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# Send Them a Message?: The Threat to a Fair and Impartial State-Court Judiciary

Barbara J. Pariente & Melanie Kalmanson

**W**hat message do voters send by removing a judge from office based on disagreement with a lawful judicial decision? That question is at the heart of this issue of the American Judges Association's *Court Review*, which focuses on the issue in light of the 2018 recall of California Judge Aaron Persky based on public outrage at the lawful, but extremely lenient, sentence he gave to a Stanford University student-athlete in a highly publicized sexual assault case. The message to other judges: *Impose harsher sentences?* Or perhaps a more specific message: *Take sexual assault cases seriously?* Viewed broadly, is this an example of the voters demanding accountability in sentencing, or of voters sending a more insidious message—*Rule in a way that is not in step with the prevailing public opinion and risk your position as a judge?* Despite the valid concerns caused by the Stanford case, it is this latter message that, in my view, presents the greatest threat to judicial independence.

In 2010, those who opposed same-sex marriage in Iowa sent precisely this dangerous message. An aptly named TV ad, "Send Them a Message," urged Iowa voters to "vote NO" on the retention of three respected Iowa Supreme Court justices, characterizing them as "activist judges" who "ignor[e] the will of voters," "legislat[e] from the bench," and "usurp the will of voters."<sup>1</sup> The ad was part of a larger, politically motivated campaign to oust the three justices who were on the ballot for merit retention. To be clear, the outrage was not based on the justices' ethics, professionalism, jurisprudence, or judicial integrity. Rather, the effort to remove these justices focused on one particular, unanimous decision striking down, as uncon-

stitutional, Iowa's ban on same-sex marriage. The message: *Do not ignore the will of the voters.*

But this message is the antithesis of the role of the judiciary in our democracy. Judges should decide cases based on the facts and the law, not the will of the voters. Our branch is not intended to be political. Our judges are expected to be fair and impartial—not swayed by popular opinion, or pressures from special interests or the other two branches of government. Perhaps Justice Sandra Day O'Connor put it best: "The Founders realized that there has to be someplace where being right is more important than being popular or powerful, and where fairness trumps strength. And in our country that place is supposed to be the courtroom."<sup>2</sup>

Yet, in 2012, inspired by the success of that 2010 campaign in Iowa, special interest groups<sup>3</sup> targeted my colleagues, Justices Peggy Quince and R. Fred Lewis, and me when we were on Florida's ballot for merit retention in 2012. As I have detailed in several articles,<sup>4</sup> our opponents used some of the same political messages employed in Iowa—especially that catch-all, ill-defined term: "activist judges." They used selected opinions from our Court that, although jurisprudentially sound, could be reduced to potentially controversial sound bites. Their true goal: oust us to give the governor his chance to select three new justices who presumably would be more in line with his judicial philosophy.<sup>5</sup> The attacks required my colleagues and me to travel the state to speak to Florida voters and editorial boards, attempting to explain that the campaign against us was not based on our integrity, professionalism, or competence.

## Footnotes

1. TV Ad: *Send Them a Message*, IA. STATE DAILY (Sept. 16, 2010), [http://www.iowastatedaily.com/tv-ad-send-them-a-message/youtube\\_2da17cf2-c151-11df-8a59-001cc4c03286.html](http://www.iowastatedaily.com/tv-ad-send-them-a-message/youtube_2da17cf2-c151-11df-8a59-001cc4c03286.html).
2. Barbara Pariente & F. James Robinson, *Preserving a Fair and Impartial Judiciary: The Cornerstone of Our Democracy*, 90 FLA. BAR J. 18 (May 2016), <https://www.floridabar.org/news/tfb-journal/?durl=%2Fdivcom%2Fjn%2Fjnjournal01.nsf%2F8c9f13012b96736985256aa900624829%2Fca10e4628afb589b85257fa10051404e>.
3. Throughout this article, we discuss the effect of "special interest groups" on the judiciary. Obviously, groups advocating for a particular view are important to the function of our government and are not inherently negative. For example, "special interest groups" appropriately participate in the judicial process by filing amicus briefs in appropriate cases relevant to their missions. In this context, the article uses the term to address groups that work to advance specific interests and may use their resources in a way that compromises the goal of a fair and impartial judiciary. See L. Jay Jackson, *Legislators and Special Interests Are Making Sure We Get the State Court Judges They Want* (July 1, 2013).

This article also addresses improper "political influence" on the judiciary. While political parties may not be directly involved, this term is used broadly to address the effect of one-sided, or politi-

cal, messages or influence that have no place in the judiciary, which was designed to be free from politics.

Finally, this article addresses the threat that arises when state legislatures react to judicial decisions in ways that may undermine judicial independence.

4. See generally Barbara J. Pariente & F. James Robinson, Jr., *A New Era for Judicial Retention Elections: The Rise of and Defense Against Unfair Political Attacks*, 68 FLA. L. REV. 1529 (2016) [hereinafter *A New Era for Judicial Retention Elections*]; Barbara Pariente, *What's Politics Have to Do With It?: Reinvigorating Our Defense of State Courts*, AM. BAR ASS'N J. (Aug. 23, 2018) [hereinafter *What's Politics Have to Do With It?*]; Barbara J. Pariente & F. James Robinson, *Preserving a Fair and Impartial Judiciary—the Cornerstone of Our Democracy*, VOIR DIRE (Spring 2015) [hereinafter *Preserving a Fair and Impartial Judiciary*].
5. See, e.g., Lizette Alvarez, *G.O.P. Aims to Remake Florida Supreme Court*, N.Y. TIMES (Oct. 2, 2012), <https://www.nytimes.com/2012/10/03/us/republican-party-aims-to-remake-florida-supreme-court.html>; Jane Musgrave, *Florida Supreme Court Retention Race Unusually Stressful, Costly This Election*, PALM BEACH POST (Oct. 12, 2012), <https://www.palmbeachpost.com/news/state-regional-govt-politics/florida-supreme-court-retention-race-unusually-stressful-costly-this-election/vpfPqHdF5LXfDydMuf9uKP/>.

So, how do we strike the appropriate balance between judicial accountability and maintaining a fair and impartial judiciary? This article attempts to answer that question by explaining why state courts are more vulnerable to attack than federal courts, defining proper characteristics for voters to consider in reviewing judges on the ballot for election or merit retention, and suggesting ways to ensure that judges and justices are less vulnerable to be removed or influenced by vocal public opinions or by special interests. Recent history has shown that, despite the good intentions of adopting a less political method of appointing and retaining judges and justices through a merit-based system, more needs to be done to further insulate state court judges from improper removal, or even influence, based on disagreement with specific judicial decisions.

### WHY STATE COURTS ARE MORE VULNERABLE TO ATTACK THAN FEDERAL

Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives in the other two branches of government.<sup>6</sup> Legislative and executive officials are expected to consider public opinion, special interests who lobby, their political party agendas, or even their own personal opinions about issues. But judges are expected to act to protect the rights guaranteed in the Constitution and to enforce the rule of law so that all who come before court are treated equally and without “fear or favor.” Justices on the U.S. Supreme Court have warned of the corrosive effect of treating judges like politicians. For example, as Justice Ruth Bader Ginsburg put it: “[N]othing less than democracy itself is at stake if partisan groups are allowed to throw . . . justices off [their states] high court[s].”<sup>7</sup> The reason for the threat is clear: even if ultimately unsuccessful, attacks against the judiciary present the real danger that the judge will fear removal if the public disagrees with a decision.<sup>8</sup>

To guard against this threat, our Founders provided the fundamental tenet in our Constitution that federal judges be appointed to “lifetime tenure with removal only for high crimes and misdemeanors.”<sup>9</sup> This system effectively prevents the specter of removal for issuing an unpopular opinion with which the public, politicians, or special interests disagree.<sup>10</sup> The federal system of lifetime appointment also creates a clear distinction between the judiciary and the other two political branches of government.

6. Republican Party of Minn. v. White, 536 U.S. 765, 805-06 (2002) (Ginsburg, J., dissenting) (joined by Justices Stevens, Souter, and Breyer).  
 7. Musgrave, *supra* note 5.  
 8. See Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CTR. JUST. 1 (2015), [https://www.brennancenter.org/sites/default/files/publications/How\\_Judicial\\_Elections\\_Impact\\_Criminal\\_Cases.pdf](https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf); Margaret H. Lemos, *The State of the Judiciary*, 101 JUDICATURE 52, 54 (Autumn 2017), <https://judicialstudies.duke.edu/wp-content/uploads/2017/08/Judicature-Fall2017-roundtable.pdf> (suggesting that it is important to consider the effect on individual judges); see also *id.* at 55 (discussing Judge Baer's reaction to “a firestorm of criticism in the press and from political actors”).

For example, although U.S. Supreme Court Chief Justice Earl Warren was under attack for the Court's then-unpopular 1954 unanimous opinion in *Brown v. Board of Education*,<sup>11</sup> which he authored, he was not in danger of removal. Despite billboards in the South that read “Impeach Earl Warren,”<sup>12</sup> which appeared immediately after the Court issued its decision in *Brown*, Chief Justice Warren's judicial position was never in jeopardy. Because of the constitutional protection designed wisely by our Founders, the public's disagreement with the opinion could never constitute grounds to remove Chief Justice Warren or any other member of that Court. This enabled the Justices to decide the case based on the Constitution, not based on which side enjoyed greater public support.

