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Politics in the Non-political Branch

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Politics in the Non-political Branch
By Justin Swanson

Judges are sitting ducks.

At least that's what Kristine Cecava thinks.

Cecava used to be a judge. For 22 years she held court, first in Lincoln County Court in North Platte, Neb., and then as a district court judge in Sidney, Neb. She handled countless civil and criminal cases dealing with a wide range of issues. But the only decision most people remember is the reason she isn't a judge anymore.

In 2006 she sentenced a 52-year-old man convicted of molesting a child to 10 years of probation.

A number of factors led to this decision. The sentence was well within the guidelines of the law, and was later affirmed by an appellate court. The prosecutor had not asked for jail time. Ten years of probation was an extensive sentence even for this crime. And Cecava, a veteran judge of 20 years at that time, made the decision in a thoughtful, contemplative way, without outside influence.

But the one factor that made news the next day – and for the next two years – stemmed from an off-hand comment Cecava made from the bench during the sentencing of the 5 foot 1 inch convict.

"So, I'm sitting here thinking this guy has earned his way to prison," Cecava said at the time. "But then I look at you and I look at your physical size. I look at your basic ability to cope with people and, quite frankly, I shake to think of what might happen to you in prison because I don't think you'll do well in prison."

"Too short for jail," the headlines would declare.

The next day Nebraska Attorney General Jon Bruning publicly condemned the decision

"It's an abomination. My office will appeal it. I don't care if he's three feet tall. It doesn't make any difference. You abuse a child, you're going to pay a price," declared Bruning according to a May 2006 KETV article.

Detractors from Sidney, Nebraska to Sydney, Australia piled on in the days, weeks, and months that followed. Cecava even faced the wrath of CNN's Nancy Grace, who is famous for her incredulity. On her May 26, 2006 show, Grace second-guessed Cecava's decision without knowing the facts of the case, had Bruning on the show to reiterate his thoughts on the decision, and maligned and misstated the way Nebraska's judicial selection system works.

"This woman got put on the bench, a political appointee, by the governor," said Grace on her show. "The people of Nebraska had nothing to do with her being on the bench."

Working in western Nebraska with a limited staff, Cecava did not have the resources or time to respond. Nor did she feel that she could under the rules that govern the conduct of judges.

"I had no resources, none, that could counter what happened there. And then you couple in the rules, the ethics for judges," she said. "I have worked hard to make sure that I lived by those rules. You look at those rules and you're not supposed to comment on any pending case. So you don't."

Two years later, Cecava was ousted from the bench in a retention election.

From her law office in Scottsbluff, where Cecava is working to restart a private practice after 22 years on the bench, the former judge reflects on her time on the bench with fondness. She is, however, concerned about the state of the judiciary. She sees a public that does not understand the workings of the court system. She sees a political climate that allows judicial and political neophytes to take down a sitting judge without just cause. She sees a steady erosion of the respect for the criminal justice system. She has seen the power of an angry mob, and worries about what that means for the integrity of the courts. She has experienced the wrath of the people through hate mail, talk radio abuse, and death threats, and wonders how the judiciary can withstand such pressure in the future.

“I have to tell you, I now understand why Pontius Pilate gave them Christ,” Cecava said.

How judges get on the bench

Cecava isn't alone in her concern for the judiciary. Bob O'Connor, president of the Nebraska State Bar Association for the 2001-02 term, sees the combination of restrictions on what judges can publicly say and retention elections as ripe for problems.

“Law suits are a zero-sum game, one winner, one loser,” O'Connor said. “Losers are usually unhappy, and sometimes they'll blame the judge for it.”

The type of judicial selection system a state uses directly correlates to the effect an disgruntled litigant can have on a particular judge. Nebraska is one of 30 states that use the Merit Selection System to choose at least some of their judges. This process involves bipartisan committees composed of lawyers and lay people who evaluate judicial candidates. State governors select individuals from the most qualified candidates to become judges. To ensure that these judges live up to their responsibilities to the public, they must go through retention elections. In retention elections, judges' names appear alone on the ballot. They are not opposed by anyone, and no political affiliation is listed. The first election comes three years after appointment, and subsequent elections take place every six years.

Most retention elections are mundane affairs. Judges up for retention appear last on the ballot, and generally voters are unfamiliar with their names. It takes a 50 percent vote to keep judges on the bench, and since this system took effect in Nebraska in 1962, only eight judges have been voted out. The presumption is that most voters see the judges on the ballot, don't know who they are, and either leave the spot blank or vote to retain.

These elections do not ordinarily have political overtones, nor were they meant to. But if for some reason someone or some group of people is unhappy with a judge up for retention, and chooses to campaign against them, there is little a judge can do to protect herself.

O'Connor puts it more artfully.

“They're screwed,” he said. “They are limited in their ability to respond by the judicial code of conduct. And they're in no position to go out and try to raise money, because that gives them the appearance of impropriety pretty quickly.”

O'Connor organized the political action committee Fair and Impartial Retention in 1998 to address what he saw as this short coming in the system. The PAC exists to provide organization and independent support to judges targeted in retention elections by raising money for advertising and coordinating with lawyers who are concerned about protecting judicial system.

