Testimony Before the Illinois Joint Committee on Government Reform
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Introduction

I am honored to be here, and I congratulate you on holding this series of hearings. My name is Bert Brandenburg, and I'm executive director of the Justice at Stake Campaign. Our mission is to promote courts that are fair, impartial and accountable to the law. An essential part of that mission is protecting courts from special interest and partisan agendas.

Justice at Stake is a national partnership with more than 50 member organizations with a bipartisan board of directors. Our partners include legal groups like the American Bar Association and the National Center for State Courts, civic groups like the League of Women Voters, and business and reform groups like the Committee for Economic Development and the Illinois Campaign for Political Reform. Our ranks include Republicans and Democrats, liberals and conservatives, and plaintiffs' and defense attorneys, as well as a broad array of civic, business and good-government organizations. All of our members support concrete steps to keep courts fair and impartial, though we do not endorse any one system of selecting judges.

The New Politics of Judicial Elections

I've been asked to discuss recent trends in judicial elections, and reforms that can help address a growing financial arms race around our courts of law.

Under our constitutional system, judges—even when they are elected—have a different role than elected legislators and executive decision-makers. As legislators, the heart of your job is to make clear promises to voters and work as hard as you can to enact them as policy. Courts are given a different task. Judges are supposed to hear cases one at a time, and make decisions based solely on the facts and the law. Their decisions are not supposed to be intertwined with by campaign trail politics.

Although judges have been elected in many states for many years, historically they haven't had to raise huge war chests, cater to interest groups, make sound-bite promises, or respond to hardball attacks. But this is changing, and impartial justice is coming under pressure. In the last decade, across America, states like Illinois have seen a perfect storm where judges are forced to raise millions from people who appear before them in court. As the river of cash swells into our courtrooms, hardball TV ads are reducing legal issues to political slogans, and special interest groups are ratcheting up pressure on judges to be accountable to them instead of the law and constitution.

In the last decade, fundraising records in at least 15 states have been broken. According to the National Institute on Money in State Politics, from 2000-07, state Supreme Court

candidates raised $167.8 million—more than double the amount raised during the whole 1990s. In the 2008 election cycle, state Supreme Court candidates raised about $30 million more. These checks are being written by attorneys, partisans, and special interests with cases in court—mostly in high-court races, but some of it in appellate and even district-court contests.

Once independent expenditures are factored in, these dollar figures climb much higher. Since 1999, third-party, interest-group spending for television airtime and other expenses totaled anywhere from $17–25 million. Indeed, since third-party groups face few requirements to disclose their campaign spending, these estimates are almost certainly low.

The escalating race for cash has left many judges feeling trapped in a bad system, forced to dial for dollars from the attorneys and parties appearing before them and constantly looking over their shoulders at interest group demands. This worries the public: a number of opinion surveys have shown that three in four Americans think that campaign contributions to judges affect the outcome of cases in the courtroom. Even more chilling, according to a poll conducted by the National Center for State Courts, nearly half of judges agrees that campaign cash is affecting courtroom decisions. As former California Supreme Court Justice Otto Kaus said, "You cannot forget the fact that you have a crocodile in your bathtub… You keep wondering whether you're letting yourself be influenced, and you do not know."

The Midwest in particular is turning into a ground zero for runaway judicial campaigns. Of the six states that have endured the costliest Supreme Court campaigns during the last decade, half are in the Midwest. Illinois ranks third nationally, behind only Alabama and Ohio: high court candidates in Illinois raised just under $20.9 million between 2000-08.

Indeed, Illinois has emerged as a national poster child for judicial elections run amok. It made national headlines in 2004, when it witnessed the most expensive contested judicial election in American history. In the downstate 5th district, the two candidates raised more than $9.3 million. That's more money than was raised in eighteen out of thirty-four U.S. Senate races that year. Trial lawyers wrote six-figure checks to the state Democratic Party and teamed up with labor leaders to funnel money into the race through a political action committee. On the other side, the U.S. Chamber of Commerce and the American Tort Reform Association poured in millions more through the state Republicans, the state Chamber, and a friendly political action committee. Justice Karmeier, the winner, said in his election night victory speech: "That's obscene for a judicial race. . . . What does it gain people? How can people have faith in the system?"

2006 also saw two candidates for an Illinois Court of Appeals seat raise more than $3.3 million, quadrupling the state record. Candidates in an Illinois circuit court campaign raised more than $750,000. Considered nationally, numbers like these are less surprising when you consider that Illinois is one of a handful of states without any limits whatsoever on what can be contributed in judicial elections.

The judicial election mess has gotten so bad that former U.S. Supreme Court Justice Sandra Day O'Connor has stepped into the fray, making fair and impartial courts one of her chief vocations in retirement. As she puts it, "In too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution." John Grisham's 2008 bestseller was about a nasty, costly Supreme Court campaign. Even Parade Magazine has been running pieces about runaway judicial contests.

