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# CHOOSING JUSTICE

## *REFORMING THE SELECTION OF STATE JUDGES*

THE REPORT OF THE CITIZENS FOR INDEPENDENT COURTS  
TASK FORCE ON SELECTING STATE COURT JUDGES

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‡ Roy A. Schotland concurs in Recommendation 5, but abstains from the report on it.



# TASK FORCE RECOMMENDATIONS

1. Whether states use elective or appointive methods of judicial selection, they should provide for judicial terms of office of adequate length. For all trial judges in courts of general jurisdiction and all appellate judges, the Task Force recommends a minimum term length of eight years, and urges consideration of longer terms.
2. States in which judges face elections should adopt a nominating commission system for making *interim* appointments to the bench. The appointing authority's choice should be limited to those candidates selected by the nominating commission, which should include members from outside the legal profession.
3. In states where judges are chosen in judicial elections, stringent campaign rules should be enforced to increase public confidence in judicial neutrality. First, full disclosure of sources of all funds expended on judicial campaigns should be required. Second, the information disclosed should be made available to the public in an efficient, easily accessible manner. Third, contribution limits should be set and rigorous recusal rules should be enforced.
4. States that provide for successive terms of judicial office by means of noncompetitive retention elections should conduct systematic, objective, broadly based judicial performance evaluations, and

should disseminate the results to voters at public expense. States with competitive elective systems should provide information regarding judicial candidates to the voters at public expense.

5. In states where judges face elections, private (nongovernmental) groups should adopt methods of oversight of judicial campaigns, including campaign speech standards that make clear the requirements of the jurisdiction's canon of judicial ethics. Voters should have access to information regarding inappropriate campaign conduct by the candidates *prior* to the election.

## MISSION STATEMENT OF THE TASK FORCE

The Task Force on Selecting State Court Judges was asked to study judicial selection in the states. Its recommendations, if adopted, can provide guidance to all states—whether they use elective or appointive judicial selection systems—in their efforts to improve their judiciaries. Recommendations concerning disqualification of judges from specific cases, interim vacancy merit plans, improved voter information, and judicial campaign oversight will be of special interest to states with elective systems, while almost all states will find the recommendations regarding judicial performance evaluations and judicial terms of office especially useful. Because most state judges are elected, we have paid particular attention to the influence of money in judicial campaigns, including the impact of the need to seek contributions, and the post-election impact of those contributions on the judiciary generally. We believe that the following recommendations will reduce the problems associated with judicial fundraising in states that continue to elect judges, and will help to promote the independence and integrity of all state judiciaries.

Respectfully submitted,

The Citizens for Independent Courts  
Task Force on Selecting State Court Judges



# REPORT OF THE TASK FORCE ON SELECTING STATE COURT JUDGES

## INTRODUCTION

The Task Force finds that there is increasing public concern regarding the independence of many state court judges who are subject to elections.

The tradition of electing judges is uniquely American, and was widely adopted by the states in the nineteenth century for the purpose of making the judiciary independent of the executive and legislative branches of government. However, such independence has been adversely affected by a growing dependence of judicial candidates on other sources of potential influence—the individuals and special interests that finance their election campaigns.

Judicial elections have always been problematic. At a minimum, the solicitation of campaign funds creates an appearance of obligation. Indeed, a 1999 survey conducted on behalf of the Texas Supreme Court and the Texas State Bar found that 48 percent of all Texas judges believe that campaign contributions significantly influence courtroom decisions.<sup>1</sup> Those figures rose to 69 percent for court staff and 79 percent for lawyers.<sup>2</sup>

Further, voter awareness of candidates' qualifications has been limited, typically resulting in low voter turnout. Winning elections often turns on factors irrelevant to candidates' credentials, such

as an easily recognizable name, a populous county of residence, strong political connections, or a good ballot position. The tenor of campaign advertising may make judicial races indistinguishable from political contests for legislative and executive offices. Moreover, the competition for campaign funds, especially for expensive televised advertisements, has placed pressure on candidates to raise money, sometimes running to several million dollars for statewide judicial offices.<sup>3</sup>

Election, of course, is a highly democratic method of choosing public officials. Judicial offices, however, are significantly different from positions in the legislative and executive branches, and therefore judicial elections must be assessed and treated accordingly. First, judges are not democratic representatives, as are legislators and governors. They represent the rule of law, not the will of the majority. Second, to ensure that judicial decisions will be based on the facts and law of each case, rules of judicial conduct generally forbid judicial candidates from making campaign promises regarding their future conduct on the bench. In addition, although rules in some jurisdictions forbid candidates from sponsoring certain types of advertisements attacking their opponents, some candidates still use negative advertising that may contravene their jurisdictions' rules of judicial ethics. Moreover, the candidates themselves may become the object of attacks by "issue groups" that oppose them. Indeed, because judicial candidates are constrained both in what they are permitted to say and in how they may solicit funds, they are particularly vulnerable to misleading advertising and attacks on judicial independence by opposing groups.

These problems of the electoral system present strong arguments in favor of "merit selection." Merit selection is an appointive system of judicial selection in which a nonpartisan, broad-based nominating commission recruits and evaluates judicial candidates to determine which are best qualified, and submits the names of the most qualified applicants to an appointing authority (for example, a state's governor), who may choose only from those names submitted. Most of the states that use merit selection systems also provide for "retention elections" for judges who are appointed to the bench. In general, such systems provide that, after completing a short initial term of office, a judge must stand, unopposed, for retention; the voters then decide whether to retain him or her for a full term.

Presently, twenty-four states and the District of Columbia use a nominating commission-based appointive plan for the initial selection of some or all levels of the judiciary, and an additional ten states use a similar plan only to fill midterm vacancies. Nevertheless, elective systems remain commonplace; 77 percent of all judges on courts of general jurisdiction and 53 percent of all appellate court judges in the states face contestable elections.<sup>4</sup>

Appointive systems do not necessarily guarantee the selection of the most capable and independent judiciary. Indeed, the Task Force recognizes the high quality and professionalism of many of the elected judges now serving on state courts. However, judges who are appointed rather than elected are relieved of the need to raise campaign funds, thereby freeing them from some vulnerability to outside influences. That there may be a link, or, perhaps more importantly, the perception of a link, between campaign contributions and judicial decision-making significantly jeopardizes public confidence in the judicial process.

A majority of the Task Force strongly endorses the merit selection process, and it is important to note that use of an appointive system of judicial selection obviates the need for the second, third, and fifth recommendations. This report and its recommendations are in no way intended to detract from the struggles of the many national and state organizations that continue to work for merit selection, nor to suggest that merit selection is unachievable. However, the political reality is that, at least for the present, in thirty-nine states, some judges face elections. Thus, particularly with regard to recommendations directed toward judicial elections, the Task Force has turned its attention to measures that it believes will substantially improve the current system.

To improve the process of judicial selection, and to enhance the independence and integrity of the judiciary, the Task Force proposes the foregoing five recommendations, which are analyzed in the next section of this report. (At the end of the analysis, Appendix 1 provides historical background on judicial selection in the states, Appendix 2 provides information on judicial term lengths in the states, and Appendix 3 provides information on interim nominating commissions.) The Task Force has chosen not to include a recommendation regarding public funding of judicial campaigns, believing that the topic raises issues that take it beyond the scope of this report.

