Judicial Selection: It's More About the Choices Than Who Does the Choosing

Honorable Lavenski R. Smith

Follow this and additional works at: http://lawrepository.ualr.edu/lawreview

Part of the Courts Commons, Election Law Commons, and the Judges Commons

Recommended Citation


Available at: http://lawrepository.ualr.edu/lawreview/vol30/iss4/3

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.
Honorable Lavenski R. Smith

I. INTRODUCTION: THE IMPORTANCE OF THE JUDICIARY TO DEMOCRATIC GOVERNMENT

America’s founders valued freedom. They staked their lives, fortunes, and sacred honor on a national vision that made government the people’s servant. To achieve that vision, they circumscribed governmental authority to certain limited purposes and segregated its power among three discrete branches, each insufficient to govern legitimately without the other. They hoped that, so limited, such a government would be sufficiently useful to their goals of prosperity and security, yet not so powerful as to threaten their cherished and recently blood-bought liberties.

Central to the founders’ vision was a well-qualified and independent judiciary. As stated in Federalist No. 78:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.¹

America entrusts the third branch of government to approximately 12,000 federal and state judges.² All 868 Article III federal judges are se-

* Judge Smith was confirmed to the United States Court of Appeals for the 8th Circuit in July 2002. Prior to his federal service, Judge Smith served two years on the Arkansas Supreme Court and three and a half years on the Arkansas Public Service Commission including two as its Chairman. Before his government work, Judge Smith practiced law and taught as an assistant professor at John Brown University. Early in his career Judge Smith was a staff attorney with Ozark Legal Services and a volunteer attorney for the Rutherford Institute. Judge Smith is a member of the American Judicature Society, the American Inns of Court, the Arkansas Bar Association and the W. Harold Flowers Law Society.

1. THE FEDERALIST NO. 78 (Alexander Hamilton).
lected through the constitutionally-mandated nomination and confirmation process.\(^3\) State judges, however, are selected through an assortment of means, predominately through election, although an increasing number of state judges are selected through some form of merit selection or appointment.\(^4\) The debate has long raged regarding which of these selection processes is superior, and no end to the argument is in sight.\(^5\)

II. THE GOAL OF THE JUDICIAL SELECTION PROCESS SHOULD BE TO SELECT GOOD JUDGES AND TO BUILD PUBLIC CONFIDENCE IN THE JUDICIARY

Arkansas’s more than 134 trial and appellate judges are selected by popular election from self-declared candidates who meet certain minimum constitutional and statutory qualifications.\(^6\) Does this method provide Arkansas with capable and ethical judges for their judicial system? Could some other method do a better job of selecting Arkansas’s judges? Perhaps, but as I have reviewed the literature and considered the subject, my conclusion is that more emphasis should be placed on the qualities of those being chosen for judicial service, regardless of the method employed to choose judges.

Judicial service is both an awesome privilege and a heavy responsibility. Persons fulfilling this role must possess personal character qualities and employ legal procedures that enable the public to see that decisions are made impartially and consistently with a solemn respect for the boundaries of the judges’ constitutional authority. The goal of any selection system should be to choose quality persons to serve. Any selection process consistent with the constitution that increases the likelihood that quality persons will serve in the judiciary deserves serious consideration. Judges, regardless of how chosen, who lack adequate legal acumen or ethical character will shake public confidence in the legitimacy of judicial decision making and thereby harm the whole of the republic. As stated by Chief Justice John Marshall, “I have always thought, from my earliest youth ‘til now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary.”\(^7\) Justice Marshall rightly feared the judiciary becoming legally unqualified and mo-

---


rally unfit to be trusted with a vital role in the preservation of constitutional liberties.

