The State Courts in 2006: Surviving Anti-Court Initiatives and Demonstrating High Performance

By David Rottman

Ballot initiatives in four states sought fundamental, and in one state revolutionary, change to their judicial branch of government. All four were defeated at the polls but similar efforts are expected in the same and other states for 2008. A number of states again featured costly and ugly judicial elections. Also, it was clear that judicial candidates overwhelmingly chose to campaign within traditional expectations of what is appropriate in a fair and impartial court system. The state judicial branches in 2006 made significant strides in refining and creating methods for measuring their performance and demonstrating their accountability to the other branches of government and to the public. "High-performing courts" is one label for these efforts.

The Year in Review

A very public struggle to define how and to whom state judicial branches should be accountable dominated the news in 2006. Ballot initiatives designed to uproot the foundations of the American legal system, judicial election campaigns rendered decidedly injudicious by national interest groups, and high stakes litigation over whether a judge can make promises or commitments to the electorate tell one part of the story.

The rest of the story, told with little fanfare, concerns steady improvements made to the quality of justice dispensed by the state courts. The most significant breakthrough came in the emergence of high-performing courts that demonstrate their accountability through continuous monitoring of their effectiveness and efficiency. Court reformers took other steps to strengthen court management and to objectively inform the public about judicial performance.

The State Courts at the Polls

Ballot Initiatives

Four ballot initiatives on judicial accountability drew national attention as the main events of 2006. All four initiatives sought to redefine judicial accountability to advance specific economic, social or political agendas. A few individuals and groups from outside the four states funded professional signature collection firms paid on a per signature basis to get measures on the ballot, and then advertising campaigns.

South Dakota's Judicial Accountability Initiative Law for Judges, unofficially "J.A.I.L. 4 Judges" and "Amendment E" on the ballot, headlined the news. The brainchild of a California resident, Amendment E sought to allow any disappointed civil litigant or convicted criminal to challenge the judge's decision before an extra-judicial Special Grand Jury. The Special Grand Jury would hold the ruling judge accountable "for making decisions which break rules defined by the volunteers [special grand jurors]."[1] The amendment called for retroactive punishment for judges and would permit sentences combining actions against the judge's personal assets and imprisonment. The final results appeared decisive to most: Amendment E lost by 89 percent to 11 percent. This did not stop the amendment's backers, who alleged a government plot and vowed to fight again in South Dakota and other states.

In Colorado, Amendment 40 sought to limit appellate judges to a maximum term of 10 years on the bench. Although presented as a judicial reform, the measure was a thinly veiled attempt to change the political makeup of the state judiciary. If passed, the measure would have immediately removed five of the current Supreme Court justices. With 57 percent of voters opposed, Amendment 40 failed. One commentator observed of Amendment 40's proponents that "these troublemakers were egged on by cynical politicians who successfully pander to their base by labeling judges as anti-American (or worse) when they issue unpopular rulings."[2]

In Oregon, Measure 40 would have switched elections of appellate judges from statewide to district-specific, a move that would have changed the political composition of the appellate bench. Previously rejected by the electorate in 2002, this measure failed with 56 percent of the voters opposed.

In Montana, a citizens' initiative to permit recall of a judge "for any reason acknowledging electoral dissatisfaction" was struck from the ballot due to fraudulent practices used to collect the qualifying number of signatures.[3] Voters in nine other states considered changes to their courts. Some changes

sought to reduce judicial discretion. North Dakota voters defeated a measure to end judicial discretion in family cases by requiring judges to grant joint legal and physical custody to both parents and to place limits on child support, regardless of the facts in a case. Other ballot initiatives defused traditional flashpoints between the legislative and judicial branches. Voters in Hawaii and in Missouri adopted changes that removed judicial pay from the political process.

Judicial Elections

Thirty-nine states use elections as one form of judicial accountability.[4] Contested elections filled 46 state supreme courts seats. In Alabama, Kentucky and Nevada, three of the 35 incumbents were defeated, and 18 ran unopposed. Two open seats were filled by candidates without an opponent. All 18 justices facing retention elections were retained. The post-2000 trend of "nastier, noisier and costlier" judicial elections continued.

