

JUDICIAL PERFORMANCE EVALUATION

REBECCA KOURLIS[†]

Good afternoon, and thank you. I have the unenviable task of following Justice O'Connor, and having spent most of my professional life trying to live up to her example, I know quite clearly that is not even close to possible. The only area in which I have a chance is that while I did not grow up on a ranch, I married into one. I am quite certain that Justice O'Connor, in her day, was a lot better at moving cattle than I was, but I would bet I have her beat with sheep because we have both sheep and cattle. So, that is my sole claim to fame.

I am going to talk to you, just very briefly, about judicial performance evaluation (JPE) and voter education. But before I do that, I want not only to express my thanks to Wayne State University and to you, Dean Ackerman, but also to the American Board of Trial Advocates (ABOTA) and to the speakers who came here today to speak with you. They are an extraordinary group with an unparalleled commitment to this issue. They braved storms and probably will continue to do so until they get home. They are indeed a panel of renowned national experts, in addition to Justice O'Connor. Thank you all for your passion about this issue.

Now, let me turn to two aspects of merit selection that we have already touched on this morning, but which I would like to explore in more detail. As Justice O'Connor has noted, some of the opposition to merit selection lies in a concern that somehow nominating commissions can be captured by interest groups and a further concern that citizens are losing their vote. There are antidotes to both of those concerns that not only address them, but supersede them and underscore the benefits of merit selection even more clearly. With respect to the nominating commission question, if the commission is appointed successively by different officials, if it is composed of a heavy quotient of non-lawyers, and if its proceedings are transparent, the problem is solved. And, it is solved in a way that can inspire public trust and confidence. I recommend that for your consideration on whatever path you decide to take in the future. The question of disenfranchisement or losing a vote is indeed what occasioned President Jackson's populist march across the

[†] Executive Director, Institute for the Advancement of the American Legal System, University of Denver. B.A., 1973, Stanford University; J.D. 1976, Stanford University. Justice, Colorado Supreme Court, 1995-2005.

country in the 1800s that reinstated judicial elections. He intended to return to the people the right to vote for their judges in order to keep the judges accountable. That same sentiment surges up in the merit selection debate. So, I want to talk about why people are NOT losing their vote, and why a merit selection system, in fact, assures more accountability of judges in the right way.

I want to touch on my personal experience in this context because I am the product of a Merit Selection system. I was appointed to the trial court bench; I stood for retention on that bench; and I went through judicial performance evaluation. I was then appointed to the Colorado Supreme Court; I went through judicial performance evaluation; and I stood for retention on that bench, as well. At the Institute for the Advancement of the American Legal System (IAALS) that I lead, we have studied JPE in some depth. We have done surveys, we have collated data, and we have talked to judges and to performance commissioners. We hold monthly calls with JPE program directors around the nation; we convened a national conference on JPE, and we are continually studying ways to improve it.

As a result of my personal experience, and as a result of the analysis and study IAALS has undertaken, I can report to you that JPE works. It serves three fundamental purposes: First, it gives judges feedback, and that's important. When I first went on the trial court bench, I had no idea whether I was doing well or not. So, I created this little thing that I called my "Pizza Hut survey" that I put on the front desk of the clerk's office. It was at a time when Pizza Hut had a similar survey on every table. My thought was that people could fill it out anonymously, put it in a little locked box and give me feedback about whether I was treating people fairly, whether they believed that they were being treated fairly, and whether I was moving the docket in a way they thought was appropriate. It was my own little judicial performance evaluation survey, but I did not get many takers. That kind of feedback is hard to come by, and it is very important. The truth is that judges seldom get any kind of negative feedback. Everybody laughs at your jokes when you are a judge, and when you are not a judge anymore, the same jokes are not nearly as funny. People only tell you how wonderful you are and you know it is not all true. So, that is purpose number one—providing judges with useful feedback about their performance. Purpose number two, and the most important from a system perspective: JPE provides the voters with information about the judges and whether the judges are doing their job well. Finally, JPE informs voters about what a good judge should be doing and what criteria are important.