III. UNETHICAL JUDGES DESTROY PUBLIC CONFIDENCE IN THE JUDICIARY

Unethical judges erode the public's respect for and confidence in the judiciary.8 Confidence is affected both by fact and perception. Judges must be actually and apparently impartial. The types of jurists who serve on the bench have a significant impact on whether "a feeling of injustice" exists among the people.9 Regardless of the substantive law applied, throughout history, all peoples "seem to have been unanimous in the desire for judges who could be trusted to judge justly and without fear or favor."10 This is because the "quality of justice" is more dependent on the quality of the individuals administering the law rather than on the "content of the law they administer."11

Alexander Hamilton identified the judiciary as the weakest of the three branches of government, as it has "neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."12 Because the judiciary is viewed as the weakest branch of government, "any power the judiciary holds derives from respect given to its decisions, and that respect derives from public trust in the impartiality of the court's decisions."13 Thus, the very appearance of a judge's impropriety diminishes the public's confidence in a judge's impartiality.14 The "continued vitality" of the judicial branch depends largely on

10. Id.
11. Id. at 5.
12. The Federalist No. 78, supra note 1.
13. Noseda, supra note 8, at 529.
14. Id.; see also Cynthia Gray, Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility, 28 U. Ark. Little Rock L. Rev. 63, 64 (2005) ("To hold judges to the highest standards of ethical conduct, a code of judicial conduct must cover not just the clear and obvious improprieties but indirect, disguised, or careless conduct that looks like an impropriety to an observer who is informed and thoughtful but not prescient or gullible.").
the public’s perception of the fairness and impartiality of judges. In essence, if the public perceives judges as being corrupt, such perception becomes a “form of reality.”

A comprehensive definition of “corruption” is “the use of public office for private gain.” Unethical or “corrupt” judicial behavior encompasses many acts or perceived motives including the following:

(1) corrupt influence on judicial action; (2) questionable fiduciary appointments; (3) abuse of office for personal gain; (4) incompetence and neglect of duties; (5) overstepping of authority; (6) interpersonal abuse; (7) bias, prejudice, and insensitivity; (8) personal misconduct reflecting adversely on fitness for office; (9) conflict of interest; (10) inappropriate behavior in a judicial capacity; (11) lack of candor; and (12) electioneering and purchase of office.

A “common thread” in most corrupt conduct is a “reliance upon secrecy and collusion.” Corrupt officials, like a dank mildew, abhor sunshine. Unethical conduct occurring within the judicial branch is perhaps more inimical to liberty than corruption occurring in the other two branches of government because the judiciary serves as “the failsafe between constitutionalism and a free-for-all or a Hobbesian state of nature.” Some of the major consequences of having a corrupt judiciary include unpredictable judicial opinions (or perhaps too predictable judicial opinions based upon the judge’s politics or personal interests), low public opinion, deprivation of fair judicial procedures, and inflated transaction costs. A 1995 public opinion poll revealed that only 8% of Americans “had a great deal of confidence in the judiciary, though 80% believe that the judges are fair and honest in their decisions.” Similarly, a national survey conducted in 1999 found that (1) public confidence in the judicial branch was below the confidence level that people had in the other two branches; (2) 81% of respondents felt that politics influenced judges; (3) 80% of respondents felt that wealthy people re-

15. Long, supra note 8, at 8-9.
18. Geoffrey P. Miller, Bad Judges, 83 TEX. L. REV. 431, 432–33 (2004); see also Dakolias & Thachuck, supra note 17, at 355 (stating that “corruption” includes fraud, extortion, violence “and other forms of criminal activity”).
20. Id. at 363–64.
21. Id. at 364–65.
22. Id. at 367.
ceived better treatment than others by the courts; and (4) 50% of respondents felt that minorities were treated worse than others by the courts.\textsuperscript{23}

Given the negative impact unethical behavior has on public confidence, it stands to reason that impartial, ethical, and legally astute judges increase public confidence in the judiciary. Judges exhibiting the following “judicial traits” should build the public’s confidence in the judiciary:

1. Judges should be cognizant of the great power they possess, as well as its limits.\textsuperscript{24} Judges who apply the law must be first committed to obeying the law. The power to interpret the law is not the power to disregard it.

