



KEITH B. NORMAN



Another Modest Proposal

My last “modest proposal” considered changes to our state’s jury system that were based on my observations from serving as a juror. Unfortunately, none of my suggestions created a groundswell for implementing those changes. Consequently, I harbor no illusions that my current proposal will be any better received than the last. Nevertheless, I offer it for your consideration.

This past February, Birmingham lawyer and American Bar Association President Tommy Wells debated Eleventh Circuit Court of Appeals Judge Bill Pryor at a Federalist Society luncheon about changing the method of selection for Alabama’s appellate judges. Tommy argued for the need to remove judges from the expensive partisan judicial contests through an appointive process. His premise for changing our current elective process was that these generally negative, high-cost campaigns are eroding the independence of the state’s appellate courts. Ironically, Judge Pryor, who was nominated by the President and confirmed by the United States Senate, argued that the appointive process would actually be no better.

During this just-concluded 2009 regular session of the Alabama legislature, two bills to help address the partisanship and cost issues for judicial races were defeated, mostly along party lines. One of the bills would have required judicial candidates to be elected on a non-partisan ballot, while the other bill would have limited contributions to appellate candidates from individuals, businesses or political action committees to \$500. Without question, the cost of partisan statewide judicial campaigns is staggering. The spending for the supreme court contest in 2008 reached \$5.3 million. In 2006, the race for chief justice was the second costliest judicial race in U.S. history with the candidates spending over \$8.2 million and an estimated \$1 million in special-interest-group spending. When citizens see these tremendous sums spent on partisan judicial races, public confidence in the judiciary’s fairness and impartiality is compromised. These two bills would have brought needed changes to address these problems.

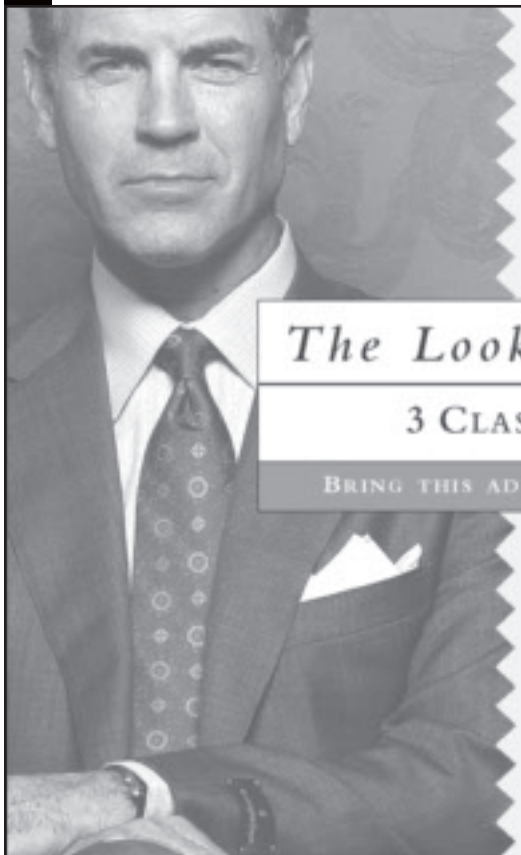
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This past February, *USA Today* and Gallup released a poll showing that 89 percent of those surveyed believed the influence of campaign contributions on judges' rulings is a problem while 59 percent thought this was a "major" problem. More than 90 percent of those surveyed thought that judges should be removed from a case if it involves a contributor. These findings are buttressed by a study in 2002 by the Justice at Stake organization that indicated that 26 percent of the judges it polled believed that campaign contributions have at least some influence on judicial decision-making. The Justice at Stake study further found that 70 percent of voters support selecting judges through a form of merit selection with retention election.¹ In a 2007 survey, Zogby International polled 200 senior executives principally at companies of 500 or more employees about state judicial election fundraising. The findings show that business

leaders are concerned that disproportionately large campaign contributions are influencing judge's decisions and creating an unacceptable appearance of this influence. Survey respondents were virtually unanimous in their opinion that judges should recuse themselves from cases involving contributors.²

Throughout the first eight decades of the 20th century, Alabama was essentially a one-party state so judicial candidates did not, for the most part, run on the platform of a political party. Of course, this quickly changed when Guy Hunt was elected as the first Republican governor since Reconstruction. The politicization of statewide judicial races or "judicial platforming" increased in 2002 with the U.S. Supreme Court's decision in *Republican Party of Minnesota v. White*.³ Despite these recent changes of the last two decades, efforts to strengthen the independence of Alabama's courts are



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not new. In 1916, Alabama State Bar President Charles S. McDowell recognized the role of judges to be necessarily distinct from elected members of its co-equal branches. He wrote:

“If the unyielding and zealous advocates of the primary system for choosing judges are logical, they must go further than they have gone and declare, virtually, that they do not want men upon the courts because of their legal attainments, but because of their political alignments. All men recognize a difference between a political and judicial office, and we should recognize a corresponding difference between candidates for these offices.... The judge does not make the law, and it is not therefore material what he thinks about current political issues. He is chosen to serve the people, not to represent them; he does not translate their

convictions into statutes, nor shape the policy of the State. His office is simply to hold the scales of justice even as between man and man, and he should never be forced into a contest which must inevitably engender passion and prejudice which are fatal to judicial poise....”