Of course, even the federal model of lifetime appointment does not immunize federal judges from personal attacks. Throughout history, but intensifying more recently, various groups, such as the media, lobbyists, and politicians—including, even at times, the President of the United States—have attacked federal judges for decisions with which they disagree and, on occasion, have specifically attacked not just the decision but the decision maker. As the President of the American Bar Association (ABA) recently explained:

Disagreeing with a court's decision is everyone's right, but when government officials question a court's motives, mock its legitimacy or threaten retaliation due to an unfavorable ruling, they intend to erode the court's standing and hinder the courts from performing their constitutional duties.<sup>13</sup>

After U.S. President Donald Trump referred to a federal judge as “an Obama Judge,” criticizing an adverse ruling and the judge himself, U.S. Supreme Court Chief Justice John Roberts publicly “defended the independence and integrity of the federal judiciary,” stating:

We do not have Obama judges or Trump judges, Bush

**So, how do we strike the appropriate balance between judicial accountability and maintaining a fair and impartial judiciary?**

9. *What's Politics Have to Do With It?*, *supra* note 4; see U.S. Const. art. III.  
 10. See *White*, 536 U.S. at 804; Lemos, *supra* note 8, at 54.  
 11. *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).  
 12. See, e.g., *Earl Warren*, HISTORY, <https://www.history.com/topics/us-politics/earl-warren> (last visited Dec. 4, 2018); *Earl Warren*, U.S. HISTORY, <https://www.u-s-history.com/pages/h3834.html> (last visited Dec. 4, 2018).  
 13. See *Statement of Bob Carlson, ABA President Re: Being Thankful for Judicial Independence*, AM. BAR ASS'N (Nov. 27, 2018), <https://www.americanbar.org/news/abanews/aba-news-archives/2018/11/statement-of-bob-carlson—aba-president-re—being-thankful-for-j/>.

**Since 2010, special interest groups have increasingly interfered in retention elections.**

judges or Clinton judges[.] . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.<sup>14</sup>

Unlike the federal system, virtually all state judiciaries—whether selected by contested elections, gubernatorial appointment, legislative selection, or commission-based gubernatorial appointment—do not enjoy the protections enshrined in our federal constitution.<sup>15</sup> Instead, jurisdictions across the country use various processes because the method of judicial selection, as well as terms of service, are controlled by each state’s own constitution.<sup>16</sup> Sometimes, different jurisdictions within the same state even use different processes.<sup>17</sup>

Many states adopted merit-based systems for judicial selection and retention in an effort to insulate state-court judges as much as possible from the politics seen in elections in the other two branches.<sup>18</sup> Under the merit-based system, judges are appointed by the state’s governor after review by a commission based on their qualifications, which “typically include a candidate’s legal ability, integrity and impartiality, professionalism and temperament, and any other necessary skills for the level or jurisdiction of the court to which the candidate is applying.”<sup>19</sup> Then, periodically throughout their term depending on the state’s constitution, the judge appears on the ballot.<sup>20</sup> Voters vote yes or no as to whether the judge should retain his or her seat and “does not face a challenger.”<sup>21</sup>

Unfortunately, history has shown that even merit-based systems are not immune from attack. Since 2010, special interest groups have increasingly interfered in retention elections, a topic on which voters are often under-educated,<sup>22</sup> by mischar-

acterizing judges and their decisions. “[S]pecial interest groups seek to remove good judges whose only offense is having ruled according to the law, rather than the special interest groups’ agenda.”<sup>23</sup> In fact, the most recent report from the Brennan Center for Justice explains that merit-based systems have become more political in recent years, to the point that any intended decrease in political influence by adopting the merit-based system may be lost.<sup>24</sup> Some argue that merit-based systems are *more* political than elections.<sup>25</sup> Even more concerning, some of these efforts by special interest groups to oust well-qualified jurists, as in Iowa, have been successful.

Some, myself included, attribute the rise of these politically motivated attacks against the judiciary on the U.S. Supreme Court’s January 2010 decision in *Citizens United v. Federal Election Commission*.<sup>26</sup> As Wallace Jefferson, former Chief Justice of the Texas Supreme Court, and I explained in 2015, *Citizens United* and other decisions “led to unrestricted spending from outside groups” on elections in all three branches of government.<sup>27</sup>

Accountability for the conduct of judges, like all public officials, is, of course, critical to a well-functioning democracy. However, a threat arises when the “accountability” is based on one-sided attacks or mere disagreement with an isolated decision.<sup>28</sup> And, “accountability” in the form of voters at the ballot box choosing to remove the judge poses a great danger to judicial independence. Ironically, Professor Margaret Lemos, professor and Senior Associate Dean for Faculty and Research at Duke Law, explains that, at least in the abstract, the public actually *disfavors* politicization of the courts:

Studies of state court systems . . . suggest that the more political the judicial-selection system, the lower the public’s sense of the legitimacy of the courts. Public confidence in the courts tends to be lower in states with partisan judicial elections than in other kinds of selection systems. When the public hears about judges accepting campaign contributions or being subjected to

14. Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks “Obama Judge,”* N.Y. Times (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>.  
15. Lemos, *supra* note 8, at 54; Malia Reddick & Rebecca Love Kourlis, *Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices*, INST. ADVANCEMENT AM. LEGAL SYS. 1 (Aug. 2014), <https://jpo.wrlc.org>; see *Methods of Judicial Selection*, NAT’L CTR. ST. COURTS, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=) (last visited Aug. 24, 2018). Only Rhode Island has adopted the federal model of lifetime appointment. A few other states have adopted systems in which judges are appointed for one long term. *Methods of Judicial Selection*.  
16. *Methods of Judicial Selection*, *supra* note 15.  
17. See *id.* (explaining that districts in Kansas are split on the selection of district judges; seventeen districts use gubernatorial appointment from nominating commission while fourteen districts use partisan election).  
18. *A New Era for Judicial Retention Elections*, *supra* note 4, at 1543-44.  
19. *Id.* at 1543.

20. *Id.*  
21. *Id.*  
22. See *New Resources for Evaluating Judicial Candidates*, Informed Voters: Fair Judges (Aug. 16, 2018), <https://ivp.nawj.org/2018/08/16/new-resources-for-evaluating-judicial-candidates/> (“Many voters do not know what to look for in selecting judges or why they are on the ballot.”).  
23. Wallace Jefferson & Barbara J. Pariente, *The “Citizens United” Anniversary Is a Regrettable Date for State Courts*, VOIR DIRE 14 (Spring 2015).  
24. ALICIA BANNON, CHOOSING STATE JUDGES: A PLAN FOR REFORM 10 (2018); see Jefferson & Pariente, *supra* note 23, at 14.  
25. See Reddick & Kourlis, *supra* note 15, at 9; Edward A. Purcell, Jr., *The Ideal of Judicial Independence: Complications and Challenges*, 47 TULSA L. REV. 141, 154 (2011). Other common criticism of merit selection includes “that it puts elites in control of selecting judges,” and “nominating commissions operate in secret with no public accountability.” Reddick & Kourlis, *supra* note 15, at 8.  
26. *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010).  
27. Wallace & Pariente, *supra* note 23, at 14.  
28. See, e.g., Lemos, *supra* note 8, at 55 (explaining why public accountability, at some level, is important).

or using attack ads, public support for and confidence in the courts diminishes.<sup>29</sup>

While principled criticism of judicial decisions is part of a functioning democracy, the threat of removal is antithetical to the Framers' core principle of an independent and non-political judicial branch of government.<sup>30</sup> Jurists should not perceive a potential threat to their position if they rule in a way that is unpopular, or out of step with public opinion, special interests, or the other political branches.

Ultimately, the question is whether there is ever an appropriate reason for voters to remove a judge because of disagreement with a judicial decision. My response is a resounding "no." Removal on these grounds presents the real risk of making judges accountable to the voters, those in power, and those whose interests are threatened by judicial decisions. Such "accountability" undermines judicial legitimacy, threatens judicial independence, and upends the essential role of the judiciary—to protect each person's (whether individual or corporate) constitutional rights, which may, at times, prove counter to the majority view, special interests, or the other two branches of government.

So, what are the proper considerations to ensure a balance between accountability and judicial independence? The next section explains these five proper considerations for evaluating judges or judicial candidates: (1) integrity, (2) professional competence, (3) judicial temperament, (4) experience, and (5) service.

