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Chapter Six

The Washington State Court System

David May

Introduction

MANY CITIZENS PROBABLY CONSIDER it the primary function of the judicial branch to resolve disputes. They might further suppose that in the interests of fairness, judges must be isolated from the pressures of public opinion and ideological bias, and that, ideally, judges should simply declare the law without imbuing it with any particular political content. This view, which supposes that judges act as mere oracles of the law, represents one of the many, often polar positions held in American society concerning the role of judges and law in this country. While it may be appealing to imagine that judges are apolitical sages of the law, in reality they frequently are significant political actors, making important public policy choices.

Although law and politics may be conceptually distinct in the minds of many, they actually share many practical similarities. Washington State judges exercise broad powers of judicial review, and, in courts with discretionary jurisdiction, the selection and denial of cases is a politically charged process. Moreover, for the vast majority of judges in the state who are elected, the process of their selection and retention requires that they be, to some degree at least, political creatures. Thus, this chapter examines the factors that influence Washington judges' interpretation of the law and the exercise of their judicial role in the state.

Some of the factors that influence the role of Washington judges include: the structural components of the system, i.e., how the courts of Washington are organized; how judges are selected and courts are administered; and, perhaps most importantly, how courts interact with other political and social institutions, such as the state's executive and legislative branches and powerful interest

groups and professional organizations. How these and other factors combine to create the context in which judges are either more or less likely to act in a policy-making manner, and how such action impacts law and public policy in the state of Washington, is the subject of this chapter.

Structure of the System

Judicial Administration

Composed of courts arrayed in a hierarchically ordered, four-tiered configuration, the Washington court system is comprised of trial courts and appellate courts, including the Supreme Court of the State of Washington in Olympia. These courts involve more than 400 judges. In addition, there are hundreds of attorneys and thousands of citizens who are involved in cases or the process of jury service. All of these people and activities require administrative support, which is provided by support agencies and personnel totalling about 3,000 people. Judicial administration in Washington includes everything from reform efforts and research requests to creating and maintaining court calendars. Records and documents produced must be carefully catalogued, filed, and archived by court clerks, county clerks, the reporter of decisions, court reporters, bailiffs, and law librarians. The court administrator oversees the entire process.[1] Although the administration, organization, and maintenance of the state's judicial system is a monumental task, it is undertaken for very little cost to the state. The entire budget for the judicial system, which has remained relatively consistent over time, is less the 0.3 percent of the total state budget. Certainly there are additional costs borne by local governments for the courts in their jurisdictions, but the statewide administration of justice is still a very good value for the dollar.

In addition to the macro-administrative needs of the system, individual judges at all levels require on-site administrative help. Law clerks, court reporters, court commissioners, visiting judges, law librarians, administrative assistants, and legal interns provide much needed administrative assistance to judges. Finally, to assure that sufficient judicial independence is maintained and that ethical standards are observed, the Task Force on Canons of Judicial Ethics and the Commission on Judicial Conduct oversee the conduct of judges and lawyers in the state. The Commission on Judicial Conduct is perhaps the more important of the two.[2] It was established by constitutional amendment in 1980 to oversee the ethical behavior of judges without having to utilize drastic measures of impeachment or other avenues of removal through the legislature. The commission investigates complaints and, in its administrative and oversight capacity, recommends to the Supreme Court the censure, suspension, or dismissal of judges. The commission can also recommend the removal of a judge for serious disabilities that prevent him or her from performing the duties of office.

Trial and Appellate Courts

As in most other judicial systems, Washington's courts can be divided into *trial* and *appellate* levels. To understand the judiciary, one must understand the important differences between these types of courts and something of their internal workings.

Trial and appellate courts generally perform very different functions in a judicial system. In simple terms, trial courts try fact. They are concerned with what events can be shown to have happened and who might have caused them. In most trial courtrooms, a single judge presides. He or she is the final say in what happens in that courtroom. A trial judge must be able to think quickly and make crucial decisions about evidence, legal motions and the law. For minor affairs—traffic cases for example—the judge alone may be in the position of deciding guilt and innocence and assigning a penalty. In more important matters, juries are selected to sift through competing versions of the facts and judges act as impartial overseers of the process. Trial courts are the most familar to the general public, thanks in part to television and cinema.

