A LEGAL, POLITICAL, AND ETHICAL ANALYSIS OF JUDICIAL SELECTION IN OHIO: A PROPOSAL FOR REFORM

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I. INTRODUCTION: THE IMPORTANCE OF JUDICIAL SELECTION ISSUES

The issue of judicial selection is a controversial topic within our legal system. Many analysts suggest that the method of judicial selection used, and the rules adopted to direct it, have important implications for the promotion of general political values and the application of substantive

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law.[1] There seems to be a growing belief that current laws related to the selection of judges influence the administration of justice. For example, a recent article in *Parade Magazine* noted that "from 2000 to 2007, some $167 million was spent on judicial campaigns," a figure which is "more than twice as much as in the entire previous decade."[2] Charles W. Hall of Justice at Stake, a nonpartisan group for judicial reform, suggested that this influx of special interest contributions may compromise a citizen's right to a fair trial.[3] Whether these concerns are real, the perception that the contributions can influence our courts is a matter of great concern for the legal profession and society in general. Efforts must be made to ensure the integrity of our legal system. This article reviews the general methods of judicial selection, Ohio's choice of judicial selection, the implications of that choice, and specific reforms that will ensure jurists cannot possibly be influenced by their contributors.

II. METHODS OF JUDICIAL SELECTION

A. The Evolution of Judicial Selection

At the state level, there are five major methods of judicial selection: partisan election, nonpartisan election, gubernatorial appointment, legislative appointment, and the Missouri Plan.[4] At least two states have adopted each of these strategies, with the majority of states relying upon some type of election process.[5] As Lawrence Baum noted, the judicial selection system adopted by a state

> has a strong historical element. Different systems have been popular in different periods, reflecting changes in people's views about goals and the best means to achieve them. Until the 1840s, the federal government and most states gave power over judicial selection to the other

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[1] *See, e.g.*, DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES 192 (4th ed. 2007); LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 93–94 (6th ed. 2008).

[2] Sharon Male, *Can Judges be Bought?*, PARADE MAG., Mar. 8, 2009, *available at* http://www.parade.com/news/intelligence-report/archive/can-judges-be-bought.html.

[3] *Id.*

[4] *See* ROBERT A. CARP ET AL., JUDICIAL PROCESS IN AMERICA 101–07 (7th ed. 2007) (providing an in-depth analysis of each method); *see also* NEUBAUER & MEINHOLD, *supra* note 1, at 184–92; BAUM, *supra* note 1, at 105–17.

[5] *See* BAUM, *supra* note 1, at 107 ex. 4.3.

> branches of government—the chief executive, the legislature, or both.[6]

These approaches were intended to minimize the role of popular democracy.[7] Prior to the 1840s, the majority of Americans were not legally entitled to vote, and there were concerns about peoples' capability to cast informed ballots.[8]

The prominence of elected judges at the state level emerged during the mid-1800s as part of the populist movement during the Jacksonian era.[9] A major objective of the movement during this era was to democratize the political process.[10] "At the time of the Civil War, twenty-four of the thirty-four states had an elected judiciary."[11]

The twentieth century marked the advent of another method of judicial selection. A group of reformers disenchanted with the influence of party bosses promoted the concept of merit selection. Former President William Howard Taft and other prominent lawyers expressed dissatisfaction with existing methods of judicial selection because they provided too little judicial independence and gave legal confidence insufficient weight.[12] The reform agenda of the American Judicature Society (AJS) also reflected this feeling. Its leaders sought a new method of judicial selection and helped devise a system in which a state governor chose a new judge from a list of

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[6] *Id.* at 94.

[7] *Id.*

[8] *See, e.g.*, ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 49–52 (2000).

[9] *See* NEUBAUER & MEINHOLD, *supra* note 1, at 184.

[10] *Id.*

[11] *Id.*

[12] BAUM, *supra* note 1, at 94.

> Early in the twentieth century, former president William Howard Taft and other prominent lawyers expressed dissatisfaction with all other existing methods of judicial selection, arguing they provided for two little judicial independence and gave insufficient weight to legal competence. This feeling was reflected in the reform agenda of the American Judicature Society (AJS), founded in 1913, whose leaders sought a new method of judicial selection. The AJS helped devise a system in which a state governor would choose a new judge from a list of nominees provided by an independent commission, with the voters having the chance to approve or disapprove the governor's choice.

Id.

nominees provided by an independent commission.[13] The voters then had the chance to approve or disapprove the governor's choice.[14] This system of selection, which relies upon a commission and a retention-only election, is generally referred to as the Missouri Plan because Missouri was the first state to fully adopt this strategy in 1940.[15]

B. Ohio's Methods

The State of Ohio relies upon a combined system of partisan and nonpartisan elections to select its judges.[16] In nonpartisan elections, a party's political affiliation is omitted from the ballot.[17] Ohio uses "a strange combination of partisan and nonpartisan elections" for seats on its supreme court.[18] Political parties nominate the candidates, but the general election ballots do not list "candidates' party affiliations."[19]

III. MONEY COMBINES WITH JUDICIAL POLITICS

Complicating an already untidy process is the influx of money in judicial elections. "In 1980, candidates for the chief justice position spent $100,000; six years later, they spent $2.7 million."[20] In 2004, Ohio judicial candidates raised a record-breaking $6.3 million.[21] In addition to these expenditures, the AJS noted that special interest groups have become increasingly prominent in judicial elections.[22]

In 2000, the U.S. Chamber of Commerce "spent between $1 and $2 million" on advertisements to oppose "the re-election of a sitting Supreme

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[13] *Id.*

[14] *Id.*

[15] *See id.* at 94–95.

[16] *See* MICHAEL J. STREB, RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 7 (2007).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] AM. JUDICATURE SOC'Y, *The Amount of Money Spent in Ohio and Other States on Supreme Court Cases*, *in* A FORUM ON JUDICIAL SELECTION: A TIME FOR ACTION 12 (2009), http://www.judicialselection.net/resources/Forumbriefbook.pdf.

[21] Rachel Paine Caufield, *Hunter Center Is Nationally Recognized Resource on Judicial Selection*, JUDICATORIES (Am. Judicature Soc'y, Des Moines, Iowa), Apr. 2007, http://www.ajs.org/ajs/publications/Judicatories/2007/April/Hunter%20Center.asp.

[22] AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: OHIO, http://www.judicialselection.us/judicial_selection/index.cfm?state=OH (last visited Mar. 8, 2010).

Court justice."[23] It also supported Citizens for a Strong Ohio, which spent approximately $4 million on similar advertisements.[24] "Citizens for an Independent Court, a group supported by trial lawyers and labor unions, [also] spent approximately $1.5 million . . . ."[25] In 2002, a collection of "independent groups spent an estimated $5 million on television."[26]

IV. JUDICIAL DISQUALIFICATION AND RECUSAL IN OHIO

As in the past, Justices of the Ohio Supreme Court can, and do, preside over cases involving parties or entire industries that financed their campaigns.[27] Currently, Ohio does not have judicial conduct or ethics rules prohibiting such conduct.

Even worse, although the Chief Justice of the Ohio Supreme Court has the power to disqualify lower court judges,[28] there is no procedure to determine whether members of the Ohio Supreme Court should be disqualified; these justices are expected to disqualify themselves, if necessary.[29] As such, a movant has nothing but persuasion to use against justices who would otherwise be subject to disqualification.

By statute, the State of Ohio provides a remedy for disqualification regarding county and municipal judges, common pleas judges, probate

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[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

> In 2000, Citizens for a Strong Ohio, a group backed by the U.S. Chamber of Commerce, spent an estimated $4 million on advertisements opposing the re-election of a sitting Supreme Court justice, and the Chamber itself spent between $1 and $2 million. Citizens for an Independent Court, a group supported by trial lawyers and labor unions, spent approximately $1.5 million in 2000. In 2002, independent groups spent an estimated $5 million on television . . . .

Id.

[27] *Cf.* OHIO CODE OF JUDICIAL CONDUCT § 2.11(A) (2009) (allowing a judge to "disqualify himself or herself in any proceeding in which the judge's *impartiality* might reasonably be questioned").