“The concept is that judges should be given a fair shake,” he said. “I’m not trying to get judges retained, as much as I’m trying to get a fair shake for the judges. [A retention election] shouldn’t be over a single case. It should never be over a single case.”

A brief look at the evolution of judicial appointment in the U.S. helps one understand the values and purpose of Nebraska’s Merit Selection System.

According to Seth Andersen, executive director of the American Judicature Society, a nonpartisan, nonprofit organization dedicated to the promotion of fair and impartial courts, the 13 original states all used some form of appointments.

“There’s an interesting history of changes and debates over how judges are selected,” he said during an interview at the Society’s home office in Des Moines, Iowa, across the street from Drake University.

“Nine of them used some kind of legislative selection, the other four gave the power to the governor, but usually it was those two branches kind of cutting deals and putting judges on the bench.”

Though the federal government still uses appointment, by the middle of the 19th century the public was unhappy with the power the executive and legislative branches held over the judicial branch at the state level, explained Andersen. That, coupled with the rise of populism and the expansion of suffrage rights, led many of the newer states toward judicial elections. These elections were partisan, meaning the political affiliation of the potential judge would be noted on the ballot, and the parties were able to select who would be their candidate.

“Judicial elections were actually seen at the time as a way to make judges more independent because they wouldn’t be just responsible to the leg-breakers in the legislature,” he said. “They would be responsive to the people at large.”

Jed Shugerman, an assistant professor at Harvard Law School, wrote his dissertation, “The People’s Courts: The Rise of Judicial Elections and Judicial Power in America,” on the shift to judicial elections. His analysis of judicial decisions shows that in the decade following this shift, state Supreme Courts overturned almost as many laws as they had in the previous 60 years combined. These statistics, combined with the historical context, lead Shugerman to conclude that the shift to judicial elections did free up the judiciary from the corrupting political influence associated with the appointment system.

But with judges now forced to campaign for a spot on the bench, several shortcomings emerged. The American Judicature Society spells some of them out in an essay on their website entitled “Merit Selection: The Best Way to Choose the Best Judges.” For example, the caliber of a judge is sometimes a minor issue when a party puts together a ticket, and political credentials can come before competence. And when raising money to run for the bench, judges oftentimes accept donations from lawyers. It is likely that some of those lawyers will eventually come before that judge later on, which raises questions about the judge’s ability to be fully impartial. Finally, because according to this essay, “traditional campaign rhetoric and promises have no role in judicial elections,” voters have no real basis for making an informed decision. In this situation a voter might make a blind decision, many vote based on name recognition alone, or not vote at all.

Around 1900, reformers began pushing for nonpartisan judicial elections, according to “In Defense of Judicial Elections,” a book by Chris Bonneau and Melinda Gann Hall. By taking

political affiliation out of the equation, political parties could not as easily place their people on the bench. This allowed judges to be more independent while still remaining directly accountable to the electorate, Bonneau and Hall argue. In nonpartisan elections, candidates are not formally affiliated with a political party, and there is a primary vote only if there are more than two candidates. The top two candidates compete in a run-off election.

But while eliminating the power of political parties to pick judicial candidates did diminish the influence of political machinations to some extent, it did not solve the problems associated with judges being forced to campaign for office. Political parties are still involved in nonpartisan elections, judges still must raise money from lawyers and parties who may later come before them, and there is still little basis for voters to make an informed decision.

The next major reform to judicial selection came in 1940 from the citizens of Missouri, who were fed up with the control exerted over the judiciary by corrupt political bosses in Kansas City and St. Louis, according to the Missouri Judicial Branch website. That November, the state dramatically reorganized its judicial appointment system by adopting the “Nonpartisan Selection of Judges Court Plan” as an amendment to its constitution. This method of selection would become known as the Missouri Plan, though it is commonly referred to as the Merit Selection System because it seeks to select judges based on merit rather than political connections or political skills.

A flurry of states adopted the merit selection plan in the 1960s and early 1970s, according to the American Judicature Society’s judicial selection website. In 1962 Nebraska adopted the Merit Selection system for the Supreme Court and Appellate Courts. Iowa adopted the system for all its judges that same year. Nebraska extended Merit Selection to County Court Judges in 1974.

Despite broad acceptance of the Merit Selection System, a majority of states still use direct judicial elections to choose some or all of their judges. But advocates for Merit Selection continue to advocate for their system, and are quick to share shocking direct election anecdotes to emphasize their point.

Former Judge Cecava described spending time with fellow judges in Kentucky following a mock trial competition, and hearing a couple of local members of the judiciary discuss fundraising for an upcoming election. One judge explained that he had a young lawyer running against him, but had already secured \$25,000 from a local law firm for his own campaign and thought he could get the same amount from other firms.

“And then before it was done, the judge says ‘And when I win, I’ll make sure he pays,’” remembered Cecava, wide-eyed as she recounted the scene.

Mike Kinney, president of the Nebraska State Bar Association for the 2009-10 term, told of sharing a dinner at K-Paul’s Louisiana Kitchen in New Orleans with a local appellate court judge. That judge had a friend on the Louisiana Supreme Court who had just taken part in overturning a significant verdict. Incensed, the plaintiff’s lawyer announced that he would now be running for that Supreme Court justice’s position.

“Now my friend is going to have to raise a million dollars to keep his job,” the judge had told Kinney over dinner.

