

JUNE 13 2014 5:01 PM

# How to Take Out a Supreme Court Justice

When politicians target elected judges with big money, the justice system loses.

By Dahlia Lithwick



Tennessee Supreme Court Chief Justice Gary Wade, seated, and, standing from left to right, Justices Janice Holder, Sharon Lee, William Koch Jr. and Cornelia Clark.

Courtesy of the Tennessee State Courts

**I**n 2009, Iowa's Supreme Court voted—unanimously by the way—that the state constitution protects the right of same-sex couples to marry. Very shortly thereafter, three of the Justices happened to come up for a retention election in November 2010—a judicial election in which one essentially runs against oneself in a yes/no vote. Chief Justice Marsha Ternus and Justices Michael Streit and David Baker were targeted by a costly campaign to unseat them, funded in good measure by out-of-state interest groups, for no other reason than

their votes in that unanimous decision (a judicial act that is now so utterly routine, it's almost boring). Nearly \$1 million from out-of-state groups like the National Organization for Marriage were poured into the campaign. The three Justices decided not to answer the attack ads or to finance campaign committees. They agreed that raising big money and answering the allegations leveled against them in the attack ads would serve to do nothing more than politicize judicial elections, leading them to discuss the merits of decisions and/or shill for money to launch counterattacks. None of which is befitting the stature of judges meant to be above the political fray. All three lost their jobs in a day.



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Knocking off a state supreme court justice is one of the cheapest political endeavors going. It costs a few measly million bucks to buy a judge's robe, which is vastly cheaper than a Senate campaign. But when politicians target elected judges and justices with political claims using political tactics (big money and inaccurate accusations), judges are forced to either respond like politicians or judges. Opting to do the former destroys the notion of impartial justice. Opting for the latter ends judicial careers.

And now here we go again. Three justices on the Tennessee Supreme Court are facing an election-year attack, not for any particular decision they have authored or even for any unpopular opinion they have espoused. No, in an ugly campaign in Tennessee that appears to be getting ever uglier, Senate Speaker Ron Ramsey, who is also the state's lieutenant governor, is attempting to oust three state Supreme Court justices in their Aug. 7 retention elections, chiefly for the judicial outrage of having been appointed to the high court by a Democrat. Under Tennessee law, the governor appoints Supreme Court justices, and then they come up for retention elections every eight years thereafter. This is a pretty common set-up in states that elect their justices.

Former Democratic Gov. Phil Bredesen appointed justices Gary Wade, Cornelia Clark, and Sharon Lee to the high court. They are all up for retention in two months and Ramsey, seemingly unable to get past the first few entries in the "Stock Campaign Insults" dictionary, has mounted a statewide assault targeting the three as "soft on crime" and

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“anti-business.” As the Shreveport Times notes, Ramsey is going after the three jurists “despite the fact that the Judicial Performance Evaluation Commission that Ramsey helped to appoint found them qualified to retain their posts.” Ramsey is a member of the Republican State Leadership Committee, which has a history of targeting judicial races across the country and calls the Tennessee race “high on our radar.”

Ramsey is arguing that he clairvoyantly knows that the Supreme Court as constituted will overturn limits on payouts in medical malpractice and other civil lawsuits that ensure “you’re not going to be punished by some jury that gives you some exorbitant return on the lawsuit.” And he’s also grumpy that in 2011 the Supreme Court vacated the death sentence of murderer Leonard Edward Smith because of ineffective counsel. (Smith ultimately got a life sentence in exchange for the death penalty being dropped.) But beyond the usual bellyaching about the suckiness of some court decisions with which he personally disagrees—or hopes to disagree with someday—there’s all sorts of speculation in the Tennessee press about what Ramsay is really attempting to achieve with this campaign. If even one of the incumbents loses, it will shift the balance of the court to a majority-Republican institution. The Shreveport Times posits that since the state Supreme Court justices pick the state attorney general, the purge may be an effort to create a “Republican” majority on the five-justice court to ensure that there is a newer, more Republican, attorney general. Ramsey pretty much just up and said so at the state GOP’s annual fundraiser in Nashville last week: “Folks, it’s time that we had a Republican attorney general in the state of Tennessee.”

Or it may not even be that targeted. As the editors suggest, “since the Republican Party now has supermajorities in both legislative houses and holds the governor’s office, perhaps the campaign only is an effort to complete the trifecta with the addition of the judicial branch.”

Sam Venable, a columnist at the Knoxville News-Sentinel, pointed out last week that purging the entire state of all those with a “D” behind their name—or anyone seated by anyone with a “D” behind his or her name—“is completely understandable, of course. It’s what politicians do. It’s how they live, breathe and have their being.” And of course this is true. Smearing judges who can’t, or won’t, smear back is politics pure and simple. The problem for the justice system is that the only solution to a bad guy with a well-financed attack campaign is to construct a good guy with a well-financed ad campaign. After all, the enduring lesson of the Iowa Supreme Court meltdown of 2010 is that dignified silence doesn’t win elections. And so the Tennessee Bar Association is, in an admirably bipartisan fashion, getting itself organized to finance and promote a counterinitiative to keep the judicial seats as judiciously as possible. That this is bipartisan is good. That it is happening at all (lawyers raising money for the judges before whom they will appear) is a disaster.



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-Milo Bloom

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In recent weeks the Nashville Bar Association circulated a resolution to members urging them to vote to retain the three justices. A group of attorneys and a former Tennessee Supreme Court chief justice are speaking out in support of the judges. And supporters of the three justices have already raised, as of last week, \$600,000 to finance the opposition campaign. That is, notes the Insurance Journal, in rather stark contrast to the 2006 Supreme Court retention race, in which the state Bureau of Ethics and Campaign Finance reported that no money was spent. None.

And that's the real problem. When judicial races turn into spending races, what suffers most is not Democrats or Republicans, but judicial independence and integrity. As has been exhaustively chronicled by one nonpartisan study after another, judges don't want to be dialing for dollars from the attorneys who litigate before them, and litigants don't want to appear before judges who dial for dollars. All of the data shows that the effect is a decline in confidence in the independence of the judiciary and a spending arms race that spirals ever more out of control. That's the paradox of course: Cynically preying on an unspecified public fear of out-of control judges will ultimate result in actual jurists who are actually compromised, either by taking money they shouldn't be taking, or making promises and pledges they are in no position to make. In either case, imaginary judicial shadiness becomes a lot more real.