campaign by a special group to foil the retention of Justice Lanphier, he was not accused of judicial malfeasance or incompetence; rather, the focus was on selected decisions rendered by the Nebraska Supreme Court that frustrated the public.[19] While on the Nebraska Supreme Court, Justice Lanphier participated in a number of decisions involving term limits and Nebraska's second-degree murder statute.[20] In response to a unanimous decision of the Nebraska Supreme Court holding unconstitutional a term-limits amendment passed through Nebraska's initiative process, advocates of term limits seized on public sentiment concerning a number of Nebraska Supreme Court decisions overturning second-degree murder convictions to mount a public campaign to have Justice Lanphier voted out of office.[21] Only two months before to the 1996 election in which Justice Lanphier stood for retention, founders of an organization called "Citizens for Responsible Judges" cited Lanphier's "disregard for the safety of [Nebraska] communities" and Lanphier's "willingness to set convicted murderers free on minor technicalities" while waging a very public and political campaign against him.[22] Justice Lanphier was ultimately not retained in office, with only approximately 38 percent of the voting public voting in favor of retention.[23]

III. THOUGHTS ABOUT IMPROVING THE RETENTION VOTE SYSTEM

Identifying the apparent problems with existing elective retention systems and understanding the possible underlying reasons for those problems is the first step toward proposing meaningful reform. The next step is to address those concerns in a way that helps achieve the best possible system of retention, ensure optimum independence and optimum quality members of the judiciary, and recognize the inherent resistance to change that could complicate reform efforts. Additionally, meaningful reform should seek to provide both short-term improvements and long-term systemic change.

As a preliminary matter, it bears noting that elective retention can be effective. A 1991 study of over 900 judges from 10 states who stood for retention in elections concluded that elective retention systems actually influence the behavior of judges, both with respect to the rendering of competent decisions and temperament on the bench.[24] Surveyed judges indicated that, in their opinions, the best ways to win retention elections is to perform competently, to be fair and impartial, to manage cases well, and to be knowledgeable.[25] The survey indicated that the vast majority of judges self-report that their behavior and performance on the bench are influenced by the accountability of having to stand for retention elections.[26]

A 1991 study of over 900 judges from 10 states who stood for retention in elections concluded that elective retention systems actually influence the behavior of judges . . . .

There are reasons to believe the public will actually react differently to different judges rather than treat judges as interchangeable. Differences in the vote results among judges appearing on the same ballot is evidence that voters do discern among different judges (at least somewhat and albeit perhaps for unclear or improper reasons). For example, in the same 1996 retention election in which Justice Lanphier was not retained (as discussed above) by a vote of approximately 60% against retention and 40% in favor of retention, other judges appearing immediately after Justice Lanphier on the ballot were retained by votes of 70% or more in favor of retention.[27]

One approach to reforming judicial retention elections in states like Nebraska is to implement steps toward systemic change. These steps should include reforming education about the judicial branch at the "academic" level, increasing the amount of public information available about the judicial branch, and improving the quality of information available about the judicial branch. These steps can provide some short-term improvement in the meaningfulness and effectiveness of judicial retention elections, and can also provide long-term systemic change.

First, changes need to be made to improve "education" about the judicial branch. Although "education" is often a popular buzzword for reform efforts, to affect meaningful improvement in judicial retention elections, education must encompass far more than just voter guides and other adult education tools. Rather, changes need to be made at the academic level to promote more significant education about the judicial branch. School curricula need to include education about the workings of the judicial branch, the mechanisms of judicial selection and retention, and the importance of an independent and highly competent judiciary. It is vital that students begin learning about the judicial branch as a coequal branch of government, and about the role of the public in ensuring an independent judiciary. Employing school curric-

19. *See* Traciel V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 70-71 (1999).
20. *Id.* at 70.
21. *Id.* at 70-71.
22. *Id.* at 70.
23. *Id.* at 72.
24. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312-13 (1994).
25. *Id.*
26. *Id.*
27. Judge Irwin's election results in the 1996 retention election serves as an example. Judge Irwin represents the same judicial district on the Nebraska Court of Appeals as Justice Lanphier did on the Nebraska Supreme Court. Judge Irwin's name appeared on the ballot immediately below Justice Lanphier's name, and Judge Irwin received a "yes" vote of more than 70%, almost exactly the opposite of Justice Lanphier's vote.

