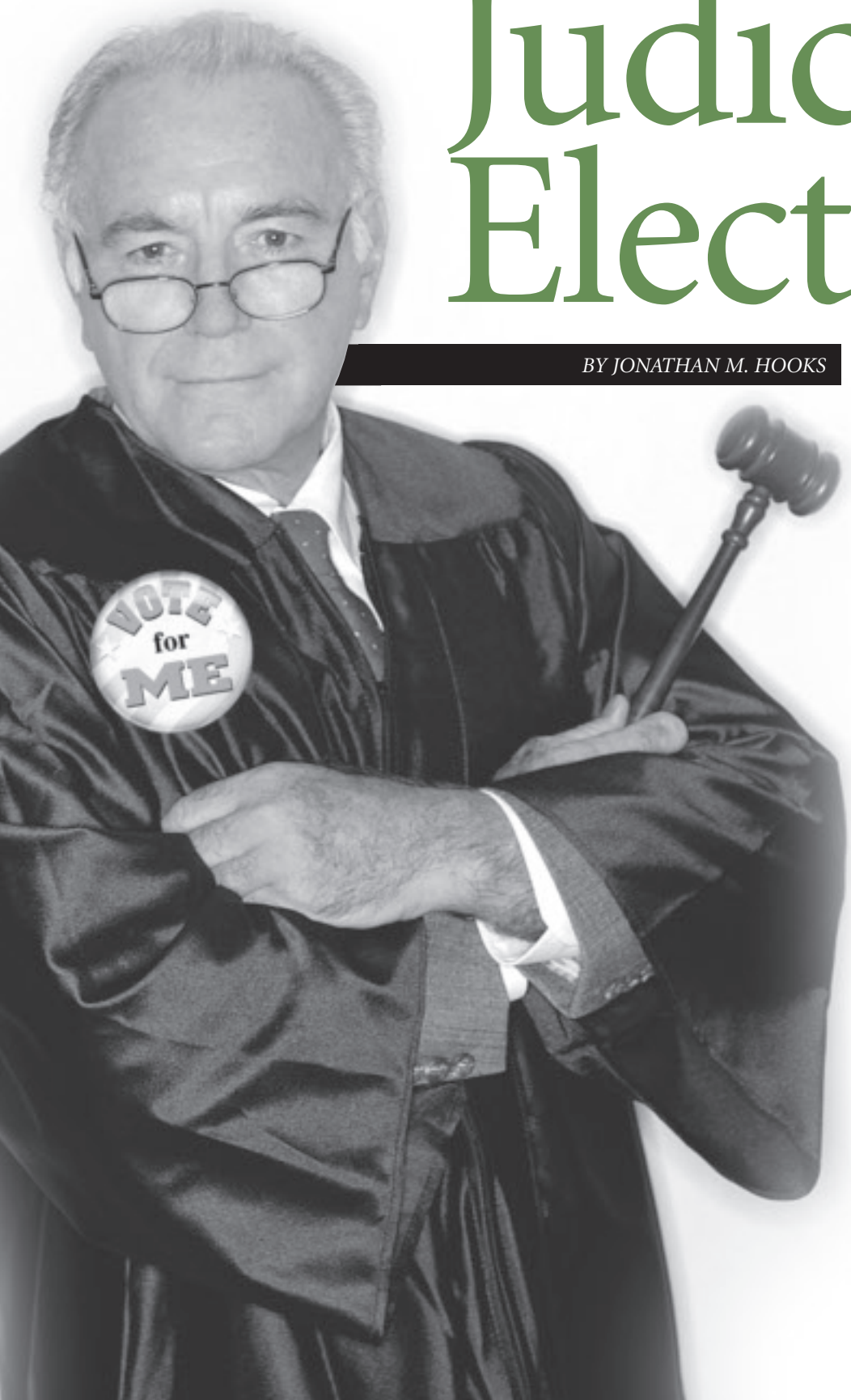
In Defense of Judicial Elections

BY JONATHAN M. HOOKS



This past fall, Alabamians re-elected three incumbent state supreme court justices, elected one new associate justice and ushered in a new era electing this state's first female chief justice. With these elections behind us, and in the wake of spent campaign coffers, deteriorating roadside campaign signs and tired volunteers, an old issue has surfaced once again within the Alabama State Bar: Should this state continue electing judges, or should we, as a state, choose a new method to put appellate judges onto our highest courts?

