

Public Financing of Judicial Campaigns

**Report of the Commission on Public Financing of
Judicial Campaigns**

**American Bar Association
Standing Committee on Judicial Independence**

February 2002

ISBN 1-59031-207-4
Product Code # 3970004

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541 N. Fairbanks Court
Chicago, Illinois 60611

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The recommendations of the Commission on Public Financing of Judicial Campaigns were approved by the American Bar Association House of Delegates in February 2002.

The Commentary contained herein does not necessarily represent the official position of the ABA. Only the text of the of the recommendations has been formally approved by the ABA House of Delegates as official policy. The report, although unofficial, serves as a useful explanation of the recommendations.

The work of the Commission and the publication of this report were funded by a generous grant from the Joyce Foundation.

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Standing Committee on Judicial Independence**

Commission on Public Financing of Judicial Campaigns

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EXECUTIVE SUMMARY

The ABA Commission on Public Financing of Judicial Campaigns was convened by the ABA Standing Committee on Judicial Independence in accordance with a directive from ABA House of Delegates in 1999 to examine the feasibility of public financing of judicial elections. The Commission's honorary co-chairs are Hon. Howard Baker and Hon. Abner Mikva, its chair is D. Dudley Oldham of Houston, Texas, and its membership includes representatives from the League of Women Voters and the Conference of Chief Justices, as well as a number of ABA entities. Professor Charlie Geyh of Indiana University School of Law served as Reporter to the Commission. The Commission, which received substantial funding from the Joyce Foundation and additional support from the Open Society Institute, held three public hearings over the course of one year, heard from more than 25 witnesses and reviewed voluminous documents and reports.

The Commission unanimously recommends that states that elect judges in contested elections finance judicial elections with public funds. In reaching this conclusion, the Commission recognizes that judicial elections are unique from elections for legislators and executives. These latter public officials are elected to be representative of and responsive to constituencies whereas judges are not representative officials but are responsive to the rule of law rather than constituencies. The Commission concludes that public financing of judicial elections will address the perceived impropriety associated with judicial candidates accepting private contributions from individuals and organizations interested in the outcomes of cases those candidates may later decide as judges. In support of its recommendation, the Commission makes several findings and offers several principles to help guide the development of a public financing scheme for judicial elections.

Primary Recommendation

The Commission recommends that states which select judges in contested elections finance judicial elections with public funds, as a means to address the perceived impropriety associated with judicial candidates accepting private contributions from individuals and organizations interested in the outcomes of cases those candidates may later decide as judges.

Findings Regarding Judicial Elections

1. The Commission finds that the cost of judicial campaigns is escalating.
2. 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.
3. The Commission finds that when campaign costs exceed contributions received, judges often take out loans to make up the difference.
4. 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.
5. The Commission finds that when judges make decisions that favor contributors, they may be accused of favoritism.
6. The Commission finds a pervasive public perception that campaign contributions influence judicial decision-making.
7. The Commission finds that judges are uncomfortable soliciting contributions, which may discourage outstanding judicial candidates from seeking or remaining in judicial office.
8. The Commission finds that qualified candidates who lack connections to wealthy contributors may be impaired in their ability to compete effectively for judicial office.
9. The Commission finds that when judges are required to campaign like political branch candidates, it contributes to the inappropriate politicization of the judiciary.
10. The Commission finds that the only significant public financing program for judicial campaigns implemented to date has not been adequately funded.

Principles in Support of Public Financing of Judicial Elections

1. Public financing programs must be sensitive to Constitutional limitations on states' power to regulate judicial campaign finance.
2. Public financing programs should be designed to best suit the particular needs of a particular state or territory.
3. Public financing programs are most suitable for primary and general election campaigns of high court judges, and in some cases, intermediate appellate judges.
4. Public financing programs should provide judicial candidates with full public funding in amounts sufficient to encourage participation.
5. Public financing programs should be restricted to serious candidates in contested elections who have met specified criteria indicating a certain level of support.
6. Public financing programs should be conditioned on the candidates' agreement to forego private financing and to limit their use of public funds to legitimate campaign purposes.
7. States and territories should address the impact of independent campaign expenditures and recognize the impact of general issue advocacy on public financing programs.
8. Public financing programs should distribute funds in the form of bloc grants to candidates and should also provide voter guides to the electorate.
9. Public financing programs should be funded from a stable and sufficient revenue source.
10. Public financing programs should be administered by an independent and adequately staffed entity.

The recommendations were reviewed by the ABA Standing Committee on Judicial Independence after additional comments were received. A report with recommendations was submitted to the ABA House of Delegates, the ABA's policy making body, and adopted at the ABA 2002 Midyear meeting in Philadelphia in February 2002.

OPENING

In a speech to an ABA symposium on judicial independence, US Supreme Court Justice Anthony Kennedy said, “The law makes a promise – neutrality. If the promise gets broken, the law as we know it ceases to exist. All that’s left is the dictate of a tyrant, or perhaps a mob.” The rule of law is a fundamental concept of our government. It allows all our citizens to enjoy the liberty and freedoms promised by our state and federal constitutions and protects against the tyranny of the majority. By interpreting state and federal constitutions, the judicial branch checks the wills of the legislature and the executive to ensure that all citizens, whether part of the majority or not, are allowed equal access to all rights and liberties guaranteed them.

While there are many threats to judicial independence, one of the more pervasive problems is the nature and cost of running for the bench. Campaign battles may be necessary for legislative and executive branch elections, where people are being elected to represent viewpoints of a constituency and advocate on their behalf. They are not natural, though, for the judiciary. The judicial branch is uniquely structured to be independent and separate from the legislative and executive branches. Judges are required to be impartial, neutral decision-makers who apply the facts of the case to the law, without looking to the prevailing popular trends, without fear or favor. Respect for the rule of law is what sets our country apart and makes our system of government an example for all. Judges should not be elected because they favor a particular industry, philosophy or stand on crime. They cannot campaign on a platform, nor should they be elected as representatives of a particular interest.

Unfortunately, though, due to the cost of campaigning for a seat on the bench, judicial candidates are forced to turn to others for support. By turning to others for financial support to run an election, judges open the door to comparisons with races for legislative and executive offices. Questions are asked about where the money comes from and what is expected in return for the money. A detrimental consequence of this is the erosion of public trust and confidence that the judicial branch can and does perform its duties with neutrality and impartiality, without regard to prevailing trends or outside influences.

Financing of judicial campaigns raises many distinct and complicated issues. Approximately 80% of this country’s state and local judges must stand for election in some manner. Whether it is the initial path to the bench or a retention election, or both, the cost of running a campaign has increased significantly over the past decade.

The ABA has long supported the need for improvements in judicial campaign financing. In 1997 the ABA created a Task Force on Lawyers' Political Contributions to examine lawyers' contributions to the campaigns of government officials, judges and judicial candidates. The Task Force studied these areas and submitted two separate reports to the ABA House of Delegates. In 1998 the Task Force issued the second of its reports, which dealt with lawyers' contributions to judicial campaigns. Recommendations dealing with this report were submitted to the ABA House of Delegates at the 1998 Annual Meeting but were withdrawn. Then-ABA President Philip Anderson created an Ad Hoc Committee on Judicial Campaign Finance to review the recommendations of the Task Force and to recommend to the ABA House of Delegates how these recommendations might best be given effect. At the ABA Annual Meeting in August 1999 the report and recommendations of the Ad Hoc Committee were presented to and adopted by the ABA House of Delegates. The recommendations modify the ABA Model Code of Judicial Conduct. Both the initial Task Force report and the Ad Hoc Committee report touch on public financing of judicial elections as a viable alternative. Due to the depth of study needed, though, both reports defer the matter. The Ad Hoc Committee report specifically assigns the task of additional study on the issue of public financing to the ABA Standing Committee on Judicial Independence.

With this mandate, the Standing Committee approached the Joyce Foundation for financial support to undertake a two year study on public financing of judicial campaigns. The Standing Committee formed a Commission on Public Financing of Judicial Campaigns, composed of nine experts in the areas of judicial ethics, campaign finance reform, and election law. The Commission held three public hearings over the course of six months, bringing in a variety of different witnesses to testify before the Commission. Witnesses who testified before the Commission include:

Hon. Eric Andell, former Justice, Texas First Court of Appeals
John Bonifaz, National Voting Rights Institute
Roger Bybee, Wisconsin Citizen Action
Joe Cerrell, Cerrell & Associates
Cristen Feldman, Texans for Public Justice
Wayne Fisher, Past President, Texas State Bar Association
Rep. Pete Gallego, Texas House of Representatives
Deborah Goldberg, The Brennan Center for Justice
Craig Holman, Ph.D., The Brennan Center for Justice
Marshall Hurley, Marshall Hurley, PLLC
Dr. Ruth S. Jones, Ph.D., Professor of Political Science and Executive

Assistant to the President for University Programs, Arizona State University

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Kevin Kennedy, Wisconsin State Board of Elections
Mark Lopez, American Civil Liberties Union
Michael Malbin, Campaign Finance Institute
Mike McCabe, Wisconsin Democracy Campaign
Terry McCoy, League of Women Voters of Ohio
Hon. Thomas Moyer, Chief Justice, Supreme Court of Ohio
Nick Nyhart, Public Campaign
Bob Peck, Association of Trial Lawyers of America
Hon. David Peeples, Texas judiciary
Samantha Sanchez, National Institute on Money in State Politics
Roy Schotland, Georgetown University Law School
Hon. B.B. Schraub, Presiding Judge, Texas 3d Administrative Judicial Region
Robert M. Stern, Center for Governmental Studies
Jim Wootton, Institute for Legal Reform (submitted written testimony)

Commission members reviewed voluminous materials and revised a number of drafts. The following report represents a year's worth of hard work and great effort from a very talented Commission.

I. INTRODUCTION

A. The Unique Role of Judicial Elections in State Government

Judicial elections are different from political branch elections in fundamental ways. Governors and legislators are, by design, the people's representatives. They are not expected to insulate themselves from the electorate, but are supposed to be influenced by and reflect their constituents' point of view. For that reason, those who seek office in the political branches make campaign promises to decide pending and future matters in particular ways as a means to attract like-minded voters. The peril of financing such races with private funds is not that it enables contributors to influence governmental decision-making, but that it enables them to influence governmental decision-making more than other constituents.

Judicial candidates, in contrast, are not representatives and do not have "constituents" in the same sense as other elected officials. They are supposed to be—and appear to be—impartial, to apply the law as it is written regardless of whether it is popular with voters, and are subject to discipline if they make campaign promises to decide specific cases particular ways. Because virtually any external influence over a judge's independent decision-making is inappropriate, the need to insulate judges from the influence of—and the appearance of influence of—campaign contributions may be all the more pressing. Although the vast majority of judges in the United States stand for election, the states have long struggled to reconcile their commitment to electoral accountability with the need to preserve judicial independence. A brief historical overview of state judicial selection chronicles that struggle.

B. Judicial Elections in Historical Context

Colonial American courts were dependent on the monarch for their continued tenure in office, which was a source of considerable consternation to the colonists and culminated in a grievance to King George, in the Declaration of Independence. To reduce judicial dependence on the executive, the fledgling states provided for judicial selection via gubernatorial or legislative appointment and transferred the removal power from the executive to the legislative branch.

Appointment remained the exclusive method of judicial selection among the states until the ascendance of Jacksonian Democracy in the 1830s. Jackson's unique brand of populism was very much in tension with judicial independence and the appointive

systems that ostensibly fostered it. “The boast of an independent judiciary is always made to deceive you,” charged one Jackson disciple. “We want no part of our government independent of the people.” Instead, he argued, “judges should be made responsible to the people by periodical elections.”¹ Mississippi made the move to judicial elections in 1832, as did every state entering the union after 1845 and several of the original states that had previously appointed their judges.

