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# In the Wake of White: How States are Responding to Republican Party of Minnesota v. White and How Judicial Elections are Changing

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**PUBLIC FINANCING FOR NON-PARTISAN JUDICIAL  
CAMPAIGNS: PROTECTING JUDICIAL INDEPENDENCE  
WHILE ENSURING JUDICIAL IMPARTIALITY**

*Phyllis Williams Kotey\**

“Judges need to be intimidated. . . .” Tom DeLay, House Majority  
Leader<sup>1</sup>

I. INTRODUCTION

The selection of state court judges in the United States has been the subject of vigorous debate.<sup>2</sup> The controversy continues to build as some scholars contend that only the appointment of judges ensures the independence of the judiciary by insulating the judge from retaliation for unpopular decisions.<sup>3</sup> Yet volumes of evidence unfold each day to

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1. In 1997, Tom Delay, then Majority Whip, introduced legislation to limit the terms of federal judges and to restrict their review in death penalty and voter referendum cases, asserting that Article II of the United States Constitution gives Congress appellate jurisdiction. DeLay announced to a group of reporters that, “Judges need to be intimidated. . . .” In a speech about judicial independence on February 1, 2001, Justice Ruth Bader Ginsburg responded to Delay’s comment calling him an exterminator. Justice Ginsburg said columnist Bob Herbert of the Washington Post got it right when he said in a December 2000 column that, “[a]n intimidated judge is a worthless judge.” See Deborah Kristensen, *In Search of Judicial Independence*, 46 JUN ADVOCATE (Idaho) 27 (2003).

<sup>2</sup> See, e.g., JEFFREY M. SHAMAN ET AL, *JUDICIAL CONDUCT AND ETHICS* (Matthew Bender, ed., Lexis Law Publishing 2000); STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENT PROCESS* (Basic Books 1994); CHARLES H. SHELDON AND LINDA H. MAULE, *CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES* (Washington State University Press 1997); ROSCOE POUND FOUNDATION & YALE LAW SCHOOL, *PRESERVING THE INDEPENDENCE OF THE JUDICIARY: THE DUAL CHALLENGE OF DEMOCRACY AND THE BUDGET CRISIS: REPORT OF THE 1993 FORUM FOR STATE COURT JUDGES* (Barbara Wolfson ed., 1994)

3. Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York*

reveal a judiciary under attack for making legal albeit unpopular decisions.<sup>4</sup> While the cloak of a lifetime appointment with no effective method of removal does little to instill confidence in the impartiality of the judiciary, an election riddled with partisan rhetoric or one-sided attacks is no panacea for instilling trust.<sup>5</sup> This state of affairs can be best described as “learning to live within the cesspool that has been created”<sup>6</sup> in a system that requires judges to stand for election, yet avoid the improprieties of campaign misconduct.

The different methods utilized throughout the country for selecting state court judges have produced a myriad of commentaries and criticisms that range from assertions that the appointment process diminishes the judiciary’s accountability to the people, to admonitions that judicial elections put “justice for sale.”<sup>7</sup> The overriding consideration in this debate continues to be that preserving judicial impartiality and promoting judicial independence are invaluable components of our judicial system. However, the threat to judicial independence continues as more judges become political targets of legislators seeking to impeach them in response to their court decisions.<sup>8</sup> Even though the pull of the lever at the voting machine offers no greater protection to judges who serve at the will of the vote of the majority, it is the preservation of the right to vote, not the partisan outcries, that becomes the more compelling reason for electing judges.

Judicial independence is a valuable component of the American system of justice. This article posits that partisan judicial elections, funded from the coffers of lawyers, special interests groups and political parties,<sup>9</sup> cannot effectively build confidence in the impartiality or

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*City 1977-2000*, 37 U. MICH. J.L. REFORM 791, 818 (2004).

4. Penny White, *It’s a Wonderful Life, or Is It? America Without Judicial Independence*, 27 U. MEM. L. REV. 1, 8 (1996).

5. See Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 112 (1998).

6. This phrase was coined from a discussion with Justice Michael Keasler of the Texas Criminal Court of Appeal on October 25, 2004 at the National Judicial College in Reno, Nevada. Justice Keasler opined that given the reality that judges are selected by election, the challenge for judges is to avoid ethical violations while striving to be elected by “learning to live within the cesspool that has been created.”

7. See Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L.J. 95, 95 (2003).

8. White, *supra* note 4, at 2.

9. Deborah Goldberg & Craig Holman, *The New Politics of Judicial Elections: How 2000 Was a Watershed Year for Big Money, Special Interest Pressure, and TV Advertising in State Supreme Court Campaigns* 11 (2002). Some analyses suggest that at least one-half of all donations to judges come from lawyers and business interests. *Id.* Political parties rank third. *Id.*

independence of the judiciary.<sup>10</sup> In addition, political appointments, by their very nature, act as forums for consideration of political, not judicial, qualifications.<sup>11</sup> Therefore, if judges are to be placed before the public for a vote, public funded nonpartisan elections offer the public the best protection from the improper influence of money thereby instilling the virtues of impartiality and independence.

## II. METHODS FOR SELECTION OF STATE COURT JUDGES

### A. *The History*

The appointment process as a preferred method for selecting judges is embedded in the history of our country.<sup>12</sup> Alexander Hamilton wrote, “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.”<sup>13</sup> The Framers of this limited constitutional form of government designed a judicial branch to independently decide questions of law shielded from the undue influence of the other branches of government. This permanent appointment of judges with a standard of good behavior for continuance in office was a “barrier to the encroachments and oppressions of the representative body.”<sup>14</sup> It was obviously anticipated that such encroachments and oppressions—in response to unpopular rulings by a court—would eventually affect the decisional process of judges compromising both impartiality and independence.

The historical significance of the origin of our country and its break from colonization certainly influenced the Framers of our Constitution. The original colonies failed to insulate the judiciary; instead choosing to have judicial power subject to influences from the executive and

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10. J. Clark Kelso, *Judicial Elections: Practices and Trends*, Institute for Legislative Practice, McGeorge School of Law, University of the Pacific, (1999) at [http://www.mcgeorge.edu/government\\_law\\_and\\_policy/publications/ccglp\\_pubs\\_mje\\_judicial\\_elections.htm](http://www.mcgeorge.edu/government_law_and_policy/publications/ccglp_pubs_mje_judicial_elections.htm) (last visited Mar. 24, 2005). Candidates, lawyers who appear regularly in court and persons organizations are the people most interested in judicial elections. *Id.* People generally contribute to a campaign with the expectation of receiving something in return. *Id.*

11. Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U.L. REV. 65, 72-3 (2002).

12. THE FEDERALIST NO. 78 (Alexander Hamilton), THE FEDERALIST: A COLLECTION OF ESSAYS BY ALEXANDER HAMILTON, JOHN JAY AND JAMES MADISON, INTERPRETING THE CONSTITUTION OF THE U.S. AS AGREED UPON BY THE FEDERAL CONVENTION, SEPTEMBER 17, 1787 (Wiley Book Company, 1901).

