Judicial Independence Series

Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts

by Deborah Goldberg

Brennan Center for Justice at NYU School of Law

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This paper is the third in a series of reports exploring judicial independence issues. The series will focus initially on state judicial elections. The series also includes:

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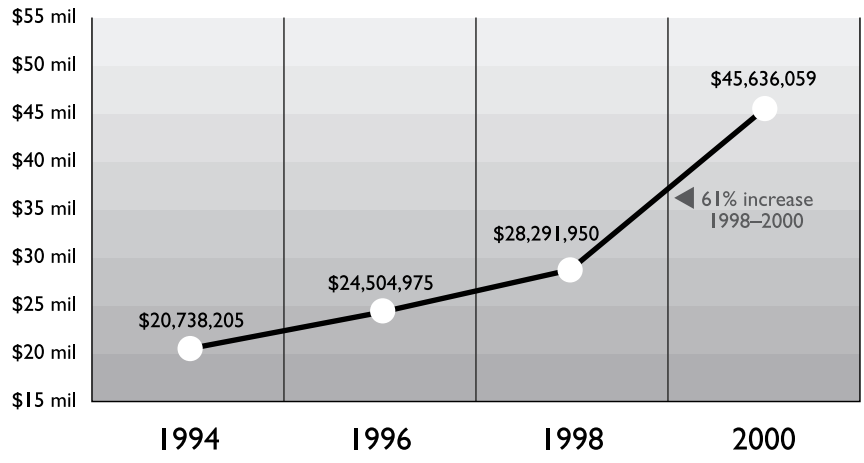
Introduction

The era of big money in judicial elections is upon us. Between 1998 and 2000, fundraising by candidates for state supreme courts jumped 61 percent. Much of this money came from the very lawyers and parties who appear before those courts. Non-candidate spending in the 2000 supreme court races, by political parties and interest groups, reached approximately $16 million in just the four states with the most hotly contested elections. [1]

Figure 1. Total Money Raised by State Supreme Court Candidates 1994–2000



Reprinted with permission from Justice at Stake.
Data provided by the Institute on Money in State Politics.

The campaigns of 2002 continued the trend. The U.S. Chamber of Commerce announced that it would spend $25 million in 2002 to influence races for state courts and attorneys general. Television advertising related to supreme court elections began months earlier in 2002, and appeared in more states, than it did in the prior election cycle. With supreme court elections in 33 states, funding and spending set new records.

[1] For more information about the financing of the 2000 supreme court elections, see Deborah Goldberg, *et al., The New Politics of Judicial Elections* (Justice at Stake 2002), *available at* www.justiceatstake.org.

The impact of all this money on public trust in state courts is well documented. National and state public opinion surveys repeatedly confirm that sizable majorities of voters believe that campaign contributions to elected judges have more than a little influence on judicial decision-making. Shockingly, large numbers of state judges – 26 percent in one recent national poll – agree.

Figure 2. National Polling Data

Q How much influence do you think campaign contributions made to judges have on their decisions?

	Total Judges	Total Public
A great deal of influence	4	36
Some influence	22	40
Just a little influence	20	14
No influence at all	36	5
Don't know/refused	16	5
(Blank)	2	
Total great/some	**26**	**76**

Greenberg Quinlan Rosner Research Inc., State Judges' Poll (Nov. 2001–Jan. 2002), Public Poll (Oct.–Nov. 2001), for Justice at Stake.

What Can Be Done to Combat the Real and Perceived Influence of Money on Elected Judges?

Some people argue that the only way to guard against the influence of money on elected courts is to eliminate judicial elections altogether and to replace them with non-elective selection systems. But voters have not proven eager in recent years to relinquish their power to decide who serves on their state courts. Where the electorate is committed to both the right to vote for judges and the preservation of judicial impartiality, something else must be done to shield candidates for the bench from the real and perceived corrupting power of campaign contributions. Public funding for judicial elections can provide that safeguard.

States do not have to begin from scratch when drafting public financing laws for judicial elections. In recent years, states and localities have adopted a variety of public funding programs for persons seeking legislative and executive offices. States therefore have a wide range of models from which to draw in designing such a program for judicial candidates.

The challenge in structuring a public funding program for judicial elections is to ensure that rules originally developed to regulate political branch elections are appropriately adapted to preserve fair and impartial courts. The goal is to secure judges who are unbiased, open-minded, and beholden to no-one, while permitting diverse and highly qualified candidates to run for the bench, regardless of their access to wealth. The rules of campaign finance must be tailored to ensure that judges can continue to fulfill their unique constitutional role in our democracy.

For those who would like to design a public funding program for judicial campaigns, this essay:

- outlines the key elements of such a program for the various sorts of elections held for judges in this country,
- rebuts some common constitutional attacks on those elements, and
- discusses issues unique to judicial elections that should be considered when drafting public financing bills.

The recommendations set forth here emphatically should not be regarded as the only constitutional way to design a public financing system that serves the goal of fair and impartial courts. Judicial election reformers

must think creatively about how to accommodate political constraints and adapt available options to legal structures specific to their state. In some cases, it may be desirable to proceed in stages – adopting only the least controversial elements first and pressing for more substantial subsidies or for further regulation when the need is clear and the time is ripe.

What Sort of Judicial Elections Could Be Financed with Public Funds?

Judicial campaign finance laws must take into account the different forms of elections found in the states. Of the 39 states that hold elections for courts of general jurisdiction, some provide for direct competition between candidates seeking to win or to keep a seat ("contested elections") and others use appointive systems to select judges, who are later subject to an up-or-down vote to keep their seats ("retention elections"). Sometimes the two selection systems function simultaneously in the same state, usually for judges in different geographic areas or for courts at different levels. Sometimes judges must stand for only one contested election and then survive retention elections to keep their seats.

In every state except Wisconsin, candidates competing for judgeships are completely dependent upon private funds to conduct their campaigns.

In 30 states, contested elections are held for at least some judges of general jurisdiction. Of those states, 12 conduct all elections, and another six conduct some or all trial court elections, on a non-partisan basis. In every state except Wisconsin, candidates competing for judgeships are completely dependent upon private funds to conduct their campaigns – and even in Wisconsin, where the public funding program is seriously underfunded, candidates depend largely on private contributions. Candidates for the Court of Appeals and Supreme Court of North Carolina will have a full public funding option as of 2004.

