# NEITHER THE PROBLEM NOR THE SOLUTION LIES SOLELY WITH THE JUDICIARY: RESPONSE TO ROBERTSON'S *JUDICIAL IMPARTIALITY IN A PARTISAN ERA*

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In *Judicial Impartiality in a Partisan Era* ("Professor Robertson's Article"), Cassandra Burke Robertson focuses on the danger the judiciary faces as a result of "growing partisan polarization."[1] She should be applauded for bringing this problem to the forefront. Unquestionably, politically motivated attacks against the judiciary have increased since 2010.[2] Professor Robertson's Article illuminates the dichotomy between the expectation that the judiciary be fair and impartial in protecting litigants' constitutional rights—as guaranteed by the this country's fundamental documents, the U.S. and state constitutions—and the threat to those bedrock principles when politically motivated special interests look to the judiciary to support their own political agendas.[3]

Professor Robertson's Article proposes that the solution to this dangerous dichotomy lies in changes to judicial decision-making processes.[4] But, this proposal perpetuates the belief that judges are incapable of deciding a case without regard to perceived political allegiances that may have helped them achieve their position.[5] With respect, it appears Professor Robertson's Article assumes that partiality based on political affiliation is endemic to our federal and state judiciary.

Rather, as former Florida Supreme Court Justice Barbara J. Pariente and others have explained,[6] part of the solution lies in more informed public education as well as reviewing our judicial selection processes. The public should be encouraged to realize that judicial decision-making does not always produce decisions that "align[] with" each judge's

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1. Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 756 (2018).

2. Barbara J. Pariente & Melanie Kalmanson, *Send Them a Message?: The Threat to a Fair and Impartial State-Court Judiciary*, 54 CT. REV. 10, 10 (forthcoming 2019); *see* Barbara J. Pariente & F. James Robinson, Jr., *A New Era for Judicial Retention Elections: The Rise of and Defense Against Unfair Political Attacks*, 68 FLA. L. REV. 1529, 1534 (2016); Maggie Barron, *O'Connor & Breyer on Judicial Independence*, BRENNAN CTR. FOR JUST. (Apr. 9, 2008), https://www.brennancenter.org/blog/oconnor-breyer-judicial-independence [https://perma.cc/5TJT-7ZZM].

3. Robertson, *supra* note 1, at 756–57.

4. *See id.* at 770.

5. *See* Sandra Day O'Connor, *Remarks on Judicial Independence*, 58 FLA. L. REV. 1, 4–5 (2006) (addressing the importance of judicial independence in the face of recent political attacks on the judiciary).

6. Pariente & Kalmanson, *supra* note 2, at 21. *See generally* Pariente & Robinson, *supra* note 2 (criticizing the "rough-and-tumble" political nature of judicial-merit retention elections).

individual perceived "policy choices" or political beliefs.[7] Likewise, the public should be informed on the proper considerations when voting for judicial candidates—in either election or merit-based selection and retention systems.

After addressing each solution proposed in Professor Robertson's Article, this Response provides an alternative, arguably more appropriate, approach to counteracting the rise of improper, politically motivated attacks on the judiciary.

## I. ROBERTSON'S SOLUTIONS

Professor Robertson's Article presents three solutions to the increased politicization of the judiciary: (A) Recusal, (B) Curbing Discretion in Recusal, and (C) Protecting the Procedural Safeguard of Impartiality.[8] Addressing each in turn, this Part explains why these solutions, while well-intentioned, could actually perpetuate rather than counteract the problem.

### A. *Recusal*

First, Professor Robertson's Article announces that "recusal motions are unlikely to solve the problem."[9] The problem, Professor Robertson posits, is that judges will not recuse themselves when confronted with actual allegations of bias.[10] While there may be instances where a litigant is frustrated or negatively affected by a judge's failure to recuse, or a judge improperly fails to recuse, recusal motions are, in fact, an improper method for addressing perceived political differences between litigants and the judiciary for other reasons.[11]

The discussion in Professor Robertson's Article regarding rules on recusal and disqualification conflates the idea of impartiality based on concrete evidence of bias—for example, the judge having a financial interest in the outcome of a case—and impartiality based on a judge's *perceived* political beliefs. Judges should not be required to recuse based on improper or unjustified attacks—especially through motions for recusal—merely based on political disagreement or motivation.

