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THE LEAST OF EVILS FOR JUDICIAL SELECTION

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I. INTRODUCTION

> There never was a time that I did not find him a fair, courteous, patient, and impartial judge and, sometimes to my sorrow, a very wise and discerning judge. In all these years I never found him anything but a wise, patient, and loyal friend, always ready to give generously to a younger man from the great store of wisdom which he had accumulated through the years. All the time I have been practicing law he has been one of the men whom I held before me as a model to be imitated, however far I might fall short of success in such imitation.[1]

These were the comments of the then-president of the Mississippi Bar at a memorial ceremony for Chief Justice Sydney M. Smith in 1948. Chief Justice Smith had been the longest-serving justice (39 years) and chief justice (36 years) in Mississippi history. A memorial service is not the occasion for highlighting faults. Instead, the best that was in a person, what he aspired to be and often was, is expressed as part of the veneration that comforts those who grieve. Such comments also articulate standards on which others may model themselves, also no doubt imperfectly.

What was said about Chief Justice Smith includes what I believe to be the traits necessary for an excellent judge. Integrity, patience and intellect, impartiality and wisdom are the foundations for dispensing justice in a manner to draw credit to the judge and to the judiciary.

Over two thousand years earlier, a philosopher described in even more utopian terms what the characteristics for judges should be. As Socrates explained to his pupil Plato, the person who dispenses justice must himself be virtuous:

> [H]e governs mind by mind; he ought not therefore to have been trained among vicious minds, and to have associated with them from youth upwards, and to have gone through the whole calendar of crime, only in order that he may quickly infer the crimes of others as he might their bodily diseases from his own self-consciousness; the honourable mind which is to form a healthy judgment should have had no experience or contamination of evil habits when young, and this is the reason why in youth good men often appear to be simple, and are easily practised upon by the dishonest, because they have no examples of what evil is in their own souls. . . .
>
> Therefore, I said, the judge should not be young; he should have learned to know evil, not from his own soul, but from late and long observation of the nature of evil in others: knowledge should be his guide, not personal experience. . . . Then the good and wise judge whom we are seeking is not this man, but the other; for vice cannot know virtue too, but a virtuous nature, educated by time, will acquire a knowledge both of virtue and vice: the virtuous, and not the vicious, man has wisdom in my opinion.[2]

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1. Phil Stone, Address at a Memorial Ceremony Honoring Chief Justice Sydney M. Smith, (1948).

2. PLATO, THE REPUBLIC, IN THE PORTABLE PLATO 400-01 (Benjamin Jowett trans., Scott Buchanan ed., Penguin Books, 1977) (1948).

Plato's *Republic,* with judges who have been virtuous since birth, presents an ideal to which any practical system is bound to compare poorly. Working with human clay, no selection process will form perfect results. The truly just person, again to quote Plato, "does not permit the several elements within him to interfere with one another . . . ; he sets in order his own inner life, and is his own master and his own law, and at peace with himself; . . . and when he has bound all these together, and is no longer many, but has become one entirely temperate and perfectly adjusted nature, then he proceeds to act . . . ."[3] Such people do not exist. Still, the concept that those who judge best must have mastered their own passions and prejudices before they pronounce judgment on the passions and prejudices of others, is a compelling explanation of human nature. What is correct about the picture drawn by Socrates is that a good judge is more than objective skills or ideology. Those may even be secondary matters.

The Founding Fathers of our own republic sought to allow the best possible individuals to be chosen as judges by giving the nation's highest ranking officer the power to make the selections, providing oversight by the Senate, and then insulating the judges from injurious influences by providing for life tenure and protecting their salaries from diminution.[4]

The State of Mississippi has taken a more varied approach to selection of judges. These are the procedures that have been used for the state's highest court during the stated time periods:

1817-1833 Election by legislature.
1833-1869 Popular election.
1870-1916 Gubernatorial appointment to terms; possibility of reappointment.
1916-1994 Partisan election.
1994- present Nonpartisan election.[5]

Every procedure employed so far has engendered criticisms. Each change that has been made must have been from a sense that the new approach was an improvement over the old. Our present nonpartisan system, itself an alleged improvement over its predecessor, is now subject to frequent censure.[6] One significant selection process has never been tried in this state. It is the "Missouri Plan," also called the merit selection system. It includes a nominating committee that presents a list of possible appointees to the governor from which the person named must be selected, followed at some later time by a retention election.

As we are again engaged in determining if there are better ways to choose judges, I will suggest a framework for evaluating the various proposals. It is a simple one.

1) Does the selection process give sufficient prominence to what is important about judges?

2) Does the selection process give undue prominence to what is unimportant about judges?

3) What are the costs and benefits of the process itself apart from the quality of the selection?

3. *Id.* at 449-450.
4. U.S. CONST. art. II, 2 (2) & art. III, 1.
5. Leslie Southwick, *Mississippi Supreme Court Elections 1916-1996,* 18 MISS. C. L. REV. 119-121 (1997).
6. *See, e.g., Supreme Court: Judicial Elections Producing an Odor,* CLARION-LEDGER, Oct. 22, 2000, at 4H.

Taking these criteria, a judgment can be made about the system that best emphasizes what we are seeking without giving undue weight to what is meaningless or harmful. There is no mathematical precision. A discussion of the realities of the proposals requires common sense and freedom from cant. The best answer will no doubt be far from a perfect one. We should strive to understand what legitimately can be accomplished with each approach to selection of judges.

Plato's *Republic* sets too high a standard, but perhaps the description of Chief Justice Sydney Smith gives us meaningful characteristics. If what we are seeking is a mode of selection whose primary focus is on legal ability, impartiality, integrity, temperament and similar traits, then we should avoid systems whose primary focus is either on political contacts or political skills. However, one piece of cant should be dispelled at the beginning. All the possible procedures involve politics. A paraphrase of nineteenth century Prussian military theorist Carl von Clausewitz is appropriate. He famously said that "War is the continuation of politics by other means."[7] Similarly, "merit selection" with retention elections, or executive appointment and legislative confirmation, or nonpartisan elections are all simply political selection by other names. Though the politics may not be identically exhibited, it is likely just as impassioned.

In Mississippi and perhaps in most states, judicial politics means recurring battles in the philosophical warfare occurring between plaintiff's lawyers and business interests. It has reached a pure and extremely caustic form in Mississippi. The financial stakes are massive. Selection of a new judge on a closely divided Supreme Court or Court of Appeals, in which the selection may alter or solidify a current division, would be seen by both sets of combatants as Armageddon. We should long for the days in which judges were not seen just as votes, but longing and ignoring reality should never be combined. There seems no reason to believe that whatever the selection process, that these contending groups will become less insistent about the outcomes.

The various procedures that have been used around the country will be examined. The focus will move from those that are perceived to be the most merit-based to those that are considered the most base.

II. THE VARIOUS JUDICIAL SELECTION METHODS

A. American Practice

An overview of what is occurring in other states is a useful place to start. Every few years some state will change its procedures, as Mississippi did in 1994 as is discussed below. States may vary their procedures depending on the level or location of the judges. Thus subject to some slight adjustments and to the realization that if a state uses a combination of approaches, what is listed here applies to selection of appellate judges, this is the present utilization of the different procedures:[8]

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7. Gordon A. Craig & Felix Gilbert, REFLECTIONS ON STRATEGY IN THE PRESENT AND FUTURE, IN MAKERS OF MODERN STRATEGY FROM MACHIAVELLLI TO THE NUCLEAR AGE 863 (1986).

8. Miles Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation,* 2 MICH. L. & POL'Y REV. 71, 74-75 (1997). The totals were adjusted since the figures still showed Mississippi as being a state that used partisan elections. A somewhat different summary appears in Robert L. Brown, *From Whence Cometh Our State Appellate Judges: Popular Election Versus the Missouri Plan,* 20 U. ARK. LITTLE ROCK L.J. 313, 314 (1998).

a) Appointment by the governor without a nominating commission -- 9 states.

b) Appointment by the governor from a list provided by nominating commission; subsequent retention election ("Missouri Plan") -- 15 states.

c) Appointment by the legislature -- 3 states.

d) Partisan election -- 8 states.

e) Nonpartisan election -- 14 states.

A summary from the United States Department of Justice for 1998 is that twenty-one states select appellate judges through gubernatorial appointment, three by legislative appointment, fourteen by non-partisan elections, eight by partisan elections, and four by retention elections.[9]

A fair indication of the pendulum swings in sentiments around the country is that all the states that entered the Union before 1845 provided for appointed judges. Starting in 1846 and continuing until 1912, seventy-five percent of all new states provided for election of judges.[10] The first use of what became known as "merit selection" was in Missouri in 1940. No other state adopted that procedure until 1958, but now at least 15 states use it in part. Missouri itself applies the procedure to selection of lower court judges only in five metropolitan circuits. The remaining forty circuits select judges in partisan elections.[11]

B. Merit Selection

Since Missouri was the first state to adopt a plan proposed by academicians beginning in 1914, it has earned the name "Missouri Plan." There are variants, but the concept is that a small group of individuals are appointed by specific governmental and Bar officials to a nominating commission. Interviews, background investigations or other preliminary work may be undertaken. They agree on a list of perhaps three names to submit to the governor. From this list, the governor must choose the appointee. After the passage of a designated period as judge, the appointee will be voted on by the people in an election not against an opponent, but just as an up or down vote on retention. If retained, the judge continues in office for a much longer period before needing again to face the voters.

The make-up of the commission is of considerable importance. In Missouri, the commission consists of lawyers selected by the bar association, non-lawyers selected by the governor, and a sitting judge who chairs the commission.[12]

The potential for merit actually being the basis for selection exists in theory. The practice in the states has not been convincing. A potential is that committee politics will substitute for electoral politics. My first close encounter with Missouri appellate judges was at a judicial seminar not long after I was elected. A small number of judges from around the country were meeting. In the beginning rituals appropriate for such meetings, we each gave a few details about our-

9. United States Department of Justice, Bureau of Justice Statistics, *available at* http://wwwojp.usdoj.gov/bjs/courts.htm#selection (last checked 2/28/2002).

10. Donald C. Wintersheimer, *Judicial Independence Through Popular Election,* 20 QUINNIPIAC L.R. 791, 794 (2001).

11. Daniel R. Deja, *How Judges Are Selected: A Survey of the Judicial Selection Process in the United States,* 75 MICH. B. J. 904, 905-906 (1996).

12. David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi,* 13 MISS. C. L. REV. 1, 22-26 (1992).

selves including how we were selected. The first of the four Missouri appellate judges to perform this task said, with emphasis to make clear his sarcasm, that he was chosen through the *merit* system. He laughed and said that merit being combined with knowing the right people were the essentials in his selection. His Missouri colleagues agreed when giving their stories.