Since 1868, Alabama has chosen appellate judicial candidates in a partisan, statewide, popular election.[1] In recent years, however, many attorneys and judges holding prominent positions in the bar have called for the current system to be scrapped in favor of a different procedure by which a judge could take the bench. This new approach, colloquially labeled by its proponents (and referred to herein) as "merit selection," functions by allowing a nominating commission to recommend a small group of potential jurists for the consideration of the governor, who would then appoint one of the nominees.

Momentum clearly is building for this approach in some corners of the bar. A string of bar presidents has used the post to advocate merit selection,[2] and in 1997, and again in 2005, the Board of Bar Commissioners endorsed a merit selection plan. On April 24 of this year, a modified version of the bar's merit selection plan was introduced into the legislature, aimed not only at supreme court justices but also at members of the courts of civil and criminal appeals.[3] By the time this article is published, the issue of merit selection could potentially be slated to appear as a proposed constitutional amendment on a ballot near you. Why this growing distaste for judicial elections?

Some Background

Recent campaigns for the supreme court often have been expensive and occasionally malicious. Following on the heels of the 1994 Hooper-Hornsby election controversy, Justice Harold See's 1996 campaign for the court was attacked in a nasty television commercial now known in this state's electoral lexicon as simply "the skunk ad."[4] The repugnance of this commercial may have been a factor in the race, in which Justice See prevailed and became the fourth conservative on a court long dominated by Democrats. With the subsequent replacement of retiring Justice Terry Butts with Republican Champ Lyons, control of the supreme court suddenly shifted to a conservative (although not yet officially Republican) majority.[5] As the stakes rose, so grew the cost of successfully running for the court, as well as the tenor of many campaigns. Although races for lower appellate courts have continued a trend as relatively low-key in tone and involving relatively little money, the supreme court has continued its own trend: With the exception of a few no-contest elections, usually between a well-liked incumbent and a relatively unknown opponent, most recent supreme court races involve significant contributions and expenditures and occasionally an advertisement which crosses the lines of decency.

Is the System Broken?

From the recent history recounted above, we see two elements which have played key roles in recent judicial campaigns: money and tone. These features are frequently cited as the precise reasons that Alabama should discontinue judicial elections. Proponents of merit selection argue that these are problems that will largely disappear under the proposed nomination/appointment regime.[6] Money is perhaps the central problem seen by advocates for merit selection. Earlier this year, in the March edition of this publication, former Alabama Law School Dean Daniel Meador explicitly stated the view held by many supporters of a merit selection process: "A major reason why this system [of judicial elections] is bad is money–contributions of vast amounts of money in support of candidates for election to these appellate judgeships, an *evil* not present in any of the other selection systems."[7] Tone is not to be overlooked, however. From the skunk ad a decade ago to more recent television commercials, there certainly have been campaigns relying on overheated rhetoric to get traction in the polls.

That the electoral process is often accompanied by these elements, however, is a far cry from the notion that the process is terminally ill. Why, then, do advocates for merit selection see the process as broken? Why do they see the information and free speech contained in campaign advertisements, and paid for by interested contributors, as "evil?" There are two prominent reasons offered.

First, merit selection proponents argue that money gives the strong impression that Alabama's judicial branch is "for sale," or conversely, that a particular special interest has "bought" a particular candidate-turned-judge.[8] In support of this argument, supporters of merit selection note that races for the supreme court in Alabama consistently rank as some of the most expensive appellate races in the country. As a matter of first principles, however, one cannot rationally conclude that "justice is for sale" simply because of the *amount* of money. The 2006 race for chief justice of the Supreme Court of Alabama involved contributions of nearly $8 million,[9] a high figure to be sure, but a figure exceeded by, for example, Governor Riley alone in his 2006 re-election bid.[10] Some U.S. Senate and (of

course) U.S. Presidential races dwarf these figures, sometimes in the course of a one-day fundraiser. Any principled argument that high-dollar campaigns are, or are suspect to be, corrupt would have to call for the appointment by commission of the governor, our U.S. senators and the President of the United States.

The perception that judicial candidates appear to be "bought" and justice seems to be "for sale" is understandable to some degree, because contributors are often attorneys or have an interest in judicial decisions reached on Dexter Avenue. It is generally true that in large part, judicial candidates are funded by specific special interests; one is often bankrolled in part by the plaintiff's bar, another by the defense bar. But the argument that these contributors have thus bought a candidate is incorrect, because it puts the cart before the horse.