2. Judges should strive for unassailable impartiality. All persons should expect fair consideration before any court of law and not suspect that the judge is “distracted with any jarring interests.”\textsuperscript{25} The judge must respect people from every walk and station of life but give preference to none of them.

3. Judges should readily admit to their mistakes when they occur, recognizing that they are not immune to error.\textsuperscript{26} Judicial accountability really begins neither at the ballot box nor with an impeachment bill in the House of Representatives but in the conscience of the judge.

4. Judges should exhibit modesty on the bench instead of arrogance, acknowledging that judicial service is public service and not a license to display one’s supposed superiority.\textsuperscript{27}

5. Judges should always tell the truth. The public has the right to know how judges arrive at their conclusions and should not be deceived as to how judges reach their decisions. “Public confidence in the judiciary increases when the public is told the truth.”\textsuperscript{28}

Indisputably, we need good judges, and such judges should possess “honesty and courage; wisdom and learning; the kind of humility that enables a man to rise above the faults and prejudices of his own inner self, and to see and think and decide on higher ground.”\textsuperscript{29} Accordingly, a primary goal of any judicial selection system should be to “maintain public confi-

\textsuperscript{23} Varsho, supra note 4, at 447.
\textsuperscript{25} John Adams, while discussing his views on government and in particular the importance of the judiciary, stated, “The judges, therefore, should be always men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention. Their minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men.” JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 291–92 (C. Bradley Thompson ed., 2000).
\textsuperscript{26} Barak, supra note 24, at 61.
\textsuperscript{27} Id.
\textsuperscript{28} Id. at 62.
\textsuperscript{29} Haynes, supra note 9, at 8.
dence in the fairness and integrity of the judicial system."30 Maintaining public confidence in the judiciary "does not require a belief that all judicial decisions are wise, or all judicial behavior impeccable;" instead, it requires "a satisfaction that the justice system is based upon values of independence, impartiality, integrity, and professionalism and that, within the limits of ordinary human frailty, the system pursues those values faithfully."31

Judicial selection, regardless of method, must engender, or, at a minimum, not undermine public confidence in judicial decision making: "The effects on public confidence in the judiciary need to be considered with every selection system because if large segments of the population lose faith in the judiciary, 'justice is in very serious trouble.'"32 The question is whether the method of judicial selection directly affects the public's confidence in the judiciary and the judiciary's independence and accountability.33

IV. OVERVIEW OF STUDIES OF JUDICIAL ETHICS RELATIVE TO METHOD OF SELECTION

Currently, five judicial selection methods "dominate state selection systems, although some states tailor each selection method to their individual needs."34 The five methods of selection are gubernatorial appointment, legislative appointment, partisan elections, nonpartisan elections, and the "merit system" or "Missouri Plan."35 A typical merit system is composed of a nonpartisan judicial nominating commission that recruits and evaluates judicial candidates.36 Thereafter, the commission supplies the governor with a list of candidates.37 The governor then chooses a judge from that list. Judges chosen by the merit system are subject to a retention election at the end of their term.38 In a retention election, "the only question on the ballot is 'should Judge X be retained in office?'"39


32. Varsho, supra note 4, at 455 (quoting JUSTICE IN JEOPARDY 2 (American Bar Assoc. ed., 2003)).

33. Id. at 454.

34. Id. at 456.

35. Id.

36. Id. at 460.

37. Id.

38. Varsho, supra note 4, at 460.

39. Id.
Only a small number of states use a gubernatorial or legislative appointment system to choose their judges. In contrast, approximately twenty-one states employ an election system to initially select their judges. The merit selection system is gaining acceptance and use in the states; approximately fifteen states and the District of Columbia use a merit selection sys-


tem to initially select their judges. Nine states combine merit selection with other methods to create their own unique judicial selection system.

