

Judicial Democracy

Trends *Alert*

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Critical information for state decision-makers

Judicial Democracy

October 2003



The Council of
State Governments

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The Council of State Governments

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Executive Summary

In recent years, the judiciary has increasingly rendered decisions in areas such as Medicaid, education finance and prison reform, that can have major impacts on public policy and state budgets. Consequently, interest groups and lawyers have shifted some of their attention and resources to the judicial branch. This, in turn, has led some voters to question the integrity of the bench. The judicial branch is a key element in the American system of checks and balances, so judicial reform is likely to be a hot topic at the state level in the coming years.

State leaders should be aware of several trends concerning the judiciary:

- Judicial elections are becoming more expensive.
- More interest groups are becoming involved in judicial campaigns and may avoid certain campaign finance reporting requirements by not specifically endorsing a particular candidate.
- Trends related to judicial elections accompany low public confidence in the court system.

This *TrendsAlert* highlights these major trends and looks at some of the factors behind them. In addition, it provides an overview of the three primary methods of judicial selection – appointment, election and the merit system – and presents the advantages and disadvantages of each method. Lastly, this report outlines a number of judicial reforms that state leaders may want to consider. These reforms deal with judicial campaign finance, campaign conduct, voter awareness and judicial conduct while on the bench.

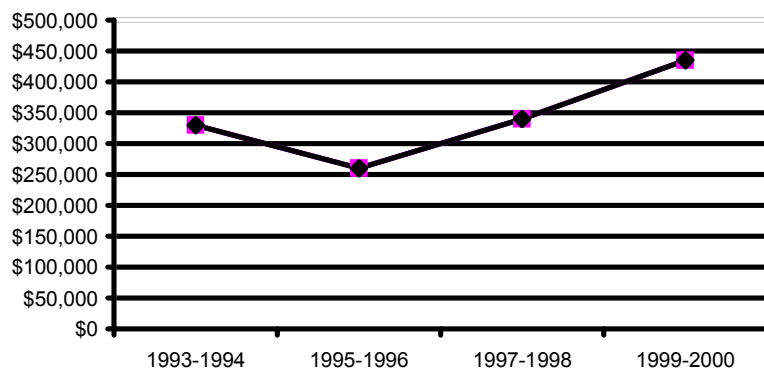
1. Trends in Judicial Elections

Judicial elections are becoming more expensive for a number of reasons. In addition to skyrocketing costs, more interest groups are becoming involved in judicial campaigns and may avoid certain campaign finance reporting requirements by not specifically endorsing a particular candidate. These trends are accompanied by low public confidence in the court system.

Rising Costs of Judicial Campaigns

Judicial candidates are raising and spending more money than ever before. The average amount of campaign funds raised by judicial candidates has been increasing since 1995. This is illustrated in **Figure 1.1**.

Figure 1.1 Average Funds Raised by Judicial Candidates, 1993-2000



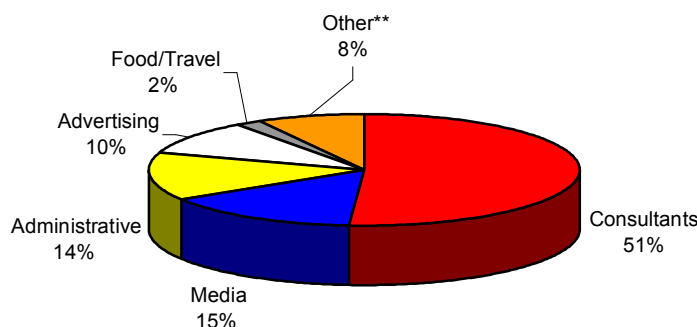
Source: Deborah Goldberg, Craig Holman, and Samantha Sanchez, "The New Politics of Judicial Elections," *The Brennan Center for Justice and National Institute on Money in State Politics* (February 2002).

1.1. This trend is most apparent in state Supreme Court races of 2000 that proved to be the most expensive judicial election cycle to date. In fact, fundraising for Supreme Court races jumped more than 60 percent between 1998 and 2000.¹ On average, each state Supreme Court candidate raised \$430,529.² Even more extraordinary, 16 state Supreme Court candidates raised more than \$1 million each.³

Why Are Judicial Elections Becoming More Expensive?

Judicial candidates are raising more money in part because campaigns are becoming more expensive to run. Escalating campaign costs can be attributed to at least two factors. First, modern campaigning tactics include political consultants and television airtime, which are both expensive. Second, courts have made several rulings that have changed public policy, so interest groups are concentrating more on promoting their ideas through judicial rulings rather than legislation.

Figure 1.2 State Supreme Court Candidate Expenditures, 1989-2000*



* This chart is based on expenditure records from Supreme Court candidates in Alabama, Illinois, Louisiana, Michigan, Montana, North Dakota, Pennsylvania and Wisconsin.

** Other categories include: payments to political party (1.9%), events (1.4%), printing (1.4%), fundraising (1.1%), election day activities (0.5%), contributions to other candidates' campaigns (0.2%), and other smaller expenses.

Source: Data from Justice at Stake Campaign, <<http://www.justiceatstake.org>>

Times have changed, and so have campaign strategies. In the past, campaigning involved mostly door-to-door canvassing and other grassroots activities. Modern campaigns, in contrast, emphasize mass media and hired consultants.

Figure 1.2 shows a breakdown of current campaign expenditures for state Supreme Court candidates.

Hired consultants are driving up the costs of judicial campaigns.

Between 1989 and 2000, consultants accounted for 51.2 percent of the total money spent on judicial campaigns.⁴ Paid political consultants have often replaced traditional, more inexpensive grassroots campaigning based on volunteer efforts.

Along with the costs of hiring consultants, candidates must now raise money to ensure ample airtime for their message. And television time is expensive.

Interest Group Involvement in Judicial Campaigns

Courts have come to address issues also addressed by legislators and governors, such as prison reform, use of Medicaid expenditures and education finance. As courts continue to address controversial subject matter, interest groups will continue to become an integral part of judicial campaigning.⁵

Interest groups spent nearly \$3 million on television advertising for state judicial races in 2000.⁶ But interest groups can escape certain reporting requirements under normal state campaign finance laws by restricting their commercials from using "magic words,"⁷ such as "elect" or "defeat" that clearly advocate the endorsement or defeat of a particular candidate. Because they do not refer directly to the endorsement or the defeat of a candidate, interest groups are not required to adhere to special financial reporting requirements normally practiced by candidates. In 2000, 4,451 television commercials were aired for judicial races, and only 1.2 percent contained magic words.⁸

Lawyers and business interests contributing to judicial elections have helped ignite a rise in campaign finances. In 2000, both groups spent a combined \$2.8 million for television advertising in state Supreme Court races. Trial lawyers, since 1989, have contributed 29 percent campaign donations to judicial

candidates,⁹ and business interest groups have given 19 percent of all judicial contributions.¹⁰ The two groups combined have made almost 50 percent of all contributions to judicial candidates and are perceived to have a vested interest in future decisions rendered by state judiciaries. **Figure 1.3** shows the breakdown of state judicial campaign contributions.

Public Confidence in the Judicial System

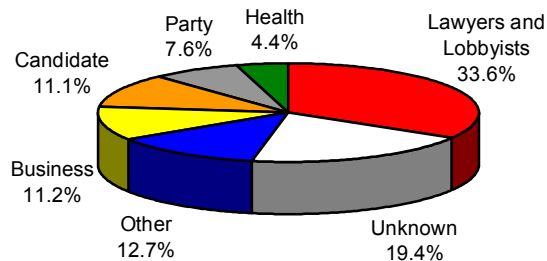
The increasing amount of money that filters into judicial campaigns from interest groups and private donors may jeopardize the free and unbiased image of justice. The public negatively views the appearance of impropriety of judges deciding cases in which one or both parties have contributed to his or her campaign.¹¹

A national survey administered by the National Center for the Courts in 1999 found that 81 percent of the respondents

agreed that judges' decisions are swayed by political considerations.¹² Another national survey found that more than 75 percent of voters and almost 30 percent of state judges feel that campaign contributions influence judicial decision-making at least somewhat.¹³ Two recent national surveys conducted by Greenberg Quinlan Rosner Research and American Viewpoint reveal a low public confidence in state court systems because of the increasing impact of politics, money and special interests.¹⁴ The surveys also point to a low level of public involvement in and awareness of judicial elections.