With the rare exception of the occasional "stealth" candidate who has formed no coherent judicial philosophy, there are two primary and distinctive, and in many cases, wholly contradictory, viewpoints on how a judge should fulfill his duty. For purposes of an effective stereotype to illustrate this point, simply consider the general legal philosophy espoused by members of, say, the Federalist Society versus the philosophy of members of, say, the American Constitution Society. One's general legal philosophy tends to strongly correlate with political affiliation; hence, your average Federalist Society sympathizer will tend to run as a Republican and hold judicial views advocating judicial restraint, whereas your average candidate agreeing with the American Constitution Society will tend to affiliate with Democrats and be slightly more inclined to take an activist role. Because political affiliation is such an effective shorthand for judicial philosophy, a special interest group can support candidates more likely to decide cases in favor of that group. The fact that money follows philosophy, as opposed to special interests purchasing a candidate's vote, is never better illustrated than when a judge "stings" his supporters by deciding a case against this contributor base. In short, a judge is not a robed Charlie McCarthy under the control of a special-interest ventriloquist. Although money is both convenient and effective as a polemical tool, we attorneys, of all people, should be able to look past such an emotionally-loaded argument and soberly consider whether it holds water.

The other reason offered for abandoning judicial elections, which intertwines the twin "evils" of money and tone, is that nasty campaign advertisements give the public ample reason to look at the field of candidates and conclude that "they're all bums."[11] That is, by the time we reach Election Day, the argument goes, all candidates have been exposed at every point of vulnerability, and they all have suffered some compromise of their integrity, ethics and/or morality. The most obvious reply to this argument is that not all campaigns expose skeletons or sling mud, and sometimes two opponents will entirely refrain from "negative advertising." Second, we cannot overlook two complementary facts: political advertisements run by a candidate's campaign are publicly attributed to that candidate, and dirtier ads usually hurt the source rather than the target. From this we see that more often than not, the public is savvy enough to sift through the rhetoric and make an informed decision as to whether or not the accusations against another candidate warrant voting for his opponent. Finally, this particular argument, like many raised in support of merit selection, cannot logically be limited to the judiciary. To suggest that judicial candidates are alone in running ads that scandalize or attack opponents is to deny stark reality. We cannot diagnose judicial elections as broken by pointing to the skunk ad unless we are prepared to handle the implications of the "Daisy" ad, too.[12]

Considering all of the above, it seems likely that the problems accompanying judicial elections have been overstated. This does not mean, however, that there is no room to improve the system. The fundamental question is whether the proposed reform would, as a practical matter, enhance the judiciary's reputation for fairness and impartiality and repudiate the notion (however unsupported) that "justice is for sale" in Alabama. Few people, including this author, would be against a reform effort aimed at improving our profession, if it truly accomplished that goal. In evaluating the merit selection plan, however, we, as members of the bar, must be certain that the actual plan proposed is worthy of being enacted into law. It is an old axiom that a well-defined problem is halfway solved. Likewise, a well-written bill is halfway enacted. Because this issue may soon be before us as citizens, and because this push for "reform" has not subsided, we would do well to evaluate the likely outcome of the proposed plan.

Follow the Money

The heart of the bar's plan is the elimination of elections so that a candidate no longer solicits and spends campaign contributions to advertise his candidacy to the general public. No election, so the argument apparently runs, no money; the elimination of money, in turn, would purportedly eliminate mud-slinging advertisements and perceived corruption. This

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logic seems to operate on a naïve assumption, namely that the individuals ultimately recommended by the nominating commission will not have actually *sought* that nomination. That is, the bar's plan seems to assume that the elimination of elections will somehow result in the elimination of *ambition*. This unfounded belief ignores human nature. As it is, the overwhelming majority of people nominated by a merit selection commission will achieve that honor after very publicly throwing their hat in the ring to seek a vacated seat on the bench. Given that folks will seek nomination and appointment, then, how precisely *would* an interested candidate get his message across to members of the nominating commission? And how would his supporters translate their hopes into action? Put another way, in the pursuit to be one of the lucky three chosen by the nominating commission, and moreover, the governor's appointee, what might a candidate and his supporters do?