Jacksonian skepticism of judicial independence and desire for judicial accountability help to explain the birth of partisan judicial elections in the 1830s, but does not account for the continued momentum of the elective judiciary movement long after Jackson and his followers had lost influence. As historian Kermit Hall has explained, the lawyers who drafted state constitutions providing for judicial elections were not hostile to judicial independence, but solicitous of it.² From their perspective, appointive judiciaries did not produce independent judges, but judges who were dependent on the governor or legislature that appointed them. In their minds, strong, independent judges could only be assured if judges were elected, so that their authority derived from the people they served.

With the advent of the Populist/Progressive Era at the turn of the twentieth century, the relationship between partisan judicial elections and judicial independence came under renewed scrutiny. Partisan elections did not produce independent judges, progressive reformers argued, but judges who were dependent on the political parties for their nomination. To foster independence, they urged, judicial elections should be non-partisan.

Non-partisan elections were not without their skeptics, either. By depriving the electorate of party-affiliation as a basis for distinguishing among judicial candidates, critics claimed, non-partisan elections often led voters to base their decisions on little more than name-recognition, which served the interests of neither independence nor accountability. In an effort to encourage the selection of more capable and independent judges, some states introduced so-called merit-selection systems, in which judges are appointed from a pool of nominees selected by a panel of public officials, lawyers and lay people, on the basis of their qualifications. To ensure

¹ Quoted in Mary L. Volcansek and Jacqueline L. Lafon, *JUDICIAL SELECTION: THE CROSS-REVOLUTION OF FRENCH AND AMERICAN PRACTICES* 90 (1988).

² Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 AM. B. FOUND. RES. J. 345.

accountability, judges so appointed later run unopposed in retention elections, in which voters are asked to decide whether the judge should remain in office. In short, the proliferation of judicial selection methods among the states manifests an effort spanning the life of the nation to make judges accountable to, and at the same time independent of the electorate. Some states, like their counterparts in the federal system, have successfully struck this balance for over 200 years by retaining a purely appointive model; others have done so by combining initial appointment with retention elections; and still others by selecting judges in more traditional elections. This need to insulate judicial decision-making from excessive partisan, political and popular influence—even as we call judges to task in periodic elections—distinguishes the selection of judges from their counterparts in the political branches and is at the forefront of the Commission’s thinking as it approaches the task before it here.

C. Judicial Elections Today

In the last five years, the American Bar Association has become increasingly concerned by recent developments in the state judicial selection arena that threaten to impair the independence of the judiciary.

- In 1997, the ABA Commission on Separation of Powers and Judicial Independence was constituted by President N. Lee Cooper under the auspices of the Federal Judicial Improvements Committee. The Commission found that “[t]he election process for judicial selection and retention in many states gives rise to concerns about the impact of campaign financing on the impartiality of judges.” The Commission concluded that “greater consideration needs to be given to the serious ethical problems presented by judicial campaign fund-raising,” and endorsed then pending amendments to Rule 5C(2) of the Model Rules of Professional Conduct that would require judges to recuse themselves from cases in which the lawyers or parties had made contributions to the judges’ reelection campaigns above specified amounts.
- In 1998, the ABA Task Force on Lawyers’ Political Contributions concluded that “[t]he status quo in judicial campaign finance has already eroded public confidence in several jurisdictions and puts it at too great a risk in all 42 States where judges stand for election.” The Task Force recommended further revisions to Rule 5(C)(2) that would impose more comprehensive disclosure obligations on campaign contributions. A version of these recommendations was adopted by the ABA House of Delegates in 1999.
- In 1998-99, the ABA, under the leadership of President Philip S. Anderson, sponsored a series of symposia leading to the National Conference on Public

Trust and Confidence. These meetings examined the foundations of judicial independence, the state of civic society and the public perception of the judicial role in our democratic republic.

- In 2000, the ABA Commission on State Judicial Selection Standards noted that “[t]here has in recent years been an alarming increase in effort by special interests to influence the outcome of judicial elections through both financial contribution and attack campaigning.” To improve the judicial selection process, the Commission recommended the establishment of “credible, deliberative, non-partisan bodies to evaluate the qualifications of all judicial aspirants.” These judicial eligibility commissions were recommended for all state systems without regard to the method of judicial selection they employ.

This Report on the public financing of judicial campaigns represents the next in a logical progression of projects that the ABA has undertaken to promote judicial independence, improve judicial selection, and better the process by which judicial election campaigns are financed.³ In this regard, the ABA joins with all fifty states in a shared commitment to a system of selecting judges that will produce a highly capable, eminently qualified, impartial, independent, and yet accountable judiciary. As Marshall Hurley, a private practitioner from North Carolina who has represented the Republican National Committee and the North Carolina State Republican Party, testified before the Commission:

Everybody in this room and many of our professional counterparts and colleagues all agree on what we want on the bench. We want independence. We want people who have the ability to make those good decisions and . . . to resolve those disputes or to sentence that criminal and to do the job so, to me, the starting point is a point of unity.⁴

³The ABA has long supported merit selection systems in which judges are initially appointed and later stand for retention election as striking the right balance between judicial independence and accountability. At first blush, the report of this Commission, which evaluates the desirability of public financing in states that employ conventional elections, might seem at odds with an ABA position that eschews such elections in favor of merit selection. However, the ABA recently reaffirmed its preference for merit selection but has adopted policy designed to improve judicial elections in recognizing the impediments to adopting merit selection in many states.

⁴ *Public Financing of Judicial Campaigns: Hearing Before the American Bar Association Standing Committee on Judicial Independence*, March 23, 2001 at 179 (hereafter “Commission Hearing”).

The Commission's findings in this Report take up where those of its predecessor commissions left off. As elaborated below, the Commission finds that cost of running judicial campaigns has increased dramatically as judicial races are being contested with increasing frequency and intensity. Judicial candidates must cover that added cost by taking out larger loans or accepting more campaign contributions from lawyers, prospective litigants and interest groups. The public suspects that judges are influenced by their contributors, and allegations of quid pro quo are becoming more common. For their part, many judges and prospective judges are uncomfortable with this escalating "arms race" in judicial elections; to avoid it, some sitting judges have gone so far as not to seek reelection, and some highly qualified persons have been discouraged from seeking judicial office in the first place. The net effect of these developments has been to create the impression that judges are no more "impartial" than other elected officials, which threatens to further politicize the judiciary and undermine public confidence in the courts.

Put another way, placing judges in the unwelcome position of soliciting escalating sums of money from individuals and organizations interested in the outcomes of cases that those judges decide, gives rise to what Wayne Fisher, a past President of the Texas State Bar and the Chair of the Texas Judicial Campaign Finance Study Committee, characterized before the Commission as a "perceived impropriety":

[I]f you are going to have an elective system dependent upon contributions raised from the public . . . most of those contributions historically have come from lawyers and/or people or groups who have an interest in the outcome of litigation, and that, of course, creates this problem of perceived impropriety."⁵

To address this perceived impropriety, the Commission has explored the desirability and feasibility of financing judicial campaigns with public money. Over the course of the past year, the Commission held three hearings across the country, took testimony from over 25 witnesses, reviewed published materials, commissioned reports from political science consultants and met for several days of deliberations. At the conclusion of that process, the members of the Commission agreed upon a primary recommendation and ten implementing principles.

⁵ *Commission Hearing*, November 17, 2000 at 23-24.

Recommendation:

The Commission recommends that states which select judges in contested elections finance judicial elections with public funds, as a means to address the perceived impropriety associated with judicial candidates accepting private contributions from individuals and organizations interested in the outcomes of cases those candidates may later decide as judges.

Implementing Principles:

1. Public financing programs must be sensitive to Constitutional limitations on states' power to regulate judicial campaign finance.
2. Public financing programs should be designed to best suit the particular needs of a particular state or territory.
3. Public financing programs are most suitable for primary and general election campaigns of high court judges and, in some cases, intermediate appellate judges.
4. Public financing programs should provide judicial candidates with full public funding in amounts sufficient to encourage participation.
5. Public financing programs should be restricted to serious candidates in contested elections who have met specified criteria indicating a certain level of support.
6. Public financing programs should be conditioned on the candidates' agreement to forego private financing and to limit their use of public funds to legitimate campaign purposes.
7. States should address the impact of independent expenditures and recognize the impact of general issue advocacy on public financing programs.
8. Public financing programs should distribute funds in the form of bloc grants to candidates and should also provide voter guides to the electorate.
9. Public financing programs should be funded from a stable and sufficient revenue source.

10. Public financing programs should be administered by an independent and adequately staffed entity.

Let us be clear. The path to reform is far from certain. Proposals to finance political branch campaigns have been debated actively for decades, but this Commission finds itself at the forefront of efforts to establish public financing programs for judicial campaigns--an idea whose time has come only now. The Commission recommends that states consider financing contested judicial elections with public funds, but does so with its eyes open to the reality that public financing offers no panacea to the problems that pervade judicial campaign finance in many states. The remainder of this report elaborates on the Commission's findings, recommendations, and implementing principles.

II. COMMISSION FINDINGS

A. The Commission finds that the cost of judicial campaigns is escalating.

The cost of running judicial election campaigns is increasing dramatically across the country. “In the thirty-nine states that elect judges at some level,” reported The Nation magazine in 1997, “the cost of judicial races is rising at least as fast as that of either Congressional races or presidential campaigns, as candidates for the bench pay for sophisticated ads, polls and consultants.”⁶ While cautioning the Commission that national averages can be misleading, given variations among the states, Samantha Sanchez of the National Institute on Money in State Politics testified that “[t]he average, or mean, cost of running for [Supreme Court judicial] office has risen over the last decade, as has the median cost of running.”⁷ In his testimony to the Commission Dr. Craig Holman, Senior Policy Analyst for the Democracy Program at the Brennan Center for Justice, and a consultant to the Commission, attributed the phenomenon to increased competition for judicial office: “Running for judicial office is costing dramatically more money than it ever has in the past. There’s been this brand new interest, apparently, in competing for judicial offices and where there are elections offered for it, it costs much more.”⁸

Some illustrations:

- In **Alabama**, total spending on two Supreme Court seats increased from \$237,281 in 1986, to \$2,080,000 in 1996.⁹

⁶Sheila Kaplan & Zoe Davidson, *The Buying of the Bench*, THE NATION (1997).

⁷ Samantha Sanchez, *Money in Judicial Politics*, March 21, 2001 at 2. This report was produced for the American Bar Association Standing Committee on Judicial Independence.

⁸ *Public Financing of Judicial Campaigns: Information Session Before the American Bar Association Standing Committee on Judicial Independence*, September 8, 2000 at 95 (hereafter “Information Session”).

⁹ Mark Hansen, *A Run for the Bench*, A.B.A. J. 68, 70 (October, 1998).

- In **California**, median spending on contested elections in Los Angeles County Superior Court rose from \$3,000 in 1970, to \$70,000 in the early 1990s—an increase of 2,000 percent.¹⁰
- In **Illinois**, three Supreme Court candidates raised more money in primary elections than any candidate had previously raised in their entire campaign.¹¹
- In **Kentucky**, spending increased from \$52,000 for one Supreme Court seat in 1978, to \$412,362 for two seats in 1996.¹²
- In **Michigan**, a Supreme Court candidate raised \$180,000 to win election in 1994; in 1998, the winning candidate raised over \$1 million.¹³
- In **Montana**, average spending per Supreme Court seat increased from \$63, 647 in 1984, to \$138, 460 in 1996.¹⁴
- In **North Carolina**, the greatest amount spent in a Supreme Court race in 1988 was \$90,330; by 1994, that amount had increased to \$241,709.¹⁵
- In **Ohio**, the campaign for the Chief Justice’s seat increased from \$100,000 in 1980, to \$2.7 million in 1986.¹⁶

¹⁰ The Price of Justice: A Los Angeles Area Case Study in Judicial Campaign Financing 51 (1995).

¹¹ Mark Schauerte, *Fund-raising for Supreme Court Primaries Breaks Records*, 23 CHICAGO LAWYER, 10 (March, 2000).