[28] OHIO CONST. art. IV, § 5(C).

[29] *See* 22 OHIO JUR. 3D *Courts and Judges* § 117 (2009).

judges, and appellate judges.[30] Yet, it provides no such remedy for disqualifying Ohio Supreme Court Justices.[31] The only disqualification provision that exists specifically with regard to an Ohio Supreme Court Justice is contained within the Supreme Court Rules for the Government of the Judiciary of Ohio.[32] Moreover, this rule only pertains to a Supreme Court Justice that is "the complainant or the respondent in [a] disciplinary, disability, retirement, removal, or suspension proceeding."[33]

Like all fifty states and the federal courts, Ohio has a Code of Judicial Conduct modeled after the American Bar Association's Model Code of Judicial Conduct.[34] Ohio's Code was recently rewritten, and as of March 1, 2009, Ohio Judicial Canon 2.11 governs disqualification.[35]

There have been two versions of the ABA Model Code of Judicial Conduct. Canon 2.11 is modeled after the older version, which provided that a judge should disqualify himself or herself when "the judge knows or learns" that a party or its lawyer made contributions to that judge's campaign within a specified amount.[36] Under the current ABA Model, this provision is preserved as new Canon 2, Rule 2.11(A)(4).[37] However, although the ABA believed this provision was worth preserving, Ohio left it out of its most recent Code of Judicial Conduct.[38]

Ohio is not alone in ignoring the ABA Model provision on campaign contributions. Notwithstanding the fact that thirty-nine states elect their

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[30] *See* OHIO REV. CODE ANN. § 2701.031 (West 2009) (county and municipal judges); *id.* § 2701.03 (common pleas judges); *id.* § 2101.39 (probate judges); *id.* § 2501.13 (appellate judges).

[31] *Cf.* OHIO CODE OF JUDICIAL CONDUCT R. 2.11(A) (2009) (allowing a judge to "disqualify himself or herself in any proceeding in which the judge's *impartiality* might reasonably be questioned").

[32] *See* SUPREME COURT RULES FOR THE GOV'T OF THE JUDICIARY OF OHIO, R. II, § 4 (2010).

[33] *See id.*

[34] *E.g.*, MELANIE K. PUTNAM & SUSAN M. SCHAEFGEN, OHIO LEGAL RESEARCH GUIDE 134 (1997).

[35] *See* OHIO CODE OF JUDICIAL CONDUCT R. 2.11(A) (2009).

[36] MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(e) (2004) (provision was first adopted by the ABA in 1999).

[37] This standard may have had its antecedent in an earlier law review article. *See* Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 452 (1988) (proposing a recusal/disqualification standard based upon amount of campaign contributions).

[38] *See* OHIO CODE OF JUDICIAL CONDUCT (2009).

judges,[39] not a single state has adopted the ABA Model Code provision on campaign contributions.[40] In 2002, the State of Mississippi adopted something similar to the ABA's 1999 amendments,[41] but it maintains that its provision is different from the ABA's because it states:

> A party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge. Such motions will be filed, considered and subject to appellate review as provided for other motions for recusal.[42]

In 1995, the State of Alabama adopted a similar provision, which placed a recusal limit of $4000 on supreme court justices and appellate judges and a $2000 limit on trial judges.[43]

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[39] *E.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring).

[40] *See, e.g.*, Molly McLucas, *The Need for Effective Recusal Standards for an Elected Judiciary*, 42 LOY. L.A. L. REV. 671, 682 (2009).

[41] *Cf.* Terri R. Day, *Buying Justice:* Caperton v. A.T. Massey: *Campaign Dollars, Mandatory Recusal, and Due Process*, 28 MISS. C. L. REV. 359, 378 (2009) ("In an effort to stem the tide of 'politics as usual' . . . Mississippi adopted a recusal rule which provides that 'political contributions may but do not necessarily raise concerns about a judge's impartiality.'"). The ABA has implemented several amendments to the Model Code, all which related to the negative influence of campaign contributions on judicial independence. *See* MODEL CODE OF JUDICIAL CONDUCT App. B (2004) (cataloguing amendments to the 1990 Code to date). However, it is hardly clear that these amendments will survive strict scrutiny analysis under *White*. *See* Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1095–1107 (2004) (noting that the ABA's concurrent attempt to relax judicial speech restrictions but increase judicial disqualification for that speech may not pass strict scrutiny analysis).

[42] MISS. CODE JUDICIAL CONDUCT Canon 3(E)(2).

[43] ALA. CODE § 12-24-2 (2009); *see also* Brackin v. Trimmier Law Firm, 897 So. 2d 207, 230–34 (Ala. 2004) (providing an example of an Alabama Supreme Court Justice's statement of nonrecusal).

V. PUBLIC PERCEPTION OF OHIO'S JUDICIAL SELECTION, CAMPAIGN CONTRIBUTION, AND DISQUALIFICATION PROCESSES

A. Relationship to Due Process

Arguably, the lack of a systemized recusal procedure for supreme court justices in the Ohio judicial system may give rise to potential due process issues. Under federal substantive due process, there is a highly-valued, constitutionally protected right that a litigant is entitled to a fair and impartial trial and tribunal.[44] Specifically, the Due Process Clause entitles a litigant to a fair trial, which "requires an absence of actual bias in the trial of cases."[45] A fair trial means that the judge is "require[d] to be impartial in weighing the evidence presented before him [or her] . . . ."[46] The U.S. Supreme Court further explained that the law is designed to "prevent even the probability of unfairness."[47] Thus, judges have to remain impartial in all aspects and any "possible temptation . . . which might lead him not to hold the balance nice, clear and true" is in violation of the Due Process Clause.[48] Ultimately, "due process requires a 'neutral and detached judge'" preside over all aspects of a case.[49]

Ohio has vested in every litigant a right to an impartial tribunal by making the Ohio Code of Judicial Conduct and the Ohio Rules of Professional Conduct binding upon the judiciary.[50] This right is, of course, also protected by state procedural due process.[51] In Ohio, it is mandatory that "[a] judge shall perform the duties of judicial office impartially,

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[44] *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 829 (1986) (Brennan, J., concurring) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)); Ward v. Vill. of Monroeville, 409 U.S. 57, 60 (1972) (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)).

[45] *Murchison*, 349 U.S. at 136.

[46] *Id.* at 138.

[47] *Id.*

[48] *Tumey*, 273 U.S. at 532.

[49] Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 617 (1993) (quoting *Ward*, 409 U.S. at 61–62); *see also* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (discussing adjudicative proceedings' neutrality requirement).

[50] *See* SUPREME COURT RULES FOR THE GOV'T OF THE JUDICIARY OF OHIO, R. I, § 1 (2010).

[51] *See* OHIO CONST. art. I, § 16.

competently, and diligently."[52] Under this rule, even the *appearance* of impropriety supports disqualification.[53]

B. Judicial Selection

1. Generally

The debate over which method for selecting judges is most effective revolves around individuals' political objective. Should courts be staffed in a manner that gives priority to judicial independence or to public accountability? Lawrence Baum captured the essence of this debate when he wrote: "Many people argue that judges should be selected in a way that maximizes their freedom from control so that they can apply the law in the way they think appropriate. But others contend that judges are important policymakers, so they should be accountable to the people they serve . . . ."[54]

Although the Missouri Plan promotes the influence of professional panels generally made up of lawyers, non-lawyers, and sometimes former or current judges, most analysts suggest that it does not eliminate politics from the judicial selection process.[55] Governors tend to appoint their "political supporters to the commission," and commission members are often motivated by political considerations when nominating judicial candidates.[56]

None of the judicial selection processes can claim that they operate in a manner that ensures they can maximize their objectives. However, the three appointment methods (Gubernatorial, Legislative, and Missouri Plan) likely promote greater judicial independence, while partisan and nonpartisan elections arguably promote more public accountability.

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[52] OHIO CODE OF JUDICIAL CONDUCT Canon 2 (2009).