To answer this, we first have to understand what a candidate could not do. That is, what legal framework would regulate and limit unethical and corrupt efforts in a merit-selection system? The constitutional amendment proposed by the bar would eliminate the electoral process, but *would not replace that process* with any sort of framework designed to prohibit or frustrate attempts to improperly influence the nominating commission. Since elections are gone, no rational person would declare himself a "candidate" and follow campaign finance laws, so those limits would evaporate. Additionally, candidates and their supporters trying to sway the minds of public officials would not be constrained by lobbying laws, because the governing definition for lobbying only mentions practices designed to influence legislation, not practices aimed at having particular individuals placed in positions of power.[13] What would be the end result? If one's efforts to be nominated are governed by neither campaign finance laws nor laws constraining lobbyists, what does govern those efforts? What safeguards will ensure that key players avoid corrupt practices? The only limits left standing in the wake of a merit selection plan would be those created by the state's criminal code, prohibiting crimes such as bribery and extortion, and Canon 7 of the *Code of Judicial Ethics,* which applies to candidates for judicial office, whether popularly elected statewide or chosen "on the basis of a merit system election."[14]

Canon 7 requires that a candidate should maintain "the dignity appropriate to judicial office," and prohibits the candidate from "authoriz[ing] or knowingly permit[ting] any other person to do for the candidate what the candidate is prohibited from doing under [the Canons]."[15] But what, precisely, is beneath the "dignity appropriate to judicial office?" Can a judicial candidate buy dinner for one or more members of the commission, during which they discuss the candidate's judicial philosophy? As a candidate standing for election, he could hold a campaign rally where his campaign provides food. The difference is only one of degree, not of kind. If a merit-selection candidate could provide food, what about recreation? Some candidates for election hold rallies at recreational facilities, after which there is, say, skeet shooting or pony rides paid for by the candidate's campaign. There would be no difference, in kind, if a candidate treated one or more members of the commission to, say, a round of golf, or his supporters provided a weekend golf vacation during which the candidate addressed them about his judicial philosophy. The only difference between the electoral situations described above and the predicted moves of a candidate seeking nomination from the commission is that the merit-selection candidate can identify the precise individuals he must sway to his favor and offer significantly more perks for taking the time to consider his "merit" for office. Ultimately, as a matter of dollars, merit-selection proponents may have a point when they say that the new system would reduce the amount of money involved. But the possible scenarios contemplated above provide just a glimpse into the way this process could spiral out of control.

In the end, then, would the proposed merit selection plan end the alleged corruption inherent in judicial elections? Likely not. Rather, the plan very well could usher in an era in which judicial candidates are chosen in a more corrupt environment than exists today. It would

possibly do nothing to prevent the fact that money is expended in the pursuit of office, and additionally remove from public scrutiny the details of who is funding or subsidizing the office-seekers, what they are doing to win appointment, and what they are saying about their competitors. As with many laws passed without sufficient forethought, the hoped-for result may quickly vanish, replaced by a reality never sought or desired by even its most ardent proponents. And in this particular case, the result may end up more corrupt than the even the most egregious examples of corruption under the current system of electing judges.

The point here is not that the proposed merit-selection plan is some conspiracy to make judicial appointments the business of smoke-filled backrooms, nor is it that merit selection, per se, is always and in every case a bad idea. The point is that we must be cautious about the system we adopt to achieve our desired ends. For instance, a nominating commission may well pass its own set of ethics provisions by which its members agree to refrain from any contact with potential nominees and/or their supporters except in very specific and limited instances. This would be very good. But a nominating commission may also choose not to adopt rules governing its practices, instead allowing members to act largely as they please. Campaign finance and lobbying laws, however imperfect, have been crafted largely in response to abuses of the system. The merit-selection plan would create a third system, heretofore untested within Alabama. Should the plan be adopted as currently conceived, we have no assurance that the new system would not eliminate the perceived corruption alleged to occur in the presence of money and dirty ads. Instead, we have a good-faith basis by which we may conclude that it could increase corruption by diverting money and half-truths underground and out of the eyesight, and oversight, of the public.

Questionable Constitutionality

As drafted, the merit-selection amendment also may suffer from a serious constitutional defect which, although it may not doom the entire system, could hold serious implications for the commission, and the first fruits of its work. Because Alabama is a "Section 5" state under the Voting Rights Act of 1965, any change that we make to any aspect of our election laws and practices must be pre-cleared by the U.S. Department of Justice ("DOJ").[16] Pre-clearance is essentially the review by DOJ to ensure that this change will not disenfranchise minority voters. And it is for purposes of satisfying the DOJ's pre-clearance requirements that the proposed merit-selection legislation recently introduced into the legislature affirmatively, and laudably, states:

> "All appointments and elections of members to the Judicial Nominating

> Commission shall be inclusive and shall be made with due consideration to the geographic diversity of the state, including rural and urban geographic areas, and the gender, racial, and ethnic diversity of the state, and without regard to political affiliation."[17]

In drafting the amendment, however, additional provisions were inserted, no doubt, to add some "teeth" to the bill's diversity language. Specifically, of the nominating commission's nine members (four non-attorneys, four attorneys and one judge),[18] at least one lawyer and at least one non-lawyer must be a minority, and at least one member of each of those groups must be a woman.[19] Within the nine-member commission, then, there are four "slots," making up 44 percent of the commission, which must be reserved for individuals identified not by the content of their character, but by the color of their skin and/or their gender. These "slots" constitute an explicit racial/gender quota.

