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John F. Irwin
Nebraska Court of Appeals

Daniel L. Real
Nebraska Court of Appeals

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Cover Page Footnote

Judge Irwin is one of the original six members of the Nebraska Court of Appeals, created in 1991. He served as Chief Judge from September 1998 through September 2004. He served as President of the National Council of Chief Judges in 2005. He currently chairs the Nebraska Supreme Court Judicial Branch Education Advisory Committee and the Nebraska Judicial Ethics Committee, and co-chairs the Nebraska Criminal and Juvenile Justice Subcommittee of the Minority and Justice Task Force. He also is an officer of the Appellate Judges Council of the American Bar Association. He currently teaches Appellate Litigation at Creighton University School of Law. ** Daniel L. Real is a 1995 graduate, magna cum laude, of Creighton University School of Law. He has served as a career judicial staff attorney for the Nebraska Court of Appeals since 1995. In addition, he has been an adjunct faculty member at Creighton University School of Law in Omaha, Nebraska, since 1999, teaching in the Legal Writing & Lawyering Skills program. He is also the author of scholarly articles. See Daniel L. Real, Appellate Practice in Nebraska: A Thorough, Though Not Exhaustive, Primer in How To Do It and How To Be More Effective, 39 Creighton L. Rev. 29 (2005); Daniel L. Real, Appellate Practice in Nebraska: A Primer in How To Be More Effective, NEB. LAW. MAG., July 2006, at 5.

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ENRICHING JUDICIAL INDEPENDENCE: SEEKING TO IMPROVE THE RETENTION VOTE PHASE OF AN APPOINTIVE SELECTION SYSTEM

Honorable John F. Irwin and*
*Daniel L. Real***

> [I]ndependence of the judges is . . . requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.[1]

> The reformer is careless of numbers, disregards popularity, and deals only with ideas, conscience, and common sense. He feels, with Copernicus, that as God waited long for an interpreter, so he can wait for his followers.[2]

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1. The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

2. Richard Hofstadter, The American Political Tradition and the Men Who Made It 136 (Alfred A. Knopf, Inc. 1973) (1948) (quoting Wendell Phillips).

I. Introduction

Judicial independence and reform seem inextricably intertwined. Even as Alexander Hamilton eloquently argued for the importance of an independent judiciary, the history of our states reveals the difficulty in evolving the best possible system of judicial selection to achieve optimum independence and quality. The inherent resistance to change and the premium to be placed on patience in would-be reformers further complicate the discussion. As the recent symposium at Fordham Law School revealed, a panoply of ideas exists about how to most effectively continue moving toward the ideal system of selecting state court judges. Toward that end, this Essay seeks to address a relatively narrow aspect of the issue: the struggle to improve the effectiveness of judicial retention elections in an appointive selection system. This Essay will start by reviewing the framework of the existing system of selection and retention in Nebraska. It will consider why an appointive system might need, or want, to maintain elective retention. Next, this Essay will consider some of the potential problems related to the effectiveness of existing appointive systems that employ retention elections. This Essay will conclude with some proposals for improving the effectiveness of the retention vote in Nebraska and similarly situated states.

II. A Look at Nebraska's Existing System of Judicial Selection

Nebraska's judiciary consists of a supreme court, an intermediate court of appeals, district courts, county courts, juvenile courts, and a workers' compensation court.[3] All judges in Nebraska are appointed by the governor, who chooses from a list of candidates submitted by a judicial nominating commission.[4] Once appointed, judges in Nebraska must stand for periodic non-partisan retention votes.[5] The Nebraska Constitution, the Nebraska Statutes, and the Nebraska Supreme Court Rules set forth the details of Nebraska's system of judicial selection.[6]

3. *See* Neb. Const. art. V, § 27 (establishing the Juvenile Courts); Neb. Const. art. V, § 2 (establishing the Supreme Court); Neb. Const. art. V, § 9 (establishing the District Courts); Neb. Rev. Stat. § 24-1101 (2006) (establishing the Court of Appeals); Neb. Rev. Stat. § 24-503 (establishing the County Courts); Neb. Rev. Stat. § 48-152 (establishing the Workers' Compensation Court).

4. *See infra* notes 7-27 and accompanying text.

5. *See infra* notes 28-29 and accompanying text.

6. *See infra* notes 7-29 and accompanying text.