¹² Hansen, *supra* note 9 at 70.

¹³ George Weeks, *Fix is Long Overdue on Selection for State Supreme Court*, THE DETROIT NEWS, November 28, 1999.

¹⁴ Hansen, *supra* note 9 at 70.

¹⁵ Kaplan & Davidson, *supra* note 6.

¹⁶ Hansen, *supra* note 9 at 69.

- In **Pennsylvania**, two candidates for a Supreme Court seat in 1987 raised a total of \$523,000 between them; by 1995, that figure had increased to \$2.8 million.¹⁷
- In **Washington**, the victors in the 1980 Supreme Court races spent between \$30,000 and \$50,000; by 1995, that figure was up to \$150,000.¹⁸
- In **Wisconsin**, former Chief Justice Nathan Heffernan noted that in 1965, his Supreme Court race cost him \$50,000, as contrasted to the \$1.2 million spent in 1999.¹⁹

B. 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.

As the cost of campaigning escalates, judicial candidates are required to raise more and more money from contributors who typically include lawyers, prospective litigants or organizations with an economic or political interest in the outcomes of cases to be decided by the courts to which the candidates are seeking election (or reelection). It bears emphasis that unlike executive and legislative branch races, which are supported by a comparatively diverse funding base, judicial races attract the attention of a narrower band of interested contributors that have traditionally been limited to lawyers, and more recently been expanded to include a range of interested groups. In her study of Supreme Court races, Samantha Sanchez found that lawyers and undifferentiated lobbyists were responsible for 28.1% of total contributions nationwide. The combined contributions of groups representing the interests of general business, real estate and insurance, energy and natural resources, construction, health, labor, transportation, agriculture and single ideological issues were responsible for an additional 23.7%.²⁰ Moreover, those percentages are likely to be understated, insofar as the sources for 24% of all contributions in Ms. Sanchez's ongoing study currently remain unknown.

¹⁷*Id.*

¹⁸Kaplan & Davidson, *supra* note 6.

¹⁹ *Work in Progress*, The Joyce Foundation.

²⁰ Samantha Sanchez, *Money in Judicial Politics*, March 21, 2001 at 7.

Some illustrations:

- Between September and December 1999, an **Alabama** Associate Justice raised over a quarter of a million dollars, with \$35,000 coming from the Business Council of Alabama, \$10,000 from the Alabama Forestry Association, and \$5,000 each from political action committees representing automobile dealers and insurance agents. “Republicans traditionally enjoy heavy support from the business community,” a Mobile newspaper reported, while “Democrats have relied more on trial lawyer backing.”²¹
- In **California**, the Los Angeles Times reported that one justice raised over \$600,000 in support of his retention election “from businesses, attorneys and judges,” while another raised very nearly that amount from lawyers and judges, among others.²² In addition, a Report issued in 1995 found that 45% of contributions to Los Angeles County superior court races came from lawyers.²³
- In **Florida**, the Miami Herald reported that in 1998 in Miami-Dade County “more than \$5 million was contributed and loaned to judicial campaigns. The money was derived mostly from people within the legal profession.”²⁴
- In **Illinois**, the press reported that a Supreme Court candidate criticized one of her opponents for accepting “a string of contributions, including \$80,000 from 10 personal-injury law firms,” and a second for accepting a \$35,000 contribution from a real estate developer.

²¹ Sean Reilly, *GOP Justices Stomp Democrats in Fund Raising*, MOBILE REGISTER, February 2, 2000.

²² Maura Dolan, *Members of High Court Face Ouster Attempt*, LOS ANGELES TIMES, October 18, 1998 at A3.

²³ *The Price of Justice: A Los Angeles Area Case Study in Judicial Campaign Financing* 67 (1995).

²⁴ Scott Silverman, *Merit Selection: Best System for Choosing Judges*, THE MIAMI HERALD, July 23, 1999.

- In **Louisiana**, the Baton Rouge Advocate reported that “Groups with major financial interests in judicial decisions—trial lawyers and business—are investing heavily in ‘their candidates for races.’”²⁵
- In **Michigan**, the Detroit News reported that for each of three Supreme Court seats “Corporate contributions for Republicans and union contributions for Democrats will be extensive;”²⁶ the same columnist later added: “Both Democrats, darlings of trial lawyers, and Republicans, buddies of big business, have soared past the half-million dollar mark in Supreme Court campaign spending in recent years.”²⁷
- In **North Carolina**, a journalist with a Raleigh newspaper complained that “Judges are spending more of their time begging for campaign contributions from the very lawyers who appear before them.”²⁸
- In **Ohio**, the Cleveland Plain Dealer reported that “more than half—\$2.1 million of the \$4.1 million Ohio justices received in campaign contributions from 1993 through 1998 came from lawyers and lobbyists.”²⁹
- In **Texas**, the Texas Lawyer reported on a study by a reform group which found that “\$3.7 million of the \$9.2 million contributed to

²⁵ Lanny Keller, *Judicial Campaigns Undermine Respect*, THE ADVOCATE, January 13, 2000.

²⁶ George Weeks, *Michigan Should Let the Governor Appoint Top Court’s Justices*, THE DETROIT NEWS, October 17, 1999, at C6.

²⁷ George Weeks, *Fix is Long Overdue on Selection for State Supreme Court*, THE DETROIT NEWS, November 28, 1999.

²⁸ Rob Christensen, *Judicial Reform Stalls Out*, THE RALEIGH NEWS & OBSERVER, February 12, 1999, at A3.

²⁹ T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, THE CLEVELAND PLAIN DEALER, February 15, 2000, at 1A.

seven justices between 1994 and 1997 was given by contributors who were closely linked to parties on the court docket.”³⁰

- In **West Virginia**, “among the four Democrats vying for two seats on the court . . . personal injury lawyers have been the biggest contributors among donors;” trial lawyer contributions to three of the four Supreme Court candidates accounted for 63 percent, 56 percent and 53 percent of their total contributions.³¹

C. The Commission finds that when campaign costs exceed contributions received, judges often take out loans to make up the difference

In addition to soliciting contributions, candidates sometimes borrow needed funds by loaning personal funds to their campaigns, or borrowing funds from other sources. Samantha Sanchez’s study revealed that 6.4% of the total funding for Supreme Court races came from the candidates themselves.³² In the case of independently wealthy judicial candidates who underwrite their own campaigns, this may pose no problems. Such candidates make a point of saying that by campaigning with their own money, they are beholden to no one,³³ and in **West Virginia**, one judge has gone so far as to propose that the Code of Judicial Conduct be revised to prohibit campaign contributions from all sources other than family funds.³⁴

Unless states are prepared to limit the pool of judicial candidates to the independently wealthy, however, those who cannot afford to self-finance their

³⁰ Janet Elliott, “60 Minutes” Visit Finds Court’s Defenders in Hiding, TEXAS LAWYER, August 24, 1998, at 1.

³¹ Chris Stirewalt, *Lawyers Donate Most to Judicial Candidates*, THE CHARLESTON GAZETTE & DAILY MAIL, May 6, 2000.

³² Samantha Sanchez, *Money in Judicial Politics*, March 21, 2001, at 7.

³³ Chris Stirewalt, *Lawyers Donate Most to Judicial Candidates*, THE CHARLESTON GAZETTE & DAILY MAIL, May 6, 2000 (Supreme Court candidate and incumbent Robin Davis loaned her own campaign \$475,000, which in the words of her campaign director “allows her to never be beholden to one group or another.”)

³⁴ Fanny Seiler, *Changes to Judicial Ethics*, THE CHARLESTON GAZETTE & DAILY MAIL, February 1, 2000.

campaigns and who have not generated contributions sufficient to wage an effective campaign, often borrow the difference. Dr. Holman told the Commission that in **California** trial court elections, “the people suffering the greatest burden of the costs of these judicial campaigns are the candidates themselves,” who will “very frequently go into debt,” and “assume very significant loans.”³⁵ The problem, Dr. Holman explained, was that “if they win, they’re on the bench and they’ve got this large loan they’ve got to repay,” which means that “they continue to have to do fund-raising after the election in order to pay themselves back.”³⁶ The pressure on such judges to raise money is thus compounded; they must seek out contributors to ensure not only their reelection but their solvency as well.

D. 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.

In addition to the support that judicial candidates receive from direct contributions and personal loans, candidates are often supported indirectly by independent campaigns. In his report to the Commission, consultant Craig Holman found that fully a third of all campaign advertisements in judicial elections were run by groups independent of the candidates themselves, who were in turn responsible for slightly less than half of all advertising, with the remainder sponsored by political parties.

The perceived impropriety that arises when a lawyer or interested organization contributes to a judicial campaign may not accompany independent advertising expenditures on a candidate’s behalf to the same extent, insofar as the latter do not involve transfers of funds from one interested in how the judges decide particular issues to the would-be judge who will decide those issues. Such expenditures are nevertheless a concern for two reasons. First, it is reasonable to anticipate that if the opportunities for interested organizations to make private contributions to judicial candidates directly are limited or eliminated by public financing programs, such organizations may redirect those contributions into independent campaigns. Second, the attacks on judicial decisions and judges in election campaigns that have been of particular concern to the ABA in recent years have occurred largely in the context of advertising sponsored by independent groups. Craig Holman reported that 76% of all “attack” ads that ran in judicial campaigns were produced by independent groups. Advertising run by the candidates, on the other hand, tended to promote their

³⁵ *Information Session*, *supra* note 8 at 97.

³⁶ *Id.* at 101.

qualifications, while ads run by political parties tended to contrast the candidates.

E. The Commission finds that when judges make decisions that favor contributors, they may be accused of favoritism.

The judge who accepts a “contribution” in exchange for giving the contributor favorable treatment in a specific case, has committed a form of bribery that will subject the judge to disciplinary action for violation of the code of judicial conduct, criminal prosecution and removal from office. Such cases of outright bribery are rare, but situations in which members of the press or public call attention to what they regard as a suspicious correlation between a judge’s campaign contributions and the judge’s subsequent, favorable treatment of the contributor, are more common. The notion that people will naturally tend to make such correlations is neither surprising nor new. After noting that an overwhelming percentage of judges, lawyers and the general public in Texas “believe that judicial campaign contributions have at least some if not a substantial influence on judicial decisions,” Texas Representative Pete Gallego told the Commission that:

I really don’t think that that’s a new phenomenon, because if you look back at the Old Testament. . . the Book of Deuteronomy has a statement that says, “judges and officials shall not take a gift, for a gift blinds the eyes of the wise and perverts the words of the righteous.” ³⁷

The problem is further exacerbated by campaign advertising in Michigan, Ohio and elsewhere that has accused judges of being controlled or influenced by their contributors. Other examples:

- In **Louisiana**, a staff writer for the Times-Picayune opined that the Louisiana Supreme Court “buckled to pressure from big business” when it revised rules limiting the practice of the Tulane legal clinic in response to a suit it had filed which antagonized interested businesses. A *Frontline* television news magazine story reported that the move enabled the Chief Justice “to pick up enough of the business donors to win another term.” “Anyone who watched *Frontline*,” the staff writer concluded, “must have come away with the impression that [the Louisiana Supreme Court Chief Justice] sold his soul to get re-elected.” ³⁸

³⁷ *Commission Hearing*, November 17, 2000 at 80.