In Florida, where a merit-selection plan currently operates, a similar quota system imposed by an earlier version of the statute was struck down as an unconstitutional violation of the Equal Protection Clause.[20] Under the earlier statute, which established a judicial nominating commission, one-third, or 33 percent, of the slots were reserved for a woman or minority.[21] In *Mallory v. Harkness*, the U.S. District Court for the District of Southern District of Florida, citing the U.S. Supreme Court's famous *Bakke* decision,[22] among others, held that the Florida statute constituted a quota system which neither advanced a compelling state interest nor was narrowly tailored to achieve such interest.[23] In *Bakke*, the Supreme Court had prohibited a quota system whereby slots or positions were held for individuals identified solely by a racial characteristic.[24] This prohibition has in no way been undermined by subsequent Supreme Court cases such as the recent *Grutter v. Bollinger* decision.[25] Putting aside entirely the issue of a gender-based quota and whether it would draw similar objections, the sheer existence of a racial quota is sufficient to call the constitutionality of the merit-selection amendment into question.

Although a severability clause will save the overall constitutionality of the bar's proposed merit-selection bill, any court challenge would force the state's hand. It would be forced either to spend money fighting a losing battle to defend the constitutionality of the provisions or to suffer the embarrassment of having to admit that the organization representing Alabama's lawyers misapprehended the holding of a U.S. Supreme Court precedent older than the practicing attorney authoring this article. Perhaps, as The Florida Bar did in the *Mallory* case, the Alabama State Bar would take the second route, "announc[ing] that the Bar [will] not defend the challenged statute," and later "disavow[ing] any interest in defending the statute."[26] Either way, the legal profession in Alabama could come away with a bruised reputation.

Final Thoughts

Despite their positive aspects, judicial elections are no panacea. Whether running for probate judge in a small Alabama county or for the state supreme court, dirty politics and bankrolling by special interests can and sometimes have derailed ethical, honest, bright and principled candidates who likely would have served honorably as superb jurists, and no doubt those same forces sometimes have ended too soon the tenure of worthy judges who were replaced by jurists of distinctively less merit. The notion that elections are a universal good is not held by this author. The notion that merit selection will end or even diminish the chances of corruption and odious politics, however, while a wonderful-sounding thought, seems to collapse upon closer scrutiny.

In *Federalist* No. 51, James Madison memorably wrote that "[i]f men were angels, no government would be necessary." As mentioned earlier, a judicial nominating commission may in fact operate in such an ethical manner, establishing ground rules designed to eliminate many of the concerns voiced above. But we absolutely cannot rely upon this hope unless the people bind the members of any eventual nominating commission by law. And the people cannot bind those commission members unless they receive and approve a bill containing explicit and firm safeguards preventing corrupt practices from taking root. As it exists in its current form, the proposed legislation does nothing to counter decidedly un-angelic practices that could germinate as the commission considers its first few vacancies and feels its way along a path not clearly laid before it.

We, as a profession, would do well to continue to consider whether there is a workable and effective method of improving the means by which we install judges to their positions. We should consider all variants of methods designed to choose our judges. Each has its benefits and drawbacks. In considering whether to and/or how we should proceed, we need to consider soberly and rationally both sides to all possibilities, thinking beyond the first stage and considering the ultimate implications of the system we consider adopting. By doing so, we may be surprised to see that the current system is perhaps flawed, but better than any alternative yet conceived. ■

