CRIMINAL JUSTICE REFORM IN ALABAMA

A Report and Analysis of Criminal Justice Issues in Alabama

Part Two:

Judicial Selection in Alabama

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JUDICIAL SELECTION IN ALABAMA
REPORT OF THE EQUAL JUSTICE INITIATIVE OF ALABAMA
EXECUTIVE SUMMARY

Alabama is one of only a few states that continues to select all circuit trial and state appellate judges through partisan elections for six-year terms. The frequency and highly politicized nature of judicial selection has created enormous problems in the state that have undermined the independence, integrity and reliability of state court judges to interpret and apply the law.

Alabama leads the nation in spending for judicial elections. Because it is the only southern state besides Texas to impose no caps on contributions from political action committees, judicial candidates in statewide races have raised over 33 million dollars in the last ten years. Harsh and bruising political campaigning has reduced many judicial election races into shamelessly contentious fights that have severely compromised the effectiveness of the courts to function fairly.

The president of the Ohio State Bar recently observed that people with money who are affected by judicial decisions “have reached the conclusion that it’s a lot cheaper to buy a judge than a governor or an entire legislature and [the judge] can probably do a lot more for you.” Big business coalitions with a focus on limiting tort judgments and developing favorable policies for business interests have invested heavily in Alabama judicial elections. The plaintiffs’ civil bar has also funded candidates who will preserve tort remedies that have proved very lucrative for some attorneys and consumers.

Adding fuel to this fire is the recent ascendency of former Chief Justice Roy Moore and a slate of judicial candidates who proclaim association with the Ten Commandments and other religious ideology. Justice Moore was ultimately removed from office after refusing to obey a federal court order that his ten commandments monument violated the Constitution. Many grassroots groups have vowed to replace all sitting judges with candidates who embrace their religious values. The confluence of these forces has changed Alabama judicial selection dramatically in recent years.

Until 1994, no Republican had been elected to any statewide judicial position in the 20th century. Now all members of the Alabama Supreme Court are Republicans. None of the 19 appellate court judges in Alabama are African American. Less than 4 percent of the 140 trial court judges in Alabama are black.

A significant consequence of highly politicized judicial selection in Alabama has been a
focus on criminal justice in judicial campaigns. Candidates make an assortment of promises to be tough, to impose and uphold death sentences and to exploit fear and anger about crime. Candidates present pictures of themselves as harsh and unsympathetic when it comes to dealing with criminals and frequently use their support of the death penalty to symbolize toughness and other politically popular images with the electorate. One Supreme Court Justice recently announced publicly that he would not follow binding U.S. Supreme Court precedent that prohibits the execution of juveniles because he considers the Court’s ruling liberal “judicial tyranny.” There are growing concerns about the impartiality and the integrity of many state courts and judges.

There is a tremendous need for reform. The Equal Justice Initiative of Alabama believes that partisan election of judges should be immediately terminated. Selection of judges should be non-partisan, based on merit and as immune from political pressure as possible. EJI recommends switching to non-partisan elections and imposing campaign contribution limits not to exceed $5000 immediately. These short-term reforms must be followed by a transition to merit selection of state appellate court judges by elected officials with input from specially formed commissions who can evaluate the qualifications of judicial candidates.

January 2006

This report is prepared by the Equal Justice Initiative of Alabama in Montgomery, Alabama. EJI is a private, non-profit law project that provides legal assistance to the poor and advocates on behalf of the disadvantaged, particularly on criminal justice matters. Special thanks for this report is due to Benjamin Maxymuk, Marc Shapiro, Aaryn Urell, Daniel Savery, Kristian Collins, Randy Susskind and Eva Ansley.

Bryan Stevenson
Judicial Selection in Alabama

Alabama is one of a handful of states that continues to select its judges through partisan elections, which have become increasingly politicized and controversial over the last 15 years.

While the state continues to rely on partisan elections for the selection of judges, nearly 85% of respondents in a statewide poll could not name more than one candidate for statewide judicial office.

From 1993 to 2002, the thirty-seven judicial candidates in statewide Alabama races raised a total of over 33 million dollars, by far the highest in the nation. The money raised by judicial candidates in Alabama is more than double the amount raised by candidates in every other state besides Texas. The infusion of big money into Alabama judiciary elections has transformed judicial races. These historically “low-profile” contests in which little campaigning occurred and small amounts of money were expended have become heated partisan contests that undermine public confidence in an independent judiciary and raise questions about the influence of special interests.

In Alabama donors are free to give as much as they wish because the state imposes no limits on judicial campaign contributions by individuals or political action committees (PACs). All other southern states which hold judicial elections, except Texas, cap individual and PAC contributions at between $500 and $5000.

The Impact on Criminal Justice

Though crime rhetoric permeates Alabama judicial campaigns. A candidate can show no respect for protecting the rights of people accused of crime without fear of attack. In addition to accusing each other of being soft on crime, judicial candidates routinely tout their own commitment to punishing criminals.

The persistent emphasis on crime in judicial campaigns sometimes threatens to make judicial elections indistinguishable from races for prosecutors or attorney general. The nature of Alabama’s judicial selection system pressures judges to submit to popular opinion rather than the law. Endorsements by prosecutors and police officials are not uncommon. In 1998, a Supreme Court candidate listed his endorsements from 30 police chiefs and 4 police groups as a basis for getting voter support.
Alabama is one of only 4 states that has a system of “judicial override,” in which a judge can override a jury’s sentence in a death penalty case. Alabama is only state with both judicial override and partisan elections of all reviewing judges. Nearly 21% of Alabama’s death row received their sentences after elected judges overrode the jury’s verdict. In Delaware, where judges are appointed, override is almost always used to spare life rather than to forfeit it, as opposed to in Alabama where 90% of overrides impose death sentences.

“A campaign promise to ‘be tough on crime,’ or to ‘enforce the death penalty,’ is evidence of bias that should disqualify a candidate from sitting in criminal cases.”
- John Paul Stevens, U.S. Supreme Court

The intensity and partisanship of judicial races and the inevitability of judges ruling in controversial cases has greatly increased pressure on judges not to rule in favor of politically unpopular minorities. Alabama’s judicial selection system has led to the virtual exclusion of people of color from the state judiciary.

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<th>DIVERSITY OF THE ALABAMA BENCH (by Court)</th>
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<td>Supreme Court</td>
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<td>Total # Judges</td>
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While there exists broad support for judicial selection reform amongst experts and commentators, similar support has not been forthcoming in the Legislature. Legislation to provide for nonpartisan election of appellate, circuit and district judges has been introduced at least once each year since 2000, but has in every case been either postponed or referred to committee, where it has died.

The power of the Judiciary Inquiry Commission (JIC) to regulate and deter egregious attacks or other misconduct during campaign has been repeatedly undercut by the courts, mostly on First Amendment grounds. Members of the Judicial Campaign Oversight Committee, which was prematurely discontinued in 2002, noted that the very existence of the Committee, and the implicit threat of sanction or censure, curtailed bad behavior.

Reform is greatly needed in Alabama. Switching to nonpartisan elections, campaign finance reform, voter education and the reinstatement of the Campaign Oversight Committee are critically important first steps. Switching to nonpolitical, non-partisan selection of judges is ultimately needed to restore the independence and credibility of the judiciary.

People with money who are affected by judicial decisions “have reached the conclusion that it’s a lot cheaper to buy a judge than a governor or an entire legislature and he can probably do a lot more for you.”
- President, Ohio State Bar
JUDICIAL SELECTION IN ALABAMA

As one judge of the Alabama Court of Criminal Appeals has noted,¹ there is a distinct irony to be found in the juxtaposition of the august and hallowed physical setting of the Judicial Building, housing Alabama’s Supreme Court, Court of Criminal Appeals, and Court of Civil Appeals, and the raucous electoral process by which Alabama selects the judges who sit on those courts. While Alabama’s statewide appeals courts are housed in “the most awe-inspiring building in Alabama,”² its appellate judiciary is selected through a money-soaked system of partisan elections that has precisely the opposite effect: undermining public confidence in the independence of the judiciary and the availability of a fair hearing for all litigants.³ Yet, in a 2000 Mobile Register-University of South Alabama poll, 85% of Alabamians favored election of state judges, with only 11% endorsing an appointment system, despite the fact that approximately 80% of them do not vote nor were are they able to name more than one candidate for statewide judicial office.⁴

Indeed, failing confidence in judicial independence does not necessarily lead to support for appointment or “merit selection” systems.⁵ One 2001 nationwide survey found that while 80% of the public felt that campaign contributions have “a great deal” or “some” influence on judicial decisions,⁶ more than 80% also believed that judges should be elected.⁷ Although there has been no shortage of voices – including leading newspapers, scholars and judges in the state, as well as the American and Alabama State Bar Associations – advocating reforms such as nonpartisan elections, elections by geographic district, restrictions on campaign finance, and a move to some form of the “Missouri plan” of merit selection, Alabama’s long history of partisan judicial elections has not been seriously challenged since the early 1970s, when merit selection and nonpartisan elections were debated but not put to a vote prior to adoption of constitutional amendments establishing a unified state judicial system.⁸

This report first describes the structure, costs and politics of the current system of judicial selection in Alabama, with a focus on the emergence since the early 1990s of fierce partisan politics and abundant special interest money, which has caused judicial elections to become precipitously “nastier, noisier and costlier.”⁹ It then addresses the consequences of the current system of money, politics, and judicial elections for the appearance, and the reality, of independent judicial decision-making and the protection of individual rights, especially the rights of unpopular political minorities. Finally, this report addresses recent proposals and attempts at reform and the effect of these efforts, leading to a discussion of current short- and long-term opportunities for effective reform to amend the current system of judicial selection and/or buffer its most disturbing effects.
I. ALABAMA’S CURRENT SYSTEM OF JUDICIAL SELECTION

A. Organizational Structure of the Courts and Judicial Elections

Since 1975, Alabama has had a unified judiciary system consisting of a supreme court, two intermediate appellate courts – for criminal and civil cases – and four types of trial courts, with the circuit courts being the trial courts of general jurisdiction. Judges at all levels except the municipal courts are elected in partisan elections. Vacancies arising between elections are filled by gubernatorial appointment. The position is then contested in the first general election occurring after the appointee has been in office for one year. All judges serve six-year terms; in the appellate courts and circuits with more than one judge, these terms are staggered. Where more than one seat on a court is contested in a single election, candidates compete in separate races for individual “places” on the court (e.g., “Alabama Supreme Court, Place 1”). Alabama’s sixty-seven counties are covered by forty-one circuit courts, staffed by 142 judges elected by circuit. In 2001, fourteen of 140 circuit court judges were women, and six were African-Americans. Circuit court judges are paid a salary of $111,973, ranking twenty-third among the states. Adverse decisions in the circuit court can ordinarily be appealed to either the Court of Civil or Criminal Appeals, both of which consist of five elected judges, one of whom serves as the presiding judge. Judges of the Court of Criminal Appeals earn a salary of $151,027, fourth among the state intermediate courts of appeal. Decisions of the intermediate courts are ordinarily subject to discretionary appeal to the Alabama Supreme Court, which consists of eight elected associate justices and an elected chief justice. The justices earn a salary of $152,027, seventh highest among the states. Of the total of nineteen appellate judges in Alabama, five are women (two on the Supreme Court and three on the Court of Criminal Appeals) and none are racial or ethnic minorities. All appellate judges are elected in statewide, at-large elections; circuit court judges are elected by circuit.