[53] *Id*. at R. 2.11(A). Judicial ethics commentators have stated that "favoritism toward one of the parties to a suit is what constitutes disqualifying bias or prejudice." JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT & ETHICS § 4.04 (3d ed., Matthew Bender & Co. 2000) (1990); *see also id.* at ch. 4 (discussing judicial disqualification in general); *see generally* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES (2d ed. 2007) (providing a comprehensive discussion on judicial disqualifications).

[54] BAUM, *supra* note 1, at 93.

[55] *See* CARP ET AL., *supra* note 4, at 105–06.

[56] *See* NEUBAUER & MEINHOLD, *supra* note 1, at 188.

2. Ohio

All state judges in Ohio are selected through a system of partisan and nonpartisan elections.[57] This method is supported by a number of rules that result in a unique set of features,[58] which have many citizens concerned about both judicial integrity and independence in Ohio and the ability of this system to promote public accountability. To best illustrate these concerns, the analysis below focuses on Ohio Supreme Court elections.

Critics of this approach maintain that the low visibility of judicial elections results in the election of judges who receive the largest amounts of campaign contributions.[59] Despite these criticisms, Ohio voters have rejected reform efforts instituting appointment of judges on multiple occasions.[60] In 1987, Issue 3, a ballot initiative to adopt a merit appointment system, was rejected by a margin of 65% to 35%.[61] Issue 3 lost in eighty of Ohio's eighty-eight counties.[62]

Issue 3's decisive defeat shows that the citizens of Ohio strongly support the belief that judges must be publicly accountable, and that a fair system of elections is the best method to ensure procedural and substantive fairness. However, state statutes that regulate the operation of these judicial elections and subsequent judicial behavior seem to mitigate the promotion of public accountability.

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[57] *See* discussion *supra* Part II.B.

[58] *See* OHIO REV. CODE ANN. § 3505.04 (West 2009).

[59] *See, e.g.*, Kara Baker, Comment, *Is Justice for Sale in Ohio? An Examination of Ohio Judicial Elections and Suggestions for Reform Focusing on the 2000 Race for the Ohio Supreme Court*, 35 AKRON L. REV. 159, 159–61 (2001); Nancy Marion et al., *Financing Ohio Supreme Court Elections 1992–2002: Campaign Finance and Judicial Selection*, 38 AKRON L. REV. 567, 567–68 (2005).

[60] *See, e.g.*, John D. Felice et al., *Judicial Reform in Ohio*, *in* JUDICIAL REFORM IN THE STATES 51–52 (Anthony Champagne & Judith Haydel eds., 1993).

[61] *See* Felice et al., *supra* note 60, at 65–66.

[62] *Id.* at 65. *See also* Thomas R. Phillips, *Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 137–47 (2003) (providing a critique on the current state of judicial elections). The substance of this article was taken from a keynote address made in 2002. *See* Chief Justice Thomas R. Phillips, Keynote Address at The Ohio State University Moritz College of Law Symposium: Perspectives on Judicial Independence (Mar. 21, 2002).

C. Campaign Contributions

The dramatic increase in the cost of judicial campaigns has many citizens concerned.[63] These trends have had a major impact on public evaluations of the judicial system. A poll commissioned by the late Ohio Supreme Court Chief Justice, Thomas J. Moyer, revealed that "nine out of ten Ohioans believed that judicial decisions were affected by political contributions."[64] A League of Women Voters survey corroborated this finding, with 83% of voters agreeing that "campaign contributions influence judges and judicial candidates . . . ."[65] Even 75% of Ohio judges themselves expressed concern that special interests were trying to use the court to shape policy.[66]

On January 25, 2006, Chief Justice Moyer testified before the Ohio House Judiciary Committee on H.B. 266, stating, "A majority of citizens believe campaign donations influence the behavior of a judicial candidate if he or she should win. How can we expect citizens to believe otherwise when more than seven million dollars was raised by candidates in three of the Supreme Court races in 2004?"[67]

Even the U.S. Supreme Court acknowledged the reasonable apprehension people may have when they learn that opposing sides have financed the judges in their cases. "[R]elying on campaign donations may leave judges feeling indebted to certain parties . . . . Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary."[68]

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[63] *See* discussion *supra* Part III.

[64] *See* Citizens' Comm. on Judicial Elections, *Report of the Citizens' Committee on Judicial Elections (Ohio) (1995)*, *in* PBS FRONTLINE: JUSTICE FOR SALE: SUMMARIES OF SELECTED STUDIES, http://www.pbs.org/wgbh/pages/frontline/shows/justice/que/studies.html (last visited Mar. 11, 2010).

[65] LEAGUE OF WOMEN VOTERS OF OHIO, HIGH STAKES BIG MONEY: CHANGING THE WAY OHIO ELECTS JUDGES 2 (2002), *available at* http://www.lwvohio.org/assets/attachments/file/Changing_the_Way_Ohio_Elects_Judges.pdf.

[66] AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: HISTORY OF REFORM EFFORTS: OPINION POLLS AND SURVEYS, http://www.judicialselection.us/judicial_selection/reform_efforts/opinion_polls_surveys.cfm?state=.

[67] Chief Justice Thomas J. Moyer, Testimony on H.B. 266 before the Ohio House Judiciary Committee (Jan. 25, 2006), *available at* http://www.supremecourt.ohio.gov/PIO/Speeches/2006/moyerHB266_012506.asp.

[68] Republican Party of Minn. v. White, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring).

We cannot ignore the threat that financial contributions pose to judicial independence; without which, there is no real separation of powers under our tripartite system of government. According to Justice Kennedy, "If an attorney gives money to a judge with the expectation that the judge will rule in his interest or his client's interest, that is corrosive of our institutions. That is corrosive of judicial independence."[69] Justice Breyer echoed a similar sentiment, "Judicial independence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts . . . [which] do[es] not include deciding according to campaign contributions."[70]

"Procedural fairness is *the* critical element in public perception and satisfaction with the court system."[71] The operation of the Ohio Judicial System has caused many analysts to question its integrity. For example, the *Cleveland Plain Dealer* Editorial Page bluntly called Ohio "a state that's a national symbol of courts for sale."[72] This characterization is of great concern given that 84% of Americans feel we need strong courts that are free from political influence.[73]

In Ohio, money via campaign contributions is a destructive and glaring exception to the universal norms of judicial conduct, and it is destroying the public's trust in our courts.

D. Disqualification

As the ABA recognized, there needs to be a disqualification and recusal standard for campaign contributions;[74] yet, only Alabama and Mississippi have one.[75] The U.S. Supreme Court has recognized that recusal is the due process counterweight to judicial free speech issues,

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[69] Interview by Bill Moyers with Justices Stephen Breyer and Anthony Kennedy, U.S. Supreme Court, in Washington, D.C. (PBS television broadcast Nov. 23, 1999), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html.

[70] *Id.*; *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(e) (2004) (disqualification for campaign contributions); *id*. at Canon 5(C)(2) cmt.

[71] Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 5 (2007).

[72] Op-Ed, *Ohio Supreme Court*, CLEVELAND PLAIN DEALER, Apr. 6, 2006, at B8.

[73] *See* JUSTICE AT STAKE, SPEAK TO AMERICAN VALUES HANDBOOK 2 tbl. (2006), *available at* http://www.justiceteaching.org/resource_material/JAS-SpeaktoAmValues.pdf.

[74] *See supra* note 36 and accompanying text.

[75] *See supra* notes 42–43 and accompanying text.

which include campaign contributions,[76] and an effective counterweight requires a sound and comprehensive disqualification and recusal procedure.[77]

The ABA amended Canon 2.11 to include mandatory disclosure and disqualification over certain threshold contribution limits precisely because of concerns arising from the pay-to-play perception.[78] In Ohio, like most states, many question the motives behind large campaign contributions provided to judges.[79] According to a leading commentator on judicial disqualification:

> The practice of accepting gifts or favors from parties implicates fundamental policy concerns. Parties are usually not permitted to give such gifts or favors, and judges are usually not permitted to accept them. Indeed, even favors that were bestowed on a judge by a person before he or she became a party before that judge may raise concerns sufficient to warrant judicial disqualification in certain circumstances.[80]

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[76] *See* Republican Party of Minn. v. White, 536 U.S. 763, 794 (2002) (Kennedy, J., concurring); *id.* at 802 (Stevens, J., dissenting) ("[T]he problem of individual bias is usually cured through recusal."); *see generally* Tobin A. Sparling, *Keeping up Appearances: The Constitutionality of the* Model Code of Judicial Conduct's *Prohibition of Extrajudicial Speech Creating the Appearance of Bias*, 19 GEO. J. LEGAL ETHICS 441 (2006) (arguing that due process rights must prevail over judicial free speech).