Everyone who loses a case in a trial court has a right of initial appeal, meaning that they can request an appellate level court review of the trial proceedings. However, the appellate review will not likely be concerned with the facts brought forth in the original trial. Appellate courts and judges are relatively unconcerned with ascertaining facts and usually rely on the facts established in the preceding trial court. Rather, appellate courts deal almost exclusively with questions of law and its application and constitutional analysis and precedents. These courts determine if all participants in the trial court followed the rules in making their case and if the judge applied the law correctly. Appellate courts do not involve juries, nor do they view evidence or make inquiries of witnesses. Instead, the cases they review turn on arguments about the meaning of the law. In written and oral arguments, the two sides present their interpretations of the meaning of the law and how it should be applied to the matter at hand to a panel of appellate judges. In Washington State, appellate courts consist of from three to nine judges who act in concert, collegially, to determine the outcome of disputes.

After the record has been reviewed and the arguments heard, the appellate court retires to deliberate and eventually produce a written opinion. Written opinions are usually required when decisions are rendered, although a written opinion is not mandated in relatively unimportant cases at the court of appeals level. If appellate courts find an error in the application of the law, they may simply reverse the lower court decision and dismiss the case or remand it to the trial court for further consideration. These decisions are reached and the opinions are written in a very different environment than the trial court. Because there is considerably less time pressure on appellate courts to resolve cases quickly, they may deliberate at length on each case before them.

As appeals rise through the judicial hierarchy, the decisions made become increasingly significant. Higher-level decisions are binding on the courts below. If a case reaches the state's Supreme Court, the decision rendered by that court establishes a precedent to which all other courts in the state must adhere.

Trial Courts

Trial courts populate the bottom tier of Washington's judicial system. At the lowest level of this tier are *courts of limited jurisdiction.* Included in this category in the state are *municipal* and *district courts.* Municipal courts, established by cities or municipalities, include both professional and lay judges and include traffic violations bureaus (traffic court). District courts represent county-level judicial bodies. Hearing the bulk of the state's cases, these lowest-level courts perform a vital judicial function. From these initial trial courts there is a right of appeal to the next level, the *superior courts.* The superior courts each oversee one of thirty-one state-mandated judicial districts. These courts function as both trial courts for large cases and as courts of appeal for cases arising from courts of limited jurisdiction.

Washington's courts of limited jurisdiction employ approximately 150 professional judges, each of whom has obtained a law degree and has passed the Washington State bar exam. Approximately 100 professional judges work in district courts, and the remainder preside over municipal courts. These judges are elected to four-year terms, through non-partisan elections within the geographic jurisdiction of the courts on which they will serve. In addition to the ranks of professional judges, there are also non-professional or lay judges serving in the state. There are approximately thirty such judges (or commissioners, as they are known in some municipal courts), who primarily oversee traffic court cases. These judges may be elected, but are most frequently appointed by city councils or county commissioners. Courts with non-professional or lay judges operate as courts of no record, meaning that they do not produce a written record of the proceedings.

Altogether, the total staffing level for courts of limited jurisdiction, including lay and professional judges, is about 180 judges. The subject jurisdiction of these courts is broad, extending to both civil and criminal cases for misdemeanors, gross misdemeanors, criminal traffic cases (e.i., DUI cases), and preliminary hearings in felony cases. The civil docket of these courts may include damage and contract claim suits up to $50,000 and requests for orders of protection, as well as traffic and parking infraction cases.

Courts of limited jurisdiction are the final stop in the judicial system in most instances. The number of cases filed in these lowest courts has remained relatively stable in recent years, consistently representing about seven of every eight legal cases filed in the state. More than 1.29 million limited jurisdiction cases were filed in 2001. Roughly one-quarter of Washington's citizens interact in some fashion with the court system each year. Non-parking judicial dispositions generated more than $126 million for state coffers in 2001. In terms of caseload, revenue, and the administration of justice, Washington's courts of limited jurisdiction obviously play a vital role in state government.

Superior courts, also called courts of general jurisdiction, hear far fewer cases than courts of limited jurisdiction. Cases are heard as mandatory original jurisdiction cases, such as juvenile justice and felony cases, or are heard on appeal from courts of limited jurisdiction. They represent cases that are too large to be heard at a lower level or important cases appealed from lower courts. In the case of appeals from municipal or lay courts of no record, appeals are frequently heard *de novo* ("over again")—i.e., treated as entirely new cases. Appeals from professional courts and district courts are heard and decided on the written or video record from the initial trial court. Superior courts are all courts of record. The 150 judges of the superior court system are all professional judges, elected by non-partisan ballot to four-year terms of office.