When addressing the question of which system is the "best" method of judicial selection, an appropriate and prudent inquiry is which system produces the most ethically sound jurists. Proponents of merit selection assert that merit selection produces better qualified judges; as proof, "they claim that discipline for judicial misconduct almost invariably involves elected, not appointed judges." Additionally, general agreement exists among legal academics that "popular election is, on the whole, a poor method of selecting judges." Some academics have asserted that the electoral process "has not been an effective method of judicial discipline because voters are more likely to vote out judges for unpopular decisions than for ethical infractions."

Studies—though scarce—addressing the ethical performance of judges chosen under the various selection systems tend to show that elected judges are disciplined more often than judges that are appointed through the merit system. One of the earliest comparisons of the performance of merit-

42. Id. Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, New Mexico, Rhode Island, Utah, Vermont, and Wyoming all use the merit system. Id. More specifically, sixteen states use the merit system to initially select trial judges for courts of general jurisdiction: Alaska, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Iowa, Maryland, Massachusetts, Nebraska, Nevada, New Mexico, Rhode Island, Utah, Vermont, and Wyoming. Id. Eighteen states use the merit system to select judges for their intermediate appellate courts: Alaska, Arizona, Colorado, Connecticut, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, New York, Oklahoma, Tennessee, and Utah. Id. Finally, twenty-four states use the merit system to select judges for their courts of last resort: Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, New York, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, and Wyoming. Id.

43. Id. Arizona, Florida, Indiana, Kansas, Missouri, New York, Oklahoma, South Dakota, and Tennessee combine merit selection with other methods to choose their judges. Id. More specifically, Arizona, Indiana, Kansas, and Missouri use "combined methods" to choose their trial judges for courts of general jurisdiction. Id. This means that the states choose some judges through merit selection, while others are chosen in competitive elections. Id.

44. Judith L. Maute, Selecting Justice in State Courts: The Ballot Box or the Backroom?, 41 S. TEX. L. REV. 1197, 1225–26 (2000); see also MAX BOOT, OUT OF ORDER 196–97 (1999) ("It's no coincidence that virtually all examples of misconduct in this chapter involve states that pick their judges through partisan elections.").

45. Long, supra note 8, at 15.

46. Id. at 16.

47. The reason that such few comprehensive studies exist on the discipline rate between elected and appointed judges may be because state judicial conduct organizations vary substantially in their reporting of judicial discipline. Some organizations publish in-depth summaries of discipline statistics, e.g., California Commission on Judicial Performance, whereas others provide minimal information. See the American Judicature Society's website,
selected judges and elected judges concluded that "a merit plan 'tend[ed] to eliminate the selection of very poor judges.'"  

Evaluations of judicial discipline in three elective states—California, Florida, and New York—show that "a sharp distinction is found between the number of judges initially appointed and those initially elected."  

California’s Commission on Judicial Performance published a summary of discipline statistics from 1990 to 1999. That summary found "a disciplinary rate per thousand judges of 29.8 for the initially appointed category [and] 43.6 for the initially elected." From 1970 to 2000, of the sixty-nine Florida judges disciplined, "70% of the judges who were reprimanded and 83% of those who were removed (or resigned with charges pending) had initially been elected." Likewise, in New York City, of the forty-one limited jurisdiction judges disciplined from 1977 to 2002, "80% had been elected (from among the 314 civil court judges) and only 20% appointed (from among the 288 family and criminal court judges)."  

In contrast to the studies in California, Florida, and New York City, the Texas Judicial Conduct Commission released statistics in 1987 showing that 58% of the district and appellate judges sanctioned by that commission were originally appointed; in contrast, only 42% of judges disciplined were originally elected.  

Following the lead of California, Florida, New York, and Texas, other states should move away from a debate over which method of judicial selection is theoretically better from a political philosophy perspective. Instead, states should focus on whether their current method of judicial selection, whether electoral or merit based, is producing ethical and competent judges.

http://www.ajs.org/ethics/eth_conduct-orgs.asp, for a comprehensive list of state judicial conduct organizations.