³⁸ James Gill, *Influencing Louisiana’s Judiciary*, The New Orleans Times-

- In **Michigan**, the Michigan Manufacturers Weekly Newsletter boasted that “[d]uring 1998-99, MMA-PAC contributions swayed the Supreme Court election to a conservative viewpoint, ensuring a pro-manufacturing agenda.”³⁹
- In **New York**, the Association of the Bar of the City of New York found “an apparent correlation between campaign contributions to Surrogate Court judges and appointments as guardians ad litem.”⁴⁰
- In **Ohio**, the Cleveland Plain Dealer reported on the allegations of a court reform group, that “The Ohio Supreme Court ruled favorably two-thirds of the time for clients of the 20 Cleveland area attorneys who gave the most to justices’ political campaigns from 1993 through 1998.”⁴¹
- In a segment titled “Justice for Sale” 60 Minutes reported that in 1987, when **Texas** Supreme Court justices were receiving most of their contributions from plaintiffs’ lawyers, plaintiffs won 67 percent of the time, whereas in 1998, when the court received “most of its contributions from corporations, and doctors, and their lawyers,” the “defendant wins 69 percent of the time.”⁴²

It is possible to explain each of these correlations—if indeed they do exist—in terms decidedly less sinister than those ascribed to them by the media or other organization responsible for their publication.⁴³ Even accepting, however, that correlation is not

Picayune, December 3, 1999.

³⁹ Trevor Coleman, *Complaint Overreacts of Remarks About State Supreme Court*, Detroit Free Press, October 25, 1999.

⁴⁰ John Caher, *Judicial Election Funding Reform Explored*, NEW YORK LAW JOURNAL, December 8, 1999.

⁴¹ T.C. Brown, *majority of Court Rulings Favor Campaign Donors*, CLEVELAND PLAIN DEALER, February 15, 2000, at 1A.

⁴² *Justice for Sale?* CBS News, 60 Minutes, Volume XXXI, Number 7 at 14-15.

⁴³ In Louisiana, for example, the business interests that allegedly influenced the Chief Justice to crack down on the Tulane clinic opposed the justice’s reelection

tantamount to causation, the appearance of impropriety—the perception that the judge in question has acted in favor of a contributor—may persist.

F. The Commission finds a pervasive public perception that campaign contributions influence judicial decision-making.

From the perspective of the public, the media, and many court reform organizations, the old adage that “money talks” is accepted wisdom when it comes to assessing whether judges are likely to be influenced by the campaign contributions they receive. The perception that judges are influenced by the contributors to their reelection campaigns is widespread. This “perceived impropriety” does not accompany all private contributions. Contributions of inconsequential amounts are insufficient to create a reasonable concern that they are capable of buying influence. More sizable contributions, however, are a different matter.

- In **Alabama**, the Birmingham News reported that the Alabama Supreme Court would be asked to review a \$15.2 million verdict against an insurance company for violating the privacy of a state senator, but suggested that the “bigger question” was whether the Court should hear the case, because “all nine members of the court have received campaign contributions directly from individuals or political action committees connected to the case.”⁴⁴
- In **California**, Dr. Holman reported on an interview with a Los Angeles trial judge who told him “It’s always in the back of my mind who gave me . . . a large contribution and who didn’t.” The judge

throughout the campaign, calling into question the extent of their influence over him. Daniel Juneau, President of the Louisiana Association of Business and Industry, *Business Influence Over Court was Overstated*, NEW ORLEANS TIMES-PICAYUNE, December 13, 1999 at 4B. In Michigan and Texas, the fact that the judicial philosophies of elected judges coincide with the political agendas of their contributors does not necessarily imply that the judges were influenced by their contributors so much as that the contributors supported judges who think as they do (which may underscore the impact of campaign contributions on election outcomes, but does not necessarily evidence corruption). In New York and Ohio, the fact that lawyers who contribute to the campaigns of judges are more likely to win their cases and receive desirable appointments than non-contributors, may conceivably reflect little more than that successful and effective lawyers often have more money to give to judicial campaigns.

⁴⁴ Michael Sznajderman, *Alfa Case May Bring Contribution Conflicts With Court*, THE BIRMINGHAM NEWS, March 3, 2000.

emphasized that “I try not to let it influence my judgment,” but Holman noted that it still posed a problem because “it offers an appearance that perhaps judges may be up for sale.”⁴⁵

- In **Florida**, a columnist for the Tampa Tribune noted that “incumbent judges feel compelled to build campaign war chests to fend off would-be challengers or to keep prospective candidates from even considering running. And when judges accept money from citizens, often lawyers and law firms, voters are left with the impression that the judges’ independence may be compromised.”⁴⁶
- In **Illinois**, Circuit Court Judge Bonnie Wheaton (who opted to self-fund her unsuccessful Supreme Court race) noted that “people do not want judges soliciting large contributions from attorneys and other special interests.”⁴⁷
- In **Louisiana**, a Baton Rouge survey revealed that 56% of voters thought that judicial decisions are influenced by campaign contributions, while 33% thought that “for the most part the judges rule impartially.”⁴⁸
- In **Michigan**, a Detroit Free Press editorial noted that: “[t]here’s been tremendous controversy here and across the nation about special interests giving heavily to state Supreme Court elections. It’s created at least the perception that some justices are swayed by contributions.”⁴⁹

⁴⁵ *Information Session*, *supra* note 8 at 108.

⁴⁶ Editorial, *The Difficult Task of Selecting Judges*, THE TAMPA TRIBUNE, December 20, 1999 at 12.

⁴⁷ Scott Fornek, *High Court Candidates Spar Over Contributions*, THE CHICAGO SUN-TIMES, February 4, 2000.

⁴⁸ Lanny Keller, *Judicial Campaigns Undermine Respect*, THE BATON ROUGE ADVOCATE, January 13, 2000.

⁴⁹ Editorial, *Out of Order*, DETROIT FREE PRESS, December 28, 1999.

- In **New York**, family court judge Dennis Duggan told the press that the perception that “judges can be influenced” by campaign contributions “pervades not only the general public but the profession as well.”⁵⁰
- In **North Carolina**, a journalist for the Raleigh News & Observer commented, “Judges are spending more of their time begging for campaign contributions from the very lawyers who appear before them. (How would you like to go before a judge, knowing the other party’s lawyer had given \$1,000 to his reelection kitty?)”⁵¹
- In **Ohio**, a 1995 survey reported that nine out of ten residents believed that campaign contributions influenced judicial decisions.⁵² Ohio Chief Justice Thomas Moyer testified before an ABA hearing in 1996, that “one of the defects in the state systems . . . where the judges are still elected” is that whenever it is reported that an interest group “has contributed ‘x’ number of dollars to a judicial candidate, the presumption by most people is that that has some influence on the judge’s conduct,” regardless of how “earnestly we assure the people that funds that come into our campaign don’t influence our decisions.”⁵³
- In **Pennsylvania**, the executive director of Pennsylvanians for Modern Courts complained that “[j]udges should not have to buy their way onto the bench,” because “it leads to the inescapable conclusion, whether accurate or not, that justice is for sale.”⁵⁴ A 1998

⁵⁰ John Caher, *Judicial Election Funding Reform Explored*, THE NEW YORK LAW JOURNAL, December 8, 1999.

⁵¹ Rob Christensen, *Judicial Reform Stalls Out*, THE RALEIGH NEWS & OBSERVER, February 12, 1999, at A3.

⁵² T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, THE CLEVELAND PLAIN DEALER, February 15, 2000, at 1A.

⁵³ *Public Hearing before the ABA Commission on Separation of Powers and Judicial Independence*, October 11, 1996 at 163.

⁵⁴ Meki Cox, *To Become a Judge in Philadelphia*. . . ASSOCIATE PRESS, February 10, 1999.

poll sponsored by a special commission appointed by the Pennsylvania Supreme Court, found that nine out of ten voters believed that judicial decisions were influenced by large campaign contributions.⁵⁵

- In **Texas**, a 1998 survey sponsored by the state Supreme Court found that 83% of Texas adults, 69% of court personnel, and 79% of Texas attorneys believed that campaign contributions influenced judicial decisions “very significantly” or “fairly significantly,” while 48% of judges indicated that money had an impact on judicial decisions.⁵⁶
- In **West Virginia**, the high percentage of campaign contributions coming from trial lawyers prompted a local court reform group representative to comment that “[t]hose kind of numbers speak poorly for the system, and have to leave voters wondering what all that money buys Even if justice is fair and unaffected, the appearance of impropriety is unavoidable.” A Supreme Court candidate agreed that the prevalence of lawyer contributions was “the most significant problem” in the process, because contributors “think they are buying influence,” and “wouldn’t be giving it if they thought they were throwing it away.”⁵⁷

G. The Commission finds that judges are uncomfortable soliciting contributions, which may discourage outstanding judicial candidates from seeking or remaining in judicial office.

In some states judges are permitted to solicit campaign contributions themselves. In most states they must do so through their campaign committees. In either case, many judges are deeply concerned about the appearance problem that is created when they accept contributions, directly or indirectly, from lawyers and interest

⁵⁵ Executive Summary, ABA Task Force Report on Judicial Campaign Finance, November, 1998 at 2.

⁵⁶ 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* (May 1999).

⁵⁷ Chris Stirewalt, *Lawyers Donate Most to Judicial Candidates*, THE CHARLESTON GAZETTE & DAILY MAIL, May 6, 2000.

groups who have an interest in the outcomes of cases the judges decide. Joe Cerrell, a political consultant who has managed hundreds of judicial campaigns, told the Commission that:

[T]he vast majority of judges HATE raising money. Most judges believe fund raising is not appropriate for them and they have a hard time asking for those checks. However, they also recognize fundraising is a necessary component in order to communicate with voters.⁵⁸

- In **Alabama**, Criminal Appeals Judge Pamela Baschab complained that “[s]pecial interests are slicking up candidates and selling them like washing powder . . . like dog food.”⁵⁹
- In **California**, former Justice Joseph Grodin observed that “a judge asking lawyers for money is quite degrading and threatens their integrity . . . Imagine appearing before a judge who received contributions from the other side.”⁶⁰
- In **Idaho**, a Supreme Court justice said that she “avoided any information that might indicate which attorneys donated to her campaign,” and that with respect to non-lawyers she would be told of large donations so that she could recuse herself from cases in which such donors were parties, but she conceded that the difficulties of avoiding appearance problems convinced her that judicial elections must be financed differently.⁶¹
- In **Michigan**, the Chief Justice complained that judicial elections had become “a battle of special interests.”⁶² “Several sitting justices have professed their distaste for seeking donations from lawyers and

⁵⁸ Prepared Statement of Joe Cerrell, Political Consultant (January 27, 2001).

⁵⁹ Robert Gordon, *Special Interests Bad for System, Judge Says*, THE BIRMINGHAM NEWS, December 10, 1999.

⁶⁰ V. Dion Haynes, *Interest Groups Politicizing State Court Balloting*, CHICAGO TRIBUNE, November 1998.

⁶¹ Mark Warbis, *Silak Stresses Non-Partisanship*, IDAHO STATESMAN.COM.

⁶² George Weeks, *Fix is Long Overdue on Selection for State Supreme Court*, DETROIT NEWS, November 28, 1999.

litigants who appear before their court,” a Detroit columnist reported, “[b]ut they argue that to disarm unilaterally would be suicidal as well as pointless.”⁶³

In some cases, judges have been so troubled by the compromising position in which they find themselves after accepting funds from interested contributors that they have declined to seek reelection. Former Texas Supreme Court Justice Bob Gammage was reported to have “quit after one term because contributions were corrupting the system.” Said Gammage, “people don’t go pour money into contributions because they want fair and impartial treatment. . . . They pump money into campaigns because they want things to go their way.”⁶⁴

H. The Commission finds that qualified candidates who lack connections to wealthy contributors may be impaired in their ability to compete effectively for judicial office.

John Bonifaz, Executive Director of the National Voting Rights Institute, testified before the Commission that in the view of his organization, privately funded judicial elections violate the equal protection clause of the United States Constitution. He pointed to data in Wisconsin reflecting that a disproportionately high percentage of judicial campaign contributions come from a small number of affluent white communities, while a disproportionately low percentage come from communities of color.⁶⁵

The Commission need not embroil itself in Constitution-parsing to conclude that the size of a judicial candidate’s campaign war chest is an imperfect indicator of that candidate’s qualifications or intrinsic popularity with the vast majority of voters who make no contributions. The size of that war chest nevertheless exerts an often decisive impact on election results. Dr. Craig Holman reported to the Commission on the findings of his California study:

⁶³ Brian Dickerson, *State Supreme Courts, Campaign Cash a Dangerous Mix*, DETROIT FREE PRESS, November 29, 1999.