Although roughly 80 percent of the public prefers to select its judges by election,¹⁵ a majority of American voters and judges express support for a variety of reforms that would disclose special interest campaign activities, increase voter education about judicial candidates and the courts, and improve the tone and conduct of judicial campaigns. The results of a national survey of voters and state judges are summarized in **Figure 1.4**.

Figure 1.3 Contributions to Judicial Campaigns in 2001 - 2002*



This chart is based on the data from the 2001 and 2002 campaign contributions in Alabama, Alaska, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Washington, Wisconsin and Wyoming.

** Other categories include contributions from energy and natural resources (2.1%), retiree and civil servants (2.3%), construction (2%), transportation (1.1%), agriculture (0.8%), communication and electronics (0.6%), ideology/single issue (0.3%), small contributions (1.5%) and labor (1.8%).

Source: Data from National Institute on Money in State Politics <<http://www.followthemoney.org>> (September 11, 2003).

Figure 1.4 Results From a Survey of American Voters and State Judges

<i>Indicator</i>	<i>Voters</i>	<i>Judges</i>
ERODING PUBLIC CONFIDENCE		
Campaign contributions to judges have at least some influence on their decisions.	76%	26%
Individuals or groups who give money to judicial candidates often get favorable treatment.	67%	—
Concerned about special interest groups buying advertising to influence the outcomes of judicial elections.	81%	79%
LACK OF PUBLIC KNOWLEDGE AND INTEREST		
Have a great deal of information about candidates in judicial elections.	13%	—
Concerned that “because voters have little information about judicial candidates, judges are often selected for reasons other than their qualifications.”	90%	87%
SUPPORT FOR REFORMING JUDICIAL SELECTION SYSTEMS		
Support for a requirement “that all political advertisements in judicial elections clearly state who is paying for the ad.”	88%	94%
Support for new state efforts to provide voter guides prior to judicial elections.	90%	75%
Support for a general proposal to provide public funding of judicial elections.	80%	61%
From a national survey of 1,000 registered voters, Oct. 30 through Nov. 7, 2001, and a separate national survey of 2,428 state judges from Nov. 5, 2001 to Jan. 2, 2002, including 188 state Supreme Court justices, 527 appellate court judges and 1,713 lower court judges.		
Source: Justice at Stake Campaign, < http://www.justiceatstake.org/files/PollingsummaryFINAL.pdf >		

The judicial system has been gaining media and organizational attention recently because of these trends in judicial elections. Judicial elections, however, are not the only method of judicial selection. The next section provides an overview of the three major methods of judicial selection.

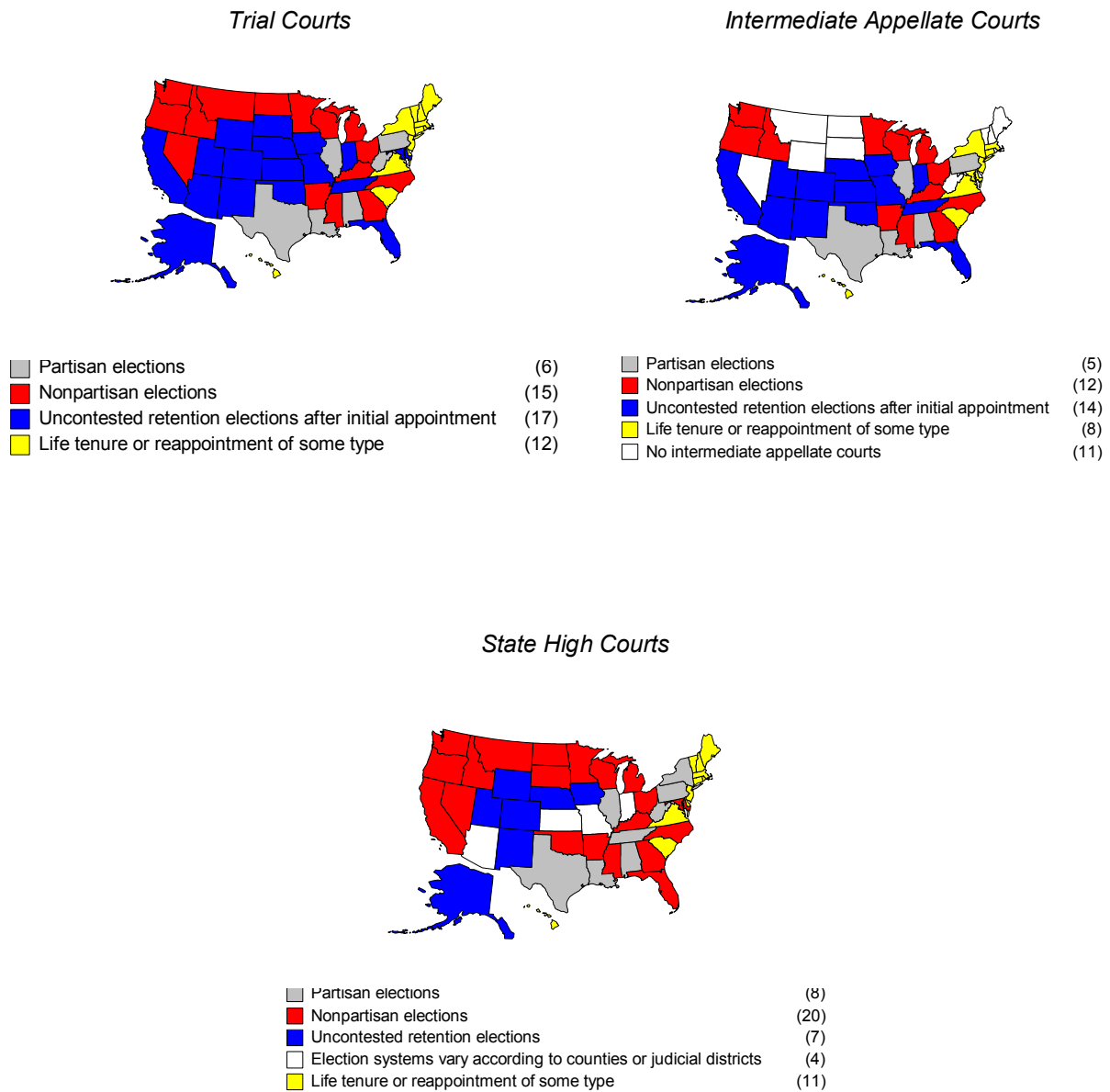
2. Judicial Selection in the States

Currently, 30,000 state judges preside over a bench in the United States.¹⁶ This number is greater than all state members of the legislative and executive branches combined. Unlike governors and legislators who are elected, there are primarily three different ways that states can choose their judiciaries – election, appointment and the merit system, which combines election and appointment. Judicial selection methods used in states are illustrated in **Figure 2.1**. The pros and cons of each method are highlighted in **Figure 2.2**.

Judicial Appointment

Currently, judges are appointed by either the governor or legislature in eleven states. In the early history of the United States, the newly formed states often followed the English tradition of judicial appointment. These decisions were probably swayed by the opinions of the Founding Fathers who were not fond of judicial elections. In the “Federalist Papers,” Alexander Hamilton, James Madison and John Jay argued that judicial elections would hinder judicial objectivity and persuade judges to succumb to popular opinion, rather than the letter of the law.