The Task Force recognizes that there is no national prescription for reforming judicial selection completely. Rather, the history and political traditions unique to each state necessarily will dictate which

reforms are likely to improve the process. Moreover, the ways in which reforms must be enacted—through revisions to a state constitution, statute, executive order, state Supreme Court rule, or a code of judicial conduct—also are not uniform among states.

It is with an understanding of these constraints that the Task Force offers for consideration the following analysis of its recommendations.

## ANALYSIS

***1. Whether states use elective or appointive methods of judicial selection, they should provide for judicial terms of office of adequate length. For all trial judges in courts of general jurisdiction and all appellate judges, the Task Force recommends a minimum term length of eight years, and urges consideration of longer terms.***

Unlike their federal counterparts who are appointed with life tenure, most state judges are appointed or elected for a term of years. The length of the judicial term has significant consequences for reappointment or reelection, and requires maintenance of a delicate balance between judicial independence and judicial accountability. Unduly short terms increase the frequency with which judges are subjected to political pressures from the electorate or the appointing authority; on the other hand, longer terms, in the views of some, may leave judges isolated from the communities they serve.

The Task Force recommends longer tenure than many states have for two reasons. First, longer terms strike the more appropriate balance between independence and accountability.<sup>5</sup> Second, by reducing the frequency of campaigns, longer tenure helps to lessen the influence of money on judicial elections. Task Force members agree that a minimum term of eight years would meet these objectives.<sup>6</sup>

As noted in the Introduction, throughout the country, 77 percent of all judges of trial courts of general jurisdiction, and 53 percent of all appellate judges, face contestable elections. Of these trial judges, 30 percent have initial terms of four years or less (this total increases to as many as 44 percent when trial judges appointed to fill interim vacancies are included). Twenty-eight percent of elected appellate judges have initial terms of two years or less (the total increases to as many as 69 percent when appellate judges appointed to fill interim

vacancies are included). Another 4 percent of elected appellate judges sit for initial terms of only three or four years.<sup>7</sup>

The length of subsequent terms is slightly greater: of all elected trial judges, 81 percent have subsequent terms greater than four years, and 99 percent of elected appellate judges have subsequent terms longer than four years. However, for 62 percent of elected trial judges and 45 percent of elected appellate judges, these subsequent terms are only six years in length.

Short terms are most problematic in elective systems. States with shorter terms necessarily have more elections; thus, they encounter more instances in which the necessary campaign fundraising can raise the appearance of obligations to contributors. Most importantly, the need to campaign frequently discourages qualified potential candidates, and discourages many of the ablest judges from remaining on the bench. Even where positions are almost never contested, short-term positions are inherently less attractive because of the lack of job security. Short terms also tend to result in “bedsheet ballots”—ballots that are so long and filled with so many candidates that they discourage voter participation—since, while there may be fewer candidates per race, there will be more races in an election cycle. Finally, short terms mean that candidates must raise campaign funds more frequently.

Short terms also present problems for appointed judges. Of appointed judges of trial courts of general jurisdiction, 7 percent have terms of just three to four years, and another 8 percent have terms of only five to six years. Of appointed appellate judges, 8 percent have initial terms of five to six years; 11 percent have subsequent terms of only five to six years. Thus, job security and competition for a limited number of positions on the bench remain issues for many appointed judges.

Longer terms promote judicial independence: instead of being forced to attend to the demands of reelection (and its concomitant need for fundraising) or reappointment, judges can focus on applying the law, regardless of popular sentiment. Longer terms may also in fact promote judicial accountability: the public has a greater opportunity to evaluate a judge’s record and professional behavior.

Every state has a system of judicial discipline that sanctions judicial misconduct and, where the misconduct is especially egregious, removes judges from the bench. The longer the term, the greater the need for an effective disciplinary system. As a corollary to enhancing judicial accountability by increasing term lengths, the Task Force

recommends that states also consider the adequacy of their judicial discipline systems.

***2. States in which judges face elections should adopt a nominating commission system for making interim appointments to the bench. The appointing authority's choice should be limited to those candidates selected by the nominating commission, which should include members from outside the legal profession.***

Observers of state judicial selection methods have noted that elective systems tend to be, in fact, “one-person judicial selection” where interim (or midterm) vacancies are concerned. In nearly all of the twenty-one states that elect judges directly at all court levels, the governor has the power to appoint judges to fill such vacancies.<sup>8</sup> In most states, more than half of all judges initially reach the bench through gubernatorial appointment to fill an interim vacancy; in some states, such as California, nearly 90 percent of judges are appointed initially, and contested elections are the exception, rather than the rule.

This system of “one-person judicial selection” presents serious problems for the independence of the judiciary. Executives who have sole authority to appoint judges are free to create their own criteria for judicial selection, which may have little or no bearing on the qualifications necessary to perform effectively and impartially as a judge. The most frequent abuse of executive power in this area is the practice of appointing only one’s own political party allies to the bench. In one state, a governor appointed nearly 190 judges during his eight years in office, all of whom were members of his political party. Frequently, governors rely most heavily on recommendations from local party officials in making appointments, thereby turning judge-ships into political patronage rewards.

However, a method exists to improve the appointment process for interim vacancies. For states that elect judges, adoption of merit-based nominating commissions for interim appointments helps to safeguard the traditional ideals of the elective system, by ensuring greater public involvement in and a less politicized process for choosing a significant number of judges. Currently, eleven states employ a nominating commission system only to assist the executive in making certain interim appointments.<sup>9</sup> (New Mexico fills all vacancies through its nominating commission. It then holds contested partisan elections for the first full term after appointment and

retention elections for additional terms.) In these states, nominating commissions are not used to fill vacancies for initial terms of office.

Nominating commission systems typically contain several basic elements. First, they are broadly based, consisting of lawyer and non-lawyer members, with judges sitting *ex officio* on some commissions; several of these states also provide that a majority of the members must be nonlawyers. Second, to avoid domination of the process by one political party, appointment authority for selection or election of commission members is often spread among several sources, including the state bar, the supreme court, the legislature, and the governor. In seven of the eleven states described above, the executive is required to appoint only from the list of nominees provided by the nominating commission. Third, and perhaps most important, these nominating commissions are charged with recruiting, investigating, interviewing, and recommending only the most highly qualified lawyers to fill judicial vacancies.

A 1991 American Judicature Society (AJS) survey of governors using executive order merit plans shows that governors view the nominating commission process very favorably, because the focus is on the merits of the candidates themselves. At the time of the survey, the consensus among governors was that this kind of merit plan minimizes partisan political influence, provides the highest quality nominees, and broadens the pool of applicants, resulting in a more diverse group of nominees in terms of race, ethnicity, gender, and practice background. One governor observed that “this system is a lot better than either popular election or unfettered gubernatorial choice,” while another declared, “I believe the effectiveness of a merit plan depends a great deal on how the process is treated by the executive. I treat the process very seriously.”<sup>10</sup> AJS has also found that citizens are supportive of midterm vacancy merit plans because they inject a degree of community involvement into a system that would otherwise be “one-person judicial selection.”

