MERIT SELECTION IN INDIANA: THE FOUNDATION FOR A FAIR AND IMPARTIAL APPELLATE JUDICIARY

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INTRODUCTION

Forty years ago the people of Indiana amended their constitution to provide for the merit selection and retention of appellate judges.[1] After 120 years of partisan judicial elections, the amendment to article 7 of the Indiana Constitution was a significant, if not radical, departure. Under the Constitution of 1852, virtually all Indiana judges were elected on a partisan ballot, and appellate judges were swept in to office and out of office on political tides that had nothing to do with their judicial qualifications or performance.

The *Indiana Law Review* has invited us to reflect upon Indiana's forty years of experience with merit selection and to consider whether merit selection in practice has achieved its promise to remove appellate judges from partisan politics, to secure and retain able jurists, and to maintain a fair and impartial appellate judiciary.

This Article will consider (1) the national judicial reform movement that led to Indiana's revised Judicial Article, (2) the work of the Judicial Study Commission which recommended merit selection, (3) the debate in the Indiana General Assembly over adoption of the amendment to article 7 of the Indiana Constitution, (4) the campaign for ratification of the amendment, and (5) Indiana's experience with merit selection, including a brief comparison with judicial elections in other states.

The proper role of the courts has been an important topic since the earliest days of the republic. In *Democracy in America*, Alexis de Toqueville concluded, "Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate . . . ."[2] De Toqueville's observation reminds us that public interest in the business of the courts is woven into the fabric of the nation. Thus, as the American Judicature Society recently observed, "The debate over judicial selection, which began before the founding of the nation, is an ongoing conversation about the judicial function in a democratic society."[3]

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1. IND. CONST. art. VII, § 11.

2. ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 309 (Henry Reeve trans., Penn. State Univ. 2002) (1830), *available at* http://seas3.elte.hu/coursematerial/LojkoMiklos/Alexis-de-Tocqueville-Democracy-in-America.pdf.

3. RACHEL PAINE CAUFIELD, AM. JUDICATURE SOC'Y, INSIDE MERIT SELECTION: A NATIONAL SURVEY OF JUDICIAL NOMINATING COMMISSIONERS 5 (2012).

I. THE NATIONAL JUDICIAL REFORM MOVEMENT

The adoption of Indiana's revised Judicial Article was one chapter in a broad judicial reform movement that began in the early 20th Century. Three historic events shaped that movement. The first was an address by Roscoe Pound, a young law professor from the University of Nebraska, who would later become Dean of the Harvard Law School.[4] In August 1906, Pound spoke at the annual meeting of the American Bar Association.[5] His paper entitled, "The Causes of Popular Dissatisfaction with the Administration of Justice," was a rigorous critique of contemporary legal institutions and an indictment of the status quo.[6] Pound assailed "the putting of our courts into politics" and contended that "compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."[7] Pound's remarks caught the delegates by surprise and caused a stir. Dean Wigmore, who was present, reported that Pound's address was "something different" than "the typical Bar Association address of that period" and described the speech as "the spark that kindled the white flame of high endeavor . . . [which] spread[] through the entire legal profession and . . . the administration of justice."[8] Pound planted the seeds for reform, and today his address is widely recognized as the seminal event in the modern judicial reform movement.

The second significant event was the founding of the American Judicature Society.[9] AJS became the epicenter of judicial reform and the preeminent private institution dedicated to promoting the integrity of the judiciary and fair and impartial courts.[10] The impact that the American Judicature Society has had on the administration of justice in the United States for almost 100 years cannot be overstated.

And the third significant event occurred in 1940 when Missouri became the first state to approve a constitutional amendment adopting a merit selection plan.[11] This plan had been first proposed by the American Judicature Society in

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4. *See Who Is Roscoe Pound?*, POUND CIV. JUST. INST., http:/www.roscoepound.org/whoisroscoe.aspx (last visited Dec. 20, 2012).

5. *See ABA Timeline*, A.B.A., http://www.americanbar.org/utility/about_the_aba/timeline.html (last visited Dec. 20, 2012).

6. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 395-417 (1906), *reprinted in* Roscoe Pound, *Proceedings in Commemoration of the Address*, 35 F.R.D. 241, 273, 290 (1964).

7. *Id.* at 289, 290.

8. John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906: The Spark that Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE SOC'Y 176, 176 (1936-37).

9. *See About AJS*, AM. JUDICATURE SOC'Y, http://www.ajs.org/ajs/ajs_about.asp (last visited Dec. 20, 2012).

10. *See Strategic Plan Overview*, AM. JUDICATURE SOC'Y (2007), http://www.ajs.org/ajs/pdfs/AJS%20Strategic%Plan%20-%20version.pdf.

11. *See Judicial Selection in the States: Missouri*, AM. JUDICATURE SOC'Y, http://www.judicialselection.com/judicial_selection/index.cfm?state=MO (last visited Dec. 20, 2012).

1913, and in 1938, it was approved by the American Bar Association.[12] The A.B.A. or Missouri Plan became a blueprint for judicial reform in many states, including Indiana.[13]

II. THE JUDICIAL STUDY COMMISSION

The 1965 session of the Indiana General Assembly approved an act creating a twelve member Judicial Study Commission.[14] The Commission would include four (4) members from the Senate, four (4) members from the House of Representatives and four (4) members appointed by the governor.[15] Not more than 50% within each group of appointees would be affiliated with the same political party.[16]

The Commission was chaired by Evansville attorney and State Senator F. Wesley Bowers and included other leaders of the legal profession.[17] Indiana University Chancellor and former President Herman B Wells served as Director of the Commission.[18] The legislature charged the Commission with, among other things, the duty "to study the needs of this state for revision of its judicial system" and to report its recommendation "as to needed changes in the organization of the judicial department or the courts."[19] Litigation to enjoin creation of the Commission delayed the work of the Commission by six months.[20]

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12. REPORT OF THE JUDICIAL STUDY COMMISSION 121 (1966) [hereinafter JUDICIAL STUDY COMMISSION REPORT].

13. *Id.*

14. *Id.* at 1-2.

15. *See* John Dean, *Judge Funk Rules Judicial Study Commission Is Unconstitutional*, INDIANAPOLIS STAR, July 24, 1965, at 17.

16. *Id.*

17. Commission members included Sen. F. Wesley Bowers, Rep. Robert V. Bridwell, Rep. Robert D. Anderson, Rep. John W. Donaldson, C. Ben Dutton, Sen. William W. Erwin, William M. Evans, Carl M. Gray, Sen. A. Morris Hall, Gilmore S. Haynie, Rep. David F. Metzger, and Sen. Leonard Opperman. *See* JUDICIAL STUDY COMMISSION REPORT, *supra* note 12, at report cover.

18. *Id.* at 2.

19. 1965 Ind. Acts, chs. 47, 75, 77.

20. JUDICIAL STUDY COMMISSION REPORT, *supra* note 12, at 1. The reason for the six-month delay is interesting. In early 1965, Indianapolis attorney Leo L. Kriner, on his own behalf, filed a lawsuit in the Marion Superior Court to enjoin the formation of the Commission. *See Rumors of Court Involvement in Suit Told Legislators*, INDIANAPOLIS STAR, July 15, 1965, at 7. In July, Judge Glenn W. Funk issued a fourteen-page order and temporary injunction prohibiting officials from creating the Commission. *See* Dean, *supra* note 15. Judge Funk indicated that he would consider making the injunction permanent, which was Kriner's stated goal. *Rumors of Court Involvement in Suit Told Legislators*, *supra*.