## ENSURING ACCOUNTABILITY: PROPER CONSIDERATIONS

Despite the attention of several prestigious groups of

lawyers—including the American Bar Association (ABA),<sup>31</sup> the American Judicature Society,<sup>32</sup> and the American College of Trial Lawyers<sup>33</sup>—the threat of improper influence on our state judiciary remains a serious problem that threatens the essence of a fair and impartial judiciary.<sup>34</sup> Because attacks against the judiciary continue, it is important to determine the proper factors that should be considered in electing, retaining, or even impeaching or recalling judges—whether by voters, the executive, or the legislature. Strong arguments supporting judicial accountability exist, especially when the breaches arise from actual judicial misconduct.<sup>35</sup>

But judicial accountability should not come at the expense of judicial independence or fairness. In fact, there are already several forms of accountability in place that appropriately strike this balance. First, there is an important check on judicial behavior in that all judges are required to follow their state's Code of Judicial Conduct.<sup>36</sup> With respect to misconduct, that accountability is properly monitored by strong judicial qualifications commissions.

Accountability also derives from the basic requirement that trial judges adhere to precedent and follow the rules of evidence, and their decisions are subject to review by a higher court. As the Supreme Court of Washington has explained:

Judicial independence does not equate to unbridled discretion to bully and threaten, to disregard the require-

**Jurists should not perceive a potential threat to their position if they rule in a way that is unpopular.**

29. *Id.* (footnotes omitted); see also Jeffrey M. Jones, Frank Newport & Lydia Saad, *How Americans Perceive Government in 2017*, GALLUP (Nov. 1, 2017), <https://news.gallup.com/opinion/polling-matters/221171/americans-perceive-government-2017.aspx> ("Americans have a relatively higher level of trust in the judicial branch than either the executive or legislative branch.").

30. See *Republican Party of Minn. v. White*, 536 U.S. 765, 804 (2002) (Ginsburg, J., dissenting); Justice Free from Special Interests, Informed Voters: Fair Judges, <https://ivp.nawj.org/app/uploads/2016/06/Politics-and-special-interests.pdf> ("Unlike our representatives in the legislature, we depend on our judges to stand apart from politics and partisan ideas.").

31. See *Statement of Bob Carlson, ABA President Re: Being Thankful for Judicial Independence*, AM. BAR ASS'N (Nov. 27, 2018), <https://www.americanbar.org/news/abanews/aba-news-archives/2018/11/statement-of-bob-carlson--aba-president-re-being-thankful-for-j/> (The ABA "is committed to an independent, impartial judiciary that is free from political influence.").

32. The Mission of the American Judicature Society is "to secure and promote an independent and qualified judiciary and a fair system of justice." AM. JUDICATURE SOC'Y, <http://americanjudicaturesociety.org/> (last visited Nov. 29, 2018).

33. Am. College of Trial Lawyers, *Judicial Independence: A Cornerstone of Democracy Which Must Be Defended* (Sept. 2006).

34. *Lee v. State Bd. of Pension Trustees*, 739 A.2d 336, 341 (De. 1999); *A New Era for Judicial Retention Elections*, *supra* note 4, at 1537-38; see Randall T. Shepard, *Judicial Independence and the Problem of Elections: "We Have Met the Enemy and He Is Us,"* 20

Q.L.R. 753, 753 (2001); see, e.g., *North Carolina GOP Leader Raises Possibility of Impeaching Justices*, BRENNAN CTR. JUST.: FAIR CTS. E-LERT (Aug. 24, 2018); see also Greytak, et al., *Bankrolling the Bench: The New Politics of Judicial Elections 2013-14*, BRENNAN CTR. JUST. 3 (2015), [https://www.brennancenter.org/sites/default/files/publications/The\\_New\\_Politics\\_of\\_Judicial\\_Election\\_2013\\_2014.pdf](https://www.brennancenter.org/sites/default/files/publications/The_New_Politics_of_Judicial_Election_2013_2014.pdf).

35. For example, as the recent impeachment of four West Virginia Supreme Court justices for improper use of state funds reminds us, judges are accountable to the public in their positions as governmental actors. *West Virginia House Votes to Impeach Four West Virginia Supreme Court Justices; Senate Schedules Trial*, BRENNAN CTR. JUST.: FAIR CTS. E-LERT (Aug. 24, 2018). Yet, some have posited that the alleged improper use of funds was a smokescreen for a political agenda by the other branches. See Meagan Flynn, *West Virginia Botches Impeachment of Chief Justice. Faces Constitutional Crisis. Stay Tuned.*, WASH. POST (Oct. 15, 2018), [https://www.washingtonpost.com/news/morning-mix/wp/2018/10/15/west-virginia-botches-impeachment-of-chief-justice-faces-constitutional-crisis-stay-tuned/?utm\\_term=.a2e7c64c75a2](https://www.washingtonpost.com/news/morning-mix/wp/2018/10/15/west-virginia-botches-impeachment-of-chief-justice-faces-constitutional-crisis-stay-tuned/?utm_term=.a2e7c64c75a2).

36. See generally, e.g., Code of Judicial Conduct for the State of Florida, Fla. Supreme Ct., <http://www.floridasupremecourt.org/decisions/ethics/canon7.shtml> (last updated June 18, 2015); Code of Judicial Conduct, N.J. Courts (Sept. 1, 2016), <https://njcourts.gov/attorneys/assets/rules/cjc.pdf>; Oregon Code of Judicial Conduct, Or. Cts. (2013), <https://www.courts.oregon.gov/rules/Other%20Rules/CodeJudicialConduct.pdf>.

## What if a judge uses a racial slur while performing his or her official duties, or in public?

ments of the law, or to ignore the constitutional rights of defendants. . . . Judicial independence requires a judge to commit to following the constitution, the statutes, common law principles, and precedent without intrusion from or intruding upon other branches of government. It does not refer to independence from judicial disciplinary bodies (or

from higher courts). Decision making is constrained by the evidence, by appropriate procedural rules, records and legal principles.<sup>37</sup>

In an attempt to advance the goal of a fair and impartial judiciary, the National Association of Women Judges (NAWJ) launched its Informed Voters Project (IVP), “a non-partisan voter education initiative developed to increase public awareness about the judicial system, to inform voters that politics and special interest attacks have no place in the courts, and to give voters the tools they need to ensure judges are appointed and elected on the basis of their character and ability.”<sup>38</sup> IVP offers the following five factors as proper considerations in evaluating judicial candidates for selection and retention—(1) integrity, (2) professional competence, (3) judicial temperament, (4) experience, and (5) service—which frame the discussion below.<sup>39</sup> Similarly, former U.S. Supreme Court’s Justice Sandra Day O’Connor’s *The O’Connor Judicial Selection Plan*, sets forth the following “values desired in individual judges”: fairness and impartiality, competence, judicial philosophy, productivity and efficiency, clarity, demeanor and temperament, community, and separation of politics from adjudication.<sup>40</sup>

### 1. INTEGRITY

First, IVP explains that judges should be of the highest

integrity: “[a] judge should be honest, impartial, and committed to the rule of law.”<sup>41</sup> Likewise, Canon 1 of the ABA’s Model Code of Judicial Conduct states that judges “shall uphold and promote the independence, integrity, and impartiality of the judiciary.”<sup>42</sup> Given that each state’s code of judicial conduct and the federal and state constitutions are the lynchpins to judicial service,<sup>43</sup> violating these obligations would properly subject a judge or justice to consequence, including removal.<sup>44</sup>

As the Brennan Center explains, “A judge’s job is to apply the law fairly and to protect our rights, even when doing so is unpopular or angers the wealthy and powerful.”<sup>45</sup> Therefore, as discussed above, “the reality of competing in costly, highly politicized elections is at odds with this role.”<sup>46</sup> Justice Ginsburg, joined by Justice Breyer, addressed this in 2015 in her concurring in part opinion in *Williams-Yulee v. Florida Bar*:

“Favoritism,” *i.e.*, partiality, if inevitable in the political arena, is disqualifying in the judiciary’s domain. . . . Unlike politicians, judges are not “expected to be responsive to [the] concerns” of constituents. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. [1434,] 1441 [(2014)] (plurality opinion). Instead, “it is the business of judges to be indifferent to popularity.” *Chisom v. Roemer*, 501 U.S. 380, 401, n. 29, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991) (internal quotation marks omitted).<sup>47</sup>

Of course, situations in which a judge should be removed may not be so clear cut. As others have recognized, these “characteristics . . . are . . . difficult to measure.”<sup>48</sup> What if a judge’s decisions reflect impermissible bias based on race, ethnicity, gender, sexual orientation, or other forms of bias?<sup>49</sup> What if a judge uses a racial slur while performing his or her official duties, or in public? For example, in 2018, Florida trial judge was under review for “using the word ‘moolie’ to describe a black defendant . . . while speaking with the defendant’s lawyer in chambers about scheduling.”<sup>50</sup> After

37. In re Hammermaster, 985 P.2d 924, 936 (Wash. 1999).

38. *About the Informed Voters Project*, Informed Voters Project: Fair Judges, <https://ivp.nawj.org/about/> (last visited Aug. 24, 2018).