AJS’s studies show that while citizens and governors themselves support midterm vacancy plans, opposition tends to come from local- and state-level political party officials, who stand to lose the power they can wield over judicial selection when their party controls the statehouse. For this reason, it can sometimes be difficult to pass either a statute or a constitutional amendment providing for a midterm vacancy merit plan. Adoption of an executive order is accomplished more easily, but it is vulnerable to extinction when a new governor is elected.

The Task Force thus urges states to adopt, by statute or constitutional amendment, a nonpartisan (or bipartisan) nominating commission system for interim vacancies.<sup>11</sup> The Task Force also recommends that any plan for a nominating commission system require that the executive must appoint *only* from the list of nominees provided by the commission; without such a provision, nominating commissions are merely advisory bodies. Further, to increase the legitimacy of the commission in the eyes of the general public, it should include members from outside the legal community.

***3. In states where judges are chosen in judicial elections, stringent campaign rules should be enforced to increase public confidence in judicial neutrality. First, full disclosure of sources of all funds expended on judicial campaigns should be required. Second, the information disclosed should be made available to the public in an efficient, easily accessible manner. Third, contribution limits should be set and rigorous recusal rules should be enforced.***

Money used to finance judicial elections should neither influence nor give the appearance of influencing judicial decisions. One way to ameliorate the negative influence of money on judicial campaigns is through a recusal (disqualification) rule.

### *DISCLOSURE*

Any system of recusal requires full and effective disclosure of all campaign contributions. Disclosure should apply whenever a lawyer contributes to a judicial campaign or to a party or political action committee (PAC) that contributes to or otherwise supports judicial candidates. Such disclosure should include the lawyer's employment or professional affiliation(s) (for example, the law firm or other organization for which the lawyer works). States may also wish to require disclosure of the employers or professional affiliations of *all* contributors, including nonlawyers.

Ideally, all contributions originating from the law firm or organization should be publicly disclosed as a unit, to provide a complete picture of the contributors to a specific campaign. Contributions must be disclosed promptly, and the disclosure statements must be made readily available to the public. At a minimum, states should provide the resources to make disclosure statements publicly accessible at the

courthouse where the judge regularly presides; preferably, they would be made available at *all* courthouses where the judge sits. In addition, states should make disclosure statements available in on-line format via the Internet.

### *RECUSAL*

The U.S. Supreme Court has recognized that, to prevent the appearance of corruption, the state has a legitimate interest in limiting the amount of money that a candidate may receive from one person, even if there is no actual *quid pro quo* for a particular contribution.<sup>12</sup> The concern is greatest in situations where the recipient has the power to make, or to exercise great influence over, decisions that affect the interests of the contributor. Thus, a contribution of \$1,000 to a judicial candidate is more troublesome than a \$1,000 contribution in a legislative race, where the recipient may be one of one hundred or five hundred members.

The notion of judicial recusal, or disqualification, is well established. While recusal is generally not employed by legislators, judges are required to recuse themselves in many situations—for example, in cases in which they own stock in a company appearing before them, even where their interest is very small and it is highly unlikely that their own economic interests will be materially affected by the case. Federal law requires recusal for holding “a financial interest in the subject matter,” which has been construed to mean “any” such interest.<sup>13</sup> Ultimately, not only must judges decide cases based on the facts of each case and the applicable law, they also must *appear* to do so, without regard for outside interests.

*Mandatory Recusal.* The Task Force’s principal recommendation is that states in which judges face elections should require recusal of any judge who has received an excessive contribution (one that exceeds the applicable limit) from a lawyer, law firm, client, or other interested person or entity. It recommends a “bright-line rule” that would require recusal whenever a campaign contribution exceeds the limit set by the relevant jurisdiction.<sup>14</sup> Rules that are adopted should provide policy guidance and should contain examples of the situations in which recusal is and is not required. The following analysis discusses some of the factors and issues that jurisdictions should take into account in crafting their own bright-line rules.<sup>15</sup>

The Task Force recommends that a recusal rule be mandatory: a judge must recuse him- or herself in any case in which a lawyer or a client made a contribution to the judge's campaign that, at the time it was made, exceeded the prescribed legal limit. States must determine the appropriate legal limit for their jurisdictions, and how and to whom they will apply.<sup>16</sup>

The rule should apply throughout the length of the term during which (or in anticipation of which) the contribution was made. The Task Force recognizes that judges in some states are elected to longer terms of office (for example, ten to fifteen years); such states may deem it appropriate to shorten the period during which recusal is required. However, the Task Force urges that a mandatory rule apply, at a minimum, for the first five years after the contribution is made.

An important question involves the mechanics of recusal: Who can request that a judge recuse him- or herself? If either party is permitted to move for recusal, a lawyer (or client) in a given case who wants to avoid a particular judge need only make a contribution over the allowable limit. Such a situation encourages "judge shopping," and will not enhance public confidence in the judiciary. Thus, the Task Force recommends adoption of a rule specifying that recusal may occur only on motion of the adverse party—that is, the party to whose interests the contribution could be presumed detrimental. For purposes of determining whether the legal contribution limit has been exceeded, the Task Force does not endorse aggregation of contributions from lawyers, clients, and/or other parties on a particular side of a case.

*Discretionary Recusal.* In addition to establishing a bright-line rule, there is support among some members of the Task Force for urging states to formalize a judge's discretionary option to withdraw from a case, either on motion or *sua sponte*, when he or she believes that some relationship or connection with a party or counsel (for example, campaign contributions, membership on a campaign committee, hosting of a campaign fundraising event, and so on) reasonably may be perceived to affect his or her fair and impartial adjudication of the matter. Discretionary withdrawal may be appropriate when a reasonable person would conclude that, in light of the circumstances surrounding contributions or other assistance made to the campaign of the judge before whom the case is pending, the judge's objectivity may appear to be compromised in favor of the opposing side.

However, contributions that comply with the applicable limit, standing alone, are not sufficient grounds for such withdrawal. Four factors relevant to the determination of whether withdrawal may be appropriate are:

1. the aggregate amount of contributions by lawyers, parties, and other supporters of a particular side in a case (for example, trade associations, labor unions, political action committees, and so on, where there is any basis to believe that the contributions of such supporters were the result of concerted activity intended to influence the judge, or where such groups have demonstrated an intent to file *amicus curiae* briefs or to petition to intervene in support of one side);
2. the ratio of the contributions made by those listed in (1), above, to the total contributions made to the judge's campaign;
3. the timing of the contributions (how long ago they were made, and whether they were made after the identity of the judge handling the case was known to the contributors);
4. the competing concerns of preventing delay in the case in question and preventing inefficiency in managing other matters on the judge's docket, particularly in those jurisdictions where replacing a judge is a difficult matter.

A rule providing for motions for discretionary recusal must require that any such motion be *timely*. Denial of such a motion to recuse should be reviewable only on grounds of abuse of discretion.