[77] *Cf. White*, 536 U.S. at 797–803 (Stevens, J., dissenting) (discussing the importance of recusal procedures).

[78] *See* AM. BAR ASS'N, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 206 (2004) ("In August 1999, the ABA House of Delegates adopted Canon 3E(1)(e) as an amendment . . . . The amendment imposes contribution limits and disclosure standards on judges . . . and requires judges to disqualify themselves from hearing cases in which parties or their lawyers have contributed to the judge's campaign . . . .").

[79] *See, e.g.*, Gary Webb, *Mob-Linked Groups Donate to Chief Justice*, CLEVELAND PLAIN DEALER, Oct. 12, 1986, at 1A (discussing potential judicial impropriety of campaign contributions from two labor unions allegedly linked with organized crime).

[80] FLAMM, *supra* note 53, at 176–77 (citations omitted); *see also* SHAMAN ET AL., *supra* note 53, at § 11.12.

VI. DISQUALIFICATION AND RECUSAL PROPOSAL TO REVISE OHIO'S CODE OF JUDICIAL CONDUCT

As stated above, Ohio recently revised its Code of Judicial Conduct.[81] This revision followed a lengthy process and review of the former Canons undertaken by the Task Force on the Code of Judicial Conduct from 2007 through 2009.[82]

At the March 31, 2008 meeting of the Ohio Judicial Conference's Ethics and Professionalism Committee, Judge Joseph D. Russo proposed a position paper to the Task Force on the Code of Judicial Conduct.

A. Judge Russo's Position Paper and Proposal

Today, as in the past, any justice of the Ohio Supreme Court can sit on cases where parties or entire industries which have financed their campaigns have legal issues pending before them. *The Wall Street Journal*, *The New York Times*, and various Ohio newspapers have gone to great lengths to discuss how judicial campaigns have been taken over by "spending by special interests" that has soared "into the stratosphere."[83] These types of characterizations have led to perceptions of impropriety.

In 2002, Chief Justice Moyer commented, "We have been subjected to the dark side of democracy. The message is a direct attack on our courts. We are telling people that we don't expect judges to be fair and impartial."[84] "Roy Shotland, a Georgetown law professor and national authority on judicial selection, put it bluntly: Ohio is viewed nationally as a

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[81] *See supra* notes 34–35 and accompanying text.

[82] *See* OHIO CODE OF JUDICIAL CONDUCT (2009) (summarizing the background behind Ohio's new Code of Judicial Conduct effective Mar. 1, 2009), *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/conduct/judcond0309.pdf.

[83] Dorothy Samuels, *Judges for Sale*, N.Y. TIMES, Dec. 12, 2006, http://select.nytimes.com/2006/12/12/opinion/13talkingpoints.html?pagewanted=1&_r=1; *see, e.g.*, *A Free Speech Landmark: Campaign-Finance Reform Meets the Constitution*, WALL ST. J., Jan. 22, 2010, at A18; Brody Mullins & Elizabeth Williamson, *From Yachts to Textiles, Perks for Special Interests*, WALL ST. J., Jan. 29, 2009, http://online.wsj.com/article/NA_WSJ_PUB:SB123318931108326779.html; Mark Niquette, *Ruling Could Render Ohio's Campaign-Spending Law Toothless*, COLUMBUS DISPATCH, Jan. 22, 2010, at 1A.

[84] Editorial, *Cash v. Quality: Ohio's Judicial Elections Smell More of Money than Merit, and the Rules Must Change to Give Voters Meaningful Choices*, CLEVELAND PLAIN DEALER, Mar. 5, 2003, at B8.

kind of rogue state. It has become the epitome of all that's wrong with judicial elective politics."[85]

In response to this problem, Chief Justice Moyer organized a forum to discuss this issue in the Spring of 2003. The forum, "entitled 'Judicial Impartiality: The Next Steps,' was the first forum to discuss the judiciary since the state's last constitutional convention in 1912. Moyer organized the forum after unsuccessful attempts to coax the General Assembly to react to the spiraling costs to candidates and the rise of interest groups' influence."[86]

Two reports were issued as a result of this forum: A Call to Action[87] and Progress Report.[88] The reforms offered by these reports were not well-received by many in the media. For example, the Editorial Board of the *Cleveland Plain Dealer* stated:

> The blueprint for judicial reform in Ohio is misnamed . . . and would be more aptly titled 'Baby Steps—Some of Them in the Wrong Direction. Monday's release of the long-awaited recommendations from a judicial election committee can only be described as a disappointment. . . . Last March, we suggested that this effort at judicial reform replace a system that pays lip service to fairness and impartiality with one that demands them. These reforms, though are neither courageous nor meaningful.[89]

On January 25, 2006, Chief Justice Moyer testified before the Ohio House Judiciary Committee on H.B. 266, where he stated, "A majority of

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[85] Editorial, *Ohio Courts Held Hostage by Combatants*, DAYTON DAILY NEWS, Mar. 10, 2003, at A8.

[86] T.C. Brown, *Leaders Discuss Electing Justices*, CLEVELAND PLAIN DEALER, Mar. 7, 2003, at B1.

[87] NANCY MARION ET AL., JUDICIAL IMPARTIALITY: THE NEXT STEPS; PRELIMINARY REPORT ON CONFERENCE PROCEEDINGS: A CALL TO ACTION (2003) (a preliminary report on the forum proceedings of March 6, 2003).

[88] JUDICIAL INDEPENDENCE AND IMPARTIALITY: THE NEXT STEPS, A PROGRESS REPORT (2004) (a report on the activities through 2003 of the Judicial Qualifications & Term Lengths, Campaign Finance Disclosure, and Voter Education & Public Funding Work Groups).

[89] Editorial, *Nice Try, But . . . Reforms Suggested for Ohio's Judicial Election System Would Do Very Little to Improve on the Current Mess*, CLEVELAND PLAIN DEALER, Jan. 14, 2004, at B8.

citizens believe campaign donations influence the behavior of a judicial candidate if he or she should win. How can we expect citizens to believe otherwise when more than seven million dollars was raised by candidates in three of the Supreme Court races in 2004?"[90]

In a front page article of the Sunday *New York Times*, Ohio judicial elections were the subject of national ridicule when the *Times* reported:

> Thirty-nine states elect judges, and 30 states are holding elections for seats on their highest courts this year. Spending in these races is skyrocketing, with some judges raising $2 million or more for a single campaign. As the amounts rise, questions about whether money is polluting the independence of the judiciary are being fiercely debated across the nation. And nowhere is the battle for judicial seats more ferocious than in Ohio.
>
> An examination of the Ohio Supreme Court by *The New York Times* found that its justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time. Justice O'Donnell voted for his contributors 91 percent of the time, the highest rate of any justice on the court.
>
> In the 12 years that were studied, the justices almost never disqualified themselves from hearing their contributors' cases. In the 215 cases with the most direct potential conflicts of interest, justices recused themselves just 9 times.
>
> Even sitting justices have started to question the current system. ''I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race,'' said Justice Paul E. Pfeifer, a Republican member of the Ohio Supreme Court. ''Everyone interested in contributing has very specific interests.''

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[90] Chief Justice Thomas J. Moyer, Testimony on H.B. 266 before the House Judiciary Committee (Jan. 25, 2006).