Rachel Paine Caufield, associate professor of politics and international relations at Drake University and research fellow for the American Judicature Society’s Hunter Center for Judicial Selection, recounted a conversation with a defense attorney in Texas, where judges are directly

elected. This defense attorney remembered walking into a county courthouse to defend a client and seeing a campaign billboard on top of the courthouse for the judge he was about to make arguments before. The billboard featured a slogan about being tough on crime and not letting criminals go free.

“This defense lawyer was like, ‘Yeah, I didn’t feel great walking into the courtroom that day,’” said Caufield. “That [billboard] may not reassure me or my client that they’re getting a fair shake. It’s a potentially troubling claim.”

In the mid-1980s former Nebraska Supreme Court Chief Justice John Hendry represented a paralyzed man suing a manufacturer in Texas. The main issue of the case was whether Texas law or Nebraska law would be applied in the federal court, because the law in Texas was much more favorable to injured plaintiffs. Shortly after the courts in Texas determined that Texas law would apply, the case was settled. Speaking with the Texan lawyer Hendry had partnered with, Hendry asked how it was that Texas had such favorable, judge-made law for plaintiffs.

“We buy it,” his Texan partner said.

Two recent public examples illustrate the problems that can result from direct elections. The first is the Prosser-Kloppenburg nonpartisan election in Wisconsin in April 2011. The second is the *Caperton v. Massey* case decided by the U.S. Supreme Court in 2009.

New York Times reporter Monica Davey wrote on April 4, 2011 that the Wisconsin Supreme Court race between twelve-year incumbent Justice David T. Prosser and Assistant Attorney General JoAnne Kloppenburg devolved into a referendum on Gov. Scott Walker’s controversial proposal to limit the collective bargaining rights of public workers. Money poured into the state from liberal and conservative groups, and by the time the vote came down, the candidates were almost a secondary issue. Charles H. Franklin, a professor of political science at the University of Wisconsin-Madison, told Davey that the election “has really become a proxy battle for the governor’s positions and much less a fight about the court itself.”

Though a nonpartisan race, voters associated Prosser with Gov. Walker, a Republican, and Kloppenburg with Democratic protestors at the Wisconsin capitol. While both candidates made many claims about desiring to rule impartially in a nonpartisan manner, and though both complied with the \$300,000 public financing limits for the campaign, advertisements paid for by the national political organizations overshadowed their campaigns. The local judicial election became a political pawn in the national Republican-Democratic battle. The important decision of who would sit on Wisconsin’s highest court was lost in the shuffle of partisan rancor.

Caperton v. Massey was a U.S. Supreme Court case originating in West Virginia, where judges are chosen by direct partisan election. As laid out in the Supreme Court’s decision, Hugh Caperton, president of a large mining company, won a \$50 million lawsuit against the Massey Energy Company in 2002. Massey’s chairman and CEO, Don Blankenship, quickly turned around and invested \$3 million in the judicial election campaign of Brent Benjamin. Benjamin’s opponent was the incumbent seated on the bench where Caperton’s \$50 million lawsuit was headed on appeal. Massey’s \$3 million investment accounted for more than half of Benjamin’s campaign fund.

Benjamin ultimately won the judicial election with 53 percent of the popular vote. When Massey’s appeal came before Benjamin’s court, he refused to recuse himself from the case. Benjamin cast the deciding vote, overturning the \$50 million decision. However, the U.S.

Supreme Court ruled that Benjamin should have recused himself from the case as he had “a direct, personal, substantial, pecuniary interest” in it, and “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”

Between 1990 and 2004, total spending on State Supreme Court races averaged \$712,013 in partisan direct elections, and \$452,575 in nonpartisan direct elections, according to the book “In Defense of Judicial Elections.” According to Associated Press reports, the most expensive judicial campaign in history was between two candidates for the Supreme Court of Alabama in 2006. The candidates raised a combined total of \$13.5 million.

In defense of direct elections

Advocates of merit selection are quick to disparage direct judicial elections, but proponents of these contests are just as vocal in their support of them. These proponents point to the value of democracy in shaping the U.S., and disparage merit selection as an elitist system supported by blue bloods who don’t trust the American people.

“All things being equal, I personally trust the democratic process more than I trust people who are already in a, quote, ‘superior position’ determining who’s going to make judgments about the entire population,” said Judge James Cissell, a directly elected juvenile probate judge in Hamilton County, Ohio.

“I think (direct elections are) the greatest safeguard for honesty in government.”

Additionally, Cissell said he knows of no definitive study or proof to show that merit selection produces superior judges.

“There’s no empirical evidence to suggest that one system is more corrupt than the other,” Cissell said. “There’s no empirical evidence to suggest (merit selection is) better. It’s an elitist movement, and basically a statement of contempt about the electorate.”

In Cissell’s experience, the election horror stories provided by Cecava and Caufield are anomalies that reflect regional tendencies, and call for some sort of judicial disciplinary action. According to Cissell, his home state of Ohio has strict fundraising rules for judges and their staffs, which he said helps keep elections clean. He also points out that all systems have produced both excellent and corrupt judges.