13. *Id.*

14. *Id.*

legislative branches of government.<sup>15</sup> In the Articles of Confederation, judges had limited jurisdiction with a guarantee of neither salary nor longevity.<sup>16</sup> Congress, not the courts, had final appellate authority in all disputes and differences, thus creating “the phenomenon of legislative courts.”<sup>17</sup> This occurrence was in direct contradiction of the Separation of Powers Doctrine that gave the courts, not Congress, appellate authority.<sup>18</sup>

Shaped by the philosophical position of our Founding Fathers, our present federal system of judicial selection began to take form.<sup>19</sup> Federal judges are appointed by the President with the advice and consent of the Senate.<sup>20</sup> A chief complaint articulated in the Declaration of Independence was that “he [King George III] has made judges dependent on his will alone, for tenure of their offices, and the amount and payment of their salaries.”<sup>21</sup> Therefore, both salary and longevity were addressed in recognition of the need for both factors to preserve independence and ensure impartiality. With salaries that could not be reduced and life tenure, judicial independence and impartiality were institutionalized in our federal system of government.<sup>22</sup>

These changes in the judicial branch of our government did not ensure a change in the attitude of the Federalist. The legislature wielded enormous power and in fact, many significant constitutional controversies of the period that marked the beginning of our constitutional form of government were resolved in the legislative and executive branches.<sup>23</sup> The judiciary remained as an apparent uneven

15. ROSCOE POUND, ORGANIZATION OF COURTS 64-67 (Little, Brown & Co. 1940).

16. ARTICLES OF CONFEDERATION, art. IX (repealed in 1789). The jurisdiction of judges was limited to trials of piracies and felonies committed on high seas and appeals in capture cases. *Id.* In fact, legislative action was necessary for the enforcement of judgments. *Id.* In addition, judges did not have the protection of guaranteed salaries or life tenure. *Id.*

17. Edwin H. Greenbaum & W. Williard Wirtz, *Separation of Powers: The Phenomenon of Legislative Courts*, 42 IND. L.J. 153, 153-55 (1967).

18. *Id.* at 154-55.

19. The fight to establish judicial independence was also waged in England before the American Revolution when King James I established prerogative courts. See Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 568 (1996).

20. U.S. CONST. art. II, §2.

21. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776). Hamilton, in the Federalist No. 79, observed the need for a guarantee of judicial independence noting that “[A] power over a man’s subsistence amounts to power over his will.” Hamilton, *supra* note 12.

22. See Cox, *supra* note 19, at 572.

23. David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 220 (1998). The Louisiana Purchase, the Burr Conspiracy, the War of 1812, the Cumberland Road, the Missouri Compromise and the Monroe Doctrine were all controversies that were fought and decided in the legislative and executive branches. *Id.*

appendage in the three branches of government. The ability of the courts to conduct review of legislation became the subject of debate that, once resolved by the courts, began to elevate the courts to the level of the other two branches of government.<sup>24</sup>

Historically, the federal method of judicial selection was perceived as a guarantee of judicial independence because judges were insulated from the threat of removal and did not rely on popular approval. The congressional attempt at impeaching the judiciary<sup>25</sup> is evidence that both the past and the present are replete with political attacks on judicial independence. The stakes are high in a process that results in a permanent position, and the results are only as good as the gatekeepers that allow others to enter.<sup>26</sup>

### *B. The Appointment Process*

The appointment process has been coined “merit selection” because it is believed to produce the most qualified and meritorious candidate through the vetting process.<sup>27</sup> A key feature of the appointment process that is believed to render the judicial selection process nearly impervious to political influence is the use of a nominating commission.<sup>28</sup> This nominating commission plays an integral role in the screening and recommendation of judicial candidates to a separate body that makes the actual appointment from a list of recommended candidates.<sup>29</sup>

Depending upon the state, the appointment is made by the legislature,<sup>30</sup> the governor<sup>31</sup> and in the rarer cases, by the judiciary.<sup>32</sup> In California, Maine, and New Jersey the governor appoints judges without a nominating commission, but subject to the confirmation of the senate.<sup>33</sup> As meritorious as it may be to some scholars to use the

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24. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

25. The *Marbury v. Madison* decision sparked a fierce attempt by the Jeffersonians to impeach the “Federalist” judges who “impermissibly” extended their power of judicial review. See Cox, *supra* note 19, at 575. The judges were appointed for their “lifetime” to the *federal* bench as the Federalists lost power. See *Marbury*, 5 U.S. at 137-38.

26. Harold See, *Comment: Judicial Selection and Decisional Independence*, 61 LAW & CONTEMP. PROBS. 141, 142 (1998).

27. Zeidman, *supra* note 3, at 834.

28. *Id.* at 831.

29. *Id.* at 832.

30. American Judicature Society (AJS), *Judicial Selection Methods in the States* at [http://www.ajs.org/selection/sel\\_state-select-map.asp](http://www.ajs.org/selection/sel_state-select-map.asp) (last visited Mar. 24, 2005).

31. *Id.*

32. *Id.* The legislature in Virginia appoints all judges, the judiciary appoints its own in Hawaii. *Id.*

33. Zeidman, *supra* note 3, at 834.

appointment process (merit selection) for the selection of state court judges, the fact remains that in all but eleven of our fifty states, judges must face a popular vote to retain or win their seat.<sup>34</sup> It is doubtful that the general public will voluntarily give up the right to elect its judges.

### C. *The Election Process*

Historically, elections were seen as the answer to breaking landowner control of the judiciary. Judges viewed elections as an opportunity to unite popular support to counter legislative and executive power.<sup>35</sup> Judicial elections are generally uncontested, but are becoming the subject of controversy and litigation as candidates employ traditional political tactics in an arena that is anything but traditional.<sup>36</sup> Some form of an election is used in a majority of the states to elect judges. In fact, judges at some level face election in thirty-nine states.<sup>37</sup> In eight states partisan elections are held to select judges serving in the state's highest court.<sup>38</sup> These are the courts of last resort (for an appeal in the state court system) and the justices must conduct a partisan election to obtain and retain a seat on the court.<sup>39</sup> In the absence of public campaign financing, justices face the prospect of soliciting, accepting and utilizing funds from lawyers and litigates who may have appeared or might appear before the court.<sup>40</sup> The limits of both independence and impartiality are severely stretched in the process.

In thirteen states, judges sitting at the highest level of the state court are elected in nonpartisan elections.<sup>41</sup> The judges in these nonpartisan

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34. See Bradley A. Smith, *Symposium on Judicial Elections: Selecting Judges in the 21<sup>st</sup> Century*, 30 CAP. U.L. REV. 437, 437 (2002).

35. Philip L. Dubois, *Accountability, Independence and the Selection of State Judges: The Role of Popular Elections*, 40 SW. L.J. 31, 35 (1986).

36. See, e.g., *Republican Party of Minnesota v. White*, 536 U.S. 765, 768 (2002); *Weaver v. Bonner*, 309 F.3d 1312, 1315-18 (11th Cir. 2002); *Spargo v. New York State Comm'n on Judicial Conduct*, 351 F.3d 65, 67-74 (N.D. N.Y. 2003).

37. Smith, *supra* note 34, at 437. The number includes thirteen states that employ a form of partisan election for at least some of their judges and seventeen states that employ some form of non-partisan election. AJS, *supra* note 30.

38. AJS, *supra* note 30. In Alabama, Illinois, Louisiana, Michigan, Ohio, Pennsylvania, Texas and West Virginia, judges are elected to the state's highest court in partisan elections. *Id.* Judges run under and are identified by political party labels. *Id.*

39. *Id.*

40. See Pamela Willis Baschab, *Putting the Cash Cow Out to Pasture: A Call to Arms for Campaign Finance Reform in the Alabama Judiciary*, 30 CUMB. L. REV. 11, 20-21 (2000). Some judges have resigned rather than face the minefield of the current elective process. *Id.* at 20.

41. AJS, *supra* note 30. These states are Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington and Wisconsin. *Id.*

elections also face the prospect of soliciting, accepting, and utilizing funds from those who appeared or may have appeared before the court.<sup>42</sup>

Given the pervasiveness of judicial elections, it is doubtful that citizens will easily abandon the right to select or retain judges by ballot. Therefore, the key is to develop a system that minimizes improper political influences.