> ''They mean to be buying a vote,'' Justice Pfeifer added. ''Whether they succeed or not, it's hard to say.''[91]

The Ohio State Bar Association responded to this critique by saying that the "Association would like to see consideration of stronger recusal and/or disqualification provisions that would be triggered when campaign contributions reach certain levels, subject to waiver by mutual consent of the parties."[92]

Recently, Chief Justice Moyer stated in part:

> As in many other states, including my own state of Ohio, public confidence in the courts is being threatened under the weight of more aggressive, partisan and expensive judicial elections.
>
> Interest group campaign contributions have caused judicial candidate fundraising to skyrocket all across the country. . . .
>
> In Ohio, where I have served as chief justice since 1987, election to the Supreme Court now routinely costs at least $1 million. Candidates have little choice but to raise funds from attorneys and others who may later have cases in our court, creating the perception of a conflict of interest in many minds.[93]

Despite these problems, the proposed Ohio Code of Judicial Conduct Rule 2.11 deletes the model rule relating to disqualification procedures related to the acceptance of significant campaign contributions. This deletion is wholly inappropriate at this juncture in Ohio judicial history. The perception of the Ohio Supreme Court must be dramatically altered. Since Ohio is currently overhauling the Ohio Code of Judicial Conduct,

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[91] Adam Liptak & Janet Roberts, *Tilting the Scales? The Ohio Experience: Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1; *see also* Adam Liptak, *Case Studies: West Virginia and Illinois*, N.Y. TIMES, Oct. 1, 2006, at A21 (discussing examples from those states); *see generally*, Opinion, *Judicial Politics Run Amok*, N.Y. TIMES, Sept. 19, 2006, at A24 (arguing that high spending and special interest involvement in judicial campaigns undermine public respect and confidence in the judiciary).

[92] Press Release, Oh. St. B. Ass'n, Oct. 5, 2006 (statement of President John S. Stith).

[93] Thomas J. Moyer, *Wisconsin Has Chance to Improve Faith in Courts*, CAPITAL TIMES, Mar. 5, 2008, at A7 (arguing in favor of public financing of judicial elections).

now is the time to act. There will be some who will resist these changes because of the sacrifice it may impose on the current members of the court. However, doing the right thing is often difficult. A recusal rule related to campaign contributions will address any appearance of impropriety. A recusal rule partnered with a second proposal for publicly financed judicial campaigns, such as those currently held in North Carolina or to be held in the future in Wisconsin, will eliminate the specter of a judicial system influenced by financial contributions. Together, these proposals will ensure a fair and impartial judiciary. For these reasons, the following modification to Rule 2.11(A)(4) of the Ohio Rules of Judicial Conduct should be made:

> (4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, ~~or~~ the law firm of a party's lawyer, has within the current and/or previous election cycles made aggregate contributions to the judge's current campaign or any previous campaign for any office that qualifies that person, entity, or special interest, as a "major donor," which is defined, as follows:
>
> > (a) If the donor is an individual, "donor" means that individual, the individual's spouse, or the individual's or the individual's spouse's child, mother, father, grandmother, grandfather, grandchild, employee and employee's spouse;
> >
> > (b) If the donor is an entity other than an individual, "donor" means any entity, its employees, officers, directors, shareholders, partners, members, and contributors and the spouse of any of them;
> >
> > (c) If the donor is a 501(C) or 527 organization as defined by the Internal Revenue Service, then "donor" means any individual, and any entity, including its employees, officers, directors, shareholders, partners, members, contributors and spouses of any of them who have contributed to the 501(C) or 527 organization;
> >
> > (d) If the donor is a political party organization as defined by the Internal Revenue Service, then "donor" means any individual, and any entity,

> including its employees, officers, directors, shareholders, partners, members, contributors and spouses of any of them who have contributed to the political organization;
>
> (e) A "major donor" is a donor who or which has, in the judge's current and/or previous election cycle for any office, made a contribution to the judge's campaign for any office of (a) more than $10,000, if the judge is a justice of the Supreme Court or running for that office, (b) more than $7,500 if the judge is a judge of the Court of Appeals or running for that office, or (c) more than $5,000 if the judge is a judge of a court other than the Supreme Court or the Court of Appeals or running for that office;
>
> (f) The term "contribution to the judge's campaign" shall be the total of all contributions to a judge's campaign and shall be deemed to include all contributions of every kind and type whatsoever, whether in the form of cash, goods, services, or other form of contribution, and whether donated directly to the judge's campaign or donated to any other person or entity for the purpose of supporting the judge's campaign and/or opposing the campaign of the judge's opponent(s). The term "contribution to a judge's campaign" shall also be deemed to include any publication, advertisement or other release of information, or payment therefore, other than a bona fide news item published by existing news media, which contains favorable information about the judge or which contains unfavorable information about the judge's opponent(s).

B. Initial Reaction to the Proposal

The initial proposal was well-received by judges in attendance at the Ethics and Professionalism Committee meeting. The Committee generally concurred on the need to bring the proposal to the attention of the Ohio Judicial Conference and the Task Force, in hopes of allaying any negative

perception of the supreme court. The meeting adjourned with all of the judges agreeing to consider the proposal for revision at the next meeting.

On April 21, 2008, the Committee met again and finalized its proposal for the Task Force.[94] The proposal was passed by all members present because "[t]he committee believed that when a major donor to a judge's election campaign or previous campaign is a party to litigation, the judge should recuse himself or herself. This is important to the perception of fairness and impartiality."[95]

C. The Ohio Judicial Conference's Response to the Proposal

The Committee then forwarded the proposal to the Task Force and the Ohio Judicial Conference's Executive Committee.[96] On June 2, 2008, the members of the Ethics and Professionalism Committee received a letter from Judge Sheila G. Farmer, Chair of the Ohio Judicial Conference.[97] The letter explained that the Executive Committee overwhelmingly declined to endorse proposed Rule 2.11(A)(4), and thus, "the new Rule 2.11(A)(4) proposed by the Judicial Ethics and Professionalism Committee does not represent the position of the Ohio Judicial Conference."[98] However, Judge Farmer stated, "The Ohio Judicial Conference considers revisions to the Code of Judicial Conduct to be of particular importance to Ohio Judges."[99]

At the time, the Officers of the Executive Committee were Judge Sheila Farmer, Judge Thomas Swift, Judge Jim James, Judge Everett Krueger, and the Honorary Chair, Chief Justice Thomas J. Moyer.[100] All

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[94] *See OJC in Action*, FOR THE REC. (Ohio Judicial Conference, Columbus, Ohio), 2d Quarter, 2008, at 19, *available at* http://www.ohiojudges.org/_cms/tools/act_Download.cfm?FileID=2356&/FtR 2008 2nd Qtr..pdf.

[95] *Id.*

[96] *See id.*

[97] Letter from Judge Sheila G. Farmer, Chair, Ohio Judicial Conference, to Supreme Court Task Force on the Code of Judicial Conduct, Ohio Supreme Court (June 6, 2008) (on file with the Ohio Judicial Conference).

[98] *Id.*

[99] *Id.*

[100] *See* OHIO JUDICIAL CONFERENCE, 2008 REPORT 11 (2008), *available at* http://www.ohiojudges.org/_cms/tools/act_Download.cfm?FileID=2164&/2008 Biennial Rpt- non spreads.ind.pdf.

the Officers of the Executive Committee were members of the Republican Party—as were all of the Justices of the Ohio Supreme Court.[101]

Despite this letter, the Task Force met on June 12, 2008 to discuss the proposed change to Rule 2.11.[102] According to the meeting's minutes, the Task Force discussed three alternatives relative to the issue of disqualifying a judge "based on the receipt of campaign contributions: adhering to the initial Task Force recommendation to delete Model Rule 2.11(A)(4), adopting a proposed rule in place of Model Rule 2.11(A)(4), or adopting a proposed new Comment [1A]."[103] The Task force also addressed the scope of the proposals:

> [W]hether a rule or comment addressing . . . campaign contributions would facilitate "judgeshopping" by litigants and lawyers, [and] whether a rule or comment would invite grievances against judges, . . . invite grievances or malpractice actions against lawyers who fail to investigate and pursue possible bases for disqualification, and . . . take into account contributions made by lawyers and litigants to issue-oriented campaigns operating independently from the judge's campaign committee.[104]

After discussion, the Task Force "[a]dopted a motion to modify and add proposed Comment [1A] to Rule 2.11."[105]

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[101] *See, e.g.*, *Election Filings*, AKRON BEACON J., Jan. 3, 2004, at B4 (noting Sheila Farmer's affiliation with the Republican Party); *Election 2006*, AKRON BEACON J., Nov. 3, 2006, at G11 (noting Jim James' affiliation with the Republican Party); Lee Leonard, *Bill Adding Judgeships Clears Legislature*, COLUMBUS DISPATCH, Feb. 3, 1994, at 1B (noting Everett Krueger's affiliation with the Republican Party); Dennis Willard, *Method of Picking Justices Should Go*, AKRON BEACON J., June 14, 2009, at B1 (noting all seven Ohio Supreme Court Justices are members of the Republican Party).