What judges may in good humor say could be exaggerated. Indeed, perhaps merit is still the foundation and politics just chooses among well-qualified people. These four Missourians appeared to be able judges. What some studies by social scientists have indicated is that a "merit system" at least creates a higher level of minimum qualifications than do other systems: the Missouri Plan "has tended to eliminate highly incompetent persons from the state judiciary."[13] Thus perhaps the floor for basic competence is raised. Is that all? The methodology and purposes of the studies, the essentially subjective nature of some issues -- how does one statistically measure competence and temperament on the bench -- and other variables make conclusions uncertain about the quality of judges chosen under different plans. Nonetheless, here are some of the conclusions reached in various studies:

> A summary assessment of the impact of the Plan on the Missouri judiciary indicates that it has pushed the age at which lawyers go to the bench upward, and it has also made prior judicial service a more important feature of an appellate judge's experience. Moreover, it has not affected the essentially parochial character of the Missouri bench [being born and educated in Missouri].[14]

> [Another] study found that a few more merit selected supreme court justices attended prestigious law schools than those selected by other methods.[15]

> While the number of studies and available data regarding minority judges on the bench continues to increase, it may still be too early to reach a definitive conclusion regarding which selection method enhances diversity. The signs are, however, that merit selection is at least not an obstacle to diversity.[16]

> One of the most basic arguments of those who favor the [merit selection] plan is that it produces a more qualified bench. To the extent that quality can be measured objectively, however, the evidence to date suggests that the Missouri Plan does not fulfill its promise.[17]

At best, these studies indicate that judges appointed by a "merit selection" plan have somewhat different characteristics than those chosen in other ways. But the differences are small and not necessarily meaningful. Another scholar surveying the surveys determined this:

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13. Jona Goldschmidt, *Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise? Merit Selection: Current Status, Procedures, and Issues,* 49 U. MIAMI L. REV. 1, 42 (1994, (quoting RICHARD A. WATSON & RANDALL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN 345 (1969)).

14. WATSON & DOWNING, *supra* note 13, at 219.

15. Goldschmidt, *supra* note 13, at 42.

16. Goldschmidt, *supra* note 13, at 41.

17. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform,* 95 AM. POL. SCI. REV. 315, 316 (2001).

> At the very least, one can determine whether different selection mechanisms tend to produce different types of individuals as measured by . . . variables [such as] educational attainments, prior judicial experience, the absence of parochialism, and so on . . . . And if the Missouri Plan is supposed to produce decidedly superior judges, these results might be expected to show up in such data. However, the research reported thus far does not lend much support to this claim.
>
> Not only is there little evidence of the superiority of judges selected by the merit system (although there is some evidence to the contrary), there is in fact little to show that judicial selection mechanisms make any difference at all!
>
> Where are we then? If the lay, the professional, and even the political inputs built into the Missouri Plan do not work as advertised, and if the plan in general cannot be shown to produce superior judges, what is left of the argument? The answer is, not much.[18]

Early studies, meaning twenty-five years ago before the explosion in high-stakes tort litigation, already revealed distortions in merit selection. Forcing pre-ordained results occurred in at least three ways: (1) the commission's submitting a list that includes the person that the commission definitely wanted and two others who were not serious contenders; (2) sending an even more cynical list that includes a "political friend of the governor, one political enemy, and one from the other party"; and (3) after a commissioner had been told by the governor whom to name, the commission then sends that name to the governor along with two others, the quality of the remaining names largely being irrelevant.[19]

In more recent times, it is inevitable that the politics that are endemic to electoral contests, which pit high-budget campaigns funded by plaintiffs' lawyers with high-budget campaigns funded by business interests, play out in committee politics. The agendas of each "side" may be carried into the committee deliberations by the members of the respective groups who are on the nominating commission. Since the selection of judges is so vitally important to both interest groups, the battle is first fought out among those who make the selections for membership on the nominating commissions. Bar associations themselves are riven by the divisions between the groups. Then, perhaps as important as any factor, the governor may be beholden to and even have a background in one of the factions. The governor thus may seek to make sure through the means already described that the commission presents the "right" name.

> The result has been that, while *partisan* political considerations may, to a certain extent, have been removed from the selection process, politics is still a factor. The forum for such political considerations has merely been shifted from the electoral arena to the commissions and the governor's mansion.[20]

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18. HARRY STUMPF & JOHN CULVER, THE POLITICS OF STATE COURTS (1992).
19. Goldschmidt, *supra* note 13, at 51.
20. Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 32 (1995).

Finally, to the extent the retention election is thought to be a valuable correcting device to the appointment process, the evidence is entirely contrary. Close to ninety-nine percent of judges who undergo a retention election are successful.[21] Examples of situations in which judges were rejected -- California Supreme Court Chief Justice Rose Bird and two of her colleagues in 1986,[22] Tennessee Justice Penny White in Tennessee in 1996[23] -- are perhaps more important not as exemplars of unfair campaigns against incumbents as some have alleged them to be, but as proof of just how difficult it is for voters to pay attention during retention elections. If virtually every single judge is retained, and if exceptions occur only if opponents are sufficiently shrill, then retention elections have no utility. To be generic, a judge may be incompetent, inattentive to the position, and without any necessary skill (which was not the concern about the just-named judges), but unless the public is told that she turns heinous murderers loose, the judge will be retained. More judges than one percent surely have been deserving of being excused from further service, while the one percent that have been discharged may not always have been the right ones for the voters to fire. An election in which the focus is not on competing candidates but only on a judge's record must not allow proper voter evaluations.

Though Mississippi has no experience with statutorily required "merit selection," three governors did voluntarily employ a variant of the approach to fill vacancies. Starting in 1980 with Governor William Winter, a lawyer, and following through the administrations of Governors Bill Allain and Ray Mabus -- also lawyers -- a committee made recommendations to the governor. The system was not employed by either of the next two governors. Six justices were named: Lenore Prather (1982), James L. Robertson (1983), Mike Sullivan (1984), Joseph Zuccaro (1987), Joel Blass (1989), and Fred Banks (1990). What is striking about this list is that the first woman, a law school professor, an eminent senior member of the Bar, and the second black justice all came out of the committee procedures. The other two were experienced trial judges.

Despite the concerns expressed in this article about "merit selection," I acknowledge that this brief experience with a similar process produced some justices who would have had a difficult time initially being elected and who proved to be able members of the court. That political calculations factored into the choices and that friendship with the governor was sometimes useful do not diminish the quality of the credentials. If this pattern held true generally under "merit systems," the concerns expressed here would be much less realistic. It is unlikely, though, that Mississippi would find itself less subject to the internal commission politics that have been experienced in other states with such selection systems. Indeed, developments in the Mississippi court system over the ten years since the ad hoc "merit" procedures were abandoned suggests that the risks

21. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOYOLA L. REV. 1429, 1430 (2001).

22. Dann & Hansen, *supra* note 21, at 1431-32. The case for the California judges' non-retention was made in Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007 (1988).

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

of merit being superseded by viewpoint are higher than ever. In fact, the dismay about the impact of money and the propriety of the message being presented in judicial campaigns begins with a campaign in 1990,[24] just as this temporary nominating committee experiment was drawing to a close. In 1996 for the first time since 1940, there was a contest for all four Supreme Court positions on the ballot. That was repeated in 2000.[25] The high stakes with which the judicial selection game has been played since 1990 would not likely change just because the selection method was adjusted.

In summary, merit selection is buffeted by the same influences and involves the same participants as do judicial elections, but these activities are behind the veil of committee formation and then the secrecy of the selection process. The retention election aspect is either irrelevant or embarrassing. It is the philosophical agenda of the governor and a majority on the nominating commission that can control the judges. Thus the baneful effects of the warfare between the competitors in the tort system may more often than not lead to selection of a judge strongly in one camp or the other. If merit in the sense of "fair, courteous, patient, and impartial" judging, as was said of Chief Justice Sydney Smith, is the goal, there is a considerable risk that nominating commission politics is more likely to lead to an extremely partial judge. That core partiality may well dominate over every other consideration as the stakes in the tort wars get even higher.

C. Executive Appointment, Legislative Confirmation

The federal model of appointment by the executive without any initial nominating commission, coupled with confirmation in the legislature is followed in nine states. In Mississippi, gubernatorial appointment and senate confirmation was the system established by the 1869 constitution and persisted, despite several efforts to change it, until a constitutional amendment in 1916.[26] There was no life tenure, however. Justices had nine-year terms and then would need to be reappointed and reconfirmed to continue on the bench.[27]

A related approach just for filling vacancies was proposed in the 2002 legislative session. The house and senate disagreed on how to amend a current statute that required someone who is appointed to fill a judicial vacancy to run at the next election for the remainder of the term. The proposal first adopted in the senate would have allowed the appointee to serve the remainder of the term if he or she received senate confirmation within one year of the vacancy.[28] What was finally enacted, however, provided that a special election would be held if more than half of the remaining term was still to be served at the time of the next available election; otherwise, the appointee would serve the remaining portion of the term.[29]

24. *See* Southwick, *supra* note 5, at 165-77. After about 35 years of most Supreme Court elections being unopposed, in the 1970's and 1980's there started to be serious contests for at least some of the seats. The first high-budget campaign with significant television advertising, largely focusing on the candidate's toughness on crime, was in 1990. It was successful. *Id.* at 175-76.

25. Southwick, *supra* note 5, at 182-88 (1996 elections); the 2000 elections are described at the end of this article.

26. Southwick, *supra* note 5, at 120-21; MISS. CONST. art. VI, 2 (1869); MISS. CONST. art. 6, 145 (1890).

27. MISS. CONST. art. 6, 149 (1890).

28. MISS. SEN. BILL 2289 (2002), amending MISS. CODE ANN. § 23-15-849, as initially adopted by the senate.

29. MISS. SEN. BILL 2289 (2002), as signed by the governor. The legislation received the required approval under the federal Voting Rights Act on July 2, 2002. *See* MISS. CODE ANN. § 23-15-849, editor's note.

With a federal-style system, the problems of the veiled politics of nominating commissions and gubernatorial selection already discussed under the "merit system" analysis are altered by making the politics simpler. No longer is the need for controlling the commission necessary for a governor who is so inclined. Instead, the governor's discretion is fettered solely by the need for ratification by another political body, usually the senate but potentially both legislative houses. If the politics of the governor and the legislature are the same, then confirmation is likely not a meaningful check on the quality of the appointment. In fact, if a business-oriented governor is confronted with a plaintiff lawyer senate, or if the reverse exists, the quality of the appointment also may not be especially important. There is a risk that the philosophy and not the experience, intellect and temperament of the judge will control.

A fair assessment of gubernatorial appointment is that "executives appoint judges who reflect their own values on important legal, political, and social issues."[30] That is no surprise, but the effect that has on the credentials and confirmability of judges needs to be considered.

Recent experiences with United States Senate confirmation of Presidential appointments to the judiciary are a fair indication of the contentiousness that arises under this sort of system. President Bush has not as of this writing even named a Supreme Court justice, but commentators have spoken ominously of the philosophical warfare that will break out between Senate and President as soon as that opportunity arises.[31] A Senate Judiciary subcommittee held hearings on the need to consider the ideology of judges in voting on confirmation.[32] The slow pace of confirmations at the end of the Democratic Administration, a time when Republicans were in charge of the Senate, and the slow pace of confirmations in the Republican Administration now that Democrats are in control of the Senate, have been much noted. Each side in the debate has presented evidence that its confirmation rate is better than that when the other party has been in charge of the Senate, which is an example of the malleability of statistics.

For those who might be considering adopting an analogous procedure for state judges, there may be relevance to the confirmation experience of United States District Judge Charles Pickering of the Southern District of Mississippi. His promotion to the Court of Appeals was stymied in 2002 by the Senate Judiciary Committee. "While the Pickering nomination fight had its own trajectory, people on both sides of the issue were keenly aware that they were testing the battle lines for future confrontations over the ideological shape of the federal courts."[33] Differences between a Mississippi governor and a majority of legislators on the controversial philosophical issues facing state judges could similarly make the process a protracted and volatile one.