These courts of general jurisdiction are responsible for trying felonies for which the possible sentence exceeds one year in prison, and civil suits in excess of $50,000. In recent years, the number of cases filed in superior courts has remained relatively consistent. In 2001, Washington superior courts resolved some 274,000 of approximately 280,000 cases filed.[3] The largest percentage of these actions pertained to civil matters (38%), followed by domestic issues (15%) and criminal cases (13%). The remaining 34 percent was composed of probate, guardianship, mental illness, adoption, and juvenile cases.

Appellate Courts

While the superior courts and the courts of limited jurisdiction function primarily as trial courts, the *Court of Appeals* and Washington's *Supreme Court* function exclusively as appellate courts. The Court of Appeals serves as an intermediate appellate body, functioning much like the courts of appeal in the federal system, screening the Supreme Court from excessive caseloads, and serving as the final adjudicatory level in most cases. The Court of Appeals must review all properly filed appeals from lower courts. In practice, the court hears all appeals from superior courts that do not fall within the mandatory jurisdiction of the Supreme Court.

The Court of Appeals system is divided into three geographic jurisdictions and judges are drawn separately from those three areas. Each of the twenty-two total Court of Appeals judges is elected for a six-year term of office though non-partisan election. Division I of the Court of Appeals is comprised of nine judges who are elected from northwestern Washington[4] and sit in Seattle. Division II is located in Tacoma and draws judges from western and southwestern

Washington.[5] Division III is located in Spokane; its judges are drawn from the counties of eastern Washington.[6]

The caseload of the three divisions varies somewhat, with Division I consistently hearing the most cases of the three, averaging 1,946 cases per year between 1997 and 2001. Division III heard the fewest cases during the same period, with 884 cases annually on average; and Division II fell in the middle, averaging 1,348 cases per year. In recent years, the caseload of the three divisions combined has remained remarkably stable. In 2001, 4,199 cases were heard. They were split relatively evenly between civil and criminal appeals, averaging 53% criminal and 47% civil across the three divisions.

The final piece of the structural puzzle for Washington courts is the state's court of last resort, the Supreme Court of Washington. The nine justices who sit on this highest court have a large and varied jurisdiction that is defined both by the state constitution and by statute. Justices are selected on a state-wide, non-partisan ballot and serve staggered six-year terms. The only requirement for service is admission to the Washington bar. The court has original jurisdiction over any petitions or charges against state officers and a mandatory jurisdiction over all capital case appeals in the state. In other instances, cases decided by a lower court in the state may be appealed to the Supreme Court if the total monetary value of the case exceeds $200, but these appeals are reviewed only at the discretion of the court itself. The court hears and decides all cases *en banc*, meaning all nine justices participate, although preliminary motions and petitions for review are heard by a five-member panel of the court.

The Supreme Court acts as the final arbiter of justice in the state. Its nearly 140 annual written opinions appear in *Washington Reports* and provide citable precedent for lower courts, state officials, and the Supreme Court itself. It is only the very exceptional case that can be appealed from this court to any outside court, such as the United States Supreme Court. Cases dealing entirely with state law are generally not subject to review by any other body. In its interpretation of state statutes, the state constitution or its administrative regulations, the Supreme Court acts in most instances as a true court of last resort. In addition to this profound legal responsibility, the Supreme Court has significant administrative responsibility over lower courts in the state. Lower courts may have limited autonomy on many issues of policy and procedure, but those policies must be within the guidelines established by the Supreme Court. The court serves this function by supervising the legal profession and is responsible for overseeing requirements for admission to the bar and defining and enforcing legal ethics. The justices on the Supreme Court approve the "Rules of Professional Conduct." They oversee application of those rules through the Washington State Bar Association and enforce penalties for violations, including disbarment, suspension, and censure.

Although the administrative responsibilities of the court are decidedly important, the primary duty of the Supreme Court is to resolve disputes. While the total number of cases decided by the Washington Supreme Court each year may appear small by comparison to other courts, the import of these cases and the lasting impact of the decisions rendered most certainly warrant the careful attention given to each case. The Court receives an average of nearly 1,500 petitions for review each year. This number is comprised of mandatory appeals, petitions for discretionary review, mandatory review of death penalty cases, attorney admission and discipline cases and requests from federal court for review. Some of the categories, such as review of capital cases, are usually a relatively small component of the overall court docket (e.g., only six were heard in 2001), but they can be important nonetheless.