B. Campaign Financing, Increased Spending and the Effect on Judicial Independence

The cost of running for statewide judicial office in Alabama has skyrocketed over the last two decades. Although this is a nationwide phenomenon, the problem in Alabama is particularly severe. From 1993 to 2002, the thirty-seven judicial candidates in statewide Alabama races raised a total of over $33,000,000 – eight million more than the next-highest total (Texas) and more than double the total of the candidates of any other state besides Texas. In successfully defending his seat on the Supreme Court, one judge raised almost $1.6 million in 2002, the third highest total in the nation. In 2000, this judge led the nation with just over $1.6 million raised in a failed bid for the Republican nomination for chief justice. His victorious
opponent in that election was Roy Moore, the hero of the religious right who rose to prominence through his display of the Ten Commandments in the courtroom and courthouse, in defiance of federal courts. Although down from the highs of 2000, exorbitant spending in Alabama judicial races continued in 2004, with candidates for the three Supreme Court seats raising $7.4 million, second only to Illinois, a state whose population is twice as large as Alabama’s. Almost $2.8 million of that money was spent on television advertising, including over $800,000 spent on ads by special interest groups in the Republican primaries.

This infusion of big money into Alabama judicial elections has transformed judicial races from “low-profile contests in which little campaigning occurred and small amounts of money were expended” to heatedly partisan contests that undermine public confidence in an independent judiciary and threaten to subject the judicial branch, like the legislative and executive branches, to constituent and special interest pressures. Indeed, special interest groups have been able to capitalize on this situation. Notably, their ability to dictate judicial election outcomes is largely a result of poor voter turnout. Though 80% of the public supports judicial elections, 80% does not vote in them. This lack of voter participation leaves the battlegrounds of judicial elections in the hands of special interest groups and those members of the public who are motivated by their allegiance to one of the special interests involved in the campaign. These factors effectively undermine any contention that judicial elections are a “populist” measure of judicial accountability. Further degrading public confidence in an independent judiciary is the recognition that, once on the bench, donors like the Business Council of Alabama, which gave almost $300,000 to one Alabama candidate in 2002, expect to benefit from their expenditures. Because Alabama imposes no limits on judicial campaign contributions by individuals or PACs, candidates who intend to run a successful campaign face enormous financial pressure, which is most readily relieved by the deep pockets of special interest groups. The quid pro quo being an expectation that once elected the former candidate will rule favorably on issues of importance to the group that supported him or her.

C. Special Interests, the Politicization of Judicial Elections and Judicial Independence

The “money magnet” of partisan elections has led to Alabama becoming one of the “permanent arenas in the Court Wars,” with battles raging on several fronts, including so-called tort reform, so-called family values, and issues of crime and punishment, especially capital
punishment. This trend started in the early 1990s, when Republicans began a conscious effort to take over the traditionally Democratic Alabama judiciary (prior to 1994, no Republican had been elected to the Alabama Supreme Court in the twentieth century). While the initial impetus for this effort was the desire of Republican-aligned business, medical and insurance groups to limit their exposure to risk in the form of tort liability, other interest groups have also been involved, particularly conservative Christian groups who seek to elect candidates who share their views on schools, religion, abortion, and gay rights. Finally, and significantly, the generally increased intensity and partisanship of judicial races and the inevitability of judges ruling in controversial cases has greatly increased pressure on judges not to rule in favor of politically unpopular parties, especially criminal defendants, lest they be taken to task in the next election as insufficiently "tough on crime."

D. The Resurgent Republican Party and the Rise of Bitter Partisan Politics in Judicial Elections

The 2000 Republican primary contest for chief justice of the Alabama Supreme Court underscores these central themes. First, although this was a contest for the Republican primary, it was in many ways the main event, due to the reversal of fortunes which has changed an all-Democratic court in 1994 to an all-Republican one in 2004.34

In 1994, Alabama Republicans imported an up-and-coming political strategist named Karl Rove, who had experienced success with Republican judicial candidates in Texas by coining such terms as "jackpot justice" in attacking putatively pro-plaintiff jurists.35 Alabama had been christened "tort hell" for its reputation as a plaintiff-friendly jurisdiction (a reputation symbolized by BMW of North America, Inc. v. Gore,36 in which the Alabama Supreme Court upheld a $4 million punitive damages verdict for a man whose new car had been repainted before sale without his knowledge). In 1987, business interests succeeded in getting "tort reform" laws passed by the Alabama Legislature, only to see all of the important aspects of this legislation struck down by the Alabama Supreme Court by 1993.37 Convinced that judicial change was necessary to achieve their policy goals, business groups funded Republican candidates to challenge the previously invulnerable Democrats. With Rove providing the blueprint of money, anti-trial-lawyer rhetoric, and negative attack ads, as well as brilliant message-management and demographic analysis, Republicans subsequently won nearly every election to the high court, resulting, finally, in an all-Republican court in 2004.38

As noted above, the Republican attack, and attempted Democratic responses, led to the conversion of judicial elections from what had been fairly "low-profile" affairs to highly politicized, money-soaked rumbles. Low points of these contests include the supposed "whisper campaign" started by Rove in 1994 against one particular candidate. Rove led a campaign that allegedly spread rumors that the opposing candidate, who dedicated much of his life to helping
abused children and was pictured holding hands with children in his campaign ads, was a homosexual pedophile. 1996 brought a commercial from Kenneth Ingram’s campaign in which an announcer impugned the opposing candidate’s record and ethics while the screen showed an image of a skunk fading into the opposing candidate’s image. This same campaign included a commercial recounting a woman’s brutal murder and featuring a shadowy on-screen reenactment, followed by a shot of Judge Ingram on the bench as the narrator states, “Without blinking an eye, Judge Kenneth Ingram sentenced the killer to die.” The ad concludes with the victim’s daughter saying, “Thank Heaven Judge Ingram is on the Supreme Court.”

While the races since 2000 have been slightly less expensive and raucous than those from 1994 to 2000, they are still highly politicized, both between parties and within the Republican party. For example, in 2002 one candidate attacked the other for “taking trial lawyer money” and for being on Al Gore’s legal team “against George Bush,” while touting his own endorsement from Judge Roy Moore. And in a 2004 intra-party attack, Roy Moore-endorsed ads stated: “Jean Brown’s been endorsed by every liberal newspaper in Alabama . . . She removed the Ten Commandments and insulted us with her politically correct ACLU-approved display.” The candidate emerged victorious in this contest for being “the mantle of [a] ‘true conservative.’” Furthermore, as discussed below, the persistent emphasis on crime, which sometimes threatens to make judicial elections indistinguishable from races for prosecutors or attorney general, continues unabated.

E. The Ideological and Economic Interests Driving Politicization of Alabama Judicial Races

The second salient point about the 2000 primary race for chief justice is that it brought into temporary conflict the two main interest groups behind the Republican resurgence: business interests and the religious right. Ordinarily, these groups support the same slate of Republican candidates, at least in the general election. While business groups donate more money, conservative Christian groups such as the League of Christian Voters and the Christian Coalition of Alabama have very effective grassroots organizations and are able to reach large numbers of dependable voters with their voting guides. The Christian Coalition distributes questionnaires asking candidates’ views on issues such as gambling, abortion, same-sex marriage, and God in schools.
In 2004, in all four statewide judicial races, with the exception of one, all the Republican candidates ‘toed the line’ on all issues, while the Democratic candidate declined to answer. The Alabama Supreme Court, following United States Supreme Court precedent, has ruled that judges cannot be restrained from commenting on such political questions, unless they are asked specifically to comment on pending litigation. However, the prevalence of such judicial statements severely undermines the appearance of judicial impartiality when cases implicating these issues come before the court, particularly when they present federal constitutional issues, which should be governed by federal court precedent, not by state judicial ideology.