Sixteen states employ a selection system whereby judges are initially appointed by the governor or state legislature, with or without input from a nominating commission, for a (usually short) term after which the judges face a "yes"-or-"no" popular vote to retain their seats. Judges who win retention serve for another (usually longer) term, until the next retention election. Judges who fail to receive the requisite percentage of "yes" votes in the retention election lose their seats, and the appointive process begins anew. In addition to the states using the selection system just described, Illinois and Pennsylvania use retention elections to determine whether judges who initially won office through contested elections may keep their

Figure 3. Selection System in States with Elections for Courts of General Jurisdiction

Appointment/ Retention Election	Non-Partisan Election	Partisan Election	Other
Alaska	Arizona[1]	Alabama	Maryland[2]
Arizona	Arkansas	Illinois[3]	
California	California[TC]	Indiana[4]	
Colorado	Florida[TC]	Kansas[5]	
Florida	Georgia	Louisiana	
Indiana[6]	Idaho	Michigan[7]	
Iowa	Indiana[8]	Missouri[9]	
Kansas	Kentucky	New York[TC]	
Maryland	Minnesota	North Carolina[10]	
Missouri	Mississippi	Ohio[7]	
Nebraska	Montana	Pennsylvania[3]	
New Mexico[11]	Nevada	Tennessee[TC]	
Oklahoma	North Carolina[TC]	Texas	
South Dakota	North Dakota	West Virginia	
Tennessee	Oregon		
Utah	South Dakota[TC]		
Wyoming	Washington		
	Wisconsin		

TC=trial courts

1. For trial courts in counties with populations of less than 250,000.
2. Appointment, followed by non-partisan election to retain trial courts.
3. Followed by retention election.
4. For Circuit Court, except in one county, and Superior Court, except for four counties.
5. For trial courts in 14 out of 31 districts.
6. For Supreme Court, Court of Appeals, and two counties' Superior Courts.
7. Partisan in substance, but technically non-partisan.
8. For one county's Circuit Court and two counties' Superior Courts.
9. For Circuit Court, except for four counties, followed by retention election.
10. For Supreme Court and Court of Appeals.
11. Followed by partisan election; winner faces retention elections.

Information provided by American Judicature Society.

seats; in New Mexico, judges are first appointed, then run in a partisan contested election, and the winner thereafter faces retention elections.

Public financing laws can be designed for both contested elections and retention elections. Public financing of contested elections is increasingly recognized as the most promising way to address threats to fairness and impartiality — real or apparent — caused by private contributions to candidates in competition for the bench. In 2002, both the American Bar Association and the Committee for Economic Development announced their support for full public financing of judicial elections in states that maintain elective systems.

Public financing for retention elections has received little attention. Some supporters of full public funding for contested judicial elections have balked at the concept, citing concern that the state will appear to be protecting incumbents by providing subsidies to sitting judges but not to groups opposing their retention. For the reasons explained below, however, appointed judges facing organized campaigns to defeat their retention may be particularly good candidates for public funding, which should be constitutional under existing legal precedent.

What Are the Basic Options for Public Funding of Contested Judicial Elections?

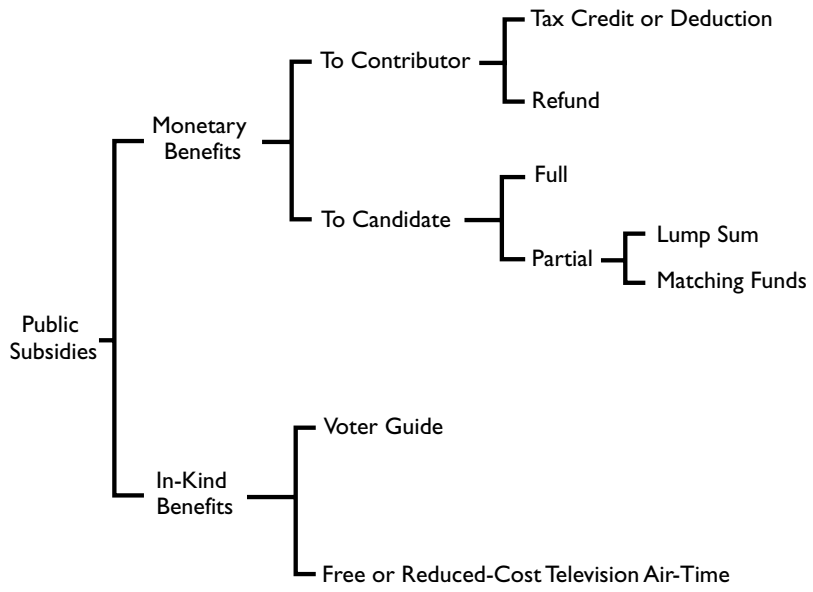
There are several systems already in place through which public monies subsidize candidates' campaigns.

- **Direct cash grants to candidates** – This is the most common system. The grants may partially or fully finance the campaigns of candidates who participate in a public funding program.
- **Tax breaks or cash refunds to contributors** – These programs subsidize campaigns indirectly by reimbursing contributors for all or part of their contributions to participating candidates, up to a fixed ceiling.
- **In-kind benefits** – Offering candidates free or reduced-cost advertising in a state-sponsored voter guide, or on state-owned or community-access television stations, for example, can lower campaign costs and the concomitant demand for funds.

Currently, all jurisdictions that offer direct or indirect cash subsidies for campaigns condition the grants upon the candidates' acceptance of a spending limit. The spending limit ensures that candidates will not simply accept public money and then continue endless private fundraising. By agreeing to cap expenditures, candidates replace private contributions with public funds. Without an expenditure ceiling, a public funding program does nothing to limit the campaign fundraising "arms race" with all its attendant ills.

Of course, spending limits reduce the overall demand for private funds, even if public financing is not available. Raising contribution limits for candidates who agree to limit spending – a mechanism sometimes known as a "cap gap" – is one way to combat the influence of money in elections without committing public funds. In New Hampshire, for example, cam-

Figure 4. Options for Public Funding



paigns are conducted exclusively with private funds, but the state quintuples the basic $1,000 contribution limit when candidates agree to adhere to a spending limit.

A few jurisdictions, including Boulder, Colorado and Chapel Hill, North Carolina, have successfully used publicity and political pressure to persuade some candidates for local non-judicial office to sign voluntary spending limit pledges, without offering either public funding or cap gaps as an incentive. In Ohio, candidates for the Supreme Court in 2000 also voluntarily adhered to a $500,000 spending limit, without receiving public funds, after federal courts preliminarily enjoined mandatory limits at that level. Typically, however, some substantial financial incentive is needed to induce acceptance of a spending limit, which virtually all courts will uphold only if it is voluntary.