Nebraska's existing system of judicial selection is prescribed by the Nebraska Constitution.[7] At Nebraska's inception, Nebraska Supreme Court justices were selected by popular election to six-year terms.[8] Similarly, in 1875, Nebraska began selecting district court judges by popular election to four-year terms and county court judges by popular election to two-year terms.[9] In 1909, the Nebraska Legislature adopted the Nonpartisan Judiciary Act, which barred judicial candidates from official affiliation with any political party.[10] In 1962, Nebraska approved a constitutional amendment adopting a "merit plan for selection of judges" of the Nebraska Supreme Court and the district courts ("the plan").[11] Nebraska extended the plan to include county court judges in 1974.[12] In 1990, Nebraska approved a constitutional amendment creating the Nebraska Court of Appeals, whose judges are also selected by the plan.[13] The plan also governs judicial selection for Nebraska's juvenile courts and workers' compensation court.[14]

The plan dictates that judicial vacancies "shall be filled by the Governor from a list of at least two nominees presented to him by the appropriate judicial nominating commission."[15] Nebraska has separate judicial nominating commissions for various geographic areas within the state, and a separate commission for the Chief Justice of the Supreme Court.[16] Each judicial nominating commission

7. NEB. CONST. art. V, § 21.

8. *See* Amer. Judicature Soc'y, Nebraska History of Judicial Selection Reform, http://www.ajs.org/js/NE_history.htm (last visited Nov. 27, 2006) [hereinafter AJS, Nebraska Judicial Selection] (summarizing the history of judicial selection in Nebraska).

9. *Id.*

10. *Id. But see* State *ex rel.* Ragan v. Junkin, 122 N.W. 473, 474 (Neb. 1909) (ruling that Nonpartisan Judiciary Act violated freedom of speech).

11. NEB. CONST. art. V, § 21; *see also* AJS, Nebraska Judicial Selection, *supra* note 8.

12. AJS, Nebraska Judicial Selection, *supra* note 8.

13. *Id.*; *see also* NEB. REV. STAT. § 24-1101 (2006) (concerning creation of Nebraska Court of Appeals and selection of judges thereto).

14. *See* NEB. REV. STAT. § 43-2117 (concerning juvenile courts); *see also* NEB. REV. STAT. §§ 48-152 to -.01 (concerning workers' compensation court).

15. NEB. CONST. art. V, § 21(1).

16. *See* NEB. CONST. art. V, § 21(4); *see also* NEB. REV. STAT. §§ 24-801 to -812 (2005) (governing judicial nominating commissions); NEB. REV. STAT. § 43-2117 (governing judicial nominating commissions for vacancies in the separate juvenile courts); NEB. REV. STAT. §§ 48-152 to -.01 (governing judicial nominating commissions for vacancies in the Nebraska Workers' Compensation Court); Marks v. Judicial Nominating Comm'n, 461 N.W.2d 551, 553 (Neb. 1990) (holding that §§ 24-801 to -812.01 constitute a complete and independent legislative act covering the subject of judicial nominating commissions); Amer. Judicature Soc'y, Nebraska Current Methods of Judicial Selection, http://www.ajs.org/js/NE_methods.htm (last visited Nov. 27, 2006)

consists of nine members: one Supreme Court justice designated by the governor to serve as a non-voting chairperson; four state bar association members; and four citizens of the relevant judicial district who are not admitted to the practice of law before the Nebraska courts.[17] Additionally, no more than two lawyers and two non-lawyers within each commission may be members of the same political party.[18] Commission members serve staggered four-year terms.[19]

A public hearing must be held within sixty days after the final determination that a judicial vacancy exists.[20] Any lawyer who meets the requirements to serve as a judge may signify her interest in being appointed to fill the judicial vacancy by filing an appropriate application at least twenty-one days prior to the scheduled public hearing.[21] Any member of the public is "entitled to attend the public hearing to express, either orally or in writing, his or her views concerning candidates for the judicial vacancy."[22] After the public hearing, the judicial nominating commission can hold additional private meetings, receive additional information in writing, and make independent investigation and inquiry as it deems necessary to evaluate the qualifications of the candidates.[23] The judicial nominating commission is even empowered, if it feels it is necessary, to institute a search for additional candidates and to hold further public hearings.[24] The judicial nominating commission forwards to the governor the names of candidates who received at least five votes from the voting members of the nominating commission.[25]

[hereinafter AJS, Nebraska Current Methods] (noting that there are a total of thirty-three commissions: one for the Chief Justice of the Nebraska Supreme Court, and one for each district of the supreme court, the court of appeals, the district court, and the courts of limited jurisdiction).

17. *See* NEB. CONST. art. V, § 21(4); *see also* NEB. REV. STAT. §§ 24-802 to -809 (2006) (providing residence requirements for judicial nominating commission members).

18. *See* NEB. REV. STAT. §§ 24-803(1) (concerning non-lawyer members), 24-806(1) (concerning lawyer members); *see also* AJS, Nebraska Current Methods, *supra* note 16 (noting that no more than two lawyer members and two non-lawyer members may be members of same political party).

19. NEB. REV. STAT. § 24-803(1).

20. *Id.* § 24-810(1).

21. *Id.*

22. *Id.*

23. *Id.* § 24-810(2).

24. *Id.* § 24-810(3).