Alabama, Georgia, Kentucky and Washington hosted truly nasty, noisy and high-cost races. The race for the chief justice of Alabama, where would-be judges compete for seats through partisan elections, exemplified the new politics of judicial elections. Preliminary figures put the total cost of the race at more than $6 million. The incumbent chief justice survived a primary challenge by another justice on his court, only to lose the general election by a narrow margin to a Democrat.[5]

Much of the venom and cash in 2006 elections can be attributed to continuous efforts by national special interest groups in pursuit of their policy agendas. A cover story in *BusinessWeek* documented the ways in which contention among large business interests have transformed judicial elections.[6] Many negative advertisements could be traced to one side in the decade-long struggle between large corporations and the plaintiffs' bar over tort reform. The U.S. Chamber of Commerce, in effect, declared victory, noting that 80 percent of the candidates they supported won.[7]

A Georgia race, in which a lawyer, supported by the business-funded Georgia Safety and Prosperity Coalition, challenged a sitting supreme court justice, exemplifies the bare-knuckle fights through television negative advertisements. Two weeks before the election, local television stations aired the following advertisement:

> Announcer: On Georgia's Supreme Court, liberal Carol Hunstein has made a habit of ignoring laws she doesn't like. Hunstein substituted her preferences on capital punishment for those who made the law. Carol Hunstein also voted to throw out evidence that convicted a cocaine trafficker; her colleagues overruled her. Hunstein even ignored extensive case law and overruled a jury to free a savage rapist. If liberal Carol Hunstein wants to make laws, she should run for the legislature instead of judge.

The Hunstein campaign responded:

> Announcer: We expect only experienced judges to serve on Georgia's Supreme Court. But Mike Wiggins has never tried a case. We expect our Supreme Court to uphold Georgia values, but Mike Wiggins was sued by his own mother for taking her money. He sued his only sister. She said he threatened to kill her while she was eight months pregnant. A judge ordered Wiggins never to have contact with her again. Mike Wiggins. The wrong experience. The wrong values for the Supreme Court.[8]

Hunstein won 63 percent to 37 percent.

The elections took place in an atmosphere already poisoned by media frenzies set off by radio and television talk show hosts who attacked a judge based on a single decision. Ohio trial judge John Connor was attacked by a nationally syndicated television commentator as the "worst judge in America." This use of invective is unexceptional nowadays, but the haste with which the state's Governor and Speaker of the House called for the judge's impeachment is not. Reason prevailed and Judge Connor remained on the bench.[9]

In the federal courts, the fight focused on what judicial candidates can say to promote their election. The litigation stemmed from an increasingly common campaign survey technique. Groups, mainly but not exclusively from the religious right, sent out questionnaires requesting candidates to express their views on social, political and legal controversies and on previously decided cases. Most questions used a multiple choice answer format. Options included "refuse" or "decline." A lengthy footnote with citation to federal court opinions distinguished those options, linking them to the U.S. Supreme Court's 2002 decision in *Republican Party of Minnesota v. White* and more recent lower court rulings on what judicial candidates can say and do.[10] If a candidate "declines," a First Amendment lawsuit likely follows challenging the state's Code of Judicial Conduct as a restriction on a candidate's first amendment rights.

The Third, Seventh, Tenth, and Eleventh Circuit Courts of Appeal are currently hearing challenges to traditional limits on judicial candidates' conduct. United States District Court challenges are pending

in Arizona, Kentucky and Wisconsin. Attorney James Bopp, who served as counsel to the groups distributing questionnaires in all of these cases, predicts that judges will be allowed to express opinions, endorse candidates and solicit donations.[11] The ultimate fate of the litigation may lie with the Supreme Court.

Thus far, most judicial candidates seem inclined to campaign on their records and not on their ideological credentials. For example, of 27 Tennessee appellate judges facing retention elections, all but one wrote to decline or simply never responded. One answered some but not all of the questions. Chief Justice William Barker of Tennessee replied to the questionnaire by letter, noting that "As did Justice Roberts, I do not wish to hint or signal that I am predisposed to rule on any matter that may come before me as a judge."[12] So far, the rate of response to litigation-linked questionnaires suggests that few judges want to become politicians rather than fair and impartial arbiters of the law.