Cash Grants to Candidates

Partial Public Funding

Most current public financing systems fund candidates' campaigns only in part. The subsidy may come in the form of a lump sum grant or "matching funds" tied to private fundraising. Usually, public funds are available only after the candidate collects a threshold number and amount of pri-

vate contributions, which must be raised under contribution limits. In a matching system, the match covers only up to a fixed sum from each contribution, and public funds are capped at a specified percentage of the spending ceiling. In 2001, New York City provided candidates who met certain threshold fundraising requirements with $4 in public funds for every $1 raised in contributions of up to $250 from City residents, until matching funds represented 55 percent of the spending limit.

Partial public funding systems do not eliminate private contributions, but they can substantially reduce the candidate's dependence upon them. The threshold to qualify for public funds ensures that candidates have a certain modicum of support, so taxpayers do not finance frivolous candidacies. In matching programs, the need to obtain matchable contributions also encourages candidates to build and to organize their base throughout the campaign, promoting ongoing grassroots electoral efforts. Generous partial public funding systems open the electoral process to candidates who might otherwise be foreclosed by the perceived need to raise large sums of money.

Full Public Funding

Another, relatively new system provides lump sum grants sufficient to run a campaign to candidates who raise a threshold number of very small private contributions, usually no more than $5 or $10 each. Candidates under this system accept no private funds once they reach the threshold qualifying them for participation in the program. Proponents of the program argue that it promotes competition and political equality by putting all candidates on a level playing field, even if their supporters can afford to make only very small contributions or none at all. Critics argue that, unless the qualifying threshold is high, the system is too expensive and too likely to foster frivolous candidacies. The system offers no inherent post-qualification incentive to undertake grassroots organizing efforts rather than impersonal media campaigns, but candidates report that full public funding has permitted them to focus on communicating with voters, even if they are not potential contributors.

This system is sometimes described as "full public funding," in contrast to the "partial public funding" system created with matching funds or grants at levels less than the total cost of campaigns. Full public funding systems typically allow candidates to raise limited sums of seed money from private sources and require candidates to raise qualifying contributions from individuals. Thus every campaign dollar does not come from public coffers, but such programs offer "full public funding" because every qualifying candidate receives public funds up to the full amount authorized for campaign spending. Full public funding systems are often known as "Clean Money" or "Clean Elections" systems. Arizona, Maine,

Massachusetts, and Vermont have full public funding systems for some or all political branch candidates. For the 2004 election, North Carolina will implement the nation's first full public funding system for judges, covering candidates for its Court of Appeals and Supreme Court. Full public funding bills for judicial elections have also been introduced in Illinois and Wisconsin.

Contribution Reimbursement

A different approach to public financing subsidizes participating candidates' campaigns indirectly by reimbursing their individual contributors for contributions up to a fixed per-person limit. The reimbursements may come in the form of a refund check or a tax benefit, such as a tax deduction or tax credit. Refunds offer the advantage of encouraging contributions – a form of political participation – from even those individuals who do not owe taxes. The refund system in Minnesota has reduced the average size of contributions and increased outreach to constituents, who can support their candidate of choice (and only their candidate of choice) at little or no cost to themselves. Contribution reimbursement may be offered in conjunction with partial public funding of candidates' campaigns or as a stand-alone program.

In-Kind Benefits

States can reduce demand for private fundraising, even without otherwise committing public funds to judicial campaigns, by supplying in-kind benefits that cut the costs of campaigning. Free television time is probably the most valuable in-kind benefit that statewide judicial candidates could receive, but states have limited authority to regulate that medium. Voter guides are also a relatively inexpensive form of in-kind benefit. But a system that offers only modest in-kind benefits can only modestly reduce the demand for private money, because a more substantial incentive is usually needed to convince candidates to participate in a program that caps spending.

What Is the Best Public Financing System for Judicial Elections?

Of the various systems, the one that would appear best calculated to promote the reality and appearance of impartial courts is the full public funding system. This system comes closest to breaking the dependency of judicial candidates on monied interests. In doing so, it may also encourage highly qualified candidates from poor communities and communities of color to run for judicial office, thereby elevating competence and diversity on the bench and increasing the potential for fair decision-making and equal justice.

Full public financing may be especially important in states with non-partisan elections. For voters who do not have the resources to undertake candidate research, the political party designation on the ballot may be the only information they receive about judicial candidates. Although judges should not be hewing to a party line when deciding cases, the party label often does provide insight into a judicial candidate's general philosophy or predispositions, which will affect decision-making. Without the party label, those voters may base electoral choices on irrelevant factors, such as ballot position or name recognition. A non-partisan system therefore confers a substantial advantage upon candidates with the financial resources or monied supporters to run direct mail or broadcast media campaigns that get the candidate's name into the public domain. To mitigate this effect, any move to non-partisan judicial elections should be coupled with a generous public financing system – full public funding if possible – to allow all candidates an opportunity to communicate meaningfully with voters.

Voters often explain their failure to vote, or to vote for judges, by citing a lack of adequate information about the candidates.

Publicly funded voter guides should also be part of any public financing system for judicial elections. Judicial elections are widely characterized by low voter turnout and high voter "rolloff" (the tendency to skip judicial races altogether when voting on Election Day), and voters often explain their failure to vote, or to vote for judges, by citing a lack of adequate information about the candidates. Voter guides can help to remedy that problem – especially in a non-partisan election – at a relatively low cost to the taxpayers. If a balky legislature refuses to appropriate funds for printing and distribution costs, the guides may be posted on the internet, and states can encourage other organizations to link their websites to the official information. The guides should educate the public not only about the candidates but also about the unique role of judges and how that role affects, or should affect, the way that elections are conducted.

What Other Provisions Should Be Included in a Public Financing Program for Contested Judicial Elections?

Contribution Limits

Contribution limits play a role in all public financing programs. In full public funding systems, candidates who decline to participate should raise their funds under reasonable contribution ceilings. In partial public funding systems, all candidates should adhere to applicable limits. The caps can help to combat the appearance (and perhaps the reality) of judges whose decisions are influenced by large infusions of cash from special interest donors.

States have a great deal of discretion in setting the levels of contribution limits. Many states already have contribution limits that apply to non-judicial candidates. In some states, the limits also apply to candidates for the bench. In Texas, contribution limits are set exclusively for judicial candidates. Special issues to be considered in establishing such limits are later in this essay.