F. “Tough on Crime” Rhetoric, Judicial Elections and Politically Unpopular Minorities

Finally, the 2000 primary race for chief justice highlighted the prominence of “tough on crime” rhetoric in judicial races, with one candidate attempting to characterize the other as soft on drug crimes by listing forty cases, complete with citations, in which the candidate supposedly let “convicted drug dealers” off with reduced sentences or probation. These accusations led to the filing of charges by the Alabama Judicial Inquiry Commission for violating the state’s Canons of Judicial Ethics by using false and misleading ads. The candidate was temporarily suspended from the bench. Ultimately no adverse action could be taken because the Alabama Supreme Court found the Canon unconstitutional on federal free speech grounds. Thus, judges can be and are accused of being “soft on crime” or “letting criminals off” when they have in fact merely signed off on a plea bargain between the defendant and the prosecutors. For example, Terry Butts was accused of twice letting an “ax murderer” off too easily, although in both cases he merely ratified a plea agreement to which all parties, including the victim’s family,
had agreed.\textsuperscript{53}

In addition to accusing each other of being soft on crime, judicial candidates in Alabama routinely tout their own commitment to punishing criminals. Although United States Supreme Court Justice John Paul Stevens has opined that "[a] campaign promise to 'be tough on crime,' or to 'enforce the death penalty,' is evidence of bias that should disqualify a candidate from sitting in criminal cases,"\textsuperscript{54} such rhetoric is ubiquitous in Alabama judicial campaigns. One candidate ran a television ad that showed a newspaper headline reading "Court upholds death sentences in two slayings" while the narrator stated that the candidate was "fighting against minor technicalities that would let criminals off" and added, "[he] knows drug dealers are dangerous criminals who threaten our children . . . [he] has the tough-on-crime record to be Chief Justice."\textsuperscript{55}

Such rhetoric is featured particularly in races for the Court of Criminal Appeals, including statements such as:

"I’ve been with victims over the last twenty-five years. I’ve been with the police."\textsuperscript{56}

"I will turn around death (penalty) cases in six months . . . That’s enough time."\textsuperscript{57}

"Adding new rights to criminal defendants is not the court’s job. It makes it harder for the prosecution to obtain a conviction."\textsuperscript{58}

"I have worked closely with police officers. I have seen the frustration of police and of crime victims when laws made by judges prevent the arrest of criminals."\textsuperscript{59}

Tough-on-crime rhetoric also extends to circuit court races. In one 1998 Montgomery race, a candidate was endorsed by the county district attorney in one ad,\textsuperscript{60} and in another, the candidate touted her experience working on a drug task force over actual video footage showing her participating in a police raid of a "crack house." The ad concluded with the candidate looking into the camera and saying, "Let’s get the drug dealers off the street, through the system and into jail."\textsuperscript{61} Also in 1998 in Montgomery, a circuit court judge ran ads featuring endorsements from a former juror and a crime victim’s son.\textsuperscript{62} In 1992, the victorious candidate in the thirtieth judicial circuit, northeast of Birmingham, suggested before the election that "serious consideration" be given to expanding the death penalty to rape and armed robbery,
while his opponent touted a “commitment to reduce crime,” expedited death penalty appeals, and the efficacy of increased imprisonment as a deterrent to crime (“California increased its prisons by four times during the eighties, and the crime rate diminished by thirty percent”). At all levels, candidates routinely cite their experience as prosecutors, especially in capital cases.  

The clear effect of these pressures is to produce both the appearance and the reality of a judiciary that is insufficiently independent to provide a fair and impartial hearing on controversial issues or enforce the rights of politically unpopular minorities. As noted by Stephen Bright, Director of the Southern Center for Human Rights, “A few rulings in highly publicized cases may become more important to a judge’s survival on the bench than qualifications, judicial temperament, management of the docket, or commitment to the Constitution and the rule of law.” As a paradigmatic example, he cites the infamous “Scottsboro Boys” case, in which an Alabama circuit judge who ordered a new trial for the defendants in 1933 was voted out of office in 1934, ending his judicial and political career.

But one need not look so far back to see the corrosive effects of “tough on crime” judicial politics. Candidates in contemporary races still compete to have the “toughest” stance on crime. For example, in 1994 Court of Criminal Appeals Judge Mark Montiel publicly challenged the “too left and too liberal” Alabama Supreme Court to set execution dates for all twenty-seven death row inmates who had exhausted their state (but not their federal) appeals. Montiel was particularly upset that Alabama’s ten executions (at the time) ranked behind states like Virginia, Louisiana, Georgia and Missouri, which he apparently considered to be Alabama’s measuring stick on this score. That Montiel ran for Supreme Court in 1994 and lost does not minimize the political power of the issue in a state where more than 60% of the people favor the death penalty. It is hard to believe that judges are not aware of the high electoral price that may be paid for unpopular rulings. A special issue of concern is that Alabama is one of three states in which a judge may override the jury’s sentencing recommendation in a capital case. In his dissent from an opinion upholding the constitutionality of this scheme, Justice Stevens noted that judges may be too responsive to “a political climate in which judges who covet higher office – or who merely wish to remain judges – must constantly profess their fealty to the death penalty.” Unsurprisingly, judges are much more likely to override a “life” recommendation and impose a sentence of death than to override a jury’s recommendation of death. Data suggest that death penalty appeals vary significantly with the method of selection of state judges. The variance is largest between appointed and elected judges, including those subject only to uncontested retention

"The fact that most of the judges who preside and often make the final life-or-death decision must stand for re-election creates a subtle bias in favor of death."

- John Paul Stevens, United States Supreme Court
Funded by special interest groups, judicial campaigns in Alabama have become bruising battles that rely on attack ads and other smear tactics to advance one candidate over another. Before 1994, no Republican had been elected to the Alabama Supreme Court in the 20th Century. Today the Court is made up entirely of Republicans. However, there are still bitter contests in the Republican primary and during the general election.

The election of Roy Moore and his Ten Commandments monument has added a new dimension to the electoral dynamics surrounding judicial selection in Alabama. While the 5280-pound granite monument has been removed from the Alabama Judicial Building by a federal court order, the politics surrounding the monument continue to burn furiously.

In the 2004 campaign, many candidates competed for the mantle of most committed to endorsing religious values and norms as a sitting judge. Incumbent Justice Jean Brown was attacked for voting with all other Supreme Court justices to comply with the federal order to remove the religious monument installed by Justice Moore.

While business groups donate more money, conservative Christian groups such as the League of Christian Voters and the Christian Coalition of Alabama have very effective grassroots organizations and are able to reach large numbers of dependable voters with their voter guides. The Christian Coalition distributes questionnaires asking candidates' views on issues such as gambling, abortion, same-sex marriage, and prayer in schools. In 2004, in all four statewide judicial raises, the Republican candidate 'toed the line' on all issues, while the Democratic candidate declined to answer.

The Judicial Inquiry Commission (JIC) originally instructed judges not to answer the Christian Coalition questionnaire in 2000.
The clear effect of electoral politics is to produce both the appearance and the reality of a judiciary that is insufficiently independent to provide a fair and impartial hearing on controversial issues or enforce the rights of politically unpopular minorities. The combination of partisan elections and special interest funding has seriously threatened the integrity of the Alabama judiciary.

The irony of such questionnaires is that supporters of U.S. Supreme Court candidate John Roberts urge that in his hearings he should not have to answer questions about how he would rule in a particular case should such a case come before the Court. However, in Alabama, as noted above, the clearer the candidate's position is on social issues, the better the candidate's chances are of winning.

The rhetoric and campaign posturing of many judicial candidates not only compromises the independence and fairness of the judiciary but it also breeds an atmosphere of contempt for the constitutional rights of the criminally accused. Courts cannot be a forum where people who are disfavored and disadvantaged can be protected by the law if judicial candidates are making commitments to disfavor and disadvantage those accused of crimes.
election; within the category of judges subject to some form of election, those subject to partisan elections were least likely to vote to overturn death sentences.\textsuperscript{73}

G. The Reality and Perception of Bias

Studies suggest a real lack of judicial independence in Alabama in regard to the specific issues of arbitration,\textsuperscript{74} environmental law,\textsuperscript{75} and the death penalty.\textsuperscript{76} But without even reaching the question of actual bias, the perception of bias is also significant – indeed, it may be said to be equally important. An impartial judiciary serves to legitimate the entire governmental system, and it is not enough that it be impartial, it must also appear to be so. It is essential that citizens feel that “[i]f other institutions falter or hide from their duties, the citizen can go down the street to the courthouse and file papers that say, ‘I ask the law to help me in this contest in which I am overmatched.’”\textsuperscript{77} However, when “[c]ase by case results-oriented decisions ... replace[] the rule of law,”\textsuperscript{78} whether in reality or in public perception, the judiciary loses its claim to legitimacy and fails to fulfill either its general role in legitimating the functions of government or its specific role in protecting our Constitutional rights - especially those of us who are weak, unpopular or despised.\textsuperscript{79} As Stephen Bright concludes, “This is no way to run a system of justice. Judicial elections, whether direct elections or retention elections, discourage good lawyers from becoming judges and result in untenable pressures on judges once in office to ignore the law and satisfy their financial supporters or public sentiment to avoid being voted out of office.”\textsuperscript{80}

II. PREVIOUSLY ATTEMPTED REFORMS AND RESULTS

Proposed reforms in Alabama’s system of judicial elections have focused on four areas:

1) moving from partisan elections to nonpartisan elections or merit selection;
2) regulation of campaign conduct and funding;
3) moving from at-large state elections to geographic districting, partially to promote at least some minority presence on the appellate courts; and
4) public financing or other methods of ensuring voter access to nonpartisan, objective information on candidates.

Reform discussion has been mostly that: discussion, by members of the bar, non-profit organizations and the media. Some legislators have been vocal, but proposed legislative reforms have not garnered much support. There has also been some litigation aimed at reform, and the courts themselves have introduced some administrative reforms that have had limited effect.

A. Moving from Partisan to Nonpartisan Elections or Merit Selection
The idea of nonpartisan elections has received strong support from groups and individuals who have commented on the issue, including a poll of state judges. More often, merit selection has been endorsed, with nonpartisan elections noted as a secondary recommendation if merit selection is not adopted. This is the position taken by many Alabama newspapers, the State Bar, the Citizen's Commission on Constitutional Reform, and the American Bar Association, among others. But while at least the idea of non-partisan elections seems to enjoy broad support from experts and commentators, similar support has not been forthcoming in the Legislature. Like complaints about filibusters and blocked judicial nominations in the United States Senate, complaints about partisan elections tend to appeal only to the minority party. Legislation to provide for nonpartisan election of appellate, circuit and district judges has been introduced at least once each year since 2000, but has in every case been either postponed or referred to committee, where it has died. While this may be attributable to Republican control of the Legislature, it may also involve a reluctance by legislators to be seen as questioning the perceived voter affinity toward electing judges.

B. **Oversight and Regulation of Campaign Activities**

While campaign oversight and ethical regulation of judicial candidates is the one area in which there has been some productive reform activity, these reforms have been of a limited nature and have been partially stymied by recent developments in the law.

1. **Administrative Oversight by the Judiciary**

The judicial branch exercises oversight over the Alabama courts and judicial candidates through the Judicial Inquiry Commission (JIC) and the Court of the Judiciary. The JIC is authorized to investigate complaints against judges or judicial candidates for violating the Canons of Judicial Ethics or for other misconduct and can file and prosecute charges in such cases in the Court of the Judiciary. The JIC also issues advisory opinions. The Court of the Judiciary has authority to impose sanctions from censure to removal from office if it finds a violation of the Canons of Judicial Ethics.