Let me pause here for a moment to explain what judicial performance evaluation looks like. It is an official program run by an

independent entity that collects data about each judge. Among the data collected are quantitative case management and docket data, along with qualitative survey data from the people who appear before that judge be they lawyers, litigants, jurors, expert witnesses or law-enforcement personnel. All those individuals complete survey questionnaires that focus on such things as the following: was the judge prepared when he or she showed up on the bench; was the judge respectful of the people in the courtroom; did the judge move the docket along efficiently; was the judge timely in his or her rulings; and were those rulings clear and understandable? In other words, the questions focus on process, not on outcome. They teach both the public and the people going through that survey process the qualities that we value in a good judge. A judge's performance on the bench is not about one controversial opinion, or one sentence that he or she imposed. Instead, it is about whether that judge is providing procedural fairness. So, not only do the judges get information that allows them to be better judges, but the voters get information that allows them to be more informed voters. In Colorado, where JPE has been in place since 1987, evaluation information is readily available on a public website, as well as in what we call a "blue book" that is delivered to every voter in Colorado. At the back of this book, there is a section titled "Judges" and it includes the narrative summary and recommendation for each judge in that judicial district who is up for retention. It collates the survey information together with the recommendation from the judicial performance commissioners. Arizona, to which Justice O'Connor referred, has a wonderful Judicial Performance Evaluation System and its website is very accessible. "You be the judge" is the moniker: a voter can go on the Arizona Supreme Court website and get access to JPE information concerning all of the judges on the Arizona ballot at any given period in time. So, voters have access to relevant, thorough, and appropriate information about the judges on their ballot in a retention system with JPE.

Sometimes, the people who are the most opposed to JPE are the judges themselves. They worry that it will undermine their judicial independence or that it will chill their ability to make good decisions or to treat the people who appear in their courtrooms appropriately. To test such concerns, IAALS surveyed Colorado judges. I think you will be surprised at what emerged. Now, keep in mind of course that JPE is not a new development—it has been in place in 1987. But listen to these statistics: over 85 percent of the trial judges and 50 percent of the appellate judges said that JPE has been significantly beneficial to their professional development. Further, a majority of the judges felt that JPE does not decrease judicial independence, and remarkably about one fourth of them think that it enhances judicial independence. Judges want

to assure that there is a wide range of data being collected so that it is comprehensive, and not just a snap shot that might run the risk of capturing only disgruntled litigants or lawyers but rather a deep and wide data source. That is their primary concern in this process. Then, they suggest that the key to making this process work is assuring that the public understands it, that the public makes use of the data when they vote in retention elections, and that they trust the process. Together with the League of Women Voters, IAALS did another study in Colorado and determined that, indeed, if voters knew that we had a judicial performance evaluation system, they would use the information and they would trust it. Unfortunately, the current number of voters who know about the system and use it is not high, but we are working on it.¹ They trusted the fact that the judicial performance commissioners were looking at the right data and making good decisions; and thus, the voters could turn to that data and those decisions to guide them. That is what an informed vote should look like.

So, when Justice O'Connor talks about the fact that politics do not belong in the court room, and that money does not belong in the court room because we need one safe place, the answer is merit selection. If we couple that with the public's legitimate desire to have some accountability from the bench—some nexus where the public and the judges come into contact with one another that allows the public to exercise judgment about those particular judicial candidates—then I suggest to you that judicial performance evaluation is part of the right kind of merit selection system. When that is further combined with an open and transparent nominating commission process, the concerns about merit selection are answered. So, together with Justice O'Connor, and under her leadership, I suggest the time is now for all of us to be examining this issue and reevaluating the best way to choose our judges, particularly in the wake of *Caperton*² and *Citizen's United*³ and the statistics about campaign spending. We can no longer leave this process to chance. It requires leadership. It requires the kind of commitment that everybody in the front row has shown by being here today to talk to you and to urge you to look carefully at your own process with an eye toward

1. In 2010, the Institute for the Advancement of the American Legal System is participating in a public service announcement campaign designed to inform voters about JPE and where to obtain access to the data. We are doing pre- and post- polling, so we will be able to determine whether the effort is successful. If it is, other states may be able to adapt it to their needs.

2. *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009).

3. *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010).

change. I thank you for your attention and interest, and I urge you to become involved in moving this state toward merit selection.