[I]n addition to educational reform aimed at creating more interested and informed voters in the future, reform should also strive to make available more public information for today's voters.

ula in this manner will change attitudes about the judiciary's role in government, and will begin to foster an attitude and an interest in the public at a younger age that will translate into future voters who are more meaningfully involved in utilizing and optimizing judicial retention elections. Although the fruits of academic curricula reform may not be apparent for some years to come, longer-range planning should be a part of any meaningful reform effort.

There is some empirical precedent for the suggestion that educational efforts related to the law can generate significant youth interest in a relatively short period of time. For example, mock trial programs, which teach young people about the process of how a typical trial might proceed, are now hugely popular and common in schools of all sizes across the country.[28] But the mock trial program has only recently become widespread. In just the past few years, this program, which started as a somewhat isolated and grassroots program, has grown in popularity and serves as an example of how quickly educational reform about the judiciary might take hold.[29]

Second, in addition to educational reform aimed at creating more interested and informed voters in the future, reform should also strive to make available more public information for today's voters. As noted above, the public information currently available on the subject of judicial retention is primarily limited to bar surveys, the results of which are not widely distributed or sought, and are given only limited coverage in print media.[30] More is needed than bar-survey results and/or "Judicial Retention Information Kits," available to voters on a bar association website,[31] as it is unlikely a significant portion of the voting public is aware of the availability of or capable of accessing these resources. Further, it is apparent that these limited resources are simply not enough to provide sufficient information to both foster interest and involvement and to make involvement meaningful.

As such, reform efforts aimed at providing more information to current voters should be broad reaching and varied. For example, there should be established a series of public forums to be held in venues all across the state on the subjects of judicial impartiality, judicial selection, and judicial retention. Such forums could help to make the current voting public more aware of the system of judicial selection, the system of retention elections, and the purposes and goals of such a retention system, as well as the importance of the public's meaningful participation. In addition to public forums, traditional media should be encouraged to provide more consistent coverage about these topics, rather than providing coverage only of the most controversial judicial decisions or the most public campaigns seeking the ouster of sitting judges.

Further, public service groups that currently participate in voter education, groups such as the League of Women Voters,[32] should also be encouraged to make the judiciary and judicial retention elections a part of their voter education efforts. Public interest groups, which hold meetings or invite guest speakers on topics of interest to the group, could provide a valuable outlet for more judicial branch and judicial retention education.

Third, in addition to starting the educational process concerning the judiciary and judicial retention earlier and increasing the availability of resources to educate current voters, it is vital that the reform process seek to improve the quality of information available to the voting public. One way to improve the quality of information available to the public is to reform the existing bar surveys about judicial performance into more thorough judicial performance evaluations, such as those already instituted in Alaska, Arizona, Colorado, and Utah.[33] Such systems are designed to "systematically collect and analyze information about judges' on-the-bench performance, and make recommendations about judges to voters prior to a retention election."[34] Contrary to the relatively simple and general bar surveys currently used in jurisdictions like Nebraska, the judicial performance evaluations in these states include commissions composed of attorneys, non-attorneys, and judges, who conduct surveys of court users (including attorneys, litigants, jurors, law-enforcement personnel, other judges, etc.) on such topics as integrity, legal competence, communication skills, temperance, punctuality, administrative skills, case-progression, rates of reversal on appeal, and continuing education.[35] The commissions then compile the survey results, analyze them, make recommendations about retention, and make the recommendations and review information available to the voting public.[36]

A meaningful judicial performance evaluation system can be effective in improving the quality of information available to the voting public, and also promotes public confidence in the information because the public is so heavily involved in the