48. Reddick, supra note 5, at 743. The behavioral study covered trial court judges both before and after Missouri’s adoption of a merit system in 1940. Id. at 742. The conclusion that merit-selected judges performed better than elected judges was reached based on attorney evaluations of the judges’ overall performances. Id. at 743. “While large proportions of both merit and elected judges were ranked in the highest quartile, fewer merit judges were ranked in the lowest quartile.” Id. at 743-44.


52. Id. at 1088.


V. ARKANSAS’S JUDICIARY IS LARGELY ETHICAL AND COMPETENT

Arkansas’s current method of judicial selection is nonpartisan elections. Before 2000, the Arkansas electorate selected its judges through partisan elections. While several states have switched to merit selection systems in recent years, Arkansas has declined to do so. If Arkansas voters are choosing largely ethical and competent jurists, then the necessity of changing from an electoral system to a merit-based system is greatly diminished. In other words, we need not repair the unbroken.

Arkansas currently has 134 jurists serving its state courts: seven judgeships in the Arkansas Supreme Court, twelve judgeships in the Arkansas Court of Appeals, and 115 judgeships in Arkansas circuit courts. From 1990 to 2007, one circuit judge was removed from office; seven judges submitted letters of resignation and agreed never to serve in the Arkansas judiciary; four judges retired from office during the investigation; and five judges resigned from office either prior to the formal disciplinary hearing or during the investigation. Thus, seventeen judges over the past seventeen years have ended their service in office as a result of judicial disciplinary proceedings. Furthermore, since 1990, approximately sixty-five judges have received a letter of admonishment, censure, suspension without pay, or removal from office.

56. Id.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
suspension with pay, informal adjustment, voluntary suspension pending dismissal of criminal charges, letter of final action, informal resolution, or reprimand from the Arkansas Judicial Discipline and Disability Commission (the “Commission”). Therefore, in total, approximately eighty-two judges received some type of sanction from the Commission over a seventeen year period. This averages to less than five judges receiving sanctions per year.

These statistics demonstrate that few judges are sanctioned each year by the Commission. But, what about the type and severity of the conduct for which these judges received sanctions? As previously noted, in seventeen years, the Arkansas Supreme Court has formally removed only one state judge from office pursuant to the recommendation of the Commission.

The judge who was removed from office had committed several offenses, which, when combined, warranted his removal. First, after becoming a judge, he continued representing two clients in litigation: a plaintiff in a personal injury lawsuit and another plaintiff in a wrongful-death lawsuit in Louisiana. After entering office, the judge continued to correspond with opposing counsel and handle client affairs as an attorney normally would, including using his chambers and judicial letterhead to complete settlement of the case. Second, the judge declined to honor a subrogation agreement with a union for medical expenses on the client’s behalf. Eventually, the judge and his client were sued, and judgment was obtained against them. Third, the judge failed to list the attorney’s fees on his outside-income report that he received from two settlements in 1993. In addition, he did not list attorney’s fees or income that he received from other attorneys and clients in 1993 and 1994. The Commission also found that the judge did not file an outside-income report with the Arkansas Supreme Court Clerk in 1996 or a statement of financial interest with the Arkansas Secretary of State in 1997.