25. NEB. CONST. art. V, § 21(5); NEB. REV. STAT. § 24-809.

After the names of qualified candidates are forwarded to the governor, the governor has sixty days to appoint a candidate to fill the judicial vacancy.[26] If the governor fails to make an appointment within sixty days, the Chief Justice or the acting Chief Justice of the Nebraska Supreme Court shall make the appointment.[27]

Sitting judges who wish to remain on the bench must submit themselves to periodic non-partisan retention votes. "At the next general election following the expiration of three years from the date of appointment . . . and every six years thereafter as long as such judge retains office, [every sitting judge in Nebraska] shall have his right to remain in office subject to approval or rejection by the electorate."[28] In the case of the Chief Justice of the Nebraska Supreme Court, the electorate of the entire state votes on the question of retention; in the case of all other judges, the electorate of the district from which the judge was appointed votes on the question of retention.[29] A simple majority of voters indicating that the judge should be retained is all that is required for successful retention.

The Nebraska State Bar Association's judiciary committee evaluates Nebraska judges.[30] To this end, the committee circulates judicial performance surveys to the state bar and attorneys complete the surveys by answering questions about judges standing for retention with whom the attorneys have had professional contact.[31] The survey asks attorneys to rate judges on a number of criteria, and also includes a question specifically asking the respondent whether the judge should be retained in office.[32] The results of the evaluation are available to the public on the bar association website and by circulation to the state print media.[33] Additionally, the bar association makes available to voters who request it a "Judicial Retention Information Kit," which includes a letter emphasizing

26. *See* NEB. CONST. art V, § 21(1).

27. *Id.*

28. *Id.*

29. *Id.*

30. *See* AJS, Nebraska Judicial Selection, *supra* note 8 (noting Nebraska State Bar Association's evaluation of Nebraska judges); *see also* Neb. State Bar Ass'n, Public Information: Judicial Evaluation, http://www.nebar.com/publicinfo/judicial_eval.htm (last visited Nov. 27, 2006) [hereinafter Nebraska Bar, Judicial Evaluation] (containing links to past judicial evaluation questionnaires and results).

31. *See* AJS, Nebraska Judicial Selection, *supra* note 8 (noting Nebraska State Bar Association's evaluation of Nebraska judges).

32. *Id; see also* Nebraska Bar, Judicial Evaluation, *supra* note 30 (containing links to past judicial evaluation questionnaires and results).

33. *See* Nebraska Bar, Judicial Evaluation, *supra* note 30 (containing links to past judicial evaluation questionnaires and results).

the importance of having an independent judiciary, guidelines to be considered in evaluating judges sitting for retention, background information about the judicial performance survey, survey results, and biographical information about those judges sitting for retention.[34]

III. Keeping Elective Retention in an Appointive Selection System

Many reformers argue for improving both independence and effectiveness in the judiciary by replacing elective retention with an entirely commission-based retention system.[35] Although the optimal goal might well be to someday move toward commission-based retention, there are good reasons to first consider keeping elective retention while striving to improve the effectiveness of the retention vote. There are both historical and practical reasons for premising the current discussion on maintaining elective retention.[36] Evidence also suggests that the purposes and goals of judicial retention systems can effectively be achieved with an improved elective retention system.

As an initial matter, it is important to recognize the historical reason for many appointive selection systems including elective re-

34. *See, e.g.*, Letter from John P. Grant, President, Neb. State Bar Ass'n, to Fellow Nebraskan (Oct. 8, 2004), http://www.nebar.com/pdfs/judiciary/mcletter.pdf.

35. For example, in the keynote address presented at the Washington State Summit on Judicial Selection and Judicial Independence at Seattle University School of Law on November 1, 2005, American Bar Association President Michael S. Greco noted that the ABA's latest policy statement on judicial selection and independence in state courts, adopted in 2003, outlined a preferred system of selection that included, as a first preference, a recommendation that judges be reappointed by a commission. *See* Michael S. Greco, President, ABA, Keynote Address at Seattle University School of Law: Wash. State Summit on Judicial Selection and Judicial Independence (Nov. 11, 2005), *available at* http://www.abanet.org/op/greco/speeches/washington_st_summit_jud_selection_11-11-05.doc; *see also* N.Y. County Lawyers' Ass'n, Judicial Selection in New York State: A Roadmap to Reform, *available at* http://www.nycla.org/sitefiles/publications/publications248_0.pdf (last visited Nov. 27, 2006) (including a recommendation that New York adopt a system of reappointment of judges entirely determined by judicial selection panels). Similarly, Connecticut employs a method of judicial reappointment that is based on nominations by the governor and reappointment by the Connecticut General Assembly. In 1986 Connecticut established a "Judicial Selection Commission" to evaluate and recommend candidates and incumbent judges for nomination by the governor. *See* Legislative Program Review and Investigations Comm., Conn. Gen. Assembly, Judicial Selection Report (Final) ch. III (2000), *available at* http://www.cga.ct.gov/pri/archives/2000jsreportchap3.htm (describing Connecticut's judicial selection process); Amer. Judicature Soc'y, History of Judicial Selection Reform in Connecticut, http://www.ajs.org/js/CT_history.htm (last visited Nov. 27, 2006).