Most recently, developments in West Virginia that helped inspire John Grisham have captured national media attention. The U.S. Supreme Court just heard arguments in Caperton v. Massey, which stems from a 2004 contest where a West Virginia coal executive spent $3 million to elect a state Supreme Court justice. Once elected, the justice cast the tie-breaking vote to overturn a $50 million damage award against the executive's company. The case sounds startling on its face. But in fact it is an unsurprising byproduct of the new politics of judicial elections. Unless something is done, there will be more to come.

Finally, voter turnout in judicial races is often very low, creating a vacuum that partisans and interest groups can exploit, by turning out their base to tip a contest. Polls show that most voters feel ill-equipped to make informed choices in judicial elections, because they too often don't have information deeper than campaign pledges and attack ad slogans at their fingertips. Groups like the League of Women Voters, state bars, and the Illinois Campaign for Political Reform work to provide reliable information, but the problem persists.

If these trends continue unchecked, we will find ourselves in an era where the public will be asked to believe that when judges can act like Huey Long on the campaign trail and like Solomon in the courtroom. Indeed, in 2010, once again, Illinois can expect to be an epicenter of special interest pressure on the courts—four Supreme Court seats will be up for election at the same time. There should be no doubt: special interests have painted a national bullseye on Illinois court elections. The checks will follow.

Solutions

As court contests have spiraled out of control across the country, there has been growing interest among state lawmakers for a number of reforms. I will focus on three of them this morning: public funding of judicial elections, performance commissions and recusal.

I will talk the most about public funding of judicial elections. North Carolina adopted it for appellate judicial elections in 2002, as did New Mexico in 2007. Other states like Wisconsin, West Virginia and Washington are considering it.

In the North Carolina program, when appellate and high court candidates raise enough in small donations from a certain number of citizens, and swear off raising money privately, they can receive public financing. If a publicly financed candidate is outspent by a

privately financed candidate or by third-party independent expenditures, "rescue" matching funds up to two times the original grant are made available.

In other words, public funding helps alleviate candidates' need to dial for dollars from the attorneys and litigants who will appear before them. When judicial candidates spend more time with all voters—rather than just a small number of check writers—they can boost confidence in the judiciary by showing that big campaign donors can't buy goodwill in the courtroom.

In North Carolina's judicial elections, the public financing program has not favored any particular class of candidates: Seats have been won by incumbents and challengers, women and men, whites and minorities, Republicans and Democrats. Most importantly, public funding promotes voters involvement by lowering meaningful contribution thresholds and increasing voter education.

The North Carolina system has now been used in three election cycles. In 2004, fourteen of sixteen candidates enrolled in the program. In 2006, eight of twelve participated, and last year eleven of twelve enrolled. In 2006, more than half of all donations came either in the form of public funds or small contributions of less than $100. Indeed, the program has encouraged judicial candidates to collect smaller contributions from more donors in order to qualify for public financing.

Not surprisingly, North Carolina judges are happy to go on record in support of the program. Judge Wanda Bryant with the Court of Appeals says, "It makes all the difference. I've run in two elections, one with campaign finance reform and one without. I'll take 'with' any day, anytime, anywhere." And a statewide poll showed that 74 percent of North Carolina voters approved of continuing public financing.

I would also echo a point made by Cindi Canary yesterday, that effective reform requires meaningful disclosure. The public deserves to know who is contributing on a timely basis. Extra energy is often needed to make sure that schemes to use conduits or otherwise evade disclosure are not be tolerated. And independent expenditures must be fully disclosed.

In regards to recusal, however the U.S. Supreme Court rules in Caperton v. Massey, every state can enact reforms to reduce any appearance of improper influence by campaign money. As campaign contributions and special interest spending skyrocket, letting judges automatically brush aside requests to step aside is no longer appropriate.

There are alternatives. The American Bar Association is reviewing possible mechanisms to require a judge's recusal when certain contribution limits are exceeded. At present, 19 states employ the simplest method—allowing each side to strike one judge, much as one might remove a potentially biased juror. Other potential reforms include a court specially designated to hear recusal motions.

Because courts traditionally set their own rules for hearing cases, I would not yet recommend that legislators dictate new recusal rules to the courts. But there is no ban on interbranch dialogue, and the commission would do well to urge the courts to step forward.

Finally, to deal with low turnout, and build on existing voter guides, eight states with appointment systems conduct judicial performance evaluations, which provide in-depth ratings of judges facing retention elections for another term. Ideally a judicial performance evaluation would provide a neutral review of the judge's judicial skills, including the judge's impartiality, case management skills, communication skills, command of substantive and procedural law, temperament on the bench, and commitment to public service. It's exactly the kind of information voters need to make an informed choice.

Conclusion

I hope that the Joint Committee will urge serious reforms to address the public's growing fear that justice is for sale. The new politics of judicial elections is here to stay. If are courts are going to be fair, and if judges are going to stay accountable to the law instead of special interests, the status quo will not suffice.

Thank you for the opportunity to testify. I'd be glad to answer any questions you may have.

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