⁶⁴ *Buying the Bench*, GAMBIT WEEKLY, November 30, 1999.

⁶⁵ *Commission Hearing*, November 17, 2000 at 167 (reporting that “ten wealthy and largely white” zip codes generated 43.3 percent of all contributions, while ten zip codes “where people of color comprised the majority” were responsible for only 1.8 percent).

Money does indeed win. The survey of California judges was accurate statistically. . . . [W]inners outspent losers each time, municipal court level as well as the superior court level.⁶⁶

To the extent that money is a more reliable proxy for determining who will win an election than who is most qualified to hold judicial office, there is legitimate cause for concern that privately funded judicial campaigns may limit access to judicial office for all candidates, of color or otherwise, who derive their support from less affluent communities that are unlikely to make significant financial contributions to judicial races.

I. The Commission finds that when judges are required to campaign like political branch candidates, it contributes to the inappropriate politicization of the judiciary.

The American Bar Association’s multi-year effort to address ongoing threats to judicial independence is driven by the recognition that the judiciary is not a political branch of government and should not be treated as one. To the extent that candidates for judicial office are obligated to run for office like political branch candidates, to solicit, accept and spend contributions from interest groups like political branch candidates, it is inevitable that the critical distinction between judges and “politicians” will begin to blur. Judge Eric Andell expressed this sentiment poignantly in his testimony before the Commission:

[I]t’s distasteful for the judicial branch of government to be tied into politics. . . . And yet, in Texas, we are. And if we are going to be in politics, then . . . are we politicians? . . . [W]e’re not supposed to be. But if you throw us into . . . that briar patch, I’m not sure what we are. . . . If you call me [a politician] and you make me run as one, am I a politician first, a jurist second? Am I a jurist first, a politician second? Boy, it’s a—it’s just a good question.⁶⁷

⁶⁶ *Information Session*, *supra* note 8 at 110. In contrast, Judge Eric Andell testified before the Commission that he lost his reelection bid despite outspending his opponent by a substantial margin. It should be noted, however, that Judge Andell’s situation was unusual in two respects: first, he was a Democratic incumbent in a judicial district that was overwhelmingly Republican; and second, his defeat was attributed not to a voter preference for his underfunded Republican opponent, but to the fact that voters who went to the polls for the purpose of sending their favorite son, George W. Bush to the White House, simultaneously voted Andell out of office by pulling the straight Republican party ticket lever.

⁶⁷ *Commission Hearing*, November 17, 2000 at 140-41.

The net effect is to create the impression that judges are no different from other elected officials: that in judicial elections, as elsewhere, money talks; that judicial findings of fact and interpretations of law are subject to the vagaries of contributor and constituent influence and that judges are no more impartial than their counterparts in the political branches; and that politics rather than law therefore dominates the decision-making process. Result-oriented justice, in which campaigns are waged to reelect or defeat a judge on the basis of her popularity with interested groups, thus becomes increasingly common. Politicization of the judiciary is the inevitable result.

J. The Commission finds that the only significant public financing program for judicial campaigns implemented to date has not been adequately funded.

Although several states have made allowances for the possibility of publicly funding judicial elections, only Wisconsin has made a significant move in that direction, with a program that seeks to provide partial public funding for its Supreme Court races.⁶⁸ Under the Wisconsin system, a Wisconsin Election Campaign Fund has been created with revenues generated by a \$1 state tax return check-off.⁶⁹ Eight percent of that fund is earmarked for grants to Supreme Court candidates in years when there is a Supreme Court election. The remainder of the fund underwrites campaigns for Governor, Lieutenant Governor, Attorney General, State Treasurer, Secretary of State, Superintendent of Public Instruction, and the legislature. To be eligible to receive public funds, Supreme Court candidates must be opposed, and must have raised contributions totaling slightly less than \$11,000, in increments of \$100 or less. The maximum public grant available for a Supreme Court candidate is \$97,031, which represents 45% of a \$215,625 spending limit that, together with specified contribution limits, candidates must agree to honor in exchange for accepting public funds. Thus, unlike recently adopted measures in Maine and Arizona that effectively provide full public funding for some political branch races, Wisconsin permits judicial candidates to raise 55% of the funds to run their campaigns from private contributions. In the event that a grant recipient is opposed

⁶⁸California permits Supreme Court candidates to make free statements in the state ballot pamphlet; North Carolina, Texas and Utah provide limited public funds to political parties that could be but have not been used for judicial candidates. Montana has abandoned a tax add-on funded program for Supreme Court candidates.

⁶⁹ See generally, Wis. Stat. 11.50.

by a candidate who has not accepted public funds and has not agreed to comply with spending and contribution limits voluntarily, the grant recipient will be relieved of the duty to abide by spending and contribution limits.

The Wisconsin Election Campaign Fund is administered by the Elections Board. The Board is comprised of eight members variously selected by the Governor, the Chief Justice, the Assembly speaker, the Senate majority leader, the minority leaders of both houses, and the chairs of the two major political parties.

Taxpayer participation in the Wisconsin check-off system declined from 19.9% in 1979, to 8.7% in 1998 (which reflected a slight rebound from the all time low of 8.1% set in 1996). The resulting fund has been inadequate to provide candidates with the \$97,031 grants authorized by the program. As a consequence, after 1989--when both Supreme Court candidates were fully funded--the grants given to nine participating Supreme Court candidates have averaged only \$45,354. As the size of the grants diminish, the incentive to opt into the system and abide by spending and contribution limits in exchange for public funds is reduced. Not surprisingly, then, the number of candidates opting into the Wisconsin public funding program declined from 150 in 1986 to 92 in 1996. In 1999, the challenger for a Supreme Court seat declined to accept public funds or voluntarily abide by spending limits, which authorized the incumbent, who had received a modest grant, to exceed her spending limit. Combined spending in the race exceeded \$1.2 million. The reaction of the press, public and legal community to the sometimes mean-spirited tenor of the 1999 campaign was negative, and in part for that reason, the two candidates in the 2000 campaign agreed to abide by the \$215,000 spending limit in exchange for grants of \$15,000.

Given the woeful state of the election campaign fund, proposals have been made to increase the size of the check-off, and to better educate the public about what programs the check-off funds. Even if the election fund were sufficient to underwrite the grants contemplated by the program, however, candidates would still raise 55% of the dollars needed to fund their campaigns from private contributions; and in cases where one candidate declines to accept public money, all limits are off. For that reason, the Wisconsin Commission on Judicial Elections and Ethics issued a 1999 report recommending that all Supreme Court and Court of Appeals races be fully publicly funded.

In June 1999, the Impartial Justice Act was introduced in the Wisconsin Senate. It would increase public funding for Supreme Court campaigns to \$100,000 for primaries and \$300,000 for general elections, with a biennial cost of living adjustment. To qualify for public money, candidates must raise one thousand \$5 contributions, and may generate up to \$5,000 in "seed money" through

contributions of \$100 or less. To fund the program, a “democracy trust fund” would be created from general revenues.

To address the independent expenditure problem, the bill provides that independent expenditures of \$1000 or more must be reported. When the aggregate amount of the independent expenditures against a publicly funded candidate exceeds 20% of the “public financing benefit for that office in any campaign,” that candidate will receive an equal amount of supplemental funding, up to three times the amount to which he or she was originally entitled.

The bill passed the Senate in March 2000 on a vote of 30 to 3, but stalled in the Assembly the next month. It is expected that the bill will be reintroduced in 2001.

III. COMMISSION RECOMMENDATIONS AND IMPLEMENTING PRINCIPLES

The Commission recognizes that this is the first comprehensive study of public financing in the context of state judicial elections. Therefore, the Commission has taken testimony from a wide variety of experts, reviewed numerous documents and researched the myriad complexities of campaign finance reform measures, especially in the context of judicial elections. Based on this work, the Commission has developed the following set of recommendations and implementing principles, which flow from its findings enumerated above.

A. The Commission's Primary Recommendation

The Commission recommends that states which select judges in contested elections finance judicial elections with public funds, as a means to address the perceived impropriety associated with judicial candidates accepting private contributions from individuals and organizations interested in the outcomes of cases those candidates may later decide as judges.

For states that elect their judges, the potential advantages of underwriting judicial campaigns with public funds are clear. The more money judges receive from public sources, the less they will have to raise from private groups and individuals who are interested in the outcomes of cases the judges decide, which will reduce the potential for campaign contributions to influence judicial behavior and address the public perception that such perceived influence may promote. Indeed, the case for public financing of judicial elections may be more compelling than it is for the legislative or executive branch races, notwithstanding the fact that almost all public funding programs have confined themselves to political branch contests.

As noted in the introduction, governors and legislators are supposed to be influenced by their constituents' point of view. In judicial races, on the other hand, where "constituent" and other external influence over a judge's independent decision-making is inappropriate, the desirability of insulating judges from the influence of, and the appearance of influence of, private campaign contributions is correspondingly greater.

The Commission has heard three basic objections to public financing of judicial elections that warrant special attention:

First, public financing of judicial elections is antithetical to the spirit, if not the letter, of the First Amendment, to the extent that public funding programs cap campaign

spending, and thereby effectively limit the quantity of speech the candidates can disseminate. The First Amendment, these critics point out, protects speech from governmental abridgment precisely because robust debate on issues of public importance is a positive good that we ought to encourage. That being so, James Wootton, President of the U.S. Chamber of Commerce Institute for Legal Reform, told the Commission in a written submission that increased spending on judicial elections is not a “bad development.” To the contrary, “the more money spent, the more speech and debate about judicial races. This ability to speak freely and support candidates financially is one of our most basic First Amendment freedoms.” In *Buckley v. Valeo*, the Supreme Court noted that voluntary spending limits, which candidates agree to honor in exchange for public funds, are permissible. Nevertheless, the premise underlying such limits, critics argue, is to counter problematic speech by limiting or eliminating it, which is antithetical to the spirit of the first amendment. “[P]ublic financing proposals are always linked with mandatory spending limits,” James Wootton noted, and “limiting the amount of speech and debate about judicial elections is simply not a good idea if we want informed voters making the decision.”⁷⁰

Mark Lopez of the ACLU used the Maine experience with political branch elections to illustrate the problem to which James Wootton alluded. There, Lopez said, available public funding represented no more than fifty percent of average spending, “based on historical spending patterns.” What was “frightening” to Lopez, was that to the extent Maine attracts “all candidates because it’s impractical to stay outside the system, then the level of debate is going to be diminished because they will have succeeded in driving down spending to levels the legislature—or in this case the voter, via ballot measure—thought were appropriate.”⁷¹

The Commission, however, agrees with other witnesses who emphasized that public financing programs coupled with voluntary spending limits are completely consistent with both the letter and spirit of the First Amendment. Public funding programs give candidates a choice: to limit private spending on campaign related speech in exchange for public funding, or to forego public funding and spend without limit. As long as candidates make that choice freely, it is theirs to make. As Deborah Goldberg testified before the Commission:

⁷⁰ *Commission Hearing*, March 23, 2001 at 6 (Remarks of James Wootton, President of the Institute for Legal Reform).

⁷¹ *Commission Hearing*, January 27, 2001 at 186-87.