28. For example. a Google search for "high school mock trial programs" yielded nearly two million results, which included links to the programs established in high schools all across the country. Google.com, High School Mock Trial Programs – Google Search, http://www.google.com/search?hl=en&lr=&q=high+school+mock+trial+programs&btng=search.
29. *See* National High School Mock Trial Championship, http://www.nationalmocktrial.org/history.cfm (documenting the growth in participation in the national tournament from five states in 1984 to forty states and three foreign countries in 2006).
30. *See supra* discussion Part III.
31. *See, e.g., supra* note 17 and accompanying text.
32. *See* League of Women Voters, http://www.lwv.org.
33. *See* Kevin M. Esterling & Kathleen M. Sampson, Judicial Retention Evaluation Programs in Four States: A Report With Recommendations xiii-xv (1998).
34. *Id.* at 4
35. *Id.*
36. *Id.*

compilation of the information, from serving as members on evaluation commissions, to being surveyed about interactions with judges, to receiving more meaningful and detailed information.[37] The American Judicature Society's review and evaluation of the judicial performance evaluation systems in Alaska, Arizona, Colorado, and Utah includes thorough and detailed considerations of many elements essential to effectively implementing such a system, including considerations about the rules and procedures to be followed by the evaluation commissions, the need for adequate funding, the need for detailed and measurable standards, the importance of confidentiality throughout the evaluation process, the need for effective means of disseminating results and recommendations, and the need for meaningful training programs.[38]

These three steps for reforming the current system of judicial retention elections, (1) educational reform at the academic level to develop more interested and informed voters in the future, (2) increasing public information about the judiciary and judicial retention elections available to the current voting public, and (3) improving the quality of information available, can all work together to bring about systemic change, both in the short term and in the long term, to address the problems with the current system of judicial retention elections. In the short term, steps can be taken to make current voters more aware of the current system of judicial selection and retention, through public forums, meaningful coverage in traditional media, and the efforts of existing voter education groups. By creating a more educated and interested voting public, both the problems of non-participation and ineffective participation can be alleviated. To be successful, however, it is also crucial to ensure that the information available to the increasingly interested and informed voting public is quality information, addressing as many aspects of judicial performance as possible in as much detail as possible. Further, in the long term, steps can be taken to create a voting public of tomorrow that will better understand the judiciary and its role in government and that will, it is hoped, take at least as much interest in the importance of judicial retention elections as in elections for the other two branches of government. Perhaps this more educated and informed voting public will even be more ready and open to the discussion of whether another retention system might be more effective than elective retention.

IV. STEPS IN THE RIGHT DIRECTION

Although, as the *Time* magazine article mentioned at the beginning of this article indicates, the subjects of judicial independence, elections, and retention have been topics of discussion for the better part of at least 30 years, and although there have certainly been a handful of scholars who have devoted time and energy to the subject for some time now, there has recently been a real surge in the breadth and diversity of the discussion.[39] This surge is reflected in a number of projects, conferences, and programs addressing these subjects and including such participants as members of the judiciary, members of academia, celebrities, and ordinary members of the public. To highlight the diversity of this growing discussion, consider the following as a mere sampling of the arenas in which this discussion is occurring:

[S]teps can be taken to make current voters more aware of the current system of judicial selection and retention . . . .

In Tennessee, a Tennessee Supreme Court initiative called the SCALES (Supreme Court Advancing Legal Education for Students) Project was designed to educate students about the judicial branch.[40] This project provides students with intensive instruction about the workings of the judiciary by using real cases pending before the Tennessee Supreme Court. In-service sessions are conducted to provide students with advanced instruction about the court system and about the particular pending cases the students will observe, judges and lawyers visit classrooms to provide additional instruction, and students are then allowed to observe oral arguments in a pending case, followed by "debriefing" sessions with attorneys. The students later receive copies of the supreme court opinion issued in the case they observed. Through this project, students receive intensive instruction about the judiciary and its role, have the opportunity to see how a real case is argued before the appellate court, meet and discuss the case with the attorneys who argued the case, and have an opportunity to gain a better understanding of the judicial branch.