36. *See infra* notes 37-41 and accompanying text.

tention. Initial reformers of judicial selection sought to remove the actual and perceived possibility of corruption associated with political elections.[37] To that end, reformers proposed various appointive selection systems, such as the nominating commission system put in place in Nebraska.[38] Those reformers, however, recognized that the public would not be eager to entirely forfeit its say in selecting judges.[39] Additionally, initial reformers recognized that elections provide a means of public accountability for the effectiveness of judicial performance.[40] As a result, the compromise for attempting to reduce corruption while allowing the public a more direct voice than representation by a commission was to remove the elections on the "front end" of the process at selection, but maintain elections on the "back end" of the process at retention.[41]

Practically speaking, the same problems that faced initial reformers continue to be problems today. As demonstrated by recent public controversy and media attention surrounding, inter alia, United States Supreme Court nominees John Roberts and Samuel Alito, "judicial independence" and "accountability" have become media buzzwords, and public scrutiny of the judiciary is continually reaching new heights.[42] In this climate, it is unrealistic to expect the public to accept less direct involvement in judicial selection and retention. As such, just as initial reformers compromised by maintaining elective retention, the current public discourse suggests that maintaining elective retention will likely be necessary, at least in the short term.

Not only is it likely necessary to consider maintaining elective retention, but evidence suggests that elective retention can be effective in furthering the purposes and goals of retention systems generally. For purposes of this Essay, there are fundamentally two

37. *See* William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 340-41 (1987) [hereinafter Hall & Aspin, *Twenty Years*].

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. For example, a recent Slate article discussed the sudden appearance of a number of state ballot initiatives appearing on November 2006 ballots across the country that pose serious threats to judicial independence under the guise of additional accountability. *See* Posting of Bert Brandenburg to http://www.slate.com/id/2146762/ (July 28, 2006, 16:13 EST); *see also* Brennan Center Fair Courts E-Lert Topic Defending Judicial Independence, http://www.brennancenter.org/programs/pester/pages/view_elerts.php?category_id=7 (last visited Nov. 27, 2006) (listing more than 140 media articles on the subject of judicial independence between January 2000 and August 2006).

different kinds of purposes and goals to consider: improving the quality of judicial performance and fostering public participation in all three branches of government.[43] Elective retention can be effective for both.

First, an effective retention system should play a meaningful role in improving the quality of judicial performance. In this sense, judicial performance entails both "competent" discharge of judicial duties and "temperate" discharge of judicial duties. The "high quality of judicial performance" purpose of retention is itself a two-sided consideration. On the one hand, an effective retention system should serve to ensure that truly substandard judicial performance, either in terms of competence or temperance, results in removal from the bench. On the other hand, an effective retention system should also serve to promote truly high standards in judicial performance. As such, an effective retention system should strive to promote a "high bar" for measuring judicial performance and then ensure that judicial performance that fails to reach that bar results in removal from the bench.

Second, an effective retention system should foster public participation in the judicial branch of government that is in some way comparable to public participation in the executive and legislative branches of government. Although all three branches of government should be considered ostensibly co-equal, and although each branch of government plays an important role in the system of checks and balances that ensures efficient operation of the others, the public generally does not seem to understand its role in ensuring quality in the judicial branch like it does in ensuring quality in the other two branches. Inasmuch as the public should rightly demand a role in ensuring quality in the judicial branch, an effective retention system should foster meaningful public participation.

The obvious difficulty in seeking to maximize the effectiveness of a judicial retention system is striking an appropriate balance between the needs and utility of judicial impartiality on the one hand and the need for judicial quality and public accountability on the other hand. As both a historical and a practical matter, reform should begin with considering how to maintain elective retention and how to allow the public a direct participatory role in retention. As discussed below, evidence suggests that elective retention can be effective in furthering the purposes of and goals of judicial re-

43. *See infra* Part VI.

tention, both from a judicial quality perspective and from a public participation standpoint.

IV. POTENTIAL PROBLEMS WITH RETENTION VOTES IN APPOINTIVE SYSTEMS

As described earlier, Nebraska currently uses a basic non-partisan elective retention system. Sitting judges stand for periodic retention votes, and their names appear on general election ballots, although the retention election is not a partisan political event. The current system in Nebraska, and similarly situated states, however, does suffer from some basic deficiencies that prevent the system from fully ensuring the purposes of judicial quality and public participation. In this regard, however, the deficiencies overlap greatly and can generally be divided into problems associated with non-participation by the public and problems associated with ineffective participation by the public.

