

“We the people of the United States, in order to form a more perfect union”

These elegant words which begin the U.S. Constitution pose a perpetual challenge to all who participate in our grand experiment in representative democratic government. Our founders created three separate, but equal, branches to carry out the business of government. Each branch is to fulfill its dedicated functions and each is to serve as a check against the potential excesses of the others. Indiana has emulated this model. Now is the time for Hoosiers to speak out in favor of a uniform, non-partisan judicial selection method to insure judicial independence for all of Indiana. If we succeed in this endeavor, we will have taken an important step toward the ***“more perfect union”*** that our forefathers envisioned.

Early in March, the U.S. Supreme Court heard oral argument in the case of *Caperton v. Massey Coal Company*. In 2002, Caperton’s company won a \$50 million jury verdict against Massey Coal Company. Massey CEO Don Blankenship vowed to appeal. He also began a very ugly public campaign to unseat West Virginia Supreme Court Justice Warren McGraw. Blankenship contributed some \$3 million – most of it for special interest attack ads -- to replace McGraw with Brent Benjamin, a previously little-known lawyer. Benjamin won the election; more than 60% of the funds supporting his campaign were traced to Blankenship. Ignoring Caperton’s requests, Benjamin refused to remove himself from the appeal panel. In the end, Benjamin cast the deciding vote – not once, but twice – to reverse the jury’s verdict. The U.S. Supreme Court will now decide whether the U.S. Constitution requires Benjamin to step aside so Caperton gets a fair hearing.

This case, which was the inspiration for John Grisham’s recent best-seller, *The Appeal*, is most definitely extreme. The Washington Post ran an editorial which began: “If ever there was a case that illustrated why electing judges is a bad idea, it is the one out of West Virginia that the U.S. Supreme Court is scheduled to hear this morning.” The same day, the New York Times also weighed in: “A wise decision would recognize the threat posed by record-breaking fund-raising for judicial elections – and make clear that judges and justices are not for sale.”

Our neighbors in Ohio, Michigan and Illinois have suffered as the campaign fundraising arms race, single-issue interest groups and partisan politics have sullied their judicial campaigns and spawned unseemly public spats between high court judges. With trial courts deciding multi-million dollar cases, it is predictable that these problems have begun to surface in elections of trial court judges.

Some argue that Indiana’s system of electing trial judges is working well. Consider, however, two events from our state during the first week of March. First is the settlement of a long-running multi-party dispute between the mayor of Muncie and her political allies, the Delaware County Prosecutor and his political allies, and Delaware County government. In a March 6 story printed by the Muncie Star-Press, Muncie Mayor Sharon McShurley stated “It was clear that justice was for sale in Delaware County.”

The same day, the Indiana Supreme Court resolved disciplinary charges against a former LaPorte County Senior Judge who resigned from the bench and from the practice of law. Chief Justice Shepard wrote:

The charges stem from the judge’s conduct in two separate cases. In the first, [it was alleged] that [the judge], when he was the elected judge, suspended a significant portion of a man’s prison term ... in

exchange for the man's father's \$100,000 contribution to two court programs. [T]he second allegation charges that [the judge] ... instituted contempt proceedings against the Sheriff of LaPorte County for having lawfully turned over [the judge's] daughter-in-law's nephew to Michigan authorities, then continued to preside over the nephew's Indiana case."

Overall, Indiana's judicial system is performing well. In 2007, more than 1,800,000 cases were filed and more than 1,800,000 cases disposed of by some 450 judges and magistrates at the trial court level. More than 2,000,000 cases are likely to be filed this year. These cases range from parking tickets to capital murder, from small claims disputes to multi-million personal injury verdicts, from divorce and child custody to adoption to decedent's estates. The system can work only with judges who are impartial and independent.

Why change from elected judges to merit-retention? In a world of special-interest attack ads and single-issue politics, partisan elections are no longer the best way to select judges. This is not to impugn the ability or integrity of elected judges; it is simply a recognition that economic, technological and political circumstances coalesce to urge modification of our judicial selection process.