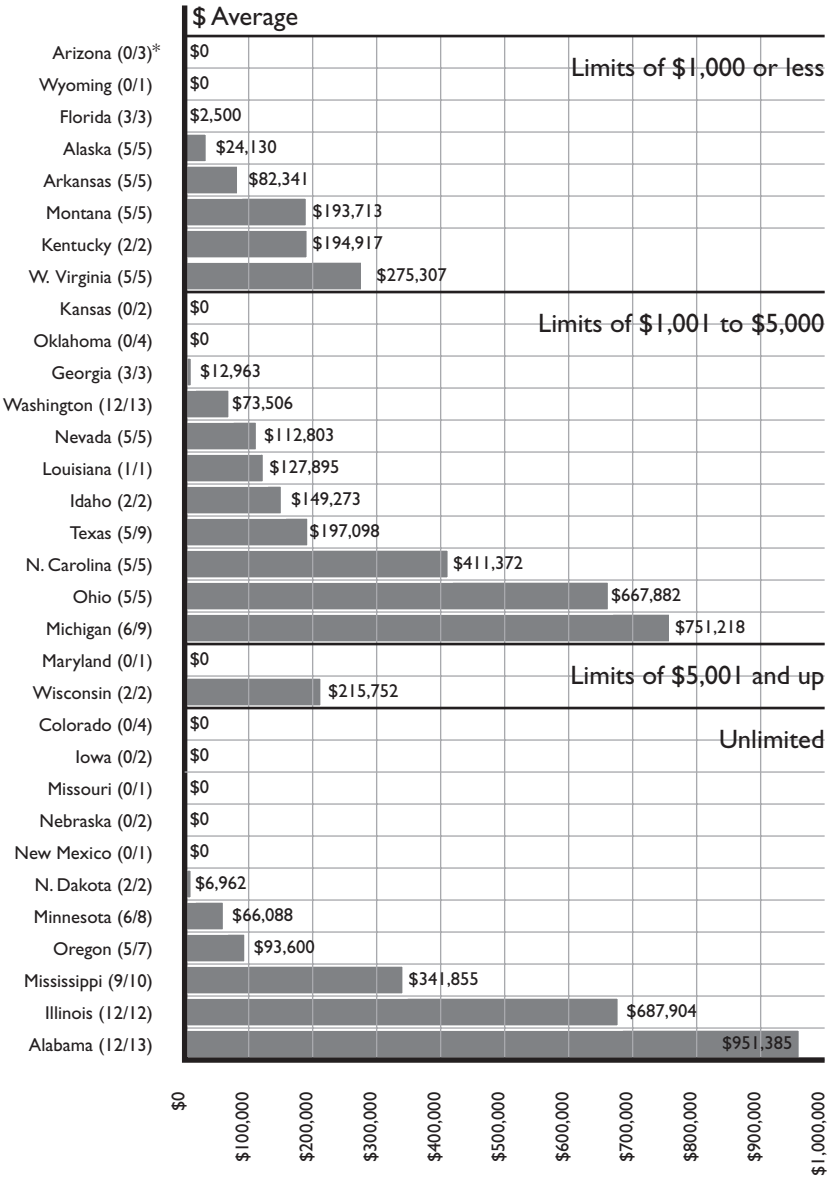
Contribution limits generally do not affect the total amount of money that candidates can raise, except in the very short-term. Contribution limits encourage candidates who opt out of public financing programs to raise funds from more donors in smaller amounts, and fundraising levels may drop temporarily while candidates build their donor base. Experience shows, however, that candidates can reach pre-limit levels of total fundraising in as little as two election cycles. The limits are therefore useful to promote the reality and appearance of fair and impartial courts, but there is no direct correlation between the level of contribution limits and the amounts that candidates raise, and the limits certainly cannot function as surrogates for spending ceilings.

Figure 5. Supreme Court Contribution Limits, by State

State	Limit
Alabama	Unlimited
Alaska	$500
Arizona	$760
Arkansas	$1,000
California	Unlimited
Colorado	Unlimited
Florida	$500
Georgia	$5,000
Idaho	$5,000
Illinois	Unlimited
Indiana	Unlimited
Iowa	Unlimited
Kansas	$2,000
Kentucky	$1,000
Louisiana	$5,000
Maryland	$10,000 4-year cycle
Michigan	$3,400
Minnesota	Unlimited
Mississippi	Unlimited
Missouri	Unlimited
Montana	$200
Nebraska	Unlimited
Nevada	$5,000
New Mexico	Unlimited
North Carolina	$4,000
North Dakota	Unlimited
Ohio	$5,000
Oklahoma	$5,000
Oregon	Unlimited
Pennsylvania	Unlimited
South Dakota	$1,000
Tennessee	$1,000
Texas	$5,000
Utah	Unlimited
Washington	$1,200
West Virginia	$1,000
Wisconsin	$10,000
Wyoming	$1,000

Information provided by the Institute on Money in State Politics.

Figure 6. Money Raised by Supreme Court Candidates in 2000, by Level of Contribution Limit



*Parenthetical shows number of candidates that raised funds/total number of candidates.

Data provided by the Institute on Money in State Politics.

Reporting Requirements and Public Access to Data

All campaign finance systems should have comprehensive reporting systems for campaign contributions and expenditures. In a full public funding system, the reporting requirements serve a variety of purposes, depending upon whose finances are being reported. For candidates participating in such a system, the key purpose served will be enforcement of limits on seed money or qualifying contributions and of regulatory provisions designed to ensure that public funds are spent exclusively on legitimate campaign expenses.

For candidates who choose not to participate in public financing programs, reporting requirements serve both enforcement and other compelling governmental purposes. The electorate can learn much about how a candidate can be expected to approach decision-making from information about the size and special interest sources of contributions. Exposing large contributions and expenditures to the light of publicity also promotes integrity on the bench, by deterring exchanges of money for favors. Finally, public financing systems that match expenditures by big-spending non-participating candidates cannot function properly without timely and accurate reporting of those figures.

Reporting requirements should also cover third parties who make independent expenditures in judicial campaigns. The public is entitled to know when potential judges benefit from major special interest spending and just who is making substantial investments in judicial elections. Full reporting of independent expenditures is also crucial in systems that match some or all of such spending with public funds.