Positive developments include the creation of six new judicial campaign oversight committees—in Alabama, Kentucky, Maryland, North Carolina, Minnesota and South Dakota. These bodies generally set voluntary standards for judicial campaigning by using persuasion and their members' own First Amendment rights to set the tone.

Demonstrating Accountability

Performance Measurement

In its Strategic Plan for 2006–12, the California Judicial Branch identified "measuring performance and demonstrating accountability" as one of its fundamental challenges. The plan noted that all public institutions, including the judicial branch, are increasingly challenged to evaluate and be accountable for their performance, and to ensure that they use public funds responsibly and effectively.

For the courts, this means developing meaningful and useful measures of performance, collecting and analyzing data on those measures, reporting the results to the public on a regular basis, and implementing changes to maximize efficiency.[13] "High Performing Courts" was the most common label for such activities, featured at national events such as the September 2006 Courts Solutions Conference[14] and a January 2007 National Summit on Performance Management for the Judiciary.

The most developed methodology for performance measurement is *CourTools* from the National Center for State Courts.[15] *CourTools* draws on concepts drawn from successful public- and private-sector performance measurement systems and offers a balanced set of applicable measures that tell courts, legislatures and the public if courts are effectively and efficiently using public resources. The 10 evaluative criteria include court user ratings of court accessibility and of the fairness with which litigants and others perceive of their treatment, as well as more conventional measures like time to disposition for cases, cost per case and effective use of juries.[16]

CourTools and other measurement systems speak to the institutional accountability of courts. When deciding a case, an individual judge is accountable to the Constitution, law and the appellate process.

2006 saw a renewed interest in expanding judicial performance evaluation programs. Most notably in six retention election states, voters have received the results of evaluations based, in part, on confidential survey feedback from jurors, litigants, attorneys and others who come into contact with a judge.[17] Judicial performance evaluation programs do not focus on cases but on a judge's adherence to "neutral, process-oriented standards."[18] Relevant questions include: "Did the judge give each party the opportunity to make his case? Did he treat everyone in the courtroom with dignity? Did he clearly and accurately explain the facts relevant to his decision, or give clear and accurate instructions to the jury?"[19]

Kansas in 2006 became the seventh retention election state to implement a performance evaluation program for all trial judges.[20] The authorizing legislation stated: "The goals of the Commission would be to improve judicial performance, help voters make more informed decisions and promote public accountability of the Judiciary."[21] Increased docket fees will fund the new program.

Building a Court Management Team

Trial courts have evolved into complex organizations. Monitoring performance and accountability requires a strong leadership position at the state level and for individual trial courts. The managerial responsibilities of presiding or chief judges of trial courts are of recent vintage, and policies and procedures defining the presiding judge's role fail to reflect the realities of what is involved in managing a trial court. For example, the court in Hennepin County of Minneapolis, Minnesota, has 78 judicial officers and more than 500 employees.

Only 17 states provide their presiding judges with extra compensation, and only 14 states promise a reduced caseload.[22] To correct this misalignment of authority and responsibilities, a national working group of judges, court administrators and judicial educators

identified key elements of a rule of court that would govern the responsibilities of presiding judges and developed the *Key Elements of an Effective Rule of Court on the Role of the Presiding Judge in the Trial Courts*.[23]

Sentencing

A 2006 national survey recorded significant changes to the public's view of judges' role in sentencing. In a reversal of survey findings from the early 1990s, the American public prefers that judges have discretion rather than be limited by mandatory sentencing laws. The image of the "lenient judge" also seems to be fading. Only one adult in five (18 percent) finds sentencing too lenient, and holds judges mostly to blame.[24] More blame is assigned to elected officials, including prosecutors. While lawmakers were viewed as having the essential role in sentencing reform, two-thirds of the public believe judges should play a major, not a limited, role in sentencing reform.[25] The judicial role is being pursued through, among other avenues, the development of "evidence-based practices that reduce recidivism."[26]

