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Abstract
The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations.

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Kathleen Hall Jamieson & Bruce W. Hardy

Will ignorance & partisan election of judges undermine public trust in the judiciary?

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.
>
> – Alexander Hamilton, The Federalist No. 78

The judicial branch enjoys higher levels of public trust than the other branches of the U.S. government. "[The Supreme] Court is an especially well regarded institution, and over and over again, polls show that Americans have more confidence in the Court than either the president or the Congress," write political scientists Gregory A. Caldeira and Kevin T. McGuire. "In evaluating the Court's authority, most Americans think that it is exercising about the right amount of political power, and more often than not they believe that the Court is doing a good job."[1] Consistent with this notion, an August 2007 survey by the Annenberg Public Policy Center of the University of Pennsylvania[2] found that 66 percent of Americans trust the Supreme Court a

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1 Gregory A. Caldeira and Kevin T. McGuire, "What Americans Know About The Courts and Why It Matters," in *The Judicial Branch*, ed. Kermit L. Hall and Kevin T. McGuire (New York: Oxford University Press, 2005), 264.

2 The 2007 Annenberg Public Policy Center Judicial Survey was prepared by Princeton Survey Research Associates International for the An-

"great deal" or "fair amount" to operate in the best interests of the American people. Sixty percent of Americans trust the courts in their own state a "great deal" or "fair amount," while only 41 percent of Americans polled trust the president a "great deal" or "fair amount" to operate in the best interests of the American people – the same level of confidence that Americans have in Congress (41 percent).

However, lurking in the data from the same survey are two factors with the capacity to undermine confidence in the judiciary and, with it, public willingness to protect the prerogatives of judges and the courts. Ignorance about the role and function of judges and the courts and partisan campaigning for judicial office each independently threaten public trust in the judiciary. As trust declines, willingness to constrain the judiciary rises.

A first predictor of diminished trust in courts is ignorance about the judiciary. In August 2007, one out of three (32 percent) in a national random sample of the adult population of the United States believes U.S. Supreme Court rulings can be appealed, and under a third (31 percent) knows that the rulings are final. Fewer than one in two (45 percent) believes that a 5 – 4 decision by the Supreme Court produces the same outcome as a 9 – 0 ruling. When the Court divides so closely, 14 percent believes the decision is referred to Congress for reconsideration, 7 percent thinks it is sent back to the federal court of appeals, and a third (34 percent) doesn't know. Forty percent thinks the Constitution permits the president to ignore a Supreme Court ruling if he believes that doing so will protect the country from harm. A little less than half of Americans (48 percent) knows Supreme Court justices usually give written reasons behind their rulings, 9 percent said justices did not give written rulings, and 44 percent did not know. In 2007, only 15 percent of Americans could correctly name John Roberts as chief justice of the United States. The survey did find that a majority of Americans knew something about some judges: two-thirds of Americans (66 percent) could name at least one of the judges on the Fox television show *American Idol*.

With ignorance about the judiciary comes an increased disposition to believe that judges are biased and a reduced tendency to hold that the courts act in the public interest. Those who adopt these views are more willing to allow Congress or state legislatures to impeach judges who make unpopular rulings; they are more likely to believe that when Congress disagrees with the Supreme Court's decisions, Congress should pass legislation saying the Supreme Court can no longer rule on that issue or topic; and they are more likely to believe that if the Supreme Court "started making a lot of rulings that most Americans disagreed with it might be better to do away with the Court altogether." This finding is consistent with a conclusion drawn by Jamieson and Michael Hennessy from the 2006 Annenberg Judicial Survey. Using structural equation modeling, they found:

> [I]ncreases in respondents' knowledge decrease[d] their belief that judges are motivated by self-interest, that they fa-

nenberg Foundation Trust at Sunnylands. A total of 1,514 adults 18 and older were surveyed by phone from August 8, 2007, to September 2, 2007. The survey has a margin of error = ±3% for results based on full sample. Additional data from this and other surveys can be found at www.annenbergpublicpolicycenter.org.