Matching funds are useful only if they are released to participating candidates in time to be spent before Election Day. Although there is no way to prevent last-minute attacks that leave no time for response – such attacks are always possible, whether or not the election is publicly funded – states can reduce the risk by requiring prompt reporting of independent expenditures and spending by non-participating candidates. A sliding schedule for reporting, in which less time is allotted for filing reports the closer the spending is to Election Day, accommodates this concern without imposing undue administrative burdens on the spenders. For example, monthly reporting may be required until 60 days before an election, weekly reporting until 30 days remain, 48-hour reporting until the last week, and 24-hour reporting in the last seven days. Mandatory electronic reporting can facilitate not only the release of matching funds but also disclosure of the expenditure information to the interested public.

All states with elected judiciaries have reporting requirements that cover judicial candidates. Obtaining full disclosure of spending by non-candidates can be more difficult because of a major loophole in most campaign finance systems. In a nutshell, the law in many states requires reporting only if funds are spent on communications that "expressly advocate" the election or defeat of a candidate by using words such as "elect" or "defeat." Communications lacking such terms are treated not as electioneering but as mere discussion of issues, which is exempt under the First Amendment from campaign finance regulation. As a result, non-candidates routinely avoid disclosure of their finances by crafting campaign advertisements without the "magic words" that transform "issue advocacy" into electioneering communications.

Both legislation and public pressure may help to expand the scope of non-candidate reporting in judicial elections. The full public funding bill introduced in Wisconsin followed a strategy much like that adopted in the

Figure 7. Impartial Justice Bill
Independent Expenditure Reporting Provisions

2001 Wisconsin Senate Bill No. 115

11.501 Definitions.

(10) "Independent expenditure" means an expenditure made for the purpose of making a communication that is made during the 30-day period preceding any spring primary for the office of justice and the date of the spring election, or if no primary is held, during the 60-day period preceding the spring election; that contains a reference to a clearly identified candidate for the office of justice at that election; that is made without cooperation or consultation with such a candidate, or any authorized committee or agent of such a candidate; and that is not made in concert with, or at the request or suggestion of, such a candidate, or any authorized committee or agent of such a candidate.

11.513 Independent Expenditures.

(1)(a) If any person makes one or more communications to be financed with independent expenditures exceeding $2,000 in the aggregate, that person shall file a report with the board. … Reports required under this subsection shall be filed within 7 days after the date that communications financed with independent expenditures exceeding $2,000 in the aggregate that are not identified in a previous report are made, or if communications are made within 15 days of the date of a spring primary or election, within 24 hours….

federal Bipartisan Campaign Reform Act of 2002 ("BCRA") to secure reporting of independent expenditures – mandating reports when communications refer to a candidate within a specified time before an election.[2] Widespread negative media attention to major unreported third-party expenditures in the Ohio Supreme Court elections of 2000 prompted one interest group to promise voluntary disclosure of its contributions and expenditures for such elections in 2002. Creative thinking and innovative reforms are needed to ensure release of complete information about money in campaigns for the bench.

Of course, only half the battle is won even if reports are filed on all contributions and expenditures. The information can serve its purpose only if it is readily accessible to the public in a meaningful form. Voters cannot be expected to sift through thousands of pages of campaign finance reports to distill information about the role of special interests. The reported data should instead be available to the public in an easily searchable format, such as an interactive website providing timely and comprehensive information about the sources and amounts of contributions and the nature and amounts of expenditures.

Trigger Provisions

Partial and full public funding systems should include mechanisms – sometimes known as "trigger" provisions – to deal with high-spending non-participating candidates or independent spenders. Under these provisions, the expenditure ceiling applicable to participating candidates is raised (or eliminated) when they face opposition spending over a certain triggering level, while their public subsidy is continued or increased, usually by matching the triggering expenditure up to a specified limit. The additional funds help to encourage participation by ensuring that participating candidates are not left powerless to respond to expenditures by non-participating candidates or their supporters, who are not subject to spending caps.

Drafters of trigger provisions will have to fix spending levels that entitle participating candidates to additional funds. Given the purpose of the funds, there is no reason to offer them if opposition spending, whether by non-participating candidates or independent spenders, does not reach the participating candidate's spending limit. But waiting to release funds until opposition spending actually hits that level may leave participants unnecessarily vulnerable to last-minute attacks to which they have no time to respond. Because candidates almost always spend what they raise, it therefore makes sense to trigger the release of matching funds when contributions reported by the non-participating candidate combined with independent spending are near or at the participant's expenditure limit.

[2] BCRA's attempt to close the "issue advocacy" loophole is subject to First Amendment challenge as of this writing. The constitutional issues should be resolved with respect to federal candidates by early July 2003, and the decision will serve as an important precedent in lawsuits challenging reporting requirements for sham issue ads in judicial elections.

Trigger provisions are most effective if they authorize release of public funds to match not only independent expenditures for "express advocacy" but also spending for campaign ads that evade reporting requirements by exploiting the "issue advocacy" loophole. Jurisdictions that cannot or do not want to require reporting of such spending may find alternative mechanisms to address the problem. For example, a statute could empower the agency that administers the public financing program to release a limited amount of additional funds to participating candidates, when there is unreported spending for ads attacking them or supporting their opponents. Without some such device, candidates who fear being swamped by sham issue advocacy may hesitate to participate in a public funding program.

What Can Be Said in Response to Claims That Elements of This System Are Unconstitutional?

Several elements of public funding systems have been subject to attack under the First Amendment, including contribution limits, reporting requirements, trigger provisions, and voluntary spending limits. In the most recent case considering these constitutional claims, which involved Maine's full public funding system for non-judicial candidates, all of these elements withstood the challenge. The basic arguments are summarized below.

Contribution Limits Can Be Low.

In January 2000, the U.S. Supreme Court rejected a constitutional challenge to a $1,075 limit on contributions to statewide non-judicial candidates in Missouri. In upholding the law under the First Amendment, the Court stated that no limit is too low, unless it is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." Since that ruling, no court has invalidated an individual contribution limit on the grounds that it is too low.

Although courts have upheld limits as low as $100 per person per election, contribution ceilings should be tailored to fit the specific circumstances of each election. States may wish to allow higher limits in larger jurisdictions, for example, although graduated limits are not constitutionally required. In fact, the Constitution affords states enormous discretion in setting the

level of contribution limits. Nevertheless, courts will examine each challenged ceiling to ensure that candidates can still raise the funds they need to get out their message.[3]

Courts Have Consistently Upheld Even-Handed Reporting Requirements for Campaign Contributions and Expenditures.