[102] Minutes of the Task Force on the Code of Judicial Conduct, (June 12, 2008), (on file with authors). The Task Force Members present at that meeting were Judge Thomas Bryant (Chair), Bernie Bauer, Marianna Bettman, Judge Douglas Chamberlain, Judge Colleen Cooney, Jonathan Coughlan, Judge Jack Durkin, Kathleen Graham, Jonathan Hollingsworth, Judge Jim Jensen, George Jonson, Marvin Karp, Jonathan Marshall, Jean McQuillan, Judge Jack Milligan, Theresa Proenza, Judge Arlene Singer, Judge Dave Sunderman, and Bill Weisenberg. *Id.*

[103] *Id.*

[104] *See id.*

[105] *Id.*

The Task Force passed Comment [1A] on that same day. The comment would have limited the amount of contributions a judge may receive for a judicial campaign and encouraged judges that they to be cognizant of societies' perceptions of "independence, integrity, or impartiality" if they accepted multiple contributions from a single person or organization. Specifically, it stated that if within the past six years, an individual or an organization contributed a total amount of money to a judge's campaign that a reasonable person would believe could affect the "independence, integrity, or impartiality" of the judge, then that judge should disqualify himself or herself from the contributor's case.[106]

D. Ohio Judicial Conference Task Force Rejects the Proposal

On July 31, 2008, the Task Force produced a Code of Judicial Conduct for public comment, with the period for those comments ending October 17, 2008.[107] After the public comment period, the Task Force reviewed twenty-two written comments and made recommendations to the Ohio

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[106] Comment [1A]:

> Rules 4.4(J) and (K) limit the contributions that a judge's judicial campaign may receive from separate individuals and organizations in connection with a particular campaign. Nonetheless, a judge should be sensitive to the effect that the receipt of multiple contributions in the course of a campaign for any public office may have on the perception of the judge's independence, integrity, and impartiality. These contributions may have been received over a period of years, for example, from a particular individual or organization, from several members of a single law firm, or from officers or members of a single organization. Accordingly, if a judge knows or learns by means of a timely motion that a party, officers or members of a party, a party's lawyer, members of the lawyer's law firm, or the law firm itself has, in the current year or in any of the previous six calendar years, made contributions to any campaign committee established by the judge to support his or her candidacy for any public office in a total amount that a reasonable person would believe could effect the independence, integrity, or impartiality of the judge in a case involving the party, lawyer, or law firm, the judge should disqualify himself or herself from that case.

[107] *See OJC in Action*, FOR THE REC. (Ohio Judicial Conference, Columbus, Ohio), 3d Quarter, 2008, at 21, *available at* http://www.ohiojudges.org/_cms/tools/act_Download.cfm ?FileID=2356&/FtR20082ndQtr.pdf.

Supreme Court.[108] Again, Rule 2.11(A)(4) and Comment [1A] were entirely removed from the proposed Code.[109]

At the Judicial Ethics and Professionalism Committee meeting on August 25, 2008, an Ohio Judicial Conference Executive Committee staff member informed the Committee that although Comment [1A] passed the Task Force, the supreme court had already rejected it, and thus it was not included in the rule for public review.[110] The Chair of the Committee then suggested that due to the Ohio Judicial Conference's clear indication that it would not endorse the amended rule, a new one would not be proposed.[111] However, it was suggested that any person interested could write directly to the court during the public comment period.[112]

The members of the Ohio Supreme Court have recognized public perceptions of the undue influence that campaign contributions can have on judicial decisions.[113] Yet, when provided with a reform proposal and the opportunity to effectuate change, they unceremoniously rejected it. It is incumbent upon the members of the court to embrace reform, especially in light of a League of Women Voters Survey, which found that 64% of voters agreed "that significant reform of the current judicial campaign system is required."[114]

At this juncture, it would be beneficial to re-propose a modified measure directly to the Ohio Supreme Court. Some critics have stated that a person could "buy" a judge's disqualification by strategically giving them too much money under proposed Rule 2.11(A)(4).[115] In light of this concern made by a Brennan Center for Justice at New York University School of Law report, an additional change was proposed to Rule 2.11(C). It added:

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[108] SUPREME COURT OF OHIO, SUMMARY OF REVISIONS CONTAINED IN THE 2009 CODE OF JUDICIAL CONDUCT (2009).

[109] *See* OHIO CODE OF JUDICIAL CONDUCT § 2.11(A)(4) (Proposed Draft Mark-Up Version 2009).

[110] Mark R. Schweikert, Staff Member, Ohio Judicial Conference Executive Committee, Comment at the Judicial Ethics and Professionalism Committee Meeting (Aug. 25, 2008).

[111] *See* Letter from Judge Sheila G. Farmer to Supreme Court Task Force on the Code of Judicial Conduct, *supra* note 97.

[112] *See OJC in Action*, *supra* note 107.

[113] *See* Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at 1.

[114] *See* AM. JUDICATURE SOC'Y, *supra* note 66.

[115] *See* JAMES SAMPLE ET AL., FAIR COURTS: SETTING RECUSAL STANDARDS 30 (2008), *available at* http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf.

> If the disqualification is under division (A)(4) of this rule, the disqualification under this section may be waived by the party, provided that the party, the party's lawyer, or the officers, partners, or other management-level employees of the party or of the law firm of the opposing party's lawyer, has not made such contributions.[116]

Thus, if by aggregate contribution, a group sought to give a judge more money than he or she would be allowed to receive in the hopes of automatically disqualifying that judge in the future, the opposing side could simply waive the provision, and defeat the group's original purpose. This modification will eliminate the "judge-shopping" argument made by critics of the proposed rule.

Judge Russo formally proposed these changes in a letter to the Ohio Supreme Court during the comment period, but the court rejected the changes.[117]

VII. THE UNITED STATES SUPREME COURT AND MONEY IN STATE JUDICIAL RACES

An Ohio case, *Dupre v. Telxon Corp.*,[118] which the United Sates Supreme Court denied certiorari for during the 2008 term,[119] addressed whether campaign contributions received by a judge from one of the parties to a lawsuit pending in the judge's court denies the opposing party due process of law.[120] In *Dupre*, the petitioners asserted that their right to an impartial hearing before the Ohio Supreme Court had been denied.[121] They asserted that the right to a fair trial "has become so obscured by the influx of campaign contributions into the judicial process, that to the extent the right still exists, it is little better than no right at all."[122] The attorneys in this case further argued that the Supreme Court "should hear [the] matter because the current practices can only be expected to grow worse without

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[116] *See supra* Part VI.A.

[117] Letter from Judge Joseph D. Russo, Ohio Common Pleas Court, to the Ohio Supreme Court (Oct. 1, 2008) (on file with the authors).

[118] 129 S. Ct. 200 (2008).

[119] *Id.*

[120] *See* Petition for Writ of Certiorari at 22, Dupre v. Telxon Corp., 129 S. Ct. 200 (Ohio July 7, 2008) (No. 08-41).

[121] *See id.*

[122] *Id.* at 2.