Attorney General John J. Dillon announced that he would appeal Judge Funk's decision directly to the Indiana Supreme Court, but there were "widespread reports" that the Indiana Supreme Court justices were behind Kriner's suit. *Id.* All five justices—Chief Justice Jackson, Justice Achor, Justice Myers, Justice Landis, and Justice Arterburn—denied such involvement. *Id.*

Significantly, the Commission itself agreed that any recommendation would be unanimous, that before "becoming a proposal of the Commission it must be the opinion of each and all Commission members that a proposal is wholly justified by the needs of the judicial system and the interests of the public."[21]

The research design for the Commission's work included three areas of inquiry: (1) an analysis of Indiana's judicial system, (2) a systematic program for gathering the opinions of others, and (3) an analysis "of current trends in judicial modernization."[22] When the Commission began its work, all but a few Indiana judges at both the state and local level were elected in partisan contests. The Commission's overarching purpose was to evaluate Indiana's system of selecting judges in a partisan political election and to consider alternatives to that system.[23]

The Commission noted that, under the Constitution of 1816, the governor had appointed the judges of the supreme court, subject to ratification by the Senate, and that that system had "provided Indiana with a first-rate [Supreme] Court," which "gained such renown that its decisions were cited throughout the United States and even in Great Britain."[24] The Commission observed that the Constitutional Convention of 1851 was "convened mainly to consider changing"

Nonetheless, Attorney General Dillon informed the General Assembly of the possible involvement of the Indiana Supreme Court justices, and the General Assembly, in a special session, passed a bill that required the following: (1) appeals from the grant of a temporary injunction lie with the appellate court, not the supreme court; (2) upon removal by the attorney general to the appellate court, the presiding justice shall fix a date within three to seven days of the removal for oral argument; (3) the appellate court must hear the oral argument en banc; (4) "on the day of such argument" at least five of the judges at the oral argument must "sign an order . . . continuing the restraint . . . in effect as originally issued"; (5) if such order is not signed in accordance with the law, "all restraint . . . shall thereupon stand dissolved by operation of law." Kriner v. Bottorff, 216 N.E.2d 38, 40-41 (Ind. App. 1966) (memorandum of Presiding Justice Smith) (discussing Ch. 7 of the Acts of the Indiana General Assembly of 1965, 2nd Special Session). That is, the General Assembly required five appellate court judges to immediately ratify Judge Funk's temporary injunction in order for that injunction to have continued effect. *See id.*

On November 22, 1965, the appellate court, en banc, held oral argument on the attorney general's removal of Judge Funk's order. Following oral argument, five judges failed to ratify the order and, as a result, this "negative action, according to the provisions of the [special session law], had the effect of dissolving the temporary injunction . . . by operation of law." *Id.* at 41. Judge Mote later filed a memorandum opinion in his own name dissenting from the court's negative action on the grounds that he believed the special session law to be an unconstitutional encroachment of the legislature into the functions of the judiciary. *Id.* at 39-40.

With the temporary injunction dissolved, the Judicial Study Commission met on December 9, 1965. *See* McCullough v. State, 900 N.E.2d 745, 747-48 (Ind. 2009) (discussing the first meeting of the Judicial Study Commission).

21. JUDICIAL STUDY COMMISSION REPORT, *supra* note 12, at 2.

22. *Id.* at 3.

23. *Id.* at 1-3.

24. *Id.* at 15.

that system, which was no longer able to cope with the problems of the rapidly growing state.[25] Thus, the Commission began its research by examining the debates from the Constitutional Convention of 1851, which was responsible for "[t]he organization and structure" of Indiana's courts.[26] The Convention of 1851 had been influenced by Jacksonian Democracy and the Populist movements, which fueled demand for the election of all public officials, including judges.[27] "Many of the delegates to the Constitutional Convention of 1851 were Jacksonians and Populists, and it was primarily through their efforts that the partisan election of judges was brought to Indiana" in the Constitution of 1852.[28]

The Commission directed a questionnaire to all members of the Indiana Bar, and nearly 53% of attorneys returned the questionnaire.[29] A different questionnaire was directed to Indiana judges.[30] The attorneys were identified by income, years of practice, the counties where they practiced, and other criteria.[31] The three most significant questions on judicial selection and tenure posed in the Indiana attorney survey included:

1. "Can the present system of judicial selection continue to obtain the best qualified judicial personnel?"

2. "Do political influences enter into judicial determinations in your experience?"

3. "Under what selection system would you be most inclined to accept judicial office?"[32]

The Commission's report is impressive in its sophistication, detail and scope. The Commission's survey showed that Indiana attorneys were "almost unanimous in their criticism of the . . . system" in which Indiana's judges were selected in a partisan political election.[33] The Commission found that 79% of the attorneys surveyed "felt that the present system could not continue to provide . . . highly qualified trial judges," and 85% of the attorney-respondents "felt the present system could not continue to provide highly qualified [appellate] judges."[34] The Commission found that Indiana lawyers believed there was a direct correlation between judicial selection and judicial independence,[35] and "[m]ost disturbing of all," that 87% of attorney-respondents "felt that politics had . . . influenced decisions to some degree," and 32% felt that politics "frequently influenced [judicial] decisions."[36]

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25. *Id.* at 9.
26. *Id.* at 3, 80.
27. *Id.* at 106.
28. *Id.*
29. *Id.* at 17.
30. *Id.* at 105.
31. *Id.* at 17.
32. *Id.*
33. *Id.* at 105.
34. *Id.*
35. *Id.*
36. *Id.*

The Commission also discovered that two-thirds of the attorney-respondents were unwilling to run in a partisan contest for judicial office, which created a shortage of qualified candidates.[37] Further, the Commission identified the existence of an inverse correlation between success in the legal profession and willingness to become a judge.[38] The Commission determined from its survey "that those [attorneys] who earn the least income are most willing to become a judge and those who earn the most income are least willing."[39] Thus, the Commission concluded, "It is unlikely that a lawyer who has built up a lucrative practice will be willing to give up his practice with no assurance that he will be a judge for more than four or six years."[40]

"Judges criticized the system almost as strongly as attorneys."[41] Of the participating judges, 63% opposed partisan elections.[42] The "judges indicated that they considered campaigning for office and engaging in partisan political activity undesirable for judges."[43] And the judges confirmed "that it is practically impossible to run for political office without incurring political debts."[44] The Commission found the survey opinions of attorneys and judges on the current system "thoroughly shocking."[45]

> The fact that attorneys were not willing to run, that they almost unanimously doubted that the present system could continue to provide good judges, that both attorneys and judges consider court decisions to be affected by political influences, and that judges had to incur political debts all thoroughly appalled the Commission.[46]

The Commission observed that the organization and structure of Indiana courts was designed with the problems of the nineteenth century in mind, and concluded that "[j]ust as the solutions of 1816 were no longer applicable in 1851, so the solutions of 1851 are no longer applicable today."[47]

The Commission considered three basic plans for judicial selection: (1) non-partisan elections, (2) executive appointments, and (3) the A.B.A. or "Missouri Plan."[48] The Commission recommended the "Missouri Plan," which, as previously noted, was first implemented in Missouri in 1940.[49] A majority of the

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37. *Id.*
38. *Id.* at 117.
39. *Id.* at 18.
40. *Id.* at 27.
41. *Id.*
42. *Id.* at 105.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 80.
48. *Id.* at 106-21.
49. *Id.* at 121.

attorneys surveyed favored this plan.[50] The Commission explained:

> The plan is essentially a combination of executive appointment and non-partisan election. The genius of this system is its ability to retain the advantages of both these systems while *excluding* the disadvantages. Under this plan three separate groups are involved in the selection of judges: the judicial nominating commission, the governor, and the public.[51]

The Commission proposed draft legislation to abolish terms of court, to create a Judicial Conference of Indiana, and to remedy shortcomings in the judge's retirement system.[52] But on the matter of judicial selection and retention, the Commission determined that "[t]he best solutions cannot be enacted by statute because they conflict with methods of judicial selection, tenure and court organization contained in the present constitution."[53] The Commission further concluded that "[t]he only way to achieve a unified, cohesive judicial system was to adopt an entirely new judicial article which would permit our judicial system to meet the needs generated by a rapidly expanding Indiana."[54] Thus, the Commission drafted a resolution amending article 7 of the Indiana Constitution to provide for the merit selection of both appellate judges and circuit court judges and for a unified judicial system that included the supreme court, the court of appeals, and the circuit courts.[55] Under the new article 7, the Chief Justice of the Indiana Supreme Court would become the Chief Justice of Indiana, who would be not only the titular head, but the actual leader of the State's entire judicial system.[56]