It's certainly the case that voluntary spending limits are constitutional. The key question is whether or not they are voluntary. The system in Maine. . . was found to be constitutional because there are opportunities for people who do not want to participate to opt out of the system.⁷²

Because candidates have the right to opt out, Ms. Goldberg took issue with Mark Lopez's conclusion that by funding elections substantially below historic spending levels, public funding drives down the level of public debate: "If the amounts given in a public financing system are too low," she contended, then "contrary to what Mr. Lopez says, it doesn't shut down speech. People simply opt out of the system."⁷³

Second, critics argue, public financing of judicial elections is infeasible, because there is no political will to implement meaningful programs. Wisconsin is the only state to have implemented a serious public financing program for judicial elections, and is the only state where significant legislation is pending. Moreover, legislation in Wisconsin is pending because the existing program there has failed to attract significant support--less than 10% of Wisconsin taxpayers have been willing to divert a dollar of their tax liability to fund the program, as a consequence of which the program has, for all practical purposes, collapsed. This has led some to conclude that there is no political will to implement public funding programs or to finance them adequately.⁷⁴ As James Wootton told the Commission, "the steady decline in taxpayer participation in the public funding process should give us pause."

Nick Nyhart of the Public Campaign, however, disagreed. He pointed to polling data indicating widespread support for public financing.⁷⁵ He added that the states which had recently enacted so-called "clean money" public financing statutes had excluded judicial campaigns from their scope for reasons unrelated to the merits or feasibility of doing so. "The groups that are working on this," he noted, "are groups with legislative agendas," who "don't work in the judicial arena and haven't seen the

⁷² *Id.* at 227.

⁷³ *Id.* at 225.

⁷⁴ *Id.* at 107-08 (testimony of Roy Schotland)("As you all know well, there are 23 states with public funding. . . but of that 23, only. . . Wisconsin covers judges, and even there only the Supreme Court. . . the dollars aren't there").

⁷⁵ *Id.* at 81-82 ("When we have polled this nationally and asked the question, would you support an alternative system under which candidates who agree to take no private money and agree to spending limits receive a fixed amount of public money for their campaigns[?]. . . we get two-thirds support nationally").

effects.”⁷⁶ As far as the failure of the Wisconsin check-off system is concerned, Mike McCabe, executive director of the Wisconsin Democracy Campaign, told the Commission that no effort had ever been made to publicize or explain the check-off program to taxpayers, and many mistakenly believed that it would add to their tax liability.

The findings of the Commission discussed in Part II of this Report concern problems that may not be completely new to judicial campaigns, but which have become acute only recently. It is therefore unsurprising that only one state has previously enacted a public funding program to address what was not--until now--perceived to present a serious problem. Indeed, this Commission’s report represents the first comprehensive effort to evaluate the desirability and feasibility of publicly financing judicial campaigns among states that select their judges in contested elections. To conclude that the states are uninterested in implementing public financing programs at a point prior to their receiving the information necessary for them to conclude that such programs are desirable, is simply premature. It is likewise counterfactual in that ambitious public financing programs have been adopted only recently in several states, including Arizona, Maine, Massachusetts and Vermont.

Third, opponents assert, public financing of judicial elections will be ineffective, because even if the candidates agree to accept public funding in lieu of private contributions, it will not neutralize the impact of private money on judicial campaigns. Public funding programs operate on the premise that candidates will voluntarily forego private contributions in exchange for public money, which will serve to diminish the appearance--and perhaps the reality--of their dependence on interested contributors for their continuation in office. As some witnesses emphasized to the Commission, however, it is unrealistic to assume that interested contributors will simply withdraw from the electoral process after the candidates have agreed not to accept private contributions; rather, it can be expected that some of these contributors will take the funds they would otherwise have given to the candidate directly, and launch their own independent campaigns in support of that candidate or against her opponent.⁷⁷ The net effect is two-fold: a) public financing will end neither the role that private money plays in judicial elections, nor end the appearance of impropriety, because the candidates will still appear dependent for

⁷⁶ *Id.* at 89.

⁷⁷ *Id.* at 12 (statement of Robert Peck) (“[S]hould you shut off one avenue for the money that tends to flow into these campaigns, there are other avenues always to be utilized.”)

their election on the indirect support of special interest groups; and b) candidates may be unwilling to opt into public financing systems for fear that if they agree to limit their spending, they will be unable to counter independent campaigns effectively.

In response to the first point, the Commission agrees that groups will continue to campaign for their candidates independently if public financing programs are adopted. Indeed, it is reasonable to assume that groups will resort to independent campaigns more frequently as the opportunities for them to contribute to the candidates directly are eliminated. Even so, the perceived impropriety associated with direct contributions is considerably more attenuated with independent expenditures. If a judge accepts a large check from an interested group, the public is far more likely to infer that the judge has a special relationship with and dependence on the contributor, than if that same group simply takes out a newspaper ad in support of the judge.

In response to the second point, and as elaborated upon below, the Commission notes that several states have included provisions in their public financing programs whereby participating candidates are authorized to receive supplemental public funds to offset independent expenditures in support of their opponents.⁷⁸ As a result, candidates are less likely to be fearful that if they agree to limit their spending to the public funds they receive, they will be unable to counter independent expenditures. The Commission recognizes that this approach is not problem free, and addresses some of those problems in Principle 7, below.

In the section that follows, the Commission elaborates on the rationales identified above, that refine and qualify its primary recommendation in support of public financing. If this recommendation and these principles are accepted and implemented, the Commission does not believe that judicial campaigns will henceforth be trouble free; but it does conclude that in states that continue to rely on contested elections as the means for selecting its judges, the process will be improved.

⁷⁸The details of such provisions and the objections to them summarized here, are discussed in greater detail below, in Principle 7.

B. Implementing Principles and Supplemental Recommendations

1. Principle: Public financing programs must be sensitive to Constitutional limitations on states' power to regulate judicial campaign finance.

This Commission has neither the mandate nor the expertise to presume to undertake a comprehensive First Amendment analysis of the constitutional uncertainties surrounding the public financing of judicial elections. Instead, the Commission's objective here is limited to identifying those constitutional issues that appear settled, and those where uncertainties remain.

The following issues appear relatively settled:

- Campaign spending is a form of political expression that is fully protected by the First Amendment freedoms of speech and association and applicable to the states through the due process clause of the Fourteenth Amendment. As a result, mandatory limits on campaign spending must survive strict scrutiny to pass constitutional muster, and so far none have. Although the government has a compelling interest in preventing corruption and the appearance of corruption, the Supreme Court has concluded in political branch races, at least, that imposing limits on a candidate's overall spending is too attenuated a means to further that interest.⁷⁹
- Although the government may not impose spending limits on political branch candidates unilaterally, it may offer candidates the option of accepting public funds in exchange for their promise to abide by campaign spending limits. Such offers are constitutional provided that participation in the public financing program is voluntary and not coercive.⁸⁰

⁷⁹*Buckley v. Valeo*, 424 U.S. 1 (1976). For an explanation of the complex *Buckley* decision see Richard E. Levy, *The Constitutional Parameters of Campaign Financing Reform*, 8 Kan. J.L. & Pub. Pol'y 43 (1999). See also, *FEC v. Colorado Republican Federal Campaign Commission*, 121 S. Ct. 2351 (2001).

⁸⁰See *Buckley v. Valeo*, 424 U.S. 1 (1976). One attack, on the grounds that the voluntary public funds in the Presidential Election Campaign Fund Act were coercive because of "legal and practical factors" failed. *Republican National Committee v. FEC*, 487 F.Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 455 U.S. 955 (1980). The First Circuit has analyzed the question in terms of whether the benefits

- The government may impose limits on the contributions individuals and organizations make to candidates directly, but may not limit their independent expenditures on a candidate's behalf.⁸¹
- The government may require individuals and organizations to file public reports on the independent expenditures they make directly on behalf of a specific candidate, but may not require them to report their expenditures on strictly issue-related advocacy.⁸²

There are several other issues, however, that remain unsettled:

- The extent to which the state's interest in preserving judicial independence and impartiality may justify restrictions on judicial campaigns, that would be impermissible in political branch races, remains uncertain. Courts in the Sixth Circuit rejected state imposed campaign spending limits for judicial candidates.⁸³ On the other

(the public support a candidate receives) and detriments (the burdens and restrictions a candidate must agree to) in a voluntary public financing scheme are roughly proportional. *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 455 (1st Cir. 2000) (finding proportionality).

⁸¹*Buckley v. Valeo*, 424 U.S. 1 (1976). The *Buckley* Court rejected limitations made on behalf of a candidate independently, but approved a \$5,000 limit for political committee contributions to a specific candidate and a \$1,000 cap per candidate for an individual or group contribution. The court approved these limits because they didn't severely limit a contributor's ability to express symbolic support for a candidate.

⁸²The *Buckley* Court made plain that the dollar values where disclosure must occur for direct gifts to candidates were left to legislative discretion unless entirely irrational. They approved a \$10 record-keeping threshold and a \$100 disclosure threshold. 424 U.S. 1 (1976). "First Dollar" reporting requirements appear to be constitutional, but not if the disclosure requirements discriminate against political action committees (PACs). *Vote Choice, Inc. V. DiStefano*, 4F3d 26 (1st Cir. 1993). But *Vote Choice* approved a contribution "cap gap" between those who accepted public funding (allowed to receive \$2,000 directly from PACs/individuals versus those candidates that did not (allowed to receive only \$1000). *Id.* at 30, 38.

⁸³*Suster v. Marshall*, 121 F.Supp. 2d. 1141 (N.D. Ohio 2000) (citing throughout *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998). See Jason Miles Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial*

hand, the Third Circuit concluded that Pennsylvania's compelling interest in preserving the integrity of its judiciary justified restrictions on personal solicitation of campaign funds by judicial candidates and a prohibition upon judicial candidates expressing their views on issues likely to come before the courts.⁸⁴

- It appears as though supplemental funding programs that provide participating candidates with funds to counter additional spending by non-participating candidates are permissible;⁸⁵ uncertainties remain, however, as to whether programs that provide participating candidates with supplemental public funds to counter speech sponsored by independent organizations interfere impermissibly with the speech rights of those organizations.⁸⁶
- As a conceptual matter, the line separating specific independent expenditures from general issue advocacy remains indistinct. As a practical matter, most courts have insisted on the creation of bright statutory lines separating reportable independent expenditures from unreportable expenditures for general issue advocacy. The extent to which legislatures may redraw those lines so as to impose expenditure reporting requirements on individuals or groups -- whose message does not explicitly use "magic words" in their advertising in support of or opposition to a particular candidate in a particular race--thus remains clouded.⁸⁷

Campaign Regulations, 2 Mich. L. & Pol'y Rev. 71(1997) for an argument that the government interest in judicial integrity and independence does survive strict scrutiny and allows judicial campaign expenditure limitations.

⁸⁴*Stretton v. Disciplinary Bd. of the Supreme Court of Pennsylvania*, 944 F.2d 137 (3rd Cir. 1991).

⁸⁵*Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996); *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998).

⁸⁶*Dagget v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding supplemental funding); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) (striking down supplemental funding).

⁸⁷We know from *Buckley* that the Court intended a "bright line" test that defined expenditure as a fund used for communication that expressly advocates the election or defeat of a clearly identifiable candidate. 424 U.S. 1 at 43-44, 80. The

2. Principle: Public financing programs should be designed to best suit the particular needs of a particular state or territory.

The states have different constitutions providing for different forms of judicial elections conducted in different legal cultures, that may affect which form of public financing (if any) is best suited to the needs of a particular jurisdiction.

The Commission recommends that states with partisan and nonpartisan elections publicly finance judicial campaigns, although it is preferable that all judicial elections be conducted in a non-partisan manner.