### III. PRACTICES FOR THE SELECTION OF JUDGES IN SELECTED STATES

#### A. Tennessee

An oft-cited example to support the elimination of judicial elections for state court judges is the case of former Tennessee Supreme Court Justice Penny White. In Tennessee, there are five justices on the Supreme Court.<sup>43</sup> The justices are appointed through a nominating commission.<sup>44</sup> Two intermediate appellate courts of equal jurisdiction, the Court of Appeals and the Criminal Court of Appeals, are also selected through a nominating commission.<sup>45</sup> After the justices are appointed, they must stand for a retention election in the next biennial general election.<sup>46</sup> Thereafter, they face retention elections every eight years.<sup>47</sup>

Justice White was appointed to the Supreme Court in January 1995.<sup>48</sup> In June 1996, she participated in a three-two decision that resulted in the reversal of a death penalty case.<sup>49</sup> Two months later, Justice White was the only Supreme Court justice facing a retention election.<sup>50</sup> The Governor denounced the death penalty decision and labeled Justice White as “a judge soft on the death penalty and weak on victim rights.”<sup>51</sup> In a campaign led by a special interest group using misleading and inaccurate information, Justice White was defeated.<sup>52</sup>

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42. Baschab, *supra* note 40, at 20-21.

43. AJS, *supra* note 30.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997).

49. Tennessee v. Odum, 928 S.W.2d 18, 33 (Tenn. 1996).

50. Uelmen, *supra* note 48, at 1133.

51. *Id.*

52. See, e.g., John Gibeaut, *Taking Aim*, A.B.A. J., Nov. 1996, at 50, 53 (1996). Reportedly, only nineteen percent of the voters participated in this vote and Justice White was removed after obtaining about forty-four percent of a retention vote. *Id.*



The timing of the campaign left little time for Justice White to mount a response and the voters were given little other information with which to judge her performance as a judge except for the barrage of information from the special interest group aimed at unseating her.<sup>53</sup> After the campaign to unseat Justice White was successful, Tennessee's governor remarked, "Should a judge look over his shoulder to the next election in determining how to rule on a case? I hope so. I hope so."<sup>54</sup>

Not all of the citizens of Tennessee were proud of the success of the campaign to unseat Justice White. Subsequently, sparked by the fear of a repeat occurrence in the 1998 election, the Tennessee Bar Association, the League of Women Voters and other groups in Tennessee joined forces to promote a public awareness program about the importance of judicial elections and the need for evaluation of a judge's complete record.<sup>55</sup> The public responded to the call to learn more about the judges before voting and accessed the information the Bar Association made available in record numbers.<sup>56</sup>

### B. Texas

In no other state is the call for judicial reform more pronounced than in the State of Texas.<sup>57</sup> All Texas judges are elected in partisan elections and must run for re-election every six years.<sup>58</sup> There are two appellate level courts at the highest level of the state - the Texas Supreme Court and the Texas Court of Criminal Appeals.<sup>59</sup> The

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53. *Id.* In the same year, a member of the Nebraska Supreme Court authored a unanimous decision that found unconstitutional a term limit initiative that failed to have the required number of signatures to qualify. Uelmen, *supra* note 48, at 1134. The sponsors of the initiative led a well financed campaign that led to his removal from the bench in the next election. *Id.*

54. *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUMAN RIGHTS L. REV. 123, 140 (1999) (edited transcription of panel discussion during ABA Annual Meeting on August 9, 1999, comments of Penny White).

55. Alfred P. Carlton, Jr., *Individual States Tackle Issues of Judicial Independence as ABA Offers Support* at <http://www.abanet.org/media/carltonstates.html> (last visited Mar. 24, 2005).

56. *Id.* The Bar Association reported receiving hundreds of calls for information on the judges and judicial elections. *Id.*

57. *Judicial Selection in the States (Texas)* at [http://www.ajs.org/js/TX\\_elections.htm](http://www.ajs.org/js/TX_elections.htm) (last visited Mar. 24, 2005). Prompted by the impropriety or appearance of impropriety of judges soliciting campaign funds from those who appear and practice before them, the question of whether justice is for sale in Texas is the subject of numerous newspaper articles, magazines and news segments. *Id.* 60 Minutes aired stories in 1987 and 1998 and Frontline aired a similar story in 1999. *Id.*

58. AJS, *supra* note 30. District Court judges must stand for re-election in a partisan race every four years. *Id.*

59. *Id.*

Supreme Court and the Court of Criminal Appeals are courts of final review at the highest level. Judicial authority is separated with civil review in the Supreme Court and most criminal review in the Court of Criminal Appeals.<sup>60</sup> The intermediate appellate courts have jurisdiction over most criminal convictions and the Court of Criminal Appeals has discretionary power to review these decisions.<sup>61</sup> While the Supreme Court has rule-making authority, the Court of Criminal Appeals does not.<sup>62</sup>

As a result of this specialization in criminal cases, Texas Court of Criminal Appeals Justices can become lightning rods for controversial decisions.<sup>63</sup> In 1994, as a result of the only death penalty case that was reversed in 1993, the Republican Party led a campaign to “take over” the Court of Criminal Appeals and the voters responded.<sup>64</sup> Partisan and special interest groups can partner to control elections because of the financial war chest that they possess.<sup>65</sup> Even if no connection exists, the Texas voter perceives that there is a connection between campaign contributions and judicial decisions.<sup>66</sup> Although no direct correlation has been made, from 1985 to 1995 the affirmance rate for death penalty cases rose from 86% to 96%.<sup>67</sup>

As judicial elections are not likely to go away in Texas, efforts to reform or improve the system have been aimed at election conduct.<sup>68</sup> A bill was passed and signed into law by the governor in 2001 requiring judicial candidates to file biographical information regarding their

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60. Uelmen, *supra* note 48, at 1139.

61. *Id.*

62. TEX CONST. art. V, § 31.

63. See Uelmen, *supra* note 48, at 1139. A writer has coined the phrase “crocodiles in the bathtub” to describe the dilemma facing judges of deciding a controversial case and facing a reelection. *Id.* at 1133. He labeled the death penalty as the “fattest crocodile.” *Id.* at 1135.

64. *Id.* at 1139. One of the justices replaced was a former prosecutor with over twelve years on the bench. *Id.* A lawyer promising “the death penalty for killers, greater use of the harmless error doctrine and sanctions for attorneys who file ‘frivolous appeals in death penalty cases’” was elected with just two years in the Texas bar. *Id.*

65. Baschab, *supra* note 40, at 20.

66. *Judicial Selection in the States (Texas)*, *supra* note 57. In 2002, a survey of Texas voters indicated that 77% of voters believed that campaign contributions to judges had a “great deal” or “fair amount” of influence on judges’ decisions. *Id.* In an earlier survey of judges and lawyers, 48% of judges and 79% of lawyers believed that the influence of campaign contributions on judges was “fairly” or “very” significant in a 1999 poll. *Id.*

67. Uelmen, *supra* note 48, at 1139.

68. Matthew Medina, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1072 (2004). A survey of Texas voters revealed that 52% preferred judicial elections over appointment and 62% of those favored nonpartisan elections. *Judicial Selection in the States (Texas)*, *supra* note 57.

educational and professional experience.<sup>69</sup> The information would be made available on the Internet and remain available at least forty-five days before the election.<sup>70</sup>

### C. Florida

Florida successfully headed off attempts by special interests groups to target its Supreme Court Justices for defeat.<sup>71</sup> Florida judges at the highest two tiers (Supreme Court and the District Court of Appeal) are selected by appointment through a nominating commission.<sup>72</sup> They then run to retain their seats every six years.<sup>73</sup> The trial court judges (circuit and county court) are elected in nonpartisan elections and run for reelection every six years.<sup>74</sup>

Special interest groups targeted Supreme Court justices facing retention elections in two different election cycles.<sup>75</sup> The Florida Bar, through its lawyers and judges, mounted a unified defense of the court that was not without some costs, even though all the justices targeted were retained.<sup>76</sup> In spite of the success of these challenges to judicial impartiality and independence, in 2000, the majority of voters in every Florida county rejected a referendum to opt out of nonpartisan judicial elections in favor of the appointment process.<sup>77</sup>

### D. North Carolina

North Carolina serves as a success story in dealing with the dilemma of judicial elections and maintaining impartiality and

69. *Judicial Selection in the States (Texas)*, *supra* note 57. The bill must be implemented by the secretary of state and did not include a provision that the guide be mailed. *Id.*

70. *Id.*

71. Uelmen, *supra* note 48, at 1140. The state has one of the highest death penalty reversal rates at 52% in 1995. *Id.*

72. AJS, *supra* note 30. The governor has sole authority for all of the appointments on the commission and receives a recommendation (non binding) from the bar for some members. FLA. CONST. art. V, § 11.