III. THE GENERAL ASSEMBLY CONSIDERS THE AMENDMENT TO ARTICLE 7

The Indiana Constitution requires that a majority of both houses of the General Assembly approve a proposed constitutional amendment and, if agreed to, the amendment shall be referred to the legislature chosen at the next general election for re-enactment.[57] In other words, an amendment must be passed by the House of Representatives and the Senate twice by successive, separately elected General Assemblies before the amendment is submitted to the electorate to be either rejected or ratified.[58] Thus, a proposed constitutional amendment must clear five hurdles before it may become law.[59]

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50. *Id.* at 122.
51. *Id.* at 121 (emphasis added).
52. *Id.* at 134-51.
53. *Id.* at 136.
54. *Id.*
55. *Id.* at 137-51.
56. *Id.* at 137-39.
57. *See* IND. CONST. art. 16, § 1.
58. *Id.*
59. *Id.*

At that time in the General Assembly, there was both bi-partisan support for and bi-partisan opposition to the revised Judicial Article. For example, an *Indianapolis Star* headline, "Hot Floor Fight Expected on Judge Selection Issue," accurately predicted the January 1969 debate on the proposed amendment in the House of Representatives.[60] Proponents argued that the measure would eliminate politics from the selection of judges on "the state['s] highest courts and would lead to better judges."[61] Opponents, however, argued that the resolution would deprive the people of "their right to pick their judges."[62]

The debate was all about "men."[63] One advocate for the resolution argued, "We need qualified men. At the present time, good men are reluctant to run because they must give up the practice of law and then be subject to partisan elections."[64] A co-author of the resolution noted that the plan was supported by the Indiana Judges Association and argued that the plan had worked well in Missouri, had been adopted in other states, and that the purpose of the plan was "to get the finest legal talent we can find."[65] However, a leader of the opposition countered that "the proposal violated the 'things our forefathers fought for,'" alluding to the grievance in the Declaration of Independence against judges appointed by the King,[66] and he asked, "'How many of the countries behind the Iron Curtain elect their judges?' . . . 'Not a one.'"[67] Another leader of the opposition reported that "he had been bombarded with letters and telegrams from the League of Women Voters since his attack on the [resolution] in an earlier debate . . . and that compared to me, Cain who slew his brother [Abel] was a rather upright guy."[68]

Before the vote, House Speaker Dr. Otis R. Bowen, from Bremen, described the sentiment as "just about a standoff," and Speaker Bowen and House Minority Leader Frederick T. Bauer from Terre Haute agreed that the parties were "split down the middle on the issue."[69] Both leaders said that neither party would take

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60. *Hot Floor Fight Expected on Judge Selection Issue*, INDIANAPOLIS STAR, Jan. 24, 1969, at 12. The newspaper reported, "The hottest floor fight of the 96th General Assembly so far is expected to explode in the Indiana House of Representatives today over a resolution to adopt a modified 'Missouri Plan' for selection of judges of the Indiana Supreme and Appellate courts." *Id.*

61. *Id.*

62. *Id.*

63. J.P. Cadou, Jr., *Court Reform Measure Given House Approval*, INDIANAPOLIS STAR, Jan. 25, 1969, at 8.

64. *Id.* (quoting Evansville Representative John C. Cox).

65. *Id.* (quoting Kokomo Representative Ellwood H. Hillis).

66. *Id.* (quoting Monticello Representative Glenn R. Slenker). Among the grievances enumerated in the Declaration of Independence is the charge that, "He [the King] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

67. *Id.* (quoting Representative Slenker).

68. *Id.* (quoting Seymour Representative John M. Lewis).

69. *Hot Floor Fight Expected on Judge Selection Issue*, *supra* note 60.

a stand on the resolution.[70]

During the 1969 session, the resolution was sponsored in the House by attorneys Ellwood H. Hillis, a Republican from Kokomo, and Adam Benjamin, Jr., a Democrat from Gary, who had both also assisted with the passage of the resolution during the 1967 session.[71] Other lawyers in the General Assembly were on both sides of the question.[72]

After a rigorous, and sometimes contentious, debate in the legislature, the revised Judicial Article was approved by majority votes in both houses during the 95th session of the General Assembly in 1967[73] and the 96th session of the General Assembly in 1969.[74] In the end, the measure passed both houses in both sessions by substantial margins. In 1967, the House vote was 61-37, and the Senate vote was 28-19. In 1969, the House vote was 58-37, and the Senate vote was 34-16. Aggregating all four votes in the legislature, 62% of the votes were cast in favor of revising the Judicial Article.[75]

IV. THE CAMPAIGN FOR RATIFICATION

The Commission's recommendation that merit selection and retention include circuit court judges was a bridge too far and did not survive the General Assembly.[76] Nevertheless, the revised Judicial Article was a paradigm shift from 120 years of partisan judicial elections for Indiana's appellate judges.

Arthur L. Hart, an attorney from Vincennes, was President of the Indiana State Bar Association (ISBA) when the proposed constitutional amendment

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70. *Id.*

71. *Judicial Amendment Is Moved Towards Second Passage in the House*, 13 RES GESTAE, Jan. 1969, at 5, 5, 27 [hereinafter RES GESTAE, *Judicial Amendment*].

72. Cadou, *supra* note 63, at 7. Among the eighteen attorneys in the House of Representatives, eleven voted for adoption and seven voted against. Indiana lawyers had been divided on the role of politics in judicial elections for many years. Articles published in the *Indianapolis Times* on successive days illustrate the point. Don Baker, *Why Some Attorneys Want Judges Removed from Politics*, INDIANAPOLIS TIMES, Feb. 1, 1961, at 13 and Don Baker, *Why Some Attorneys Want Judges to Stay in Politics*, INDIANAPOLIS TIMES, Feb. 2, 1961, at 17 appeared in the *Indianapolis Times* on February 1, 1961, and February 2, 1961, respectively.

73. IND. HOUSE J. of 1967, at 1482 (Roll Call 359); IND. SENATE J. of 1967, at 1454 (Roll Call 480).

74. IND. HOUSE J. of 1969, at 1365 (Roll Call 29); IND. SENATE J. of 1969, at 1340 (Roll Call 496).

75. One of the Senate votes for the Resolution in 1967 and again in 1969 was that of Senator Frank O'Bannon from Corydon, who later served Indiana as Lieutenant Governor and Governor. *See* IND. SENATE J. of 1967, at 1454 (Roll Call 480); IND. SENATE J. of 1969, at 1340 (Roll Call 496). The *Indiana Law Review*'s Symposium Editor, Beau Zoeller, is the grandson of Governor O'Bannon and Judy O'Bannon.

76. *Compare* JUDICIAL STUDY COMMISSION REPORT, *supra* note 12, at 143-44, *with* IND. CONST. art. VII, § 9.

passed the 1969 General Assembly.[77] In his April 1969 report to the ISBA membership, Mr. Hart declared,

> [W]e are committed to the constitutional amendment . . . . [W]e are formulating plans for a grass roots campaign throughout the State of Indiana . . . . We shall leave no stones unturned in such efforts. We shall furnish the public the truth and the facts and shall confidently await the decision of the electorate, which has the same deep and abiding interest in the improvement of our judicial system as we have.[78]

The Indiana State Bar Association's House of Delegates had supported the judicial amendment, and the Association's leadership had promoted its passage. The next step was to secure ratification by the public. To that end, the "Indiana Citizens for Modern Courts of Appeal" was established as a not-for-profit foundation.[79] Its honorary chairmen were two former governors, Roger D. Branigin, a Democrat from Lafayette, and Harold W. Handley, a Republican from Indianapolis.[80] The organization's twenty-member Board of Directors "include[d] judges, legislators and representatives of the League of Women Voters of Indiana and the Indiana State Bar Association."[81]

In July 1970, the Second Citizens Conference on Indiana Courts was held in Indianapolis and was hosted by former Governors Branigin and Handley.[82] The conference was co-sponsored by Indiana Citizens for Modern Courts of Appeal, the League of Women Voters of Indiana, and the Indiana State Bar Association, which organizations were cooperating on a state-wide educational campaign in support of the proposed Judicial Amendment to the Indiana Constitution.[83] The conference sessions were conducted by the American Judicature Society, and the two-day conference ended with the adoption of a lay citizens "consensus statement" which concluded, in part, that: "[M]embers of the Indiana appellate judiciary must be removed from the political arena in order to assure their independence, and to increase the public respect and confidence upon which the effectiveness of the judicial branch of government depends."[84]

Indiana Supreme Court Chief Justice Donald H. Hunter from Anderson was

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77. Arthur L. Hart, *A Report to the Membership of the Association Pertaining to the 1969 Legislative Program*, 13 RES GESTAE, Apr. 1969, at 5, 5.