“You know, you can sit down with people who really know the history of things, and both sides can point to 25 substantial jurists who were merit selection or who were elected, and you can point to 25 scum balls in both systems,” he said. “And I just think democracy trumps societal privilege in almost every instance of the process.”

At a fundamental level, Cissell believes that any system of putting judges on the bench is only going to be as good as the people involved in it, so there may be room for different approaches to judicial appointment. He cites as an example the proportional representation system as used in Cincinnati in the 1920s to help root out corruption in government. Unlike the traditional winner-takes-all approach to democracy, the system allows for proportional representation as determined through an election. For example, a party that received 30 percent of a vote would have 30 percent of the representation. But while this system was successful in stamping out corruption in Cincinnati, the political bosses of Tammany Hall, a Democratic organization that dominated New York City politics until the mid-1900s, were able to make the system work for them.

“It depends upon the people that are involved and whether they have a good moral compass or not,” Cissell said. “No system is going to deal away with all corruption.”

Cissell is also quick to dismiss the notion that eliminating the opportunity for measured, contemplative judges to be appointed through the use of merit selection is a bad thing. He isn’t bothered by the idea of direct elections allowing activists to get on the bench ahead of unbiased, apolitical judges.

“So what?” Cissell said. “Some of the greatest judges were activists.”

“It was Earl Warren, a politician, that used his political skills in the *Brown v. Board of Education* case, not just to make the decision, but to establish some compromises within that decision that made it a unanimous decision, which was very important for getting that decision accepted politically.”

“You’ve got a Supreme Court now that is all Ivy League. You’ve got the sort of court that the elitists want. Would it be very vigorous and strong in civil rights?” Cissell said.

Although Cissell disagrees with the notion that merit selection judges are superior to elected or appointed judges, there is no question that the systems produce different kinds of judge. Merit selection takes the politics and money out of the choice by using a series of commissions to choose a few of the most qualified candidates, and letting the governor choose from that group.

“It puts focus on ability and training,” Cecava said. “And it does stress different strengths than what you get in an elected official, and I would argue that those strengths are extremely important in being a judge.”

Jane Schoenike, the Nebraska State Bar Association’s executive director and director of admissions, laid out the process for selection in a phone interview.

In Nebraska, the merit selection process begins when a judge retires, resigns, or is not retained. The Nebraska Judicial Resources Commission, which is made up of six lawyers elected by the bar association, six lay members appointed by the governor, and led by a current Supreme Court justice, meets to decide whether the judge should be replaced. If the empty judicial seat is in a region whose population is rapidly declining, the judgeship may be moved, though this rarely happens.

Once it’s been determined that a judge needs to be replaced, a Judicial Nominating Commission meets. These commissions are made up of four lawyers and four lay people, and there is one for every trial court and appellate court district in the state, totaling 33 commissions in Nebraska. Each commission must be bipartisan, featuring two Democratic lawyers, two Democratic lay people, two Republican lawyers, and two Republican lay people. The governor appoints the four lay people. Potential judges submit lengthy applications and the commission interviews each applicant. A public hearing is held for each applicant where anyone can speak for or against them. Ultimately the commission will determine which of the applicants is qualified, and send at least two of them to the governor. According to Schoenike, Gov. Dave Heineman prefers larger groups to choose from.

A criticism of the merit selection system is that the lay people on the commissions can be easily bowled over by the lawyers on the committee, or that they come from the upper class, and so don’t fairly represent the citizenry. But Cecava disagrees with this contention.

“I would say that there was a point in time that (lay people) relied almost entirely upon what the attorneys said. But from what I hear, the training that they’ve done for them makes the lay people stronger in the closed room,” she said.

Nebraska Supreme Court justices chair these commissions, so Hendry has had a first-hand view of how they work.

“I would be there to coordinate, to referee, to answer questions they might have about the process and how the process might work, and how the votes would be taken and who would do what at what time,” Hendry said. “And from that experience I was extremely impressed with the way the lay people and the lawyers worked together.”

Though most advocates of merit selection don’t have much negative to say about this system, lately there has been some criticism of the retention election portion. In November 2010, Iowans voted out three Supreme Court justices through a retention vote. The election made headlines around the nation as funds from outside the state came into Iowa to bolster the opposition to the judges. It was readily apparent then and now that these judges were not voted out because they were bad judges, but because people disagreed with the high court’s decision in *Varnum v. Brien*, a unanimous decision declaring that it was unconstitutional to deny gay partners the right to marry under the equal protection clause of the Iowan Constitution.

This was not the first time State Supreme Court justices have been ousted through retention elections. Three Californian Supreme Court justices were not retained in 1986 over capital punishment issues. In 1996, Nebraska Supreme Court Justice David Lanphier was not retained due to displeasure over a unanimous decision he authored striking down a term limits amendment that had been approved by the voters in a public referendum and a series of rulings that resulted in the overturning of a number of second-degree murder convictions. That same year, Justice Penny White of Tennessee was not retained due to her votes on capital punishment. In 2005, Justice Russell Nigro of the Pennsylvania Supreme Court was not retained because of public anger related to pay raises for all three branches of government that were quickly passed through a legal loophole.

With the exception of the Pennsylvania case, each of these justices was targeted over their individual decisions, rather than whether they were good justices.