73. AJS, *supra* note 30.

74. *Id.*

75. Uelmen, *supra* note 48, at 1145. In 1990 Justice Leander Shaw, Jr. faced a vigorous campaign against his retention after he authored an opinion striking down the parental consent law for abortions for minors. *Id.* Justice Rosemary Barkett joined Justice Shaw in this opinion and was also targeted in 1992 by pro-life advocates who were joined by death penalty supporters. *Id.*

76. *Id.* at 1153. Over half a million dollars were spent in a campaign to educate the voters about judicial elections and stress the importance of independence. *Id.*

77. Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. M.S.U.-D.C.L., 849, 886-87. No other democracy in the world selects its judges by election. *Id.* at 890.

independence. In North Carolina, all judges are elected in nonpartisan elections to eight-year terms.<sup>78</sup> They must run for reelection at the end of those terms.<sup>79</sup> Prior to the enactment of the Judicial Campaign Reform Act,<sup>80</sup> judges were elected in partisan elections in which special interest groups had great influence and cost of campaigning was high.<sup>81</sup> The Act was enacted in response to the escalating role of money and politics in judicial elections.<sup>82</sup> The Act mandates full public financing in judicial campaigns to Supreme Court and appellate judges who agree to strict fundraising and spending limits.<sup>83</sup> The public fund is financed by voluntary contributions from attorneys when they pay their yearly bar dues and from a state income tax designation that allows individuals to direct a payment to the fund (without affecting the individual's tax liability).<sup>84</sup> The success of this Act remains to be seen, but its passage marshaled the efforts of a broad coalition.<sup>85</sup> Clearly, the desire for an impartial and independent judiciary provided common ground for a common goal. An oversight committee of attorneys and judges was formed to monitor judicial elections and to respond publicly to false and unfair attacks from the media, public or candidates.<sup>86</sup>

#### IV. ARGUMENTS FOR REFORM IN SELECTION OF STATE COURT JUDGES

##### A. Escalating Costs

“[A]s with any election, campaign contributions and special interest

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78. AJS, *supra* note 30.

79. *Id.*

80. Carolyn Raffensperger, *When Business Funds Judicial Elections*, THE ENVIRONMENTAL FORUM, Sept/Oct 2002, at 12. Reportedly, special interest money spent on judicial elections exceeded \$45 million. *Id.* This increase represented a 61% increase in two years. *Id.*

81. See Traciell V. Reid, *PAC Participation in North Carolina Supreme Court Elections*, 80 JUDICATURE 21, 29 (1996).

82. Raffensperger, *supra* note 80, at 12.

83. *Judicial Selection in the States (North Carolina)* at [www.ajs.org/js/NC\\_elections.htm](http://www.ajs.org/js/NC_elections.htm) (last visited Mar. 24, 2005). A coalition known as the North Carolina Voters for Clean Elections led the fight for reform and passage of the Judicial Campaign Reform Act. *Id.* Judges who participate can qualify for up to \$600,000 for general elections. *Id.*

84. *Id.* There is a \$600,000 limit on the amount of funds that Supreme Court candidates for the general election can receive. *Id.* The fund is not limited to incumbents. *Id.* In order to address non-participating candidates and special interest groups that try to outspend the candidate, a rescue fund amount of \$137,000 is allowed. *Id.*

85. *Id.* The North Carolina Voters for Clean Elections list almost fifty organizations as allies and affiliates. *The North Carolina Voters for Clean Elections* at [www.democracy-nc.org/nc/Coalitions/ncvce.html](http://www.democracy-nc.org/nc/Coalitions/ncvce.html) (last visited Mar. 24, 2005). The groups cover a broad range in interests and issues. *Judicial Selection in the States (North Carolina)*, *supra* note 83.

86. *Judicial Selection in the States (North Carolina)*, *supra* note 83.

groups can manipulate judicial elections so that meaningful public participation is illusory.”<sup>87</sup> The partnership of special interest groups and partisan groups can have an obvious control on the selection of a judge since the party primaries can be closed to those who fail to yield large contributions.<sup>88</sup> During the 2004 election cycle, a partisan judicial race set a national record in single-race judicial campaign contributions, with over \$8.5 million raised by the two candidates.<sup>89</sup> During the race, insurance companies and other corporations backed one candidate in hopes that his election would change the plaintiff-friendly lower courts, while trial lawyers heavily supported the opponent.<sup>90</sup>

Campaigns that must be financed from funds raised by the candidate—albeit through a campaign committee—raise the dangers of actual quid pro quo arrangements or at least the appearance that the judge may be improperly influenced.<sup>91</sup> The Code of Judicial Conduct is the body of rules that govern both judges and judicial candidates in elections and attempt to insulate the judge and judicial candidate by prohibiting personal solicitation or acceptance of campaign funds.<sup>92</sup> The Code recognizes that judicial impartiality and independence and the perception of judicial impartiality and independence are affected by the (real and imagined) impact of campaign contributions.<sup>93</sup>

A national survey<sup>94</sup> of state judges and the public asked, “How much influence do you think campaign contributions made to judges have on their decisions?”<sup>95</sup> Seventy-six percent of the public respondents indicated that they felt that campaign contributions had “some influence” or “a great deal of influence” on the decision of

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87. Scott D. Weiner, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R. –C.L.L. REV. 187, 208 (1996).

88. Baschab, *supra* note 40, at 20.

89. Paul Hampel, *Karmeier Gets Nod in Bitter Race*, ST. LOUIS POST-DISPATCH, Nov. 3, 2004, at B1. Republican County Circuit Judge Lloyd Karmeier defeated Democratic District Judge Gordon Maag in a hotly contested race for the open Fifth District seat on the Illinois Supreme Court. *Id.*

90. *Id.* See also Ryan Keith, *Spending for Supreme Court Seat Renews Cry for Finance Reform*, MERCURY NEWS (San Jose), Nov. 3, 2004.

91. Peter Cooke, *Breakstone v. Mackenzie: In a Case Where Fear of Bias is Raised by Judicial Election Campaign Contributions, There Are No Clear Winners*, 15 NOVA L.REV. 323, 340 (1991).

92. Shaman et al., *supra* at note 2, at 393.

93. *Id.* at 395.

94. Deborah Goldberg, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts*, (2004) at <http://www.brennancenter.org/resources/ji/ji3.pdf> (last visited Mar. 24, 2005). The National Polling Data was conducted by Greenberg Quinlan Rosner Research Inc. in its State Judges’ Poll conducted for Justice at Stake. *Id.*

95. *Id.*

judges.<sup>96</sup> Comparatively, twenty-six percent of the judicial respondents felt that campaign contributions had “some influence” or “a great deal of influence” on their decisions.<sup>97</sup> The sentiment of the public and judiciary that campaign contributions influence the decision of judges has been replicated in states across the country.<sup>98</sup> “Fundraising practices are a serious threat to judicial independence.”<sup>99</sup>

### B. Voter Preference

A critical question to ask is why continue to select judges in elections, given the grave concerns about the effect of campaign contributions on the perception and reality of impartiality and independence?<sup>100</sup> The answer, quite simply put, is that judicial elections are overwhelmingly the most popular method for judicial selection.<sup>101</sup> Elected judges preside over a majority of cases decided in the United States.<sup>102</sup> Further, some feel that appointed judges exercise unconstrained discretion with no regard for the majority’s will.<sup>103</sup> Therefore, elections have remained as a means of ensuring the judiciary’s accountability to the electorate.<sup>104</sup>

“‘Merit selection’ is seen by many as a masquerade to put political power in the hands of the organized bar and other members of the elite.”<sup>105</sup> This opinion is undoubtedly fueled by the vital role that the nominating commission plays in this process of selecting judges.<sup>106</sup> The composition of the nominating commission is a primary deficiency in its

96. *Id.* Interestingly, the public responses were almost evenly split with 36% indicating “a great deal of influence” and 40% indicating “some influence.” *Id.*

97. *Id.*

98. AJS, *supra* note 30. The American Judicature Society compiles and maintains information on judicial selection in every state. *Id.* The state-by-state information contains opinion polls and surveys that document concern about the relationship between the decisions that a judge makes and the contributions received. *Id.*

99. Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133, 134 (1998).