Figure 2.1 Judicial Selection in the States



Source: Data from American Bar Association Commission on the 21st Century Judiciary
http://www.manningproductions.com/ABA263/ABA263_FactSheet.htm

Note: Both Illinois and Pennsylvania hold contested partisan elections for the first term of all their judges, and uncontested retention elections for additional terms. In Ohio and Michigan, political parties are involved in nominating and endorsing judicial candidates, but the general elections are non-partisan (candidates appear on general election ballots without party labels). All judges in New Mexico are initially appointed, face contested partisan election for a full term and then run in uncontested retention elections for additional terms.

Figure 2.2 Merits and Drawbacks of Judicial Selection Methods

Judicial Appointment	
Pros	<ul style="list-style-type: none"> • Government officials may have more information about potential judges. • Government officials may know more about the judicial branch than the average citizen does. • Appointed judges may be less likely to submit to public opinion or special interests rather than focusing on the law.
Cons	<ul style="list-style-type: none"> • System gives a great deal of power to the governor or legislature that appoints judges. • Appointers may focus on political considerations rather than solely on a potential judge's qualifications. • Appointed judges may become or be perceived as political cronies. • Appointed judges may be more reluctant than elected judges to overturn legislation and executive orders.
Judicial Election	
Pros	<ul style="list-style-type: none"> • Judges, who can change public policy, are accountable to the public. • Elected judges are less likely to be beholden to the governor or legislature than are judges who are appointed by political leadership.
Cons	<ul style="list-style-type: none"> • Elections, even nonpartisan ones, can add a political dimension to the judicial branch. • Interest groups and lawyers who may appear before a judge can contribute to a judge's campaign. • Interest group influence erodes public perception of judicial impartiality, integrity and independence. • Low level of public knowledge and interest in judicial elections could mean that elected judges really aren't accountable to the public.
Merit Selection	
Pros	<ul style="list-style-type: none"> • Same as judicial appointment and judicial election.
Cons	<ul style="list-style-type: none"> • Same as judicial appointment and judicial election. • Professional, personal and party politics may be played out within the nominating commission.

Pros and Cons of Judicial Appointment

Advocates of judicial appointment argue that it is better for governors and legislatures to appoint judges because government officials have more information about potential judges and pay more attention to the judiciary than do average citizens. They also argue that campaign donations needed in judicial elections can sway a judge's objectivity and deter some qualified candidates from seeking a judgeship; judicial appointment avoids these conflicts. Proponents also note that appointment can contribute to the public perception of judicial integrity and independence. Appointed judges may also be less likely to be swayed by public opinion on hot button topics and are thus able to focus on law rather than public opinion.

Judicial Elections

Currently, most states, 32, select some or all judges with contestable elections, either nonpartisan or partisan. There can be both types of elections within states. That is, some states use partisan elections for some judges are nonpartisan elections for others.

Judicial appointment was dominant until the 1830s when the era of Jacksonian democracy began. During this era, public accountability and expansion of voting rights were prominent themes. Between 1846 and 1860, 19 of 21 state constitutional conventions chose public elections as a judicial selection method. During this period, leaders were often concerned that judges were not held accountable to the public.

Pros and Cons of Judicial Elections

Proponents of judicial elections argue that judges make decisions that affect the lives of people other than parties to a lawsuit and should be accountable to the general public. They also argue that judicial elections counter the negatives of judicial appointment, such as the possibility for political cronyism.

Ironically, the independence from political influences that the elective systems were devised to guarantee has been adversely affected by a growing dependence of judicial candidates on other sources of potential influence – individuals and private interests that finance judicial campaigns. The solicitation of financial benefits has created a perception of obligation toward the donors, which may have contributed to low public confidence in the court system.¹⁷

A low level of knowledge and interest among the electorate often characterize state judicial elections. In addition, the lack of interaction between candidates and constituents leave many uninterested in voting for judicial candidates. Figures show only 13 percent of Americans report they know enough to vote in a judicial election.¹⁸ Because so few people know judicial candidates or vote in judicial elections, it can be argued that the process does not lead to public accountability. In addition, as noted before, the public tends to believe that judicial candidates are beholden to their financial supporters.

Partisan elections add a political dimension to the judicial branch, although the judiciary is supposed to be impartial. Nonpartisan elections come with their own set of problems. Low voter awareness, for instance, usually leads to incumbent victories, and political parties may still donate to candidates.

The Merit Selection System

Currently, seven states use a merit selection system for all of their judges, and 12 states use it for some of their judges. Current judicial selection systems vary considerably from state to state, and also within a single state's different types of courts.

At the beginning of the 20th century, a reform effort began to combat some of the problems with judicial elections. The Progressives devised the merit selection system, which is a hybrid of judicial appointment and judicial election. This type of system was adopted in Missouri in 1940 and is sometimes known as the Missouri Plan.

Merit selection seeks a balance between the competing demands for judicial independence and judicial accountability by providing for initial appointment through a nominating commission and subsequent terms through retention election by the general public. In this system, a nonpartisan, broad-based nominating commission recruits judicial candidates, assesses their qualifications and submits the list of the most qualified persons to an appointing authority, most commonly the governor. After an initial appointment, the judge faces a retention election when voters review his or her record and decide whether to retain the judge for a full term.

Pros and Cons of Merit Selection

Since merit selection is a hybrid of appointment and elections, it has some of the pros and cons of each of those methods. One of the most common arguments against merit selection is that it gives nominating commissions, which are often composed of or appointed by politicians, too much power. If a member of the nominating commission has a personal vendetta against a potential judge, for instance, the judge may not be nominated. In addition, both party and professional politics may be at work within the nominating commission, which can bias the commission's recommendations.

States may employ various methods of judicial selection. The point is that most judges face some type of election, and issues with the election system have surfaced and sparked an interest in judicial reforms. The next section discusses some policy options which may improve the judicial selection process.

3. Policy Options

National surveys find significant public support for a variety of reforms to improve the selection process of state judges.¹⁹ Because judicial elections are prevalent at the state level, the policy options presented in this report focus on issues with campaign finance, campaign conduct and voter awareness. In addition, this section also highlights policy options dealing with judicial conduct while on the bench. Of course, states may also consider changing their judicial selection altogether; those with elective systems, for instance, may consider changing to an appointive system or vice versa.

Campaign Finance

There are several ways to deal with the public perception of judicial impropriety associated with litigants who have contributed to a judge's campaign. These reform options include:

- spending and contribution limits;
- partial public funding of judicial campaigns;
- full public funding of judicial campaigns;
- prohibition of fundraising in uncontested elections;
- campaign finance reporting requirements; and
- measures to promote public access to campaign finance data.

The pros and cons of each of these options are discussed below and highlighted in **Figure 3.1** on the next page.

Spending Limits and Contribution Caps

Spending limits reduce the overall reliance on private funds, even if public financing is not available. One way to mitigate the influence of money in elections without committing public funds is setting contribution limits for candidates who agree to limit overall spending.²⁰ Typically a financial incentive is necessary to induce acceptance of expenditure caps.²¹ Most commonly, public funding for judicial campaigns provides such an incentive.

States may need to find a way to control the campaign spending of those candidates or support groups that have opted out of the public funding scheme. Some states include certain "trigger" provisions in their public funding systems that raise or eliminate the expenditure ceilings for participating candidates if the nonparticipating candidate exceeds a certain threshold level of campaign spending. The trigger provisions serve two purposes: 1) to encourage candidates to participate by guaranteeing their right to respond to attack ads by candidates who do not participate in the program or groups that are not bound by spending regulations; and 2) to discourage non-participants from exceeding the limits already accepted by the participating candidates.