While the JIC maintains power to regulate and deter egregious attacks or other misconduct during campaigns, this power has been repeatedly undercut by the courts, mostly on First Amendment grounds. As discussed above, the United States and Alabama Supreme Courts have held that the government must provide a compelling reason and use narrowly tailored means when restricting the First Amendment rights of judicial candidates and judges, and have not found these conditions in the context of judicial elections, partially because states have the option of remedying harmful speech by not having elections at all.

The two main areas where the JIC's power has been curtailed are misleading advertising...
or attack ads and "announcing" of views on political questions. As discussed above, the JIC brought charges in the 2000 election based on misleading ads a candidate had run concerning the other's record of being "soft" in his sentencing of drug offenders. The information was technically true, but was presented in a misleading way, which was a violation of the Canons in effect at the time. However, upon challenge, the Alabama Supreme Court found that Canon 7(b)(2) violated the First Amendment and narrowed it to apply only to demonstrably false information disseminated with "actual malice," meaning either knowledge that the information was false, or reckless disregard for its truth or falsity. Unfortunately, this has had the effect of greatly reducing the JIC's ability to police unethical conduct, as it is rarely necessary to spread outright falsehoods in order to impugn an opponent, especially when nearly all judges regularly "reduce" charges or sentences, in the sense that they ratify plea bargains reached by prosecutors and defendants.

The second area where the JIC's power has been undercut is in the announcement of political views. As discussed above, the JIC issued advisory opinions in 1994 and 2000 stating that candidates could not respond to questionnaires such as the one distributed by the Christian Coalition of Alabama, other than to decline to answer. However, following the United States Supreme Court's decision in Republican Party of Minnesota v. White, the JIC withdrew its opinions, because White made clear that the First Amendment prevented Alabama from restricting judges' comments on political questions with the exception of comments on pending litigation. Although the evils of restricting speech may indeed be worse than the evils of judicial candidates announcing their views on political issues almost certain to come before the court, particularly when the latter can be avoided by eliminating elections altogether, this new regime nevertheless contributes to the current politicization of judicial races. Although some judges continue to abstain voluntarily from taking specific positions on controversial subjects, they risk paying a political price for doing so. This is another way in which the current system actually works to impede selection of candidates of uncommon integrity and principle.

Another notable development in the law affecting the judicial canons and the JIC came in Weaver v. Bonner, a 2002 Eleventh Circuit case which found that prohibitions on judges personally soliciting campaign funds likewise violate the First Amendment. This decision required the revision of Alabama's judicial canons to "strongly discourage" rather than prohibit this practice, which requires judges to curry favor with the very parties who will consistently be appearing in front of them as advocates.

The second main administrative regulatory effort by the courts is (or was) the Judicial Campaign Oversight Committee, established by Chief Justice Hooper in 1997, in the wake of the bitter 1996 campaigns, featuring the infamous "skunk" ad. The Committee existed in 1998 and 2000, and was credited with improving the tone and demeanor of the campaigns. The Committee was not continued in 2002, with the official explanation relying mainly on "fiscal
reasons” as well as the low number of races in that year. Committee members described the large void that was filled by the Committee, with many candidates hungry for advice and guidance on ethical matters, while also noting that the very existence of the Committee, and the implicit threat of sanction or censure, curtailed bad behavior. While this improved tenor seems to have held in 2002, it is disheartening that the Supreme Court would abandon such a promising initiative after such a short time. Furthermore, while the committees may have improved campaign conduct and positively affected the appearance of impartiality and dignity in judicial officers, they do not appear to have been empowered to address the broad problems with campaign financing that create risks of both the appearance and the reality of bias.

2. Other Attempts to Reform Campaign Conduct and Financing

Although judicial elections clearly have a special character compared to other general elections, Alabama law treats financing of all elections the same (as noted above, the only contribution limits are $500 on corporations – but not corporate PACs). Few legislative reforms have been introduced, and none have had any success, in the area of reforming campaign financing for judicial elections. However, many nonprofit groups are active in advocating for financial reform, and in detailing the spending and financing of judicial elections in Alabama. The Justice at Stake Campaign, the American Judicature Society, the Institute on Money in State Politics and the Brennan Center for Justice’s Fair Courts Project report on judicial spending and campaign financing (several of these reports are cited above). In addition, the 1996 Task Force on Judicial Elections recommended that the Chief Justice work with the executive and legislative branches to “adopt reasonable legislation regulating campaign funding for judicial elections.”

C. From At-Large State Elections to Geographic Districting?

There have been several efforts to switch from at-large election of state appellate court candidates to a system of geographic districts. The main impetus for this switch is to ensure minority representation - either racial or party - on the appellate bench. Alabama’s only two black appellate court judges lost reelection in 2000, although as noted above, there is some disagreement as to whether this was influenced by race, or was primarily a factor of party politics. Geographic districting bills introduced by Rep. Alvin Holmes in 2000 and Rep. Laura Hall and Sen. Myron Penn in 2004 met no success in the Legislature.

Reformers have also sought to achieve geographic districting through litigation alleging that the current system of statewide judicial selection violates the Voting Rights Act. However, while the Voting Rights Act does apply to judicial elections, federal courts have rejected challenges to both Alabama’s statewide at-large election system for appellate judges and “place-
based” elections in multi-judge circuits, where candidates compete for a specific seat or
“place.” In rejecting these challenges, the Eleventh Circuit has found geographic
“subdistricting” as well as other remedies such as the creation of majority-minority judicial
circuits or the use of “cumulative voting” to be inappropriate, even when a violation of the
Voting Rights Act is found, because they interfere with the state judicial policies advanced by
the established system of at-large voting.

D. Public Financing and Provision of Voter Information

Several newspapers and advocacy groups have recommended public financing for judicial
elections, both in Alabama and nationally. However, implementation of this reform is
predicated upon its constitutional viability. In North Carolina, where public financing has been
in place since 2002, a suit has recently been filed challenging the system’s constitutionality.
The plaintiffs, an appellate court judge and a right-to-life organization, contend that the state’s
public financing scheme limits free speech and unfairly disadvantages those who do not
participate in the program.

The provision of neutral forms of candidate information to voters is also widely
recommended. The Judicial Campaign Oversight Committee of 1998 made note that “the
average voter has some difficulty in acquiring information about a judicial candidate’s
background and qualifications” and recommended the creation of non-partisan voter guides
containing “factual information about the background and qualifications.”

E. Reform in Other States

Notable recent reforms in other states include New Hampshire (adopted merit selection
in 2000), North Carolina (instituted nonpartisan elections, public financing and voter guides
in 2004), Mississippi (instituted nonpartisan election in 1994), Rhode Island (adopted merit
selection in 1994) and Arkansas (instituted nonpartisan elections in 2000). Recent failures include Florida’s
2000 rejection of merit selection; the vote was by circuit and the proposal was rejected by every jurisdiction in the
state, with the average total being 32% for the measure.

III. RECOMMENDATIONS FOR FUTURE REFORM

Considering the severity of the problems of real and perceived bias in the Alabama judiciary and the failure
of several avenues of legislative, litigation-based and
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regulatory reform discussed above, subsequent reform strategy should consist of two prongs, reflecting long- and short-term goals. The long-term strategy should aim for a revamped judicial system that provides structural and cultural safeguards of independence and ensures minority representation – both in the sense of having proportional numbers of women and racial minorities on the bench and in the sense that politically unpopular minorities will receive a fair hearing in Alabama courts.

At the same time, reformers should pursue an immediate strategy aimed at incremental, achievable reforms that will limit the most corrosive aspects of the current system: the excessive influence of campaign contributions and 'wedge- issue' politics and the real and perceived lack of judicial independence, particularly in the context of criminal trials. For example, the most advisable course in the long run is to move to an appointive or merit selection system in which nominees are chosen by an independent evaluative body based on professional qualifications, but this is not politically feasible in the near future, given the strong streak of populism and suspicion of elites in Alabama politics. For the foreseeable future, we should recognize that "[t]he populist argument for judicial election is winning," and promote incremental reforms such as: non-partisan elections; controls on campaign financing up to the limits of the First Amendment (enforced via legislation or changes in the Canons of Judicial Ethics); availability of public election funds; provision of nonpartisan, factual voter guides; and the curtailment of personal endorsements of judges by prosecutors and police chiefs. This report will briefly discuss the longer-term strategies, but will focus on the more immediate options for reform.

A. Long-term Goals: Independence and Minority Representation

Alabama's Constitution is well-known as "a mess" – it is "the longest and most-amended state constitution in the nation," having been amended over 600 times since its adoption in 1901, and it is continually subject to movements seeking to tear it up and start over with a new constitutional convention. The judicial article was largely revamped by amendment in the 1970s, but despite recurrent commissions and calls for reform – including those of former Governor Don Siegelman – successful reform of the document as a whole has not materialized. Nevertheless, groups like Alabama Citizens for Constitutional Reform continue pushing for grassroots reform, and it is possible that either the political climate will change or the current system will become so unworkable as to force reform. Likewise, it is possible that future developments in the judiciary, such as a particularly lurid negative campaign or ethical scandal, may produce momentum for broad constitutional or legislative reform. Therefore, reformers should be prepared with positions on the ideal structure of the Alabama judiciary.

As mentioned above, an appointive system is ideal, while
a merit selection system with long terms (at least eight to ten years) is also a viable option. If elections of any kind are used, terms should be lengthened to minimize the influence of campaigns, strict contribution limits should be enforced, public financing should be made available, nonpartisan state committees should provide information and guidance to candidates and voters, and elections should be structured to ensure minority representation at both the circuit and state levels, through a combination of redistricting, single-member districts rather than at-large voting, or cumulative voting. Judicial candidates should not use their record of certain kinds of rulings in previous cases (e.g., percentage of votes to affirm in death penalty appeals) in their advertisements and neither solicit nor accept campaign contributions or endorsements from officers of the court, including prosecutors.123

Unfortunately, many of these ideal conditions cannot currently be advanced as politically realistic proposals. Below we discuss those which can be advocated in the short term.