30. John H. Culver, *The Transformation of the California Supreme Court: 1977-1997,* 61 ALB. L. REV. 1461, 1464 (1998).

31. *See e.g.,* Jan Crawford Greenburg, *Speculation Builds over Chief Justice Successor,* CHICAGO TRIBUNE, Feb. 17, 2002, 1 at 1 ("colossal confirmation battle" expected).

32. Hearing before the Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts on "Should Ideology Matter?: Judicial Nominations 2001," Tuesday, June 26, 2001, statements found at http://judiciary.senate.gov/hr062601sc.htm.

33. Neil A. Lewis, *Panel Rejects Bush Nominee for Judgeship,* NEW YORK TIMES, Mar. 15, 2002, at A-1, A-19.

This system's failure to employ retention elections is a benefit. As noted, retention elections are either useless or worse.

Were Mississippi to model its procedures on the federal system, the only veto on appointments is likely to be based on ideology. That is no oversight at all when the appointing and confirming authority are of the same ideological mind. This system may lead to constant impasse when there are differences.

D. Legislative Selection

The legislatures in Connecticut, South Carolina and Virginia choose their state's judges. In South Carolina the process starts with nominations from a "merit system" commission from which the final choice is taken; without such input, the Virginia legislature also elects its judges.[34] The Connecticut system has the effect of merit selection with legislative confirmation. However, the provision in the constitution states that judges "shall be nominated by the governor exclusively from candidates submitted by the judicial selection commission," and then "Judges so nominated shall be appointed by the general assembly . . . ."[35] Thus the legislative action is not called "confirmation."

Legislative selection does not offer any obvious advantages over other systems. Political considerations are likely to operate just as vigorously on legislators as on governors. Though 174 Mississippi legislators could have almost that many views on who should be chosen as a judge, the final decision would likely be strongly affected by legislative alliances, traditional voting blocs, and the power of the leadership in each house to force a particular choice.

It would be fascinating to see that process in operation. Mississippi tried the procedure from 1817 until 1833. It does not appear sufficiently likely to reappear to merit further discussion.

E. Nonpartisan Elections

The popular election of judges without partisan labels has only recently arrived in Mississippi. In 1994, the legislature amended the election statutes to provide that all judges would be chosen at an initial election held at the same time as the November general elections for Congress. If no candidate received a majority, a run-off would occur two weeks later.[36] Non-partisanship was to be assured in several ways. One was the elimination of the need initially to be nominated in a party primary. Another statutory section prohibited any reference to party affiliation on the ballot.[37] It was made unlawful for a judicial candidate to "align himself with any candidate or candidates for any other office or with any political faction or any political party at any time during any primary or general election campaign."[38] Candidates were prohibited "from campaigning or qualifying . . . based on party affiliation."[39]

34. Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or The Backroom?*, 41 S. TEX. L. REV. 1197, 1210 (2000).

35. CT. CONST. art. 5, 2 (2002).

36. 1994 Miss. Laws ch. 564, 83, codified as MISS. CODE ANN. 23-15-981 (Rev. 2001).

37. MISS. CODE ANN. 23-15-979 (Rev. 2001).

38. MISS. CODE ANN. 23-15-973 (Rev. 2001).

39. MISS. CODE ANN. 23-15-976 (Rev. 2001).

In order to make the prohibition of references to party stronger, in 1998 the legislature passed amendments to prohibit political parties from raising money for, contributing to, or endorsing judicial candidates.[40]

The good government purposes of this approach are obvious enough. By wringing every partisan connection out of judicial campaigns, what would be left for voters would solely be the qualifications of the judicial candidates. Quite obviously, though, removing party label has not removed politics. It has not made voters focus on the qualifications of judicial candidates either. Since the 1994 nonpartisan election law, campaigns for the Supreme Court have without pause moved rapidly down the path of increasing expense, disappearing dignity, and heightened controversy. It would be too much to say that nonpartisanship was the cause. It at least can safely be said that it is not part of the solution.

What Mississippi has experienced is what other states have as well:

> "[M]ost commentators contend that, far from being an improvement upon partisan elections, nonpartisan elections are an inferior alternative to partisan elections because they possess all of the vices of partisan elections and none of the virtues." Voters lose their main cue for information on who to vote for and, lacking more relevant information on individual candidates, rely on other factors such as ballot position or name recognition.[41]

The opening comment in that quote is significant. Nonpartisan judicial elections have "all the vices and none of the virtues" of partisan elections. The vices are obvious enough and certainly have continued unabated, indeed accelerated since the nonpartisan "reform" of 1994. What in the world, though, are the "virtues" of partisan elections? Simply put, the virtue is information. What voters appear to want in voting for offices of low visibility like judgeship are "cues." Reformers have felt that the party label is the wrong cue. Certainly it is an imperfect one. But when it was removed, nothing replaced it.

For almost precisely the same reason that the retention election concept has been a total failure -- it "succeeds" in causing voters to focus on an incumbent judge only if the campaign is caustic enough -- nonpartisan judicial elections give nothing that voters take to the voting booth unless the campaigns have been dramatic, which usually means negative.

Yet as the budgets for judicial campaigns have climbed, voters seemed to be less and less able to distinguish between the candidates. A review of the margin of victory of the four races in the 2000 election year bears this out. One candidate spent close to a million dollars in the campaign; other candidates had expenditures exceeding $500,000; out-of-state spending by the United States Chamber of Commerce and plaintiff-lawyer organizations was substantial. When it was over, the voters in many instances went to the polls and split almost evenly. Perhaps they felt equally confused, bemused, or abused by each campaign.

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40. *Id.*, amendment adopted over gubernatorial veto in 1999 Miss. Laws ch. 301, 16. This provision was largely nullified by a federal district judge for the same reasons as caused the governor to veto it, namely, that it infringed on free speech. Patrice Sawyer, *Party Donations OK'd in Judge Races,* CLARION-LEDGER, Oct. 22, 2002, at 1A.

41. Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or The Backroom?,* 41 S. TEX. L. REV. 1197, 1206 (2000), quoting Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?,* 23 FLA. ST. U. L. REV. 1, 26 (1995).

District 1, Position 3. Jim Smith 51.8%, Frank Voller 48.2%.

District 2, Position 2. Oliver Diaz 51.3%, Keith Starrett 48.7% (runoff).

District 3, Position 2. Charles Easley 51.9%, Lenore Prather 48.1%.[42]

The fourth race qualified as a landslide, Kay Cobb 54.5%, Percy Lynchard 45.5%.[43]

As a logical matter, it could be argued that the removal of party labels has intensified the negativity of messages and increased the expenditures for the simple reason that the voters otherwise will have retained nothing as they cast their votes for these offices. More likely, the intensity of campaigns would have increased without regard to their partisan or nonpartisan nature.

To be discussed more in the next section on partisan elections, there are philosophical differences between the person likely to run as a Republican and someone who would run as a Democrat for judicial office. Imperfect and at times misleading as party labels may be, the real question is whether these cues are better than nothing. It is obvious that voters are not likely to be making decisions based on judicial temperament, quality of law school, or the performance of the candidate as a lawyer in the courtroom. If the idea of removing party labels was that voters would then shift to such matters, the idea has been proven false.

F. Partisan Elections

Eight states continue to choose their judges by partisan elections. Gubernatorial appointment is the standard approach for filling vacancies, and merit selection may even be included at that time.

One of the reasons that partisan elections have fallen into disfavor is that party label is so incredibly important in these elections: "In partisan [judicial] races, the political party label may give most voters all the information they seek."[44] For reformers, this otherwise decisive piece of information must be kept from the voters to the point, as in Mississippi, of invalidating the election of someone who transgressed.[45]

At least two questions arise from this. First, is it proper to deny voters what apparently they would use when voting for certain offices? Secondly, what is the effect of the denial?

On the first question, it is a difficult argument in a democratic system to state that voters who make these significant selections should not be told something because they would find it too important. True, we do that with jurors. If certain evidence is irrelevant, improperly acquired, or otherwise inadmissible, we bar it from jurors' consideration even though, indeed *because* they might believe the evidence is quite compelling. The justification for that arises from the overall control over trials that must be exercised by the judges who preside. Quite differently, judges and legislators do not usually restrict the evidentiary considerations for voting. In elections, the voter is sovereign.

42. 2000-2004 MISSISSIPPI OFFICIAL & STATISTICAL REGISTER 652-53, 655-56 (2002).

43. *Id.* at 652.

44. HARRY STUMPF & JOHN CULVER, THE POLITICS OF STATE COURTS 46 (1992).

45. MISS. CODE ANN. 23-15-973 (Rev. 2001).

Similarly motivated restrictions beyond just not mentioning party labels exist for political speech in judicial campaigns. In most political campaigns, freedom of political speech is considered fundamental. The "First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office."[46] Political speech was one of the core purposes for the First Amendment: speech concerning public affairs is more than self-expression, it is the essence of self-government.[47] This reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen. . . ."[48] Political debate can be polite or acrimonious; can discuss issues appropriate, tangential, or even irrelevant to what a good voter should consider important; and can use a variety of techniques of persuasion, from logic to emotion to just plain decibels, all depending on the desires and abilities of the debaters. However, within extraordinarily wide boundaries the debate cannot be state-controlled.

In the arena of judicial elections, however, the argument has been made that there is a compelling state interest in blocking robust debate. The Supreme Court has found no legitimate purpose in drawing boundaries for political speech for elections of county supervisors or national presidents. However, the argument is that the need to avoid the appearance of favoritism or bias, and also to maintain respect for the judicial process, allows speech in judicial campaigns, indeed requires that speech be much more restricted. In 2002, the Supreme Court answered some of these questions when it declared that Minnesota could not through it Code of Judicial Conduct prohibit judicial candidates from announcing "views on disputed legal or political issues."[49] The Court found "an obvious tension between the article of Minnesota's popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause which places most subjects of interest to the voters off limit. . . . [T]he First Amendment does not permit [a State] to achieve its goal [of merit selection of judges] by leaving the principle of elections in place while preventing candidates from discussing what the elections are about."[50]

Setting the constitutional issues aside, the narrower question on selection is whether it is a net benefit or a loss to elections to take away party labels. Certainly politics remains, the same politics that is fought out by the same participants as would be involved if the campaigns were overtly partisan. Almost certainly, if there were party primaries for Mississippi appellate judges, Republican candidates would be those who more likely would find persuasive the complaints made by business interests that the tort system is being abused, while Democratic candidates would more likely embrace the aims of plaintiff's lawyers. How does that become an irrelevant starting point for voters?

In answering, it is of at least some importance that the major financial contributors to judicial candidates appear in recent elections to have found that single

46. Eu v. San Francisco County Democratic Committee, 489 U.S. 214, 223 (1991), quoting in part Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).

47. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

48. Buckley v. Valeo, 424 U.S. 1, 14 (1976), quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

49. Republican Party of Minnesota v. White, 122 S.Ct. 2528 (2002).

50. *Id.*, at 2541.

difference in philosophy the only significant consideration. The mass of voters, though, are not to be told a party label because, perhaps like children being offered a choice between candy and vegetables, they will always choose what is bad for them. So instead of party labels, voters are only to be given other more useful information in order to choose among those items. That information, disseminated through aggressive campaigns, is more likely than not something memorable about toughness on crime. Extremism in the pursuit of electoral victory is the norm; moderation in order to defend judicial dignity is the exception.