Endnotes

1. Ala. Const. of 1868, art. VI, § 11.
2. See, e.g., Fournier J. "Boots" Gale, III, President's Page, "Alabama Ground Zero," 68 *Ala. Law.* 8 (2007); Bobby Segall, President's Page, "The Independence of Our Judiciary," 66 *Ala. Law.* 324 (2005); Wade Baxley, President's Page, "Merit Selection of Judges: A Concept Whose Time Has Come," 60 *Ala. Law.* 366 (1999); Warren B. Lightfoot, President's Page, "Non-Partisan Judicial Elections," 58 *Ala. Law.* 70 (1997).
3. H.B. 710, 2007 Leg., Reg. Sess. (Ala. 2007).
4. See Glenn C. Noe, "Alabama Judicial Selection Reform: A Skunk in Tort Hell," 28 Cumb. L. Rev. 215, 215 & n. 3 (1997-98) (citing Dale Russakoff, "Legal War Conquers State's Politics; In Tort Reform Fight, Alabama Court Race Cost $5 Million," *Wash. Post,* Dec. 1, 1996, at A1)), where the commercial is described as follows: "The ad depicted a picture of a skunk that faded into a picture of Harold See, the Republican candidate for Alabama Supreme Court justice."
5. At this time, Justice Gorman Houston was a Democrat, but switched parties and ran for re-election as a Republican in 1998.
6. Daniel J. Meador, "Selecting Alabama's Appellate Judges–A Better Way," 68 *Ala. Law.* 135, 136 (2007), stating that the bar's proposed merit-selection plan "would entirely eliminate money and character assassination from the process of selecting appellate judges." See also, Bobby Segall, President's Page, "Many Things But Never Boring," 67 *Ala. Law.* 228, 234 (2006), stating that although "[p]olitics will also play a role," the merit selection plan would help to "eliminate, or substantially diminish, the obscene

amounts of money that are spent and the terrible, mean-spirited and un-judgelike advertising campaigns that are conducted."

7. Meador, supra n.6, at 136 (emphasis added).
8. Meador, supra n.6, at 136 ("The money fueling this selection system gives the unavoidable impression that seats on Alabama's appellate courts are for sale."); Segall, supra n.6, at 234 ("Very few people in our state believe judges who take a ton of money from one special interest group or another, and hope to get more funds for future elections, won't be influenced in their decision-making."); William N. Clark, President's Page, "A Year in Focus," 65 *Ala. Law.* 216, 218 (2004) ("Because of the process and the enormous costs involved in the elections, the attitude of some of the members of the public was that when that much money is put in, justice is for sale.").
9. Eric Velasco, "State Considers New Way to Pick Judges," *Birmingham News,* March 2, 2007, at A1.
10. Governor Riley raised and spent over $11 million in his re-election bid. Charles J. Dean & Kim Chandler, "Riley Out-Raised Baxley 3-1 On His Way to Victory," *Birmingham News,* Feb. 1, 2007, at A1.
11. Meador, supra n.6, at 136-37.
12. The "Daisy" ad was the famous 1964 television commercial paid for and run (only once) by President Lyndon B. Johnson's presidential campaign, wherein a little girl is picking the flowers from a daisy when an atomic bomb is dropped from the sky and detonates, mushroom cloud and all. The not-so-subtle implication of the advertisement was that the election of Barry Goldwater would result in a nuclear attack from the Soviet Union. If advertisements such as the skunk ad represent a malignancy within the election process requiring appointment by commission, logically, one must be prepared to say that the "Daisy" ad should have spurred the beginning of a process of appointing by commission the President of the United States.
13. *Ala. Code* 1975, § 36-25-1(17), which defines "lobbying" as "[t]he practice of promoting, opposing, or in any manner influencing or attempting to influence the introduction, defeat, or enactment of legislation before any legislative body; opposing or in any manner influencing the executive approval, veto, or amendment of legislation; or the practice of promoting, opposing, or in any manner influencing or attempting to influence the enactment, promulgation, modification, or deletion of regulations before any regulatory body; …."
14. Canons of Judicial Ethics, Canon 7.
15. *Id.*
16. 42 U.S.C. § 1973c(a).
17. Section 1, H.B. 710, 2007 Leg. Reg. Session (Ala. 2007), proposing the replacement of Ala. Const. 1901, Amend. 328, § 6.13, with a new § 6.13, in which the quoted language would be found in Part II.(b)(4)e.
18. Section 1, H.B. 710, 2007 Leg. Reg. Session (Ala. 2007). The committee membership would be set forth in Part II.(b) of proposed new § 6.13.
19. *Id.* See Part II.(b)(1) & (2) of proposed new § 6.13.
20. *Mallory v. Harkness*, 895 F.Supp. 1556, 1564 (S.D. Fla. 1995).
21. *Mallory*, 895 F.Supp. at 1558.
22. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
23. *Mallory*, 895 F.Supp. at 1560.
24. *Bakke*, 438 U.S. at 316-17.
25. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003). In fact, *Grutter* explicitly affirmed the "clear" legal principle of *Bakke*.
26. 895 F.Supp. at 1558.

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