78. *Id.*

79. *Citizens for Modern Courts of Appeal Organize to Conduct a Broad Public Information Program*, 14 RES GESTAE, Jan. 1970, at 12, 12.

80. *Id.*

81. *Id.*

82. The first such citizens conference was held in Indianapolis in 1964, at which former United States Supreme Court Justice Tom C. Clark had described Indiana's judicial system as "deficient and archaic by modern standards." *July 23-24 Citizens Conference to Study Court System*, 14 RES GESTAE, July 1970, at 6, 6.

83. *Judicial Merit Plan is "On the March" Through Nation*, 14 RES GESTAE, Sept. 1970, at 19, 19-21.

84. *Id.* at 19 (quotation marks omitted).

a strong advocate for judicial reform.[85] He, along with fellow supreme court Justice Richard M. Givan from Camby and appellate court Judge Patrick D. Sullivan from Indianapolis had testified in favor of the revised Judicial Article before the 1969 legislature.[86] Givan had voted for the revised Judicial Article in 1967 as a State Representative.[87] Hunter was elected to the supreme court in 1966, Givan was elected in 1968, and Sullivan was elected to the appellate court in 1968.[88]

In 1959, Justice Arch N. Bobbitt announced his support for merit selection.[89] A native of Crawford County, Bobbitt was elected to the supreme court in 1950 and is one of the best known of all Indiana Supreme Court justices.[90] As the Republican Party chairman, Bobbitt was a powerbroker and is known to have run the legislature from his suite at the Claypool Hotel.[91] He had worked diligently to sabotage the administration of Democratic Governor Henry Schricker in the 1940s.[92] Notwithstanding his vigorous partisanship, Bobbitt announced his support for the nonpartisan election of appellate court judges stating that judicial "records amount to nothing in a statewide election."[93]

The active support of Justices Hunter and Givan represented the culmination of a remarkable turnaround in the attitude of the supreme court's leadership. In 1950, just ten years before Bobbitt announced his support for merit selection, Chief Justice James A. Emmert from Shelbyville had advocated for traditional elections and opposed both the Missouri Plan and another merit selection plan that was defeated in the 1949 legislature.[94] Justice Emmert wrote that he could not recommend any change for the election of judges; he proclaimed that the Indiana constitutional requirement that the judges of the supreme court be elected from the judicial districts where they reside "is sound, since it encourages each judge to keep in touch with the legal thinking of his district," and "[t]his provision should never be changed."[95] It was unclear how Justice Emmert believed a judge should ascertain the "legal thinking of his district," or whether

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85. *See Supreme Court Justices' Hall of Fame*, COURTS.IN.GOV, http://www.in.gov/judiciary/citc/2724.htm (last visited Dec. 22, 2012).

86. *See* RES GESTAE, *Judicial Amendment*, *supra* note 71, at 27.

87. *See* Brent E. Dickson, *A Tribute to Richard M. Givan, 1921-2009 Justice, Indiana Supreme Court, 1969-1994 Chief Justice of Indiana, 1974-1987*, 43 IND. L. REV. 1, 2-3 (2009).

88. *Supreme Court Justices*, COURTS.IN.GOV, http://mycourts.in.gov/JR/default.aspx (last visited Dec. 22, 2012); *Courts of Appeals Judges*, COURTS.IN.GOV, https://mycourts.in.gov/JR/Default.aspx (last visited Dec. 22, 2012).

89. *Bobbitt Backs Nonpartisan Judge Ballot*, INDIANAPOLIS STAR, July 11, 1959, at 11.

90. Frederic C. Sipe, *Arch N. Bobbitt*, *in* JUSTICES OF THE INDIANA SUPREME COURT 323, 323-24 (Linda C. Gugin & James E. St. Clair eds., 2010).

91. *Id.*

92. *Id.* at 324.

93. *Bobbitt Backs Nonpartisan Judge Ballot*, *supra* note 89.

94. James A. Emmert, *People Should Choose Judges, Emmert Holds*, INDIANAPOLIS TIMES, Aug. 6, 1950, at 20.

95. *Id.*

he believed a judge should rely on popular sentiment to decide cases.[96]

An attorney from Hammond, Peter C. Bomberger, was President of the Indiana State Bar Association when the revised Judicial Article was presented to the electorate.[97] In his July 1970 President's Message published in *Res Gestae*, Mr. Bomberger stated the case and delivered an impassioned plea for its passage. His message was entitled, "A Crisis in our State Judicial History."[98]

Mr. Bomberger explained that the importance of the Judicial Amendment "came into sharper focus last month with our political party conventions. This year the 'entrance fee' for supreme court candidates reached an all time high of $3,725.00 with the Appellate Court not far behind."[99] Bomberger asked,

> Is this the picture of an independent, impartial judiciary our system of government requires for fair and just decisions under the law? Does it produce a judiciary which can carry out the mandate of our constitution that
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> > "Justice shall be administered freely, and without purchase; completely and without denial; speedily and without delay" . . .
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> Why should a judge with a good record, in the highest traditions of the Bench, be required to buy his way into a convention to seek another term? Certainly this system is below the dignity of a true judicial officer. . . .
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> This is not to deny that our present system has produced some good judges. They have emerged in spite of it. Likewise, it has produced some poor ones, selected merely by the whims and machinations of politics. . . .
>
> We are approaching a crisis in our state judicial history. We have an opportunity which may not be ours for generations to come if we do not obtain approval of this amendment in November. We cannot remain indifferent. We must take affirmative action now.[100]

In his final report as President to the ISBA House of delegates just a few days before the public referendum, President Bomberger summarized the run-up

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96. Emmert was better known, if not notorious for, sleeping on a couch in his office during the week, and he was often seen in the early morning walking the upstairs hallways of the Statehouse in his bathrobe. He also enjoyed inviting guests to his chambers for "'a cup of tea'—bourbon and branch water served in heavy, china tea cups." Joel Rosenbloom, *James A. Emmert*, *in* JUSTICES OF THE INDIANA SUPREME COURT, *supra* note 90, at 315, 318.

97. Charles G. Bomberger, *Bomberger: A Crisis in Our State Judicial History*, 14 RES GESTAE, July 1970, at 5, 5.

98. *Id.*

99. *Id.*

100. *Id.* at 5-6.

to the election as follows:

> [T]he campaign has risen toward the climax which will come on November 3. Intensive use has been made of all news media—the distribution of editorial and press releases, television and radio interviews and debates, and also seminars, speeches to service clubs and many other groups.[101]

Bomberger concluded, "We believe this amendment affords Indiana its finest opportunity in 100 years to promote good government in the judicial branch."[102]

In October 1970, the *Indianapolis Star* published a lengthy editorial explaining the revised Judicial Article.[103] The editorial discussed what it called the "imponderables" of electoral politics and the purely political factors that tend to make the partisan selection and tenure of judges "essentially 'a lottery.'"[104] The *Star* concluded that the Judicial Amendment would take "a vital step in the institution of an improved judiciary" and recommended that voters vote "yes" on the issue.[105] In a second editorial two days before the election, the *Star* reaffirmed its support for the revised Judicial Article.[106]

There is no better example of the judicial "lottery" under the former system of partisan elections than the career of Justice James Emmert, previously mentioned.[107] Emmert was twice elected mayor of Shelbyville, served for twelve years as Shelby Circuit Court judge and was twice elected as Indiana's attorney general.[108] He was elected to the Indiana Supreme Court as a Republican in 1946 and again in 1952.[109] He held degrees from Northwestern and Harvard Law School, where he was an assistant to Professor Felix Frankfurter, who "once said that Emmert was 'the best research student' he had ever had."[110] In 1958, after serving two, six-year terms on the Indiana Supreme Court, Emmert lost his bid for re-election when there was "a Democratic sweep of statewide offices."[111] Emmert was highly partisan but also well respected for his integrity and intelligence. If Indiana had used a merit selection system in 1958, James Emmert would have been retained in office. Instead, he lost his seat on the Indiana Supreme Court simply because he ran on the Republican ballot in a Democratic year.