39. Evaluation Tips, Informed Voters Project: Fair Judges 1, <https://ivp.nawj.org/app/uploads/2016/06/How-should-I-judge.pdf> (last visited Aug. 24, 2018); see *A New Era for Judicial Retention Elections*, *supra* note 4, at 1534; Reddick & Kourlis, *supra* note 15, at 12. These factors are similar to those suggested by the Defense Research Institute and used by, for example, New Mexico’s Judicial Performance Evaluation Commission. Defense Res. Inst., *Without Fear or Favor: A Report by DRI’s Judicial Task Force* 35 (2007), [http://www.dri.org/docs/default-source/dri-white-papers-and-reports/dri-judicial-task-force-report---without-fear-or-favor-\(2007\)-\(1\).pdf?sfvrsn=6](http://www.dri.org/docs/default-source/dri-white-papers-and-reports/dri-judicial-task-force-report---without-fear-or-favor-(2007)-(1).pdf?sfvrsn=6) [hereinafter DRI]; *Overall Factors*, Jud. Performance Evaluation Comm’n, <https://www.nmjpec.org/en/how-we-evaluate/overall-factors> (last visited Sept. 4, 2018).

40. The O’Connor Judicial Selection Plan, Inst. Advancement Am. Legal Sys. 2-3 (June 2014), <http://iaals.du.edu/projects/oconnor-judicial-selection-plan#tab=retention-election>.

41. Evaluation Tips, *supra* note 39.

42. *Model Code of Judicial Conduct*, Am. Bar Ass’n (2010), [https://www.americanbar.org/groups/professional\\_responsibility/](https://www.americanbar.org/groups/professional_responsibility/)

[publications/model\\_code\\_of\\_judicial\\_conduct/](https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/).

43. See, e.g., *United States v. Janis*, 428 U.S. 433, 458 n.35 (1976); *State v. Hess*, 785 N.W.2d 568, 584 (Wis. 2010).

44. See DRI, *supra* note 39, at 34 (“The system should select judges who will be accountable to the laws and the constitutions of the United States and the applicable state.”).

45. Bannon, *supra* note 24, at 1.

46. *Id.*

47. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1674 (2015) (Ginsburg, J., concurring in part).

48. Reddick & Kourlis, *supra* note 15, at 12.

49. See Berry, *supra* note 8, at 1.

50. Chris Perez, *Judge Uses Racial Slur to Describe Defendant, Blames New York Upbringing*, N.Y. POST (May 21, 2018), <https://nypost.com/2018/05/21/judge-uses-racial-slur-to-describe-defendant-blames-new-york-upbringing/>. “The slur is a shortened version of ‘mulignan’—a Sicilian slur used to describe black people or somebody with a dark complexion, according to the commission’s report on the case.” David Ovalle, *Miami Judge Who Used an Obscure Racial Slur Resigns from the Bench*, MIAMI HERALD (July 13, 2018), <https://www.miamiherald.com/news/local/article214845940.html>.

attempting to justify the use of this word,<sup>51</sup> “Millan agreed to undergo racial sensitivity training,” but Florida’s Judicial Qualifications Committee (JQC) recommended that Millan be suspended from the bench for thirty days without pay, fined \$5,000, and subject to a public reprimand.<sup>52</sup> The Florida JQC wrote: “The use of racially derogatory and demeaning language to describe litigants, criminal defendants or members of the public, even behind closed doors or during off-the-record conversations, erodes public confidence in a fair and impartial judiciary.”<sup>53</sup> After the Supreme Court of Florida unanimously rejected the JQC’s proposed sanctions and sent the case back for a full hearing, Millan resigned from the bench.<sup>54</sup>

In a similar vein, Florida trial judge Mark Hulsey III was charged by the Florida JQC for making racist and sexist comments in court and “misus[ing] his judicial assistant and staff attorneys.”<sup>55</sup> “[F]acing potential impeachment by the Florida Legislature and” discipline by the JQC, Hulsey resigned.<sup>56</sup> As the cases of Millan and Hulsey show, the proper response to improper judicial actions by overt acts of bias does not seem to be removal by the voters but, rather, a more vigorous use of the JQC or appropriate disciplinary body. The message this time: *Explicit prejudice will not be tolerated in the courts.*

## 2. PROFESSIONAL COMPETENCE

Second, as to “professional competence,” IVP explains that “[a] judge should have a keen intellect, extensive legal knowledge and strong writing skills.”<sup>57</sup> Professional competence matters in both judicial selection—for determining whether a candidate is qualified for the role based on the state’s specific qualifications—and judicial retention. Fortunately, judicial competence has rarely been challenged in judicial retention elections.

## 3. JUDICIAL TEMPERAMENT

Third, as to “judicial temperament,” IVP explains that “[a] judge must be neutral, decisive, respectful and composed.”<sup>58</sup> Similarly, *The O’Connor Judicial Selection Plan* explains that judges must be “patient and even-keeled” as well as “collegial and humble,” meanwhile “command[ing] respect from the community and from those who enter the courthouse,” which the judge should “work to make . . . a comfortable place.”<sup>59</sup> Canon 2 of the ABA’s Model Code of Judicial Conduct pro-

vides: “A judge shall perform the duties of judicial office impartially, competently, and diligently.”<sup>60</sup>

An example of accountability on this front comes from Arizona, where voters in 2014, recalled a judge for the first time since 1978.<sup>61</sup> Judge Benjamin Norris of Maricopa County Superior Court was presiding over a custody case when the following ensued:

**Fortunately, judicial competence has rarely been challenged in judicial retention elections.**

The mother’s attorney was trying to convince Norris that the father should not have unlimited access to his two daughters, but Norris had quashed the subpoena of the Child Protective Services caseworkers who were supposed to testify.

Then, when the mother’s attorney asked if Norris had watched a video of an earlier hearing in which a judge had imposed a protective order against the father, Norris flew into a rage.

“I work 12-hour days,” he said. “And if you start making me watch two hours of video for every hour hearing, I don’t have 36 hours in a day.”

“Why are you yelling at me?” the lawyer asked.

“Because I’m upset by this.”<sup>62</sup>

The hearing continued. “Nothing was accomplished.”<sup>63</sup> Norris’s “lack of civility,” which other judges had also noticed, “resulted in a bad review of his performance as a judge” by the Arizona Commission on Judicial Performance Review.<sup>64</sup> In response to the Commission’s review, the Maricopa County electorate rejected Norris’s retention,<sup>65</sup> sending this message: *Judges will be required to maintain a certain level of civility and patience in performing their judicial duties.* “[M]any in the legal community” considered Norris’s loss “a validation for the judicial-retention ballot.”<sup>66</sup>

In contrast to the message voters send when they merely disagree with a judicial decision, the message sent to Judge Norris was properly based on his actions in performing his role

51. Perez, *supra* note 50.

52. *Id.*; accord eds., *Racial Bias in the Courtroom Undercuts Justice*, MIAMI HERALD (July 15, 2018), <https://www.miamiherald.com/opinion/editorials/article214917125.html>.

53. Perez, *supra* note 50.

54. Order, Inquiry Concerning a Judge, No.17-570, No. SC18-775 (Fla. June 8, 2018); Ovalle, *supra* note 50.

55. Larry Hannan, *Jacksonville Judge Accused of Racist and Sexist Comments Resigns*, Jacksonville.com (Jan. 23, 2017).

56. *Id.*

57. Evaluation Tips, *supra* note 39; see *In re Barnes*, 510 N.E.2d 392, 398 (Ct. App. Ohio 1986); *Methods of Judicial Selection*, *supra* note 15.

58. Evaluation Tips, *supra* note 39.

59. O’Connor Judicial Selection Plan, *supra* note 40, at 3.

60. *Model Code of Judicial Conduct*, *supra* note 42.

61. Michael Kiefer, *Merit Proponents: Voting Out Judge Out Shoes System Works*, AZCentral (Nov. 7, 2014), <https://www.azcentral.com/story/news/arizona/politics/2014/11/07/merit-proponents-voting-judge-shows-system-works/18654583/>.

62. *Id.*

63. *Id.*

64. *Id.* After conducting surveys, asking for self-evaluations, and holding interviews with judges, “the commissioners tallied up the data as to Norris’ qualifications to remain on the bench” and “rated him at the bottom.” *Id.* The commission voted 23-3 that Judge Norris “did not meet adequate standards.” *Id.*

65. *Id.*

66. *Id.*

**Judicial temperament may also be compromised when judges are forced to participate in contested elections.**

as a judge.<sup>67</sup> Judges acting in the manner that Judge Norris acted threatens judicial legitimacy; whereas, the exact opposite is true of removing judges based on their reasoned decisions.