The U.S. Supreme Court upheld reporting requirements applicable to candidates and political committees, including political action committees ("PACs") and political parties, as long ago as 1976 in *Buckley v. Valeo*. The *Buckley* Court also upheld reporting requirements for individuals or groups that make independent expenditures. As with contribution limits, states have a great deal of discretion in setting the level of contributions or expenditures that trigger the obligation to file campaign finance reports. As a matter of policy, it does not make sense to require reporting of extremely small contributions, but as long as filing burdens are imposed even-handedly – not singling out PACs, for example, for especially onerous obligations – the requirements are unlikely to raise any constitutional issue.

Reporting requirements move into constitutionally more unsettled territory when they are designed to cover independent spending on electioneering advertising that avoids magic words. A full discussion of this subject is beyond the scope of this essay, but it may be found in the Brennan Center's publication, *Regulating Interest Group Activity in Judicial Elections*, by Mark Kozlowski, which is available at www.brennancenter.org.

Trigger Provisions Are Consistent with First Amendment Values.

Like virtually every other element of campaign finance law, triggers have repeatedly been subject to First Amendment challenge. Laws that lift expenditure ceilings for participating candidates with high-spending non-participating opponents, while continuing or increasing public subsidies for participants, have survived constitutional challenge every time and in a variety of federal appellate courts. The courts have recognized that the trigger is necessary to allay participants' reasonable fears that they will be outspent by opponents who do not accept spending limits.

Matching funds for independent expenditures are less common and have received a less consistent response in the courts. In the first decision to consider the issue, *Day v. Holahan*, the federal Court of Appeals for the Eighth Circuit invalidated Minnesota's attempt to add an independent

[3] For more information about the kinds of factors that courts will consider, see *Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws* III-3 - III-4 (Deborah Goldberg, ed. 2001), *available at* www.brennancenter.org.

spending trigger to its existing public funding system. As an initial matter, the *Day* court concluded that the prospect of a publicly funded response by participating candidates to independent spending deterred such spending and therefore burdened constitutionally protected speech. Because nearly all candidates joined Minnesota's public financing program, even without the trigger, the court held that the First Amendment burden could not be justified by the state's interest in encouraging program participation.[4]

But the Eighth Circuit undercut its own reasoning only two years later in *Rosenstiel v. Rodriguez*, when it upheld an amendment to Minnesota's law that allowed spending by non-participating candidates to trigger a waiver of the expenditure ceiling applicable to their participating opponents, who thereafter remained eligible to receive public subsidies. The court commented:

> The expenditure limitation waiver, which permits a publicly financed candidate to exceed the expenditure limits while retaining the public subsidy when opposed by a nonparticipating candidate who has spent or received contributions beyond the triggering amounts spelled out in the statute is simply an attempt by the State to avert a powerful disincentive for participation in its public financing scheme: namely a concern of being grossly outspent by a privately financed opponent with no expenditure limit.[5]

The same point could be made about the trigger challenged in *Day*, except that the participating candidate's fear of being outspent is prompted by privately financed independent groups with no expenditure limit. The continuing vitality of *Day* is therefore open to question.

More recently, the federal Court of Appeals for the First Circuit squarely rejected *Day*'s reasoning and upheld Maine's independent expenditure trigger. Noting that the complaint about the trigger "boil[ed] down to a claim of a First Amendment right to outraise and outspend an opponent," the Court stated:

> Appellants misconstrue the meaning of the First Amendment's protection of their speech. They have no right to speak free from response—the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources. The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures.[6]

This reasoning echoed a similar analysis by the trial court in Maine. Speaking of the trigger's opponents, that court reasoned:

[4] *See* 34 F.3d 1356, 1359-62 (8th Cir. 1994). The Eighth Circuit covers Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

[5] 101 F.3d 1544, 1551 (8th Cir. 1996).

[6] *Daggett v. Commission on Gov'tal Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000) (internal quotations and citations omitted). The First Circuit covers Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

> Their view of free speech is that there is no point in speaking if your opponent gets to be heard as well. The question is not whose message is more persuasive, but whose message will be heard. The general premise of the First Amendment as interpreted by the Supreme Court, on the other hand, is that it preserves and fosters a marketplace of ideas. . . . In that view of the world, more speech is better. If a privately funded candidate puts out his/her candidacy and ideas to the public, the public can only gain when the opposing candidate speaks in return. This "marketplace of ideas" metaphor does not recognize a disincentive to speak in the first place merely because some other person may speak as well.[7]

Counsel for the plaintiffs in *Daggett* admitted that they did not ask the Supreme Court to review the decision because they were afraid that it would be upheld. Lawsuits filed by opponents of Arizona's full public funding program did not challenge that state's independent expenditure trigger.

Full Public Funding Systems Are Not Coercive.

Because public funding systems routinely include spending limits, which must be voluntary under most courts' interpretation of *Buckley*, opponents of campaign finance reform often allege that the programs are so attractive that they are voluntary in name only, but coercive in actual effect. This claim has been raised in the context of challenges to both partial and full public funding systems.

Courts hearing these challenges agree, however, that states do not have to make public and private financing options equally attractive for participation in a public funding program to be voluntary. Providing incentives to induce acceptance of expenditure limits is lawful even if the inducements create some pressure for participation. The compelling state interests that justify spending limits allow states to tilt the scales in favor of participation.

On the other hand, courts will examine spending limit schemes closely to determine whether they are truly voluntary or in fact coercive. In addressing this question, courts usually adopt one or more of three approaches. First, some courts have held that the system is not coercive if there is "rough proportionality" between the benefits given participating candidates and the restrictions they accept, even if the scheme does not achieve "perfect equipoise." Courts have not offered particularly clear explanations of how to balance those benefits and burdens.

Second, courts may ask whether the package of inducements provided to encourage candidates to accept spending limits creates such a large disparity between benefits to participants and disadvantages to non-partici-

[7] *Daggett*, 74 F. Supp. 2d 53, 58 (D. Me. 1999) (citation omitted), *aff'd*, 205 F.3d 445.

Programs offering public funds as an inducement to accept spending limits have with only one exception been upheld against claims that they are unconstitutionally coercive.

pants that candidates are coerced to participate in the scheme. In other words, there comes a point at which regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive. This analysis was applied to the Kentucky public funding system, whereby participating gubernatorial slates receive a $2 subsidy for every $1 raised, and these matching grants continue even if the non-participating slate's spending triggers removal of the spending limits — making the subsidy virtually unlimited. The federal Court of Appeals for the Sixth Circuit concluded that this generous benefit, specifically including the trigger, was not so great that it reached the point of coercion.