As with other Washington courts, the Supreme Court's caseload also has remained relatively stable in recent years. Between 1997 and 2001, there was an average of 1,392 petitions filed annually, with a low in 1998 of 1,221 filings and a high of 1,557 in 2000.[7] The high court generally disposes of all filings each year, holding few cases over from one year to the next.

The number of opinions produced annually by the Supreme Court varies considerably. Types of cases brought before the court dictate the types of dispositions required, with the largest, most significant, and most interesting cases receiving full written opinions. The opinion-writing process is enormously time consuming and difficult. Supreme Court opinions are very important documents and become the citable precedent for future cases. They also figure as a means for the justices to explain their reasoning to the citizenry. Between 1997 and 2001, there was an average of about 131 opinions handed down by the court each year, with as many as 148 in 1998 and as few as 105 in 2000. Moreover, there were additional dissenting and concurring opinions also authored by one of more justices.

No judge in an elective system such as in Washington can act entirely autonomously or be totally insulated from the pressures of public opinion. Even at the Supreme Court level, the decisions rendered and opinions produced must be somewhat cognizant of public attitudes and preferences. In a system that relies on democratic input for its legitimacy, responsiveness to that input is required of all elected officials, including judges. If a judge deviates too far from the general public conception of the proper meaning of the law, he is inviting public displeasure, which in the next election might translate into nonreelection in favor of someone else perceived to be more in line with the electorate's views.

At the other extreme, however, any judge who seems too responsive to the expressed desires of particular groups might also be replaced at the next election. The judiciary is not immune to the efforts of interest groups to achieve particular policy goals, who may pursue their goals through the election of judges who are sympathetic to their causes. But if judgments appear to be too

influenced by special interests and not guided by an authentic understanding of the law, arrived at independently, such a judge faces the prospect of not being reelected.

Paradoxically, perhaps, the very people who would want impartial judges elected to the bench would probably find the link between public opinion and judicial decisions tolerable, if not actually expected and encouraged. Public opinion thus can be seen as providing yet another factor to the framework within which judges act and decide cases. The institutional legitimacy of the courts as well as the personal careers of individual judges and justices is rooted in no small measure in their willingness and ability to balance the sometimes conflicting public demand for responsiveness and independence on the part of judges. However, the system for selecting and retaining judges in Washington—through non-partisan elections—creates problems in the relationship between democratic accountability and judicial independence even as it tries to solve others (Baum 1995; Dubois 1980).

Judicial Selection

The Washington State Constitution declares in Article I: "All political power is inherent in the people and governments derive their power from the consent of the governed." As with other government officials, judges in Washington are elected by the popular vote of the people, although in a slightly different way. A 1912 amendment to the constitution established a system of non-partisan elections for all judicial officers, replacing the previous system that required nomination by a political party for a candidate to appear on the ballot. The only general exception to the rule of elected judges occurs at the municipal-court or traffic-court level where judges may be appointed by county commissioners or mayors. Appointments may also be made by executive branch officials at the state, county, or municipal level in cases where a vacancy is created by the death, resignation, or recall of an elected judge. However, a judge appointed for one of those reasons must stand for reelection in the next general election.

Electing judges is thought to create a more direct link between the people and those interpreting and applying the law, thus increasing democratic accountability of state government. At the same time, however, the system attempts to work in the opposite direction by removing partisanship from the equation[8] and by thus assuming that judging and politics are distinct activities. In actuality, however, removing partisan or ideological labels from the ballot does not remove partisan calculations from the minds of the voters (Baum 1995). Voters often use proxy measures or "information shortcuts" such as endorsements or interest groups' support to stand in the place of partisan or ideological labels (Barber 1971; Dubois 1984; Welch and Bledsoe 1986). Voters may also try to infer partisanship through assumptions about ethnicity or sex. While

these proxy measures can provide some information, the accuracy of that information can vary considerably. The assumption, for instance, that minority candidates are more liberal may be a convenient generalization, but it may be incorrect in particular cases. Nonrelated factors, such as name recognition or ballot placement, probably also play frequent and pivotal roles in voting patterns for judicial positions.[9] For example, in both the 1996 and 2000 election cycles, candidates whose names appeared first on the ballots won all but one contested election. Ironically, the single greatest effect of the system of nonpartisan elections may be caused by removing important information from the electorate about judicial candidates. This results in increased reliance on less precise, proxy measures of partisanship, increased voter roll-off, and decreased democratic accountability in the elected officials (Klein and Baum 2001; Schaffner et al 2001; Sheldon and Lovrich 1983).