The artificiality of nonpartisan judicial elections, which are as political as any campaigns in Mississippi, serves no demonstrable purpose. Distortions in voting behavior likely result, as voters do not vote without party labels in the same manner as they would if given them. Indeed, voters may in large numbers cast their ballots blindly or for essentially frivolous reasons. Depending on the area of the state, that will benefit different candidates. One of the most vigorous objections in 1994 to nonpartisan elections came from groups such as the NAACP. The president of the state chapter argued that it was important for black voters to see the party label, else "they will be confused, and it will dilute black voting strength."[51]

G. Combination Approaches

Nine states use some mixture of concepts in choosing their judges. For example, in New Hampshire, the governor appoints judges, but their confirmation is considered by an elected five member executive council. In Florida, lower court merit selection is an option to be voted on by each county.[52]

Mississippi certainly can consider employing one scheme for appellate judges and a different one for trial courts. In addition, merit nomination and gubernatorial appointment can be joined with legislative confirmation.

H. Recent Scholarly Study

One quite recent study by a Michigan State University political scientist has attempted to "probe the myths of judicial reform."[53] Professor Melinda Hall analyzed all the elections from 1980 to 1995 for supreme court justices in the thirty-eight states that use partisan, non-partisan, or retention elections for those offices. She focused primarily on accountability and independence. By accountability she means that voters were able to hold judges accountable based on "substantive evaluations of candidates or other meaningful considerations relevant to the judiciary." "Independence" in her terminology is demonstrated if judicial candidates are relatively free from simple partisan outcomes.[54] As she put it, reformers argue that retention and nonpartisan elections encourage voters to focus on these proper considerations, which means such elections provide accountability and independence, while partisan elections provide neither.[55]

51. Beverly Pettigrew Kraft, *Dissension Among Blacks Jeopardizes Redistricting Plan, Official Says*, CLARION-LEDGER, June 6, 1994, at B1.

52. Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or The Backroom?*, 41 S. TEX. L. REV. 1197, 1210 (2000).

53. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315 (2001).

54. Hall, *supra* note 53, at 315.

55. Hall, *supra* note 53, at 326.

However, she concluded that these correlations are quite weak.

> Court reformers underestimate the extent to which partisan elections have a tangible substantive component and overestimate the extent to which nonpartisan and retention races are insulated from partisan politics and other contextual forces.[56]

Professor Hall examined whether voters were able to discern ideological differences between themselves and the candidates for judge on the state's highest court. She found that voters were able to determine and then respond to those differences in partisan elections.[57] There are those who dispute that voters should be considering an "ideological distance" between their attitudes on the major questions of civil and criminal justice and the attitudes of the candidates for whom they are voting. These reformers "believe that removing partisan labels forces the electorate to seek information beyond partisanship about the acceptability of incumbents, thus enhancing the quality of the electorate's knowledge and judgement."[58] Of course, removing the label may not cause the voters to seek any additional information. Instead, the removal may just add new uncertainties to their voting.

The results of Professor Hall's studies of the supreme court elections in the thirty-eight states over the fifteen year period were these:

1) Nonpartisan and retention elections are subject to normal partisan pressures;

2) There is some accountability in nonpartisan and retention elections, not based on ideological distance between the voters' and the candidates' attitudes, but instead based on whether the murder rate is perceived to be high or low;

3) Candidate characteristics are nearly irrelevant in nonpartisan and retention elections — race, length of service, other qualities of experience. One exception is that in nonpartisan elections there is some evidence that minority candidates receive a smaller percentage of the vote than do others.[59]

In partisan elections, the results are different:

1) Ideological distance between the attitudes of the voters and those of the candidates has more impact in these elections than in nonpartisan and retention elections;

2) "Some forms of partisan politics are important in partisan judicial elections, thereby impeding independence, but concerns about accountability in these races appear to be misplaced."[60]

In summary, Professor Hall argues that the "merit selection" system "has produced a selection system that is much less visible than judicial elections." Yet the insulation seems only to obscure, not remove, many important partisan features and influences in judicial elections.[61] To be sure, there are negatives associated with partisan elections, including a much higher defeat rate for incumbents, that

56. Hall, *supra* note 53, at 324.
57 Hall, *supra* note 53, at 322.
58. Hall, *supra* note 63, at 322.
59. Hall, *supra* note 53, at 324.
60. Hall, *supra* note 53, at 324-25.
61. Hall, *supra* note 53, at 326 (quoting Henry R. Glick, *The Promise and Performance of the Missouri Plan: Judicial Selection in the Fifty States,* 32 MIAMI L. REV. 510, 519 (1978)).

have their own impact. Nonetheless, "several propositions traditionally used to criticize partisan elections and to promote nonpartisan systems and the Missouri Plan do not survive scientific scrutiny."[62]

III. CONCLUSION

If this essay appears pessimistic about all systems, that appearance is not deceiving. Judicial competence, integrity and independence are the goals. None of these systems are especially likely to give sufficient weight to such factors. Yet some systems are worse than others.

Returning to the three factors that I listed earlier in this essay, I would find that merit selection has the greatest potential for examining the qualities of character, intellect and experience that should be the focus in judicial selection. The realization of that potential is quite haphazard, and strong philosophical bias as opposed to impartiality may instead become the central credential. This is also true with elections. Average voters, even if confident in what they want as a matter of the "big picture," are not equipped by training or interest in examining the fine details of judicial credentials. Surely no difference in this regard exists between elections that are partisan and those nonpartisan. The voters are still the same voters no matter what the ballot looks like.

Insofar as what system might give the most weight to irrelevancies, I find little to distinguish them in practice. Whether appointment or election, those making the selection may be controlled by their lesser natures. Friendships, political alliances, and ideological fervor may dominate in appointments. In elections, political skills and even former races for other offices can be decisive. In both situations, those attributes will be little indication of the ability to serve. Depending on how fervent the ideology or how overbearing the political focus, these may even be impediments.

Finally, there may be costs as well as benefits just in the operation of the system regardless of the quality of judges who result. For example, the citizenry may gain confidence in the judiciary as a result of the selection process or acquire a more negative view. Judicial elections are by far the most public and time-consuming process (except for federal judicial confirmations), and therefore potentially have the greatest impact on the people. Well-financed negative publicity about incumbents or challengers may cause all candidates to be viewed as traditional politicians without any special claim to respect.

Even after election, the selection process may hover about the judge. Former California Supreme Court Justice Otto Kaus captured the idea perfectly. He picturesquely stated that after beginning service as a judge, ignoring the political consequences of decisions is like ignoring "a crocodile in your bathtub. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."[63] That applies to all the systems that do not provide for lifetime tenure. Judges who face a future contested election, a future reten-

62. Hall, *supra* note 53, at 326.

63. Gerald F. Uelmen, *Crocodiles in The Bathtub: Maintaining The Independence of State Supreme Courts in an Era of Judicial Politicization,* 72 NOTRE DAME L. REV. 1133, 1133 (1997).

tion election, or a future need to be reappointed and reconfirmed all have tub crocs. The crocodile can almost be forgotten with the usual merit system, since nearly 99% of those elections result in retention. The dangers are appreciably higher in the other systems.

In my view, the worst appointive system is traditional merit selection. That is because the retention election feature, meant to be a review of the quality of judges once in office, is a complete failure. It is better to combine the features of an independent and competent nominating commission, followed by gubernatorial appointment and senate confirmation for a definite term. At least in that situation, each component has the potential to add something useful.

Of the election procedures, the worst is nonpartisan election. It is a system built on denying voters what they really want to know about judicial candidates. If there are to be elections, then partisan elections are preferable. They should be free of unconstitutional restrictions on political speech. The winner quite possibly will be determined more by party label than any other consideration, but at least that is a reasonable if imperfect gauge of significant ideological differences between the candidates. Other differences are unlikely to be perceived. Campaigns now surely must be mush for voters even when served up at an extremely high temperature.

Choosing among these choices must not ignore the realities of Mississippi judicial politics. For better or worse, the state has seen a dramatic surge in civil litigation and the monetary amount of awards. What are in effect class actions are being brought as a result of nearly-unlimited joinder of parties being permitted in selected districts. Whether the results of the trials will be upheld on appeal are vital to the overall success or failure of each side. Is any system likely to choose appellate judges who are beyond the personal biases that pervade this kind of ideological contest? If not, is there an elective system that will allow the voters to choose meaningfully on this philosophical issue and others, either to maintain a balance on the appellate courts or purposefully to seek a certain predominance? Is there instead an appointive process that will lead to balance as well as ability?

I am tempted to answer those questions simply and pessimistically: "No." Yet that focuses on probabilities. Instead I will close by focusing on possibilities. A nominating commission, followed by gubernatorial appointment, followed by confirmation and periodic renewal of that entire process, has some hope for success. It depends on fairness and balance at each stage. Unfortunately, almost everyone involved from elected politicians in each branch of government to members of the Bar will probably be connected to one faction or the other. The final stage, senate confirmation, is potentially more useful than retention elections but also could become a complete roadblock to any appointee out-of-ideological-step with a majority of that body. There is potential, though.

For all that, it appears that partisan elections would combine the substantial negatives of being the most damaging of the systems to the image of the judiciary and the most painful to the judges themselves, with the positive of being the system most likely to lead to balance on the appellate courts. Mississippi is fairly evenly divided politically. Republican and Democratic judges actually do have

fairly distinctive world views. Thus the courts themselves would have some prospect of reflecting that division, indeed, that balance. Such an outcome appears the best that we can accomplish. Good government optimism can lead to promoting systems that ignore reality. The reality is the incredibly high stakes involved in judicial elections, which arise from the incredible sums of money being won or lost in Mississippi courts. Until judges are no longer in the business that occupies the undivided attention of the combatants in the tort wars, there is very little hope that objectivity will reign among the insiders of an appointment process. Instead, perhaps only the voters, admittedly the poor voters who really do not want to review the credentials of judges that much, have an opportunity to bring the balance.

When Jonathan Swift wrote his radical, though satirical, remedy for curing the overpopulation and poverty problems thought to exist in England in the Eighteenth Century, he called it *A Modest Proposal.* For some reason, my suggestion that partisan elections are the answer to anything makes me think of that title. Perhaps my similarly modest hope is that in the future when justices are memorialized as were those in decades past, the ideas of integrity, patience and intellect, impartiality and wisdom will continue to be mentioned without cynicism.

APPENDIX

SUMMARY OF 2000 SUPREME COURT CAMPAIGNS

In 1997, *The Law Review* published summary descriptions of the Supreme Court elections from 1916-1996.[64] Since that time, elections were held in 2000. Also, at the time of this writing, the campaigns for 2002 are beginning to take shape. What follows will bring the earlier article up to date.

A. 2000 [4 Elections]

Every presidential election year, the terms of four of the nine members of the Supreme Court expire. In 2000 all four became part of the now-inevitable struggle between business interests and plaintiff attorney groups. Each incumbent could be identified as likely to find support from a specific side of this struggle and drew a challenger whose support came from the other. Nonpartisan elections certainly can be intensely political ones.