B. Short-term Proposals

1. Nonpartisan Elections

Nonpartisan elections should be advocated as a symbolic step to confirm and emphasize the importance of impartiality and independence in the judiciary, although it is unclear that the removal of formal political affiliations in itself will affect the core problems of money, special interest influence, and judicial independence. Simply removing the party labels does send a message that judicial elections are qualitatively different than other elections, because of the different roles played by judges as opposed to legislators once elected. However, some commentators argue that removing party labels simply provides voters with less reliable bases for making a decision while doing nothing to combat the influence of big contributors and special interests. These interests do not need the party labels, and will line up for the same expensive, corrosive, polarized tort and family-values proxy fights regardless. So, while nonpartisan elections are a good issue in the sense that they attract a broad consensus and raise consciousness about the inappropriateness of partisanship in judicial selection, and thus should be advocated, significant resources will be better utilized promoting the reforms below, which deal with the substance rather than the form of the elections.

2. Campaign Finance Reform

The reform of judicial campaign financing is an obvious and essential step in combating the influence of money and special interests. Reform may be achieved through legislation (although Alabama has little current regulation of its campaign finances and has shown little likelihood of developing more) or through interpretation of the state’s Canons of Judicial Ethics. The mechanisms of reform will be discussed below. The content of these reforms should aim
to achieve the greatest possible limitation on the gathering and spending of money for judicial campaigns without running afoul of the First Amendment’s guarantee of free speech, which applies differently to contributions and expenditures.\textsuperscript{124}

Because campaign contributions can constitutionally be limited, and because Alabama currently imposes no limits on individuals or PACs, a first step should be to impose strict limits on these contributions: $1000 per candidate or $5000 on all judicial candidates for an election year. All corporate contributions should be prohibited.\textsuperscript{125} Furthermore, “coordinated” expenditures on behalf of a candidate by third parties should be included within these limitations.\textsuperscript{126} Such sharp limitations should not unduly limit judicial campaigns. Candidates have many free forums to publicize their records — newspaper and electronic media voter education guides, and proposed state-funded, nonpartisan voter guides (see below). And even with limited funds, campaigns will still be able to run television ads. Data from 2004 suggests that each airing of a commercial in Alabama costs between $250 and $450, with an average price-per-��affing of under $300, compared to a national average of $500, and over $1000 in Michigan and $700 in Illinois.\textsuperscript{127}

This reduction in the huge amounts of money going directly into candidates’ coffers will help to reduce the real influence and apparent influence of contributors, and the limit on coordinated expenditures will tend to reduce the close contacts between third-party, special-interest groups and judicial candidates, but independent expenditures by these third-party groups still pose problems. First of all, there is the possibility that expenditures will continue to be surreptitiously coordinated, which may be hard to monitor. Further, coordination may not be necessary. The rhetoric of judicial campaigns may be so formulaic at this point, and the records of major candidates so well known to special interest groups, that they are able to simply churn out effective ads with old, familiar ripostes like “jackpot justice” and claims of support for Roy Moore, the Ten Commandments, or traditional marriage.

Finally, even if the lack of coordination tends to reduce the probability of bias “in fact,” the continuing prevalence of expensive, special-interest-funded campaigns on behalf of judicial candidates will perpetuate the appearance of bias and special-interest influence. Therefore, constitutional methods of restricting third party expenditures must be investigated. It is possible that some outright limits on expenditures may pass constitutional muster. The United States Supreme Court has not ruled on campaign finance regulation aimed expressly at judicial elections. \textit{Republican Party of Minnesota v. White} was a 5-4 decision, with the four dissenting justices arguing strongly that standards for judicial elections should be different than those for the political branches.\textsuperscript{128} Those regulations most likely to pass are those “narrowly tailored” to the goal of protecting judicial impartiality. One possibility is a regulation that limits individuals or PAC expenditures on judicial elections to, say, $50,000 per election and separately bars these actors from spending more than $10,000 on commercials mentioning a specific judicial
candidate. The latter might be more acceptable as being tailored specifically to avoid the appearance of bias resulting from a deluge of visible spending by the individual or group on behalf of the candidate.

Further suggestions for constitutional and beneficial restrictions on judicial campaigns can be found in the various opinions in White. For example, Justice Scalia’s majority opinion acknowledges the difference between bias toward a legal viewpoint and bias toward a party. Scalia seems to say that a restriction tailored to target only behavior showing bias toward a party may be allowable. He cites Justice Stevens’ example of a candidate who extols his “unbroken record of confirming convictions for rape” as demonstrating a bias toward prosecutors and against criminal (rape) defendants. So, a regulation that forbade a candidate for judicial office from citing a previous decision or pattern of decisions in a specific case or type of case during the campaign could be constitutional, especially if limited to criminal cases, where the classes of litigants are most clearly defined.

Another promising suggestion comes from Justice Kennedy’s concurrence in White. Kennedy argues forcefully for First Amendment protection of judicial “announcement” of views, but stresses that Minnesota may regulate its judges, including by “adopt[ing] recusal standards more rigorous than due process requires, and censur[ing] judges who violate these standards.” Thus, while the government may not be able to prevent candidates from speaking in certain ways, it may be able to prevent judges from sitting on certain cases based on how they have spoken during the election. Recommended restrictions include: judges should recuse themselves from cases involving as an interested party any person from whom they have personally solicited a campaign contribution (partially counteracting the effect of Weaver v. Bonner, discussed above); judges should recuse themselves if a case involves as an interested party any person from whom they sought or received a public endorsement during their campaign (or alternatively and less severely, any party who appeared in the judge’s advertisements); and judges should recuse themselves if any interested party in a case has donated to their campaign, spent money in an attempt to elect them, donated to a group that spent such money, or held a political job in a group that spent such money in an amount over $2000 (this is a way of curtailing third-party spending without having to regulate the PACs directly).

C. Mechanisms of Reform

As mentioned above, increased regulation of campaign finance may be achieved through legislative action, or through judicial regulation. Almost all of the scenarios above (the exception being direct restrictions on third-party expenditures) could be accomplished by a change in the Canons of Judicial Ethics, or merely a change in their interpretation — the Canons already require a judge to, among other things, “avoid impropriety and the appearance of impropriety in all his [sic] activities” (Canon 2) and to “conduct himself at all times in a manner that promotes public
confidence in the integrity and impartiality of the judiciary” (Canon 2(A)). The Canons are adopted and amended by the Alabama Supreme Court. A new interpretation of the Canons could be announced by the Court through a comment added to the Canons or some other method, or could be announced in an advisory opinion from the Judicial Inquiry Commission. However, it seems doubtful that the Commission would announce such a policy change without guidance from the Supreme Court, since its opinions are generally based on existing precedent.

Working through the judiciary offers the benefit of having to persuade a smaller and probably more pliable group than the Legislature, which may, judging by history, be reluctant to enact any campaign finance reform (although judicial campaign finance reform would seem to be an especially popular idea given the special role of the judiciary and the demonstrated public concerns with judicial independence). The Supreme Court is also composed of judges who are not only politicians but career lawyers who presumably feel a responsibility to the institutions of the Court, the judiciary, and the bar to uphold their prestige and legitimacy. This said, the Court is also composed of members who have experience in the election process and have an interest in maintaining the status quo. However, the Court still seems to offer the better avenue for reform when compared to the Legislature at this time.

D. Campaign Oversight Committee

Another reform that should be sought from the Alabama Supreme Court is the return of the Campaign Oversight Committee. This was one of the few reforms in Alabama judicial selection to be hailed as a success, but was disbanded prematurely. Such a committee serves a useful function just through its existence, as a deterrent to campaign dirty tricks, and also provides helpful guidance to genuinely confused candidates who want to comply with ethical guidelines but are inexperienced and unsure how to act. Finally, it demonstrates at least some tangible acknowledgment from the Court and the state of the importance to judicial campaigns of questions of legitimacy and fairness.

E. Conclusion

The fundamental obstacle to all of these reforms is the presence of judges who are hostile, or at best indifferent, to them. These judges would rather “see justice done” in a way that safeguards their electoral prospects, rather than in a way that ensures a fair and impartial hearing for the proposed reforms. This problem is part of the political and legal culture in
Alabama and will not change overnight. However, the recent upswing in money, special-interest influence, and partisan politics in Alabama judicial elections has exacerbated the situation. These excesses can be combated by the several reforms advocated above, even though the larger cultural problem will require broader and longer-term reform efforts.
Alabama justices surrender to judicial activism

By TOM PARKER

In 1997, a vicious thug entered the home of a pregnant Alabama woman. He raped and repeatedly stabbed her, then fled, leaving her to die in a house with three other children. Police acted swiftly and caught the attacker, Renaldo Adams, literally red-handed with blood. After a fair trial, Adams was convicted of rape and murder and given the death penalty. It took the jury less than 90 minutes to recommend his execution.

As an assistant attorney general under then Attorney General (now U.S. Sen.) Jeff Sessions, I helped prosecute Adams and was satisfied the Alabama jury chose the punishment that best fit his crime. Consequently, I was shocked to learn the Alabama Supreme Court just freed Adams from Death Row.

Although I am now a justice of the Alabama Supreme Court, I had to recuse from any involvement in Adams’ case because I helped prosecute him. Because I believe the court’s decision illustrates a serious problem with our judicial system, however, I write to explain what I regard as a failure to defend our Constitution and laws against activist federal judges.

You see, my fellow Alabama justices freed Adams from Death Row not because of any error of our courts but because they chose to passively accommodate — rather than actively resist — the unconstitutional opinion of five liberal justices on the U.S. Supreme Court.

Those liberal justices declared last spring in the case of Roper vs. Simmons that “evolving standards of decency” now make it “unconstitutional” to execute murderers who were minors at the time of their crime. The justices based their ruling not on the original intent or actual language of the U.S. Constitution, but on foreign law, including United Nations treaties.

I am not surprised the liberal activists on the U.S. Supreme Court go to such lengths to usurp more political power. I am also not surprised they use such ridiculous reasoning to try to force foreign legal fads on America. After all, this is the same court that has declared state displays of the Ten Commandments to be unconstitutional.