Judges selected in partisan elections may confront campaign related problems that are quite different from their counterparts in states with non-partisan elections. Thus, for example, in Texas, the Commission heard testimony from Judge Eric Andell, who testified that he lost his reelection bid despite outspending his opponent by a significant margin, because he was a Democratic candidate in a predominantly Republican district where many voters cast straight-party ballots.⁸⁸ Although the number of jurisdictions that still permit voters to cast a straight-party ballot with a single pull of a lever is few, such a practice clearly undermines attempts to characterize candidates for judicial office as different from those in political branch races. In addition, partisan judicial elections will, by definition, be more partisan and

Buckley Court included some examples of words that expressly advocate for a specific candidate such as 'vote for' or 'elect' (often called "the Magic Words doctrine" by commentators). The majority of courts have followed a quite narrow interpretation of express advocacy and struck down regulations that go beyond "magic words." *FEC v. Christian Action Network, Inc.* 110 F.3d 1049 (4th Cir. 1997) (Court refused to "look at meaning behind the images" of a political advertisement.); *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999) (Informational voter guides were not express advocacy). See also, *Maine Right to Life Committee, Inc. v. FEC*, 914 F.Supp. 8 (D.Me.), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000); *Citizens for Responsible Government v. Davidson*, 236 F.3d 1174 (2001); *League of Women Voters v. Davidson*, No. 99-CV2314, 2001 Westlaw 363677 (April 12, 2001). But see, *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) (Attack ad on Jimmy Carter that sought action close to his re-election bid was express advocacy). *State ex rel. Crumpton v. Keisling*, 982 P.2d 3 (Or. Ct. App. 1999) (followed the reasoning in *FEC v. Furgatch* and adopted a broader reading of *Buckley*).

⁸⁸ *Commission Hearing*, November 17, 2000 at 113-14.

politicized than non-partisan elections, which, as Texas Judge B.B. Schraub told the Commission, may add to fund-raising pressures in partisan election states.⁸⁹ Indeed, a key campaign expenditure for court races in some states, is the cost of being placed on the political party's slate of candidates.⁹⁰

Given the special problems created by partisan judicial elections, a summit meeting of judges, legislators and other state political leaders convened to address ways to improve judicial selection, issued a "Call to Action" on January 16, 2001, that included as its first recommendation: "All judicial elections should be conducted in a nonpartisan manner."⁹¹

On the other hand, judges in non-partisan states may feel different but equally acute fund-raising pressures relative to their colleagues in partisan election states. As Texas Judge David Peebles testified before the Commission, nonpartisan elections "would be an improvement because it would take the party problems out of it, but that magnifies the importance of name."⁹² Put another way, party affiliation can be an inexpensive way to attract voters—as illustrated by the experience of Judge Eric Andell, whose opponent raised far less money but won the election by virtue of his party affiliation. In non-partisan states, judicial candidates may feel added pressure to compensate for their lack of party affiliation by increasing their fund-raising and spending to elevate their name-recognition. Moreover, it is important to bear in mind that not all "non-partisan" election states are the same; whereas some states, like Wisconsin, are avowedly non-partisan, others, like Michigan and Ohio, are non-partisan in name only, which may give rise to hybrid variations of the fund-raising problems discussed here.

⁸⁹ *Id.* at 256 ("I would hope that. . . if we can't do anything else, we would look towards some type of nonpartisan election, because I think partisan politics causes an expenditure of even greater funds").

⁹⁰ Documenting this phenomenon was beyond the scope of our Commission's report; the issue is, however the subject of ongoing studies being conducted by the National Center for Money and State Politics and the Appleseed Foundation.

⁹¹ "Call to Action: Statement of the National Summit on Improving Judicial Selection," January 16, 2001.

⁹² *Commission Hearing*, November 17, 2000 at 284.

The perceived impropriety that arises when judges solicit funds from contributors interested in the outcomes of cases those judges decide, may occur in partisan or non-partisan races, for which reason the Commission has recommended that all states which select judges in contested elections--partisan or not--implement public financing legislation. The Commission nevertheless shares the view of the Call to Action that judicial elections are best conducted in a non-partisan manner. The prospects for public financing systems to curb further politicization of the judiciary and proliferation of result-oriented justice by ameliorating the perception that judges--like other “politicians”--are influenced by their contributors and “constituents” can only be impaired when judicial elections are conducted in a highly partisan atmosphere.

The Commission recommends against full public financing for states that select judges by appointment, followed by retention election.

Problems associated with privately funded judicial campaigns have arisen not only in states that select judges in partisan and non-partisan elections, but also in “merit selection” states where appointed judges have had to raise substantial sums in campaign contributions to fend off opposition in their retention elections. At the same time, merit selection states are different in ways that warrant separate analysis.

First, the problems that public financing seeks to address may (on average) be less acute in “merit selection” states. In such states, election-related problems are eliminated from the initial selection process, because the judges are appointed. When judges later stand for retention election, they run against their records rather than competing candidates, which assures that contentious, expensive elections will occur only when voters are dissatisfied with the judge’s performance, and not every time another candidate wants the judge’s job. Moreover, because voters can not be sure that a more satisfactory replacement will be appointed if they vote an incumbent out, significant opposition to a judge’s retention is likely to arise only when dissatisfaction levels are high. Consistent with that conclusion, Samantha Sanchez reported to the Commission that while retention elections became quite expensive on those occasions in which serious opposition campaigns were launched, on average, state Supreme Court justices spent only \$46,905 per retention election, as contrasted to \$94,576 in non-partisan races and \$317,622 in partisan contests.⁹³

Second, in retention elections, there are no “opponents” to finance. In her testimony before the Commission, Deborah Goldberg of the Brennan Center for Justice argued that publicly funding incumbents would be a Constitutional means to

⁹³Samantha Sanchez, *Money in Judicial Politics*, March 21, 2001 at 4.

eliminate the appearance problem created by judges accepting money from interested contributors.⁹⁴ Issues of constitutionality aside, however, providing public funds exclusively to incumbents might end one appearance problem, only to create another: that the government is “stacking the deck” in favor of incumbent retention. To avoid appearing overly incumbent-friendly, states might consider offering an equal share of the public funds to private opposition groups. Such an alternative has problems of its own, however, for it would in effect subsidize advertising campaigns that typically attack decisions of incumbent judges who are subject to ethics rules that often forbid them from responding. Such problems, in turn, might conceivably be addressed by insisting that opposition groups agree to limit their speech (by, for example, abiding by the Code of Judicial Conduct as opposing candidates must in partisan and nonpartisan election states) in exchange for public funds, but that might only invite accusations of censorship.

Although the Commission concludes that conventional public financing is ill-advised in retention elections, this does not mean that public funds should have no role in retention election states. As discussed below, the Commission recommends publicly subsidized voter guides in all judicial elections—including retention elections—and in the unique context of retention elections, the Commission notes that several states have implemented publicly funded judicial performance evaluation programs.⁹⁵

⁹⁴ *Commission Hearing*, January 27, 2001 at 247 (testimony of Ms. Deborah Goldberg).

⁹⁵ When a judge’s retention is unopposed, voters suffer from an information shortfall, and may be left to cast their ballots on the basis of an isolated press account or a performance evaluations conducted by a local bar organization. When a judge’s retention is hotly contested, on the other hand, voters may have difficulty distinguishing accurate from distorted information. To address these problems, six states with retention elections—Alaska, Arizona, Colorado, New Mexico, Tennessee and Utah—have adopted official judicial performance evaluation programs.

In each state, publicly funded performance evaluation commissions—typically comprised of judges, lawyers and non-lawyers—are assembled to evaluate judicial performance with reference to criteria that vary from state to state, but include such considerations as the judge’s fairness, integrity, communication skills, preparation and attentiveness, temperament, and knowledge of the law. Unlike bar evaluation programs, which seek information from lawyers only, performance evaluation commissions gather information from jurors, litigants, witnesses, law enforcement, court personnel, the judges themselves and court records as well. Finally, the Commissions make a special effort to disseminate evaluation reports as widely as possible. Judicial performance evaluation programs have been relatively well received in the states that have adopted them, but concerns remain. Some judges are worried

3. **Principle: Public financing programs are most suitable for primary and general election campaigns of high court judges and, in some cases, intermediate appellate judges .**

If public financing is expanded to reach judicial races, a question that naturally arises is whether trial court contests should be publicly funded, or only supreme court or court of appeals races? Should public funding apply only to general elections, or primary elections as well?⁹⁶

The Commission recommends that states publicly finance high court races, and possibly intermediate appellate court contests.

There are at least three considerations that may influence which elections to fund. First, which races have experienced the most serious problems and would benefit most from public financing? Second, because the programs become more expensive as more elections are funded, the question becomes how many judicial races is the state willing to support? Third, offering judicial candidates public money will make running for judicial office more attractive and therefore competitive, which raises the difficult issue of how much additional competition is desirable? On the one hand, increased competition may expand voter choice to include qualified candidates who would otherwise lack the financial resources needed to run. On the other hand, increased competition may undermine ongoing efforts to cool judicial campaign rhetoric and dissuade candidates and the electorate from compromising judicial independence by turning elections into referenda on the popularity of isolated decisions that incumbent judges make.

In light of these considerations, it is unsurprising that Wisconsin--the one state to fund judicial races-- has confined its program to Supreme Court elections. Such races have the highest public profile and the problems they have encountered have attracted the most media attention; there are a manageable number of races to fund;

that the programs may undermine their independence, and that their opportunity to challenge or clarify Commission findings is inadequate. Such programs are designed to single judges out for comprehensive evaluation, and may for that reason be unfair in contested election states where an incumbent's opponent is not subject to comparable scrutiny. Moreover, it is undeniable that an unfavorable judicial performance evaluation may jeopardize a judge's tenure in office--the only question is whether that is better characterized as a threat to judicial independence or an enhancement of judicial accountability.

⁹⁶ *Information Session, supra* note 8 at 33 (testimony of Dr. Ruth Jones)

and as compared to trial court races that are often uncontested, high court races are already quite competitive, so that any increase in competition encouraged by public funding is likely to be marginal only.

In some states, where intermediate appellate court races are suffering some of the same problems as Supreme Court campaigns, extending public financing programs to the courts of appeals may be desirable. In the Commission's view, the issue of funding intermediate appellate court contests has more to do with financial feasibility than desirability. Were trial court races to be publicly funded, however, the number of races at issue would increase geometrically, as would the cost of publicly funding such races, the complexities of administering a program that vast, and the potential for unintended consequences to make the public funding cure worse than the private financing disease. For that reason, the Commission limits its recommendation to high court and possibly some intermediate appellate races.

The Commission recommends that primary and general elections receive public funding.

Primary elections may be held not only in states with partisan judicial elections, but also in non-partisan election states such as Wisconsin, where more than two candidates are campaigning for the same position. Primaries ought to be publicly funded. If they are not, publicly funded candidates in the general election may be limited to those who—in the public's mind—are subject to the influence of those contributors responsible for providing them with the private support necessary to win their respective primaries. If a state is going to go to the trouble and expense of providing judicial candidates with the public funds necessary to compete in the general election as a means to diminish the public perception that the candidates are influenced by private contributors, it makes little sense to limit the pool of eligible candidates to those who have won their primaries on the strength of private contributions.

4. Principle: Public financing programs should provide judicial candidates with full public funding in amounts sufficient to encourage participation.

Because participation in public funding systems (as an alternative to private fund-raising) must be voluntary to satisfy First Amendment requirements, the success of such programs depends on keeping funding levels high enough to encourage candidates to opt in.

The Commission recommends that public financing programs provide candidates with funds in amounts sufficient to permit them to compete effectively for judicial office.

The only way that judicial candidates will find it worth their while to forego private fund-raising voluntarily in exchange for the receipt of public funds, is if they receive public funds in amounts sufficient to enable them to reach voters effectively. Perfect parity in spending among the candidates is unnecessary, as long as the level of funds is adequate to permit all of them to communicate their message to the electorate.⁹⁷ How large the public grants must be to serve this purpose will vary depending on such factors as: state size, population, number of media markets, and judicial campaign culture (meaning the nature and extent of judicial campaigns as they have traditionally been conducted within a particular jurisdiction). To ensure that public funding levels remain adequate over time, it is also important that they be periodically indexed for inflation.

One rough proxy for the above-mentioned factors would be to correlate the size of public grants to the dollar amount of private spending in recent judicial races within the state. These races have, on average, been much less expensive than state-wide political branch races, which is to be expected. Although judicial campaigns have become increasingly politicized, codes of judicial conduct across the states limit the range of issues that judicial candidates may address, which effectively confines the scope of the public debate that funds are needed to underwrite.