Another project with similar education goals is a national project called, "Representative Democracy in America: Voices of the People," a project funded by the U.S. Department of Education.[41] The Representative Democracy project is "designed to reinvigorate and educate Americans on the critical relationship between government and the people it serves."[42] The project seeks to accomplish its goals by introducing citizens, particularly young people, to the participants and processes of government. The project sponsored a

37. *Id.* at 5.
38. *Id.* at 117-21.
39. Among the scholars who have spent considerable time and energy in this area are Norman Greene of Schoeman, Updike & Kaufman, LLP, (http://www.schoeman.com/greene.htm); Anthony Champagne of the University of Texas at Dallas (http://www.utdallas.edu/dept/socsci/faculty/tchampagne.html); Charles Geyh of Indiana Law School (http://www.law.indiana.edu/directory/ cgeyh.asp); David Rottman of the National Center for State Courts (http://www.ncsconline.org/d_research/staff.html#rottman); Luke Bierman of Justice at Stake (http://www.justiceatstake.org/contentViewer.asp?breadcrumb=8,685,760); Rachel Caufield of Drake University and the American Judicature Society (http://www.drake.edu/artsci/PolSci/Faculty.html); and Roy Schotland of Georgetown Law School. (http://www.law.georgetown.edu/curriculum/tab_faculty.cfm?Status=Faculty&Detail=323).
40. *See* American Bar Ass'n, SCALES Primer: A How-to Guide, http://www.abanet.org/yld/elibrary/memphis04pdf/scales.pdf.
41. *See* Representative Democracy in America, http://www.representativedemocracy.org/.
42. *Id.*

Actor Richard Dreyfuss garnered headlines last year by speaking out about the importance of a serious effort toward more thorough civics-related education.

Congressional Conference on Civic Education in November 2006, which included state legislators, representatives of state executive branches, and other influential civic education leaders.[43] Through its website, the project provides various products and classroom materials for use by educators.[44] Although the project's focus does not yet appear to include efforts directed at education about the judicial branch in particular, it is another example of a project aimed directly at more thorough civics-related education.

The push for more thorough civics-related education is not reserved to governmentally related projects, however. Actor Richard Dreyfuss garnered headlines last year by speaking out about the importance of a serious effort toward more thorough civics-related education. Dreyfuss appeared on Bill Maher's HBO show and spoke about the subject.[45] Additionally, ABC news highlighted Dreyfuss's plans to "launch a personal campaign to teach Americans the rights and duties of citizens."[46]

Bar leaders across the county have also taken up the task of becoming involved in the public discourse about judicial independence and the role of the judiciary in an effort to help educate the public about those subjects. For example, in 2006 the American Bar Association's Law Day topic was, "The Importance of a Fair and Impartial Judiciary."[47] Ohio State Bar Association President Jane Taylor delivered a speech on the topic to the Toledo Rotary in which she pointed to the ABA project called "The Least Understood Branch" as an example of an effort "at civic education, a return to basics, in order that our citizenry—from students to civic and community organizations—understand what is meant by the separation of powers and the role of the judiciary in a free and democratic society."[48] As various public discourse criticizing courts and threatening judicial independence have emerged, other bar leaders have stepped forward to provide a more balanced explanation of judicial independence and the role of the judiciary.[49]

Elsewhere, conferences and symposia have been organized and conducted to bring together members of the judiciary, academia, legal community, and other interested members of the public in an effort for more public discourse and education. The 2006 symposium at Fordham Law School is one example that brought together current and former judges, legal educators, public policy scholars, and interested members of the public to critically appraise existing appointive selection and retention models and to propose reform in the hopes of improving existing systems.[50] Another example is a conference held at Georgetown Law School in Washington, D.C., in September 2006 called, "Fair and Independent Courts: A Conference on the State of the Judiciary."[51] The Georgetown conference featured such participants as retired Associate Justice of the United States Supreme Court Sandra Day O'Connor and leaders from the business and media communities, nonprofit sector, and government, and explored the role of the courts in our society, the importance of an impartial judiciary, and suggestions for improving the effectiveness of the judiciary and public discourse about the judiciary.