The attempt to disconnect law and politics in the election process is probably best expressed by Washington's canons of judicial ethics. Canon 7 of Washington's Code of Judicial Conduct, for instance, prohibits candidates for judicial office from declaring a political party affiliation during the election. It also describes parameters for what candidates for judicial office may and may not disclose during a campaign. For example, brief biographies are permitted and simple statements about why a voter should choose a candidate are allowed. Prohibited is any mention of how the candidate might rule on any case presently before the Washington bench or that might occur in the future.

Canon 7 has come under significant scrutiny in recent years. The debate came to a head in 1997 when Justice Richard Sanders was censured by the Judicial Conduct Commission for giving a brief address at a pro-life rally in 1996 and for wearing a red rose at that rally (a widely recognized symbol of the pro-life movement). Sanders' critics claimed that the speech violated the "announce clause" of Canon 7, in that Sanders had in effect declared how he would vote on future reproductive rights cases.[10] In response, Justice Sanders argued that silencing him on this or any other issues would unconstitutionally violate his First Amendment rights to free expression. While Justice Sanders was eventually cleared of the ethics violation charges after a two-year battle, questions of the costs and benefits of Canon 7, and whether it provides any real protection for the judicial system or the public, are still being debated in Washington. In any case, this debate may have been made moot by a recent decision of the United States Supreme Court. In *Republican Party of Minnesota v. White* (2002), that court recently struck down as a violation of the First Amendment a similar "announce clause" in Minnesota's canon of judicial ethics. Whether Washington's restriction would fall in a similar federal challenge remains to be seen. What is clear, however, is that while Canon 7 attempts to remove partisanship and the overt influence of ideology from the judicial function in order to make the administration of justice appear independent of politics, it may actually oppose

the purpose for holding democratic elections. Unless the electorate is able to make a decision between judicial candidates based on meaningful distinctions, it is unclear how the election of judges can be an expression of anything more than the "best guess" of the voters—a system that produces little if any real democratic accountability.

Other judicial selection factors also tend to dilute democratic control over the legal system in Washington. Much happens before an election that is just as important as the election itself (Sheldon and Lovrich 1991). There are actually three sets of actors responsible for selecting judges in the state. While the final decision rests with the people of the state, the selection, recruitment, and screening of judicial candidates takes place elsewhere, often behind closed doors. The Washington State Bar Association and the larger of its county-based counterparts often play a significant role in recruiting judges for all levels of the court system. These bodies identify potential candidates, screen, and evaluate them. For vacancies on the Supreme Court and the Court of Appeals, the Judicial Recommendation Committee of the State Bar Association investigates the background of potential judges, interviews the candidates, and recommends to the governor those judges whom the committee finds to be "well qualified" for appellate appointments. County and city bar groups often play a similar role for superior and other lower-court vacancies, providing names to the governor of the state or to county commissions or to mayors (in the case of municipal courts). While the governor is not obligated to follow the bar's recommendations, the professional group's input in the process carries considerable weight. That the governor's choice for appointed judges almost invariably coincides with the bar's recommendation is another indication of how judicial selection is responsive to important interest groups. Prior to elections, bar associations around the state interview and rate candidates in contested races, particularly those for Supreme Court and the Court of Appeals, publishing the results for the general public.

Gubernatorial appointments to fill vacancies on the bench can be a more informal and often an even more political process. Decisions in cases of appointment turn usually on consultation between the governor, his or her staff, members of the state bar association board of governors, and trusted political and judicial friends. A "well qualified" rating from the bar, some previous partisan activities in the state, endorsements from important interest groups,[11] and the ability to get reelected are usually necessary for appointment to an appellate bench. They can also be made as largely patronage appointments. This mirrors the way similar non-partisan election systems work across the country, where an average of two out of three justices reach the high bench of their state through appointment first and as many as 95 percent of these appointees are thereafter retained by the electorate (Ryan et al. 1980).[12] The chances governors receive to appoint judges to the high court varies. All of the current Supreme Court justices have been elected by the voters with only one, Justice Bridge, having first been a gubernatorial appointee. However, the importance of the vacancy appointment process should not be underestimated. These appointments are made with an eye to reelection possibilities and political constituencies.