### *SUMMARY*

In summary, the Task Force finds, first, that disclosure requirements are necessary; second, that monetary limits must be set; and third, that states must define, for purposes of the rule, what constitutes an "adverse party." The ABA Task Force on Lawyers' Political Contributions provides guidance on these three basic issues.<sup>17</sup> While the Task Force recognizes that many factors must be taken into account in fashioning a rule, it endorses the creation of a bright-line

rule that mandates recusal whenever a campaign contribution exceeds the jurisdiction's legal limit.

***4. States that provide for successive terms of judicial office by means of noncompetitive retention elections should conduct systematic, objective, broadly based judicial performance evaluations, and should disseminate the results to voters at public expense. States with competitive elective systems should provide information regarding judicial candidates to the voters at public expense.***

The Task Force finds that voters in judicial elections need more and better information about the candidates. In both competitive elections and noncompetitive retention elections, voters traditionally have very little information on which to base their decisions. While most bar associations publish evaluations of judges standing for retention, the voting public does not seem to use voter guides produced exclusively by the organized bar. This may be because such guides are not always widely distributed; some evidence indicates that voters do use guides when they receive them. However, there is anecdotal evidence that the public has greater confidence in guides produced by a committee with a broader membership than simply the organized bar.

States can help to provide better information for voters by collecting and distributing appropriate information at public expense. The type of information distributed will vary depending on the type of elective system used by the state.

#### *JUDICIAL PERFORMANCE EVALUATIONS IN RETENTION ELECTIONS*

Retention elections are designed to ensure that appointed judges are appropriately accountable to the citizens they serve.<sup>18</sup> Therefore, when voters go to the polls, they should be given systematic information on the overall performance of judges standing for retention. To remedy the lack of information for voters in retention elections, several states have instituted performance evaluation commissions. These commissions, composed of both lawyers and nonlawyers, conduct surveys of many different groups of people who come into contact with a judge, which may include lawyers, police and probation officers, social service personnel, jurors, litigants, witnesses, and court staff. The commissions are funded by the state, but operate

as independent evaluators of judicial performance. The results of their surveys can provide systematic, relevant information to voters in retention elections. The criteria used by evaluation programs typically include such factors as the judge's judicial temperament, how expeditiously the judge resolves cases, whether the judge spends sufficient time on cases, and whether the judge treats litigants and attorneys with respect. The programs do not consider the content of the judge's decisions or his or her political ideology.

The involvement of political action committees and single-issue interest groups in several recent retention elections has served as an additional impetus for conducting performance evaluations. The most high-profile examples are those of former justice Penny White of the Tennessee Supreme Court and former justice David Lanphier of the Nebraska Supreme Court, both of whom were defeated in their retention bids in 1996 due to last-minute "Vote No" campaigns waged by groups in favor of the death penalty and term limits, respectively. Nebraska has no performance evaluation mechanism that could have countered the one-sided information disseminated by Justice Lanphier's opponents, and Tennessee's performance evaluation program did not begin until the 1998 elections. Many observers contend that performance evaluation results, if disseminated widely and effectively, can help voters make a more informed choice based on a judge's entire record, rather than on a decision in one controversial case that may be distorted by political opponents. This contention is supported by results of an American Judicature Society survey of voters in the four states that, as of 1996, had established performance evaluation programs for judges seeking retention.<sup>19</sup>

Currently, five states have official performance evaluation mechanisms for judicial retention elections: Alaska, Arizona, Colorado, Tennessee, and Utah.<sup>20</sup> New Mexico has begun limited performance evaluations of some judges, with plans to expand its program to all state judges in upcoming election cycles. Hawaii and the District of Columbia provide for additional terms through evaluation and reappointment by a commission. Performance evaluations do not necessarily require legislation or constitutional change; in 1998, the Oklahoma Supreme Court created a judicial evaluation commission to conduct a survey of attorneys who had appeared before the appellate judges up for retention that year.

These programs require modest but not insignificant funding in order to operate successfully. First, they must have adequate resources

to conduct and interpret the results of broad-based surveys of those who come in contact with judges standing for retention. Second, and most important, they must have adequate funding for dissemination of results—preferably through a voter guide that is sent directly to all registered voters in a state or jurisdiction. Placement of evaluation results in newspapers and on websites is an additional means of getting information directly to the voters. States without enough funding to disseminate their evaluation results widely have been disappointed with the effectiveness of their programs. Finally, in addition to ensuring adequate funding for dissemination, states should release their evaluation results during the final few weeks leading up to the election to maximize the benefit to prospective voters.

### *NONPARTISAN VOTERS' GUIDES IN COMPETITIVE ELECTIONS*

State-sponsored judicial performance evaluations are less feasible in contested elections, where one candidate may be an incumbent judge and the other an attorney with no judicial experience. However, states can publish and distribute nonpartisan voters' guides in state and local competitive elections. As a simple, cost-effective method to educate the public about its judiciary, such guides may reduce the influence of money and politics in judicial elections by providing candidates with a guaranteed method of reaching voters.

State-produced voters' guides are currently used in at least four states and in New York City, and exit polls and other studies have shown that these guides are voters' best sources of information about judicial candidates.<sup>21</sup> Voters' guides could contain biographical information, photographs, and personal statements. The guides could also include the results of bar polls or other candidate evaluations. Some states provide standardized biographical information on each candidate, while others permit the candidates themselves to supply the content.

The greatest costs associated with the guides are distribution costs; currently, the U.S. Postal Service's franking privilege (waiver of postage costs) does not apply to voters' guides. However, the total cost incurred by extending the franking privilege to the guides is small when compared to the benefits of a better-informed electorate, increased voter participation, and a reduction in negative perceptions of government. Thus, the Task Force endorses legisla-

tion to provide federal financial support in the form of postage for state and local initiatives that produce nonpartisan voters' guides for judicial elections.

***5. In states where judges face elections, private (nongovernmental) groups should adopt methods of oversight of judicial campaigns, including campaign speech standards that make clear the requirements of the jurisdiction's canon of judicial ethics. Voters should have access to information regarding inappropriate campaign conduct by the candidates prior to the election.***

Judicial elections are unique in terms of the restrictions placed upon candidates' speech. Canon 5 of the Model Code of Judicial Conduct exemplifies these heavy regulations.<sup>22</sup> Judicial campaign speech presents two difficult issues: first, as a matter of policy, whether a restriction on campaign speech is desirable; and second, whether such restrictions are constitutional. Such restrictions are intended to ensure that judicial candidates (and judges) appear neutral and unaffected by the political pressures of popular opinion. However, while courts agree on the need to construe narrowly any limits on speech, courts have not agreed on the constitutionality of several states' versions of Canon 5.<sup>23</sup>

On the one hand, candidates for judicial office must be able to inform the public about their credentials for office. On the other hand, candidates should not make promises regarding their future judicial decision-making. Such campaigning compromises impartiality and objectivity, thus threatening judicial independence and undermining public confidence in the judiciary.

Other examples of impermissible campaign conduct include candidates who advertise themselves as "Judge \_\_\_\_," even though they have never been judges, and candidates who attack decisions by their incumbent opponents in ways that distort those decisions. In 1998, for example, a Georgia Supreme Court justice was attacked by her opponent for having said in an opinion that "traditional moral standards" were "pathetic and disgraceful," whereas the justice had applied those adjectives to the majority opinion's analysis.