63. Id.
64. In reality, the Commission reported sanctioning one judge in 2007; two judges in 2006; one judge in 2005; four judges in 2004; two judges in 2003; four judges in 2002; eight judges in 2001; seven judges in 2000; seven judges in 1999; five judges in 1998; ten judges in 1997; four judges in 1996; seven judges in 1995; three judges in 1994; three judges in 1993; three judges in 1992; three judges in 1991; and eight judges in 1990. Id.
65. Obviously, these numbers do not account for unethical conduct that goes unreported.
66. Commission Final Actions (Sanctions), supra note 59.
68. CYNTHIA GRAY, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 106 (2002).
69. Id.
70. Id.
71. Id.
72. Id.
73. Id.
Finally, the Commission also took account of a variety of other personal financial shortcomings of the judge including tax liability and car tag misuse.\textsuperscript{75}

This judge's conduct, while inexcusable, did not relate directly to his behavior on the bench or his judicial decisions. The judge used bad judgment in his personal affairs, but he was not removed for judging cases badly. Moreover, the Commission commented to the Arkansas Supreme Court that the "sheer number of violations committed over such a lengthy period of time" led to its recommendation that Judge Thompson be removed.\textsuperscript{76}

As to the judges that (1) submitted letters of resignation and agreed never to serve in the Arkansas judiciary, (2) retired from office during the investigation, or (3) resigned from office either prior to the formal disciplinary hearing or during the investigation, these judges' unethical conduct covers both personal indiscretions and wrongful acts committed in their capacity as judicial officers. For example, part-time Municipal Court Judge H. Paul Jackson of Berryville resigned from office due to his questionable personal and professional conduct, as the complaints against him:

alleged that the judge had been charged with unlawfully operating a motor vehicle while intoxicated, violating the implied consent law, and operating a motor vehicle without a valid driver's license, presided at a hearing where he assessed himself a fine for not having a valid driver's license, failed to promptly administer his court or to comply with several state statutes; and signed an order that he had prepared in his capacity as an attorney, canceling a lien on land owned by a client.\textsuperscript{77}

Likewise, Municipal Judge William W. Watt of Little Rock resigned from office during the investigation of four complaints against him.\textsuperscript{78} First, a state representative filed a complaint against the judge concerning his involvement in presenting a check to that representative during a legislative session on behalf of the Arkansas Municipal Judges Council.\textsuperscript{79} Second, another complaint was filed regarding the judge's "operation of and com-

\begin{itemize}
\item[74.] GRAY, \textit{supra} note 68, at 106.
\item[75.] Between 1993 and 1997, fifty-nine checks were returned to Judge Thompson due to insufficient funds, thereby "compromising his ability to sit on cases involving 'hot checks.'" \textit{Id.} The judge was liable for $86,936.91 in delinquent federal income tax from 1994; as a result, the IRS filed a notice of tax lien on Judge Thompson and his wife. \textit{Id.} The judge received a citation from police for "placing the license tag for his 1981 Toyota on his Ford pickup truck," a misdemeanor. \textit{Id.} He also deposited client funds from two settlements in his personal operating account and disbursed checks to clients. \textit{Id.}
\item[76.] Judicial Discipline & Disability Comm'n v. Thompson, 341 Ark. 253, 277, 16 S.W.3d 212, 225 (2000).
\item[77.] GRAY, \textit{supra} note 68, at 149.
\item[78.] \textit{Id.}
\item[79.] \textit{Id.}
\end{itemize}
ments by the judge in the truancy program in the municipal court.” 80 The third and fourth complaints concerned Judge Watt’s actions “as described by the judge’s testimony in the ‘Whitewater’ trial under a promise of immunity.” 81

Municipal Court Judge Stephen Morley of North Little Rock had twenty-six formal charges pending against him when he agreed to resign and never again serve as a judge in Arkansas.82 The complaints against Judge Morley related to both his personal and professional conduct, including allegations that he threatened a process server, physically assaulted his first and second wives, committed adultery, concealed a hit-and-run accident from the police, filed a fraudulent claim, “attempted to use the prestige of his judicial office to advance his private interest when dealing with the claims adjuster,” and possessed and sold marijuana.83