Judicial temperament may also be compromised when judges are forced to participate in contested elections. Just this year, the Florida Supreme Court removed a state trial judge for 2016 campaign violations.<sup>68</sup> While running against criminal defense

attorney Gregg Lerman, Dana Marie Santino's campaign created "a Facebook page that blasted opponent Lerman's defense of 'Palm Beach County's worst criminals' and listed a few of his higher-profile cases. The page showed a photo of Lerman surrounded by the words 'child pornography,' 'murder,' 'rape' and more, in boldface and all capital letters."<sup>69</sup> In its opinion removing Santino from the bench, the Florida Supreme Court wrote that "Santino's conduct does not evidence a present fitness to hold judicial office."<sup>70</sup> Again, the message seems proper and reflects the principles espoused in nationwide judicial codes of conduct: *Judges will be required to maintain a certain level of character and dignity in all actions.*

#### 4. EXPERIENCE

Fourth, as to "experience,"<sup>71</sup> IVP explains that "[a] judge should have a strong record of professional excellence in the law."<sup>72</sup> The rationale underlying this factor often seems instinctual: a judge should be an experienced advocate rather than a brand-new attorney who has not gained sufficient experience to perform judicial duties. *The O'Connor Judicial Selection Plan* suggests that this competence requirement demands judges have the best academic and intellectual skills, stating that judges must "have excellent analytical ability," "demonstrate excellent substantive legal knowledge, or a willingness to learn

at the earliest opportunity," and "undertake the research necessary to gain command of the facts and issues presented."<sup>73</sup>

Of course, this factor is likely more important when considering a candidate for selection rather than retention because judges up for retention already have experience on the bench, so their ability to build on prior experiences to perform the judicial role is obvious. However, even after selection, a judge must be willing and able to continue expanding his or her knowledge by learning and researching, as *The O'Connor Judicial Selection Plan* explains.

#### 5. SERVICE

Finally, as to "service,"<sup>74</sup> IVP explains that "[a] judge should be committed to public service and the administration of justice."<sup>75</sup> A judge should be diligent and hardworking. The judge's motivation in fulfilling his or her duties should not be for private gain, which would cause impropriety and improper bias. Canon 3 of the ABA's Model Code of Judicial Conduct seems to contemplate this, providing: "A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office."<sup>76</sup>

Having explained these proper considerations for judicial selection and retention, or holding judges accountable, we turn next to review other messages voters have sent to judges, which were *not* based on these objective, neutral factors. Understanding these attacks and what motivated them is essential to understanding how to move forward; to make progress, we must learn from the past.

### IMPROPER CONSIDERATIONS USED TO ATTACK THE JUDICIARY SINCE 2010

Politically motivated attacks on state-court judges existed before 2010,<sup>77</sup> but 2010 was a turning point.<sup>78</sup> As mentioned above, voters and, more specifically, special interest groups in Iowa used a well-funded campaign to remove three highly qualified Iowa Supreme Court justices on the ballot for merit retention.<sup>79</sup> The impetus was the court's unanimous opinion holding

67. Another example of a judge's proper removal for improper conduct that affected the judge's official role was seen recently with the suspension of Michigan County Judge Theresa Brennan. See Orlander Brand-Williams, *State Panel: Stop Paying Livingston County Judge Brennan*, DETROIT NEWS (Jan. 16, 2019), <https://www.detroitnews.com/story/news/2019/01/16/state-panel-stop-paying-livingston-county-judge-brennan/2593509002/>.

68. Marc Freeman, *High Court Removes Palm Beach County Judge Over Campaign Misconduct*, S. FLA. SUNSENTINEL (July 2, 2018), <https://www.sun-sentinel.com/local/palm-beach/fl-pn-judge-santino-supreme-court-ruling-20180702-story.html>.

69. *Id.*

70. *Inquiry Concerning a Judge No. 16-534 RE: Dana Marie Santino*, 43 FLA. L. WEEKLY S477, 2018 WL 5095128, \*10 (Fla. Oct. 19, 2018).

71. "Experience" is defined as the "[a]ctive participation in events or activities, leading to the accumulation of knowledge or skill." *Experience*, AM. HERITAGE DICTIONARY ENG. LANGUAGE, <https://www.ahdictionary.com/word/search.html?q=experience> (last visited Aug. 30, 2018).

72. Evaluation Tips, *supra* note 39.

73. O'Connor Judicial Selection Plan, *supra* note 40, at 2.

74. "Service" is defined as "[e]mployment in duties or work for

another, as for a government." *service*, AM. HERITAGE DICTIONARY ENG. LANGUAGE, <https://www.ahdictionary.com/word/search.html?q=service> (last visited Aug. 30, 2018).

75. Evaluation Tips, *supra* note 39.

76. *Model Code of Judicial Conduct*, *supra* note 42.

77. See, e.g., Colman McCarthy, *Injustice Claims a Tennessee Justice*, WASH. POST (Nov. 26, 1996), [https://www.washingtonpost.com/archive/lifestyle/1996/11/26/injustice-claims-a-tennessee-judge/f0a28c33-fcb1-4c1b-9471-2d5704d56a88/?noredirect=on&utm\\_term=.fca53f190689](https://www.washingtonpost.com/archive/lifestyle/1996/11/26/injustice-claims-a-tennessee-judge/f0a28c33-fcb1-4c1b-9471-2d5704d56a88/?noredirect=on&utm_term=.fca53f190689) (explaining the removal of Justice Penny White in Tennessee in 1996); Georgiana Vines, *Where Are They Now: Election Loss Led to Success in Academia for Former TN Justice Penny White*, KNOXVILLE NEWS SENTINEL (Sep. 6, 2014), <http://archive.knoxnews.com/entertainment/life/where-are-they-now-election-loss-led-to-success-in-academia-for-former-tn-justice-penny-white-ep-596-354313321.html> (same).

78. *A New Era for Judicial Retention Elections*, *supra* note 4, at 1529; see A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), <https://www.nytimes.com/2010/11/04/us/politics/04judges.html>.

79. See Bannon, *supra* note 24, at 10; see also *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009);



unconstitutional a state statute banning same-sex marriage. While those who mounted the campaign against these “activist” justices—who were simply performing their judicial duty of interpreting their state constitution—celebrated the justices’ removal as “a popular rebuke of judicial overreach,”<sup>80</sup> removing the justices had “no effect on” the substance of the decision that caused the attack.<sup>81</sup> Yet, those who led the campaign commented that “the results should be a warning to judges elsewhere.”<sup>82</sup> The message: *Unpopular decisions that ignore the will of the people jeopardize your position on the bench.*

Just two years after the successful Iowa campaign, special interest groups struck again. As mentioned above, opposition groups—including Americans for Prosperity and the Tea Party through Restore Justice, and ultimately the Republican Party of Florida<sup>83</sup>—targeted my colleagues and me when we were up for merit retention in the 2012 election,<sup>84</sup> urging voters to vote “no” on our retention. Initially, they focused on a decision from our Court striking a state constitutional ballot initiative that was marginally about the health care mandate in the recently passed and very controversial Affordable Care Act.<sup>85</sup> But our opponents soon turned to a 2004 decision in a capital-sentencing case, which they used to support their argument to voters that we used our “own views to usurp the law and separation of powers.”<sup>86</sup> Focusing on these decisions, our opponents launched ads labeling us as activists, legislating from the bench, and failing to respect victims of crime<sup>87</sup>—the same buzz words that were used against the Iowa justices in the “Send Them a Message” ad.<sup>88</sup>

As a result of these attacks, we each decided that we should form a “Committee of Responsible Persons,” as authorized by the Florida Code of Judicial Conduct,<sup>89</sup> to fundraise and engage

in an educational campaign about the purpose of merit retention. Contrary to the ads, we maintained that our decisions were and would continue to be based solely on the law.<sup>90</sup> In fact, “a study commissioned by the Federalist Society found nothing to support a charge of judicial activism.”<sup>91</sup> Unlike in Iowa, our opponents were ultimately unsuccessful and, fortunately, we were each retained and able to continue in our positions through our mandatory retirements.<sup>92</sup> The message still resonated, though: *Despite the merit-retention system, your seat is not safe from political attack.*<sup>93</sup>

My concern, as seen in my own 2012 merit-retention election, is that, by waging campaigns to remove a well-qualified jurist, judges are forced to campaign against an undefined opponent—an even more difficult task than campaigning against a defined opponent in an ordinary election. I am not alone in this regard. As detailed in the law review article authored by attorney Jim Robinson and me, political attacks on state court judiciaries have continued—including in 2014 in Kansas and Tennessee, and then again in Kansas in 2016<sup>94</sup>—all fueled by groups attempting to change the composition on the court under attack.

Most recently, California voters expressed their discontent with the judiciary in 2018 by recalling Judge Aaron Persky—the first recall in the state in over eighty years.<sup>95</sup> Voters attacked Persky after he sentenced a Stanford athlete, Brock Turner, “to just six months in jail for sexually assaulting an unconscious woman.”<sup>96</sup> Although Turner faced up to fourteen

**The message:  
Unpopular  
decisions that  
ignore the will  
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80. Sulzberger, *supra* note 78.

81. *Id.* Of course, we now know that the Iowa justices’ decision was legally correct—as the U.S. Supreme Court held in 2016 in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

82. Sulzberger, *supra* note 78.

83. Alvarez, *supra* note 5; Musgrave, *supra* note 5. This was the first time “a political party ever [took] a position” regarding the retention of state court judges. See Robert Barnes, *Republicans Target Three Florida Supreme Court Justices*, WASH. POST (Oct. 30, 2012), [https://www.washingtonpost.com/politics/decision2012/republicans-target-three-florida-supreme-court-justices/2012/10/30/edb5de-1d22-11e2-ba31-3083ca97c314\\_story.html?noredirect=on&utm\\_term=.cd266c5be2f1](https://www.washingtonpost.com/politics/decision2012/republicans-target-three-florida-supreme-court-justices/2012/10/30/edb5de-1d22-11e2-ba31-3083ca97c314_story.html?noredirect=on&utm_term=.cd266c5be2f1).