100. Zeidman, *supra* note 3, at 791.

101. Larkin, *supra* note 11, at 76. “Approximately 82% of state appellate court judges and 87% of state trial judges run in some type of election.” *Id.* Consistently voters have rejected attempts to replace elections with merit retention. In Florida in 2000, a county by county ballot initiative that would have allowed each county to opt out of judicial elections in favor of merit selection was rejected in every county. Schotland, *supra* note 77, at 886-87. A similar ballot initiative in Ohio was overwhelmingly defeated in 1987. See Carrington, *supra* note 5, at 106.

102. Schotland, *supra* note 77, at 890.

103. Larkin, *supra* note 11, at 77.

104. *Id.*

105. Carrington, *supra* note 5, at 106.

106. Zeidman, *supra* note 3, at 831.

effectiveness as a non-political body.<sup>107</sup> The commission should not be partisan and should be selected from “numerous sources and by multiple authorities.”<sup>108</sup> If, in fact, the power to select judges was in the hands of a democratically appointed few who exercised their duty to appoint, without regard to political ties or affiliations, then the merit of “merit selection” could be obvious. But the reality is that the partisan nature of some of these commission appointments can be quite obvious.<sup>109</sup> Even efforts to have some diversity on the commission can be difficult to achieve.<sup>110</sup>

Elections operate as a check on judicial discretion.<sup>111</sup> Faced with a clear rule of law, the public has the right to expect that a judge will apply the law regardless of the popularity of the law or litigant.<sup>112</sup> The failure of a judge to impartially apply a law that is clear, should subject her to the will of the majority.<sup>113</sup> Special interest groups can play a vital role in financing a campaign in response to a judge’s decision, but should such groups be allowed to influence campaigns without any regard to the truth of the message? Campaign reform with a goal of “strengthen[ing] the judiciary’s legitimacy by enhancing judicial independence and accountability”<sup>114</sup> dictates that some regulation of special interest groups occurs. Regulation of the message is sure to attract constitutional

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107. *Id.*

108. *Id.*

109. Formerly, the Judicial Nominating Commission (the judicial appointing authority) in the state of Florida was comprised of nine members: three bar appointments, three governor appointments, and three selected by a majority vote by the members of the commission. Chapter 2001-282 amended this provision so that the governor has sole authority for appointing all nine members. The Florida Bar Board of Governors recommends four appointees but the governor may reject the nominees and require additional nominations. FLA. CONST. art. V, § 20, amended by FLA. STAT. ch. 43.291.

110. *See* Mallory v. Harkness, 895 F. Supp. 1556 (S.D. Fla. 1995) A white male successfully sued after being denied membership on the commission because of the requirement that women and minorities constitute a certain percentage on the commission. *Id.* at 1564. The Court of Appeals affirmed the District Court’s ruling without opinion. Mallory v. Harkness, 109 F.3d 771 (11th Cir. 1997).

111. Larkin, *supra* note 11, at 77.

112. Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 541 (1999).

113. An example of the removal of a judge by the will of the voters, was the successful campaign to unseat a judge who issued a thirty-year sentence in a murder case where the two victims were homosexuals. *See Gay Rights Groups Hail Defeat of Judge in Texas*, N.Y. TIMES, Dec. 4, 1992, at B20. The judge justified his decision to impose a thirty-year sentence instead of a life sentence with homophobic remarks. *Id.* Although he was censured by the State Commission on the Code of Judicial Conduct, he remained on the bench until the voters had an opportunity to hold him accountable. *Id.*

114. Larkin, *supra* note 11, at 84.

challenges that may be successful if sufficiently rooted in law.<sup>115</sup> Notwithstanding, regulation of the spending by a special interest group when that message is targeted at an individual candidate may withstand a constitutional challenge.<sup>116</sup>

## V. ALTERNATIVES FOR PUBLIC FUNDING OF STATE JUDICIAL CAMPAIGNS

### A. Full Funding

The most complete and comprehensive type of campaign financing provides funding up to the level allowed for campaign spending.<sup>117</sup> Generally, the provision for “full public funding” allows or requires the prerequisite collection of seed money by way of “qualifying contributions from individuals.”<sup>118</sup> After obtaining the specified number of contributors and amount of contributions, the candidate qualifies for funding up to the full amount of spending allowed.<sup>119</sup> North Carolina is the first and only state to provide full public financing in judicial elections, but other states have passed bills or are considering legislation to fully fund judicial elections.<sup>120</sup> The concept of providing full funding is not new and is utilized in non-judicial elections for some or all candidates in Arizona, Maine, Massachusetts, and Vermont.<sup>121</sup> Other forms of full public funding include tax credits or tax refunds for contributions made to a candidate of choice.<sup>122</sup>

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115. Goldberg, *supra* note 94, at 16.

116. *See id.* Such enforcement generally hinges on the use of elect and defeat to trigger the regulation of the expenditure, but a broader interpretation that looks at advocacy that expressly names a candidate or issue can be included to avoid the loophole created when the words elect and defeat are not used. *Id.* at 14.

117. Goldberg, *supra* note 7, at 105.

118. *Id.*

119. *Id.* North Carolina requires candidates to raise \$33,000 to \$69,000 from at least 350 registered voters contributing from \$10 - \$500 each. *Choosing Judges: Money Given in Past Races is Restricted, Replaced Under New Program*, Money in Politics Research (2004) at <http://www.democracy-nc.org> (last visited Mar. 24, 2005) .

120. Goldberg, *supra* note 94, at 9. The Illinois Senate passed the Supreme Court Campaign Reform Act (SB 1415) in March of 2003. American Bar Association Standing Committee on Judicial Independence, *Public Financing of Judicial Campaigns*, Feb. 2002 at [www.abanet.org/jud/Jud\\_campaign.html](http://www.abanet.org/jud/Jud_campaign.html) (last visited Jan. 4, 2005). House Bill 2800 is in committee awaiting passage. *Id.* Wisconsin provides partial funding and has legislation pending to provide full funding. Goldberg, *supra* note 94, at 9.

121. Carrington, *supra* note 5, at 120.

122. Goldberg, *supra* note 94, at 9.



### B. *Partial Funding*

Partial public funding can provide some financial relief to states while meeting the same goal that is met with full public funding. States can creatively construct schemes for providing partial public funding of judicial campaigns. One method of partial funding offers the contributor, instead of the candidate, a benefit for making a contribution.<sup>123</sup> Even though the funding does not go directly to the candidate, the candidate reaps the advantage from the incentive contributors receive from a tax refund or credit.<sup>124</sup> Additionally, partial funding can be accomplished through the use of in-kind benefits (e.g. printing or advertising).<sup>125</sup> Printing and political advertising can be costly campaign expenditures. Therefore, while no direct funding is provided with this type of assistance, “free television time is probably the most valuable in-kind benefit that statewide judicial candidates could receive.”<sup>126</sup> The most common type of partial public campaign funding is the issuance of a grant or subsidy as a matching fund “tied to private fundraising.”<sup>127</sup> Unlike full public funding in which candidates receive full funding up to the total amount allowed for spending, partial funding is limited to a cap that is a percentage of the spending allowed.<sup>128</sup>

### C. *Limits and Restrictions*

Customarily, a candidate who chooses to utilize public funding (full or partial) for campaign financing must agree to restrictions on contributions since no additional funds are collected after qualifying.<sup>129</sup> These limitations typically designate a cap on the amount of the contribution for participating and non-participating candidates.<sup>130</sup> A campaign contribution base with more contributors of smaller amounts undermines the appearance and reality of an improper influence created by fewer contributors of larger amounts.<sup>131</sup>

In addition to caps on campaign contributions, reporting requirements are instituted.<sup>132</sup> The reporting requirements apply to

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123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Goldberg, *supra* note 94, at 7.