Public confidence in judicial neutrality is further jeopardized by campaign advertisements like the following:

"Maximum Marion" Bloss—"You do the crime, you do the

time.” (Texas, 1998)

“Dedicated and Experience [sic] Preserving the Rights and Needs of Victims. I’ll Bring Balance to our Judicial Process.” (Florida, 1998)

“Mike Burns is a tough, no-nonsense Prosecutor who believes in law and order. If elected, Mike understands his duty to uphold the law regardless of his personal views.” (Florida, 1998)

This is not a new phenomenon, as demonstrated by the following advertisements from California campaigns in the 1980s:

“Sent more criminals—rapists, murderers, felons—to prison than any other judge in Contra Costa County history.”

“Over 90% Convicted Criminals Sentenced. . . . Prison Commitment Rate is More Than Twice the State Average.”

In Nevada, in 1997, a Supreme Court justice campaigned for reelection with advertisements that he had a “record of fighting crime,” which included voting to uphold the death penalty seventy-six times. As one of his colleagues wrote after that election, dissenting from the Court’s refusal to require that justice to withdraw from a capital case, “Judges are supposed to be *judging* crime, not fighting it.”<sup>24</sup>

It is important to emphasize that the Task Force does not endorse restrictions on campaign speech that would punish a judicial candidate for personal opinions or political beliefs. Rather, it endorses those limited standards that balance judicial independence and judicial accountability by preserving the requirement that judges remain objective in the performance of their duties. As discussed earlier in this report, voters tend to have very little information regarding judicial candidates generally; and when a candidate’s campaign speech or conduct violates the jurisdiction’s canon of judicial ethics, fewer still are likely to recognize that there has been a violation. Campaign oversight committees are able to disseminate that information to voters when the conduct occurs, thus providing voters with additional data to use in making informed decisions in choosing judges.

There are effective and constitutional ways to encourage judicial candidates to campaign in a manner that enhances public confidence in judicial neutrality and independence. For example, for several decades, private “citizen committees” in jurisdictions around the nation have conducted active oversight of judicial campaigns. Most such groups, while usually launched by local bar associations, consist of a diverse cross section of community leaders, and their “authority” derives from the respect their members enjoy in the community. At the beginning of the election year, some groups advise candidates of the committee’s criteria for evaluating judicial campaigns; some candidates actively seek the committee’s opinions before running their advertisements. Occasionally, oversight committees publicly declare a candidate’s conduct inappropriate for judicial office.

In addition, judicial campaign oversight committees may monitor campaign finance issues, publicizing the links between the sources of funds and the issues advanced by those sources. They may also alert the public to any violation of campaign finance laws. Such publicity can help mitigate the harm of any improper conduct before the election, and cause it to halt before it is repeated.<sup>25</sup>

Recent steps in Alabama and Ohio are noteworthy. For the 1998 elections, the Alabama Supreme Court appointed the nation’s first Judicial Campaign Oversight Committee, composed of thirteen judges, lawyers, and lay members. The Committee was established as a result of widespread dissatisfaction with the conduct of the 1994 and 1996 judicial campaigns, which were also the most expensive in Alabama history.<sup>26</sup> The Committee was responsible for ensuring compliance with the relevant Canons of Judicial Conduct and the lawyers’ Code of Professional Responsibility. In Ohio, the Board of Commissioners on Grievances and Discipline worked with two counties’ monitoring committees to establish expedited enforcement procedures. The Board of Commissioners on Grievances and Discipline is now able to hear grievances and issue at least a preliminary ruling before the election occurs.

Two problems with official oversight should be noted. First, an official body, particularly if it is part of the judicial branch, may not be perceived to be neutral in its treatment of incumbents and challengers. Second, an official body is limited by requirements of due process and free speech, and ensuing lawsuits may be used as a campaign tool. In contrast, unofficial bodies act merely as members of the community; as a result, they are subject to fewer restrictions,

and do not represent a threat to candidates' First Amendment rights. They also are likely to be able to act quickly enough to disseminate information before the election, providing voters with additional information to use in deciding which candidates are best qualified for a seat on the bench.

The Task Force thus recommends the establishment of private, nongovernmental judicial campaign oversight committees. Membership should be broad-based and diverse, including lawyers and non-lawyers; members should be representative of the community, and should have personal reputations for integrity and neutrality. Such committees should establish written procedures and standards, and should communicate with candidates at the beginning of each election year.

## CONCLUSION

To help ensure that state courts remain as independent as possible, the Task Force urges state and local jurisdictions to seriously consider implementing some or all of these recommendations. The Task Force recognizes that the recommendations can only reduce, not eliminate, the influence of both politics and money on judicial selection and retention and the resulting harmful effects on judicial independence. Since elected judges will remain subject to some financial pressures, whether real or perceived, the Task Force recommends, alternatively, that states with elective systems give serious consideration to some form of merit selection system.

## NOTES

1. See Supreme Court of Texas, State Bar of Texas, and Texas Office of Court Administration, *The Courts and the Legal Profession in Texas—The Insider's Perspective: A Survey of Judges, Court Personnel, and Attorneys*, Austin, Texas, May 1999, p. 5.

2. *Ibid.*

3. For extensive documentation on the problem of increased campaign

spending, see “Report and Recommendations of the Task Force on Lawyers’ Political Contributions, Part Two, Regarding Contributions to Judges and Judicial Candidates,” American Bar Association, July 1998, Appendix III, (hereafter “ABA Report and Recommendations”).

4. See “ABA Report and Recommendations,” Appendix II.

5. Some have also noted that the overall quality and productivity of the judiciary may suffer from high turnover.

6. Many Task Force members suggest that term lengths be increased to twelve years; indeed, this report recognizes that some states have had success with even longer terms. In New York, for example, justices of the Supreme Court, New York’s trial court of general jurisdiction, are elected to fourteen-year terms.

7. See Appendix 2.

8. In Illinois, the Supreme Court makes appointments to fill vacancies, and in a few other states the governor’s appointments must be confirmed by the legislature.

9. See Appendix 3 for a summary of these nominating commission systems.

10. American Judicature Society, Survey of Governors on Executive Order Merit Plans, 1991 (unpublished).

11. It is important to note that in some states, such as Louisiana and Arkansas, persons appointed to fill an interim vacancy are not eligible to run for a full term of office in the next general election. Therefore, adoption of a nominating commission system for interim vacancies in such states may not be a practical goal.

12. *Buckley v. Valeo*, 424 U.S. 1 (1976).

13. See 28 U.S.C. § 455(b)(4).

14. See, e.g., American Bar Association, Ad Hoc Committee on Judicial Campaign Finance, Report and Recommendation, American Bar Association, May 1999.

15. *Ibid.*, p. 4 (January 1999 Discussion Draft).

16. The report of the ABA Task Force on Lawyers’ Political Contributions provides substantial guidance on this issue. See “ABA Report and Recommendations,” p. 23.