But I am surprised, and dismayed, that my colleagues on the Alabama Supreme Court not only gave in to this unconstitutional activism without a word of protest but also became accomplices to it by citing Roper as the basis for their decision to free Adams from Death Row.
The proper response to such blatant judicial tyranny would have been for the Alabama Supreme Court to decline to follow Roper in the Adams case. By keeping Adams on Death Row, our Supreme Court would have defended both the U.S. Constitution and Alabama law (thereby upholding their judicial oaths of office) and, at the same time, provided an occasion for the U.S. Supreme Court, with at least two new members, to reconsider the Roper decision.

After all, Roper itself was established as new U.S. Supreme Court "precedent" only because the Missouri Supreme Court refused to follow prior precedent. The U.S. Supreme Court used the appeal resulting from the Missouri decision to overturn its previous precedent and declined to rebuke the state court for disregarding the prior precedent.

State supreme courts may decline to follow bad U.S. Supreme Court precedents because those decisions blind only the parties to the particular case. Judges around the country normally follow precedents in similar cases because they know that if those cases go before the court again they are likely to receive the same verdict. But state supreme court judges should not follow obviously wrong decisions simply because they are "precedents."

After all, a judge takes an oath to support the Constitution — not to automatically follow activist justices who believe their own devolving standards of decency trump the text of the Constitution. Thus, faithful adherence to the judicial oath requires resistance to such activism, and a changing U.S. Supreme Court membership makes such resistance more likely to bear good fruit.

The Adams case presented the Alabama Supreme Court with the perfect opportunity to give the new U.S. Supreme Court the occasion to overturn the unconstitutional Roper precedent. If our court had voted to uphold Adams' death penalty, he would have appealed the decision to the U.S. Supreme Court. Because the U.S. Supreme Court can accept only a handful of the petitions it receives, the court may not have heard the case at all, and Adams would have been executed as he deserves. However, if the new John Roberts-led court had taken the case, it could very well have overturned Roper.

But even if, in the worst-case scenario, the Roberts court had taken the Adams case but failed to overturn Roper, the Alabama Supreme Court would have been none the worse for standing up against judicial activism.

After all, the liberals on the U.S. Supreme Court already look down on the pro-family policies, Southern heritage, evangelical Christianity and other blessings of our great state. We Alabamians will never be able to sufficiently appease such establishment liberals, so we should stop trying and instead stand up for what we believe without apology.

Conservative judges today are on the front lines of the war against political correctness and judicial tyranny. Happily, Alabama's Supreme Court has a reputation of being one of the most conservative in the nation.

However, it does no good to possess conservative credentials if you surrender them before joining the battle.

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ENDNOTES


2. *Id.* Baschab further describes the building as “massive and solid granite . . . [containing] towering marble columns and a waterfall . . . [wherein lies] wood-paneled and carpeted courtrooms.”

3. *See* CTR. ON GOVERNMENTAL SERVICES, AUBURN UNIV., ALABAMA ISSUES 2002: PRELIMINARY RESULTS 14, http://web6.duc.auburn.edu/outreach/cgs/publications/alabama_issues_2002_preliminary_results.pdf (Mar. 19, 2002) (reporting that 35.8% of Alabamians believe corruption by judicial officials occurs “often” or “very often,” and an additional 31.5% believe it occurs “sometimes”). While these results cannot be attributed directly to the recent trend of bitter partisan judicial elections without similar, earlier numbers for comparison, the numbers by themselves are alarming for an institution premised on independence and impartiality.

4. Associated Press, *Poll: Electing Judges Preferred*, BIRMINGHAM NEWS, Mar. 20, 2000. Judge Roy Moore, infamous at the time as the “Ten Commandments” judge, was one of the candidates, and even he enjoyed only 40% name recognition. *Id.* Although the Mobile Register USA poll appeared some time before the general election, a later poll similarly showed that 90% of voters could not name a single candidate in the four associate justice races, despite the fact that Alabama led the nation in judicial campaign spending. Roy A. Schotland, *Financing Judicial Elections, in FINANCING THE 2000 ELECTION*, 213, 215 & n.18 (David B. Magleby ed., 2002) (citing This Is No Way to Choose Who’s on Appeals Courts, MOBILE REG., Nov. 8, 2000, at 12A); *see also* Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO STATE L.J. 43, 52-54 (2003) (discussing the “axiom of 80”).

5. Judicial selection methods vary by state. In general, all states use one of the following methods: appointment (executive or legislative); partisan election; non-partisan election; or “merit selection,” although some states use different methods for different levels of courts. AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES, http://www.ajs.org/js/JudicialSelectionCharts.pdf (2004). The typical system of merit selection, also referred to as the “Missouri plan” after the first state to implement it, involves a nominating commission of judges, lawyers, and laypeople which selects a set of nominees, one of which the governor must appoint. Justice Robert L. Brown, *From Whence Cometh Our State Appellate Judges: Popular Election Versus the Missouri Plan*, 20 U. ARK. LITTLE ROCK L.J. 313, 315 (1998). The appointment is for a term of years, after which the judge must run in a noncompetitive “retention” election (a simple “yes” or “no” plebiscite on whether the judge will retain her office for another term). *Id.* All states select judges for terms, after which they must
face reelection, retention election, or reappointment; no state uses a lifetime tenure system similar to that of the federal judiciary. AMERICAN JUDICATURE SOCIETY, supra. For state courts of last resort, the initial methods of selection are: appointment (6), merit selection (24), partisan election (8), and nonpartisan election (13). Id. (including the District of Columbia in count, noting that some states vary in treatment of incumbents, e.g., California has initial gubernatorial appointment with popular retention elections, while Hawaii uses the “nominating commission” aspect of the Missouri plan, but reappoints judges through review by an administrative commission).

6. TODD EDWARDS, S. LEGISLATIVE CONFERENCE, JUDICIAL SELECTION IN SOUTHERN STATES 9, http://www.slcatlanta.org/Publications/IGA/JudicialSelection.pdf (2004) (citing 2001 survey by America Viewpoint and Greenberg Quinlan). Thirty-eight percent of respondents felt that contributions have a “great deal” of influence, and 42% felt they had “some” influence. Id. In a 2001 national survey of state judges conducted by the same organizations, 33% felt that contributions had a “great deal” (5%) or “some” (28%) influence. Id.

7. EDWARDS, supra note 6. See also CTR. ON GOVERNMENTAL SERVICES, AUBURN UNIV., supra note 3, at survey protocol 3, initial frequency distributions 4 (reporting that 28.1% of Alabamians “support” (22.1%) or “strongly support” (6%) appointing rather than electing judges, while 55.5% “oppose” (45%) or “strongly oppose” (10.5%) this idea).


11. ALA. ADMIN. OFFICE OF COURTS, supra note 10, at 3. Municipal courts are authorized by the Alabama Constitution, but are not established in all jurisdictions. District courts are limited mainly to misdemeanors, felony preliminary hearings, juvenile cases and civil claims under $10,000. Probate courts (the only courts whose judges can be non-lawyers) deal mostly with wills and estates. Id. at 2. This report will focus on the most important, and most politicized, levels: the appellate and circuit courts.


17. The Court of Criminal Appeals determines its presiding judge by peer vote, the Court of Civil Appeals by seniority. American Judicature Society, *supra* note 12.


19. *Id.*

20. American Judicature Society, *supra* note 15. Ralph Cook and John England, two of only three African-Americans to serve on an Alabama appellate court since 1856, were both defeated in 2000. Further demonstrating the difficulty minorities face in running for statewide offices, Ralph Cook and Oscar Adams are the only two African-Americans who have won statewide


24. GOLDBERG & SANCHEZ, at 15-16.

25. Although Moore was ultimately forced from office in 2003 for this defiance, his endorsement continues to have a significant impact in judicial races. See, e.g., Press Release, Justice at Stake Campaign, Justice at Stake Assesses Highs and Lows from 2004 State Supreme Court Election Campaigns, http://faircourts.org/files/SC04statetrends.pdf (Nov. 23, 2004). In the 2004 Republican primaries, a former assistant to Moore who had never served as a judge, defeated incumbent Justice Jean Brown. The candidate emphasized that he was a former "top aide to Roy Moore," as well as a "conservative Christian" and a "pro-life leader." An independent ad announced Moore’s endorsement, urging voters to “stand with Judge Roy Moore and support the Ten Commandments: vote for [specified candidates].” Republican Primary Campaign Commercials (television broadcast, 2004) (DVD on file with Equal Justice Initiative).

ranked third, having raised $6.3 million. Each of these three states raised double, and in the case of Illinois nearly triple, Pennsylvania, the State that ranked fourth in 2004 state supreme court fundraising. *Id.*


29. *Id.* at 12, 17 (arguing that judges should be “guided and restrained by the law” as opposed to political considerations and noting the “frightening reality” that “the influence of special interest big money we have come to expect and, reluctantly, to live with in the other two branches of our government has spilled over into our judiciary”).

30. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO STATE L.J. 43, 52-54 (2003). These percentages comprise part of what Geyh refers to as the “Axiom of 80,” which in its totality points out the irony that:

   (1) Roughly 80% of the public prefers to select its judges by election and does so;
   (2) Roughly 80% of the electorate does not vote in judicial elections; (3) Roughly 80% of the electorate cannot identify the candidates for judicial office; and (4) Roughly 80% of the public believes that when judges are elected, their decisions are influenced by the campaign contributions they receive.

31. See Baschab, *supra* note 1, at 18 (“Obviously, no group contributes large sums of money without some expectation of a return on the investment.”). The Ohio State Bar President has said that people with money who are affected by judicial decisions “have reached the conclusion that it’s a lot cheaper to buy a judge than a governor or an entire legislature and he [sic] can probably do a lot more for you.” *Id.* (citation omitted).

32. The only limitation is a general $500 cap on corporate campaign contributions. *American Judicature Society*, *Alabama: Judicial Campaigns and Elections*, http://www.ajs.org/js/AL_elections.htm (last visited Oct. 24, 2005); *Ala. Code § 10-2A-70.1(a) (1975).* Judicial elections in Alabama are not subject to any special campaign finance regulations not applicable to elections generally. *Cf.* EDWARDS, *supra* note 6, at 10 (collecting
data demonstrating that all other Southern states which hold judicial elections cap individual and PAC contributions at between $500 and $5000, except Texas, which places a cap of $300,000 on total PAC contributions).