vor the more affluent members of society, that courts have too much power, and that judges are too affected by the political process. These four types of perceived judicial bias – self-interest, economic bias, power imbalance, political influence – … are all *negatively* associated with trust in courts. . . . [A] drop in trust and an increase in the four judicial biases predict the beliefs that the president *can ignore Supreme Court decisions* and that judges *should be impeached* on the basis of unpopular rulings.[3]

A second factor predicting reduced trust and willingness to circumscribe judicial prerogatives is living in a state that elects judges through a partisan process.[4] By one estimate, 89 percent of state judges are selected by some form of election.[5] In some of these instances, judicial campaigns have become high-stakes contests, bringing in large sums of money and attack-driven advertising campaigns. In 2006, a record $16 million was spent on advertising in state supreme court races in ten states.[6] Professor Anthony Champagne's study of judicial advertisements found that ads commonly attacked opponents, portraying them as "corrupted by campaign contributions, the tools of special interests, and soft on crime."[7]

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In recent years, the number of judicial candidates airing attack ads has increased. "In Alabama, Georgia, and Nevada candidates hurled insults and accusations that would have been unbecoming even in congressional campaigns, much less in campaigns by individuals whose judicial temperament is an important qualification for office."[8] A report by Justice at Stake found that in 2004 nine out of ten negative judicial ads were sponsored by political parties and special interest groups. By 2006 the candidates were sponsoring 60 percent of negative advertisements.[9]

While the level of attack could be a cause for concern in its own right, the existence of serious distortions in these ads is troubling as well. In a 2006 report by the Annenberg Public Policy Center's FactCheck.org, Deputy Director Viveca Novak provided illustrations of such distortions:

3 Kathleen Hall Jamieson and Michael Hennessy, "Public Understanding of and Support for the Courts: Survey Results," *The Georgetown Law Journal* 95 (2007): 902; original emphases.

4 Sixteen states elect at least some judges in an environment in which there are strong partisan cues, including, in some states, party identification on the ballot. They are Alabama, Illinois, Indiana, Kansas, Louisiana, Maryland*, Michigan, Missouri, New Mexico, New York, North Carolina**, Ohio***, Pennsylvania, Tennessee, Texas, and West Virginia.

*Maryland trial judges run in contestable nonpartisan general elections but are nominated in party primaries. A candidate in Maryland can cross-file in both the Democratic and Republican primaries.

**Although North Carolina moved away from an explicitly partisan ballot in 2002 some partisan campaigning has continued.

***In Ohio, candidates appear on the ballot without party affiliation, but their selection and campaigns are otherwise partisan.

5 Roy A. Schotland, "New Challenges to States' Judicial Selection," *The Georgetown Law Journal* 95 (2007): 1092.

6 James Sample, Lauren Jones, and Rachel Weiss, *The New Politics of Judicial Elections 2006* (Washington, D.C.: Justice at Stake, 2007); www.justiceatstake.org.

7 Anthony Champagne, "Television Ads in Judicial Campaigns," *Indiana Law Review* 35 (2001 – 2002): 670.

8 Sample, Jones, and Weiss, *The New Politics of Judicial Elections 2006*, 8.

9 Ibid.

> One ad, for example, falsely implied that a candidate for the Kentucky Supreme Court paroled a rapist who 12 hours later raped a 14-year-old and forced her mother to watch. Another portrayed a Georgia candidate as soft on crime, even though independent reviews found that she usually sided with the prosecutor and was tough on defendants in death penalty cases. And a third invited viewers to believe, wrongly, that an Alabama candidate got nearly $1 million from oil companies to run negative ads against his opponent.[10]

The public finds some of the practices associated with judicial elections worrisome. Even though a solid majority (64 percent) endorses judicial election, the 2007 Annenberg survey found that 69 percent thinks that raising money for campaigns affects a judge's rulings to a moderate or great extent. These results mirror what Charles Gardner Geyh, professor of law and director of the American Judicature Society's Center for Judicial Independence, calls the *Axioms of 80*:

> Eighty percent of the public favors electing their judges; eighty percent of the electorate does not vote in judicial races; eighty percent is unable to identify the candidates for judicial office; and eighty percent believes that when judges are elected, they are subject to influence from the campaign contributors who made the judges' election possible.[11]