[the] Court's intervention, and the public's faith in the judiciary is being destroyed."[123]

Although the Supreme Court denied certiorari in *Dupre*, it agreed to hear the West Virginia case of *Caperton v. A.T. Massey Coal Co.*,[124] which addressed the same issue as *Dupre*,[125] specifically, whether "the Due Process Clause of the Fourteenth Amendment was violated when one of the justices . . . denied a recusal motion."[126]

In *Caperton*, "a West Virginia jury returned a verdict that found . . . A.T. Massey Coal Co. . . . liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations . . . . In June 2004 the state trial court denied Massey's post-trial motions challenging the verdict and the damages award . . . ."[127]

After the verdict, but before the appeal, Don Blankenship, Massey's chairman, chief executive, and president, decided to support attorney Brent Benjamin's candidacy for the Supreme Court of Appeals of West Virginia.[128] In support of Benjamin's candidacy, Blankenship contributed the $1000 statutory maximum to Benjamin's campaign committee, donated almost $2.5 million to a political organization which supported Benjamin, and spent over $500,000 on independent expenditures, including mailings, television ads, and newspaper advertising in support of Benjamin.[129] "Blankenship's $3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee."[130] As a result of this campaign, Benjamin won with 53% of the vote.[131]

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[123] *Id.* at 26. The Court also denied certiorari for similar issues in another Ohio case, *Jones v. Burnside*, 549 U.S. 883, *reh'g denied*, 549 U.S. 1027 (2006), upon which *Dupre* relied. *See* Reply Brief for the Petitioner at 11, Dupre v. Telxon Corp., 129 S. Ct. 200 (Ohio Aug. 19, 2008) (No. 08-41). The Court also denied certiorari for *Avery v. State Farm Mutual Automobile Insurance Co*., 547 U.S. 1003 (2006), *cert. denied*., an Illinois case, which *Jones* relied upon. *See* Reply Brief for the Petitioner, *supra* note **Error! Bookmark not defined.**.

[124] 129 S. Ct. 2252 (2009).

[125] *See id.* at 2256.

[126] *Id.* at 2256.

[127] *Id.* at 2257.

[128] *See id.*

[129] *See id.*

[130] *Id.* (citation omitted).

[131] *See id.*

Because of the existing relationship between Massey and Benjamin, in "October of 2005, before Massey filed its petition for appeal . . . Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct."[132] Justice Benjamin "denied the motion . . . [and] indicated that he 'carefully considered the bases and accompanying exhibits proffered by the movants.' But he found 'no objective information . . . to show that this Justice has prejudged the matters which comprise this litigation or that this Justice will be anything but fair and impartial.'"[133]

Ultimately, in November 2007, with Justice Benjamin seated on the panel, the court reversed the $50 million verdict against Massey.[134] Justice Starcher's dissent stated, "[T]he majority's opinion is morally and legally wrong." [135]

As a result, *Caperton* appealed the case to the U.S. Supreme Court.[136] On June 8, 2009, the Court announced its opinion in *Caperton*.[137] The majority opinion noted it is "axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'"[138] "As the Court has recognized, however, 'most matters relating to judicial disqualification [do] not rise to a constitutional level.'"[139]

The Court acknowledged that the lack of past precedent regarding judicial elections made the case difficult to decide.[140] The specific claim Caperton argued was that "Blankenship's pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias."[141] Given this context, the Court conceded the difficulty of assessing actual bias, given the fact that the inquiry is often a private one, as it was in this case.[142] As the Court observed in the absence of objective criteria, "there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case."[143]

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[132] *Id.*
[133] *Id.* at 2257–58 (citations omitted).
[134] *See id.* at 2258.
[135] *Id.* (citation omitted).
[136] *See id.* at 2259.
[137] *See id.* at 2252.
[138] *Id.* (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).
[139] *Id.* (quoting FTC v. Cement Inst., 333 U.S. 683, 702 (1948)).
[140] *See id.* at 2262.
[141] *Id.*
[142] *See id.* at 2263.
[143] *Id.*

These concerns led the Court to note that in these circumstances, the law has established objective standards that do not require proof of actual bias.[144] Although formulating an objective approach, the majority in this case promoted the standard developed in *Withrow v. Larkin*,[145] where the Court asked whether, "under a realistic appraisal of psychological tendencies and human weaknesses, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."[146]

After considering the facts of this case, the Court concluded:

> [T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.[147]

The Court provided some direction as to how "objective analysis" should be applied when it stated that the analysis should center on the contribution's relative size, the total amount of money contributed to the campaign, and the apparent effect that the contribution had on the outcome of the election.[148] In providing these guidelines, the Court stressed that deciding whether a campaign contribution was a "necessary and sufficient" cause of a campaign victory is not the proper inquiry.[149] Instead, the Court concluded that "Due Process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'"[150]

After conducting the constitutional due process analysis, the Court emphasized the importance of state judicial codes in these circumstances.[151] In an apparent directive to the states, the Court asserted

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[144] *See id.* (citing Tumey v. Ohio, 273 U.S. 510, 532 (1927); Mayberry v. Pennsylvania, 400 U.S. 455, 465–66 (1971); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986)).

[145] 421 U.S. 35 (1975).

[146] *Id.* at 47.

[147] *Caperton*, 129 S. Ct. at 2263–64.

[148] *Id.* at 2264.

[149] *See id.*

[150] *Id.* (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)).

[151] *See id.* at 2265–66.

that "the[se] codes are '[t]he principal safeguard against judicial abuses' that threaten to imperil 'public confidences in the fairness and integrity of the nation's elected judges.'"[152] Finally, the Court suggested that because of the importance of judicial integrity, the "[s]tates may choose to 'adopt recusal standards more rigorous than due process requires.'"[153]

VIII. REFORMING THE OHIO JUDICIARY PROCESSES

It is imperative that Ohio consider reforming its judiciary processes by making meaningful changes, which will restore public accountability and eliminate the appearance of impropriety. To satisfy Ohio citizens' need for public accountability in their judiciary and to balance that need with the judicial integrity and independence incumbent upon those positions, Ohio must immediately undertake three reforms.

First, Ohio must allow both campaign advertisements and the ballot to identify judicial candidates by political party. Second, Ohio must allow judicial candidates to comment on specific issues when prompted by the press and the public if they agree to not rule on future cases based upon these personal views. Third, Ohio must enact the Recusal Rule as proposed by Judge Russo. The State must implement these reforms in both the Code of Judicial Conduct and the Ohio Revised Code. Arguably, one of these reforms may have already taken place, but to the extent to which it has not, Ohio must further reform the rules.

A. Allowing Partisan Judicial Elections

According to the American Judicature Society:

> Seven states elect all of their judges in partisan elections, and seven states use partisan elections to elect some of their judges. Thirteen states use nonpartisan elections to select all of their judges. An additional eight states use nonpartisan elections to select some of their judges. In total, 33 states choose some, most, or all of their judges using some form of contestable popular election.[154]

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[152] *Id.* at 2266 (quoting Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 4, 11, *Caperton*, 129 S. Ct. 2252 (No. 08-22)).

[153] *Id.* at 2267 (quoting Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002)).

[154] LARRY C. BERKSON & RACHEL CAUFIELD, AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT 2 (2004), *available at* http://www.ajs.org/selection/docs/Berkson.pdf.

Ohio is currently one of thirteen states that hold nonpartisan elections.[155] The basic argument for nonpartisan elections is "allowing more political views into judicial races could eventually taint the bench's goal of impartiality."[156] However, judges run under the party heading in the primaries and are part of the slate cards of the party during the election cycle.[157] Interestingly, there does not appear to be any advantage to a nonpartisan election over a partisan election. Some argue that to promote political accountability, the ballot must list a judge's party, so the electorate may be better informed about the choices they make.[158] In fact, "[i]n partisan [judicial] races, the political party label may give most voters all the information they seek."[159]

Initially, the new Code of Judicial Conduct allowed judicial candidates to identify themselves by party during the election cycle.[160] However, in a 5-2 vote on January 13, 2009, the Ohio Supreme Court reversed this rule without comment.[161] A spokesman for the court stated that the court would "not explain to the public why it held the secret deliberations after initially welcoming public input" regarding the changes to the Code.[162]

Former court of appeals Judge William O'Neill is currently suing the Ohio Supreme Court regarding this ban.[163] O'Neill won a prior lawsuit regarding this prohibition in 2004.[164] The Sixth Circuit later rendered the decision moot by abstaining from granting injunctive or declaratory relief

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[155] *See* OHIO REV. CODE ANN. §§ 3505.03–.04 (West 2009).