84. *A New Era for Judicial Retention Elections*, *supra* note 4, at 1549.

85. See generally Fla. Dep’t of State v. Mangat, 43 So. 3d 642 (Fla. 2010).

86. *A New Era for Judicial Retention Elections*, *supra* note 4, at 1549-50 (quoting *Preserving a Fair and Impartial Judiciary*, *supra* note 2, at 10); see Barnes, *supra* note 83.

87. See Musgrave, *supra* note 5.

88. TV Ad: *Send Them a Message*, *supra* note 1.

89. See Canon 7C(1), Code of Judicial Conduct for the State of Florida, *supra* note 36; see also *A New Era for Judicial Retention Elections*, *supra* note 4, at 1560 & n.203.

90. Musgrave, *supra* note 5.

91. Barnes, *supra* n. 83.

92. Yet, we would see these buzzwords again just before our constitutionally required retirement in January 2019. See, e.g., Gary

Rohrer, *Florida Supreme Court: Next Governor Gets to Replace Retiring Justices*, ORLANDO SENTINEL (Oct. 15, 2018), <https://www.orlandosentinel.com/news/politics/political-pulse/osne-scott-appoint-justices-20181015-story.html>; David Smiley, *Florida Supreme Court Ruling Raises Stakes of Governor’s Election*, MIAMI HERALD (Oct. 15, 2018), <https://www.miamiherald.com/news/politics-government/state-politics/article220070010.html>.

93. See *TV Spending Surges Past \$1.4 Million in Tennessee Judicial Race*, BRENNAN CTR. JUST. (Aug. 7, 2014), <https://www.brennancenter.org/press-release/tv-spending-surges-past-14-million-tennessee-judicial-race> (reporting “a national trend of increasing expenditures on judicial elections,” especially in states that “worked to insulate courts from political pressure by establishing merit selection systems”).

94. *A New Era for Judicial Retention Elections*, *supra* note 4, at 1556-57; Mark Binker, *Big Business Spends to Unseat NC Supreme Court Justice Hudson*, WRAL.com (Apr. 30, 2014), <https://www.wral.com/big-business-spends-to-unseat-nc-supreme-court-justice-hudson/13603252/>.

95. Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html>.

96. *Id.*; accord Augie Martin, Holly Yan & Dan Merica, *Voters Oust Judge Who Gave Brock Turner 6 Months for Sex Assault*, CNN (June 6, 2018), <https://www.cnn.com/2018/06/06/us/judge-aaron-persky-recall-results-brock-turner/index.html>.

**The recall of Judge Persky was still based upon public disapproval of a judicial decision that was valid under the law.**

years in prison under state law, Judge Persky sentenced him “to only six months,” citing his “age, the fact that both he and the victim were drunk and that prison time could have a ‘severe’ impact on [his] life as the reasoning behind the lenient six-month sentence.”<sup>97</sup> Persky explained that Turner also “lost his swimming scholarship to Stanford and had to register as a sex offender

in Ohio, his home state.”<sup>98</sup>

Regarding his decision, Judge Persky stated: “As a judge, my role is to consider both sides. . . . It’s not always popular, but it’s the law, and I took an oath to follow it without regard to public opinion or my opinions as a former prosecutor.”<sup>99</sup> “Judge Persky was cleared of any official misconduct,” and the appellate court upheld Turner’s conviction.<sup>100</sup> But, “talk of a recall campaign began almost as soon as he handed down his sentence. . . . In a statement filed with the county registrar in response to” campaign efforts against him, led by the victim’s mother, “Judge Persky said he had a legal and professional responsibility to consider alternatives to imprisonment for first-time offenders.”<sup>101</sup>

The Stanford case caused public outrage for several reasons. First, the public considered Turner’s sentence, although permissible under the law, unreasonably short. More importantly, many thought that the defendant’s race contributed to the leniency in sentencing—that he was given a more lenient sentence because he is white rather than black. While this concern about racial disparities in the justice system is certainly valid, recalling Persky may have actually undermined the quest for a more equitable and merciful justice system. As Professor John Pfaff, an academic who studies criminal justice, explained: “The recall will make judges more punitive, thwart progress toward scaling back mass incarceration and—though Turner and Persky are both white—hurt minorities disproportionately.”<sup>102</sup>

Unlike the attacks in Iowa, Florida, and Tennessee, the attack against Persky was not driven by special interests seeking to change the composition of the court. Rather, the attack against Persky was a result of voters’ outrage caused by one of Persky’s sentencing decisions, made in his judicial capacity, with which voters strongly disagreed because they viewed the

decision as insensitive to and minimizing the serious crime of sexual assault. However, the message was similar and harmful to a fair and impartial judiciary nonetheless. The recall of Judge Persky was still based upon public disapproval of a judicial decision that was valid under the law.

Some may argue that the message sent in the case of Judge Persky was proper based on the circumstances. But, if the message was proper under those circumstances, what is its logical end point? For state court trial judges who are required to run in judicial elections, should the judge be able to present a “tough on crime” platform?<sup>103</sup> In fact, many judges may already feel this pressure. Notably, the Brennan Center reported in 2017 that multiple studies found that judges subjected to upcoming contested elections or even retention elections are “more punitive toward defendants in criminal cases.”<sup>104</sup>

Kansas offers a useful illustration. Opposition to the 2014 and 2016 merit-retention campaigns of well-qualified Kansas Supreme Court justices rallied around outrage by the families of the victims in a decision granting two death row defendants new sentencing proceedings. While the campaign was started by the victims’ families, interest groups and the Governor became involved and ultimately used the decision to create attack ads accusing the Supreme Court of Kansas of siding with murderers. As Jim Robinson and I have discussed elsewhere, special interest groups and politicians seized on this case in an attempt to change the composition of the Kansas Supreme Court, which they considered to be “too liberal.”<sup>105</sup>

Similarly, the 2014 campaign against Justice Robin Hudson of the North Carolina Supreme Court, a well-qualified jurist, launched ads labeling her as “not tough on child molesters” and, even worse, “not fair.”<sup>106</sup> But the real motivation came from pro-business interests seeking her replacement.<sup>107</sup> Fortunately, not only were the attack ads unsuccessful in replacing Justice Hudson, but both the local and national press became aware of the motivations behind the campaign and explained it widely.<sup>108</sup> The attacks against Justice Hudson show not only the harmful messages special interests impose on voters but also, and more importantly, the importance of educating the media and public on this topic so they can properly identify and report on these attacks.

As all of these instances show, the merit-based system for selecting and retaining judges leaves good judges and justices vulnerable to attack by special interest groups. Some of these

97. Christal Hayes & John Bacon, *Judge Aaron Persky, Who Gave Brock Turner Lenient Sentence in Rape Case, Recalled from Office*, USA TODAY (June 6, 2018), <https://www.usatoday.com/story/news/2018/06/06/judge-aaron-persky-who-gave-brock-turners-lenient-sentence-sanford-rape-case-recalled/674551002/>.

98. Christine Hauser, *Brock Turner Loses Appeal to Overturn Sexual Assault Conviction*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/us/brock-turner-appeal.html>.

99. Astor, *supra* note 95.

100. Hauser, *supra* note 98.

101. *Id.*; see Hayes & Bacon, *supra* note 97.

102. John Pfaff, *California Ousts an Elected Judge. Everybody Loses*, WASH. POST (June 13, 2018), [https://www.washingtonpost.com/news/posteverything/wp/2018/06/13/california-ousts-a-judge-](https://www.washingtonpost.com/news/posteverything/wp/2018/06/13/california-ousts-a-judge-everybody-loses/?utm_term=.cd4158856239)

[everybody-loses/?utm\\_term=.cd4158856239](https://www.washingtonpost.com/news/posteverything/wp/2018/06/13/california-ousts-a-judge-everybody-loses/?utm_term=.cd4158856239).

103. See Greytak, et al., *supra* note 34, at 3.

104. Berry, *supra* note 8, at 2.

105. *A New Era for Judicial Retention Elections*, *supra* note 4, at 1553.

106. Mark Binker, *Big Business Spends to Unseat NC Supreme Court Justice Hudson*, WRAL.com (Apr. 30, 2014), <https://www.wral.com/big-business-spends-to-unseat-nc-supreme-court-justice-hudson/13603252/>; see Jefferson & Pariente, *supra* note 23, at 14.