First, elective retention systems suffer from the problem of non-participation by the public. "Voter roll-off," or the phenomenon of a voter casting votes for higher profile issues on the ballot, such as executive and legislative offices, but not casting votes on matters of judicial retention, is widely recognized.[44] Indeed, statistical data suggest that judicial retention elections are "generally characterized by low voter turnout" and that "judicial retention elections attract the smallest turnout of all the types of judicial elections."[45] Statistical studies have indicated that voter roll-off averaged approximately 36% between 1976 and 1984, 32.4% between 1986 and 1996, and 29.5% in 1998.[46] This phenomenon undermines the effectiveness of the elective retention system with regard to both judicial quality and public participation.

Inasmuch as an effective judicial retention system should strive to achieve a good balance of promoting judicial quality and impartiality ("judicial impartiality/quality") on the one hand and promoting public participation and accountability ("public participation/accountability") on the other hand, non-participation by the voting public can seriously undermine the desired balance. For example, if a significant portion of the voting public chooses

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44. *See* Hall & Aspin, *Twenty Years*, *supra* note 37, at 342; *see also* William K. Hall & Larry T. Aspin, *The Rolloff Effect in Judicial Retention Elections*, 24 SOC. SCI. J. 415, 415 (1987).

45. Hall & Aspin, *Twenty Years*, *supra* note 37, at 342.

46. Larry Aspin, *Trends in Judicial Retention Elections 1964-1998*, 83 JUDICATURE 79, 79 (1999).

not to participate in a judicial retention election, then sitting judges arguably have less imperative to act impartially and to strive for high standards of competence and temperance because a significant portion of the voting public will choose not to exercise any public accountability of the judges' performance. If a judicial district is comprised of 1000 voters, but only 700 cast votes on a particular judge's retention, then the judge might actually need approval from only 351 voters, or slightly more than one-third of the voting public; this need for approval from only one-third, rather than one-half, of the voting public certainly undermines the balance of judicial impartiality/quality and public participation/accountability.

Second, elective retention systems also suffer from the problem of ineffective participation by the public. Even among the voting public that participates in judicial retention elections, some percentage of voters traditionally will vote "yes" or "no" on judges, either for no discernible reason, or for the "wrong" reason. For example, some voters will simply vote "no" on retention for any judge, either because of a generalized distrust of public officials, as a reaction to crime rates, or because of a negative experience with the judicial system, rather than discerning specific judges who should not be retained. Similarly, some voters will simply vote "yes" on retention for any judge without considering whether each individual judge should or should not be retained. Discussion at this symposium suggested that as much as 25 to 30% of participating voters always vote "no" on retention, regardless of judicial performance evaluation recommendations.[47]

The problem of ineffective voter participation also disrupts the desired balance of judicial impartiality/quality and public participation/accountability, and arguably does so in an even more damaging manner than non-participation. Take, for example, the hypothetical scenario above where only 700 of the 1000 voters in a particular district choose to participate in the judicial retention election. Not only is the determination of whether a particular judge should remain on the bench left to a smaller voting public, but the determination may be severely skewed by the portion of those 700 voters who participate with either no discernible reason for casting a particular vote or with improper motivating forces driving a particular vote.

47. Thomas F. Whelan, *Symposium on the Best Appointive System for the Selection of State Court Judges*, 22 SUFFOLK LAW. APR. 2006, at 24, 25 (2006).

V. Possible Underlying Reasons for the Problems

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

Several of the major underlying reasons for the voting public's non-participation or ineffective participation in judicial retention elections fall under the broad umbrella of "education." These "education" related issues include the public's general lack of understanding about the judicial branch in general and about retention elections in particular, the lack of available resources to inform the public about judicial independence and performance, and the efficacy of the resources that are available. Each of these issues contributes both to voter non-participation and ineffective participation.

Although American public education includes significant instruction in government, including the three branches of government, the actual workings of the judicial system are not a prominent part of most curricula.[48] With respect to national government, students are taught: (a) details about the Electoral College, including presidential succession and other details about the executive branch; and (b) details about how legislation is crafted, debated, and passed, and details about the composition and election of senators and representatives. Students are taught comparatively very little about the Supreme Court Justice nomination process, Congress' advice and consent powers, or the process

48. This statement, as well as the general observations that follow in this paragraph, are largely matters of the authors' personal observation bolstered by personal discussions with educators and citizens in the authors' local community. The general observations, however, are illustrated and confirmed by observing sources such as Social Studies Help, http://www.socialstudieshelp.com, a website that provides assistance for, inter alia, high school advanced placement government students. Although this website provides information about a variety of theoretical and practical topics, the website fails to provide information about the process of judicial selection or retention. *See* The Soc. Studies Help Ctr., Homepage, http://www.socialstudieshelp.com (last visited Nov. 27, 2006).

through which the Supreme Court chooses, hears, or decides cases. With respect to state government, students are similarly taught details about the selection and workings of the executive and legislative branches of government, but very little about the judicial branch, other than its existence as a third branch. Beyond the general lack of education about the judicial branch, the voting public is generally uneducated about judicial retention elections; specifically the voting public is uneducated about the ideal purposes and goals of judicial retention elections.