128. *Id.* at 8.

129. *Id.* at 11.

130. *Id.* at 13.

131. *Id.* at 11.

132. Goldberg, *supra* note 94, at 13.

contributions and expenditures for all participating candidates and any special interest groups that target the election or defeat of a candidate.<sup>133</sup> The reporting requirement for expenditures is essential for enforcement to activate the “trigger provision.”<sup>134</sup> The trigger provision enables participating candidates to financially respond to non-participating candidates and special interest groups that pour large amounts of money into an opposition campaign.<sup>135</sup> It removes the existing restrictions and limitations to allow the candidate to meet the challenge of big spending.<sup>136</sup>

The enforcement of the application of reporting requirements for non participating candidates can be effectuated without great expense or inconvenience provided the deadlines for reporting become shorter as election time nears.<sup>137</sup> The penalties for failure to meet reporting deadlines must be enforced. Enforcement does not prevent non participating candidates and special interest groups from escalating spending at the end of the campaign, but it provides notice and triggers the escape of the non-participating party from the limitations and restrictions imposed by participating in public financing.<sup>138</sup> The challenge when dealing with reporting requirements for expenditures for special interest groups is to develop a mechanism for identifying spending that is targeted at the defeat or election of a candidate.<sup>139</sup> Requirements that are overly broad face the prospect of a constitutional challenge that could be successful.<sup>140</sup>

Strict limitations on campaign spending have been found unconstitutional, but a reporting requirement imposed on candidates, individuals and groups that make independent campaign expenditures was found constitutional.<sup>141</sup> The concept of public financing for judicial campaigns is gaining support as judicial candidates express frustration trying to abide by the restrictions imposed by the Code of Judicial

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133. *Id.* at 15.

134. *Id.*

135. *Id.*

136. Goldberg, *supra* note 94, at 15.

137. *Id.*

138. *See* Carrington, *supra* note 5, at 117.

139. *Id.*

140. *Id.*

141. *Buckley v. Valeo*, 424 U.S. 1 (1976). The United States Supreme Court affirmed a reporting requirement that was not only imposed on candidates, but also on special interest groups or individuals that make independent expenditures. *Id.* at 80-82. The concept of regulating special interest groups' spending will open the constitutional debate as the content of such advertisements becomes the issue. *See* Mark Kozlowski, *Regulating Interest Group Activity in Judicial Elections at* <http://www.brennancenter.org/resources/ji/ji1.pdf> (last visited Mar. 24, 2005).

Conduct and the law.<sup>142</sup>

In 2002, the American Bar Association's Standing Committee on Judicial Independence authored a report which specifically examined public financing for judicial campaigns.<sup>143</sup> The report offered findings and made recommendations that are effective tools in determining how a system of public financing in judicial campaigns should be structured.<sup>144</sup> The ten findings of the committee provide a comprehensive analysis of the need for reform.<sup>145</sup> These findings reveal a common thread in the identification and survey of the relevant issues that should be addressed regarding judicial elections. The overriding consideration of the preservation of impartiality and independence provides a backdrop that emphasizes issues that have already been identified. The issues of escalating costs of a campaign,<sup>146</sup> accepting contributions from those who appear before you,<sup>147</sup> inadequate funds to finance a campaign,<sup>148</sup> targeted campaign by special interest groups,<sup>149</sup> the appearance of impartiality,<sup>150</sup> the public perception of the influence of contributions,<sup>151</sup> soliciting funds for a campaign,<sup>152</sup> tapping into big money,<sup>153</sup> and

142. A former chief justice of Texas who was voted the most competent member of the Supreme Court resigned to work for campaign reform in judicial elections that would "take the money out of judicial politics." Baschab, *supra* note 40, at 20.

143. American Bar Association Standing Committee on Judicial Independence, *Public Financing of Judicial Campaigns*, Feb. 2002.

144. *Id.* at 9.

145. *See id.* at 11-29. "The Commission finds that the cost of judicial campaigns is escalating." *Id.* at 11. "The Commission finds that to cover their election costs, judges must accept funds from contributors many of whom may be interested in the outcomes of cases before them." *Id.* at 13. "The Commission finds that when campaign costs exceed contributions received, judges often take out loans to make up the difference." *Id.* at 16. "The Commission finds that organizations interested in the outcomes of judicial elections often initiate advertising campaigns on behalf of or in opposition to a candidate, independent of the candidate's own campaign." *Id.* at 17. "The Commission finds that when judges make decisions that favor contributors, they may be accused of favoritism." *Id.* at 18. "The Commission finds a pervasive public perception that campaign contributions influence judicial decision-making." *Id.* at 20. "The Commission finds that judges are uncomfortable soliciting contributions, which may discourage outstanding judicial candidates from seeking or remaining in judicial office." *Id.* at 23. "The Commission finds that qualified candidates who lack connections to wealthy contributors may be impaired in their ability to compete effectively for judicial office." *Id.* at 25. "The Commission finds that when judges are required to campaign like political branch candidates, it contributes to the inappropriate politicization of the judiciary." *Id.* at 26. "The Commission finds that the only significant public financing program for judicial campaigns implemented to date has not been adequately funded." *Id.* at 29.

146. *Id.* at 9.

147. Cooke, *supra* note 91, at 340.

148. Weiner, *supra* note 87, at 196.

149. Baschab, *supra* note 40, at 20.

150. *Id.*

151. *See* Cooke, *supra* note 91, at 340.

152. Goldberg, *supra* note 94, at 1.

partisan politics,<sup>154</sup> all play a pivotal role in generating the need for reform. In response to the findings by its committee, the ABA recommended that states finance judicial elections with public funds to address the perceived impropriety of judicial candidates accepting private contributions from individuals and organizations with an interest in the outcome of cases before the judge.<sup>155</sup>

#### VI. PLAN FOR THE REFORM OF THE SELECTION OF STATE COURT JUDGES

Judicial elections are different and must be recognized and publicized as such.<sup>156</sup> The Code of Judicial Conduct limits judges and judicial candidates in a way that other elected officials are not.<sup>157</sup> These limitations can create a dilemma since they are completely contradictory to traditional politics.<sup>158</sup> A voter can and should demand to know where a traditional candidate stands on issues like crime, the death penalty and abortion. But a judge who espouses a position that dictates how he will rule has violated one of the basic tenets of the judiciary - a judge should fairly and impartially apply the law.<sup>159</sup> Therefore the fundamental focus of any judicial reform must focus on: 1) an impartial and independent election process that encourages participation by allowing the voter to fairly and accurately assess the qualifications of the candidate; 2) a funding process that minimizes the influence of money by imposing limitations and restrictions on contributions and expenditure of candidates and special interest groups; 3) a voter educational process that emphasizes the importance of an impartial and independent judiciary by providing truthful and balanced information about the candidates and the process; and 4) an enforcement process that monitors and enforces violations of regulations imposed.

Ideally, reform should be aimed at all levels of state court judges. The reality is, however, that the reform necessary cannot adequately address all levels of state court judges because the sheer number of

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153. *Id.*

154. Baschab, *supra* note 40, at 20.

155. *Id.* at 9.

156. See David B. Rottman and Roy Schotland, *What Makes Judicial Elections Unique?*, 34 LOY. L.A. L.REV. 1369, 1369 (2001).