In 2004, the Supreme Court in *Blakely vs. Washington*[27] found the use of facts by judges not decided by a jury to increase the length of a sentence unconstitutional. The decision applies to cases with a jury verdict in states where judges follow mandatory sentencing guidelines. Both federal and state legislators sought ways to conform their guidelines to the Court's decision. That effort continues, as evidenced in the January 2007 decision striking down California's sentencing guidelines in *Cunningham vs. California*.[28]

Looking Forward

For the state judiciary, 2006 was a year of bullets dodged and significant steps taken to achieve high levels of performance and accountability. The public rejected limits on judicial discretion, tenure and immunity while courts took it upon themselves to increase their accessibility and efficiency through newly developed measurement processes and the creation of court management teams. Some elections got ugly, but public perception of the judiciary remains favorable and, in the case of sentencing, has improved.

The future threat to the state judiciary is the politicization of judicial elections. The stakes are high. California Chief Justice Ronald George looked back on the year, noting "if the judiciary becomes politicized, then the rule of law is in jeopardy."[29] The darkest cloud on the horizon is the extraordinary infusion of out-of-state money into trial court races and a resulting sense of intimidation from the threat of public ordeal in the media or electoral defeat. The money spent on bending the courts in one direction or another is massive, but as was observed during the year, "Lobbying for judicial selection reform is like romancing your date in a fast-food restaurant."[30] Too few individuals and groups are active in efforts to keep our courts fair and impartial.

Notes

[1] Quotations are from the South Dakota attorney general's official explanation of the Amendment. The proposed amendment sought to eliminate judicial immunity, permit civil actions against judges, create special grand juries with power to remove judicial immunity, issue criminal indictments, and appoint a special trial jury to hear subsequent criminal trials. J.A.I.L. 4 Judges, South Dakota, *http://www.sd-jail4judges.org/*.

[2] Andrew Cohen, "The legal year in review," *Washington Post*, December 29, 2006.

[3] The National Center for State Courts tracks legislation that affects the state courts and ballot initiatives in *Gavel to Gavel* (accessible at *http://www.ncsconline.org/D_Research/gaveltogavel/*).

[4] Thirty-nine states elect some or all of their appellate and general-jurisdiction (main) trial judges: 89 percent of the state judiciary faces elections. Most of these are contestable elections: 60 percent of appellate judges and 80 percent of trial judges potentially run against an opponent. Other judges face "retention" elections (where incumbent judge runs against her own record). This applies to 26 percent of all appellate and 9 percent of all trial judges. Other judges are appointed by the governor or state legislature. In non-elective states, judges often stand periodically for re-selection. Only three states follow the federal model of lifetime appointments. See D. Rottman, C. Bromage, M. Zose, and B. Thompson. "Judicial Selection 101: What Varies and What Matters," *Caseload Highlights* 13 (2) 2006. (*http://www.ncsconline.org/D_Research/csp/Highlights/Vol13No2.pdf*).

[5] M.J. Ellington, "Cobb: No Parties in Justice," *Decatur Daily*, December 24, 2006.

[6] M. Orey, "How Business Trounced the Trial Lawyers," *BusinessWeek*, January 8, 2007.

[7] Dee J. Hall, "Special Interests Eye High Court Race," *Wisconsin State Journal*, January 28, 2007, D1.

[8] The transcript of the ads and an analysis of their respective accuracy can be found at *http://www.factcheck.org/article470.html*.

[9] B.J. Marrison, (ed.), "Furor over Judge Abates as Truth Emerges," *Columbus Dispatch*, March 19, 2006. The editor observed that, "Given the furor over this case, what will a judge think when he or she faces a controversial ruling? Will the judge ponder, 'What will Geraldo think?'"

[10] 536 U.S. 765 (2002).

[11] T. Goldman, "In Kentucky Supreme Court Race, Judges Get Out Their Soapboxes," *Legal Times*, November 6, 2006. See the sidebar for Mr. Bopp's statement: "The judicial es-

tablishment has failed to realize there's been a fundamental change in the law. … They thought all they had to do was repair a few windows when the foundations for their entire regulatory scheme—for all those speech codes—has been destroyed."

[12] M. Coyle, "Judicial Surveys Vex the Bench," *National Law Journal*, September 8, 2006.