Similarly, part-time Batesville Municipal Court Judge Roy Thomas resigned from office after the Commission charged that he:

presided in proceedings involving his personal clients in eight cases; made threatening remarks to an individual who filed a judicial ethics complaint against him; attempted to use his judicial office to have a sheriff ‘help’ him to have a speeding ticket dismissed; directed a police officer not to arrest and to release a minor in possession of three kegs of beer; issued temporary driver’s permits to people whose drivers licenses had been revoked; used his judicial office to have a client released from jail; after an improper ex parte meeting with defense counsel, dismissed criminal charges against an individual, allowing the defense counsel to use the dismissal to avoid a parole revocation; without the presence of or notice to the prosecutor, accepted a guilty plea to a lesser charge; accepted gifts and favors from a car dealership while presiding over cases involving that car dealership, ruling in favor of the car dealership 43 times and against it once; and wrote approximately 166 checks with insufficient funds in the checking accounts.84

Based on the cases brought before the judicial discipline authorities in Arkansas, these represent the worst examples of unethical conduct by Arkansas judges over the past seventeen years. Based upon the number and nature of these cases, Arkansas has a low reported incidence of judicial misconduct compared to other states with elected judges. Overall, the data is

80. Id.
81. Id.
82. Id.
84. GRAY, supra note 68, at 149–50.
consistent with a state judiciary that is, on the whole, largely ethical and competent.

VI. MEASURES TO BETTER INFORM THE PUBLIC

Short of transforming the judicial selection system to an appointment and retention system, states that elect judges may want to consider adding measures to better inform the public about candidates for judicial office. The public, at present, is entirely dependent upon campaigns for their knowledge of a judicial candidate’s legal qualifications or personal qualities. Moreover, because “judicial races generally draw less attention than races for prominent executive or legislative positions . . . less information is generally available on judicial candidates . . . .”

At a minimum, states could consider forming judicial screening committees that perform rudimentary background checks on judicial candidates. Such screening would at least provide the public with important information about the judicial candidate’s employment history and criminal history.

Also, as one author has suggested, judicial performance evaluations could be incorporated into the election process. An evaluation commission composed of both attorneys and non-attorneys would conduct the judicial performance evaluations of judges running for reelection. This commission would neutrally review the sitting judge’s “impartiality, case management skills, communication skills, command of substantive and procedural law, temperament on the bench, and commitment to public service.” Candidates running for judicial office with no prior judicial experience would receive a prospective performance evaluation. This evaluation would examine the candidate’s skills and experience. After collecting the data, the evaluation commission would analyze the information and then disseminate its analysis to voters before the election. Given the general lack of information on judicial candidates, states should pursue these types of measures so that voters do not “face a slate of judicial candidates about which they know nothing particularly relevant, or even nothing at all.”

---

86. Id. at 725.
87. Id. at 748.
88. Id. at 725.
89. Id.
90. Id.
91. Singer, supra note 85, at 725.
92. Id. at 726.
VII. CONCLUSION

Diminishing the impact of undue partisan political influence upon judicial selection makes good sense. Yet the notion that judicial selection can be made entirely apolitical denies human nature and the nature of a democratic system of government. Altering the selection method may move the political influences from the ballot box, but it will not remove such influences all together from any judicial selection process.  

For all its faults, politics is a far better instrument voice than anarchy:

The reality of state judicial selection is that no one system will work for all states. When considering a selection method, a state needs to balance the conflicting ideas of independence and accountability. In addition, the state needs to consider the effect of its selection method will have on the diversity of the judiciary, along with the effect the selection method will have on the public’s confidence in the judiciary. Finally, states need to consider their regulation of the judiciary as a supplement to initial selection methods to ensure the independence and integrity of the judiciary is preserved after selection.

Non-election selection methods seem to do a better job of weeding out the judges most likely to have ethical shortcomings. But the differences between elected judges and judges chosen through merit selection may not warrant changing methods on that score alone. Other considerations, however, such as capacity to enhance diversity may tip the scale in favor of a nonelective process.

93. Maute, supra note 44, at 1242.
94. Varsho, supra note 4, at 463–64.