Rather, the public should understand that judges, in their official capacity, are expected and trusted to act as nonpolitical beings—very different from the other branches of government, which we expect to act politically. As Professor Robertson's Article notes, Justice Scalia cogently explained that judges should be trusted to approach their work

7. Robertson, *supra* note 1, at 764.
8. *Id.* at 764–74.
9. *Id.* at 769.
10. *Id.* at 768–69.
11. *Id.* at 769.

fairly and properly.[12] The rule that recusal must be based on objective factors operates to eliminate the troubling prospect that judges would be *required* to recuse themselves if a litigant merely *thought* or alleged that the judge's personal views conflicted with an issue presented in the case.

As Professor Robertson's Article explains, the political alignment of a judge's appointing executive should not be considered a guidepost for the judge's jurisprudence.[13] Merely because a Republican politician appointed a specific judge does not mean the judge will always decide consistent with Republican ideals, or is incapable of fairly reviewing a politically sensitive issue. Likewise, even if the judge ultimately votes consistent with what the public would consider the "conservative" outcome does not mean the judge did not fairly review the case on its merits.

Professor Robertson's Article ignores the possibility, or even reality, that a judge's review of the *law* may coincide with his or her perceived political ideology. For example, just because a judge votes in favor of striking down an abortion restriction does not mean the judge's views correlate to the "views of a majority of the electorate"—in this instance, Democrats—or that the Democratic executive who appointed the judge made a "good" choice.[14] Rather, it is likely that the judge's analysis compelled the conclusion that the restriction failed under the applicable constitutional analysis. If the solution in Professor Robertson's Article were implemented and judges could be recused for alleged political disagreement or inclination, it would become difficult to differentiate between legitimate recusals—based on improper actions or concrete bias—and illegitimate recusals—based on perceived political disagreement.

The more serious concern is discourse labeling judges' perceived political beliefs as the problem, or reason for a disliked decision. The public has been led—by politicians and the media—to view and characterize judges as political actors.[15] Rather than arming opponents with another weapon to use against the judiciary, namely a stronger motion for recusal, we should work to stop the war.

We must educate the public that characterizing judges as Republican

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12. *Id.* at 760 (quoting Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913, 929 (2004) (denying motion to recuse)).

13. *Id.* at 768.

14. *Id.*

15. *See* Pariente & Kalmanson, *supra* note 2, at 11; Barron, *supra* note 2 ("More and more people today think that judges make decisions based on politics rather than the law . . . ."); *see also* Jacob Ogles, *Ron DeSantis Promises New Supreme Court Won't Side So Often with Democrats*, FLAPOL (Feb. 4, 2019), https://floridapolitics.com/archives/287220-ron-desantis-promises-new-flscotus-wont-side-so-much-with-democrats [https://perma.cc/599P-4FXJ] ("[I]s this just a big coincidence? . . . Anything that had a political color to it just always happened to be decided in the way of the Democratic Party.").

or Democrat—conservative or liberal—or by the politicians who appointed them to the bench is inconsistent with the fundamental tenet of a fair and impartial judiciary.[16] As Justice O'Connor, a champion for judicial independence, explained in 2005:

> It's elementary high-school civics that we have three branches of government, which regulate each other by an intricate system of checks and balances. The main check the judicial branch has on the others is the power to declare statutes or executive acts unconstitutional, though sometimes we might check the political branches in a softer way, merely by interpreting a statute in light of constitutional values or by ruling that a regulation or executive act isn't authorized by statute. But whatever courts do, we have the power to make the President or Congress really, really angry. In fact, if we do not make them mad some of the time, we probably aren't doing our jobs. Our effectiveness, therefore, relies on the knowledge that we won't be subject to retaliation for our judicial acts.[17]

Although unconscious bias is an inescapable aspect of the human judiciary,[18] as Professor Robertson recognizes, unconscious bias is distinct from the concrete bias that would require a judge's recusal, disqualification, or removal. And, to assume that the judge's political beliefs results in judicial bias, as Professor Robertson posits,[19] is unwarranted.

### B. *Curbing Discretion in Recusal*

Second, Professor Robertson's Article proposes curbing discretion in recusal, arguing that "[a] more fruitful possibility is to expand the use of bright-line recusal rules that do not require the exercise of discretion."[20] In doing so, Professor Robertson's Article proposes rules requiring "non-discretionary disqualification" in certain instances[21] and the nationwide adoption of granting litigants peremptory challenges to use against the judge assigned to a particular case.[22] Again, this proposal identifies the judiciary as both the problem and the solution.

Rather, we should reconsider the process by which we select judges in the first place. As Justice Pariente explains: "[E]lection of state court

16. *See* Pariente & Kalmanson, *supra* note 2, at 21–22.

17. O'Connor, *supra* note 5, at 1–2.

18. *See* Robertson, *supra* note 1, at 772.