It was anticipated that substantial expenditures supporting negative campaigns would be involved for all the races. Predictions in May 2000 were that a successful race in the Southern District would require at least $300,000.[65] One winner in fact would spend almost one million dollars.

Between the time of those predictions and the controversial events of October which will be explained next, editorials were written about the dreadfulness of the whole judicial election exercise. An able former chief justice, Armis Hawkins, who always has been the holder of strong opinions, strongly urged in letters to the candidates that they limit their campaigns to $35,000, not accept

64. Southwick, *supra* note 5, at 115.

65. Beverly Pettigrew Kraft, *Judicial Election Cost on Increase,* CLARION-LEDGER, May 21, 2000, at 1A.

any campaign contribution larger than $250, and not run any television commercials.[66] There were no takers. Though that result was unsurprising, it is hard to say that the proposal was even in the best interests of the voters. If there are to be elections, and if the campaigns have to try to reach and convince 300,000 voters in a Supreme Court district, substantial expenditures are required. That reality leads to some unpleasant consequences, but selecting those consequences had irreversibly already occurred when the decision was made to have elections in the first place.

Mississippi Educational Television provided a program for all the competing candidates to appear and discuss their credentials. The two or three candidates in each of the four races would appear together, with the different races spaced a week apart on the broadcasts. Though that provided some introduction to the voters, the number of voters watching was likely quite small.[67]

Campaign finance reports filed in early October revealed that four candidates had already raised between $200,000 and $270,000, while three of the four incumbents (Prather, Smith, and Cobb), had raised between $100,000 and $170,000 each.[68] By October 16, a new issue was raised that dominated all four campaigns for the last three weeks until the general election. The United States Chamber of Commerce began running television advertisements praising four different candidates for the Supreme Court. The candidates being promoted by these advertisements were unsurprisingly those whose support had been coming much more from business interests than from plaintiff lawyers: Lenore Prather, Kay Cobb, Jim Smith, and Keith Starrett.[69] These advertisements neither endorsed candidates nor mentioned that an election was occurring. Representative of the Chamber's approach was this message in the advertisement for Chief Justice Prather:

> [The television advertisement] begins with the photograph of a gavel and a picture of Chief Justice Prather slowly materializes in the background. The narration states, "Lenore Prather -- Chief Justice of Mississippi's Supreme Court; Lenore Prather -- using common sense principles to uphold the law; Lenore Prather -- putting victims rights ahead of criminals and protecting our Supreme Court from the influence of special interests." As the narration proceeds, the words "Chief Justice," "Common Sense," and "Victims Rights" appear on the screen. The narrator then states that Lenore Prather was the first woman appointed to the Mississippi Supreme Court, and that she has thirty-five years of experience.[70]

In summary for all the advertisements, they described positive characteristics of the justices, mentioned neither election nor opponents, and encouraged viewers to contact a web site. There, a link to web pages for the campaigns of

66. David Hampton, *Judicial Candidates Must Keep Moneychangers out of the Temple,* CLARION-LEDGER, July 2, 2000, at 1H.

67. *Candidates Go Statewide Live,* CLARION-LEDGER, Oct. 5, 2000, at 1B.

68. Beverly Pettigrew Kraft, *Judges Fall Behind Foes in Cash Race,* CLARION LEDGER, Oct. 12, 2000, at 1A.

69. *Probe of Chamber's Judicial Ads Sought,* SUN HERALD, Oct. 20, 2000, at A2.

70. Chamber of Commerce of the United States v. Moore, No. 3:00-cv-778WS (S.D. Miss. Nov. 2, 2000) (memo opinion), at 6-7.

two of the candidates could be found, as could biographies of the other two candidates who perhaps had not established campaign internet websites.[71] It was later said, with no source cited, that this was a component of the Chamber's "$10,000,000 campaign to support the election of judges with strong pro-business backgrounds in Alabama, Illinois, Michigan, Mississippi, and Ohio."[72] Certainly the Chamber was involved in many states' Supreme Court races as were at least local plaintiff lawyer groups.

By the day after the first advertisements began, the president of the Mississippi Trial Lawyer Association, Lance Stevens, was denouncing them. Attorney General Mike Moore and Secretary of State Eric Clark also questioned their propriety. The principal complaint was that the Chamber had not registered as a political action committee and had not reported the sources of contributions nor recipients of expenditures. The reaction of the various candidates will be discussed in the separate election summaries that follow. What is capsulized here is that litigation began almost immediately. Because of threats of suits and other action by Moore and Clark, the Chamber filed suit first against those two officials in federal court.[73] The legal issue was the importance of the fact that the advertisements did not use words such as "vote for" the individuals whom it praised. A 1976 United States Supreme Court decision had seemingly made that a matter of importance in applying the principles for political speech.[74]

United States District Judge Henry Wingate held that the Chamber's ads constituted "express advocacy" even though no explicit message regarding voting appeared in them. The Chamber therefore had to comply with Mississippi campaign finance laws.[75]

Almost a year and a half later, the United States Court of Appeals for the Fifth Circuit overruled the district court.[76] The Court found that with only one exception,

> most Courts of Appeals have adopted the view that . . . government may regulate only those communications containing explicit words advocating the election or defeat of a particular candidate. These courts rely primarily on *Buckley*'s emphasis on (1) the need for a bright-line rule demarcating the government's authority to regulate speech and (2) the need to ensure that regulation does not impinge on protected issue advocacy.[77]

The Court found that the only exception "from this bright-line approach among our sister circuits" was in the Ninth Circuit. In the precedent relied upon by the Mississippi district court, the rule that was announced did not require explicit words referring to elections:

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71. *Id.* at 8.

72. John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections,* 9 N.Y.U. ENVTL. L.J. 217, 218 (2001).

73. Beverly Pettigrew Kraft, *Chamber Sues State to Keep Ads on Air,* CLARION-LEDGER, Oct. 24, 2000, at 1A.

74. Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976).

75. Chamber of Commerce of the United States v. Moore, No. 3:00-cv-778WS (S.D. Miss. Nov. 2, 2000) (memo opinion), at 27; Bobby Harrison, *Judge: Chamber Must Name Sponsors,* NORTHEAST MISSISSIPPI DAILY JOURNAL, November 3, 2000, at 1A.

76. Chamber of Commerce of the United States v. Moore, No. 00-60779 (5th Cir. April 5, 2002).

77. *Id.*, referring to Buckley v. Valeo, 424 U.S. 1, 44 n. 52 (1976).

> We conclude that speech need not include any of the words listed in *Buckley* to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.[78]

The requirement of express words would allow speech to be unregulated even though its undeniable purpose was to affect elections. By being underinclusive, though, such a rule would avoid chilling other expressions over which the government had no regulatory power under the First Amendment.[79] After the 2002 decision was announced, Mississippi election officials continued to condemn the Chamber's advertisements and expressed a desire to press on to the United States Supreme Court.[80]

Three other suits about the ads were filed during the 2000 election campaign, one in the central district race and two in the southern district contest. They will be discussed below.

In early 2002, Secretary of State Eric Clark asserted that the Chamber had spent $958,000 on the Mississippi campaign while the candidates raised $3.87 million; other reports said $400,000 was spent by the Chamber.[81] Expenditures by other groups, including those that quickly formed to respond to the Chamber ads, are apparently not included in these totals. One of the groups responding to the Chamber, "Mississippians for an Independent Judiciary," reported raising and spending $240,000.[82] No reports could be found for another organization that bought newspaper advertisements attacking the Chamber, the "Don't Mess with Mississippi Committee."[83]

Determining how much was spent on these races by all groups and candidates would be difficult. Without a doubt though, a new record was set in 2000. Also without a doubt, that record will be broken.

1. Central District, Post 3

Justice Jim Smith (56), first elected in 1992, was running for a second term. He was challenged by Frank G. Vollor (51) of Vicksburg, a circuit judge since 1989. Justice Smith stated that he had not originally intended to run for a second term, but determined that he had unfinished business that needed to be addressed during a second term. When Judge Vollor announced, he stated that there were too few judges on the Supreme Court with experience as trial judges, which led to decisions that were confusing and impractical to apply.[84]

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78. Federal Election Commin v, Furgatch, 807 F.2d 857, 864 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987) quoted in Chamber of Commerce v. Moore, at ___.

79. Chamber of Commerce v. Moore, No. 00-60779 (5th Cir. April 5th, 2002) at ___.

80. Jerry Mitchell, *Court: Chamber Ads Not Political*, CLARION-LEDGER, April 6, 2002 at 1B. Attorney General Moore, one of the named defendants in the suit, said the ads had been a "subterfuge to get around public disclosure laws." *Id.*

81. Larry Bivens, *Money, Ads and Judges*, CLARION-LEDGER, Feb. 23, 2002, at 1A.

82. Mississippi Secretary of State - Elections Division, 2000 campaign finance reports.

83. *Foul?* (Full-page newspaper ad), published in, e.g., HATTIESBURG AMERICAN, Oct. 29, 2000, at 10A; NORTHEAST MISSISSIPPI DAILY JOURNAL, Oct. 29, 2000, at 8A.

84. Beverly Pettigrew Kraft, *Vollor Seeking Voice in High Court*, CLARION-LEDGER, May 12, 2000, at 1B.

The campaign was not especially combative until the last month. Both candidates could be found at country fairs, craft festivals, flea markets, and other gatherings of voters. In September Judge Vollor listed three reasons that he was running: 1) "I believe decisions should be made based on the law and not on personal beliefs and political agendas;" 2) common sense needed to be returned to the Court; and 3) "a belief that everyone before the Court should be treated equally."[85] The lack of common sense was allegedly exemplified by an opinion in which Justice Smith had determined that jurors could take notes during testimony but could not have the notes with them during deliberations.[86]

Later, Judge Vollor criticized Justice Smith for joining the majority in overturning a capital murder conviction of a man who was tried for shooting four people in a Winona furniture store in 1996.[87] Indeed, a television advertisement supporting the Vollor campaign criticized Justice Smith for the high percentage of death penalty cases that the Supreme Court reversed. As Justice Smith pointed out, he dissented in most of those.[88] Judge Vollor decried the counter-attack that was brought principally by plaintiff lawyers on his behalf, who formed and funded a group called "Mississippi for Independent Judiciaries." They, too, placed television and newspaper ads attempting to convince the voters that the Chamber's tactics were outrageous. This new group's tactics were to be extremely critical of the Chamber and sponsor ads for their candidates.[89]

When the United States Chamber of Commerce ads began, Judge Vollor called on Justice Smith to stop them. An ad supporting Vollor said that the Chamber was trying "to buy influence for the big insurance and drug companies, the same companies that are against the patients' bill of rights and against affordable prescription drug plans for seniors."[90] With the transition phrase of "the same companies," the ad managed to bring in a significant national campaign issue otherwise not much discussed in a Mississippi Supreme Court race.

Justice Smith also thought himself the intended victim of a group assisting his opponent. He had been told that members of the Mississippi Trial Lawyers Association had put considerable effort in the spring to recruit a candidate against him. "I think there is an attempt by a small wealthy group of trial lawyers who have bound themselves together to take over the court."[91] He did not say whether Judge Vollor himself was the product of the recruiting campaign or just the beneficiary of funding from those who wished to defeat Justice Smith.

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85. Fred Messina, *Supreme Court Candidates Tell Reasons in Race,* VICKSBURG POST, Sept. 8, 2000, (internet homepage).