Such triggers, like virtually every other aspect of campaign finance law, have been subject to First Amendment challenges. The federal courts, however, have upheld the constitutionality of these triggers. While declaring mandatory spending limits unconstitutional in the landmark *Buckley v. Valeo* case, the U.S. Supreme Court noted that Congress could condition voluntary public funding on candidates' willingness to abide by expenditure ceilings.²² In 1994, the 8th Circuit Court upheld an amendment to Minnesota's law that allowed for lifting the expenditure ceilings of participating candidates when the nonparticipating opponents' spending exceeded a certain threshold level.²³ More recently, in *Daggett v. Commission on Governmental Ethics and Election Practices*, the federal Court of Appeals for the 1st Circuit upheld Maine's independent expenditure trigger.²⁴

Another way to address the role of money in judicial elections is to set contribution limits. Only seven states have specific judicial campaign contribution limits. These campaign contribution limits are designed to make sure that no one person or group can largely finance a candidate's campaign and thus leave the candidate beholden to the donors.

Figure 3.1 Merits and Drawbacks of Campaign Finance Reform Options

Spending and Contribution Limits

Pros

- Spending limits may make elections more about the candidates and less about money.

Cons

- Financial incentives from the state may be needed.
- If programs are voluntary, nonparticipating candidates may have an advantage over those restricted by spending limits.

Partial Public Funding

Pros

- Partial public funding replaces private money in judicial campaigns.
- Partial public funding opens the electoral process to potential candidates who do not want to raise large amounts of money for campaigns.

Cons

- Partial public funding does not altogether eliminate the need for private campaign funding sources.
- Difficulty in monitoring the special interest groups' independent expenditures for dispersing matching grants to the participating candidates.
- Public funding requires taxpayer money.

Full Public Funding

Pros

- Full public funding totally eliminates the need for private contributions.
- Like partial public funding, full public funding encourages qualified candidates from poor and minority communities to run for judicial office.
- Full public funding has an equalizing effect among candidates.

Cons

- System could be quite expensive.
- Problems with interest group influence remain.

Prohibition of Fundraising in Uncontested Elections

Pros

- Fundraising prohibitions may dispel criticisms of incumbent protection.
- Lawyers and interest groups will not have the opportunity to influence judges.

Cons

- Fundraising prohibitions are problematic when interest groups oppose a sitting judge or unopposed judicial candidate.

Campaign Financing Reporting Requirements and Public Access to Data

Pros

- Requirements help enforce judicial election laws.
- Public access to campaign data may allay public fears of interest groups' undue influence on judicial candidates.

Cons

- Monitoring campaign finance and allowing public access to data could be expensive.
- Interest groups that do not use "magic words" in campaign ads do not have to report expenditures.

Contribution and spending limits help to make elections more about the candidates and less about money. However, to encourage candidates to agree to spending limits, candidates may, for example, sometimes be offered a financial incentive from the state.

Partial Public Funding

Most existing public funding arrangements provide only partial funding for election campaigns. Under such a system, partial funds are available for candidates who have collected a threshold number and amount of private contributions. The public subsidy might be a matching fund³⁰ or a lump sum grant. Although partial public funding does not entirely eliminate private money and its influence on elections, it substantially reduces candidates' dependence on it by setting spending limits as conditions for disbursing grants. This arrangement ensures that rather than accepting public money as well as unlimited private contributions, the candidates replace private with public funds. It also opens up the electoral process to

Example 3.1 Wisconsin Election Campaign Fund

To date, Wisconsin is the only state that provides public funding for Supreme Court judicial elections. The revenues for the Wisconsin Election Campaign Fund are generated by a \$1 state tax return checkoff. To insure that only serious candidates gain access to public money, the legislation limits eligible candidates to those who are opposed and who have already raised close to \$11,000, or 5 percent of the authorized disbursement in increments of \$100 or less.²⁵

To restrict overall spending, the program requires that candidates agree to honor a \$215,625 spending limit together with specified contribution limits as a condition to accepting public funds. The maximum public grant available for a Supreme Court candidate is \$97,031.

To encourage participation in the program and discourage high spending by nonparticipating candidates, the grant recipient's spending and contribution limits are waived if the nonparticipating competing candidate has not agreed to comply with the same limits.²⁶

Since 1995, declining checkoffs in Wisconsin have reduced the public funds to an average of only 3.4 percent of total money raised by candidates.²⁷ As the size of public grants diminish, candidates have greater incentive to opt out of the program and seek unlimited campaign contributions. Not surprisingly, the percentage of publicly funded judicial candidates in Wisconsin has declined from a high of 55 percent in 1986 to just 14 percent in 2000.²⁸

In 1999, after the challenger for a Supreme Court seat refused to accept public funding or to voluntarily abide by limitations, the incumbent's spending limits were waived, causing the combined campaign spending to exceed \$1.36 million. The runaway campaign spending and negative public reaction to this election, however, motivated candidates for the 2000 campaign to accept public money and to abide by the associated spending limit.²⁹

qualified candidates who are discouraged from running by the perceived need to raise large amounts of money to finance their campaigns.

Partial public funding, however, does not eliminate the interest group influence from the process. It may also be difficult to monitor special interest groups' independent expenditures for dispersing matching grants to the participating candidates. In addition, such a system obviously requires public money. Possible public sources of money for judicial elections include general tax revenues, tax checkoffs,³¹ tax add-ons,³² criminal fine or civil penalty surcharges, court fees or attorney licensing fees. The experience of states that have implemented tax add-ons, however, demonstrates that they are largely ineffective.³³ Tax checkoffs, on the other hand, have been successfully implemented in Minnesota and to a limited degree in Wisconsin. Wisconsin's program to partially fund state Supreme Court elections is highlighted in **Example 3.1**.

Full Public Funding

Full public funding is perhaps the most radical system used to eliminate real and perceived influence of private campaign contributors on judicial independence and integrity. This type of funding would also encourage highly qualified candidates who do not want to raise

money for judicial elections to run for a seat on the bench. In 2002, North Carolina became the first state to provide full public funding for judicial elections. For more details on that program, see **Example 3.2** on the next page.

Also known as "Clean Money" or "Clean Elections" systems, full public funding systems disburse lump sum grants sufficient to run a campaign to candidates who have demonstrated public support by raising a

threshold number of small private contributions. The candidates stop accepting private money after the qualifying threshold has been reached. Reaching the threshold levels the playing field in terms of campaign finance.

This approach is especially beneficial for states with nonpartisan judicial elections. Even though judges are supposed to be impartial and not influenced by political ideology, party identification next to the candidate's name on the ballot may be a primary cue for many voters.³⁹ In the absence of party identification, candidates with financial resources and financial supporters will enjoy considerable advantage in getting their names out through the media over equally or better qualified, yet less financially capable candidates. For this reason, the equalizing effect of the full public funding system may be particularly strong in nonpartisan elections.

Critics of public financing of judicial campaigns contend that public financing is a *de facto* violation of the First Amendment since it limits campaign spending. The U.S. Supreme Court, however, has ruled that voluntary spending limits in exchange for public money is acceptable. Another major downside is that this type of system could cost a great deal of money. Critics also point out that public financing of judicial campaigns does not curb interest group involvement in the campaign process. That is, interest groups can still continue to run ads directly or indirectly opposing or supporting judicial candidates. One way to counter this would be to give candidates extra funds to contend with interest group opposition.