The lack of education about the judiciary and retention elections results in a substantially diminished pool of voters with a meaningful understanding of judicial independence, judicial impartiality, and judicial quality to seek out the kind of information that would allow meaningful participation in a retention election. The voters who are informed and do desire such information, however, will encounter the next obstacle: the lack of available resources to inform the voter.[49] Currently there are very few resources available to inform voters about judicial independence, judicial retention, or specific judicial performance. The Nebraska State Bar Association's website contains links to helpful resources, but even those resources are limited.[50] There is no indication that a significant portion of the voting public is even aware of the website or the resources contained therein. Additionally, the bar association's website is only one source of information. Other sources of information, such as print, television, and radio media, generally provide very few resources about most judicial retention elections. While traditional print, television, and radio media devote significant time to coverage of executive and legislative elections, they generally provide very little coverage about particular judges standing for retention, and then usually provide only negative coverage about a particular judge who has been targeted for non-retention. As such, rather than providing their audiences with meaningful information about the judicial branch of government, retention elections, and the information that voters need to make

49. *See, e.g.*, Hall & Aspin, *Twenty Years*, *supra* note 37, at 342 ("Some voters do not vote in judicial retention elections because they lack enough information to cast an informed vote."); David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 LOY. L.A. L. REV. 1369, 1371-72 (2001) ("Starting as long as forty-five years ago, exit polls and other polls have shown a startling lack of voter awareness of even the names of [judicial] candidates.").

50. *See* Neb. State Bar Ass'n Home Page, http://www.nebar.com (last visited Nov. 27, 2006).

informed decisions about particular judges, these media tend to largely overlook judicial retention elections.

Finally, even those voters who are able to overcome the general lack of education about the judiciary, who take a personal interest in learning about the judiciary and understanding retention elections, and who make an effort to seek out available information from sources such as traditional media or the bar association, will face the additional difficulty that the few available resources are generally inadequate to foster a meaningful decision. As noted above, the bar association circulates judicial performance surveys for completion by attorneys. The surveys, however, ask only a handful of questions about each particular judge (ranging from less than ten questions for appellate court judges to less than fifteen questions for trial court judges), are typically general in nature (such as asking for a rating from "excellent" to "very poor" on "Legal Analysis," "Judicial Temperament and Demeanor," or "Trial Management"), and provide very little opportunity for any meaningful explanation of an attorney's answers.[51]

In addition to the education-oriented issues that contribute to retention elections being less effective than possible, retention elections also suffer from being particularly susceptible to influence by political agendas. Partly because of voter drop-off and the underlying education-oriented problems already discussed, special interest groups can sometimes use retention elections to further political agendas and can take advantage of unknowing voters. One example of this phenomenon was the non-retention of Nebraska Supreme Court Justice David Lanphier in 1996.

Justice Lanphier was not accused of judicial malfeasance or incompetence; rather, the political campaign that led to his removal from the bench was spearheaded by a special interest group with a political agenda, which used public frustration over selected decisions rendered by the Nebraska Supreme Court to garner public support for his non-retention.[52] While on the Nebraska Supreme Court, Justice Lanphier participated in a number of decisions involving term limits and Nebraska's second-degree murder statute.[53] In response to a unanimous decision of the Nebraska Supreme Court holding unconstitutional a term limits amendment passed

51. *See* Nebraska Bar, Judicial Evaluation, *supra* note 30 (containing links to past judicial evaluation questionnaires and results).

52. *See* Traciel V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 70-71 (1999).

53. *Id.* at 70.

through Nebraska's initiative process, advocates of term limits seized on public sentiment concerning a number of Nebraska Supreme Court decisions overturning second-degree murder convictions to mount a public campaign to vote Justice Lanphier out of office.[54] Only two months prior to the 1996 election in which Justice Lanphier stood for retention, founders of an organization called "Citizens for Responsible Judges" cited Lanphier's "disregard for the safety of [Nebraska] communities" and Lanphier's "willingness to set convicted murderers free on minor technicalities" while waging a very public and political campaign against him.[55] Ultimately Justice Lanphier was not retained in office, with only approximately 38% of the public voting in favor of retention.[56]

VI. Proposals for Improving the Retention Vote System

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

As a preliminary matter, it bears noting that elective retention can be effective. A 1991 study of over 900 judges from ten states who had actually stood for retention in retention elections concluded that elective retention systems actually influence the behavior of judges, both with respect to the rendering of competent decisions and temperament on the bench.[57] Surveyed judges indicated that, in their opinions, the best ways to win retention elections are to perform competently, to be fair and impartial, to manage cases well, and to be knowledgeable.[58] The survey indicated that the vast majority of judges self-report that their behavior