86. *Id.* This was likely a reference to the following decision authored by Justice Smith: *Wharton v. State,* 734 So.2d 985, 991 (Miss. 1998).

87. Theresa Kiely, *Supreme Court Candidates Face off on Funding,* CLARION-LEDGER, Oct. 18, 2000, at 3B; the case was *Flowers v. State,* 773 So.2d 309 (Miss. 2000) (modified opinion on motion for rehearing; reversed because evidence about three other victims was introduced in the trial about just one of the murders).

88. Theresa Kiely, *Supreme Court Candidates Face off on Funding,* CLARION-LEDGER, Oct. 18, 2000, at 3B.

89. Mark J. Armstrong, Smith, *Vollor Banking on Meeting Voters,* VICKSBURG POST, Nov. 2, 2000, at A1.

90. Beverly Pettigrew Kraft, *Candidates Bicker over Campaign Ads,* CLARION-LEDGER, Oct. 28, 2000, at 1B.

91. Beverly Pettigrew Kraft, *Justice: High Court Under Attack,* CLARION-LEDGER, Nov. 2, 2000, at 1B.

The campaign closed with legal skirmishes over the Chamber's ads. Justice Smith asked the Chamber to stop running the ads, but the organization refused. Judge Vollor brought suit. On the Friday before the election a Hinds County chancellor ordered the ads stopped.[92] The Circuit Justice for the Fifth Circuit, Antonin Scalia, lifted that ban on the following Monday, but then the same chancellor reimposed it.[93] The election was held the next day with no testing of the chancellor's authority to overrule the United States Supreme Court.

Jim Smith received 157,464 votes (51.8%), while Frank Vollor garnered 146,574 (48.2%).[94] Total contributions and expenditures for Justice Smith were approximately $370,000. Judge Vollor reported $490,000 in contributions and expenditures.[95]

2. Southern District, Post 2

Justice Mike Sullivan died February 27, 2000. Court of Appeals Judge Oliver E. Diaz, who had served since that court commenced operations in 1995, was appointed to the high court by Governor Musgrove and took office on March 15, 2000. Justice Sullivan had been in the last year of his eight-year term, and thus the November election would be for the next full term.

After the governor appointed Judge Diaz (40), another candidate for the seat issued a press release. Judge Billy Joe Landrum (66) of Laurel had been a circuit judge for 15 years. Judge Landrum argued that because of Diaz's business interests on the coast he would not spend the time on the position that was required. He then alleged that the appointment was "to satisfy a group of people who contributed hundreds of thousands of dollars to [Musgrove's] campaign." He closed by saying in November "it will be Musgrove's choice versus the people's choice . . . ".[96]

The third candidate in the race was Keith Starrett (48) of McComb, who had been a circuit judge for eight years. He emphasized the innovations he had made as judge, including creating the state's first drug court program. Participants could avoid jail if they found and held a job, remained free of drugs and attended support group meetings.[97]

Judge Landrum criticized Diaz for not having any experience in the gritty world of trial courts, as compared to Landrum's 26 years of "seeing, hearing the cries, whimpers, and sadness of those victims."[98] He used a slogan in his newspaper advertisements that he was "Tough as Nails!"[99] As did Judge Vollor in running against Justice Smith, Judge Landrum found three reasons justifying his race. He felt that judges on the Court were basing their decisions not on the law

92. Beverly Pettigrew Kraft, *Chamber Ads Aimed at Judge Ordered Off Air,* CLARION-LEDGER, Nov. 4, 2000, at 1A; *Vollor v. Chamber of Commerce of the United States,* No. G-2000-2128 S/2 (Hinds County Chancery Ct. Nov. 3, 2000)(order granting T.R.O.).

93. *Judicial Ads Pulled Again After Restraining Order,* VICKSBURG POST, Nov. 7, 2000, at A1. *Chamber of Commerce of the United States v. Vollor,* No. 00A406 (U.S.S.Ct. Nov. 6, 2000) (stay of T.R.O.).

94. 2000-2004 MISSISSIPPI OFFICIAL AND STATISTICAL REGISTER 652-53 (2002).

95. Mississippi Secretary of State - Elections Division, 2000 campaign finance reports.

96. *Landrum Responds to Appointment,* LEADER-CALL, Mar. 9, 2000, at 3-A.

97. *Judge Qualifies to Run for Supreme Court,* CLARION-LEDGER, Mar. 25, 2000, at 1B.

98. Esther Campi, *High Court Candidates Square Off at Forum,* SUN HERALD, Oct. 10, 2000, at A2.

99. Many newspaper ads used this slogan. *E.g., Tough as Nails!,* MCCOMB ENTERPRISE JOURNAL, Oct. 6, 2000, at 7; SUN HERALD, Oct. 4, 2000, at A8; HATTIESBURG AMERICAN, Oct. 4, 2000, at 7A.

but on their personal opinions or political agendas." Secondly, he thought such decisions as the reversal of the same capital murder conviction as Judge Vollor had highlighted showed the Court had no common sense. Finally, he argued that he was the candidate not affected by special interest money from those trying to buy a seat on the Court.[100] In other advertisements, he said that there was "Revolving Door Justice" at the Supreme Court, alleging that forty-five percent of lower court decisions were overturned in 1999.[101] In newspaper advertisements, Judge Landrum also informed voters that he had been a member of the 101st Airborne, the "Screaming Eagles," and had been "hand-picked as an [aide] to Gen. William C. Westmoreland."[102]

Judge Starrett's campaign ran newspaper advertisements emphasizing the success of the drug court innovations, including favorable comments from Chief Justice Lenore Prather and Attorney General Mike Moore. In the ad Starrett said that people with drug problems[103] "deserve a second chance. Violent criminals and drug dealers don't." Endorsements from the National Rifle Association, Mississippians for Civil Justice Reform, and the medical, business, banking and manufacturing communities were publicized.[104]

Justice Diaz differentiated himself from the other two trial judges by saying that he was the only one among them who had appellate court experience, having been one of the original members of the Court of Appeals in 1995. That Court had caused an amazing turnaround of the huge backlog that had existed at the Supreme Court prior to that time.[105] Perhaps indirectly responding to criticisms about his business interests, which included his wife's operation of a bed and breakfast inn in Biloxi, he said that he could spend time with his wife and young children because appellate work is primarily reading and writing. "I think I do my best work late at night. I can get on the computer and research and read anywhere I can plug into the internet."[106]

When the Chamber of Commerce television advertisements first appeared, Judge Landrum alleged that the beneficiary of them, Judge Starrett, was condemning the high cost of campaigns yet receiving "$150,000 in out-of-state money" who kept their contributors secret.[107] Judge Starrett assured voters that he had no connection to the Chamber's activities, though he was thankful for them as a counterweight to the personal injury lawyers [who] put their money behind their candidate . . . [108] Justice Diaz brought suit in Harrison County Chancery Court and received a temporary restraining order from Chancellor Thomas Teel

100. *A Message from a Judge Who is Tough as Nails,* print-out from Landrum website, Updated Oct. 23, 2000, in possession of author. The capital murder case was *Flowers v. State,* 773 So.2d 309 (Miss. 2000) (modified opinion on motion for rehearing).
101. *Revolving Door Justice* (Landrum ad), MCCOMB EMTERPRISE-JOURNAL, Oct. 29, 2000, at 6.
102. *A Man of Integrity* (Landrum advertisement), NATCHEZ DEMOCRAT, Oct. 15, 2000.
103. *People with Drug Problems. . .* (Starrett ad), HATTIESBURG AMERICAN, Oct. 15, 2000, at 9C.
104. *Real Trial Experience . . .* (Starrett ad), NATCHEZ DEMOCRAT, Oct. 22, 2000, at 12A.
105. Esther Campi, *Supreme Court Candidates Differ on Issues,* SUN HERALD, Nov. 1, 2000, at A-1.
106. Beverly Pettigrew Kraft, *Judges Ready for Relief in Race,* CLARION-LEDGER, Nov. 5, 2000, at B1.
107. *Landrum Questions Role . . . ,* LEADER-CALL, Oct. 19, 2000, at 1A.
108. Dave Parker, *Starrett Explains Chamber TV Ads,* ENTERPRISE-JOURNAL, Oct. 29, 2000, at 1A.

stopping the ads for ten days.[109] Diaz said that "negative ads like these affect the entire judiciary."[110] Judge Landrum brought a similar suit in Jones County and received a T.R.O. from Judge Frank McKenzie. United States Supreme Court Justice Antonin Scalia on the day before the election stayed Teel's and McKenzie's orders and also that of a chancellor in Hinds County in the Vollor suit.[111] Judge Teel later that Monday afternoon held a hearing on a preliminary injunction, since Scalia's order had only set aside the T.R.O. But the chancellor found that no irreparable injury would result from denying the injunction.[112]

In the election on November 7, Justice Diaz received 131,787 votes, Judge Starrett 103,207 (30.9%), and Judge Landrum 99,548 (29.8%).[113]

Since no candidate received a majority, a run-off would be needed two weeks later. Both of the top two finishers were concerned about the Chamber ads, Diaz saying that he expected the Chamber "is going to keep dumping money into the race," while Starrett said that he might run ads attempting to distance himself from them.[114] Perhaps because of Justice Scalia's order, no further court action was taken before the runoff election.

With Mississippians being enthralled by the deadlock in the race for President that would continue well into December, turnout for the November 21 Court runoff was a major concern of each candidate. Justice Diaz prevailed, receiving 56,693 votes (51.3%), while Judge Starrett received 53,786 (48.7%).[115] That was about a third of the vote cast two weeks earlier.

The winner, Justice Diaz, reported $835,000 in contributions and expenditures. Judge Starrett reported $340,000 in expenditures and $373,000 in contributions. Judge Landrum raised and spent about $365,000.[116]

3. Northern District, Position 1

Justice Jim Roberts resigned on March 1, 1999, in order to run for Governor in that year's Democratic primary. Governor Kirk Fordice appointed former state senator Kay Cobb of Oxford to the vacancy.[117] Timing can be everything. It appeared that the governor was on the verge of announcing former senator Cobb's appointment to a Court of Appeals vacancy when Justice Roberts surprisingly resigned. Justice Roberts's term would expire at the end of 2000, so the election would choose the person who would gain the next full term.

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109. Diaz v. Chamber of Commerce of the United States, No. C2402-00-01086 (*Harrison County Chancery Ct. Nov. 4, 2000) (temporary restraining order).

110. *Chamber's Diaz-Starrett Ads Halted,* CLARION-LEDGER, Nov. 5, 2000, at 6B.

111. Chamber of Commerce of the United States v. Vollor (also Diaz and Landrum), No. 00A406 (U.S.S.Ct. Nov. 6, 2000) (stay of T.R.O.'s in Harrison County and Jones County Chancery Courts).

112. Brad Branan, *Court Candidates Lament Negativity in Campaign,* SUN HERALD, Nov, 7, 2000, at A-1. *Diaz v. Chamber of Commerce of the United States,* No. C2402-00-01086 (Harrison County Chancery Ct., Nov. 6, 2000) (order denying preliminary injunction).

113. 2000-2004 MISSISSIPPI OFFICIAL AND STATISTICAL REGISTER 651-52 (2002).

114. Brad Branan, *Diaz, Starrett Plan Runoff Campaigns,* SUN HERALD, Nov. 9, 2000, at A-2.

115. 2000-2004 MISSISSIPPI OFFICIAL AND STATISTICAL REGISTER 655-56 (2002).