19. *See id.* at 768 (noting the difficulty in detecting unconscious bias due to lack of specific facts showing bias).

20. *Id.* at 770.

21. *Id.*

22. *Id.* at 771.

judges and justices—whether partisan or non-partisan—always creates the real risk of politicizing the judiciary and subjecting the judiciary to special interest influence."[23] "While others may disagree, it seems clear that, while certain aspects of the system may certainly be improved, a merit-based system is the preferred method for judicial selection and retention."[24]

Nevertheless, even if judicial selection processes remain the same, we should trust all judges, even those elected, to perform their duties fairly and impartially. Therefore, increasing the instances in which a judge *must* grant a motion for recusal or may be unilaterally recused through peremptory challenges further undermines the legitimacy of the judiciary.[25]

Further, as to the judicial "peremptory challenge" system, which several states currently employ,[26] Professor Robertson (and others) argue that this allows litigants to remove an impartial judge and, therefore, better access to courts.[27] However, allowing litigants to unilaterally remove a judge is concerning.[28] In this context, the peremptory challenge produces a glaring problem: litigants strategically using the challenge to garner a seemingly more advantageous judge for the issue presented, which would further undermine the legitimacy of the court as an institution.[29]

Rather than perpetuating the idea of "partisan bias" in the judiciary by giving litigants control, we must disconnect the two concepts altogether.[30] The problem is not that cases cause a "high[] risk of distrust in the judicial system"[31] but, rather, that a misinformed public does not understand the appropriate considerations in evaluating the judicial decision-making process. We must educate the public that politics and the judiciary do not mix, and we should trust that the existing judicial disciplinary processes sufficiently address improper judicial actions—political or otherwise.[32] If they do not, reformation efforts should focus

23. Pariente & Kalmanson, *supra* note 2, at 19.

24. *Id.*

25. *Contra* Robertson, *supra* note 1, at 771 (arguing that one preemptory challenge per party better ensures judicial integrity).

26. *See id.*

27. *See id. See generally* Jeffrey W. Stempel, *Judicial Peremptory Challenges as Access Enhancers*, 86 FORDHAM L. REV. 2263 (2018) (arguing that judicial preemptory challenges improve access to the courts).

28. *See* Nancy J. King, Batson *for the Bench? Regulating the Peremptory Challenge of Judges*, 73 CHICAGO-KENT L. REV. 509, 510 (1998) ("The judicial peremptory challenge grants a litigant one change of judge, without having to specify a reason.").

29. King argues that the peremptory challenge causes several concerns, one of which is that litigants "will shop for judges on the basis of race or ethnicity." *Id.* at 514.

30. *See* Roberston, *supra* note 1, at 771.

31. *Id.* at 772.

32. *See* Pariente & Kalmanson, *supra* note 2, at 15, 21; O'Connor, *supra* note 5, at 2.

on addressing those insufficiencies.

### C. *Protecting the Procedural Safeguard of Impartiality*

Finally, Professor Robertson's Article correctly explains that juries and the appellate review process benefit everyone involved.[33] Of course, the right to a jury trial and the right to appellate review are basic to our judicial system and has been from its founding. But, the notion that appellate review cures any lack of impartiality assumes that legal errors in judicial decisions result from improper political influence, bias, or partiality.

As explained above, that is simply inaccurate. A judge's decision may result from many different factors, and appellate review serves to review the correctness of the judge's legal analysis.[34] Just as we should not identify a political motive as a basis for a judge's decision, we should not assume politics played a part in the basis for an appellate court's opinion.

## II. FOCUSING ON PUBLIC EDUCATION & JUDICIAL SELECTION

"[T]he basic idea is sound: If you believe . . . that the courts are important guardians of constitutionally guaranteed freedoms in our common-law system, you know that the system breaks down without judicial independence."[35] "An independent judiciary is an essential bedrock principle, and we're losing it."[36]

In addressing the rise of attacks on judicial independence, our focus should be public education and supporting reforms in judicial selection. As lawyers and academics, we must not perpetuate the assumption that the judiciary is infected with political bias.[37] The public, including the media, should be encouraged to analyze judicial decisions based on the

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33. *See* Robertson, *supra* note 1, at 772–73.

