Judicial Retention Meets Due Process

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The differences between the composition and independence of the federal and state judiciaries have often been stated in simplistic terms—federal judges are appointed and state judges are elected, so the former enjoy greater independence while the latter are subject to greater popular accountability. But several instances of non-retention of state judges, often on the heels of controversial decisions, show that the real threat to judicial independence is not popular election as the means of initially selecting judges. Rather, the problem is popular election as the means of retaining judges once selected.

As Martin Redish and Jennifer Aronoff argue in a new article, "Judges will always owe their job to *someone*, and often someone who may at some point appear before them or be directly impacted by their decisions." Instead, "the threat that a judge might make decisions on the basis of what might win him another term in office (and thus ensure his continued livelihood) looms constantly." If the goal is to ensure judicial independence at the state level that looks more like judicial independence at the federal level, initial selection is largely irrelevant—the focus must be on creating better systems of retention. However a judge obtains her position initially, she should not have to worry about whether a particular decision will adversely affect her ability to retain that position.

But Redish and Aronoff go one step further. It is not only that non-electoral retention is a good idea that the Framers were wise enough to codify in Article III and that states should adopt in the name of judicial independence. Instead, non-electoral retention is required at the state level as a matter of Fourteenth Amendment Due Process. A litigant does not receive a meaningful opportunity to be heard by a neutral arbiter if there is any risk that the judge's decision is influenced, even in small part, by considerations of how it may affect her continued service on the bench. A judge who is looking over her shoulder, worried about being thrown out of office is not a neutral arbiter, and that litigant's opportunity to be heard on the merits is rendered meaningless if the decision is influenced by external issues unrelated to those legal and factual merits. It is clear that a judge should not gain a financial profit from deciding a case a certain way; it should be equally clear that a judge should not gain continued employment from deciding a case a certain way.

Redish long ago staked out the connection among life tenure, judicial independence, and due process, specifically in recognizing the Due Process Clause as an external limitation on congressional power to strip federal courts of jurisdiction. A fundamental component of due process is that a judge should not have any direct pecuniary or personal interests in the outcome of a case or her decision in a case. That includes interests in continued employment as a judge, which are personal and pecuniary, if less direct. Due process thus demands "a form of tenure secure enough to prevent judges from having to worry about pleasing voters or the popular branches while on the bench, or from making decisions on the bench with an eye towards how they will affect the judge's future employment prospects."

Now writing with Aronoff, Redish has a new arrow in the quiver—the Supreme Court's 2009 decision in *Caperton v. A.T. Massey Coal Co.* The Court held that due process was violated where a justice of the

West Virginia Supreme Court of Appeals heard (and cast the deciding vote in) a case affecting the interests of a businessman who contributed more than $3 million to the justice's recent election campaign. That "significant and disproportionate influence" raised a "serious risk of actual bias—based on objective and reasonable perceptions," even absent a showing that those contributions actually biased or influenced the judge. On its face, *Caperton* is about the effect of retroactive judicial gratitude—the fear that the judge would rule a certain way out of a sense of gratitude for the past beneficence of one of the parties. And the Court took great pains to emphasize the unique facts of the case.

But, the authors argue, the logic and rhetoric of *Caperton* extend much further. Gratitude is not only backward-looking, but also forward-looking or prospective: A judge's anticipated need for support at some point in the future—from donors, voters, officials in other branches of government, or others—to retain her position may affect her decision just as much as gratitude for past donations. So might a judge's feared need for post-judicial employment (say, as a partner in a law firm) at some point in the future. The appearance of influence or bias and the difficulty of proving actual influence or bias—both central to the *Caperton* analysis—justify prophylactic measures against the influence of prospective gratitude just as against retrospective gratitude. Eliminating electoral retention eliminates the risk to judges of losing their positions because of an unpopular decision, in turn eliminating the risk to litigants that judges' decisions will be influence by concerns for their positions rather than the merits.

Redish and Aranoff illustrate the problem with electoral retention by describing several instances in which judges have been voted out in retention elections following well-funded election campaigns explicitly focused on particular decisions or categories of decisions. There was Justice Rose Byrd of the California Supreme Court in 1986, targeted because of her votes in several death-penalty cases. More recently, there were three justices of the Iowa Supreme Court who lost their seats in 2010 in the wake of a 2007 decision recognizing marriage equality under the state constitution, as well as a fourth justice who survived a tough battle and a relatively close vote to retain his seat. And demonstrating the ongoing practical import of these arguments, Tennessee is now the site of an organized effort to remove three Supreme Court justices, not for any particular decisions, but because of how they, as Democratic appointees, might be expected to rule on issues in unknown future cases involving unknown future litigants.

Focusing on due process means the constitutional problem is not the non-retention of these judges *per se*. If the public is permitted to vote on judges, then individual voters can vote for or against a judge for any reason, including agreement or disagreement with particular decisions or with expected decisions. The particular election does not raise either structural or due process concerns for the judge. Rather, due process focuses the analysis, and the claim of right, on litigants, present and future. The point is that the threat of a similar future electoral defeat may cause other judges to decide cases in a way that will maximize their chances of remaining on the bench or otherwise gaining or maintaining future employment. That threat violates the due process rights of the disadvantaged parties in these other cases (for example, future defendants in capital cases or future LGBTQ-rights claimants).

An open question, and an area for future exploration, is the precise nature of the "form of tenure secure enough" to allow a judge to decide the case solely on the merits and without consideration of how her decision will affect retention. Three possibilities appear—life tenure a la Article III, life tenure with a mandatory retirement age, or non-renewable terms of years. All insulate judges from voters or elected officials causing them to lose their office in response to particular decisions, thereby insulating litigants from judges deciding cases under that threat. But the second and third options create a different due process concern. Although a judge no longer is influenced by a desire to remain on the bench—she knows her judicial career will end when she turns 70 or when she has served 20 years, no matter how she decides the case—she may be influenced by a need to find non-judicial employment (for example,

as a law-firm partner) once she has left the bench. Thus, Redish and Aronoff argue, life tenure is the only means of removing all employment considerations that might distract the judge from anything other than the merits of the claims before her, at least absent an unlikely declaring that a justice may not take another job after leaving the highest court.

The debate about the appropriate balance between judicial independence and accountability and how that affects systems of judicial selection and retention shows no sign of abating. By recasting the focus on retention rather than initial selection, framing the question in due process terms, and bringing to bear the consequences of the Supreme Court's analysis in *Caperton*, Redish and Aronoff have added an important new wrinkle to the discussion.

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