Prohibition of Fundraising in Uncontested Elections

Some experts propose that public funds should only be used for candidates in contested races. For instance, judges who are unopposed in retention elections should not receive public money or private contributions. Because judges in retention elections run against their own records rather than against competing candidates, the high-stakes campaigning that characterizes contested elections occurs only if voters are dissatisfied with the incumbent's performance. Because there are no opponents to fund in the retention elections, conventional public funding only for the incumbents may raise concerns about "incumbent protection."⁴⁰ If

Example 3.2 Full Funding System in North Carolina

In October 2002, North Carolina signed into law the nation's first full-funding system for judicial elections, setting the stage for a new wave of reforms in the states concerned about runaway campaign expenditures for judicial elections. Candidates for the state's Appellate and Supreme Courts must abide by strict spending and fund-raising limits during the primary in order to receive full funding for their general election campaigns. The new law makes judicial races nonpartisan. It also reduces from \$4,000 to \$1,000 the individual contribution limit to judicial candidates and creates a state voter guide for providing information about appellate-level judicial candidates.³⁴ Funding for the program will come from \$3 taxpayer checkoffs and voluntary payments by attorneys. To insure that only serious, well-qualified candidates receive public money, participating candidates must show a demonstration of public support – qualifying contributions from at least 250 registered voters and signatures from at least 2,000 registered voters.³⁵

Currently, Democracy North Carolina and North Carolina Center for Voter Education are spearheading the effort to raise an estimated \$1.5 million to support the 2004 judicial elections. The campaign educates attorneys about the public funding legislation and encourages them to contribute \$50 along with their annual dues. The state Department of Revenue has also joined the effort by mailing out letters to more than 11,000 attorneys. Larger law firms are encouraged to donate as part of their pro bono practice.³⁶ The campaign features letters, testimonials from high profile people and television commercials that educate the public about the funding act and encourage citizens to check a box on their state income tax return.³⁷

Two other states' legislatures are considering similar public funding proposals for their Supreme Court campaigns. In March, the Illinois Senate passed the Supreme Court Campaign Reform Act that offers qualified candidates for the state Supreme Court up to \$750,000 in public funds to finance their campaigns if they agree to forego most special interest contributions. The bill is pending a House vote.³⁸ In Wisconsin, the Impartial Justice Bill will be re-introduced to provide \$300,000 for Supreme Court candidates (\$100,000 during primary elections) who agree to accept no private funding. Gov. Doyle has endorsed the proposal, as did candidates in this spring's state Supreme Court contest.

judges in retention elections take money from lawyers and interest groups, it may appear to the public that the judge is being unduly influenced by these groups.

Prohibition of fundraising would be problematic, however, in races where unopposed judges were attacked by interest groups that wage a media war against the judges. In this case, states could possibly partially or fully subsidize incumbents' efforts to ward off attack ads. To address this situation, public funds could be offered to the judge to defend his or her record. States could also subsidize voter guides and publicize publicly available judicial performance evaluations to counter interest group attacks.

Campaign Finance Reporting Requirements and Public Access to Data

Campaign finance reporting requirements and allowance of public access to campaign finance data are ways to alleviate mistrust among the public who are concerned that interest groups and lawyers may be unduly influencing the legal system. In a full public funding system, reporting requirements are needed to enforce the qualifying contributions for participating candidates, monitor the nonparticipating candidates' spending and ensure that public funds are spent on legitimate campaign purposes. In partial financing systems that match spending by nonparticipating candidates, timely and accurate reporting of those figures is essential for proper administration of the funding system.

Accounting for independent expenditures by third parties can be used in the systems that match some or all of such spending with public money. Besides serving the enforcement purposes, independent expenditure reporting enables the public to know when judges benefit from substantial special interest spending and what these special interest groups represent. Revealing large campaign contributions and independent expenditures on judges' behalf can promote integrity on the bench and discourage exchanging campaign benefits for favors in court. For this purpose, some argue that complete information about money in judicial elections should be not only available but also easily and readily accessible to the general public in a meaningful form, such as an interactive and comprehensive Web site or in a courthouse.⁴¹

All states with judicial elections have reporting requirements for judicial candidates.⁴² Allowing public access to this data could possibly be expensive because avenues for public disclosure would have to be developed. Reporting independent expenditures is more problematic, due to a special provision in most campaign finance laws. Under the First Amendment protection of free speech, the law most commonly exempts from reporting requirements any communication that does not "expressly advocate" the election or defeat of a candidate. Many interest groups avoid using magic words and avoid having to disclose their contributions.

While campaign finance reform often grabs headlines, there are other judicial reforms to consider as well. The next section focuses on campaign conduct reforms that focus on non-financial aspects of judicial elections.

Campaign Conduct

In highly contested elections, judicial candidates are compelled to employ the campaign strategy that successful legislative and executive candidates typically follow. Yet these tactics are often in conflict with the codes of judicial conduct that protect and promote the principles of judicial independence, impartiality and integrity. These codes generally prohibit persons running for the bench from promoting partisan platforms, publicly endorsing or opposing candidates for office, personally soliciting campaign funds, raising funds in tandem with non-judicial candidates and making promises of conduct once on the bench. In attempting to craft a public policy that regulates judicial campaign conduct beyond the existing limits for nonjudicial candidates, states are likely to face the First Amendment challenge in the courts. Therefore, it is important for state officials to take into account the legal limits set for states in regulating the campaign conduct of judicial candidates.

To address non-financial issues concerning campaign conduct, state policy-makers may want to consider:

- formal regulation of judicial codes of conduct, and

- informal procedures, such as information hotlines, advisory opinions and voluntary campaign oversight committees, for deciding campaign disputes.

The pros and cons of each of formal and informal regulation of campaign conduct are discussed below and outlined in **Figure 3.2**.

Regulation of Judicial Candidates

Most of the states that hold judicial elections have adopted a version of the American Bar Association’s Model Code of Judicial Conduct, which discourages political activity that is inappropriate to judicial office, and regulates the content of campaign communications.⁴³ Moreover, 12 states currently use the Constitution Project’s Higher Ground Standards of Conduct for Judicial Candidates.⁴⁴

In general, state regulations prohibit judicial candidates from making promises about how they will decide issues that may come before them as judges, since it would be improper for them to prejudge a case. Statements that commit or appear to commit the candidates to opinions with respect to controversies likely to come before the court are also prohibited. In addition, some states prohibit communication that is misleading, false or is made in reckless disregard of the validity of the information.⁴⁵

State regulations typically provide for disciplinary actions against violators including fines, removal from office, and suspension or loss of a law license. Judicial candidates accused of violating similar provisions have challenged a state’s right to restrict their campaign speech in state and federal courts.

Figure 3.2 Merits and Drawbacks of Campaign Conduct Reform Options	
Regulation of Judicial Candidates	
Pros	<ul style="list-style-type: none"> • Judicial conduct codes set ethical guidelines for judicial candidates. • The nature of the judicial branch bars candidates from making promises regarding professional conduct on the bench, which should promote judicial integrity and public confidence.
Cons	<ul style="list-style-type: none"> • The courts have recently struck down state-imposed regulations of judicial candidates..
Informal Enforcements of Judicial Conduct Code	
Pros	<ul style="list-style-type: none"> • Informal enforcements are expedient, non-adversarial means of addressing judicial campaign misconduct claims.
Cons	<ul style="list-style-type: none"> • These mechanisms do not allow for the imposition of sanctions that directly affect the violator’s tenure or practice.

Case law prior to 2000 tended to uphold the state’s interest in ensuring actual and perceived impartiality of judges over any intrusion on the First Amendment rights of judicial candidates.⁴⁶ In contrast to earlier rulings, recent state and federal court decisions

invalidate similar state regulations as overbroad impediments to the candidates’ constitutional right to communicate with their electorate. Most recently, in *Republican Party of Minnesota v. White*, the U.S. Supreme Court held that Minnesota’s Code of Judicial Conduct infringes upon the judicial candidates’ freedom of speech.⁴⁷ The Court divided the judicial campaign statements into two categories – promissory and non-promissory – and held that candidates making nonpromissory statements do not undermine their impartiality since judges have no special obligation to adhere to their earlier views.⁴⁸ Judicial campaigns in some states are already reflecting this new permissiveness.

It is interesting to identify the underlying reasoning in court decisions against content-based state regulation of judicial campaign speech. The operating premise of popular elections is that if the public is supplied with sufficient information, it will be capable of making sound choices. If the nature of the office renders this premise false, then a state has an option of switching to a different selection method, such as a merit selection. Because of the First Amendment protections, however, the state has no right to retain an election process while denying public access to information that government deems unhelpful.