[13] Judicial Council of California, Justice for All: The Strategic Plan for California's Judicial Branch, 2006–2012, adopted December 1, 2006.

[14] *www.courtsolutions.org*.

[15] B. Ostrom, R. Hanson, C. Ostrom, and M. Kleiman, "Court Cultures and their Consequences," *The Court Manager* 20 (1).

[16] For an overview, visit *http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm*.

[17] Public confidence in the courts is most strongly influenced by the perceived fairness of the procedures used by the courts to reach decisions. The implications of this conclusion for court improvement are drawn out in a 2006 study of the California courts. J. Doble, and A.M. Arumi, *Trust and Confidence in the California Courts. 2006: Public Court Users and Judicial Branch Members Talk About the California Courts*, Judicial Council of California, December 2006. (*http://www.courtinfo.ca.gov/reference/4_37pubtrust.htm*).

[18] *Shared Expectations: Judicial Accountability in Context*, published by the Institute for the Advancement of the American Legal System in Denver, 2006. (*www.du.edu/legal institute*), 7.

[19] For an example of the implementation of such an approach in a trial court, see the systematic efforts by Hennepin County (Minneapolis) to measure fairness. (*http://www.courts.state.mn.us/district/4/?page=1756*).

[20] Public confidence in the courts is most strongly influenced by the perceived fairness of the procedures used by the courts to reach decisions. The implications of this conclusion for court improvement are drawn out in a 2006 study of the California courts. J. Doble, and A.M. Arumi, *Trust and Confidence in the California Courts. 2006: Public Court Users and Judicial Branch Members Talk About the California Courts*, Judicial Council of California, December 2006. (*http://www.courtinfo.ca.gov/reference/4_37pubtrust.htm*).

[21] Kansas House Bill 2612 (accessible at *http://www.kslegislature.org/bills/2006/2612.pdf*). The bill became effective on July 1, 2006.

[22] In some states the availability of extra compensation or reduced caseloads are available in some areas but not others. See Table 28 in D. Rottman and S. Strickland, *State Court Organization 2004*, U.S. Government Printing Office, (2006).

[23] See *Key Elements of an Effective Rule of Court on the Role of the Presiding Judge in the Trial Court*, (National Center for State Courts, June 2006). The rule is intended for use at the state-level and is a part of a larger effort to promote a strong executive team that includes the presiding judge and trial court administrator. (*http://www.ncsconline.org/D_Research/Documents/Res_JudInd_ElementsofaRule_final2.pdf*).

[24] Figures are from Princeton Survey Research Associates International, *The NCSC Sentencing Attitudes Survey: A Report on the Findings*, July 2006. (*http://www.ncsconline.org/D_Research/Documents/NCSC_SentencingSurvey_Report_Final060720.pdf*).

[25] When asked to choose between the statements "Mandatory sentences are a good idea" and "Judges should have more leeway in sentencing, 57 percent preferred judicial discretion, 36 percent preferred mandatory sentencing, and seven percent were undecided.

[26] See, for example, Crime and Justice Institute, *Evidence-Based Practices: A Framework for Sentencing Policy*, Boston, November 2006 (a report to the State of Maine Corrections Alternative Advisory Committee, Sentencing Practices Subcommittee).

[27] 542 U.S. 296 (2004).

[28] 127 S.Ct. 856 (2007).

[29] Jessica Garrison, "As Politics Enters Races for Judicial Seats, Some Fear a Loss of Objectivity on the Bench," *LA Times*, October 25, 2006.

[30] Jason Boog, "Before the Flood," *Judicial Reports*, December 14, 2006. (*http://www.judicialreports.com/archives/2006/12/before_the_flood.php*).

About the Author

David Rottman is principal court research consultant at the National Center for State Courts, where he has worked since 1987. His research interests include judicial selection, judicial campaign oversight committees, public opinion on the courts, the evolution of court structure, and the pros and cons of problem-solving courts. He is the author of books on community courts, social inequality and modern Ireland. Rottman has a Ph.D. in sociology from the University of Illinois at Urbana, and previously worked at the Economic and Social Institute in Dublin, Ireland.