17. See “ABA Report and Recommendations,” pp. 19–39.

18. Only two states—Illinois and Pennsylvania—pair competitive (partisan) elections for initial vacancies with retention elections for successive terms of judicial office. In all other states using retention elections, judges are initially appointed to their positions. In Montana, which has competitive reelections, unopposed judges run on a retention ballot. In California, unopposed incumbent trial court judges do not appear on the ballot at all.

19. Readers seeking more information on judicial performance evaluation programs should contact the American Judicature Society (telephone number 312-558-6900, extension 147) to receive a copy of the report, *Judicial Performance Evaluation Programs in Four States*.

20. These five states also conduct confidential midterm performance evaluations solely for judicial self-improvement purposes. These evaluations, which are not made public, allow judges to focus on areas of performance needing improvement.

21. Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?* 2 J.L. & Pol. 57, 127–28, 163–66 (1985); “ABA Report and Recommendations,” pp. 54–56; Charles H. Sheldon and Linda Maule, *Choosing Justice: The Recruitment of State and Federal Judges* (Pullman: Washington State University Press, 1997), p. 62.

22. Canon 5A(3) of the Model Code of Judicial Conduct provides that “All Judges and Candidates . . . (d) shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”

23. See, e.g., Randall T. Shepard (Chief Justice of Indiana), *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059 (1996).

24. *Nevius v. Warden*, 944 P.2d 858, 860 (Nev. 1997) (Springer, J., dissenting), cert. denied sub nom. *Nevius v. McDaniel*, 119 S. Ct. 878 (1999).

25. In 1998, when the Federal Election Commission imposed its second largest fine ever against a U.S. House challenger for violations in 1994 and 1996, the former congressional staffer who had lost the 1994 nomination (after having won it in 1992), said “I knew then that he was receiving money in violation of federal law, and I screamed, yelled, asked for immediate investigation, and found there’s no mechanism to remedy what would be irreparable harm. There’s no temporary restraining order, no injunction, the election goes on. . . . He used illegal money and denied the [voters] the race that should have been. . . .” (“FEC Levies \$280K Fine Against Ackerman Foe,” *The Hill* [May 27, 1998], p. 3).

26. See “ABA Report and Recommendations,” Table 1, Appendix III.

# APPENDIX 1:

## A BRIEF HISTORY OF JUDICIAL SELECTION IN STATE COURTS

### INTRODUCTION

In 1837, Francis Lieber observed that while the ancients could not create an independent judiciary, Americans were unable adequately to appreciate the one they had.<sup>1</sup> Today, however, those who appreciate judicial independence also recognize the need for a measure of accountability for judges, as well as insulation from political concerns.

Because judicial authority includes the power to review legislation, judges historically have been accused of exceeding that authority and usurping the role of the legislative branch. Such criticism dates to the earliest days of the American judicial system.<sup>2</sup> Unlike most state courts, the federal courts are staffed by judges who enjoy tenure for life. While criticism of life tenure dates to Thomas Jefferson, the framers of the Constitution concluded that life tenure was the most effective means of shielding judges from political and financial pressures. The states, on the other hand, reached a different conclusion.

### A HISTORICAL PERSPECTIVE ON JUDICIAL ELECTIONS

The rationale for judicial elections was simple: because elected judges were chosen by the people themselves, they would inspire greater public trust, and their decisions, in turn, would command greater

respect. Moreover, elections would provide judges with a background appropriate to the responsibilities inherent in the political role of judicial review. In theory, legislatures thus would be less likely to intrude upon judicial decisions, and if bad judges were elected, recourse would be available at the ballot box.

By the end of the nineteenth century, the weaknesses of judicial elections had become increasingly evident.<sup>3</sup> In rural counties, elections intensified fears of hometown prejudice against nonresident parties. Elsewhere, judicial elections were often marked by a very low level of knowledge and interest among the electorate. There were also at least three more serious weaknesses that the advocates of judicial elections had not anticipated: the role of political parties; the need for and sources of campaign funds; and the substantive content of the campaigns themselves.<sup>4</sup>

## STATE EFFORTS TO IMPROVE JUDICIAL SELECTION

Some states included provisions in their constitutions for the recall of elected officials,<sup>5</sup> and seven extended these provisions to include judges. Colorado's constitution provided for public referenda to review judicial decisions. In 1911, outraged by a New York Court of Appeals decision invalidating the state's mandatory worker's compensation law,<sup>6</sup> former president Theodore Roosevelt proposed that New York follow Colorado's example, granting the people a referendum on the constitutionality of legislation.<sup>7</sup> Ohio, North Dakota, and Nebraska also amended their constitutions to require supermajority votes of their highest courts to invalidate legislation.<sup>8</sup> Such efforts to subject judicial decisions to popular referendum eroded the judiciary's independence, particularly under elective systems.

In the late nineteenth century, the public grew increasingly suspicious of urban political machines and feared that judges could not be trusted to decide cases independently of their party sponsors. Political parties played a significant role in judicial elections, awarding nominations and support to party regulars and contributors.<sup>9</sup> However, because the parties' interests extended beyond the outcome of a particular election, they did sometimes eliminate underqualified candidates who might otherwise have won election.<sup>10</sup>

The need for and sources of campaign funds presented a second concern.<sup>11</sup> Judicial candidates received contributions from lawyers

and litigants who appeared in their courts, and even when such amounts were relatively small, the contributions raised at least an appearance of impropriety. This problem was exacerbated when a candidate retained surplus campaign funds or held postelection fundraisers to pay campaign debts.<sup>12</sup>

The substantive content of judicial campaigns presented a third difficulty (one that still exists). Political candidates had to appeal to their future constituents for votes, and they often did so by making promises regarding future policy decisions. However, judicial candidates who made such promises regarding their decisions in future cases (in which, by definition, the parties had not yet been heard) sacrificed the neutrality and objectivity they were expected to bring to the position. While professional ethical standards may have proscribed such campaign promises,<sup>13</sup> candidates sometimes failed to practice appropriate restraint.<sup>14</sup> Some also argued that free speech protection should outweigh concerns regarding judicial objectivity and its implications for due process.<sup>15</sup>

After 1912, the direct democracy movement faded.<sup>16</sup> As lengthened ballots diminished the likelihood that voters were exercising knowing choices and increased the election prospects of candidates with familiar names but few qualifications, political parties found it increasingly difficult to prevent the election of underqualified judges.<sup>17</sup> In this environment, a movement arose among the organized bar to improve methods of judicial selection and retention. Some states had fashioned “nonpartisan” elections by removing judicial candidates from partisan tickets. However, this weakened the parties’ influence and simply made judges more vulnerable to other financial influences.<sup>18</sup>

This situation led to growing support among the bar for “merit selection.” Under this method of judicial selection, candidates were nominated by a committee that examined their experience and credentials; those chosen were then subjected to retention elections (that is, elections in which the judge is unopposed, and voters simply decide whether the judge should remain in office). The merit selection method was first suggested by Albert Kales, vice president of the American Judicature Society, which was founded in 1913 by members of the bench and bar to improve judicial administration. In 1937, the American Bar Association adopted a merit selection policy, and in 1940, Missouri became the first state to establish a merit-selection method of choosing judges, which came to be known as “the Missouri plan.” Eight more states adopted a merit selection plan for

at least some judicial vacancies over the next thirty years. In the 1970s, fifteen additional states adopted a form of appointive selection for at least some levels of their judiciaries. As a result of the variety among the plans that were adopted, almost no two states now have identical systems of judicial selection, and most have different systems for different types of courts.<sup>19</sup> However, the trend since 1950 has been toward merit selection.