The referendum on the revised Judicial Article was held on November 3,

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101. *ISBA's Past President Presents His Report*, 14 RES GESTAE, Nov. 1970, at 12, 12.

102. *Id.* at 13.

103. Editorial, *Who Shall Judge?*, INDIANAPOLIS STAR, Oct. 24, 1970, at 18.

104. *Id.*

105. *Id.*

106. Editorial, *Blank Check*, INDIANAPOLIS STAR, Nov. 1, 1970, at § 2, p.2.

107. *See* Emmert, *supra* note 94 and accompanying text.

108. Rosenbloom, *supra* note 96, at 315-16.

109. *Id.*

110. *Id.* at 316. Professor Frankfurter later became a United States Supreme Court Justice and "a leading figure in President Franklin D. Roosevelt's New Deal administration." *Id.*

111. *Id.* at 318.

1970.[112] The total votes cast on the question was 914,633, and the referendum passed by 141,323 votes, representing 57.7% of the votes cast.[113] In his December 1970 message, ISBA President John A. Kendall from Danville reported, "The election day response was the greatest vote in the history of Indiana referendums on constitutional amendments."[114] President Kendall recounted that, as a member of the General Assembly in the early 1940s, he and another legislator had "introduced on two occasions a bill similar to the Missouri Plan" and had been "unable to even get the bill out of committee."[115] Kendall thanked the fifteen state-wide organizations, particularly the League of Women Voters of Indiana, for their "wholehearted support" in the 1970 educational campaign.[116] He declared that "[a] new course is charted for the Indiana Bench and Bar. Now our efforts must be directed toward helping make the system work effectively and equitably."[117]

Even before the amendment had been ratified in the general election, a class action was filed in the Clay Circuit Court seeking to have the revised Judicial Article declared illegal.[118] The plaintiffs challenged the amendment on three grounds, including the contention that the language adopted by the State Election Board and used on the ballot was insufficient.[119] In *Roeschlein v. Thomas*, the appellate court, sitting en banc, rejected all claims and held on a motion for summary judgment that the constitutional amendment revising article 7 was valid.[120] The Indiana Supreme Court then granted transfer and adopted the per curiam opinion of the appellate court on February 24, 1972.[121]

V. INDIANA'S EXPERIENCE WITH MERIT SELECTION

In 2010, the American Judicature Society stated the case for merit selection as follows: "An independent judiciary is one of the hallmarks of American democracy. For our judicial system to function independently and effectively, it is imperative that qualified judges be free to make appropriate decisions under the law."[122] In the minds of some, the term "judicial independence" suggests that

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112. *See* IND. CONST. art. 16, § 1(b).

113. John A. Kendall, *New Course Charted for Indiana Bench and Bar*, 14 RES GESTAE, Dec. 1970, at 5, 5.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Roeschlein v. Thomas, 273 N.E.2d 554, 568 (Ind. App. 1971) (en banc) (per curiam), *superseded by* 280 N.E.2d 581 (Ind. 1972).

119. *Id.*

120. *Id.*

121. *See Roeschlein*, 280 N.E.2d at 582.

122. Brief for Am. Judicature Soc'y, Amicus Curiae, in Support of Appellees & Affirmance of the Judgment of the District Court at 3, Kirk v. Carpeneti, 623 F.3d 889 (9th Cir. 2010) (No. 09-35860).

an independent judiciary is not accountable to the public.[123] But as the former Chief Justice of Indiana Randall T. Shepard has explained, "Judicial independence is the principle that judges must decide cases fairly and impartially, relying only on the facts and the law."[124]

Since her retirement after twenty-four years on the United States Supreme Court, Justice Sandra Day O'Connor has become the most visible and formidable critic of judicial elections and an advocate for merit selection in the states.[125] In numerous speeches and publications she has expressed her concern about "'increased partisan activity in judicial elections,' with 'large sums of money spent by special interests.'"[126] Speaking at a summit sponsored by the ABA Presidential Commission on Fair and Impartial Courts, Justice O'Connor stated that "how we select our judges is crucial to a fair and impartial judiciary" and that "[t]he public is growing increasingly skeptical of elected judges in particular."[127]

Writing for the *Missouri Law Review*, Justice O'Connor said,

> While the debate about judicial selection has persisted for centuries, the climate has changed dramatically. In states that elect their judges, the expense and volatility of judicial campaigns have risen to obscene levels. Money is pouring into our courtrooms by way of increasingly expensive judicial campaigns. Litigants are attempting to buy judges along with their verdicts, and the public's trust in our courts is rapidly deteriorating as a result.[128]

Justice O'Connor has also lamented her vote with the 5-4 majority in the

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123. *See, e.g.*, Frank B. Cross, *Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L.J. 195, 198-99 (2003) ("There is little reason to expect that a wholly independent, unaccountable judiciary would appropriately restrain itself and sincerely seek to apply neutral legal principles to the cases they decide.").

124. AM. C. OF TRIAL LAWYERS, JUDICIAL INDEPENDENCE: A CORNERSTONE OF DEMOCRACY WHICH MUST BE DEFENDED 1 (2006), *available at* http://www.actl.com/AM/Template.cfm?Section= All_Publications&Template=/CM/ContentDisplay.cfm&ContentID=2548.

125. *See, e.g.*, Sandra Day O'Connor, Op-Ed., *Take Justice Off the Ballot*, N.Y. TIMES, May 23, 2010, at WK9; Sandra Day O'Connor, Opinion, *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A25 [hereinafter O'Connor, *Justice for Sale*]; Sandra Day O'Connor, Opinion, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

126. Bob Egelko, *Former Justice Warns of Threat to Judiciary*, S.F. CHRON. (Nov. 4, 2006, 4:00 AM), http://www.sfgate.com/bayarea/article/SAN-FRANCISCO-Former-justice-warns-of-threat-to-2467339.php.

127. James Podgers, *O'Connor on Judicial Elections: "They're Awful. I Hate Them,"* A.B.A. J. (May 9, 2009, 7:09 AM), http://www.abajournal.com/news/article/oconnor_chemerinsky_sound_warnings_at_aba_conference_about_the_dangers_of_s/ (internal quotation marks omitted).

128. Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 480 (2009) (footnote omitted) [hereinafter O'Connor, *The Essentials and Expendables of the Missouri Plan*].