At the primary and general election stages, judicial candidates selected and screened by others run on a non-partisan ballot and "the people" are expected to act as the final voice in selecting judges. However, it is not unusual for judicial candidates to run unopposed, with only a single candidate filing and appearing on the ballot. In the 2000 election, for instance, only nine of the 52 judicial positions were contested elections. If a candidate for a judicial position is running unopposed or receives more than half of the total votes cast in the primary, he or she is elected to the position and does not have to run in the general election. If three or more candidates are running and no one candidate receives more than half the votes, then the two receiving the most votes face each other in the general election.[13]

In general, however, even contested judicial elections suffer from significantly reduced voter participation or voter "roll-off," with fewer people voting in them than vote in the partisan races on the same ballot. The lack of political substance in judicial races, as required by Canon 7, undoubtedly decreases voter enthusiasm for judicial elections, as does the nonpartisan nature of the system and the lack of information available about the candidates (Klein and Baum 2001). The significant number of uncontested judicial elections probably serves also to depress turnout and participation, since statistically those elections that are contested have less roll-off than those that are not.[14] These general trends hold true for even the highest court in the state. Uncontested elections serve as a source of yet another problem in the system.[15]

Beyond the vast amounts of advertising that candidates supply, most voters in judicial elections depend for information on the voter's guide that is published by the secretary of state's office for each general election. The guide contains information on each candidate for judicial office as allowed under Canon 7, and is generally considered to be a source of reliable information about the candidates. As fewer elections are contested, however, the voter's guide becomes less valuable because it is not published until after the primary has selected the "winner." Thus, for the primary at least, voters lack a source of quality information on which to base their choice. In that absence, interest group politics, political advertising, and word of mouth tend to be the only guidance available. These voting cues and information shortcuts may lead voters to choose candidates on the basis of group ignorance rather than personal knowledge (Sheldon and Lovrich 1983a; 1999).

Whatever its causes, roll-off should be viewed as a problem for a system designed to produce some measure of democratic legitimacy and accountability, particularly at the highest level of the judiciary, where judges are more often

asked to decide cases with important public policy implications. Even beyond arguments for democratic legitimacy, it seems that the people of Washington should care about the opportunity to select those individuals who will serve, largely without supervision, as the final arbiters of the law in the state. However, that is demonstrably not the case. In the 2000 election, for example, there were four Supreme Court positions on the ballot (one more than usual due to an appointed justice standing for retention after appointment). Two of the elections were contested and two were run uncontested; the differences are obvious. The two contested elections had roll-off rates of 25.9 percent and 27.9 percent, respectively.[16] The non-contested elections had roll-off rates of 39.5 percent and 40.8 percent, respectively—almost 60 percent greater. Even those percentages are misleading, because they represent only a percentage of total voters who cast ballots which, in the 2000 general election, was 75.4 percent of registered voters or only 57.6 percent of the voting eligible population. For the race with the lowest participation rate, the turnout was only 52.2 percent of those who voted for at least one other office—such as the president of the United States—and only 39.8 percent of Washington State citizens who were eligible to vote.[17]

Though this seems to suggest that judicial elections are not very competitive or highly contested, it is a false assumption. For the closest of the elections discussed above, the margin of victory for the winner was only five percentage points (52% to 47%) or about ninety thousand votes out of more than 2.5 million votes cast in that election statewide.[18] Lower court judges with smaller constituencies often encounger even closer results, with elections turning on a few thousand or even hundred votes. A contested superior court race in Benton County in that same election was decided by only 9,100 votes, and the closest contested election was decided in Pierce County by less than 5,000 votes. Because the margins can be so small, the pressures to campaign effectively are enormous. That pressure translates into the need to raise and spend large amounts of money on advertising and campaigning. The election mentioned above, decided by only 9,100 votes, cost the two candidates combined more than $160,000 to run.

The 2002 race for the Supreme Court was even more expensive. Close races between candidates has pushed the average total expenditures to more than $170,000, with one candidate spending in excess of $300,000 on his campaign.[19] Even local, lower court elections have become expensive propositions. In the 2002 campaign, an incumbent candidate for the Superior Court from King County spent almost $65,000. In Spokane County, a contested District Court seat in the 2002 election cost the two candidates $98,000 combined. That judicial candidates are able to raise such significant amounts of money from individuals and from interest groups suggests that the officials, once elected, are expected to be engaged in more than the abstract process of

administering justice. Rather, it conveys that they are engaged in a highly political undertaking.