Are retention elections valuable, allowing a democratic outlet for political angst as Judge Cissell argues? Or are they electoral lynch mobs for defenseless jurists?

In defense of retention elections

Michael Streit thinks retention elections are worthwhile. Streit, one of the Iowa justices who was voted out, offers a unique perspective on the issue. According to Streit, retention elections are an important part of the electoral system, but they must be used the right way.

“If voters use retention for voting out judges that violate their oath of office, that do things that are illegal or immoral or a violation of some kind of standard, that’s what retention elections are for,” he said. “Not to register the opinion on one case.”

“That’s a weakness in the retention system.”

Judges in states with merit selection systems are neither called on to speak to the public to defend their decisions, nor are they equipped to do so. These judges are not appointed

based on persuasive speeches, poignant commercials, or other hallmarks of politicking. They are appointed based on their analytical abilities and aptitude.

A mechanism does exist in the judicial code of ethics that allows judges to raise funds within a limited time frame if they can show they “have drawn active opposition.” But judges with busy caseloads and no political experience do not tend to embrace this option. In the state of Nebraska, if the organization Fair and Impartial Retention doesn’t come to a judge’s aid, her side of the issue would likely be under-represented or nonexistent.

Streit acknowledges that the Iowa justices could have come out in defense of their decision in the *Varnum* case, and thinks that future judges and justices under similar attacks ought to do so. However, he stands by their decision to not speak out. In his opinion, entering into the fray would have politicized the office, and that was not something they were prepared to do.

“Had we launched commercials, had we become regular politicians and had videos of me helping boy scouts camp, and camping out with my son Ashton, and going into the rifle range, and shooting guns and singing in a gospel choir, you think I could have moved four points?” Streit asked. “I think I probably could have; probably.”

“But our court – having no history in this – would have been just drastically changed. As one of the justices has said, ‘I don’t think I want to be a part of that court.’”

“I don’t want to judge like that. I don’t want to be part of that kind of a system,” Streit said.

But however idealistic Streit has been about allowing politics to enter the judicial branch in his own case, he does acknowledge that future justices under siege will probably have to speak out.

That being said, the real reason Streit believes he lost his job is not just because Iowans did not like the part he played in the *Varnum* decision. He believes the issue runs much deeper, all the way to the core of the judicial system, to the concept of judicial review.

Judicial review

A core element of our democracy is that the legislative and executive branches of government make and enforce laws based on the will of the people. Part of the judicial branch’s role is to exercise the power of judicial review, the assessment of whether those laws fit within the legal framework laid out by the founding fathers in the Constitution.

It’s important to remember that the judicial branch’s power is equal to that of the legislative and executive branches. Each of has different powers and responsibilities that are unique.

“The three branches of government are kept separate from each other, so in government to accomplish something you need the different branches to coordinate with each other so that no single branch can get too much power,” explained Eric Berger, assistant professor of constitutional law at the University of Nebraska.

Berger sees a few issues with separation of powers in retention elections.

“One could be that it is really problematic to have voters being able to oust judges whose decisions in certain cases they don’t like,” Berger said. “A real practical problem that you often have is voters making decisions sometimes based on ad campaigns where a lot of money has been poured in by opposition to make a certain judge look bad. Sometimes those ads are

not fair – sometimes they’re not even accurate – but sometimes they result in a judge being ousted.”

Additionally, Berger points out that judges are supposed to say what the law is and apply the law as it exists in making factual determinations.

“You would hope that they do so with a degree of impartiality rather than do it based on what might be popular. But if judges have to answer to voters, then judges become a lot more like other elected officials. And to some extent there is a great concern that this could compromise what the law is, because suddenly they’re worried not about getting the right legal answer, but about doing what is popular, the same way an elected legislator would,” he said.

Conversely, allowing the judiciary be able to overturn the decisions of the democratically elected legislature also poses a separation of powers issue.

“That’s the counter-majoritarian problem,” Berger said. “To some extent having either voters or the legislature being able to oust judges who have made unpopular decisions is a check on that counter-majoritarian power of the judiciary.”

“The reason why many states have elections for judges is a concern, I think, about having the judiciary too unchecked, and being able to wield too much counter-majoritarian power,” he said.

The judicial branch is responsible for making sure that laws passed in the U.S. are constitutional, and if it deems a law unconstitutional, it has the power to overturn it. This ability of the judiciary helps keep the other two branches in check.

“The legislative branch who passed the law is not going to declare something void. The executive that signs the law is not going to declare something void. Who would declare it void?” Streit asked. “Well, it would be the court.”

Hendry, the former chief justice of Nebraska, likes to think of the constitution in contractual terms in which the people have agreed to be governed, and the government has agreed to govern. The constitution sets out the powers that have been given to the federal government, and the powers that the people retain.

“Within that contract, who in the government is responsible to ensure that the terms of the contract are properly administered? In many instances that falls upon the judiciary,” Hendry said.

According to Streit, some opponents of the *Varnum* decision claim that this power was never explicitly given to Iowa’s Supreme Court. Though Streit concedes that though the power of judicial review is not given in so many words, he contends the language of the Iowan Constitution, when read in the historical context of its drafting, clearly does give this power to the Iowa Supreme Court.