The Annenberg survey also revealed that the public does not clearly distinguish the role of judge from that of legislator. Seventy-seven percent holds that, to a great or moderate extent, state judges should represent the views of the people of their state. Ninety-four percent believes that this is a responsibility of the state legislators. Three-fourths (75 percent) reports that representing the views of the people of their state applies to both state judges and state legislators. When asked whose job it is to interpret the laws of the state and the state constitution, 91 percent said state judges, while 87 percent reported that, to a great or moderate extent, it is the state legislators' responsibility. Fifty-six percent of Americans believe that expressing their views on controversial issues is a responsibility that applies to judges, while 75 percent see this as a responsibility of state legislators.

Multivariate statistical analyses of the 2007 Annenberg survey show that Americans who live in states that hold partisan judicial elections are more distrusting of the courts than Americans who live in states that do not hold such elections.[12] Specifically, after controlling for gender, age, race, education, political party identification, and news media use, living in a state that holds partisan elections[13] is negatively related to trusting the courts in that state to operate in the best interest of the American people. Participants living in a state that holds partisan elections are also more likely to believe that courts "legislate from the

10 Viveca Novak, "Judicial Campaigns: Beginning to Look a Lot Like Congress: Would-be judges employ big bucks, TV ads and questionable attacks," November 20, 2006; available at http://www.factcheck.org/judicial-campaigns/judicial_campaigns_beginning_to_look_a_lot.html.

11 Charles Gardner Geyh, "Why Judicial Elections Stink," *The Ohio State Law Journal* 64 (2003): 47–79.

12 For a detailed description of the multivariate analyses, see the Annenberg Public Policy Center report "Partisan Judicial Elections Foster Cynicism and Distrust"; available at http://www.annenbergpublicpolicycenter.org/NewsDetails.aspx?myId=241.

13 See Geyh, "Why Judicial Elections Stink."

bench" and less likely to believe that the courts are "fair and impartial" in their rulings and "interpret the law." Finally, those living in a state that holds partisan elections were more likely to agree that "judges are just politicians in robes." All of these results are statistically significant and hold in the presence of control variables. Taken together they suggest that partisan judicial elections have the capacity to erode public trust in the judicial branch.

This erosion of trust is significantly related to support for punitive policy decisions. Controlling for gender, age, race, education, news media use, and knowledge about the courts, analyses of the 2007 Annenberg survey show that a lack of trust in the courts is significantly related to willingness to: (1) allow Congress or state legislatures to impeach judges; (2) afford Congress the ability to pass legislation saying the Supreme Court can no longer rule on an issue or topic if Congress disagrees with the Court's rulings; and (3) believe that it might be better to do away with the Supreme Court altogether if it "started making a lot of unpopular rulings."

Responding to concerns such as these, retired associate justice of the U.S. Supreme Court, Sandra Day O'Connor, recommends[14] that states do away with judicial elections and adopt a merit-selection process in which an independent committee of citizens recommends qualified candidates for appointment by the governor. States that currently elect judges are unlikely to forgo that practice, however. The August 2007 Annenberg survey found nearly two-thirds (64 percent) favor the direct election of judges, while a merit-selection process is favored by less than one-third (31 percent).

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Justice O'Connor's second suggestion focuses on implementing civic education programs about the judiciary, a recommendation consistent with our findings that knowledge about the courts increases trust in this branch of government. Analyses of the 2007 survey suggest that civic education can increase knowledge about the courts. Fifty-three percent of those surveyed reported taking a class in civics or a course that focused on the U.S. Constitution or the judicial system. Controlling for gender, age, race, education, and news media use, these individuals were significantly more knowledgeable about the courts than those who had never taken such a class. As our analysis predicts, increased knowledge predicted increased trust in the judiciary. And, as outlined above, with increased trust comes a heightened disposition to protect judges from impeachment for unpopular rulings and the judiciary from stripped jurisdiction. Trust also increased the belief that the Supreme Court should be retained in the face of unpopular rulings.

14 Sandra Day O'Connor, "Justice for Sale," *Wall Street Journal*, November 15, 2007.