Finally, courts may ask whether the scheme is based essentially on rewarding candidates who accept spending limits or on punishing candidates who reject such limits. Inducements, even generous ones, are rarely found to render the state's scheme coercive, while plans that appear to be based on penalizing those who do not agree to limits are likely to be found coercive. Perhaps for this reason, programs offering public funds as an inducement to accept spending limits have with only one exception (a partial public funding scheme coupled with a cap gap that gave participants a 15-1 fundraising advantage over non-participants) been upheld against claims that they are unconstitutionally coercive. Maine's full public funding scheme survived such a challenge as recently as 2000.

Full Public Funding Programs Do Not Discriminate Against Challengers.

Opponents of full public funding often claim that programs with spending limits will systematically entrench incumbents. According to that argument, incumbents have such an inherent electoral advantage that challengers who abide by expenditure caps will have no real chance to compete, even if the incumbent adheres to the same limit. Given the unequal starting points, in other words, equal spending necessarily preserves the incumbents' greater name recognition and is therefore discriminatory against challengers.

The Supreme Court has twice rejected this complaint in upholding contribution limits, and the argument is equally unsupported as a challenge to full public funding programs. The argument fails because the unquestionable electoral advantage of incumbents derives in part from their greater ability to raise funds, which becomes irrelevant when incumbents participate in a full public funding system. By far the vast majority of challengers in private financing systems fail to raise or spend anywhere near as much as their opponents. Full public financing programs with spending limits equalize candidate expenditures and thus *reduce the relative advantage*

of participating incumbents. Indeed, empirical analysis shows that, even without public funding, spending limits *increase* the competitiveness of challengers (although they inescapably continue to face uphill battles to unseat incumbents). Challengers who believe that they can compete more effectively by opting out of the public funding system are, of course, entitled to do so.

How Can This Program Be Applied to Retention Elections?

Before considering how full public funding might constitutionally be applied to retention elections, it is worth recalling the rationale for appointing judges as an initial matter. The idea is to shield judges not from the influence of politics (which unavoidably enters in appointive systems as well) but from the compromising pressures of contested elections. Appointment is supposed to secure highly qualified judges rather than those who win office by pandering to majority views (which are often inconsistent with the rights of unpopular minorities) or by raising large sums from contributors seeking to influence decisions of the court.

When they are selected for judicial office, appointed judges thus may not have a broad base of popular support, and they may possess no skills, experience, or interest in fundraising. Moreover, they will likely know that sitting judges have traditionally won retention with little controversy and often without raising a dime. Of the 17 states holding only retention elections for Supreme Court candidates over a 10-year period, nine saw no fundraising whatsoever and, in an additional three, only one candidate raised any funds. Having just been elevated to the bench, the appointees may therefore be disinclined to spend their first years in office actively courting what may prove to be a wholly unnecessary base of campaign contributors for a retention election. If they do not build that base, they leave themselves particularly ill equipped to combat a well-funded negative campaign launched against them late in the election season by independent "issue advocacy" groups that are constrained by neither ethical codes or disclosure requirements.

States concerned enough about protecting the integrity and quality of their courts from the political pressures of contested elections to appoint their judges in the first place should create structures that continue to insulate the appointees as much as possible from pressures to behave like other incumbent elected officials. Incumbents of the political branches often track public opinion polls for guidance with respect to their policy-

Judges should not be playing to the home crowd, and they should not be compromising even the appearance of impartiality by routinely collecting contributions from the lawyers and parties who appear or are likely to appear before them in court.

making (or at least the spin they put on it), and their campaign fundraising is almost always a year-round process. Judges should not be playing to the home crowd, and they should not be compromising even the appearance of impartiality by routinely collecting contributions from the lawyers and parties who appear or are likely to appear before them in court. But those unattractive options are essentially the only ones available to sitting judges whose independent decision-making is increasingly likely to subject them to an organized attack in a retention election. Offering public financing to such judges provides comfort that they will be able to respond if attacked for unpopular decisions and thus helps to ensure that retention elections do not undermine the integrity of the courts that states have attempted to protect with their appointive process.

Publicly subsidizing judges standing for retention is not that different from providing matching funds for independent expenditures in contested races. Maine provides public funds to participating candidates who face independent expenditures against them or in favor of their opponents, and the system has been upheld against constitutional challenge – even though the participating candidate may be an incumbent, the opponent may not reach the public financing qualifying threshold, and the subsidy is never available to independent groups. The appearance of incumbent-protection that arises when only an incumbent receives public funds does not defeat the state's interest in combating the reality and appearance of corruption and in encouraging participation in the public financing system, whether in contested or retention elections.

Moreover, the concern about "incumbent protection" is inapposite in a context where the equal treatment of two classes – incumbents and challengers – is not at issue. Even in contested elections, such equal protection claims are generally available only when there is record evidence of invidious discrimination against challengers as a class. But retention elections are intentionally designed to eliminate the contest with a challenger, so the possibility of discrimination is illusory. The very same state interests that justify rejection of contested elections in favor of appointive systems also support public financing for retention elections.

Payment mechanisms in a full public funding system for retention elections would have to ensure that judges seeking retention could meaningfully counter opposition campaigns, which are often designed to hit shortly before the election, when there is almost no time to respond. The most promising system would appear to be one that conveyed an amount adequate for a retention campaign to a special bank account established by the judge's retention committee well in advance of the election. The committee would be authorized to commit only a modest portion of the funds in anticipation of possible attack and to spend the rest once opposition

expenditures approached that same level. The two-stage funding process protects the public fisc in the event that no opposition campaign materializes. The initial commitment is analogous to the reduced grant made available to unopposed general election candidates under Maine's full public funding program, while the release of the remaining amount functions much as limited matching funds do. Independent groups may ultimately have the resources to outspend sitting judges, but the system will give judges the ability to convey their point of view, without raising concerns about the influence of private contributors. As in any public financing system, any unexpended funds would be returned to the state for future use.