[156] Reginald Fields, *Court Reverses Ruling on Candidates*, CLEVELAND PLAIN DEALER, Jan. 21, 2009, at B2.

[157] *See, e.g.*, Reginald Fields, *Ex-Judge Sues over Ban of Judicial Candidates Identifying Party*, CLEVELAND PLAIN DEALER, Jan. 23, 2009, at B6.

[158] *See, e.g.*, MICHAEL DEBOW ET AL., THE FEDERALIST SOC'Y, THE CASE FOR PARTISAN JUDICIAL ELECTIONS (2003), http://fed-soc.org/publications/PubID.90/pub_detail.asp ("Accountability requires institutional arrangements that strengthen voters' ability to select officials who will . . . govern consistently with the majority's policy preferences. Concurrently scheduled partisan judicial elections more readily allow voters to hold judicial policymakers accountable . . . .").

[159] *Id.* (citation omitted).

[160] *See* Fields, *supra* note 156.

[161] *See id.*

[162] *Id.*

[163] *See id.*

[164] *See* O'Neill v. Coughlan, 511 F.3d 638, 639 (6th Cir. 2008).

that would interfere with pending state judicial proceedings; that is, a legal grievance filed against O'Neill that had not yet gone to hearing.[165]

Assuming the same legal rationale that resulted in O'Neill's 2004 victory is still in place, his current suit should also be successful, and this latest decision by the Ohio Supreme Court will be overturned. If that is completed, judicial candidates once again can refer to themselves by their party affiliation from the start of their campaign to the completion of the election cycle.

Putting party affiliation on the ballot, however, requires a legislative enactment. It is imperative that legislation pass immediately so the voters of Ohio will have at least the minimum amount of information required to make an informed decision about whom they are voting for in the judiciary. Rather than bring politics into an already political situation as suggested by its detractors, adding a party cue on the ballot ensures the one party currently in power cannot continue to hold power simply because of name recognition or incumbency. Current arguments with regard to preserving the status quo seem fueled more by protection of those in power rather than an actual attempt to examine this issue and reform it. The addition of party affiliation to the ballot would immediately result in the promotion of increased public accountability on the part of the judiciary.

B. Judicial Candidates Should Be Allowed to Speak Their Minds

A second reform that would bring more public accountability to the judiciary is to allow judicial candidates to express their views with regard to issues of the day raised by the public and by the press. In the past, the Code of Judicial Conduct did not allow judicial candidates to comment, in any way, on issues that could appear before them in the future.[166] This effectively prevented judicial candidates from saying much regarding issues raised by the public or the press. This restriction results in statements that gives voters little insight into candidates' beliefs, such as, "I will be 'fair' and act in accordance with the laws of Ohio."[167]

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[165] *Id.*

[166] *See* OHIO CODE OF JUDICIAL CONDUCT Canon 7(B)(2)(d) (2000) (noting that a judge shall not "[m]ake statements that commit or appear to commit the judge or judicial candidate with respect to cases or controversies that are likely to come before the court").

[167] *See, e.g.*, *id.* at Canon 7(B)(2)(c) (noting that a judge shall not "[m]ake pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office").

In *Republican Party of Minnesota v. White*,[168] the U.S. Supreme Court ruled that Minnesota's requirement prohibiting judges from discussing political issues was unconstitutional under the First Amendment.[169] Minnesota, at the time, had an ethics rule constraining candidates seeking election as a judge from discussing issues that could come before them if elected—referred to as an "announce clause."[170] This ruling eliminated Minnesota's ethics rule and allowed judges greater freedom to discuss their views during the election cycle.[171]

Ohio did not follow the *White* ruling initially because it already removed its "announce clause" years earlier.[172] However, in its most recent form, the Code of Judicial Conduct includes Rule 2.10, which effectively functions as an "announce clause."[173]

In the "Comparison to the Ohio Code of Judicial Conduct," the Ohio Supreme Court clearly took notice of *White* when it stated that Rule 2.10(B) is "narrower with respect to prohibitions" than Ohio Canons 7(B)(2)(c) and (d).[174] The Rule 2.10 restriction demonstrates the prohibition applies to pledges and promises made by a judge, even outside political campaigns.[175] However, after *White*, the prohibition is limited to pledges, promises, or commitments "made in connection with cases, controversies, or issues likely to come before the court" and are inconsistent with a judge's impartial performance.[176] Thus, the reference in Canon 7(B)(2)(d) to "statements that commit or appear to commit the judge" is not retained.[177]

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[168] 536 U.S. 765 (2002).

[169] *See id.* at 788.

[170] *See, e.g.*, *id.* at 773.

[171] *See id.* at 788.

[172] *See, e.g.*, Katherine Moerke, *Must More Speech Be the Solution to Harmful Speech? Judicial Elections After* Republican Party of Minnesota v. White, 48 S.D. L. REV. 262, 290 n.245 (2003) ("The Supreme Court of Ohio also issued an order in September, 2002, stating that no changes will be made to its Code of Judicial Conduct in light of *Republican Party of Minn. v. White*.").

[173] *See* OHIO CODE OF JUDICIAL CONDUCT R. 2.10 (2009).

[174] *See id.* at "Comparison to Ohio Code of Judicial Conduct", *available at* http://www.sconet.state.oh.us/boards/JudConductTF/JudConduct/rule2_10.pdf.

[175] *Id.*

[176] *Id.*

[177] *Id.*

> Rule 2.10(B) corresponds to Ohio Canons 7(B)(2)(c) and (d), except that it does not encompass judicial candidates and it is narrower with

(*continued*)

Arguably, this new rule change would allow a judicial candidate greater freedom to comment on current issues as long as the comments are not inconsistent with the impartial performance of a judge's adjudicative duties. As such, it accomplishes the goal this article seeks to address—greater public accountability on the part of the judiciary. However, to attain this goal, courts must interpret the new rule expansively, as it has been in other jurisdictions post-*White*.[178]

C. Enacting Firm Recusal Standards

Once greater judicial accountability is promoted by allowing (1) advertising and the ballot to state political parties; and (2) judicial candidates to comment on issues of the day, then firm recusal standards must be enacted to ensure judicial integrity and independence.

Ohio must immediately enact the reforms discussed in Judge Russo's recusal proposal. These reforms will prevent the judiciary from falling prey to outside control by moneyed interests donated by people who perceive contributions made to the court can influence it, while still allowing political participation by anyone who desires to be involved. It is incumbent upon the current members of the Ohio Supreme Court to act upon this proposal for the future good of the Ohio judiciary.

> respect to its prohibitions. Placing this particular restriction in Rule 2.10 makes it clear that the prohibition applies to pledges and promises made by a judge even when made outside the context of a political campaign. However, in light of the decision issued by the United States Supreme Court in *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002), the prohibition is limited to pledges, promises, or commitments that are made in connection with cases, controversies, or issues likely to come before the court and that are inconsistent with the impartial performance of a judge's adjudicative duties. For the same reason, the reference in Canon 7(B)(2)(d) to "statements that commit or appear to commit the judge" is not retained in this rule.

Id.

[178] *See, e.g.*, Ala. Right to Life Political Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1083 (D. Ala. 2005) (striking down Alaska's "Pledges or Promises" clause); N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1039 (D. N.D. 2005) ("A careful reading of the majority opinion in *White* makes it clear that the 'pledges and promises clause' . . . [is] not long for this world.").

IX. CONCLUSION

When it comes to the selection of judges throughout Ohio, Ohioans' perceived goal is to promote public accountability, while ensuring judicial independence and integrity.[179] To a great extent, the current rules regarding judicial selection stand in sharp contrast to this goal. Following the proposals discussed in this article, a simple legislative enactment and a change to one rule of the Ohio Code of Judicial Conduct make this goal obtainable. These changes are long overdue.

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[179] *See* discussion *supra* Part V.