54. *Id.* at 70-71.
55. *Id.* at 70.
56. *Id.* at 72.
57. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312-13 (1994).
58. *Id.*

and performance on the bench are influenced by the accountability of having to stand for retention elections.[59] Further, differences in the vote results between judges appearing on the same ballot suggest that voters do discern between judges, at least somewhat and albeit perhaps for unclear or improper reasons. For example, in the same 1996 retention election in which Justice Lanphier was not retained (as discussed above) by a vote of approximately 60% against retention and 40% in favor of retention, other judges appearing immediately after Justice Lanphier on the ballot were retained by votes of 70% or more in favor of retention.[60]

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

First, changes need to be made to improve "education" about the judicial branch. Although "education" is often a popular buzzword for reform efforts, to effect meaningful improvement in judicial retention elections, education must encompass far more than just voter guides and other adult education tools. Rather, changes need to be made at the academic level to promote more significant education about the judicial branch. School curricula need to include education about the workings of the judicial branch, the mechanisms of judicial selection and retention, and the importance of an independent and highly competent judiciary. It is vital that students begin learning about the judicial branch as a coequal branch of government and about the role of the public in ensuring an independent judiciary. Employing school curricula in this manner will change attitudes about the judiciary's role in government, and will begin to foster an attitude and an interest in the public at a younger age that will translate into future voters who are more meaningfully involved in utilizing and optimizing judicial

59. *Id.*

60. Judge Irwin's election results in the 1996 retention election provide an example. Judge Irwin represents the same judicial district on the Nebraska Court of Appeals as Justice Lanphier did on the Nebraska Supreme Court. Judge Irwin's name appeared on the ballot immediately below Justice Lanphier's name, and Judge Irwin received a "yes" vote of more than 70%, almost exactly the opposite of Justice Lanphier's vote.

retention elections. Although the fruits of academic curricula reform may not be apparent for some years to come, long-term planning should be a part of any meaningful reform effort.

There is some empirical precedent for the suggestion that educational efforts related to the law can generate significant youth interest in a relatively short period of time. For example, mock trial programs, which teach young people about the process of how a typical trial might proceed, are now hugely popular and common in schools of all sizes across the country.[61] But the mock trial program has only recently become widespread. In just the past few years, this program, which started as a somewhat isolated and grassroots program, has grown in popularity and serves as an example of how quickly educational reform about the judiciary might take hold.[62]

Second, in addition to educational reform aimed at creating more interested and informed voters in the future, reform should also strive to make more public information available for today's voters. As noted above, the public information currently available on the subject of judicial retention is primarily limited to bar surveys, the results of which are not widely distributed or sought, and are given only limited coverage in print media.[63] It is true that the Nebraska State Bar Association has taken steps in recent years to make information, such as the bar survey results and a "Judicial Retention Information Kit," available to voters on the bar association website.[64] It is not apparent that a significant portion of the voting public is aware of the availability of these resources or is capable of accessing these resources. Further, it is apparent that these limited resources are simply not enough to provide sufficient information to both foster interest and involvement and to make involvement meaningful.

As such, reform efforts aimed at providing more information to current voters should be broad reaching and varied. For example,

61. For example, a recent Google search for "high school mock trial programs" yielded approximately 2,000,000 results which included links to the programs established in high schools all across the country. *See* Google.com, High School Mock Trial Programs–Google Search, http://www.google.com/search?hl=en&lr=&q=highschool+mock+trial+programs&btng=search (last visited Nov.27, 2006) (yielding 2,040,000 results).

62. *See* Nat'l High Sch. Mock Trial Championship, http://www.nationalmocktrial.org/history.cfm (last visited Nov. 27, 2006) (documenting the growth in participation in the national tournament from five states in 1984 to forty states and three foreign countries in 2006).

63. *See supra* Part V.

64. *See supra* notes 30-34 and accompanying text.

a series of public forums should be established, held in venues all across the state on the subjects of judicial impartiality, judicial selection, and judicial retention.[65] Such forums could help to make the current voting public more aware of the current system of judicial selection in Nebraska, the current system of retention elections, and the purposes and goals of such a retention system, as well as the importance of the public's meaningful participation. In addition to public forums, traditional media should be encouraged to provide more consistent coverage of these topics, rather than only providing coverage of the most controversial judicial decisions or the most public campaigns seeking the ouster of sitting judges.

Further, public service groups that currently participate in voter education—groups such as the League of Women Voters[66]—should also be encouraged to make the judiciary and judicial retention elections a part of their voter education efforts. Public interest groups that hold meetings or invite guest speakers on topics of interest to the group could provide a valuable outlet for more judicial branch and judicial retention education.