116. Mississippi Secretary of State - Elections Division, 2000 campaign finance reports.

117. Pamela Berry, *Cobb to Assume New Role as Justice,* CLARION-LEDGER, March 3, 1999, at 1A.

Justice Cobb (58) announced for re-election. Her only challenger was Chancery Judge Percy Lynchard, Jr. (44) of Hernando, who had been first elected a chancellor in 1994. Much like Judge Landrum did in running against Justice Diaz, Chancellor Lynchard argued that he was better qualified because of his experience as a trial judge. Justice Cobb had gone directly from private practice to the state's highest court.[118]

Both candidates conducted active campaigns, traveling the 33 counties of the districts in search of votes. Justice Cobb maintained some of her normal court schedule in Jackson, and noted that the chancellor had something of an advantage just by having his court duties keep him in the district.[119]

Chancellor Lynchard highlighted his years as a judge, six years as a chancellor and nine years as a municipal judge. He said that Cobb "has slightly over 15 months of experience [as a judge] and I've got 15 years, so there's really no comparison."[120] In campaign ads, he publicized endorsements of local officials such as the Leflore County Chancery Clerk, the DeSoto County Sheriff, and a former tax assessor/collector.[121]

When the Chamber of Commerce ads appeared, Justice Cobb had raised only about two-thirds of the funds as had Lynchard, $102,000 to $170,000. She said that the Chamber "is coming in on the side of the financial underdogs" and "levelling the playing field."[122] Final financial reports for the campaign revealed that Cobb had raised about $260,000 and spent $238,000, while Lynchard had raised $484,000 and spent $453,000.[123] Justice Cobb received 157,258 votes (54.8%), while Judge Lynchard received 131,350 votes (45.5%).[124]

4. Northern District, Post 2

Chief Justice Lenore Prather had been appointed to the Supreme Court in 1982, the first woman to serve on the state's highest court. Since the senior justice becomes chief, she ascended to that position when the former chief justice Dan Lee retired in January 1998. In her years as a chancellor and then a Supreme Court justice, she had never had an election opponent. The 2000 election would be different.

Chief Justice Prather (68) announced for re-election. Initially, Richard Daniel Bowen (49) of Iuka and Charles D. (Chuck) Easley (51) of Caledonia filed against her. Bowen was a member of one of the major plaintiff lawyer firms in northeast Mississippi, while Easley was a sole practitioner. Bowen stated that the Court "is in need of a better balance of the interest of the common people." Easley thought

118. Beverly Pettigrew Kraft, *Judicial Candidates After Votes,* CLARION-LEDGER, Oct. 4, 2000, at 3B.
119. Jimmie E. Gates, *Lynchard Challenging Cobb for Judicial Seat,* CLARION-LEDGER, Oct. 16, 2000, at 1B.
120. Matt Moore, *Supreme Court Races Generate Big Dollars,* NORTHEAST MISSISSIPPI DAILY JOURNAL, Oct. 22, 2000, at 6B.
121. *Here is Why Others are Supporting Percy Lynchard for Supreme Court* (Lynchard ad), NORTHEAST MISSISSIPPI DAILY JOURNAL, Oct. 22, 2000, at 4A; Percy Lynchard campaign pushcard, in possession of author.
122. *Supreme Court Races Generate Big Spending,* HATTIESBURG AMERICAN, Oct. 22, 2000, at 1A.
123. Mississippi Secretary of State - Elections Division, 2000 campaign finance reports.
124. 2000-2004 MISSISSIPPI OFFICIAL AND STATISTICAL REGISTER 652 (2002).

the other two candidates likely to be backed by special interests. "I'm not owned by any special interest . . . I don't intend to run a high-price campaign."[125]

At the end of July, Bowen withdrew from the race. He said he was interested in a circuit court position being vacated on August 31. Whether he already had received assurances from Governor Musgrove for the appointment was not made public. In October he was appointed to the vacancy.[126]

It appeared at the time to many people that the stronger of the two challengers to the Chief Justice had withdrawn from the field, leaving a much easier contest for her. Mr. Easley did not abandon the field though. On the day that Bowen was appointed to the trial court, Easley reminded voters of his candidacy by attacking Prather. He said that she is leading the court down the wrong path. What he alleged is that the Court "doesn't recognize victim's rights; it's more interested in protecting criminals." Easley also argued that the Court did not work hard enough. If another chief justice took over, the court would be more effective.[127] He called Prather "the most liberal member of the Supreme Court." He found that she had voted "to reverse the convictions of over 100 murderers. She has voted against the death penalty more than any other member of the Supreme Court."[128]

By the time of the post-election analyses that attempted to explain Chief Justice Prather's defeat, many thought that her response to all this was too passive. Her expenditures were by far the lowest of all of that year's nine Supreme Court candidates. She ran some television advertisements, but they were dwarfed in numbers by the controversial Chamber of Commerce ads. In newspaper advertisements, she trumpeted the endorsements of Senator Thad Cochran, former Governor William Winter, former Lt. Governor Evelyn Gandy, and former Supreme Court Justice Reuben Anderson.[129]

The Chamber ads became an issue in this race as well. Chief Justice Prather asked that the organization stop running ads on her behalf. She said that "out of concern for both the integrity of our judicial system and the public's perception of it, . . . I respectfully call on the U.S. Chamber of Commerce to immediately discontinue the running of these ads."[130] The response from those supporting Easley was to run an ad showing individuals in judicial robes standing in a group with large price tags around their necks.[131] Near the end of the campaign, Easley loaned his campaign $100,000 for a large and late television advertisement effort. This blitz may have been critical, especially when it was not being countered by the Prather campaign except through the problematic Chamber ads.[132]

125. Beverly Pettigrew Kraft, *Two Candidates Enter Race for High Court,* CLARION-LEDGER, May 6, 2000, at 1B.

126. *Lawyer Quits Race for Court Post,* CLARION-LEDGER, July 29, 2000, at 7B; Eileen Bailey and Sandi Pullen, *Bowen to Fill Ford's Seat,* NORTHEAST MISSISSIPPI DAILY JOURNAL, Oct. 14, 2000, at 1A.

127. Marty Russell, *Easley Questions Prather's Record in Supreme Court,* NORTHEAST MISSISSIPPI DAILY JOURNAL, Oct. 14, 2000, at 1B.

128. Beverly Pettigrew Kraft, *Prather, Easley on Ballot for Court Slot,* CLARION-LEDGER, Oct. 14, 2000, at 1B.

129. *Justice for Mississippi* (Prather ad), NORTHEAST MISSISSIPPI DAILY JOURNAL, Oct. 29, 2000, at 9A.

130. Press release by Chief Justice Prather, Oct. 20, 2000, copy in possession of author.

131. This information comes from two people, not including the Chief Justice, who saw the response ads. They were largely generic and were used in other Supreme Court races as well.

132. Tim Kalich, *Chief Justice's Loss a Stunner,* PRESS REGISTER, Nov. 14, 2000.

Mr. Easley won with 144,708 votes (51.9%), while Chief Justice Prather received 134,039 votes (48.1%).[133] That was a surprise to almost all who commented on the race in the news reports. The Chief Justice would later say that her failure to respond to the charges that she was soft on crime and had voted to reverse too many criminal cases was a critical mistake.[134]

Final financial reports revealed that the Chief Justice raised and spent about $149,000. Mr. Easley raised $332,000 and spent $237,000.[135]

In 2001 former Chief Justice Prather had an opportunity to close out her public career on a positive note when she accepted appointment as interim president of her alma mater, Mississippi University for Women.

B. 2002 [1 election]

When January 2002 arrived there were three campaigns for the Supreme Court in the offing. The one position on the court whose election does not occur in a Presidential election year, being that presently held by Justice Chuck McRae, would be contested. Also, vacancies in two positions since the last election had occurred, had been filled by gubernatorial appointment, and would need to be on the November ballot to determine who would serve the remainder of the term.

A change to the three-race scenario began when, as part of Chief Justice Ed Pittman's set of reform measures, the Supreme Court proposed that no special elections be held to fill vacancies. Instead, all appointees would serve for the remainder of the terms. As spring arrived and some early contenders for the positions began to surface, legislation was adopted that required a gubernatorial appointee to run in an election only if more than half the term for the position was still to be served at the first election more than nine months from the creation of the vacancy.[136]

Central District [this election was cancelled]

Justice Fred Banks, who began service on the Court in January 1991, resigned effective October 31, 2001, to enter private law practice in Jackson. James Graves, a Hinds County Circuit Judge since 1991, was appointed by Governor Ronnie Musgrove and was sworn in November 1, 2001. Ceola James (55) of Greenville, a chancellor since 1999, filed in early January 2002 to run for the seat in the special election for the remainder of the term that was to be held in November 2002. On July 2, the United States Department of Justice approved the bill eliminating the requirement of an election if less than half the term remains to be served. This election was therefore canceled. Justice Graves (48) thus would not have to run until November 2004, as the term to which Justice Banks was elected in 1996 expires in January, 2005.

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133. 2000-2004 MISSISSIPPI OFFICIAL AND STATISTICAL REGISTER 653 (2002).

134. Beverly Pettigrew Kraft, *Prather Leaves Regrets at Bench,* CLARION-LEDGER, Dec. 24, 2000, at 1A.

135. Mississippi Secretary of State - Elections Division, 2000 campaign finance reports, reports filed through March 31, 2002.

136. MISS. SEN. BILL 2289 (2002), as adopted, codified as MISS. CODE ANN. § 23-15-849(b).

Southern District

Justice Chuck McRae's eight-year term does not expire until January 2004. Nonetheless, the election for the next term will be held in November 2002. This unusual scheduling is a vestige of the adjustments that were necessary after Mississippi switched in 1916 from appointments to elections for Supreme Court justices. The term of an appointment under the 1890 Constitution was originally nine years. When that provision was amended to provide for elections, the current justices remained in office until the end of their nine-year terms. The next term following election would be eight years. Elections would be in even-numbered years contemporaneous with those for Congress. The closest such election for two of the then-three seats on the Supreme Court was fourteen months prior to the end of the nine-year terms.[137] That fourteen-month gap has remained for both seats, one now held by Justice Bill Waller in the central district and the other by Justice McRae.

Justice McRae (63), who was first elected in 1990 to fill the remainder of a term, then re-elected in 1994, filed for another term. Anthony Mozingo (40), an attorney in private practice in Hattiesburg who had run close races for district attorney in 1995 and 1999, filed but later withdrew. Challengers who remained in the race were Jess H. Dickerson (55) of Gulfport, and Larry Buffington (49) of Collins. Buffington has been a chancellor since 1995, while Dickinson was in private law practice on the Gulf Coast.

Northern District [this elections was canceled]

Justice Mike Mills resigned to take office as a judge of the United States District Court in Oxford. George Carlson of Batesville, a circuit judge since 1983, was appointed by Governor Musgrove (also of Batesville) to replace him effective November 1, 2001.[138] Justice Carlson (57) filed for election to the remainder of the term, and he received no challenger. When the legislation was approved by the Department of Justice that removed the requirement for special elections if less than half of a term remained, the formality of an unopposed election was canceled. Carlson could then serve until the end of the term to which Justice Mills had been elected in 1996, which would be January 2005.