Informal Enforcements of Judicial Conduct Code

Besides formal procedures for resolving alleged violations of states' judicial campaign regulations through litigation, many jurisdictions have developed alternative informal procedures for deciding campaign disputes. Such procedures as information hotlines, advisory opinions and voluntary campaign oversight committees have proven effective in preventing or stopping inappropriate campaign conduct.⁴⁹

For example, Georgia's Special Committee on Judicial Election Campaign Intervention is charged with resolving allegations of ethical misconduct by informal and nonadversarial means within 10 days. And New York's Judicial Campaign Practices Committee for Monroe County mediates any campaign conduct disputes that may arise among the candidates who signed a voluntarily campaign pledge.⁵⁰

Informal monitoring efforts are most successful when candidates and the public perceive them as a fair and expedient alternative to formal oversight committees. For this reason, these efforts should include processes for informing the public about the degree of cooperation and compliance they receive from the campaigns. A monitoring body should have a nonpartisan or bipartisan makeup of well-respected community leaders from within and outside the legal profession, and be willing to publicly comment on the conduct of candidates, political parties or third party groups.⁵¹

Informal enforcement mechanisms are expedient, nonadversarial means of addressing judicial campaign misconduct claims and have been upheld by the courts as permissible way of dealing with unethical and unfair campaign practices. On the other hand, these mechanisms do not allow for the imposition of sanctions that directly affect the violator's tenure or practice.

In addition to reforms related to campaign finance and campaign conduct, policy-makers may want to look at policy options that increase voter awareness of judicial candidates. Because most judges face some type of election, increasing voter awareness is an important aspect of judicial reform and is one way to make sure that voters make informed decisions about judicial candidates

Voter Awareness

As is true in many instances, information and education can remedy several problems. Informational and educational programs may focus on:

- the role of the judicial branch in state government;
- the conduct of judicial campaigns; and
- individual candidates.

This information can help increase voter awareness of the judicial system and hopefully increase voter participation in judicial elections. These options, which are summarized in **Figure 3.3**, are discussed below.

Information about the Judicial System

States can sponsor educational programs dealing with the importance of the judiciary. Schools, media and civic organizations can provide a variety of outlets for such information. The reasoning behind these educational sessions is that the more people know about the judicial branch, the more they will pay attention to judicial appointments or participate in judicial elections. Such programs provide an indirect way of garnering interest in the judicial system, so it could be a long process before people become more aware of and are more interested in judicial elections.

Information about Judicial Campaigns

State judicial campaign regulations will be ineffective if judicial candidates, their campaign aides and consultants, and the general public are not informed about state election laws and associated sanctions for violations. As such, several states have launched educational initiatives to inform the public about the unique nature of judicial elections. Several states, including Michigan, Florida, Ohio and Washington provide voter pamphlets or information guides to registered voters. "Higher Ground" standards developed by the Citizens for Independent Courts reflect rules that are already applicable to judicial candidates in

many states and provide a general guideline to voters interested in ethics rules that govern judicial campaigns.⁵²

Figure 3.3 Merits and Drawbacks of Voter Awareness Reform Options

Information about the Judicial System	
Pros	<ul style="list-style-type: none"> • Raising awareness of the judiciary in general can raise interest in judicial selection. • Various outlets for information dissemination already exist.
Cons	<ul style="list-style-type: none"> • Information dissemination could be a slow process.
Information about Judicial Campaigns	
Pros	<ul style="list-style-type: none"> • Information about judicial campaigns is helpful to both candidates and voters. • Campaign education helps sustain judicial independence and integrity.
Cons	<ul style="list-style-type: none"> • Information dissemination could take a lot of time and effort.
Information about Judicial Candidates	
Pros	<ul style="list-style-type: none"> • Information on specific candidates is more direct than information on the judicial system or judicial campaigns in general. • State-sponsored information about candidates is akin to free advertising and may reduce the demand for private fundraising.
Cons	<ul style="list-style-type: none"> • Gathering and distributing the information could be expensive.

Some jurisdictions have mandated special seminars that inform judicial candidates about campaign conduct rules and regulations. The Supreme Court of Ohio amended its judicial campaign codes to include a two-hour mandatory course on campaign conduct and finance. The Washington State Judicial Ethics Committee, which is part of the judicial branch, held two voluntary campaign forums in 2000 for judicial candidates and members of their campaign committees.⁵³ In addition, states have established telephone contacts and hotlines to respond to questions arising during the campaign. Because the judicial scrutiny limits states' statutory capacity

to regulate campaign behavior, similar efforts to educate candidates and the public on the rationale for higher standards of conduct for judicial candidates will help sustain judicial independence and integrity.

One problem with this policy option is that information dissemination could take a lot of time and effort. Because campaign regulations can be complicated, it may take time before candidates and the public understand the rules.

Information about Individual Judges

The primary reason voters do not vote in judicial elections is the lack of information about the candidates.⁵⁴ Therefore, providing voters with information about sitting judges in retention elections or opposing candidates in contested judicial elections may be an important way to increase voter participation in judicial elections. This method is more direct than educating the public on the judicial system and judicial campaigns in general.

Traditionally, because judicial candidates do not run on platforms, judicial races rarely attracted media attention, affording the public scant information about the candidates' qualifications. Winners in judicial elections are often determined by factors irrelevant to candidates' credentials, such as an easily recognizable name, strong political connections, residence in a populous county or even ballot design.⁵⁵ Instead of providing substantive information on the background and qualifications of candidates, special interest groups often run negative ads aimed at candidates with whom they disagree. In fact, 80 percent of group television ads attacked judicial candidates during the 2000 state Supreme Court elections.⁵⁶

States can play a crucial role in better informing their citizens by collecting and distributing unbiased information on judicial candidates at public expense. This would also reduce demand for private fundraising, even without otherwise committing public funds to judicial campaigns.⁵⁷ As with other educational efforts, gathering and distributing information about judicial candidates takes time and resources.

Research has shown that voters' preferred source of information is not television, but rather a voter pamphlet or voter meetings with candidates in small neighborhood settings.⁵⁸ States with retention elections can conduct judicial performance evaluations, while states with contested elections can provide public information

regarding the participating candidates. This information can be included in voter pamphlets, which could be very helpful to voters and could increase voter participation. **Figure 3.4** highlights some state-sponsored voter guides that are available via the Internet.

Figure 3.4 State-Sponsored On-Line Voter Guides for 2002

State	Web Address
Alaska	www.aic.state.ak.us/
California	www.ss.ca.gov/elections/elections_justices.htm
Michigan	sosnsl01.sos.state.mi.us/voterguide/candidates.asp
Oregon	www.sos.state.or.us/elections/nov52002/guide/toc.htm
Utah	courtlink.utcourts.gov/VoterPamphlet2002.PDF
Washington	www.vote.wa.gov/guide/index.tpl

Thus far, the policy options discussed have focused on judicial campaigns. There are, however, policy options that focus on the conduct of sitting judges and are thus relevant to all states regardless of their method of judicial selection. These are highlighted in the next section.

Judicial Conduct on the Bench

States can also address issues with judges once they are elected or appointed to the bench. State officials may want to address such issues as:

- recusals in cases of possible impropriety;
- the length of judicial terms; and
- judicial evaluation methods.

Policy options related to judicial conduct while on the bench are discussed in the next section, and the pros and cons of each option are outlined **Figure 3.5** on the next page.

Recusals in Cases of Possible Impropriety

States may want to consider rules that prohibit judges from hearing cases in which either party or their legal counsel has contributed to a judge's campaign fund. Alternatively, states can consider a threshold contribution amount, above which judges would recuse themselves from hearing a case.

Because lawyers and business interest groups are the two largest categories of contributors to judicial campaigns, it could conceivably be difficult to find a judge who has not received campaign funds from litigants or their lawyers. If a threshold contribution amount is chosen rather than barring a judge from presiding over cases that involve campaign contributors, then it may be difficult to determine what that threshold amount should be.