Third, in addition to starting the educational process concerning the judiciary and judicial retention earlier and increasing the availability of resources to educate current voters, it is vital that the reform process seek to improve the quality of information available to the voting public. One way to improve the quality of infor-

65. A recent decision by a Nebraska district court judge sentencing to probation a defendant convicted of sexual assault on a child drew a fair amount of local and national media coverage. *See, e.g.*, *Too Short Prison Sentence Protested*, WASH. TIMES.COM, May 27, 2006, *available at* http://www.washingtontimes.com/national/2006 0526-110743-2455r.htm. Among the local criticism were comments from people who decried how judges like this "get elected to the bench," as well as the suggestion from some to make note of the judge's name for the next time she stood for a retention vote. Such comments seem indicative of the fact that although some voters are at least somewhat aware of Nebraska's system of judicial selection and retention, others are still under the mistaken belief that judges are initially "elected" to the bench. *See* Ed Howard, *No Child Molester is too Small to go to Prison*, NEBRASKA STATEPAPER.COM, May 26, 2006, *available at* http://nebraska.statepaper.com/vnews/display.v/ART/2006/05/26/44774afe205d7?in_archive=1; *see also* Posting of Darrell to *No Child Molester is too Small to go to Prison*, http://nebraska.statepaper.com/vnews/display.v/ART/2006/05/26/44774afe205d7?in_archive=1 (May 30, 2006); Posting of Gerald F. Pond to *No Child Molester is too Small to go to Prison*, http://nebraska.statepaper.com/vnews/display.v/ART/2006/05/26/44774afe205d7?in_archive=1 (May 29, 2006); Postings of Husker_Mama to *No Child Molester is too Small to go to Prison*, http://nebraska.statepaper.com/vnews/display.v/ART/2006/05/26/44774afe205d7?in_archive=1 (May 26, 2006, May 30, 2006, and June 1, 2006); Posting of radicalron to *No Child Molester is too Small to go to Prison*, http://nebraska.statepaper.com/vnews/display.v/ART/2006/05/26/44774afe205d7?in_archive=1 (May 30, 2006).

66. *See* League of Women Voters Homepage, http://www.lwv.org (last visited Nov. 27, 2006).

mation available to the public is to reform the existing bar surveys about judicial performance into more thorough judicial performance evaluations, like those already instituted in Alaska, Arizona, Colorado, and Utah.[67] Such systems are designed to "systematically collect and analyze information about judges' on-the-bench performance, and make recommendations about judges to voters prior to a retention election."[68] Contrary to the relatively simple and general bar surveys currently used in Nebraska, the judicial performance evaluations in these states include commissions comprised of attorneys, non-attorneys, and judges, who conduct surveys of court users (including attorneys, litigants, jurors, law enforcement personnel, other judges, etc.) on such topics as integrity, legal competence, communication skills, temperance, punctuality, administrative skills, case-progression, rates of reversal on appeal, and continuing education.[69] The commissions then compile the survey results, analyze them, make recommendations about retention, and make the recommendations and review information available to the voting public.[70]

A meaningful judicial performance evaluation system can effectively improve the quality of information available to the voting public, and also promote public confidence in the information because the public is so heavily involved in the compilation of the information, from serving as members on evaluation commissions, to being surveyed about interactions with judges, to receiving more meaningful and detailed information.[71] The American Judicature Society's review and evaluation of the judicial performance evaluation systems in Alaska, Arizona, Colorado, and Utah include thorough and detailed consideration of many elements essential to effectively implement such a system, including considerations about the rules and procedures of the evaluation commissions, the need for adequate funding, the need for detailed and measurable standards, the importance of confidentiality throughout the evaluation process, the need for effective means of disseminating results and recommendations, and the need for meaningful training programs.[72]

67. *See* KEVIN M. ESTERLING & KATHLEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS xiii-xv (1998).

68. *Id.* at 4.

69. *Id.*

70. *Id.*

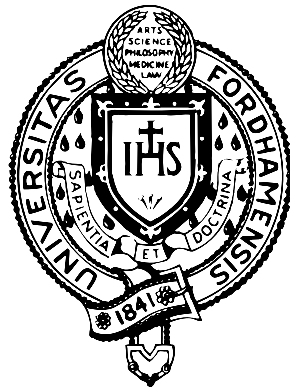
71. *Id.* at 5.

72. *Id.* at 117-21.

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

VII. Conclusion

Judicial reformers seeking to develop the best possible system of selecting state court judges must be patient, but they must also open their minds to the world of possibility and explore ideas for seeking both short-term and long-term systemic change that, in a common sense fashion, will address the problems that inhibit the effectiveness of the current retention election system. To that end, improving public awareness about the existing system, its goals, and its current weaknesses, and implementing steps to address those weaknesses, will help to keep us moving toward the best possible system. Changing attitudes and interest in judicial retention elections is certainly not an easy task, but it is only through seeking such change that reformers of an elective retention system can hope to near its potential effectiveness.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