137. Southwick, *Mississippi Supreme Court Elections, supra* note 5, at 127.
138. Jimmie E. Gates, *2 Named to State's High Court,* CLARION-LEDGER, Oct. 30, 2001, at 1A.

MISSISSIPPI SUPREME COURT JUSTICES 1833-2002

[Following each name is a parenthetical indicating whether a judge was first elected or appointed; from 1867-1915, there were no judicial elections. The second notation reveals whether the judge died in office, resigned before the end of a term, retired at the end of a term without running for re-election or being reappointed, or was defeated.]

District 1

Original 1832 position (Post 1; most recent term began January, 1998)

William Sharkey (elected; resigned)	1833-1851 C.J. 1833-51	Warren
Colin S. Tarpley (appointed, resigned)	Nov.-Dec. 1851	Hinds
William Yerger (elected; defeated)	1852-1854	Hinds
Alexander Handy (elected; resigned)	1854-1867 C.J. 1863-67	Madison
Ephraim Peyton (appointed; resigned)	1867-1876 C.J. 1870-76	Copiah
H.H. Chalmers (appointed; died)	1876-1885 C.J. 1881-82	De Soto
James Arnold (appointed; resigned)	1885-1889 C.J. 1888-89	Lowndes
Thomas Woods (appointed; retired)	1889-1900 C.J. 1889-91;'96-1900	Kemper
S.S. Calhoon (appointed; died)	1900-1908	Madison
Robert V. Fletcher (appointed; retired)	1908-1909	Panola
Sydney Smith (appointed; died)	1909-1948 C.J.1912-48	Holmes
Malcolm Montgomery (appointed; defeated)	1948-1950	Yazoo
Percy Lee (elected; retired)	1950-1966 C.J. 1964-66	Scott
Stokes Robertson (elected; retired)	1966-1982	Hinds
Dan Lee (elected; retired)	1982-1998 C.J. 1995-98	Hinds
Bill Waller, Jr. (elected)	1998-	Hinds

1916 position (Post 2; most recent term began January, 1997)

Clayton D. Potter (appointed; defeated)	1916-1917	Hinds
George Ethridge (elected; defeated)	1917-1941	Lauderdale
Julian Alexander (elected; died)	1941-1953	Hinds
Fred Lotterhos, Sr. (appointed; died)	Jan. 1953 -Jan. 1954	Hinds
Robert Gillespie (appointed; resigned)	1954-1977 C.J. 1971-77	Lauderdale
Francis Bowling (appointed; resigned)	1977-1984	Hinds
Reuben Anderson (appointed; resigned)	1985-1990	Hinds
Fred Banks (appointed; resigned)	1991-2001	Hinds
James Graves (appointed)	2001-	Hinds

1952 position (Post 3; most recent term began January, 2001)

James G. Holmes (appointed; defeated)	1952-1961	Yazoo
Henry L. Rodgers (elected; resigned)	1961-1976	Winston
Roy Noble Lee (appointed; retired)	1976-1993 C.J. 1987-93	Scott
Jim Smith (elected)	1993-	Rankin

District 2

Original 1832 position (Post 1; most recent term began January, 1996)

Cotesworth Smith (elected; defeated)	1833-1838	Wilkinson
Rutulius Pray (elected; died)	1838-1840	Hancock
Cotesworth Smith (appointed; defeated)	1840-1841	Wilkinson
Ed Turner (elected; retired)	1841-1844	Adams
J.S.B. Thacher (elected; defeated)	1844-1850	Adams
Cotesworth Smith (elected; died)	1850-1863 C.J. 1851-63	Wilkinson
David Hurst (elected; retired)	1863-1865	Amite
Harry T. Ellett (elected; resigned)	1865-1867	Claiborne
Elza Jeffords (appointed; retired)	1867-1869	Issaquena
George F. Brown (appointed; new const.)	1869-1870	Warren
H.F. Simrall (appointed; retired)	1870-1878 C.J. 1876-78	Warren
James Z. George (appointed; resigned)	1878-1881 C.J. 1878-81	Carroll
Tim Cooper (appointed; resigned)	1881-1896 C.J. 1885-88; 1894-96	Copiah
Thomas Stockdale (appointed; retired)	1896-1897	Pike
Samuel Terral (appointed; died)	1897-1903	Clarke
James H. Price (appointed; resigned)	March-August 1903	Pike
Jeff Truly (appointed; retired)	1903-1906	Jefferson
Robert Mayes (appointed; resigned)	1906-1912 C.J. 1910-12	Copiah
Richard F. Reed (appointed; retired)	1912-1915	Adams
J. Morgan Stevens (appointed, resigned)	1915-1920	Forrest
William Cook (appointed; died)	1920-1937	Forrest
Harvey G. McGehee (appointed; retired)	1937-1964 C.J. 1949-64	Marion
Neville Patterson (elected; resigned)	1964-1986 C.J. 1977-86	Lawrence
Ruble Griffin (elected/appointed; died)	1986-1988	Hancock
Joel Blass (appointed; defeated)	1989-1991	Harrison
Chuck McRae (elected)	1991-	Jackson

1916 position (Post 3; most recent term began January, 1997)

John B. Holden (appointed; died)	1916-1928	Pike
W.J. Pack (appointed; defeated)	1928-1929	Jones
V.A. Griffith (elected; retired)	1929-1949 C.J. 1948-49	Harrison
Lee Davis Hall (elected; resigned)	1949-1961	Marion
Robert Lee Jones (appointed; retired)	1961-1973	Lincoln
Harry Walker (elected; resigned)	1973-1987 C.J. 1986-87	Harrison
Joseph Zuccaro (appointed; retired)	1987-1989	Adams
Ed Pittman (elected)	1989-C.J. 2001-	Forrest

1952 position (Post 2; most recent term began January, 2001)

R. Olney Arrington (appointed; died)	1952-1963	Copiah
Thomas Brady (appointed; died)	1963-1973	Lincoln
Vernon Broom (appointed; resigned)	1973-1984	Marion
Mike Sullivan(appointed; died)	1984-2000	Forrest
Oliver E. Diaz, Jr. (appointed)	2000-	Harrison

District 3

Original 1832 position (Post 2; most recent term began January, 2001)

Daniel W. Wright (elected; resigned)	1833-1838		Monroe
James Trotter (appointed; resigned)	1838-1842		Monroe/ Marshall
Reuben Davis (appointed; resigned)	April-August 1842		Monroe
Alexander M. Clayton (elected; defeated)	1842-1852		Marshall
Ephraim Fisher (elected; resigned)	1852-1858		Yalobusha
William Harris (appointed; resigned)	1858-1867		Lowndes
Thomas Shackelford (appointed; new const.)	1867-1870	C.J. 1868-70	Madison
Jonathan Tarbell (appointed; retired)	1870-1876		Scott
J.A.P. Campbell (appointed; retired)	1876-1894	C.J. 1882-85; 1891-94	Attala
Albert H. Whitfield (appointed; resigned)	1894-1910	C.J. 1900-1910	Lafayette
William Anderson (appointed; resigned)	1910-1911		Lee
William McLean (appointed; retired)	1911-1912		Grenada
Sam Cook (appointed; defeated)	1912-1921		Coahoma
William Anderson (elected; defeated)	1921-1945		Lee
Lemuel A. Smith, Sr. (elected; died)	1945-1950		Marshall
John W. Kyle (appointed; died)	1950-1965		Panola
Lemuel A. Smith, Jr. (appointed; resigned)	1965-1982		Marshall
Lenore Prather (appointed; defeated)	1982-2001	C.J. 1998-2001	Clay/Lowndes
Charles D. Easley (elected)	2001 -		Lowndes

1916 position (Post 3; most recent term began January, 1997)

Eugene O. Sykes (appointed; retired)	1916-1925		Monroe
James G. McGowen (elected; died)	1925-1940		Yalobusha
William Roberds (appointed; resigned)	1940-1960		Clay
Taylor H. McElroy (appointed; retired)	1960-1965		Lafayette
William Inzer (elected; died)	1965-1978		Pontotoc
Kermit Cofer (appointed; retired)	1978-1981		Yalobusha
Armis Hawkins (elected; resigned)	1981-1995	C.J. 1993-95	Chickasaw
Mike Mills (appointed; resigned)	1995-2001		Itawamba
George Carlson (appointed)	2001-		Panola

1952 position (Post 1; most recent term began January, 2001)

William N. Ethridge (appointed; died)	1952-1971	C.J. 1966-71	Lafayette
Robert P. Sugg (appointed, resigned)	1971-1983		Webster
James L. Robertson (appointed; defeated)	1983-1992		Lafayette
James L. Roberts (elected/app; resigned)	1992-1999		Pontotoc
Kay Cobb (appointed)	1999-		Lafayette

MISSISSIPPI COURT OF APPEALS JUDGES 1995-2002

The Court of Appeals was formed by legislation adopted in 1993 and 1994. The first elections were in November 1994. The judges took office in January 1995. There are ten judges on the Court, two from each of five districts. The initial terms were staggered, so that all ten judges would not come up for re-election at the same time. After the end of the shorter initial terms that applied to six of the ten seats, all the positions have eight-year terms.

Chief Judges are named by the Chief Justice of the Supreme Court for 4-year terms. The Chief Judge then names two Presiding Judges, who have no set term.

	First District	
Post 1 (initially had a four-year term; most recent term began January 1999)		
Thomas A. Coleman (elected; resigned)	1995-1999, PJ 1995	Choctaw
D. Rook Moore, III (appointed; defeated)	1999-2001	Marshall
David A. Chandler (elected)	2001-	Choctaw
Post 2 (initially had an eight-year term, next term will begin January 2003)		
Roger H. McMillin, Jr. (elected)	1995-, PJ 1997-1999, CJ 1999-	Union
	Second District	
Post 1 (initially had an eight-year term; next term will begin January 2003)		
John J. Fraiser, Jr. (elected, resigned)	1995-1997, CJ 1995-1997	LeFlore
James H. Herring (appointed; defeated)	1997-1999	Madison
Tyree Irving (elected)	1999-	LeFlore
Post 2 (initially had a six-year term; most recent term began January 2001		
Leslie D. King (elected)	1995-, PJ 1999-	Washington
	Third District	
Post 1 (initially had a six-year term; most recent term began January 2001)		
Billy D. Bridges (elected)	1995-, PJ 1995-1997, CJ 1997-1999	Rankin
Post 2 (initially had a four-year term; most recent term began January 1999)		
Mary Libby Payne (elected; resigned)	1999-2001	Rankin
James Brantley (appointed)	2001-	Madison
	Fourth District	
Post 1 (initially had a four-year term; most recent term began January 1999)		
Leslie H. Southwick (elected)	1995-, PJ 1999-	Hinds
Post 2 (initially had an eight-year term; next term will begin January 2003		
Frank D. Barber (elected; died)	1995-1997	Hinds
B. Greg Hinkebein (appointed; defeated)	1997-1999	Hinds
L. Joseph Lee (elected)	1999-	Hinds

Fifth District

Post 1 (initially had an eight-year term; next term will begin January 2003		
Oliver E. Diaz (elected; resigned)	1995-2000	Harrison
William H. Myers (appointed)	2000-	Harrison
Post 2 (initially had a six-year term; most recent term began January 2001		
James E. Thomas (elected)	1995- , PJ 1995-1999	Harrison