Critics may argue that the analogy with Maine's system fails, because unopposed general election candidates originally were entitled to no public funds, and unopposed candidates would still appear not to be entitled to receive matching funds for independent expenditures. Admittedly, the analogy between the Maine program and that proposed here for retention elections is imperfect, because there are salient differences between the unopposed candidate and the judge seeking retention. After all, an unopposed candidate in a contested election is unlikely to face an independently financed attack campaign, because the expenditures (except in extraordinary circumstances) will not reduce the candidate's chances of winning. By contrast, such a campaign can unseat a judge in a retention election. The differences between the Maine system and the proposed public funding system for retention elections reflect the different dynamics of the campaigns financed in each. Judges can be expected to participate in a public funding program only if it is structured to allow them to participate meaningfully in the debate about retention, as the two-staged process described above permits. The retention election funding program is thus justified by the compelling interest in encouraging participation, which in turn protects the integrity of the state's courts.

Do Judicial Elections Raise Any Special Issues for Full Public Financing Programs?

Increased Competition May Not Always Be Desirable.

A full public funding system for judicial campaigns must be introduced with care, because some of the virtues of the system in elections for political offices may in fact militate against the program where the judiciary is concerned. For example, by encouraging the entry of candidates who would not otherwise consider a run for elective office, full public funding may introduce competition where little previously existed. Although we generally believe that more competition is better, we should not so easily leap to that conclusion in proposing structures to regulate judicial elections.

In jurisdictions that have already managed to secure a diverse and qualified bench, we may in fact want to discourage competition. After all, the idea that a well-qualified judge should be freed as much as possible from political pressure is what explains the federal selection system – both the appointive process and life tenure. The reasons to support full public funding programs are therefore most persuasive when judicial elections are already highly competitive or when more competitive elections hold some promise for diversifying and improving the quality of the bench. Introducing full public funding in other circumstances may serve little purpose and invite problems, by bringing in money that would not otherwise be spent on campaigns. In those situations, alternative campaign finance rules, such as strict contribution limits, might better address concerns about the influence of big money on decision-making.

Special Rules for Incumbents May Sometimes Be Justified in Judicial Elections.

Concerns about undesirable competition may also support lifting the usual qualification requirements when judges seeking re-election choose to participate in public funding programs. Judges who have previously won election to the bench have already established themselves as serious candidates, and we generally want both to discourage them from looking to the "home crowd" for affirmation and to limit the influence of private money on their re-election. We may therefore wish to permit their participation in public funding programs without the need to collect even small qualifying contributions. Incumbent officials of the political branches are

not entitled to special qualification rules, because we want them to remain attentive to the interests of their constituents and therefore reasonably ask them to confirm public support with each election. Judges are different.

Figure 8. Special Qualifying Provisions for Sitting Judges

2001 North Carolina Senate Bill No. 1054

Secion 163-278.64. Requirements for participation; certification of candidates.

(b) Demonstration of Support of Candidacy. — Except for candidates described elsewhere in this subsection, participating candidates who seek certification to receive campaign funds from the Fund shall first, during the qualifying period:

(1) Obtain qualifying contributions from at least 250 registered voters. . . .

(2) Obtain signatures from at least 2,000 registered voters. . . .

Candidates who hold office on the Supreme Court or Court of Appeals … are deemed to have demonstrated support and are not required to comply with subdivisions (1) and (2) of this subsection.

In other words, certain policies that would be derided as "incumbent protection" in non-judicial elections might well be acceptable in judicial selection systems. After all, life tenure – surely the most extreme form of incumbent protection – is constitutionally guaranteed to federal judges, even though it is unthinkable for the political branches. Qualifying rules that differentiate between judicial incumbents and challengers should therefore be subject to a different equal protection analysis than rules making such a distinction among candidates for the political branches. Such rules in non-judicial elections might constitute invidious discrimination against challengers as a class, but the compelling governmental interest in safeguarding the reality and appearance of judicial impartiality justifies the distinction in elections for the bench. Moreover, although courts may rightfully be suspicious of *legislators* who use campaign finance laws to insulate *themselves* from effective electoral challenge, legislatures seeking to protect *judicial* independence – which may be exercised as a check on their own institutional power – deserve deference to their judgment.

Aggregate Limits on Contributions from Attorneys and Parties Who Appear Before Elected Judges May Promote Confidence in Fair and Impartial Courts.

Texas imposes aggregate limits on contributions from members of a single law firm. The purpose of such a rule is to address the perception that firms with litigation before an elected court are unduly influencing the outcome, or the actions of the court, through numerous individual contributions delivered to the judges in a collectively substantial bundle. By reducing the amount of money coming from firms appearing before the court, the state hopes to rebuild confidence in the impartiality of judicial decision-making.

But the limit favors candidates supported by large corporate defendants over those preferred by individual plaintiffs, because the law firms for both sides are treated equally, but the clients are situated very differently. Large corporations (and many of their executive personnel) can afford the maximum judicial campaign contribution whereas most of the people suing them cannot. The imbalance created by the contribution limit may exacerbate the perception that courts are biased toward the wealthy.

That perception may be addressed in part if corporate contributions are banned, and contributions from executive or administrative corporate personnel are treated in the same way as those from lawyers in a single firm, rather than as contributions to a corporate PAC. Although contributions from PACs may be limited to the same amount as contributions from individuals, the contributors to PACs – unlike the lawyers in Texas law firms – are typically not limited in the aggregate with respect to what they may give as individuals to a campaign. The law firm model for contributions from corporate management should therefore help to preserve the appearance of impartiality in cases with economically mismatched parties better than would a traditional PAC model.

Conclusion

A full public funding system can alleviate the problems presented by privately financed judicial elections that are highly competitive, politicized, and costly only if the vast majority of candidates for the bench participate in the program. Our limited experience with such programs constrains our ability to predict whether judicial candidates will participate voluntarily at sufficient rates to address real and perceived threats to fair and impartial courts. States and localities with longstanding partial public financing systems have, however, achieved very substantial participation rates. And the increasingly vocal and widespread concern among elected judges about the negative influence of privately financed judicial campaigns on public confidence in the judiciary suggests that competing candidates for the bench may be more willing to limit spending than candidates for executive or legislative offices.

Before worrying about participation rates, however, legislators and citizens who want fair and impartial elected judges must give judicial candidates the option of running campaigns without private funds. If you are thinking about drafting a public funding bill, we invite you to take advantage of the Brennan Center's legal and policy expertise. We will be happy to help you craft legislation that is responsive to the special needs of your state or to review bills that you have already drafted for potential constitutional or other legal problems. We can also provide legislative testimony about the issues discussed above and help to defend the legislation against inevitable constitutional attack. Please call us for assistance at 212-998-6730 or email us at brennan.center@nyu.edu.

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