Term Lengths

Unlike their federal counterparts, most state judges are appointed or elected for a limited number of years. The debate on judicial term limits ultimately concerns a dichotomy between judicial independence and judicial accountability. Because short judicial terms translate into more frequent elections in which judges are subjected to external political and financial pressures, longer judicial terms may be more favorable for maintaining the perception and reality of judicial independence.

Short judicial terms increase the frequency of judicial campaigns and the influence of money in state court systems, especially in the states with contested election systems. The need to campaign frequently discourages qualified potential candidates from running and qualified incumbent judges from remaining

on the bench. Short judicial terms can contribute to the lack of job security, which, even if elections are not contested, could discourage qualified potential candidates. Longer terms, on the other hand, enable judges to concentrate on applying the law without attending to the strenuous demands of reelection and the associate need for fundraising, and ultimately promote judicial independence.⁵⁹ Longer judicial terms can contribute to the improvement of merit selection systems as well. Job security and competition for the limited number of positions on the bench remain pressing issues for many appointed judges who face retention elections.⁶⁰ Longer terms enable the public to conduct a more comprehensive review of a judge's performance for subsequent reelection, and thus promote judicial accountability. Some judicial reform experts recommend that all judges in courts of general jurisdiction and all appellate judges have a minimum term length of eight years.⁶¹

Figure 3.5 Merits and Drawbacks of Judicial Conduct Regulations

Recusals in Cases of Possible Impropriety	
Pros	<ul style="list-style-type: none"> Recusals would erase all perception and reality of impropriety.
Cons	<ul style="list-style-type: none"> It may be difficult to find a judge who has not received contributions from litigants or their attorneys. If judges recuse themselves if litigants or their attorneys have contributed over a threshold amount, it may be difficult to determine what the threshold should be.
Longer Judicial Terms	
Pros	<ul style="list-style-type: none"> Longer terms reduce the frequency of elections thus diminishing the problems associated with judicial elections.
Cons	<ul style="list-style-type: none"> Longer terms increase the possibility that judges become more isolated and less accountable to citizens.
Judicial Evaluations	
Pros	<ul style="list-style-type: none"> Evaluations by independent commissions offer an objective means of promoting judicial accountability. Evaluations are an important source of information for voters.
Cons	<ul style="list-style-type: none"> Evaluators must be impartial and not affected by personal, professional or party politics.

Despite these advantages, there are also problems with longer judicial terms. Perhaps most importantly, critics argue that the longer the guaranteed position on the bench, the more isolated and less accountable a judge becomes to citizens.

Judicial Evaluation

To alleviate concerns regarding the lack of judicial accountability, states can adopt and update adequate and well-enforced disciplinary mechanisms. Of the 39 states that elect judges, 37 provide for both impeachment and special disciplinary process to sanction judicial misconduct.⁶²

The function of retention elections is to add judicial accountability to the merit system by permitting the voters to reject a judge with a poor judicial performance record. In practice, however,

retention elections suffer from the same lack of public awareness that characterize contested judicial election systems.⁶³ Since judges in retention elections run against their own record, there are no campaigns, issues or public debates to inform the electorate on the candidates' qualifications.

Six states – Alaska, Arizona, Colorado, New Mexico, Tennessee and Utah – currently use official judicial performance evaluation programs to provide objective, survey-based information to their voters.⁶⁴ Unlike the information provided and sponsored by private entities such as bar associations and special interest groups, these programs are established and funded either by the judicial branch or the legislature and operate as independent evaluators of judicial performance.⁶⁵

All existing evaluation programs share a number of common elements. First, public funding determines their official status. Second, the programs employ broad-based survey mechanisms that include jurors, litigants, witnesses, court staff, police and probation officers, social service personnel and others who are in a position to assess judicial performance.⁶⁶ Each state has established an evaluation commission for judges up for retention elections. In most instances, either elected officials or members of the judiciary appoint commission members. Third, the official judicial retention evaluation programs strive to

disseminate survey results as widely as possible through mail, Internet and printed media.⁶⁷ The criteria used to evaluate judges typically include such factors as judicial temperament, expeditiousness in resolving cases, sufficient time spent on cases and treatment of litigants and attorneys. The commission may meet with the judge and collect data such as caseloads, statistics, disposition records, disciplinary sanctions and other non-survey information. The content of the judge's decisions or political ideology do not figure into the evaluations.⁶⁸ All programs also conduct confidential midterm performance evaluations, solely for providing judges with systematic, anonymous and honest feedback on their performance for self-improvement purposes.⁶⁹

There are several advantages associated with judicial evaluations. Official publicly sponsored and widely disseminated evaluations can effectively counter possibly one-sided, distorted information provided by the judicial opponents⁷⁰ or interest groups that support each candidate. Moreover, timely and widely disseminated official performance evaluations can reduce the necessity of fundraising by judges who face organized opposition from special interest groups.⁷¹ Evaluations by independent commissions offer an objective means of promoting judicial accountability without incurring any of the negative effects of contested judicial election systems. Judges benefit from retention evaluation programs by having clear guidelines for the execution of their duties and objective feedback on their performance. In fact, nearly all judges consider their evaluations to be a fair process, and a majority concedes that it holds them appropriately accountable to the public.⁷² These evaluations can be included in voter guides to inform the public of a judge's performance and help them make their voting decision.

The validity of the evaluation, of course, relies on fair and impartial evaluators who make well thought-out evaluations of judges. If the integrity of the evaluating committee is compromised by an evaluator who is personally or professionally opposed to a judge, then the evaluation process is diminished.

Conclusion

This *TrendsAlert* has provided a brief look at the current trends in judicial elections – rising costs, increasing interest group involvement and growing public skepticism concerning judicial integrity and independence. State officials can address these trends with a wide array of policy options, including reforming judicial campaign finance procedures, addressing campaign conduct, increasing voter awareness and evaluating judicial performance. The judicial branch is a key element in the American system of checks and balances, so judicial reform is likely to be a hot topic at the state level in the coming years.