“Judicial review of the constitutionality of statutes and executive branch actions was accepted throughout the country [at the time of the drafting of Iowa’s constitution],” Streit explained. “And in fact, if you look at the Iowa debates on our constitution, they talked about the Supreme Court being a final check on whether something is constitutional.”

Furthermore, Article XII, Section 1 of the Iowa Constitution states, “This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void.” This portion of the constitution has been understood to grant power to the Iowan judiciary to repeal laws and acts of the legislative and executive branches. Therefore, it is completely within the

power of the Iowa Supreme Court to overturn a law they determine violates the constitution, according to Streit.

Article I, Section 6 of the Iowa Constitution declares that all laws must apply equally to all Iowan citizens: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." The Iowa Supreme Court has applied this throughout the state's history, and has repeatedly given equal protection to minorities and women well before other states or the federal government. As laid out in *Varnum*, this has meant refusing to treat humans as property and holding that Iowa's laws must equally protect people of all races 17 years before the U.S. Supreme Court penned the Dred Scott decision, and rejecting the concept of segregation 81 years before *Brown v. Board of Education*.

So while different segments of the population disagree on the value of gay marriage in society, Iowa's Constitution can reasonably be read to guarantee a level of equality that requires that gay marriage be legal. That was the unanimous decision in *Varnum*, which upheld a decision made by the Polk County District Court.

Power

According to Streit, anger with the *Varnum* decision was only part of what made the 2010 Iowa retention election such a flash point.

"I think it's all just power," he said. "It's calculated exploitation of emotions that voters bring to bear when they get into the ballot box."

According to a number of experts, judicial appointment across the country has changed over the last 20 to 30 years as politicians have focused on them as political opportunities.

Professor Ian Bartrum, associate professor of law at the University of Nevada, Las Vegas, was a law professor at Drake University in Des Moines, Iowa during the 2010 retention election. He said he sees a trend over the last 30 years of politicizing judicial appointments at the federal level, and he now sees that mentality seeping down to state races.

"It's a mindset that sees the judiciary as, in realpolitik kinds of terms, as a capturable, important sort of political place," Bartrum said.

Streit points to the amount of money that came into Iowa for the election as the most troubling aspect of the whole deal.

"The outside money is one step removed," he said. "We don't know who these people are that are trying to control or manipulate or affect our Iowa court system. They go in and splash all this money around, and they don't really care what they left behind."

Money came into the state from many conservative organizations and PACs. "Letter from Iowa," a bar review article written by University of Iowa College of Law professor Todd Pettys says that funding came from "numerous out-of-state organizations, including the Alliance Defense Fund, in Arizona; the American Family Association, in Mississippi; the Campaign for Working Families, in Washington, D.C.; Citizens United, in Washington, D.C.; the Faith & Freedom Coalition, in Georgia; the Family Research Council, in Washington, D.C.; and the National Organization for Marriage, in New Jersey."

In light of this influx of outside money, Streit disputes the popular claim that the campaign against him and his colleagues was a 'grass roots effort.' He also takes issue with those who brag about having defeated three justices.

“We just don’t have a history of [justices] campaigning in Iowa,” he points out. “The last political event I went to was 28 years ago. And [former Iowa Chief] Justice Ternus probably 13 or 14 years ago. I don’t think she ever did anything political.”

“Talk about beating a bunch of amateurs.”

Not only did the justices lack any campaign experience, but the systemic, theoretical arguments made on their behalf failed to translate to the 5 second sound bites needed to get air time.

“[Our opponents] had all these beautiful phrases like ‘judicial activism’ and ‘rogue court’ and ‘imperious judges ruling on us,’” Streit said.

Trying to counter these emotive political phrases with judicial maxims and case law was a mismatch.

“It’s like bringing a stack of law books to a knife fight,” Streit said.

Reasons to fix the system

With an explosive wedge issue like gay marriage or the death penalty, and a significant amount of funding, it is possible to unseat a judge or justice. In Midwestern states like Iowa and Nebraska, the cost of commercial spots on the radio and television is far less than on the coasts, so a little funding can go a long way. Even though unseating justices cannot change a controversial decision the court made, the threat of being unseated can keep justices and judges looking over their shoulders.

“The opponents of the judges made it very clear that their goal was not just to get rid of three justices on the Iowa Supreme Court, it was to send a message to justices around the country,” Andersen said. “And I think that they were successful at sending that message.”

That’s not to say that every judge or justice up for retention is vulnerable right now. Only nine justices have been voted out nationwide since 1986. But there have been significant changes in that time that have increased the odds of quality judges losing retention elections.

One factor is that the U.S. Supreme Court’s decision in *Citizens United v. Federal Election Commission* now allows for more money to enter the political system from corporations.

A second factor is an increase in the automatic no vote, or the percentage of people who automatically vote for judges to not be retained, no matter who they are. Legal organizations and concerned members of the bench and bar have noted a rise in this tendency over the last 10 to 15 years.

In 2000, Kinney started following this trend after some of his friends told him about how they always automatically vote no in retention elections.

“At that point in time, every judge, no matter how they were graded in the judicial poll, no matter what type of judge, they were all getting an automatic 25 percent no vote in the Omaha area,” Kinney said. “So that doesn’t make it a 50-50 deal anymore. That makes it a 75-25. That means that those trying to get rid of a judge, all they’ve got to do is convince 25 percent of the people, not 50 percent of the people.”