33. GOLDBERG & SAMANTHA SANCHEZ, supra note 23, at 19, 21.

34. Thomas Spencer, et al., Moore Wins, Credits God, BIRMINGHAM NEWS, Nov. 8, 2000 (noting that all four supreme court contests in the general election were won by Republicans with approximately 54% of the vote, and that the Republican majority on the court expanded from 5-4 to 8-1).


36. 646 So. 2d 619 (Ala. 1994), rev’d 517 U.S. 559 (1996). BMW was reversed as being so “grossly excessive” as to violate the Due Process Clause of the Fourteenth Amendment – “the first instance of [the United States Supreme Court’s] invalidation of a state-court punitive assessment as simply unreasonably large.” BMW of North America, Inc. v. Gore, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting). On remand, the Alabama Supreme Court reduced the punitive damages to $50,000.

37. See George Lardner, Jr., Speech Rights and Ethics Disputed in Judicial Races, WASH. POST, Oct. 8, 2000, at A13 (noting that Alabama Supreme Court was all-Democratic in 1993, and that Chief Justice “Sonny” Hornsby was a past president of the Alabama Trial Lawyers Association). Rove’s most important candidate in his first Alabama race was Perry Hooper, who defeated Hornsby for chief justice in 1994, though not without a prolonged and ugly recount battle that included accusations of “outright thievery” and resulted in Hooper’s victory by 262 votes. Green, supra note 35, at 93-95.


on file with Equal Justice Initiative).


42. Id.


44. Justice at Stake Campaign, supra note 25, at 2; Campaign Commercial (television broadcast, 2004) (DVD on file with Equal Justice Initiative). Brown’s “insulting gesture” was an attempt to keep the Ten Commandments in the Alabama courthouse in some form while also complying with a federal court order. For her part, Brown stated in her ads that it was a “sad day” when the Commandments were removed, which is why she “led the effort to bring them back.” Brown Campaign Commercial (television broadcast, 2004) (DVD on file with Equal Justice Initiative).

45. Justice at Stake Campaign, supra note 25, at 2.


47. Id.

48. The Judicial Inquiry Commission originally instructed judges not to answer the CCA questionnaire in a 2000 advisory opinion. 00 Op. Judicial Inquiry Comm’n 763, http://www.alalinc.net/jic/opinions/oa00-763.htm (Sept. 8, 2000) (citing its own 1994 opinion and several of the Alabama Canons of Judicial Ethics relating to impartiality and the dignity of the office and finding that “judicial candidates should not respond to questions concerning issues that are likely to come before them in their judicial capacity”). However, in the wake of the United States Supreme Court’s holding in Republican Party of Minnesota v. White, 536 U.S. 765 (2002), expanding the free speech rights of judicial candidates to “announce” their views on political questions, the Judicial Inquiry Commission withdrew its opinion.

49. Justice O’Connor acknowledged this serious problem in White, but concluded that: “If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.” 536 U.S. at 792 (O’Connor, J., concurring) (arguing that “the very practice of electing judges undermines” judicial impartiality).


52. The candidate had filed suit in federal court to enjoin enforcement of the Canons. Responding to certified questions from the federal court regarding that litigation, the Alabama Supreme Court found that Canon 7(b)(2) could only be applied to "demonstrably false" statements with "actual malice," and not to the use of true information, even if used in a way intended to deceive or mislead. Butler v. State Judicial Inquiry Comm'n, 802 So. 2d 207, 218-19 (Ala. 2001) (citing New York Times Co. v. Sullivan, requiring a similar "actual malice" standard for state libel laws). The Court explained that, "The people of Alabama have chosen to select their judges in partisan, contested elections. So long as this is the case, it is essential that judicial candidates have the unfettered opportunity to make their views known." Id. at 214-15 (quotations omitted). Later, the United States Supreme Court cited a similar rationale in invalidating restrictions barring judicial candidates from "announcing" their views on political subjects. Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

53. William Pryor Campaign Commercial (television broadcast, 1998) (DVD on file with Equal Justice Initiative). Butts defended his "toughness" on crime by asserting in an ad that, "I've looked killers in the eye and sentenced them to death." Butts Campaign Commercial (television broadcast, 1998) (DVD on file with Equal Justice Initiative). Although these ads occurred in a race for attorney general, Butts ran on and was attacked for his record as a judge, a reminder that pressure on judicial decision making may be exerted not only by the prospect of future judicial races, but also by judges' broader political and electoral ambitions. Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U.L. REV. 759, 792-93, 815-16 & n.292 (1995) (noting that the state bench "is more likely to be a stepping stone to a higher political office" than the federal bench; former Alabama governor George Wallace, as a circuit judge early in his career, made political hay from his defiance of federal officials investigating racial disparities in state jury pools).


56. Quoted in Dana Beyerle, Candidates for Court Seat Run ‘Dignified’ Race, Tuscaloosa News, Oct. 19, 1996 (on file with Equal Justice Initiative); see also Q & A: Alabama Court of Criminal Appeals, Mobile Reg., May 29, 1996 (quoting Sorrells, “I have been a prosecutor for over 20 years . . . I have prosecuted many capital-murder cases”).


60. Endorsements by prosecutors and police officials are not uncommon. For example, one circuit court candidate appeared in an ad with the Montgomery Police Chief stating, “I’ll work with law enforcement to see . . . that the rights of crime victims are fully protected.” (But not mentioning the rights of criminal defendants.) Charles Crook Campaign Commercial (television broadcast, 1998) (DVD on file with Equal Justice Initiative) (emphasis added). Also in 1998, a supreme court candidate listed his endorsements from thirty police chiefs and four police groups. Glen Murdock Campaign Commercial (television broadcast, 1998) (DVD on file with Equal Justice Initiative) (“Law enforcement trusts Glen Murdock’s conservative values and tough-on-crime views.”).

61. Campaign Commercial (television broadcast, 1998) (DVD on file with Equal Justice Initiative) (“She knows how to fight crime . . . She served as an undercover agent, searched crack houses and arrested drug dealers.”).

62. Campaign Commercial (television broadcast, 1998) (DVD on file with Equal Justice Initiative) (showing victim’s son describing how candidate “helped her” get justice when no one else would).

63. In addition to instances cited above, see, e.g., Criminal Appeals Court Candidates State Views, Qualifications, Montgomery Advertiser, May 24, 2000 (candidates Riley, Saxon and Martin cite their prosecutorial experience, candidate Mansell cites fifteen years as police officer).

64. Bright & Keenan, supra note 53, at 785 & n.123.

65. Id. at 765 n.32 (citing Dan T. Carter, Scottsboro: A Tragedy of the American South 265-73 (rev. ed. 1992)).
66. Paul Newberry, Judge Attacks State Court Judges Over Death Penalty, TUSCALOOSA NEWS, May 19, 1994 (Mark Montiel, a candidate for the Alabama Supreme Court stated, “What is the problem? Why is Alabama so slow in carrying out executions?”).

67. Id.

68. See CTR. ON GOVERNMENTAL SERVICES, AUBURN UNIV., supra note 3, at initial frequency distributions 7 (61.7% of Alabamians polled in 2002 support death penalty, 30.4% opposed); Most Support Death Penalty, BIRMINGHAM NEWS, July 3, 2000 (citing Mobile Reg. poll finding 63% of Alabamians in favor of death penalty, 25% opposed).

69. See Bright & Keenan, supra note 53, at 791-92 (“[J]udges are well aware of the consequences to their careers of unpopular decisions in capital cases.”).


71. Harris, 513 U.S. at 519 & n.5 (Stevens, J., dissenting). Underscoring the deep historical roots of judicial independence in America, Stevens continued: “The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.” Id. at 519-20. Stevens was the lone dissent in an 8-1 decision.

72. See Harris, 513 U.S. at 513 (citing Alabama Prison Project statistics showing five cases where jury’s death verdict overridden versus forty-seven cases where jury’s life verdict overridden); Harris, 513 U.S. at 521-22 & n.8 (Stevens, J., dissenting) (stating that “[i]n fact, surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty,” while citing Alabama Prison Project statistics and similar, though less extreme, statistics from Florida); Ken Silverstein, The Judge as Lynch Mob: How Alabama judges use judicial overrides to disregard juries and impose death sentences, AMERICAN PROSPECT, May 7, 2001, at 26 (citing Alabama’s “9-to-1 ratio” of seventy overrides of life verdicts versus eight overrides of death verdicts). Silverstein argues that the use of judicial override is much worse in Alabama than in the other states where it is available. In Delaware, where judges are appointed, override is almost always used to spare life rather than to forfeit it. And “override is rarely employed anymore in Indiana or Florida, because the supreme courts in those states frequently reject its application — something that has never happened in Alabama.” Id.
73. Gerald Uelmen, *Elected Judiciary*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 170-71 (Leonard W. Levy et al. eds., Supp. I 1992) (finding, for 1977-1987, state supreme court affirmation rates of: 26.3% for judges subject only to executive appointment; 55.3% for those subject to uncontested retention elections (merit selection); 62.9% for contested, nonpartisan elections; 62.5% for contested, partisan elections; and 63.7% for legislative appointment). Uelmen also notes that after three California Supreme Court justices were defeated in uncontested retention elections based on their alleged ‘softness’ on the death penalty, that court’s affirmation rate rose from 7.8% to 71.8%, with little change in governing precedent. *Id.*

74. Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 *CAP. U. L. REV.* 583, 627 (2002) (arguing that academics must study not only correlation between apparent desires of voters and judicial decisions, but between those decisions and the desires of judges’ campaign contributors and finding that “[t]here is a strong correlation between a justice’s source of campaign funds and how that justice votes in arbitration cases”). Cf. Stan Bailey, *Monroe: There’s Too Much Arbitration*, BIRMINGHAM NEWS, Sept. 23, 2004 (attributing to Democratic Supreme Court candidate the view that “decisions by business-backed Republican justices, who hold eight of the nine seats on the state Supreme Court, have moved the state toward business interests at the expense of consumers”).