Supreme Court's 2002 opinion in *Republican Party of Minnesota v. White*.[129] Speaking at a 2006 appellate judges and attorneys conference in Dallas, Justice O'Connor stated she was "having second thoughts about [her vote in *Minnesota v. White*] because it 'has produced a lot of very disturbing trends in state election of judges.'"[130]

These sentiments were recently echoed in a *New York Times* editorial entitled, "No Way to Choose a Judge," observing that, "choosing judges in partisan elections, rather than through a system of merit selection, can create a serious problem of quality control."[131] The *Times* summarized the corrosive effect of politics and the taint of special interest money on the selection of judges as follows:

> Requiring would-be judges to cozy up to party leaders and raise large sums from special interests eager to influence their decisions seriously damages the efficacy and credibility of the judiciary. It discourages many highly qualified lawyers from aspiring to the bench. Bitter campaigns—replete with nasty attack ads—make it much harder for judges to work together on the bench and much harder for citizens to trust the impartiality of the system.[132]

The *Times* article stated that, while merit selection and retention are not a "perfect fix," it would be a start toward ridding courtrooms of politics and campaign cash, concluding that "[t]he country certainly does not need any more bad examples of justice for sale."[133]

Article 7, section 10 of the Indiana Constitution requires that a vacancy on the supreme court or the court of appeals "shall be filled by the Governor, without regard to political affiliation, from a list of three nominees presented to him by the judicial nominating commission."[134] And the General Assembly has provided by statute that the Commission shall recommend to the Governor "only the three (3) most highly qualified candidates" for each vacancy.[135]

But one criticism of Indiana merit selection has been that it is not really non-partisan. In truth, Republican governors have appointed appellate judges affiliated more or less with the Republican Party, and Democratic governors have appointed appellate judges affiliated more or less with the Democratic Party.[136]

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129. 536 U.S. 765 (2002).

130. Linda P. Campbell, *Replace State's Partisan Judicial Elections*, VICTORIA ADVOC., Nov. 23, 2006, at B5 (quoting U.S. Supreme Court Justice Sandra Day O'Connor).

131. Editorial, *No Way to Choose a Judge*, N.Y. TIMES, March 16, 2012, at A26, *available at* http://www.nytimes.com/2012/03/16/opinion/no-way-to-choose-a-judge.html?_r=0.

132. *Id.*

133. *Id. See also* Editorial, *Judicial Elections, Unhinged*, N.Y. TIMES, Nov. 19, 2012, at A20 (noting that "special interest money . . . has severely weakened the principle of fair and impartial courts").

134. IND. CONST. art. VII, § 10.

135. IND. CODE ANN. § 33-27-3-2(a) (West 2012).

136. *See, e.g.*, Emily Geiger, *Iowa's Partisan Judicial Selection Process*, IOWA REPUBLICAN

Of course, the Governor's ultimate authority is derived from his own election. In making these judicial appointments, the Governor represents by proxy the will of the voters who elected him. Nevertheless, the Governor's discretion is limited: he must appoint from a list of three nominees presented to him by the Judicial Nominating Commission.[137]

There are many variables in the selection process, and the first is the applicant pool. Qualified individuals must first be motivated and, in some cases, recruited to apply.[138] Before the Commission can investigate an applicant, the applicant must give written consent to the public disclosure of information,[139] and some potential applicants have undoubtedly been discouraged by the fact that the names of all candidates who have applied are disclosed as soon as the application period is closed "but before the Commission has begun to evaluate any of the candidates."[140] Attorneys in private practice concerned about the possibility of jeopardizing relationships with colleagues and clients may be discouraged by the reputational risk inherent in submitting an unsuccessful application.[141]

And some applicants have tended to self-select, assuming at the outset that political affiliation is either a qualifier or a disqualifier. That has not always been true, however. In 1972, when merit selection was first used to select the ninth member of the newly created court of appeals, the Commission nominated two Republicans—Charles W. Cooper, a Madison attorney, Robert B. Lybrook, a Nashville attorney and former appellate court judge—and one Democrat, Addison M. Beavers, a Warrick Circuit Court judge. Governor Edgar Whitcomb appointed Lybrook.[142] Again, in 1977, the first time merit selection was used to fill a supreme court vacancy, the Commission sent the names of Republicans Albert Pivarnik and V. Sue Shields and Democrat Jonathan J. Robertson to Governor Bowen, who appointed Pivarnik.[143] In 1986, the Commission nominated Lafayette attorney Brent E. Dickson, a Republican, and Indianapolis

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(Aug. 18, 2010), http://theiowarepublican.com/2010/iowa%E2%80%99s-partisan-judicial-selection-process/ (referring to Iowa's system, which similar to Indiana's).

137. IND. CONST. art. 7, § 10.

138. Jessica M. Karmasek, *Twenty-Two Apply for Open Seat on Ind. SC*, LEGAL NEWSLINE (July 9, 2012, 11:40 AM), http://legalnewsline.com/news/236655-twenty-two-apply-for-open-seat-on-ind-sc (stating the Judicial Nominating Commission's duty is to "recruit and select candidates to fill vacancies on Indiana appellate courts").

139. IND. CODE ANN. § 33-27-3-2(b) (West 2012).

140. *Id.* § 33-27-3-2(d).

141. *See, e.g.*, Associated Press, *Daniels Has Third Chance to Appoint Female Justice*, HERALD BULLETIN (Aug. 9, 2012), http://heraldbulletin.com/breakingnews/x1555256955/Daniels-has-third-chance-to-appoint-female-justice.

142. *Judge Robert B. Lybrook*, COURTS.IN.GOV, http://www.in.gov/judiciary/appeals/2438.htm (last visited Dec. 27, 2012).

143. *Justice Biographies: Justice Alfred J. Pivarnik*, COURTS.IN.GOV, http://www.in.gov/judiciary/cite/2827.htm (last visited Dec. 27, 2012); *Bowen Appoints Valparaiso Judge to Supreme Court*, EVANSVILLE PRESS, May 16, 1977, *available at* http://local.evpl.org/views/viewarticle.asp?ID=414670.

attorney Lila J. Cornell, a Republican, as well as court of appeals Judge Robert H. Staton, a Democrat, for a seat on the Indiana Supreme Court.[144] Governor Robert Orr appointed Dickson.[145]

It is important to remember that the non-partisan features of the revised Judicial Article are not limited to merit selection. Under article 7, section 11, justices and judges are "subject to approval or rejection by the electorate" in retention elections conducted without any party affiliation, and section 11 also provides that Indiana's appellate judges cannot "run for an elective office other than a judicial office, directly or indirectly make any contribution to, or hold any office in, a political party or organization, or take part in any political campaign."[146] The constitutional provisions for selection and retention found in article 7, sections 9, 10 and 11 of the Indiana Constitution, including the outright prohibition against participation in partisan political activity, remove Indiana appellate judges from the political arena and from any obligation to political parties.[147]

Since 1972, the seven-member Indiana Judicial Nominating Commission established under article 7, section 9, has played a critical role in the success of merit selection in our state. The Commission has constitutional authority and responsibility to evaluate candidates for vacancies on the supreme court and the court of appeals and statutory authority to do the same for the tax court.[148] The constitutional provisions have been supplemented by statutes, which require the Commission to evaluate each candidate's qualifications in writing based on seven enumerated criteria, including, among others, legal education, legal writings and reputation, and to consider "[a]ny other pertinent information that the commission feels is important in selecting the most highly qualified individuals for judicial office."[149]

The application and vetting process is not for the faint-hearted. Each applicant runs a public and private gauntlet. Completion of the application itself is a major undertaking. The application thoroughly and systematically explores each candidate's personal and professional life.[150] Applications are now posted

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144. Adrienne Meiring, *The Role of the Judicial Nominating Commission in Judicial Selection*, IND. COURT TIMES (Sept. 3, 2010), http://indianacourts.us/times/2010/09/the-role-of-the-judicial-nominating-commission-in-judicial-selection/.

145. *See Brent E. Dickson, Chief Justice*, COURTS.IN.GOV, http://www.in.gov/judiciary/cite/2829.htm (last visited Dec. 27, 2012).

146. IND. CONST. art. VII, § 7.

147. IND. CONST. art. VII, §§ 9-11.

148. *See About the Commissions*, COURTS.IN.GOV, http://www.in.gov/judiciary/jud-qual/2380.htm (last visited Dec. 27, 2012).

149. IND. CODE ANN. § 33-27-3-2(a)(7) (West 2012). Specifically, 33-27-3-2(a) requires the Commission to consider a candidate's legal education, legal writings, reputation in the practice of law, physical condition, financial interests, activities in public service, and any other pertinent information. *Id.* § 33-27-3-2(a)(1)-(7).