Over the course of the last decade, Kinney has watched that number in the Omaha area grow from 25 percent to 35 percent. In other words, a determined campaigner only has to convince 15 percent of the electorate to vote no. If a divisive wedge issue comes before a court, and the judge or justices are forced to make a decision that will incense half the community, the job of the opposition gets that much easier.

“I just hate to see somebody lose their job over doing their job, and I think that’s what happened in Iowa,” Kinney said. “We have really good judges in Nebraska, and I would hate to see a judge lose his or her position because they issued an unpopular opinion.”

A third factor is rhetoric about activist judges that has been developing over the course of the last 20 to 30 years.

“This is a narrative that has been put forward and sharpened, and is being used successfully in these anti-retention campaigns, and everything else,” Andersen said. “It’s becoming pervasive, and is softening up the electorate, especially those who are in that very large slice of the electorate right now which are not happy with incumbents, not happy with public institutions, not happy with government, not happy with wall street, just not happy.”

Anderson said he fears that in the future it may no longer take a significant wedge issue to oust a judge who has merely done her job.

Recommendations

Is there anything states can do to preempt abuse of the retention vote? The following are recommendations gleaned from discussions with judges and judicial experts.

1. State governments should consider judicial performance evaluation programs

Many merit selection states, including Nebraska, use bar association reports to rate the effectiveness of judges. These bar reports ask lawyers to rate how they feel about judges on 10 to 14 factors, and if they feel the judges or justices should be retained.

The American Judicature Society, however, advocates an alternative: judicial performance evaluation commissions. According to K.O. Myers, the society’s director of research and programs, judicial performance evaluations take a broad view of the competence of judges by interviewing everyone they regularly interact with, including court staff, attorneys who have argued before them, litigants, and jurors.

“It has some metrics to evaluate a judge’s performance. Things all the way from the time it takes them to file their opinions, their behavior and their comport on the bench, how they treat litigants, and how well they do their job in terms of all the things anybody has to do when they have a job,” Myers said.

“It’s not so much looking at if the opinions are right or not.”

According to Hendry, who is an advocate of judicial performance evaluation commissions, after the analysis is completed, a report is created. This report would be first given to the judge so they have an opportunity to respond to any criticisms, and eventually released to the public.

Because this type of commission is independent from the bar association, members of the American Judicature Society say that the opinion of a judicial performance commission holds more weight with the public than the results of the bar’s poll of lawyers.

“It’s usually distilled in some fashion and made available to the voters who can say OK, here is what the judge is doing a good job at, here are the criteria we’re using, here’s how we rank them on how well they’re doing. That way (the public is) not just in a vacuum saying ‘I’m hearing people say that this judge made a terrible decision, I’m going to vote against them,’” Myers explained. “It gives them more information about how the judge is actually doing on the bench.”

Streit also thinks judicial performance commissions can help reduce abuse of retention elections. He points to the success the Colorado Office of Judicial Performance Evaluation as an example.

Colorado's judicial performance evaluation website boasts its success: "As a result of the efforts of the state and district commissions and the important backing of the Colorado legislature, the Colorado Judicial Performance Program is nationally recognized as a model for other states, with similar judicial models to follow."

Cecava is one who would appreciate eliminating the bar's evaluation.

"Those ratings can be – and are on a regular basis – abused," she said.

She takes particular issue with her final review, which took place in 2008, two years after her headline-making decision. Only 57.47 percent of the lawyers participating said she should be retained. According to Cecava, this ranking was significantly lower than her average rating from her previous 22 years on the bench.

The average bar poll rating of the 140 judges in Nebraska in 2008 was an 88 percent in favor of retention. Five scored lower than 60 percent. One judge was given a 100 percent, and the lowest rating was a 40 percent. Cecava was the only judge not retained that year.

Cecava takes issue with the amount of lawyers who took part in her evaluation, pointing out that the poll is statewide, and there are only 37 lawyers in her district. According to Cecava, the amount of lawyers who participated in the poll was much larger than 37.

"They didn't appear in front of me," Cecava said. "They don't know what kind of judge I am."

The evaluation asks lawyers to rate the judges "with whom you have professional experience." On Cecava's 2008 evaluation, 56.67 percent of the respondents said that their principle practice was in her district. On 2008 evaluations overall, 71.6 percent of respondents said they were commenting on a judge that was in the same district as their principle practice.

The American Judicature Society has written and revised a Model Judicial Selection Provisions handbook, which can be found at http://www.ajs.org/selection/docs/MJSP_web.pdf.

2. Judges, lawyers, and concerned citizens must be advocates for the court system

-Judges, lawyers, and concerned citizens in merit selection states must seek to preempt ugly retention campaigns by regularly working to help the public become more comfortable with the role of the judiciary in society.

Streit believes the most important thing that can be done to prevent another retention election like the one that ousted him is for judges to let their voices be heard.

"In my exit interview, so to speak, with the Supreme Court, I said that they have to get out and get out and get out," he said. "And I think they should hire more law clerks and delegate a lot of their work, and get out amongst the people."

Frank Carroll, Iowa State Bar Association president during the campaign against the Iowa judges, said he thinks the new Iowa chief justice, Mark Cady, has learned this lesson and reacted accordingly.