In 1951, Alabama State Bar President John A. Caddell sought to increase judicial independence with the passage of legislation providing for the appointment of judges under a “Missouri Plan.” “Mr. Johnny,” a life-long Democrat, related to me not long before his death that when he proposed a Missouri Plan for Alabama, his few Republican friends (they were few because there were few Republicans in those days) approved and supported the concept. He said that his Democrat friends almost disowned him for supporting the plan. Of course, the legislation proposing a Missouri Plan for Alabama failed.



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In 1973, then-Chief Justice Howell Heflin proposed a new judicial article. Among the features of the constitutional amendment was a provision that allowed for the merit selection and retention election of the state's appellate judges and non-partisan elections of circuit and district court judges. Remarkably, the leadership of the state house and senate, who were Democrats as was a preponderance of both houses, required the removal of the merit selection provision before they would allow passage of the rest of the judicial article. Recent efforts to persuade the legislature to enact legislation supported by the state bar implementing a merit selection plan have generally been acceptable to the Democratic members of the Alabama legislature but, as in the past, have met similar fates but at the hands of house and senate Republicans.

In the early 1990s, the Alabama State Bar Task Force on Judicial Selection, chaired by **Robert Denniston** of Mobile, recommended several voluntary guidelines for candidates seeking judicial office.⁴ In the preface of their report of March 14, 1994 the task force observed:

“ . . . The one area of greatest concern to the members of the bar and the public is the unseemly amounts of money contributed by some special interest groups and individuals, and some lawyers and law firms, to candidates for judicial office, and

the acceptance of such large sums by the candidates. While some such large contributors may be doing no more in their minds than supporting a well qualified individual who has a similar legal philosophy as the contributor, and are not seeking any special favor in return, the public and opposing litigants often see the matter in a different light.”

Key among the recommendations was voluntary limits on campaign contributions. Those recommended monetary contribution limits were:

Cash Contributions	Supreme Court	Courts of Appeal	Circuit/District Court
From Individual	\$750	\$500	\$500
From Law Firm/Members	\$4,000	\$2,500	\$2,500
From PAC or organization	\$5,000	\$3,000	\$3,000

Other aspects of the task force's comprehensive voluntary guidelines for judicial campaigns included the creation of a judicial campaign monitoring committee, the forerunner of the current day Judicial Campaign Oversight Committee, and the compilation and publication of judicial campaign contributions for an easier determination of compliance with the monetary guidelines by the public. Although the voluntary guidelines were not formally adopted by the Alabama State Bar



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Board of Bar Commissioners, at least one candidate of whom I am aware, **Associate Justice Hugh Maddox**, chose to abide by the voluntary contribution limits in his successful re-election bid in 1994.

As our experience with merit selection has revealed, the fate of legislation is more often based on who is in power at the time rather than particular merits. With the appellate courts now dominated by lawyers who ran under the Republican banner, Republican officials and legislators have no desire to change the current system. This was also true when lawyers sought judicial office under the Democratic banner and Democrats dominated judicial offices. Likewise, judicial candidates themselves have been reluctant to curb campaign contributions by adopting voluntary contribution limits.

I have a “modest proposal” for those who support partisan elections of all judicial candidates and argue that merit selection takes away the right of voters to elect their judges (which it doesn’t). My proposal would preserve partisan elections, but would help restore the dignity that has been stripped from judicial elections because of the obscene amounts of money raised and spent by candidates for statewide office. My proposal is **automatic disqualification** of a judge or justice based on campaign contributions. This is not a new concept. In fact, mandatory recusal legislation⁵ was enacted in 1995 in response to a particularly egregious supreme court race the previous year that saw campaign contributions crack the \$1 million mark for the first time. This particular legislation, sponsored and signed into law by a Republican governor, proved to be unworkable, however, because the Alabama Supreme Court determined that it was unable to fashion specific administrative rules as required under the act.

The act essentially provided for a party to seek mandatory recusal of a judge before which the party was appearing if that party’s opponent in the case had previously made a campaign contribution that exceeded a threshold amount. The act’s legislative intent plainly expresses:

“The Legislature intends by this chapter to require the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety

because as a candidate the justice or judge received a substantial contribution from a party in the case including attorneys for the party, and all others described (in the act) . . . This legislation in no way intends to suggest that any sitting justice or judge of this state would be less than fair and impartial in any case. It merely intends for all the parties to a case and the public be made aware of campaign contributions made to a justice or a judge by parties in a case and others described (in the act)...”

Large sums of money that flow to partisan judicial campaigns call into question the fairness and impartiality of our courts and erode public confidence in the judiciary. This is not a new problem, but it is one that in the minds of most citizens is having a greater impact than ever before. If our state political leaders continue to thwart change, as they historically have done, the judicial branch, as a matter of self-preservation, should consider adopting mandatory recusal/automatic disqualification rules as a part of the *Canons of Judicial Ethics* to help address this serious problem. ▲▼▲

Endnotes

1. I am grateful to Buck Lewis, president of the Tennessee Bar Association, for his timely article appearing in the April 2009 issue of the *Tennessee Bar Journal* which provided the survey information. This information was taken from the February 17, 2009 issue of *USA Today* in an article entitled, “Supreme Court Case with the Feel of a Best-Seller.”
2. See *Zogby International Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges* (2007).
3. 536 U.S.765 (2002).
4. Published in *The Alabama Lawyer*, May 1994, pp. 137-141.
5. See Section 12-24-1 *et seq.*, *Code of Alabama* (1975).



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