107. See Binker, *supra* note 106.

108. E.g., *id.*; Tom Bullock, *Controversial “Justice for All NC” PAC Returns for Late Push on Judges*, WFAE 90.7 (Oct. 30, 2014), <http://www.wfae.org/post/controversial-justice-all-nc-pac-returns-late-push-judges#stream/0>.

attacks have even been successful in sending messages to judges that have no place in the judicial branch, the one branch of government designed to be free from improper influence.<sup>109</sup> As the Defense Research Institute has stated: “The unique position of the judiciary stems in part from the long-standing commitment to the American people to the rule of law and to constitutional government.”<sup>110</sup>

## POTENTIAL WAYS TO IMPROVE THE MERIT-BASED SYSTEM

So, what can we do to ensure that American voters, and the public at large, understand and evaluate judges based on proper characteristics—as outlined above—rather than the improper motivations that have led to former attacks? As Alicia Bannon, Deputy Director for Program Management of the Brennan Center, observed, “there is far more agreement on the problems associated with judicial elections than on potential reforms.”<sup>111</sup> While others may disagree, it seems clear that, while certain aspects of the system may certainly be improved, a merit-based system is the preferred method for judicial selection and retention. Thus, I start with the premise, which may be controversial among some in the judiciary and legal profession, that election of state court judges and justices—whether partisan or non-partisan—always creates the real risk of politicizing the judiciary and subjecting the judiciary to special interest influence.

Both the Brennan Center and *The O’Connor Judicial Selection Plan*, as well as other organizations,<sup>112</sup> have invested many resources in determining best practices and creating proposals for reforming the merit-selection and -retention systems. Having reviewed the literature and personally experienced these unwelcome attacks, I agree that, at the least, we should (1) review how judicial nominating commissions (JNCs) are composed and instructed, (2) maintain a vigorous judicial qualifications committee (JQC) process to ensure accountability, (3) consider a system of judicial evaluations, such as the one in Arizona, provided it can be truly non-partisan, and last but not least (4) concurrently provide an effective forum to continue to educate the

public, the media, and voters on judges up for retention election. In the end, I am in favor of a true merit-based system for all levels of judges with a properly constituted and nonpartisan JNC as well as a vigorous JQC to monitor complaints about judicial conduct. I also believe we should consider one lengthy term for judges, without retention, as the Brennan Center has proposed.<sup>113</sup>

**So, what can we do to ensure the American voters, and the public at large, understand and evaluate judges based on proper characteristics . . . ?**

## I. REVIEWING THE COMPOSITION AND INSTRUCTION OF JNCs

First, political influence must be removed (or at least minimized) from every step of the judicial selection and retention process, beginning with the JNC. Each state’s JNC and JQC is specifically tasked with ensuring that judges and justices are properly vetted before selection and that they comply with the appropriate code of judicial conduct while in office. As former Chief Justice of the Arizona Supreme Court, Ruth V. McGregor, explained, the JNC “is the key to the judicial merit selection process.”<sup>114</sup> Likewise, the independence of JNCs is critical. Thus, I agree with the Brennan Center and *The O’Connor Judicial Selection Plan* that we should rethink how JNCs are composed and instructed.<sup>115</sup>

For example, in states like Florida, the Governor appoints each member of the JNC, resulting in the likelihood of a more partisan commission that, in turn, selects the list of the candidates from which the Governor appoints judges or justices.<sup>116</sup> In Vermont, by contrast, the eleven-member JNC is appointed as follows: three members appointed by the Bar; two members appointed by the Governor; three members appointed by the Senate; and three members appointed by the House.<sup>117</sup> Vermont’s system seems to diversify the interests at stake better

109. See O’Connor Judicial Selection Plan, *supra* note 40, at 3-4.

110. DRI, *supra* note 39, at 24.

111. Alicia Bannon, *Rethinking Judicial Selection*, AM. BAR ASS’N (June 14, 2017), [https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/2016/volume-24-number-1/rethinking\\_judicial\\_selection/](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-1/rethinking_judicial_selection/).

112. See, e.g., DRI, *supra* note 39.

113. See Bannon, *supra* note 24.

114. O’Connor Judicial Selection Plan, *supra* note 40, at 5; *accord* In re Advisory Op. to Governor, 276 So. 2d 25, 30 (Fla. 1973) (“The purpose of the judicial nominating commission is to take the judiciary out of the field of political patronage and provide a method of checking the qualifications of persons seeking the office.”).

115. Bannon, *supra* note 24, at 2 (recommending bipartisan nominating commissions that are “appointed by diverse stakeholders,” “include non-lawyers, and have clear criteria for vetting candidates.” (emphasis added)); O’Connor Judicial Selection Plan, *supra* note 40, at 5 (recommending that nominating commissions be “constitutionally based” and “representative of the community to be served by the judge”).

116. § 43. 291, Fla. Stat. (2018); see also *Judicial Nominating Commis-*

*sion*, Mass.Gov, <https://www.mass.gov/orgs/judicial-nominating-commission> (last visited Nov. 27, 2018). Before 2001, Florida’s JNC was composed of three members appointed by the Florida Bar, three members appointed by the Governor, and three members selected and appointed by a majority vote of the other six members. § 43.291, Fla. Stat. (2000). However, in 2001, the Florida Legislature changed the statute to the system Florida uses today, under which Florida’s Governor appoints five of the nine JNC members. For the other four members, the Florida Bar submits names to the Governor to accept or reject—essentially giving the Governor ultimate control over all nine seats on the JNC. § 43.291, Fla. Stat. (2001); ch. 2001-282, Laws of Fla. In 2018, when there were three upcoming vacancies on the Supreme Court of Florida, political influence on the JNC was at the forefront of discussion. See, e.g., Lloyd Dunkelberger, *Ron DeSantis Gets List of Conservative Nominees for Florida Supreme Court Vacancies*, ORLANDO WEEKLY (Nov. 28, 2018), <https://www.orlando-weekly.com/Blogs/archives/2018/11/28/ron-desantis-gets-list-of-conservative-nominees-for-florida-supreme-court-vacancies>.

117. *Judicial Nominating Information*, Vt. Judiciary, <https://www.vermont-judiciary.org/attorneys/judicial-nominating-information>.

**JQCs are critical in ensuring that judges are held accountable for violating judicial codes of conduct.**

than systems like Florida's, which, in turn, decreases the risk of politicizing the judiciary.

There are many options. Systems like Kentucky's and Indiana's even involve voters, although the process is more partisan in Kentucky. There, the JNC is composed of "the chief justice of Kentucky (who also serves as chair), two attorneys elected by all attorneys in the vacancy's jurisdiction and four non-attorney Kentucky citizens who are appointed by the governor. The four citizens must equally represent the two major political parties."<sup>118</sup>

Similarly, Indiana's seven-member JNC consists of three attorneys, three non-lawyers, "and the Chief Justice of Indiana or a Justice of the Supreme Court whom the Chief Justice may designate."<sup>119</sup> One attorney and one non-attorney are chosen to represent "each of three geographic districts of the Court of Appeals."<sup>120</sup> The attorney members "serve three-year staggered terms, after being elected by the attorneys in their respective districts."<sup>121</sup> The Governor appoints the non-attorney members, one from each of the Districts, to serve three-year terms."<sup>122</sup>

Indiana's JNC-selection process seems to more effectively reduce political influence, which is critical, by ensuring that each geographical area is represented, including a combination of attorneys and non-attorneys, as well as the Chief Justice, and involving the public. As *The O'Connor Judicial Selection Plan* explains, reducing political influence at this stage will help reduce any political influence that could arise in the next stage—gubernatorial appointment—as Governors are naturally political actors who are elected by voters to lead the state's executive branch.

## 2. MAINTAINING VIGOROUS JQCS

Second, we must ensure that each state's JQC remains independent and impartial. JQCs are critical in ensuring that judges are held accountable for violating judicial codes of conduct. As the cases of Judges Millan, Mulsey, and Santino illustrate, the JQCs are an effective way to ensure accountability under the judicial codes of conduct. In Florida, for example, the JQC has caused the removal or resignation of six judges since 2017—four judges resigned, voluntarily dismissing JQC

actions,<sup>123</sup> and two judges were removed by the Supreme Court of Florida after a JQC action.<sup>124</sup>

## 3. JUDICIAL EVALUATIONS

Third, we should consider implementing a system of judicial evaluation, such as the system used by Arizona and proposed by *The O'Connor Judicial Selection Plan*. In Arizona, each judge is evaluated twice during his or her term—"once at midterm and once at the end of the term just before the general election. The review is a two-part process."<sup>125</sup> As part of the data collection and reporting stage, the Judicial Performance Review (JPR) Commission distributes and collects surveys by "people who have contact with the judges during a prescribed time period," "holds public hearings," and "accepts written comments from the public at any time."<sup>126</sup> Then, as part of the self-evaluation and improvement stage, the "[j]udges complete self-evaluations to rate their own performance," using categories identical to those used in the surveys.<sup>127</sup>

After compiling the data, the JPR Commission determines whether the judge "Meets" or "Does Not Meet" the judicial performance standards, which include whether the judge:

- administer[s] justice fairly, ethically, uniformly, promptly and efficiently;
- [is] free from personal bias when making decisions and decide[s] cases based on the proper application of law;
- issue[s] prompt rulings that can be understood and make[s] decisions that demonstrate competent legal analysis;
- act[s] with dignity, courtesy and patience; and
- effectively manage[s] their courtrooms and the administrative responsibilities of their office.<sup>128</sup>

Ultimately, the JPR Commission's findings are made available to the public.<sup>129</sup>

Similarly, *The O'Connor Judicial Selection Plan* proposes a judicial performance evaluation system that would "publically [sic] disseminate regular evaluations of the performance of individual judges, based on criteria generally understood to be characteristics of a good judge."<sup>130</sup> *The O'Connor Judicial Selection Plan* defines those criteria as follows:

- Command of relevant substantive law and procedural rules
- Impartiality and freedom from bias
- Clarity of oral and written communications
- Judicial temperament that demonstrates appropriate respect

118. *Judicial Nominating Commission*, Ky. Ct. Justice (2018), <https://courts.ky.gov/commissionscommittees/JNC/Pages/default.aspx>.