150. *Id.* § 33-27-3-2(c).

online.[151] The Commission conducts public interviews with the candidates that are reported in the traditional press, online, and in the blogosphere.[152] And the Commission "inquire[s] into the personal and legal backgrounds of each candidate by investigations made independent from the statements on an application . . . or in an interview with the candidate," including information provided by "a law enforcement agency[,] any organization of lawyers, judges or individual practitioners[,] or any other person or association."[153] "The Commission may not consider a communication other than an attributable communication in evaluating a candidate."[154] The Commission concludes its work when it submits the list of three nominees to the governor with its written evaluation of each nominee based on the considerations set forth in the statute.[155] The governor then has sixty days to interview the candidates, to conduct his own inquiry, which includes a background investigation by the Indiana State Police, and to make the appointment.[156]

To fully appreciate the success of Indiana merit selection, we need only compare Indiana's experience with the recent experience of other states with contested elections. In its most recent report, "The New Politics of Judicial Elections 2009-10," Justice at Stake, a national nonpartisan partnership created with a purpose of keeping courts fair, impartial and independent, along with its partners, the Brennan Center for Justice and the National Institute on Money in State Politics, documents the flow of special interest money into judicial elections during the 2009-2010 reporting period.[157] The report describes a "hostile takeover of judicial elections" by outside groups not accountable to the candidates that contributed nearly 30% of all money spent in judicial elections.[158] According to the report, our own neighbors, Michigan, Ohio and Illinois, were three of the top ten states in total spending on supreme court elections.[159]

Michigan easily ranked first, Ohio ranked third and Illinois ranked fifth, in total expenditures, all in the millions of dollars.[160] Justice at Stake reports that

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151. *See, e.g.*, *Application for the Indiana Supreme Court: Loretta H. Rush*, IND. JUDICIAL NOMINATING COMM'N (June 28, 2012), *available at* http://www.in.gov/judiciary/jud-qual/files/jud-qual-sc-108-rush-app.pdf (providing access to the application of Indiana's most recent supreme court justice, Loretta H. Rush).

152. *See, e.g.*, *Supreme Court Finalists' Interview Before the Judicial Nominating Commission*, ADVANCE IND. (Aug. 9, 2012), http://advanceindiana.blogspot.com/2012/08/supreme-court-finalists-interview.html (providing access to video recordings of the interviews).

153. IND. CODE ANN. § 33-27-3-2(c) (West 2012).

154. *Id.* § 33-27-3-2(i).

155. *Id.* § 33-27-3-2(f).

156. *See id.* § 33-27-3-4(a).

157. ADAM SKAGGS ET AL., JUSTICE AT STAKE CAMPAIGN, BRENNAN CTR. FOR JUSTICE & NAT'L INST. ON MONEY IN STATE POLITICS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-10 (2011).

158. *Id.* at 1.

159. *Id.* at 5.

160. *Id.*

independent expenditures by state parties and special interest groups have resulted in "a greater use of attack adds by groups not affiliated with candidates on the ballot,"[161] and "[s]o great was the independent spending in Michigan that the four supreme court candidates . . . at times seemed like bystanders in their own elections."[162] And in Iowa's 2010 retention vote for three supreme court justices, more than 90% of the funding for the "Vote No" campaign came from out-of-state groups.[163] As Iowa Chief Justice Mark Cady told Iowa legislators in 2011, "This branch of government is under attack."[164]

The data from Justice at Stake's recent report identified another significant and ominous trend, namely that in the 2009-2010 reporting period there was a "money explosion in retention elections."[165] In the entire previous decade, spending in retention elections had accounted for only 1%, but in the 2009-2010 period, spending in retention elections accounted for 12.7% of all election spending.[166] The Justice at Stake report concluded that, "In its full context, the most recent [2009-2010] election cycle poses some of the gravest threats yet to fair and impartial justice in America."[167] As Justice O'Connor has said, interest groups are pouring money into judicial elections in record amounts, and most of this money comes from special interest groups that believe their contributions can help elect judges who will be likely to rule in a manner favorable to their cause.[168] And as interest-group spending rises, public confidence in the judiciary declines.[169]

Under Canon 4, Rule 4.2 of the Indiana Code of Judicial Conduct, a candidate for retention to judicial office may engage in campaign activities only when his "candidacy has drawn active opposition."[170] Thus, the triggering event for a judicial retention campaign in Indiana is active opposition. But once this condition precedent has been satisfied, the door is opened to unlimited interest-group spending, and once "active opposition" appears, it may well be too late for an incumbent judge to organize an effective response.[171]

CONCLUSION

So how should we evaluate whether Indiana's forty years of experience with the merit selection and retention of appellate judges has been successful?

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161. *Id.* at 3.

162. *Id.* at 4.

163. *Id.* at 8.

164. *Id.* at 27.

165. *Id.* at 7.

166. *Id.* at 2, 7.

167. *Id.* at 1.

168. O'Connor, *Justice for Sale*, *supra* note 125.

169. *Id.*

170. IND. CODE OF JUDICIAL CONDUCT R. 4.2(D) (2012).

171. *E.g.*, Mary A. Celeste, *The Debate Over the Selection and Retention of Judges: How Judges Can Ride the Wave*, 46 CT. REV. 82, 88 (2009-2010).

First, the Judicial Nominating Commission has served its purpose well and has performed as intended. Since January 1, 1972, when the revised Judicial Article took effect, some thirty different attorneys have been elected by the Bar and served on the Judicial Nominating Commission, including many leaders and distinguished members of the legal profession.[172] Of equal importance has been the participation and dedication of some thirty-three citizen members from each of the three geographic districts of the court of appeals who have leavened and broadened the Commission's deliberations with the perspectives of non-attorneys.[173]

There is no question that the Judicial Nominating Commission conducts a more thorough, systematic, objective, and reliable evaluation of judicial candidates than the political party conventions ever did. Indianapolis attorney John C. Trimble, who served as a member of the Commission from 2008 to 2010, described the process in 2010 as follows:

> The recent selection process . . . exceeded all prior precedent for direct public access and input. For the first time, candidate applications were posted online, which allowed the press and the public to review every detail of applicant information. In addition, the public had access to the candidates' writing samples, letters of recommendation and academic transcripts.
>
> Journalists from across the state attended the interviews. Photography was allowed, with some photos viewed as many as 700 times. Bloggers were permitted to observe and report on the questions posed by the commissioners and the answers of the candidates, and citizen observers were also present.
>
> As a commissioner, I can attest that our members received input on the candidates from legislators, other elected officials, appellate judges, trial judges, academia, business interests, citizens and friends and foes of the candidates.[174]

Since 1972, Governors Whitcomb, Bowen, Orr, Bayh, O'Bannon, Kernan, and Daniels have appointed eleven supreme court justices, twenty-nine court of appeals judges and two tax court judges through merit selection, including eleven women and four African-Americans.[175] Many other well-qualified individuals have applied and were either not nominated or were nominated and not selected, and it is not uncommon for an applicant to have applied for more than one

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172. Adrienne Meiring, Counsel, Indiana Commission on Judicial Qualifications, Indiana Judicial Nominating Commission (Dec. 28, 2011) (unpublished) (on file with author).

173. *Id.*

174. John C. Trimble, *Method of Selecting Appellate Judges Serves Indiana Citizens Well*, INDIANAPOLIS STAR, Oct. 6, 2010, at A15.

175. Robert D. Rucker was appointed both to the Indiana Court of Appeals and to the Indiana Supreme Court. *See* Appendix.

vacancy. The composition of the applicant pool, timing and, indeed, a good bit of luck play a part in who is ultimately selected.

While political affiliation may well have influenced the appointment of these forty-two judges, merit selection has virtually eliminated the taint of party politics and the role of interest groups. Our appellate judges stand for retention on their own identity with no ties to political organizations. Between 1974 and 2012, sixty-two retention elections were held and, on average, 69% of the public voted to retain the justices and judges.[176]

In many states, unchecked special interest spending has hijacked judicial elections and placed the independence and integrity of the judiciary at risk. But that has not occurred in our state. As of this writing, there has been virtually no money spent on Indiana retention elections.