Finally, even local media outlets have started becoming involved in the discussion. As one example, in November 2006 an online newspaper in Nebraska included an article titled, "Too Many Critics Do Not Understand the Duty of Judges."[52] In the article, the author decried public feedback to stories involving the judiciary in which people "complain of judges who are 'out of touch' with the will of one interest group or another."[53] The article concluded with: "The independent judiciary is supposed to be independent. The former is obvious. Sadly, it is not obvious to everyone."[54] This article is yet another example of the upsurge in the amount of discourse on these topics.

The notion that we need an independent judiciary is practically timeless. The recognition that various methods of judicial selection and retention entail certain threats to judicial independence and are, for other reasons, not as effective as they

43. Representative Democracy in America, Congressional Conference on Civic Education, http://www.representativedemocracy.org/detail.asp?repdemPLinks_ID=12.
44. Representative Democracy in America, Products & Classroom Materials, http://www.representativedemocracy.org/detail.asp?repdemPLinks_ID=3.
45. *See, e.g.,* http://www.jwharrison.com/blog/2006/11/21/real-time-richard-dreyfuss%E2%80%99-civics-lesson-part-1/ and http://www.jwharrison.com/blog/2006/11/21/real-time-richard-dreyfuss%e2%80%99-civics-lesson-part-2/. The videos of Dreyfuss's appearance are available elsewhere on the internet, as well, and can be found by running a Google search.
46. ABC News, *Actor Wants to Bring Back Civics* (Dec. 3, 2006) (transcript available at http://abcnews.go.com/ThisWeek/ story?id=2696871&page=1). In the article, ABC quoted Dreyfuss as saying, "If you think that running a government like ours is, arguably, more complicated than running a pharmaceutical company or an auto company—and it is—then we should train people to the running of the country."
47. *See* Jane Taylor, President, Ohio State Bar Ass'n, Law Day Speech at the Toledo Rotary Luncheon, The Importance of a Fair and Impartial Judiciary (May 1, 2006)(transcript available at http://www.abanet.org/judind/toolkit/impartialcourts/lawday.pdf).
48. *Id.*
49. *See* http://www.abanet.org/judind/toolkit/impartialcourts/barleaders.pdf.
50. *See* Symposium, *supra* note 8.
51. *See* Press Release, Georgetown University Law School, Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 18, 2006) (available at http://www.law.georgetown.edu/news/releases/september.18.2006.html).
52. Ed Howard, *Too Many Critics Do Not Understand the Duties of Judges* (Nov. 28, 2006), http://nebraska.statepaper.com/vnews/display.v/ART/2006/11/28/456c59743fbff?in_archive=1
53. *Id.*
54. *Id.*

could be is also a long-standing principle. What is reassuring is that there is suddenly a plethora of examples of groups and individuals, from members of the judiciary to educators to public policy experts to celebrities to media to ordinary citizens, who are moving to make discussion of these topics and education about the judiciary a priority. These are all steps in the right direction.

V. CONCLUSION

Judicial reformers seeking to develop the best possible system of selecting state court judges must be patient, but must also open their minds to the world of possibility and explore ideas for seeking both short-term and long-term systemic change that, in a commonsense fashion, will address the problems that inhibit the effectiveness of the current retention election system. To that end, improving public awareness about the existing system, its goals, and its current weaknesses, and implementing steps to address those weaknesses, will help to keep us moving toward the best possible system. Changing attitudes and interest in something like judicial retention elections is certainly never an easy task, but it is only through seeking to do just that that reformers of an elective retention system can hope to near its potential for effectiveness.

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