Retention elections were a device to satisfy the voters' desire for self-governance without risk of improper political influences on judges. As originally envisioned, a judge running unopposed in a retention election would be retained, in the absence of scandalous misconduct,<sup>20</sup> and for decades, retention elections worked as expected: no judge standing for retention failed to achieve it.

## RECENT DEVELOPMENTS

About 1980, political parties and interest groups began to take an even greater interest in judicial elections. In some states, tort and insurance law moved to the top of the political agenda as campaign issues in judicial elections. By 1980, local groups of personal injury lawyers organized to work for the election of judges they believed would rule favorably for their clients. For a time, some observers felt that they controlled elections to the Supreme Court of Texas,<sup>21</sup> and their success evoked a response from insurance companies and others whose financial interests were threatened by what they perceived to be a "plaintiffs' court." Now, nearly two decades since, many observers believe that the pendulum has swung in the opposite direction and now characterize the court as a "defendants' court." A similar series of events has occurred in Alabama,<sup>22</sup> and, less visibly, in other states.<sup>23</sup>

During this period, television advertising also entered judicial elections. Political advertisements on commercial television have affected judicial elections in two ways. First, the cost of advertising, especially on television, has increased the need for campaign funds. Second, expert consultants and focus groups have been used to tailor such advertising, which sometimes directs negative sentiments toward political adversaries. Such attacks can be effectively countered, if at all, only by a televised response, thus further raising the cost of judicial campaigns.

## CONCLUSION

In recent years, polls have shown that the public overwhelmingly believes that judicial decisions are influenced by campaign contributions. In some states, recent headlines have called attention to large favorable judgments and fee-paying appointments (such as receiverships) granted to lawyers or parties who previously had made large campaign contributions to the judge(s) involved.<sup>24</sup> These concerns weaken public confidence in the independence of the judiciary.<sup>25</sup> These problems show no sign of abating, making the need for the reforms discussed in the accompanying report all the more urgent.

## NOTES

1. Francis Lieber, *Manual of Political Ethics*, 2d ed., Theodore Woolsey, ed. (Philadelphia: J. B. Lippincott and Co., 1875), p. 363.

2. For example, in the early days of the republic, the New York State Legislature protested certain decisions made by Chancellor James Kent by forcing him into retirement. In Connecticut, a grand jury indicted its own presiding judge, Federalist Tapping Reeve, as a result of comments he made about Jefferson from the bench. Likewise, for ideological reasons, Pennsylvania Federalists deprived Jefferson's friend Thomas Cooper of his judgeship, and in 1813, a Federalist New Hampshire legislature expelled all Democratic judges from the state's courts. In 1824, as punishment for decisions adverse to tenants and debtors, Kentucky's Democratic legislature fired all Whig members of its highest court. By the 1830s, Jacksonian Democrats advocated the election of judges, and by the middle of the nineteenth century, judges were elected in all but a few states.

3. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and The Rule of Law*, 62 U. Chi. L. Rev. 689, 713–29 (1995).

4. See, e.g., John v. Orth, *Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges: A Transcript of the Debates from the 1868 Constitutional Convention*, 70 N.C. L. Rev. 1825 (1992).

5. Recall was first adopted in Oregon in 1908, and little consideration was given to the possible exclusion of judges from that provision. Allen H. Eaton, *The Oregon System: The Story of Direct Legislation in Oregon* (Chicago: A. C. McClurg and Co., 1912).

6. J. Patrick White, *Progressivism and the Judiciary: A Study of the*

*Movement for Judicial Reform 1901–1917* (Ph.D. dissertation, University of Michigan, 1957), p. 349.

7. Speech at Carnegie Hall, New York, October 20, 1911, *The Works of Theodore Roosevelt*, Herman Hagedorn, ed. (New York: C. Scribner's Sons, 1925). An account of this remarkable event is provided by Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?* 75 *Tex. L. Rev.* 907, 933–49 (1997).

8. White, *Progressivism and the Judiciary*, p. 420.

9. This remains a feature of partisan judicial elections in numerous states. Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?* 2 *J. L. & Pol.* 57, 65–66 (1985).

10. Absent party control, the election is often decided by name recognition. Schotland, *Elective Judges' Campaign Financing*, pp. 86–89, gives numerous examples.

11. *Ibid.*, pp. 59–63.

12. See, e.g., the event described in David Fraser, "Letter Asks Help to Cut Judge's Debt," *Arkansas Democrat-Gazette*, July 16, 1994, p. 1A.

13. Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 *Geo. J. Legal Ethics* 1059, 1059–68 (1996).

14. See, e.g., Schotland, *Elective Judges' Campaign Financing*, pp. 66, 79–80.

15. *ACLU v. Florida Bar*, 744 F. Supp. 1094 (N.D. Fla. 1990); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991); *Stretton v. Disciplinary Bd.*, 944 F.2d 137 (3d Cir. 1991); *Buckley v. Illinois Judicial Inquiry Board*, 997 F. 2d 224 (7th Cir. 1993).

16. See generally Patrick L. Baude, *A Comment on The Evolution of Direct Democracy in Western State Constitutions*, 28 *N.M. L. Rev.* 313 (1998).

17. William Howard Taft, *The Selection and Tenure of Judges*, 38 *A.B.A. Rep.* 418, 422–23 (1913).

18. See David Adamany and Philip DuBois, *Electing State Judges*, 1976 *Wis. L. Rev.* 731 (1976); Ray M. Harding, *The Case for Partisan Election of Judges*, 55 *A. B. A. J.* 1162 (1969); Philip Dubois, *Voting Cues in Non-partisan Trial Court Elections*, 18 *L. & Soc. Rev.* 395 (1984).

19. A summary of the variations is provided in Polly Price, "Selection of State Court Judges," in Roger Clegg and James D. Miller, eds., *State Judiciaries and Impartiality: Judging the Judges* (Washington, D.C.: National Legal Center for the Public Interest, 1996), pp. 16–19.

20. Larry T. Aspin and William K. Hall, *Political Trust and Judicial Retention Elections*, 9 *Law & Pol'y Q.* 451 (1987).

21. Anthony Champagne, *The Selection and Retention of Judges in Texas*,

40 SW. L.J. 53, 90 (1986). *And see* American Tort Reform Association, "America's Third Party": A Study of Political Contributions by The Plaintiff's Lawyer Industry, Washington, D.C., 1994; Orrin W. Johnson and Laura Johnson Uris, *Judicial Selection in Texas: A Gathering Storm?* 23 Tex. Tech L. Rev. 525 (1992); Anthony Champagne, *Campaign Contributions in Texas Supreme Court Races*, 17 Crime, L. & Soc. J. 91 (1992); Anthony Champagne, *Judicial Reform in Texas*, 72 Judicature 146 (1988).

22. For an account of recent events in Alabama, see Glenn C. Noe, *Alabama Judicial Election Reform: A Skunk in Tort Hell*, 28 Cumb. L. Rev. 215 (1998).