Still, we must forthrightly acknowledge that there has always been and will continue to be some politics in the selection of judges.[177] Thus, the test for the success of a merit selection system is not whether politics has been entirely eliminated but whether, and to what extent, merit selection has reduced and minimized the role of party politics and interest groups.[178] And the ultimate test is whether the plan has provided and sustained a qualified appellate judiciary in which the public can have confidence.

When announcing his retirement from the supreme court, Justice Frank Sullivan, Jr. said "that he [wa]s most proud that during his time on the bench not a single case was decided along party lines for political purposes."[179] Justice Sullivan summarized in just a few words how well merit selection has worked in Indiana:

> We have a judicial selection system in this state that minimizes the importance of partisanship. People are not thinking about partisanship when they cast their votes. . . . It's a remarkably, remarkably good system that we have here in Indiana. It lifts up raging moderates, such that each of us is free to find our own way to what we think is the right decision under the law and the facts in any particular case.[180]

Thus, the Indiana Constitution emphatically declares that Indiana's appellate judges are not partisan political officials, and our judges have behaved accordingly. Merit selection has enabled Indiana's appellate judges to maintain a demeanor that does not demean the office. For forty years, Indiana's appellate courts have remained above the fray, in a calm and civil place, removed from the sound and the fury of politics.

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176. These statistics were compiled from information provided by the Indiana Secretary of State and are on file with the author. See the Appendix for a chronological listing of each justice and judge appointed pursuant to the revised article 7.

177. O'Connor, *The Essentials and Expendables of the Missouri Plan*, *supra* note 128, at 480.

178. *Id.*

179. Niki Kelly, *New Vacancy on Indiana's Highest Court*, J. GAZETTE (Apr. 3, 2012, 11:29 AM), http://www.journalgazette.net/article/20120403/NEWS07/304039978/1002/LOCAL.

180. *Id.*

When Governor Daniels introduced Mark S. Massa as his appointee to the Indiana Supreme Court, he stated that the selection process was "full of integrity."[181] Indiana's merit selection system has brought well-qualified attorneys to the appellate bench who have diligently and consistently produced well-reasoned opinions. A performance evaluation of incumbent judges is beyond the scope of these remarks, but without discounting any other judge, it is not inappropriate to ask who can seriously question the intellectual firepower, work ethic or integrity of our recently retired Justices, Shepard, Boehm and Sullivan?

The system has allowed our state's appellate judges to engage full time in the serious business of judging and to give careful consideration to every matter brought before them without distractions. Our judges issue written opinions that not only decide each case but articulate the law. And these opinions are an open book to be reviewed and critiqued by the public, the press and the profession. The strength of Indiana's appellate courts is derived from what George F. Will has called, "the public's respect for public reasoning."[182]

Today we stand on the shoulders of those Indiana leaders of a previous generation, in both public and private life, who firmly believed in an independent judiciary and who were relentless in their pursuit of that objective. They believed that judges should not be—and should not be seen—as politicians in robes. They believed that independent courts and a justice-for-hire system cannot be reconciled. They believed that partisan judicial elections fueled by special interest money substitute the rule of cash for the rule of law and cheapen the judiciary.

The judiciary is not merely a third political branch. As Oliver Wendell Holmes, Jr. so famously wrote, "The standards of the law are standards of general application."[183] And those standards are not grounded in politics, ideology, or the roar of the crowd. Thoughtful deliberation and well-reasoned judgment are the currency of the judiciary. And Indiana's system of merit selection and retention has provided an appellate judiciary characterized by just that—thoughtful deliberation and well-reasoned judgment.

Indiana has shown that when properly designed and administered, a system of merit selection can provide the foundation for an independent, well-qualified judiciary of men and women capable of giving fair and impartial consideration to every question presented. Forty years of experience with merit selection and

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181. Governor Mitchell E. Daniels, Jr., Remarks at the Appointment of Mark S. Massa to the Indiana Supreme Court (Mar. 23, 2012).

182. George F. Will, Opinion, *Gingrich, the Anti-Conservative*, WASH. POST, Dec. 21, 2011, http://www.washingtonpost.com/opinions/gingrich-the-anti-conservative/2011/12/20/gIQALq8CAP_story.html. Will's observation is derived from Alexander Hamilton's famous statement in *Federalist 78* that the power of the judiciary is not derived from either "the sword or the purse . . . but merely judgment." THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *See* Randall T. Shepard, *On the Way to Something Better*, 55 RES GESTAE, Jan./Feb. 2012, at 9, 14.

183. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 108 (32d prtg. 1938) (1881).

retention in Indiana have provided appellate decisions rendered without fear or favor by judges who are not controlled by, or accountable to, any political party or interest group but accountable only to justice and the rule of law.

APPENDIX[184]
CHRONOLOGICAL LISTING OF THE JUSTICES OF THE INDIANA SUPREME COURT SINCE JANUARY 1, 1972

Alfred J. Pivarnik
5-13-1977 – 12-14-1990

Randall T. Shepard
9-6-1985 – 5-23-2012

Brent E. Dickson
1-6-1985 –

Jon D. Krahulik
12-14-1990 – 10-31-1993

Frank J. Sullivan, Jr.
11-1-1993 – 7-31-2012

Myra C. Selby
1-4-1995 – 10-7-1999

Theodore R. Boehm
8-8-1996 – 9-30-2010

Robert D. Rucker
11-19-1999 –

Steven H. David
10-18-2010 –

Mark S. Massa
4-2-2012 –

Loretta H. Rush
11-7-2012 –

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184. This is a list of justices and judges appointed to the Indiana Supreme Court and the Indiana Court of Appeals pursuant to the revised Judicial Article. The list does not include justices and judges elected to either of Indiana's appellate courts before the amendment to article 7 took effect on January 1, 1972. It also does not include the two judges appointed to the Indiana Tax Court, Thomas G. Fisher, appointed by Governor Orr in 1986, and Martha Blood Wentworth, appointed by Governor Daniels in 2011, pursuant to statute. *See* IND. CODE ANN. §§ 33-26-2-4, 33-27-3-1 (West 2012). All information was compiled from the website for Indiana's judiciary, www.in.gov/judiciary. For a full list of the justices of the Indiana Supreme Court and the judges of the Indiana Court of Appeals before the amendment to Indiana's Judicial Article took effect, see https://mycourts.in.gov/JR/Default.aspx.

CHRONOLOGICAL LISTING OF THE JUDGES OF THE INDIANA COURT OF APPEALS SINCE JANUARY 1, 1972

Robert B. Lybrook
1-1-1972 – 9-30-1979

William I. Garrard
1-21-1974 – 1-24-2000

V. Sue Shields
7-1-1978 – 1-27-1994

Eugene N. Chipman
8-1-1978 – 10-26-1981

Stanley B. Miller
8-1-1978 – 6-20-1994

James B. Young
8-1-1978 – 8-31-1988

Robert W. Neal
10-1-1979 – 5-27-1989

Wesley W. Ratliff, Jr.
1-1-1980 – 11-3-1992

William G. Conover
10-26-1981 – 12-31-1993

Linda L. Chezem
11-21-1988 – 12-31-1997

John G. Baker
6-2-1989 –

Betty Barteau
1-1-1991 – 3-31-1998

Robert D. Rucker
1-1-1991 – 11-19-1999

John T. Sharpnack
1-1-1991 – 5-4-2008

Edward W. Najam, Jr.
12-30-1992 –

Ezra H. Friedlander
1-7-1993 –

Patricia A. Riley
1-1-1994 –

James S. Kirsch
3-4-1994 –

Carr L. Darden
11-28-1994 – 7-20-2012

L. Mark Bailey
1-30-1998 –

Melissa S. May
4-9-1998 –

Margret G. Robb
7-6-1998 –

Nancy H. Vaidik
2-7-2000 –

Paul D. Mathias
3-30-2000 –

Michael P. Barnes
5-22-2000 –

Terry A. Crone
3-8-2004 –

Cale J. Bradford
8-1-2007 –

Elaine B. Brown
5-5-2008 –

Rudolph R. Pyle III
8-27-2012 –