Professional and academic leaders have found that merit selection produces more independent, higher quality judges than the partisan political process. It also is clear that merit selection offers the surest route to a diverse bench. For women and persons of color seeking a judicial career, the best opportunity to become a judge is through merit appointment. Statistics demonstrate that merit selection is at least 40% more likely to create a diverse judiciary than partisan election. The Indiana General Assembly Judicial Study Commission, with a great deal of this research material available to it, recommended just last fall that the merit selection system in St. Joseph County should remain unchanged. Finally, when presented with objective information about the merit-retention process, polling shows that the public prefers merit retention.

Indiana's judges are the umpires on whom we rely to make the often close and difficult calls in disputes that can be the focus of intense public interest and passionate debate. It is imperative that our umpires be free to make calls based on whether the ball is in the strike zone ... without regard to who the pitcher is, who the batter is, or who the opposing managers are.

If our great governmental experiment is to survive, it is beyond dispute that adherence to the rule of law is at its very foundation. If our Constitution is to be anything more than words on paper, courts must protect the unpopular minority; they must be "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement." *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

To those who believe judges are best chosen by partisan elections, consider this hypothetical. Assume that the justices of the U.S. Supreme Court were elected in 1954 rather than appointed by the President with Senate approval. Answer these questions: (a) How would *Brown v. Board of Education* have been decided? (b) Had an elected court declared racial segregation unconstitutional, would its judges have been re-elected? (c) Considering the answers to the first two questions, what kind of country would the U.S. be today?

This is not to say that independence and impartiality are the only important traits for our judges. Our judges must be accountable for their legal decisions and for their personal conduct because it is from the consent of the governed that they draw their power. Trial judges are accountable for their rulings to the Indiana Court of Appeals and Supreme Court. In our three-branch system of government, they should be accountable

to no one other than appellate courts for their legal analysis and rulings. In the administration of their courts and in their personal conduct, however, judges are also called to account.

Court budgets are set by the legislature and governor; those branches check empire-building by judges. Like lawyers, our judges are governed by a strict code of ethics in their personal and professional conduct. Indiana's Commission on Judicial Qualifications permits anyone to lodge a complaint. Judges face far more exacting standards for their personal ethical conduct than members of the legislative or executive branches.

St. Joseph and Lake counties use a "modified Missouri Plan" for selection of Superior Court judges. A nominating commission comprised of three public members and three attorneys, chaired by an Indiana Supreme Court Justice, meets to review applications from those interested in a judicial opening. The commission selects the five top applicants; those names are forwarded to the Governor, who makes the appointment from that slate. Should the Governor fail or refuse to select from the slate recommended, the choice is made by the Chief Justice (in 36 years of our "merit-retention" process, that has never occurred).

In Vanderburgh and Allen counties, Superior Court judges are elected on a "non-partisan" basis. In Marion County, they use a unique process in which the political parties slate eight candidates each; the sixteen candidates then run for 15 spots on the court. In the other 87 Indiana counties (and in Lake and St. Joseph Circuit and St. Joseph Probate courts), judges run in partisan elections.

For the last 75 years *no state* has adopted anything other than a merit-based method of judicial selection. Over this time period, professional and academic thought has united in the view that best governmental practices dictate a judiciary selected, insofar as possible, by merit selection. This view has been endorsed by the Lake County Bar Association, St. Joseph County Bar Association, Indiana State Bar Association, the Indiana Judicial Conference, the National Center for State Courts and the American Bar Association-- and by the League of Women Voters and St. Joseph County Chamber of Commerce. It has the editorial endorsement of the *South Bend Tribune* and *The Indiana Lawyer* as well.

The Indiana State Bar Association has repeatedly endorsed merit-retention for judges, most recently in the summer of 2008 when its board voted to support an effort to create a uniform, statewide plan for merit-retention of trial judges.

Merit-retention, not partisan political election, is the preferred method of judicial selection for those who want trial judges free to make rulings on the facts and the law, and not out of fear or in search of favor. Adopting merit-retention statewide will bring better government; it is a move which will further our pursuit of that "more perfect union" our forefathers began.