75. 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, 225-26 (2001) (detailing an “Oklahoma Project” also known as Citizens for Judicial Review, which had close ties to the Republican Party and Koch Industries and “created a kind of nationwide franchising operation for pro-business advocacy in state judicial elections” that specifically targeted eight states, including Alabama). Apparent political effects in regard to environmental matters have already been observed in Louisiana. *Id.* at 267-68.

76. See, e.g., Bright & Keenan, *supra* note 53.

77. Baschab, *supra* note 1, at 13 (quoting John C. Godbold, Senior Circuit Judge for the U.S. Court of Appeals for the Eleventh Circuit). Godbold describes the court as “an intermediary between the citizen and the government” whose “job is to decide . . . without counting heads, without regard to the identity of lawyers, and without considering the possibility of public approval or condemnation.” *Id.*

79. See Brown, supra note 5, at 314-15 (quoting from Alexis de Tocqueville, Democracy in America 289 (Vintage ed. 1954) (discussing rise of judicial elections in the Jacksonian period: "[I]t will be found out at some future period that by thus lessening the independence of the judiciary they have attacked not only the judicial power, but the democratic republic itself."). See also CTR. ON GOVERNMENTAL SERVICES, AUBURN UNIV., supra note 3, available at http://web6.duc.auburn.edu/outreach/cgs/publications/alabama_issues_2002_preliminary_results.pdf (reporting that 67.3% of Alabamians believe judicial corruption occurs at least "sometimes").

80. Bright, supra note 78, at 852.


82. See, e.g., Editorial, Mixed Signals: People Want to Elect Judges, But Don't Know Them, BIRMINGHAM NEWS, Mar. 26, 2000; Editorial, A First Step, MONTGOMERY ADVERTISER, Dec. 17, 1996 (endorsing nonpartisan elections as politically viable first step, but suggesting merit selection is better plan, though "a lot harder sell").


86. See Editorial, Think Small: No Great Ideas Or Hope for Judicial Election Reform, BIRMINGHAM NEWS, Feb. 15, 2001 ("There was a time when Democrats fought Republican efforts for nonpartisan judicial elections, but that was back when Republicans couldn’t win elections. Now,
Republicans like things just the way they are.


89. Id. “Decisions by the Court of the Judiciary may be appealed to the Alabama Supreme Court.” Note that impeachment by the Legislature may also result in removal from office, but this is unlikely to occur in the context of electoral conduct.

90. Republican Party of Minnesota v. White, 536 U.S. 765 (2002). White notes the longstanding principle that speech about political issues is at the “core of our First Amendment freedoms.” Id. at 774.


92. See, e.g., Butts-Pryor “ax murderer” ad discussed above.

93. 536 U.S. 765 (2002). The Eighth Circuit’s opinion on remand is likely to reinforce the trend of politicized judicial elections wherein it held that Minnesota’s canon, prohibiting candidates from publicly affiliating with a party and/or participating in partisan activities, was unconstitutional. 416 F.3d 738, 766 (8th Cir. 2005).

94. Christian Coalition of Alabama v. Cole, 355 F.3d 1288, 1290 (11th Cir. 2004) (affirming decision that Christian Coalition’s suit was moot in wake of JIC withdrawal of opinion).

95. 309 F.3d at 1322-23.

97. Id. ("The 1998 and 2000 committees . . . changed the spirit of judicial campaigns in Alabama.").

98. Id. at 16.

99. Id.

100. See id. at 16-17 ("The decision to forego a campaign oversight committee in 2002 may have destroyed a barely begun tradition . . . the prospect for clean campaigns in future elections is uncertain.").


104. Id. (quoting Auburn political scientist attributing losses more to “straight ticket Republican voting than race,” and quoting Representative Holmes emphasizing the role of race and stating that it was a “tragic mistake” for the justices to appear in their own commercials).


107. While these cases have resulted in split decisions in the Eleventh Circuit, they have ultimately been resolved against the plaintiffs. See, e.g., Southern Christian Leadership Conference of Alabama v. Sessions, 56 F.3d 1281 (11th Cir. 1995) (en banc) (overruling divided panel and deciding that plaintiff African-American voters and civil rights organizations had not established violation of the Voting Rights Act in circuit and district judicial districting); White v. State of Alabama, 74 F.3d 1058 (11th Cir. 1996) (vacating lower court order by Judge Myron Thompson approving settlement between class of black voters and state that would have established complicated scheme for appellate courts, designed to ensure minority representation). However, the Eleventh Circuit has held that under some circumstances at-large circuit-wide and countywide election of judges can violate the Voting Rights Act ("VRA"). Nipper v. Smith, 1 F.3d 1171 (11th
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Cir. 1993), rev’d on other grounds, 39 F.3d 1494, 1537, 1546 (en banc) (confirming “legally significant racially polarized voting, and, therefore, vote dilution” in violation of VRA, but denying all proposed alternatives for relief, including single-member subdistricting, creation of new majority-minority circuit, and corporate board-style system of cumulative voting, because these alternatives ran counter to Florida’s interest in maintaining its chosen system of judicial selection and “undermin[ed] the administration of justice in the courts”), cert. denied, 514 U.S. 1083. Cf. SCLC, 56 F.3d at 1298, 1318 (Hatchett, J., dissenting) (arguing that the SCLC majority incorrectly applied the standards announced in Nipper to the facts in Alabama and that “recircuiting, subdistricting, and cumulative voting are feasible remedies” for Alabama’s violations of the VRA in at-large judicial districting scheme).

108. See, e.g., Nipper, 39 F.3d at 1542-46. Cf. SCLC, 56 F.3d at 1313-1315, (Hatchett, J., dissenting) (citing Lani Guinier, noted advocate of cumulative voting, while arguing that cumulative voting would advance, rather than retard, underlying policies by producing “better, more dedicated” judges and reducing negative campaigning).


114. EDWARDS, supra note 6, at 5.


116. EDWARDS, supra note 6, at 5.

118. Although the influence of partisan politics and special interests might still be felt in battles over control over and composition of the nominating body, such a system would significantly increase the reality and perception of judicial independence from political groups and would reduce the prevalence of raucous and unseemly electoral behavior.

119. Judge James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 *ALBANY L. REV.* 775, 787 (2004). Wynn, a North Carolina Court of Appeals judge, and Mazur argue that neither judicial independence (sought through appointive systems) nor accountability (sought through elective systems) can be meaningfully achieved without significant diversity in the judicial ranks and that, therefore, it is more important to promote the value of judicial diversity than a change of judicial selection mechanisms. *Id.* at 776.


121. *Id.* The 1901 Constitution was adopted largely to disenfranchise African Americans and poor white males. *Id.* Judicial election rather than appointment was adopted over very little resistance (a vote of 75-13, with numerous absences), although former Governor William C. Oates strongly advocated the appointment system, warning that elections could not secure an “intelligent, independent judiciary” because:

it is the most natural thing in the world when the man is usually a candidate to succeed himself or for some other office, he wants to get votes, and he is going to cater as much as he can to such a settlement as will bring them . . . [T]he judge may be very honest, but the human nature in him and his own interests makes him naturally look for a reason . . . [to rule] in favor of the big fellow, he wants his influence, he wants to be popular with him.


122. Even an amendment to remove outdated and unenforced Jim Crow language from the Constitution failed in 2004. *See* Val Walton, *Recount Showing No Major Change in Metro Counties*, *BIRMINGHAM NEWS*, Dec. 1, 2004, at 1B (discussing defeat of Amendment No. 2, which would have removed segregationist language from Alabama’s Constitution providing for separate public schools. The amendment’s defeat was attributed, at least facially, to citizen concern over increased taxes for educational funding). While this episode reflects badly on the progress of race
relations in Alabama, it also underscored the significant popular fear of increased taxes that retards efforts at constitutional reform in Alabama. Alabama’s current Constitution places strict limits on tax increases, and a popular viewpoint seems to be that if it acts as a straitjacket impeding efficient government but also maintaining low tax burdens, this is an acceptable trade-off. See, e.g., Ken Waites, Letter to Editor, Constitution Keeps Taxes Low, BIRMINGHAM NEWS, Dec. 8, 2003 (“My impression is that constitutional reform really means removing language that limits the government’s ability to increase taxes. If that is the case, we are better off with the old 1901 document because many citizens of Alabama simply cannot afford a new one.”).

123. Another needed reform, tangentially related to judicial elections, is a change to independent circuit commissions to appoint counsel for indigent defendants. As discussed above, the incidence or appearance of judicial influence in criminal cases may also come from the defense side, when the judge who takes contributions from defense attorneys controls a “patronage system” by which she also appoints those attorneys to cases.

124. The Supreme Court has held that in the context of political campaigns, money is essentially a proxy for speech, and that this speech belongs at the core of First Amendment protection because it pertains to the political process. See Buckley v. Valeo, 424 U.S. 1 (1976). However, the Court has still upheld bans on contributions to campaigns, while consistently striking down limitations on expenditures. See, e.g., id.; Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000). Note that it makes no difference if the restriction is in a statute or a judicial canon – it is attributed to the government generally for the purpose of the First Amendment challenge.

125. The $1000 individual and PAC limits and the ban on corporate contributions are currently in use by North Carolina, West Virginia, and Kentucky. EDWARDS, supra note 6, at 10 tbl.4.

126. The Supreme Court has held that “coordinated” expenditures – money spent by third parties or PACs in concert with a candidate’s campaign – are functionally the same as contributions and may be similarly limited. Federal Election Commission v. Colorado Republican Federal Campaign Committee, 533 U.S. 431 (2001).


128. While the majority justices felt that Minnesota’s choice was to discontinue elections or allow largely the same freedoms for judicial candidates as those in other elections, Justice O’Connor, at least, expressed deep reservations about judicial elections. 536 U.S. 765, 788-90 (2002) (O’Connor, J., concurring). While in White she felt that Minnesota had chosen its own fate by insisting on elections, she may have come out differently in the context of campaign financing.
129. *Id.* at 776-77 & n.7 (opinion of the Court).

130. *Id.; see also id.* at 800-01 (Stevens, J., dissenting).

131. *Id.* at 794 (Kennedy, J., concurring).

132. It is less clear if recusal rules could be used as a “back door announce clause” by requiring judges to recuse themselves from cases involving issues they have commented publicly on, or commented on during a campaign.