"I just think Justice Cady's doing a great job," Carroll said. "They have hearings now around the state, he's very, very open. He spends some of his lunches over at the state capitol when the state legislature's in session. He comes to the bar meetings all of the time, and he's

very receptive to questions. I couldn't have been any more pleased in working with anybody under those circumstances than working with him."

Carroll also emphasized the importance of making sure the members of the bar are comfortable with the Supreme Court, and don't hold in their criticism until a justice's seat is on the line.

-In the face of retention campaigns focused on individual decisions and not overall Judicial comport, judges, lawyers, and concerned citizens must match the campaign efforts of those attacking the judiciary.

In the event that a judge or justice is deemed to be targeted for an individual decision and not her skills and abilities as a judge, the targeted judge, as well as lawyers and concerned citizens must respond.

"If it were me, I can only speak for myself, if I were being subject to a challenge on retention, I would follow the judicial code and I would do that which was judicially permissibly or ethically permissible to do the best I can to get my views forward as to why a particular decision was rendered," said Hendry, the former Nebraska chief justice. "Some judges may not want to do that, some judges may not want to get involved in that fight, because it's uncomfortable and it can be messy."

"I would want to do whatever is ethically appropriate to get my message out to the voters as to why a particular case may have been decided in the way it was," Hendry said.

Kinney, the former Nebraska bar president, echoes that attitude.

"I don't think you can rely just on grass-roots, talk-to-your-neighbors, get-the-word-out campaigns. I don't think you can get away with that in this day and age. I think you need to match them dollar for dollar, and commercial for commercial," Kinney said.

Though a clear departure from tradition, judges, lawyers, and concerned citizens must adapt to a world where local judicial seats are capturable positions. In the face of money coming in from out of state, especially in states like Nebraska and Iowa where air time is relatively inexpensive, they must be ready and willing to stand up for their judicial system.

-In these situations, Nebraskan judges should strongly consider embracing the positions of self-defense available to them in the Nebraska Revised Code of Judicial Conduct.

The Nebraska Revised Code of Judicial Conduct contains the rules "that judges, individually and collectively, must respect and honor". This code is strict, and judges take it very seriously. Section 5-304, Canon 4, deals with the kinds of political and campaign activity judges may take part in. Comment 11 on that rule provides context for handling responses or campaigning: "The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to retention election. Campaigns for judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them to make informed electoral choices."

If a judge or justice feels they are handling a case that may produce a backlash, they must become familiar with the elements of 5-304, and be prepared to act on them. To facilitate

this, state officials can help with the educational process by incorporating discussion of these issues into continuing legal education for judges.

3. More transparent judicial selection processes

The merit selection system, with its numerous commissions and committees, can seem convoluted and arcane to the lay person. Though already largely a public process, any steps to bring further transparency to merit selection would help counter the charges of critics like Cissell, who see the process as elitist.

As an example of transparency, Pettys said that when Iowa's judicial nominating commission interviewed judges to fill the seats of those ousted after *Varnum*, the process was streamed live on the Internet. These interviews are still available on the Iowa Judicial Branch website. By including the public in this process, the public can in turn have more ownership and trust in the judiciary.

Conclusion

In reality, these ugly retention elections are far from the norm. Andersen, the executive director of the American Judicature Society, points out that only 1 percent of judges up for retention have ever been ousted, and half of those stemmed from a single scandal in Illinois. There, judges are directly elected, and to retain their places on the bench must get more than 60 percent of the vote.

Some, like Pettys, think the Iowa election was an aberration.

"It seems to me that the stars fell into a rare and powerful alignment in 2010, with a substantial influx of out-of-state money being used to run a relentless campaign against justices who had issued a high-profile ruling on one of the most controversial social issues of our time during a period marked by strong anti-incumbent and anti-government sentiment," he said in "Letter from Iowa."

And as Cissell argues, the Iowa election could even be viewed as a positive manifestation of democracy that should be embraced.

But the fact remains that the forces that removed these judges were out to send a message of intimidation to the judicial community at large. And they succeeded.

"You cannot tell me that justices, when they see this happen, do not try to weigh and gauge the political impact of certain decisions," Streit said.

"I think it just has a relentless unending effect on the diminution of our fair and impartial courts. Judges more and more will look over their shoulder whenever they get a case that may not be popular with popular opinion, popular belief, the politics of cases."

In the age of social media, with the loosened campaign limitations allowed by the U.S. Supreme Court through *Citizens United*, and a playbook for how to successfully use wedge issues to drive out justices and judges, the odds are that the perfect storm that drove out three Iowa Supreme Court justices can and will come again.

Public support for the judiciary will be critical in the future. Lawyers and lay people concerned about the state of the judiciary must be prepared to defend justices who are under attack for a single controversial decision. The funding and vigor of those attacks against the judiciary must be matched. And judges and justices must be prepared to defend themselves in an ethically appropriate way. And state legislatures should consider instituting judicial

performance evaluation programs. Though it may be more popular to reduce spending than to create new programs, the 1996 campaign against Justice Lanphier shows that ugly retention elections can happen in Nebraska, and at the highest level. Judges, and those that support them, must have tough conversations about these issues soon. Until then, justice is vulnerable.