23. For the Wisconsin experience, for example, see Nathan S. Heffernan, Speech, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 Marq. L. Rev. 1031 (1997); Shirley S. Abrahamson, *Remarks Before the American Bar Association Commission on Separation of Powers and Judicial Independence*, 12 St. John's J. Legal Comment. 69 (1996). For the Michigan experience, see Kurt M. Brauer, *The Role of Campaign Fundraising in Michigan's Supreme Court Elections: Should We Throw the Baby Out with the Bathwater?* 44 Wayne L. Rev. 367 (1998).

24. For a recent example, the Supreme Court of Alabama upheld an enormous punitive damage award after every member of the court had received sizable contributions from counsel for the plaintiff. *ABC World News Tonight*, October 9, 1995 (transcript #5201); *Nightline*, October 24, 1995 (transcript #3762). Pennzoil lawyers contributed \$315,000 to members of the Texas court deciding its enormous claim against Texaco; and four of the judges receiving contributions were not facing reelection campaigns. Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 Fla. L. Rev. 529, 555 (1991). Alabama and Texas have since modified their rules of judicial conduct to prohibit this practice.

25. See, e.g., Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary*, 14 Ga. St. U. L. Rev. 817, 845 (1998) (discussing "rapidly growing role of special interest groups").



## APPENDIX 2:

### SUMMARY OF TERM LENGTHS FOR STATE JUDGES

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**TABLE 1. SUMMARY OF ELECTORAL STATUS OF STATE JUDGES**

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<b>Judges</b>	<b>Appellate Courts</b>	<b>Trial Courts</b>
Stand for some form of election	1,084 (87%)	7,380 (87%)
Do not stand for some form of election	159 (13%)	1,111 (13%)
Total	1,243 (100%)	8,491 (100%)

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*Sources: ABA Task Force on Lawyers' Political Contributions, Part II*, 69 (July 1998) (corrected for recategorization of one state); American Judicature Society, *Judicial Selection in the States* (1998); National Center for State Courts, *State Court Caseload Statistics* (1996).

**TABLE 2. TERM LENGTH FOR ALL STATE APPELLATE JUDGES**

<b>Length of Term</b>	<b>Appellate Courts<sup>a</sup></b>	
	<b>Initial Term</b>	<b>Subsequent Terms</b>
2 years or fewer	305 (25.9%)	—
3–4 years	38 (3.2%)	10 (0.8%)
6 years	346 (29.4%)	510 (44.5%)
7–8 years	151 (12.8%)	194 (16.9%)
10 years	168 (14.3%)	226 (19.7%)
11–15 years	138 (11.7%)	177 (15.4%)
15 years or more	31 (2.6%)	39 (3.4%)

<sup>a</sup> Not included are New York's intermediate appellate judges, who are appointed from judges who had been elected to the trial courts.

**TABLE 3. TERM LENGTH FOR ELECTED APPELLATE JUDGES**

<b>Length of Term<sup>a</sup></b>	<b>Appellate Courts</b>	
	<b>Initial Term</b>	<b>Subsequent Terms</b>
2 years or fewer	305 (28.2%)	—
3–4 years	38 (3.5%)	10 (0.9%)
6 years	332 (30.6%)	486 (44.8%)
7–8 years	89 (8.2%)	171 (15.8%)
10 years	154 (14.2%)	212 (19.6%)
11–15 years	166 (15.3%)	205 (18.9%)

<sup>a</sup> Of all elected appellate judges, 40.4% (438) are appointed for initial terms of four years or fewer and then face only retention elections. In all elective systems, a majority of judges initially reach the bench by appointment to vacancies.

**TABLE 4. TERM LENGTH FOR ALL STATE TRIAL COURT  
(GENERAL JURISDICTION) JUDGES**

<b>Length of Term</b>	<b>Trial Court of General Jurisdiction</b>	
	<b>Initial Term</b>	<b>Subsequent Terms</b>
2 years or fewer	868 (10.2%)	—
3–4 years	1,450 (17.1%)	1,506 (18.0%)
6 years	3,966 (46.7%)	4,646 (55.5%)
7–8 years	1,134 (13.4%)	618 (7.4%)
10 years	408 (4.8%)	408 (4.9%)
11–15 years	538 (6.3%)	814 (9.7%)
15 years or more	127 (1.5%)	372 (4.5%)

**TABLE 5. TERM LENGTH FOR ELECTED TRIAL COURT  
(GENERAL JURISDICTION) JUDGES**

<b>Length of Term<sup>a</sup></b>	<b>Trial Court of General Jurisdiction</b>	
	<b>Initial Term</b>	<b>Subsequent Terms</b>
2 years or fewer	868 (11.76%)	—
3–4 years	1,377 (18.66%)	1,433 (19.41%)
6 years	3,884 (52.63%)	4,564 (61.84%)
7–8 years	428 (5.80%)	428 (5.80%)
10 years	366 (4.95%)	366 (4.95%)
11–15 years	457 (6.20%)	589 (8.00%)

<sup>a</sup> Of all elected trial judges, 13.8% (1,019) are appointed for initial terms of four years or fewer and then face only retention elections. In all elective systems, a majority of judges initially reach the bench by appointment to vacancies.



## APPENDIX 3:

### SUMMARY OF MIDTERM VACANCY MERIT PLANS<sup>a</sup>

State	Year Established	Level of Court	Legal Basis of Plan
Alabama			
Jefferson County	1951	Circuit	Constitutional
Madison County	1974	Circuit	Constitutional
Mobile County	1982	Circuit, District	Constitutional
Tuscaloosa County	1990	Circuit, District	Constitutional
Georgia	1975, 1983; revised 1984, 1991	Appellate Court Superior Court State Court	Executive Order
Idaho	1967; amended 1985	Supreme Court Court of Appeals District Court	Statutory

<sup>a</sup> In addition to the eleven states listed in this table, five states or localities use nominating commissions to fill initial and interim vacancies at the appellate and supreme court level while also providing for nominating commissions to help fill only interim vacancies on lower courts: Florida, New York City, Oklahoma, South Dakota, and Tennessee. These jurisdictions are not included in the above table because they use merit selection plans for initial and interim vacancies on their higher courts, and not simply as interim vacancy merit plans.

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**Summary of Midterm Vacancy Merit Plans (cont.)**


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<b>State</b>	<b>Year Established</b>	<b>Level of Court</b>	<b>Legal Basis of Plan</b>
Kentucky	1975	Supreme Court Court of Appeals Circuit Court District Court	Constitutional
Minnesota	1983; revised 1987, 1989, 1992	District Court	Statutory
Montana	1972	Supreme Court District Court	Constitutional
Nevada	1976	Supreme Court District Court	Constitutional
New Mexico	1988	Supreme Court Court of Appeals District Court Metropolitan Court	Constitutional
North Dakota	1981 1983	Supreme Court District Court County Court	Constitutional Statutory Statutory
West Virginia	1981, 1989	All levels	Executive Order
Wisconsin	1983; revised 1987	Supreme Court Court of Appeals Circuit Court	Executive Order

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