157. Roy Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 85 (1985).

158. Cynthia Canary, *Know Before You Go: A Case for Publicly Funded Voters' Guides*, 64 OHIO ST. L. J. 81, 82 (2003).

159. *Morial v. Judiciary Comm'n*, 565 F.2d 295, 302 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

judges involved would make the cost of reform prohibitive. Additionally, citizens are in a better position to know the local trial judges' records and qualifications and to determine their impartiality and independence. Presumably, a trial court judge that fails to apply the law impartially and independently will be subject to the authority of the appellate court on appeal and the will of the public at an election.<sup>160</sup> The need for impartiality and independence is most critical at the appellate level because these judges are the most vulnerable to the reality and the appearance of improper influences from campaign contributions due to the escalating costs of these elections.<sup>161</sup> The cost of a state supreme court election can climb into the millions in some cases.<sup>162</sup> Lawyers, business interests and political parties rank first, second and third respectively as contributors in judicial campaigns.<sup>163</sup> An apparent interest in gaining the influence of a judge is clear. Hence, critical campaign reformation should be aimed at minimizing the influence caused by the campaign contributions of these three entities. Limiting initial campaign reform to those judges who sit only in an appellate capacity will drastically reduce the cost of change because of the smaller number of judges at that level.<sup>164</sup>

#### A. Nonpartisan

No method for the selection of judges can completely eliminate improper political influence. Therefore the challenge is to establish which selection method will best promote judicial impartiality and protect judicial independence. Many suggest that appointing judges is the best way of insulating judges from the ethical problems associated with running a judicial campaign.<sup>165</sup> However, a whole new set of political influences occur when judges are selected through the appointment process.<sup>166</sup> History suggests that appointing authorities are concerned not only with friendship, but also with party loyalty and

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160. Karlan, *supra* note 112, at 541.

161. Holman, *supra* note 9, at 5.

162. *Id.* at 7. In 2000, state supreme court candidates raised \$45.6 million for their campaigns. *Id.* The average candidate raised \$430,529. *Id.* at 8. Over \$1 million was raised by sixteen candidates. *Id.*

163. *Id.* at 9. The groups contribute more than half of all donations to judicial candidates. *Id.* Partisan judicial races attract even more in contributions. *Id.* at 5.

164. See Zeidman, *supra* note 3, at 791-92. In the United States, there are almost 8,500 state trial court judges in courts of general jurisdiction while there are only over 1,200 state appellate court judges. *Id.*

165. See Kelso, *supra* note 10.

166. *Id.*

ideology. Therefore, by its very nature, judicial selection using the appointment process gives the power to select a judge to an elite few and is undemocratic and decreases accountability.<sup>167</sup>

Only thirteen percent of the fifty-three percent of elected state appellate court judges are elected in nonpartisan elections.<sup>168</sup> Consequently, eliminating partisan elections in favor of nonpartisan elections is a feasible starting point for reform. Judges take an oath to fairly and impartially apply the law. The rule of law and its fair and impartial application must be the benchmarks for the success of a judge. If judges cannot be free to fairly and impartially apply the law, then citizens will have no respect or trust for the impartiality or independence of the court's rulings or the justice system. Traditional candidates are free to offer and receive special consideration for party affiliations.<sup>169</sup> Judges should not be.<sup>170</sup> The traditional link between candidates and special interest groups is a reality of partisan politics. Conversely, animus between candidates and special interest groups is an undesirable reality of partisan politics.<sup>171</sup> The foundation of impartiality and independence commands that judges must be different than other politicians. No one should argue that impartiality and independence will be promoted in a judicial system in which party, friendship and kindred are involved. The injection of party politics has an impact on impartiality and independence.<sup>172</sup>

While it has been suggested that partisan elections serve democratic and constitutional principles and promote participation by ensuring judicial accountability, to whom is accountability ensured?<sup>173</sup> A judiciary accountable to the people, not the party, must be maintained to promote impartiality and independence. Unquestionably, party

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167. *Id.*

168. Zeidman, *supra* note 3, at 791.

169. Baschab, *supra* note 40, at 19.

170. *Id.*

171. *Id.*

172. From the beginning, the partisan election of judges was steeped in politics and it continues today. See James E. Lozier, *The Missouri Plan A/K/A Merit Selection is the Best Solution for Selecting Michigan Judges*, 75 MICH. BUS. L.J. 918, 918 (1996). During the presidential term of Andrew Johnson, landowners constantly engaged in tenant disputes and needed control of the judges. *Id.*

173. Studies have suggested that the method of selecting judges can be a predictor of judicial decisional outcome. See F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 434-35 (2004). One study indicated the partisan judges decide case in a more partisan way. *Id.* at 434. Another study found that partisan judges are associated with higher tort awards. *Id.* at 434-35. A third study indicated that partisan judges are less likely to overturn a death penalty. *Id.* at 434. Most disturbing is the finding that partisan elections discourage judges from dissenting in controversial cases. *Id.*

affiliation simplifies fundraising and voter identification, especially for those who contribute and vote accordingly.<sup>174</sup> But is party identification a necessary and proper characteristic for ensuring impartiality and independence? It is not the election, but the fundraising practices utilized in the election that threaten independence.<sup>175</sup> Rather than abandoning judicial elections, the real solution is to support reforms that address the real problems of fundraising, voter education and campaign conduct.

### *B. Public Funding*

There have been reports that millions have been spent on judicial campaigns.<sup>176</sup> No public funding system can support the full and unfettered contribution of total and unlimited funding; nonetheless there must be an answer to these escalating costs. A candidate seeking a position on an appellate court or seeking to retain a position on a supreme court must be prepared to expend a certain amount of energy and effort to organize and create a base of support. Once the base of support is established, however, a candidate should be able to qualify for public funding up to the legal amount allowed.<sup>177</sup> Once there is a decision to receive public funding, the candidate agrees to abide by limitations on contributions, expenditures and conduct.<sup>178</sup>

A method for qualification that requires a candidate to have a minimum number of contributors and amount of contributions appears to be equitable and take into consideration the need for a candidate to develop a base of support to be a viable contender. A candidate wishing to do nothing other than stand for election would be seen as a frivolous candidate. A wealthy candidate will always have the alternative to opt out of public funding, but the candidate without substantial financial resources would have the ability to work a grassroots campaign to become a viable candidate.

The exorbitant fundraising and spending in judicial elections is not limited to candidates.<sup>179</sup> Therefore the spending by special interest

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174. See Ray Harding, *The Case for Partisan Election of Judges*, 55 A.B.A. J 1162, 1163 (1969).

175. Chemerinsky, *supra* note 99, at 134.

176. Kelso, *supra* note 10. In Pennsylvania where judges at all levels are selected by partisan elections, a Supreme Court justice spent \$1.2 million in a retention campaign. *Id.*

177. Goldberg, *supra* note 7, at 105.

178. Goldberg, *supra* note 94, at 11. These limitations imposed must be carefully tailored to avoid constitutional impediments. See generally *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *Buckley v. Valeo*, 424 U.S. 1 (1976).

179. Carlton, *supra* note 55, at 848. An interest group in Pennsylvania spent a significant

groups must be subject to the same reporting requirements. A trigger provision which lifts the limitations on contributions and expenditures for the participating candidate is essential to address the issues of non-participating opponents or targeted spending special interest groups.<sup>180</sup> Limitations on spending that raise the limit on contributions if a candidate participates can provide a workable way to begin to lower the money spent during campaigns. These limits should be set high enough to encourage participation, but low enough to prevent creating an unfair advantage to wealthy candidates.

### C. Voter Education

A publicly funded voter guide must first address the fact that judicial elections are different.<sup>181</sup> It should be divided into two parts. Part One should deal with general information on the courts, the role of the judge and the application of the Code of Judicial Conduct.<sup>182</sup> A preamble to the guide should include a statement to the voter that an impartial and independent judiciary is a cherished hallmark of the justice system and that the guide is being sent in an attempt to preserve and ensure impartiality and independence during the election process. It should provide a summary of the applicable Code of Judicial Conduct which should cover the constraints on speech, conduct and fundraising.<sup>183</sup> Most importantly, the guide should contain statements from the candidates that acknowledge they know and will abide by these rules.<sup>184</sup> These components should be a part of all voter guides for judicial elections. If a candidate refuses to sign the acknowledgement, then that fact must be included.