34. *See, e.g.*, Barron, *supra* note 2; Joel D. Eaton, *Jumping Through the Hoops to Meaningful Appellate Review: Protecting the Record at Trial*, 62 FLA. BAR J. 12, 12 (1988) ("Arguably at least, an error which affects the outcome of a trial ought to be correctable on appeal as a matter of right—since the broad purpose of the system, from bottom to top, is to ensure that justice is ultimately done according to the law . . . . One line of authority has it that appellate courts sit to review the propriety of legal rulings made by trial judges . . . ."); ANNE MARIE LOFASO, *The Appellate Courts' Role in the Federal Judicial System*, *in* A PRACTITIONER'S GUIDE TO APPELLATE ADVOCACY 1, 4 (2010); *see also, e.g.*, Webster v. Chappell, No. CIV S-93-306 LKK DAD DP, 2014 WL 2526857, *48 (E.D. Cal. June 4, 2014) (discussing the importance of meaningful appellate review in death penalty cases); Larry V. Starcher, *The Importance of Appellate Review*, W. VA. LAW. 8, 8 (1999) (placing the responsibility of review on the appellate courts).

35. O'Connor, *supra* note 5, at 2.

36. Barron, *supra* note 2.

37. *See The System, The Problem, The Solution*, INFORMED VOTERS PROJECT, https://ivp.nawj.org/system-problem-solution/ [https://perma.cc/HB2T-AFGE] (last visited Apr. 3, 2019).

merits and not jump to conclusions that the decision was motivated by any underlying political agenda.

While one may disagree with a court's decision, the reason for such disagreement should not be based on politics or a judge's perceived political views. As the President of the American Bar Association (ABA) recently explained: "Disagreeing with a court's decision is everyone's right, but when government officials question a court's motives, mock its legitimacy or threaten retaliation due to an unfavorable ruling, they intend to erode the court's standing and hinder the courts from performing their constitutional duties."[38]

When the public is sufficiently educated on the judiciary's role in our system of government, problems that cause improper attacks—pressures to vote a certain way based on a candidate's perceived politics or disputing a court's decision based on perceived politics—will hopefully decrease.

In addition, we should reconsider our judicial selection processes by focusing on proper considerations rather than political influence. "[S]tate court judges, without a system comparable to federal judges' lifetime appointments (or at least a defined lengthy term) will always be vulnerable to removal, or fear of removal, for rendering 'unpopular' decisions, or those disapproved by public opinion, special interests, or the other political branches."[39] If judges were not required to participate in elections or appointed after a politically influenced process, they likely would feel less responsible or obligated to a specific contributor or political party.[40] "In the end, a process where highly qualified attorneys and judges are selected through a nonpartisan and independent commission, even while the [executive] ultimately selects from that list, is the best way to ensure that the public gets what it deserves: a highly qualified and fair and impartial judiciary."[41]

Notwithstanding, even if we continue to operate in a system with judicial elections and merit selection and retention, the public should be informed on how to properly consider a judge's candidacy. The Informed Voters Project of the National Association of Women Judges "offers the following five factors as proper considerations in evaluating judicial candidates for selection and retention—(1) integrity, (2) professional

38. *Statement of Bob Carlson, ABA President Re: Being Thankful for Judicial Independence*, AM. BAR ASS'N (Nov. 27, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/11/statement-of-bob-carlson--aba-president-re--being-thankful-for-j/ [https://perma.cc/C77R-U4RE].

39. Pariente & Kalmanson, *supra* note 2, at 21.

40. *See* Barron, *supra* note 2. *See generally* Pariente & Kalmanson, *supra* note 2 (detailing the experience of how judges must respond to negative political attention).

41. Pariente & Kalmanson, *supra* note 2, at 21–22.

competence, (3) judicial temperament, (4) experience, and (5) service."[42] Similarly, Justice O'Connor's *The O'Connor Judicial Selection Plan* "sets forth the following 'values desired in individual judges': fairness and impartiality, competence, judicial philosophy, productivity and efficiency, clarity, demeanor and temperament, community, and separation of politics from adjudication."[43]

"[A]s the Founders knew, statutes and constitutions don't protect judicial independence: People do. And the value of judicial independence is a lesson that even some of our leaders perhaps have not learned."[44]

42. *Id.* at 14 (citing *Evaluation Tips*, INFORMED VOTERS PROJECT: FAIR JUDGES 1, https://ivp.nawj.org/app/uploads/2016/06/How-should-I-judge.pdf (last visited Aug. 24, 2018)). For an elaboration on each of these factors, see *id.* at 14–16.

43. *Id.* at 14 (quoting *The O'Connor Judicial Selection Plan*, INST. ADVANCEMENT AM. LEGAL SYS. 2–3 (June 2014), http://iaals.du.edu/projects/oconnor-judicial-selection-plan#tab=retention-election).

44. O'Connor, *supra* note 5, at 4; *see* U.S. CONST. art. III (lacking any mention or requirement of judicial independence).