Conclusion

In many ways Washington's courts represent a very stable system. The institutional structure of the system has changed little in recent years, the caseload has not risen dramatically, and the output has been relatively consistent. In terms of policy-making, the lower, trial courts, and even the Court of Appeals are relatively more constrained than the Supreme Court, due to the structure of their jurisdiction and size. But even affecting the Supreme Court, the election of judges creates an additional burden for the judiciary extending beyond hearing and deciding disputes. Elected judges must try more explicitly to balance the desire for judicial independence with the political need for accountability and responsiveness. How those elements are balanced in the system depends on several factors, including the involvement and attention of the electorate. The nonpartisan system of judicial elections in Washington, by withholding relevant information from the electorate, probably accounts for a decrease in citizen participation; it certainly is responsible for a decrease of well-informed participation, evidenced by lower general turnout and in high roll-off rates. In addition, judicial candidates are forced increasingly to jeopardize their independence, in appearance if not in fact, by a system that requires them to raise large amounts of money from special interest groups and other potential benefactors of the courts in order to successfully compete for office.

The relationship between elections and judicial performance is certainly not a simple one. Even judges themselves can seem of two minds about elections and elective systems. A recent survey of judges reported in *The Judges Journal* suggests that judges are overwhelmingly concerned about the power of money in judicial elections, the low levels of public involvement in elections, and about the independence of the judicial system (Dierker 2002; Greenberg and DiVall 2002). In the same issue of that journal, however, another article decries the decision in *Minnesota v. White* as creating more problems than it solves (Schotland 2002).

Many of these questions revolve around the real role of public opinion as expressed at the ballot box and the strength of support for particular outcomes in the court. It could be, as Stimson et al. (1995) suggest, that the Court is removed from but not oblivious to the desires of the public. This would mean that judges in the state of Washington consider themselves neither as pure delegates responding directly to the will of the people, nor as trustees interpreting and applying the law independently. The court system and judges who work inside it act within a larger framework of law and politics at the state level. This framework or "political regime" (Clayton and May 1999) of the state is part

and parcel of the numerous variables affecting how judges perceive their role in particular cases and overall.

Undoubtedly, the most vitally affected judicial arena is the state Supreme Court. With the largest subject and geographic jurisdiction, the Supreme Court sits atop the judicial hierarchy. It is able to choose, in most instances, the cases that it will hear and is the most removed from the possibility of being reviewed and overturned. This court is the most free to act in innovative, responsive, and policy-creative ways, and to legislate from the bench. But its justices are, in the end, still elected officials. The candidates for the high court are subject to problems of voter roll-off, uncontested elections, inability to provide in-depth information for voters, and increased fundraising and monetary pressures in campaigning.

The remarkable, overall stability of the judicial branch of Washington government masks some important questions of law and politics in the state. Far from idle inquiry, these questions go to the heart of a system that aspires to be democratic in character and responsive in nature. The current arrangement calls into question the ability of the judicial system to live up to that ideal.

Endnotes

1. The court administrator is appointed by the Supreme Court and is responsible for execution of the administrative policies of the Washington judicial system. He or she compiles statistics, engages in studies of efficiency and management, provides information to the judicial system as directed, and prepares and submits the annual accounting of the judicial expenditures and appropriations.
2. The Commission on Judicial Conduct investigates allegations of misconduct on the part of judicial officers. The membership of the commission is composed of two lawyers, three judges, and six nonlawyer citizens. The commission cannot alter judicial decisions or actions, and objections to specific outcomes are not reviewed by the commission. It can, however, reprimand or censure a judge for official misconduct or recommend to the Supreme Court that a judge be removed or suspended for misconduct or incapacity.
3. Superior courts in the state have historically had a considerable backlog of cases on their dockets. They have been unable to deal with even the relatively low numbers of filings each year, holding many cases over until the next term. In recent years, that trend has begun to reverse itself, with the courts actually clearing more cases and beginning to decrease the decade-old backlog of cases.
4. Division I is divided into three districts. District one, King County, elects six judges. District two, Snohomish County, elects two judges. District three, composed of Island, San Juan, Skagit, and Whatcom counties together, elects one judge.
5. Division II is similarly divided into three districts. District one is Pierce County, from which three judges are elected. District two includes Clallam, Grays Harbor, Jefferson, Kitsap, Mason, and Thurston counties and is represented by two judges. District three, comprised of Clark, Cowlitz, Lewis, Pacific, Skamania, and Wahkiakum counties, elects two judges.