Part Two of the guide is not an essential component, but would be beneficial given the ballot falloff symptomatic to judicial races.<sup>185</sup> This

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amount of money on judicial campaigns and became the subject of successful litigation to limit its spending. *Id.*

180. Goldberg, *supra* note 94, at 15.

181. Canary, *supra* note 159, at 81.

182. *Id.* at 83.

183. ABA Model Code of Judicial Conduct, Canon 5, provides that “[a] Judge or Judicial Candidate shall refrain from inappropriate political activity.” ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1990). This provision of the Code governs campaign conduct. *See id.* Shaman et al., *supra* note 2, at 366. “It should be noted. . . that no Code provision has more variations among the states that have adopted the Code than Canon 5.” *Id.* at 366.

184. A public acknowledgement to abide by the rules should be an essential element in the guide.

185. Canary, *supra* note 159, at 86. Voter falloff describes the tendency of voters to vote on the ballot items at beginning of the ballot in greater frequency than those items at the end of the ballot. *Id.*



part could provide truthful information regarding the background and qualifications of the candidates.<sup>186</sup> A bar or public-sponsored poll or evaluation that included lawyers, litigants and court personnel could be included and would avoid the bias label that might attach to a lawyer-only poll.<sup>187</sup> An alternative to the poll or evaluation could simply be the results of a bar interview.<sup>188</sup> The key to this part of the guide is the inclusion of balanced and truthful information about the candidates to enable the voter to make an informed decision.

The League of Women Voters has been a historical source of voter guides and voter information.<sup>189</sup> However, the ability of a single organization to disseminate this information depends on the available resources in the community.<sup>190</sup> Consequently, the guides may not be evenly distributed. The ability to access voter guide information should not depend on the variance of local resources; therefore public funding should be used to ensure that every household get a copy of the voter guide. While many issue-oriented groups produce voter guides, these guides may be inappropriate for judicial candidates who must always be impartial and independent.<sup>191</sup>

#### *D. Monitoring and Enforcement*

The bench and bar must take the lead in ensuring and preserving judicial integrity and independence. A non-partisan, diverse, community-based committee comprised of the media, lawyers (sitting judges may be unable to ethically sit on this board), and community leaders should be enacted to monitor campaign conduct. This committee would encourage all members of the community to be monitors of campaign conduct. The committee need not have enforcement power, but would have the power—as do all other citizens—to report violations to the appropriate enforcement agency. This committee could serve as a mechanism to stave off attack campaigns that contain false and misleading information by responding with true and balanced information as the judicial candidate is limited in how he can respond.<sup>192</sup>

The enforcement arm for ethical violations during judicial elections

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186. *Id.* at 85.

187. Lawyer polls alone can lack the independence of an evaluation that allows more than just lawyers to participate.

188. Canary, *supra* note 159, at 85.

189. *Id.*

190. *Id.*

191. *Id.*

192. ABA MODEL CODE OF JUDICIAL CONDUCT, Cannon 5, (1990).

must include both the bench and the bar working in concert to ensure that judges and judicial candidates understand that violations will be punished.<sup>193</sup> An advisory committee could be formed to give advisory opinions to judges and candidates during the election period to allow them to avoid misconduct.<sup>194</sup> The enforcement agency should be separate from the monitoring and advisory entities to ensure the integrity of the process. The question may arise why these actions are necessary when they are not utilized for other political candidates and the answer remains the same as it has been throughout – judges and judicial elections are different.

## VII. CONCLUSION

The principles for implementing the recommendations of the ABA Standing Committee for Judicial Independence provide a model framework of what campaign reform should be implemented.<sup>195</sup> These principles, like the ABA findings, identify ten key factors in campaign reform in judicial elections. This plan for campaign reform contemplates the implementation of each of these principles.

Principle 1: “Public financing programs must be sensitive to Constitutional limitations on the power of the states to regulate judicial campaign reform and financing.”<sup>196</sup> Limitations and restrictions that are either too restrictive or too broad can face the same constitutional impediments. Therefore appropriate limits should be imposed.

Principle 2: “Public financing programs must tailored by the states to fit their specific needs.”<sup>197</sup> Given the variations in how judges are selected from state to state, one plan will not fit all. Therefore, while nonpartisan elections may appear to be the best alternative for some states, the addition of publicly funded campaign funds to the existing method of judicial selection may be the best fit. Some difficulties should be anticipated if elections are partisan because of the inherent

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193. Since 2000, the Judicial Ethics Advisory Committee (JEAC) of Florida and the Florida Bar teamed together to hold forums in every circuit in which there was a contested judicial election. The Board of Governors for the Bar, the Chief judge, political parties, media and any other interested parties are invited to the forum. The disciplinary process of the Bar’s Grievance Committee and Judicial Qualifications Committee are explained in great detail.

194. In addition, JEAC of Florida formed an Elections Subcommittee issue fast track advisory to judges and judicial candidates about their own anticipated conduct. Violators have been subjected to investigation by the Judicial Qualifying Committee (JQC) or the Bar Grievance Committee.

195. *Public Financing of Judicial Campaigns*, *supra* note 143, at 35-56.

196. *Id.* at 35.

197. *Id.* at 38.

political nature of partisan races. Public funding in a partisan race may, however, resolve the issue of the dependence on partisan money since the significance of money should be decreased. Retention races may draw the criticism that they unfairly favor the incumbent since no opponent appears on the ballot.

Principle 3: “High court and intermediate appellate judge campaigns are best suited for reform.”<sup>198</sup> The unique position of judges that sit in an appellate capacity makes them ripe for reform. The limited number of judges at this level will result in a lower cost for reform. Additionally, the wide variety of selection methods for trial court judges makes reform problematic.

Principle 4: “Adequate and sufficient public financing are keys to the success of a public funding program.”<sup>199</sup> There must be a commitment to publicly funded campaigns that is evidenced by the allocation of funds in amounts sufficient to ensure success of the program. There will be no incentive for candidates to participate if funding is inadequate.

Principle 5: “The public financing program should contain threshold requirements for qualifying to ensure that frivolous candidates are discouraged from participating.”<sup>200</sup> The goal of public financing is to remove the politics of money but not the politics of hard work from judicial campaigns. Therefore the threshold requirements serve a fundamental role in encouraging sincere and meaningful campaigning.

Principle 6: “Candidate participation should impose limitations on contributions.”<sup>201</sup> In an attempt to combat the significance of money, participation by candidates in publicly funded campaign programs must be tied to limitations on campaign contributions.

Principle 7: “Expenditures should be regulated to include issue advocacy spending that is typical among special interest groups.”<sup>202</sup> Regulation of the expenditures of special interest groups in addition to the expenditures of candidates and other individuals is as important as the limits on campaign contributions. This regulation, however, must provide a provision that triggers elimination of the limitations if a nonparticipating candidate or special interest group exceeds the limitation.

Principle 8: “Public financing programs should make voter

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198. *Id.* at 42.

199. *Id.* at 43.

200. *Public Financing of Judicial Campaigns*, *supra* note 143, at 45.

201. *Id.* at 47.

202. *Id.* at 48.

education an integral component.”<sup>203</sup> The overriding theme in any analysis of reform underscores the need for fair and balanced education of the voter about the system in general and about judicial elections in particular.

Principle 9: “The source of funding for public financing reforms must be stable.”<sup>204</sup> The continuing and sustaining support of publicly funded campaigns for judiciary will yield the best probability for success. If funding is erratic, then there will be no incentive for candidates to participate in the program since the availability of funds could not be assured.

Principle 10: “The independence of the administration of public financing programs fund is of utmost importance.”<sup>205</sup> If the implementation of public funding in judicial elections falls prey to the same political influences that affect the impartiality and independence of the judiciary, its success is doomed before it starts.

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203. *Id.* at 52.

204. *Public Financing of Judicial Campaigns*, *supra* note 143, at 54.

205. *Id.* at 55.