Endnotes

- ¹ Deborah Goldberg, Craig Holman and Samantha Sanchez, "The New Politics of Judicial Elections," *The Brennan Center for Justice and National Institute on Money in State Politics* (February 2002), 7.
- ² Goldberg, "The New Politics," 8.
- ³ Goldberg, "The New Politics," 8.
- ⁴ Goldberg, "The New Politics," 9.
- ⁵ Center for Legal Policy, 17.
- ⁶ Goldberg, "The New Politics," 14.
- ⁷ Goldberg, "The New Politics," 18.
- ⁸ Goldberg, "The New Politics," 18.
- ⁹ Goldberg, "The New Politics," 9.
- ¹⁰ Goldberg, "The New Politics," 9.
- ¹¹ Committee for Economic Development (CED), 23.
- ¹² Committee for Economic Development (CED), 23.
- ¹³ Alfred P. Carlton, Jr., "Judicial Elections: Judicial Independence at Risk," *The National Voter*, September/October 2002.
- ¹⁴ Greenberg Quinlan Rosner Research Inc., "Justice at Stake: National Survey of American Voters and State Judges" 49 (poll conducted Oct. 30 – Nov. 7, 2001; results published Feb. 2002).
- ¹⁵ Charles Gardner Geyh, "Why Judicial Elections Stink," *The Ohio State Law Journal*, 64 no. 1 (2002), www.moritzlaw.osu.edu/lawjournal/geyh.htm.
- ¹⁶ Committee for Economic Development (CED), 1.
- ¹⁷ Greenberg Quinlan Rosner Research Inc., "Justice at Stake: National Survey of American Voters and State Judges" 49 (poll conducted Oct. 30 – Nov. 7, 2001; results published Feb. 2002). Results of this public opinion poll show that the problem of low public confidence in elected judges persists.
- ¹⁸ Greenberg, 2.
- ¹⁹ Greenberg, 2.
- ²⁰ New Hampshire, for example, does not offer public funding for election campaigns, but quintuples the \$1000 contribution limit if candidates accept a spending limit (Goldberg, 7).
- ²¹ Deborah Goldberg, "Public Funding of Judicial Elections: The Role of Judges and the Rules of Campaign Finance," *The Ohio State Law Journal*, 64 no. 1 (2002), 7. www.moritzlaw.osu.edu/lawjournal/goldberg.htm
- ²² 424 U.S. 1 (1976).
- ²³ *Rosenthal v. Rodriguez*, 101 F.3d 1356, 1356-62 (8th Cir. 1994)
- ²⁴ 205 F.3d 445, 464 (1st Cir. 2000).
- ²⁵ Other means of preventing frivolous candidates from gaining access to public money are requirements of gathering a minimum number of petition signatures and limiting eligible candidates to those who received a minimum percentage of the vote in the previous election.
- ²⁶ WIS. STAT. § 71.10(3)(a)(2000).
- ²⁷ Roy A. Schotland, "2002 Judicial Elections and State Court Reforms," *The Book Of The States*, vol. 35. (Lexington, Kentucky: The Council of State Governments, 2003), 239.
- ²⁸ Charles Gardner Geyh, "Publicly Financed Judicial Elections: An Overview," *The Loyola of Los Angeles Law Review*, 34 no. 4 (2001), 1477.
- ²⁹ Geyh, "Publicly Financed Judicial Elections," 1477.
- ³⁰ The matching system covers only up to a fixed amount from each contribution, and public funding stops at a specified percentage of the spending limit. For example, in 2001, New York City provided the qualified candidates with \$4 in public funds for every \$1 raised in contributions of up to \$250 from City residents, until matching funds reached 55 percent of the spending limit.
- ³¹ A tax checkoff allows a taxpayer to earmark a dollar amount of their tax liability to the campaign fund, without increasing a filer's tax bill or reducing any refund.
- ³² Tax add-ons allow taxpayers to add to their tax liability with a contribution to a clean campaign fund.
- ³³ Geyh, "Publicly Financed Judicial Elections," 1478.
- ³⁴ Bert Brandenburg, "North Carolina Adopts Public Financing for Supreme Court and Appellate Judicial Campaigns," *Justice at Stake Campaign*, press release, October 10, 2002, <<http://faircourts.org/files/NCsigning.pdf>> (24 July 2003).
- ³⁵ 2001 North Carolina Senate Bill No. 1054, Section 163-278.64.
- ³⁶ "North Carolina Prepares for Publicly Funded Judicial Campaigns," *Eyes On Justice*, The Justice at Stake Newsletter, May 29, 2003.
- ³⁷ For more information on full public funding of North Carolina's judicial elections go to <http://ncjudges.ncvoter.com>

³⁸ The bill and its status are available at:

<http://www.legis.state.il.us/legislation/billstatus.asp?DocNum=1415&GAID=3&DocTypeID=SB&LegID=4434&SessionID=3>

³⁹ B. Michael Dann and Randall M. Hansen, "Judicial Retention Elections," *The Loyola of Los Angeles Law Review*, 34 no. 4 (2001), 1439.

⁴⁰ Geyh, "Publicly Financed Judicial Elections," 1472.

⁴¹ *Uncertain Justice: Politics in America's Courts*, (New York: The Century Foundation, 2000), 95.

⁴² Goldberg, "Public Funding Of Judicial Elections," 14.

⁴³ Richard A. Dove, Esq. "Judicial Campaign Conduct: Rules, Education, and Enforcement," *The Loyola of Los Angeles Law Review*, 34 no. 4 (2001): 1448.

⁴⁴ The Constitution Project, Press Release, June 27, 2002.

⁴⁵ Dove, 1449.

⁴⁶ Dove, 1451.

⁴⁷ *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2528 (2002).

⁴⁸ Geyh, "Why Judicial Elections Stink."

⁴⁹ Dove, 1459.

⁵⁰ Dove, 1459.

⁵¹ Dove, 1459.

⁵² See *The Higher Ground Standards of Conduct for Judicial Candidates*, The Constitution Project.

<http://www.constitutionproject.org/ci/standards.pdf> (4 July 2003).

⁵³ Dove, 1457.

⁵⁴ Dove, 1457.

⁵⁵ In surveys sponsored by the Justice at Stake campaign, 90 percent of voters and 87 percent of judges say they are concerned that "because voters have little information about judicial candidates, judges are often selected for reasons other than their qualifications." <http://faircourts.org/contentViewer.asp?breadcrumb=5,302> (4 July 2003).

⁵⁶ Goldberg, "The New Politics," 17.

⁵⁷ Goldberg, "Public Funding of Judicial Elections."

⁵⁸ Nicholas P. Lovrich, Jr. and Charles H. Sheldon, "Is Voting a Flight of Fancy or a Reflection of Policy and Value Preferences?" *Justice System Journal* 16 (1994): 57.

⁵⁹ *Uncertain Justice*, 91.

⁶⁰ Of appointed judges of trial courts (general jurisdiction), 7 percent have terms of just three to four years, and another 8 percent have terms of only five to six years. Eight percent of all appointed appellate judges have initial terms of five to six years, and 11 percent have subsequent terms of only five to six years. See *Uncertain Justice*, 91.

⁶¹ *Uncertain Justice*, 90. The Committee for Economic Development recommends extending terms for trial and appellate judges to a minimum of six years; 10 years for justices on the highest court. See CED, "Justice for Hire."

⁶² Schotland, 234.

⁶³ Seth S. Andersen, "Judicial Retention Evaluation Programs," *The Loyola of Los Angeles Law Review*, 34 no. 4 (2001), 1375.

⁶⁴ Andersen, 1376.

⁶⁵ Performance evaluation programs do not require legislation or constitutional change; they can be established by court order. For example, Oklahoma's Supreme Court created evaluation commission in 1998 to conduct a survey of attorneys who have appeared before the appellate judges up for retention elections that year. See *Uncertain Justice*, 99.

⁶⁶ Andersen, 1377.

⁶⁷ For example, Alaska, Arizona, Colorado, and Utah mail findings to all registered voters as a part of the voter guide for each election cycle. Alaska, Arizona and Colorado place their findings on the Web. In addition, Alaska and Colorado place the findings in local newspapers. See Dann and Hansen, 1439.

⁶⁸ *Uncertain Justice*, 99.

⁶⁹ Andersen, 1376.

⁷⁰ *Uncertain Justice*, 99.

⁷¹ Andersen, 1379.

⁷² Kevin M. Esterling and Kathleen M. Sampson, *Judicial Retention Evaluation Programs in Four States* (Chicago: American Judicature Society, 1998), 42-47.

Glossary of Terms

Contested election system – a direct competition between candidates seeking to win or to keep a seat on the bench.

Retention election system – a system in which a judge is initially appointed by the governor or state legislature, with or without input from a nominating commission, for a term, followed by the up-or-down popular vote that determines if the judge retains the seat.

Full public funding – a relatively new system that provides lump sum grants sufficient to run a campaign to candidates who raise a threshold number of very small private contributions. Once the threshold qualifying for participation is reached, no more private funding is accepted.

Partial public funding – a system created with matching funds or grants at levels less than the total cost of campaigns. Usually, the candidate needs to collect a threshold number and amount of private contributions before qualifying for public funding.

Merit selection – an appointive system of judicial selection in which a nonpartisan, broad-based nominating commission recruits and evaluates judicial candidates. After submitting the names of the most qualified candidates to the appointive authority, most commonly a state governor, the appointive authority chooses the best-suited candidate for that particular position. Most of the states that use merit selection systems also provide for “retention elections” for the appointed judges.

Tax checkoff – allows taxpayer to earmark a dollar amount of their tax liability to the campaign fund, without increasing a filer’s tax bill or reducing any refund.

Tax add-on – allows taxpayers to add to their tax liability with a contribution to a clean campaign fund.