6. Division III is also divided into three districts. District one encompasses Ferry, Lincoln, Okanogan, Pend Oreille, Spokane, and Stevens counties, from which two judges are elected. District two includes Adams, Asotin, Benton, Columbia, Franklin, Garfield, Grant, Walla Walla, and Whitman counties, from which one judge is elected. District three is Chelan, Douglas, Kittitas, Klickitat, and Yakima counties, from which two judges are elected.
7. The largest factor in that year's high filing rate is the number of personal protection petitions. Between 1997 and 1999, the total number of these filings rose more than 340 percent, while most other types of filings remained constant or even fell slightly.
8. As with many other states, other identifying information is also stripped away from the ballot. Incumbency and occupation are also not listed. In the particular case of Washington, voters have the resource of the Voter's Pamphlet, produced by the secretary of state's office, that is available prior to the general election and which contains the best available information to assist in making reasonably informed choices. However, this is of little help in the primary election, when many judicial races are actually decided.
9. One example of problems caused by scanty information is the defeat in 1990 of the then sitting Washington State Supreme Court Chief Justice, Keith Callow. Despite the absence of any negative information about his job performance, Callow was defeated by Charles Johnson, a lawyer who ran an aggressive campaign and who also happened to shares the same name as a Seattle trial judge of some reputation. While there is little empirical evidence to support it, the claim is frequently made that pseudo-name recognition played a decisive factor in the election. (See also London, Robb. 1990. "For Want of Recognition, a Chief Justice Is Ousted," *New York Times* September 28: Sec. B).
10. For a more complete account, see Tyrone Beason's article in the Seattle *Times*, "Sanders Denies Ethics Violation" (December 27, 1996: Local News) and David Postman's article, "Panel Clears Justice Sanders," also in the Seattle *Times* (April 29, 1998: Local News).
11. In a nominally non-partisan electoral system, interest group endorsements can often serve as proxies for partisan labels. Important interest groups, such as police officers associations or education interest groups, may conjure in the minds of voters the expectation of partisan affiliation on the part of the candidate, even if none is expressed.
12. For a more complete account of the Washington high courts, see Charles H. Sheldon's definitive history of the court, *A Century of Judging: A Political History of the Washington Supreme Court* (1998. Seattle: University of Washington Press).
13. District court positions are an exception. By state law (RCW 29.21.015), two-candidate races for district court positions are not placed on the primary ballot but must appear on the general election ballot. If there are three or more candidates for the position, the process of primary election and advancement to the general election is the same as other positions.
14. Schaffner et al. (2001) also argue that the non-partisan ballot has a general depressive effect on turnout. This translates into judicial elections as well.
15. In Spokane County, for example, the 2002 general election saw thirteen judicial positions on the ballot, but only four were contested. Those four included only two of the three Supreme Court positions and two district court positions. Statewide in the 2002 general election only 27 judicial positions were contested in the November election.
16. National roll-off rates average between 25–35 percent for judicial elections across the entire range of partisan and non-partisan state elections. Retention elections, common

in the Missouri Plan system of judicial selection, often see much higher roll-off rates—often in excess of 75 percent (Dubois 1980).

17. It is worth noting that roll-off rates for the 2000 election were lower than average roll-off rates for the state. Presidential election years produce generally higher roll-off that correlates roughly to the higher overall turnout rates in those elections. In the 1996 election, roll-off in the contested Supreme Court position was 32 percent, while the 1998 contested Supreme Court position experienced an average of 22 percent roll-off. This judicial roll-off occurred while the general rate of participation declined from 75 percent in the 1996 election to 62 percent of registered voters participating in 1998.
18. That margin of victory is similar to others in recent years. In 1996, ten of the forty-four judicial elections in the state were contested. The winner in those elections received an average of 54 percent of the vote, to the loser's average of 46 percent. A similar result can be seen in the nine contested elections (of fifty-two total judicial elections) in 2000, where the average margin for the victor was only 57 percent.
19. These expenditure figures are taken from Public Disclosure Commission C-4 filings by the candidates. They do not include independent expenditure made by third parties.

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2004 election

Pos 1 Jim Johnson ~~2148075~~ ~~23%~~ roll-
Mary Kay Becker 2264513 19%

Pos 5 Barbara Madsen 1892177 33% roll

Pos 6 Richard Sanders 2,148075 23% roll-
Terry Sebring

Governor 2805916 (First count)
0% rollover