119. *Judicial Nominating Commission Fact Sheet*, In. Judicial Branch, <https://www.in.gov/judiciary/jud-qual/2920.htm> (last visited Nov. 27, 2018).

120. *Id.*

121. *Id.*

122. *Id.*

123. Inquiry Concerning a Judge RE: John Patrick Contini, No. SC18-1189 (Fla.); Inquiry Concerning a Judge RE: Stephen Thomas Millan, No. SC18-775 (Fla.); Inquiry Concerning a Judge RE: Claudia Robinson, No. SC17-2093 (Fla.); Inquiry Concerning a

Judge RE: Mark Hulsey, III, No. SC16-1278.

124. Inquiry Concerning a Judge No. 16-534 RE: Dana Marie Santino, 43 FLA. L. WEEKLY S477 (Fla. Oct. 19, 2018); Inquiry Concerning a Judge No. 16-377 RE: Scott C. Dupont, 252 So. 3d 1130 (Fla. 2018).

125. See *JPR Process*, AZ Cts., <https://www.azcourts.gov/jpr/About-JPR/JPR-Process> (last visited Dec. 5, 2018).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. O'Connor Judicial Selection Plan, *supra* note 40, at 7.

- for everyone in the courtroom
- Administrative skills, including competent docket management
- Appropriate public outreach<sup>131</sup>

Implementing plans similar to these would ensure a non-partisan, objective review of judicial performance, which would, in turn, provide feedback to judges and, more importantly, educate voters on the proper criteria by which judges should be reviewed for retention.

#### 4. PUBLIC EDUCATION

Finally, it is important to create forums for voter education on judges who appear on the ballot for merit retention. As the IVP's purpose indicates and the example from North Carolina illustrates, voter education is critical. The ABA and IVP have started this process. In 2005, the ABA appointed a Commission on Civic Education and the Separation of Powers.<sup>132</sup> Also, the ABA's Standing Committee on the American Judicial System states in its mission statement that it "supports efforts to increase public understanding about the role of the judiciary and the importance of fair courts within American democracy."<sup>133</sup> More specifically, the Subcommittee on State Courts "supports efforts to increase public understanding of judicial selection and retention methods and to increase informed citizen participation in states where judges are subject to election of any kind."<sup>134</sup>

IVP provides educational materials—slide presentations, handouts, etc.—on their website that can be used for making presentations to the public, organizing presentations at law schools and universities, coordinating outreach efforts, and presenting at bar association events.<sup>135</sup> Other organizations have also recognized the importance of education in the mission to reduce improper influence on judicial selection and retention.<sup>136</sup> Ultimately, regardless of legislative change, voter education is critical in ensuring that judges are evaluated "about procedural fairness, demeanor, and knowledge—not about particular outcomes in individual cases."<sup>137</sup>

#### CONCLUSION

In creating the judiciary as a separate and co-equal branch of government, our Founders understood the importance of a

fair and impartial judiciary—one that does not bend to the will of the majority, the other two branches of government, or special interests. In the end, state court judges, without a system comparable to federal judges' lifetime appointments (or at least a defined lengthy term) will always be vulnerable to removal, or fear of removal, for rendering "unpopular" decisions, or those disapproved by public opinion, special interests, or the other political branches.<sup>138</sup> Yet state courts review 95% of all cases in the United States.<sup>139</sup>

**In creating the judiciary as a separate and co-equal branch of government, our Founders understood the importance of a fair and impartial judiciary . . . .**

So how do we as members of the legal profession and judiciary balance accountability with judicial independence? It is not through campaigns to remove judges who render decisions with which members of the public, political parties, or special interests disagree. The primary vehicle for judicial accountability—ensuring compliance with codes of judicial conduct and imposing consequences for misconduct—should be each state's judicial qualifications commission. In addition, an independent evaluation commission such as the one constituted in Arizona, if truly nonpartisan, could be charged with periodically evaluating each judge on the basis of objective, appropriate criteria, such as those explained in this article: integrity, professional competence, judicial temperament, experience, and service.

Further, increasing voter education on judicial elections and retention, ensuring that judicial nominating commissions for merit-selection states are appointed to ensure balance and focus on the merit of the applicants, implementing nonpartisan, objective evaluations, considering the elimination of merit-retention elections in favor of one lengthy term, and ensuring the viability of state judicial qualifications commissions are all proper areas of focus. In the end, a process where highly qualified attorneys and judges are selected through a nonpartisan and independent commission, even while the Governor ultimately selects from that list, is the best way to

131. *Id.*

132. DRI, *supra* note 39, at 33.

133. *Standing Committee on the American Judicial System*, Am. Bar Ass'n, [https://www.americanbar.org/groups/committees/american\\_judicial\\_system/](https://www.americanbar.org/groups/committees/american_judicial_system/) (last visited Nov. 27, 2018).

134. *Id.*

135. *See News and Events*, Informed Voters: Fair Judges, <https://ivp.nawj.org/news-archive/> (last visited Nov. 27, 2018); *Resources*, Informed Voters: Fair Judges, <https://ivp.nawj.org/press-roompsa/#psa> (last visited Nov. 27, 2018).

136. *See, e.g.*, President's Special Task Force to Study Enhancement of Diversity in the Judiciary and on the JNCs, Fla. Bar (2017), <https://www.floridabar.org/wp-content/uploads/2017/04/report-of-the-florida-bar-presidents-special-task-force-to-study-enhancement-of-diversity-in-the-judiciary-and-on-the-jncs.pdf>

(making ten recommendations, two of which focused on education); *see also Judicial Independent Resource Guide*, Nat'l Ctr. State Cts., <https://www.ncsc.org/Topics/Judicial-Officers/Judicial-Independence/Resource-Guide.aspx> (last updated Mar. 6, 2018).

137. O'Connor Judicial Selection Plan, *supra* note 40, at 7.

138. Of course, "unpopular" is relative because, as we know, public opinion is fluid and changes from year to year and, at times, from month to month or day by day. *See, e.g.*, *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/> (explaining how public opinion on same-sex marriage has changed over time).

139. Greytak et al., *supra* note 34, at 1-2; *Fair Courts*, BRENNAN CTR. JUST., <https://www.brennancenter.org/issues/fair-courts> (last visited Nov. 16, 2018).

ensure that the public gets what it deserves: a highly qualified and fair and impartial judiciary.

I continue to urge that lawyers and judges become actively involved in defending our judiciary. I also urge the media, through a free and independent press, to become educated about these issues so they can effectively inform the public of the proper considerations when judges are up for retention, as well as the actual special interests behind the attacks on well-qualified judges.<sup>140</sup> At the same time, it is important to maintain ongoing civic education initiatives in schools, colleges, and for the general public. While I remain concerned about whether all of these groups, individually or collectively, can stem the tide—especially from those who would reduce messages to either a 30-second sound bite or, worse, a 280-character Tweet—we have no choice but to put forth our best concerted efforts. Nothing less than “justice” and the fundamental tenets of our Democracy are at stake.<sup>141</sup>



Justice Barbara J. Pariente graduated from George Washington Law School in 1973 with highest honors. After clerking for a federal district court judge, she began a career in private practice in civil litigation where she earned an AV rating from Martindale-Hubbell. Through Florida’s constitutional system of merit selection, she became an appellate judge in 1993 and then, again through merit selection, was appointed in 1998 to the Supreme Court of Florida, where she served through her recent mandatory retirement in January 2019. She served as Florida’s Chief Justice from 2004-2006. Throughout her judicial career, she has promoted the importance of upholding and advancing a fair and impartial judiciary and has served as co-chair of the National Association of Women Judges Informed Voters/Fair Judges Project: <http://www.nawj.ivp.org>. As a result of these efforts, Justice Pariente was recently awarded the Justice Sandra Day O’Connor Award for Judicial Independence by the American College of Trial Lawyers. Justice Barbara J. Pariente, FLA. SUPREME CT., <http://www.floridasupremecourt.org/justices/pariente.shtml> (last visited Nov. 30, 2018).



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140. See DRI, *supra* note 39, at 36 (urging their members to “[b]ecome involved”).

141. See generally, STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).



## AMERICAN JUDGES ASSOCIATION: PROCEDURAL FAIRNESS INTERVIEWS

The American Judges Association (AJA) conducted interviews about procedural fairness with nine national leaders on issues involving judges and the courts. The interviews, done by Kansas Court of Appeals Judge and past AJA president Steve Leben, cover the elements of procedural fairness for courts and judges, how judges can improve fairness skills, and how the public reacts to courts and judges. The interviews were done in August 2014; job titles are shown as of the date of the interviews.

Visit <http://proceduralfairnessguide.org/interviews/> to watch the interviews.