Several considerations, however, counsel caution and flexibility in the implementation of such an approach.

- First, extremely expensive campaigns are sometimes followed by extremely inexpensive ones, so that if the two are simply averaged it will yield a budget insufficient to run the first campaign and unnecessary to run the second.
- Second, as noted in the Commission's findings, judicial campaigns are becoming increasingly expensive, for which reason the average expenditures of past campaigns may understate realistic spending estimates in future campaigns.
- Third, privately funded candidates incur added costs associated with generating contributions that publicly funded candidates avoid, for which reason past spending patterns may, to that extent, overstate future spending needs.

⁹⁷For more on the extent to which equal spending is necessary, see discussion accompanying Finding H, *infra*.

The Commission recommends that states implement full, rather than partial public financing systems for judicial races.

Public funds may be used to partially or fully fund judicial and other races. Arizona and Maine effectively provide full public funding for their political branch races, while Massachusetts and Vermont provide nearly full public funding (80 percent and 85 percent of their respective spending ceilings). Other states match privately generated contributions with public funds on a one to one or other basis (Florida, Hawaii, Kentucky, Maryland, Michigan primary, Nebraska, Rhode Island), or supply candidates with block grants that represent a specified percentage of the candidates' overall spending ceiling (Michigan general election, Minnesota, Wisconsin).

Partial public funding leaves the door open to perpetuating the perceived impropriety that public funding systems are designed to diminish. As long as judicial candidates continue to depend on interested groups and individuals for a significant volume of the funds needed to compete for and win judicial office, the perception that judges may be influenced by their private contributors is likely to persist. That perception might be diminished in a partial public funding system that limits private contributions to amounts so inconsequential as to dispel the perception that they could buy influence. An unintended consequence of such an approach, however, would be to place an enormous burden on the candidates to raise the additional monies needed to compete effectively, by requiring that they solicit fewer dollars from a much larger number of contributors. The Commission concludes that it is preferable to avoid these problems by providing candidates with the public funds needed to wage an effective campaign, without resorting to significant private fund-raising.

5. Principle: Public financing programs should be restricted to serious candidates in contested elections who have met specified criteria indicating a certain level of support.

Judge David Peebles testified before the Commission that he was particularly concerned about the potential for public funding programs to underwrite (and so encourage) less than serious candidates. "[I]f everybody who wants to run for judge is going to be funded," he warned, "some very mediocre people who couldn't raise \$500 from their peers. . . would be entitled to public financing."⁹⁸ As Dr. Ruth Jones testified, however, there are a number of ways in which public financing systems

⁹⁸ *Commission Hearing*, November 17, 2000 at 269.

could address this problem. One is to limit eligible candidates to those who gather a minimum number of petition signatures. Another is to require grant applicants to generate a minimum number or amount of small campaign contributions.⁹⁹ A third might be to limit grant eligibility to candidates who received (or whose party received) a minimum percentage of the vote in a previous election.

The Commission recommends that states limit eligible candidates to those who succeed in generating a minimum number of small contributions.

Virtually every state with a significant public financing program limits candidates eligible to receive public funds to those who have raised a minimum number or dollar amount of qualifying contributions.¹⁰⁰ Thus, for example, Arizona, Maine and Massachusetts require candidates to raise a specified number of small contributions; Hawaii, Michigan, Minnesota, Rhode Island,¹⁰¹ Vermont and Wisconsin require candidates to raise a specified dollar amount in small contributions; while Florida, Kentucky, Maryland and New Jersey require that candidates raise a specified dollar amount in contributions of unspecified size.

This approach is preferable to a petition process, because it requires a tangible display of support that petitions do not, which can ensure that only serious candidates succeed in generating the requisite number of contributions. In order for that to be the case, it is important that candidates be required to generate a significant number of contributions in an amount that--while not large enough to create a perceived impropriety--is still large enough to constitute a showing of bona fide support. To further guarantee that only serious candidates with broad based support receive public funds, states may wish to consider requiring that contributions be generated across a minimum number of counties throughout the state.

The Commission recommends that eligibility to receive public funds be limited to candidates in elections that are contested.

⁹⁹ *Information Session*, *supra* note 8 at 34.

¹⁰⁰ The lone exception is Nebraska, which offers legislative candidates who have agreed to abide by spending ceilings, public funds equal to the dollar amount spent by their non-participating opponents in excess of the spending limit.

¹⁰¹ In Rhode Island, the qualification requirement applies only to independent candidates; major party candidates qualify automatically.

Supreme Court justices are occasionally, and in some states frequently, unopposed for reelection. Although justices in such situations sometimes find it desirable to amass campaign “war chests” as a means to protect themselves against the possibility of an opponent surfacing unexpectedly, the contributions “arms race” that public financing programs are designed to avoid is simply not going to occur in uncontested elections. The Commission therefore recommends that eligibility to receive public funds be limited to races in which a candidate is opposed.

6. Principle: Public financing programs should be conditioned on the candidates’ agreement to forego private financing and to limit their use of public funds to legitimate campaign purposes.

Although states may not require candidates to accept public funds, they may condition the distribution of public funds to candidates who choose to receive them, on the candidates’ agreement to abide by specified conditions.¹⁰² All fourteen states with significant public financing programs insist that participating candidates agree to voluntary spending ceilings in exchange for public funds. States such as Arizona and Maine, which for all practical purposes provide full public funding but nevertheless permit candidates to raise “seed money,” impose contribution limits on such monies, while states that provide partial public funding, such as Massachusetts, Michigan, Minnesota and Wisconsin, impose contribution limits on the funds that may be raised privately. Some states, including Hawaii, Kentucky, Maryland and Nebraska, require that a participating candidate have an opponent.

The Commission recommends that states condition the distribution of public funds on the candidates’ promise to forego private funding.

If public financing programs are to reduce the perceived impropriety associated with judges receiving private contributions from individuals and organizations with a political or financial interest in the outcomes of the cases those judges decide, it is imperative that the private contributions giving rise to that perception be eliminated. As previously emphasized, if a state does not offer candidates public funds in amounts sufficient to enable them to wage an effective campaign without recourse to private money, they will simply opt out of the program and defeat its purpose. On the other hand, if the size of the public grant is generous enough to provide an attractive alternative to private fund-raising, conditioning the receipt of funds on the candidates’ promise to forego the private contributions they no longer deem necessary to compete effectively should not pose a problem.

¹⁰² *Information Session, supra* note 8 at 35-36.

The Commission recommends that states condition the distribution of funds on the candidates' promise to limit their use of public monies to campaign related purposes.

Every state with a meaningful public financing program requires qualifying candidates to limit their use of public funds to legitimate campaign purposes. Although the Commission recommends against earmarking public grants for specific uses, it is clearly appropriate for states to prohibit candidates from appropriating campaign funds for personal or other non-campaign related uses. Consistent with this recommendation and the Commission's goal of reducing inappropriate politicization of the judiciary, public funds should be available only to pay for direct campaign expenses, and should not be transferable to political parties or other candidates.

7. Principle: States should address the impact of independent expenditures and recognize the impact of general issue advocacy on public financing programs.

The challenges that independent campaign expenditures and general issue advocacy present to the viability of public financing programs have been alluded to previously in this report and raise some of the most difficult issues this Commission has had to confront. In situations where both candidates agree to cap their spending in exchange for public funds, the candidate on whose behalf an organization campaigns independently receives an added boost that her opponent, hampered by spending limits, may be unable to counter effectively. Candidates fearful of independent campaigns may therefore think twice about opting into public funding programs; indeed, declining participation in the Wisconsin program has been attributed in part to such fears.

To address this problem, Maine, Arizona and legislation pending in Wisconsin authorize a participating candidate to receive supplemental public funds to match the independent expenditures of individuals or groups in support of the participating candidate's opponent. These supplemental public funding plans have, however, created four concerns.

First, although the United States Court of Appeals for the First Circuit upheld this feature of the Maine plan, the plaintiffs did not file a petition seeking a writ of certiorari in that case, which left the door open for attorney Robert Peck, testifying on behalf of the American Trial Lawyers Association, to tell the Commission that in

his view, the First Circuit decision “would not survive scrutiny in the U.S. Supreme Court.”¹⁰³

Second, fiscal responsibility dictates that states impose upper limits on the supplemental grants compliant candidates may receive and spend to counteract the effects of independent expenditures on their opponents’ behalf. To the extent that the maximum supplemental public grants awarded to participating candidates are unable to keep pace with the private spending of independent organizations that support their opponent, the imbalance will persist.

Third, the success of supplemental funding plans depends on disclosure of independent expenditures by the organization making those expenditures because the amount of money an organization spends on behalf of a candidate enables the state to determine the size of the supplemental grant awarded to that candidate’s opponent. As noted in Principle 1, however, independent groups may be required to report their expenditures for specific candidates, but not for general issue advocacy, which may enable independent organizations to circumvent reporting requirements by recasting their message as “issue advocacy.”

Fourth, the foregoing discussion assumes that independent organizations are campaigning in good faith on behalf of their candidate, which may not always be the case. If an organization attempts to undermine a candidate by running consciously ham-handed commercials on her behalf, such an act of sabotage should not entitle the opposing candidate (the candidate secretly favored by the organization responsible for the commercials) to receive additional funds to counter the sham ads.

The Commission concludes that making supplemental public funds available to candidates for the purpose of enabling them to respond to speech sponsored by independent campaign expenditures is the most workable means to encourage robust debate in judicial campaigns and preserve public financing as a viable option for judicial candidates. The Commission recognizes, however, that the Constitutionality of this approach is not free from doubt, for which reason the Commission’s recommendation in favor of such an approach is made subject to final resolution of constitutional uncertainties.

If supplemental funds are not available to provide publicly funded candidates with the additional resources needed to respond to political advertising underwritten by

¹⁰³ *Commission Hearing*, January 27, 2001 at 33. *See also*, *Day v. Holaban* 34 F.3d 1356 (8th Cir. 1994).

independent expenditures, candidates may be unwilling to forego private fund-raising in exchange for public money, out of fear that they would lack the means to counter independent campaigns if they arose. As far as the first objection to supplemental funding plans is concerned, the constitutionality of such plans is not free from doubt, as Mr. Peck testified; nevertheless, other witnesses provided the Commission with reason to believe that the Supreme Court would uphold them. Mark Lopez of the American Civil Liberties Union, for example, who was unsuccessful in his efforts to have the First Circuit declare the Maine plan unconstitutional, told the Commission that the ACLU did not seek Supreme Court review because language in a recent Supreme Court decision led it to suspect that the Court would uphold the decision.¹⁰⁴ Deborah Goldberg of the Brennan Center went further, arguing that the Maine case was rightly decided by the First Circuit:

[W]hat the courts are recognizing and what the First Circuit recognized is that the ability to speak, which a trigger gives a candidate who would otherwise not have the funds to respond, is not only consistent with, but entirely in furtherance of the goals of the First Amendment.¹⁰⁵

With exceptions, the Commission is not constituted of members selected because of their special expertise in election law, for which reason it is reluctant to speculate as to how other courts of appeal or the Supreme Court will finally resolve this issue. Suffice it to say for purposes here, that the Commission's recommendation in favor of supplemental funding mechanisms is made subject to resolution of lingering constitutional uncertainties.

The Commission likewise acknowledges the legitimacy of the second objection to supplemental funding plans: that in some cases statutory caps on supplemental funds may prevent publicly funded candidates from receiving enough additional money to match independent expenditures in unusually expensive campaigns. Dr. Craig Holman, however, explained why this imbalance need not be fatal to the success of the program. He noted that campaign activity has a "bell curve." Up to a certain level, spending "really matters," but above that level, "it no longer delivers as much impact." As long as a public financing program provided "just enough funds for the candidate to get to the top of the bell," and "get his or her message out," it would

¹⁰⁴ *Id.* at 189 ("We got a little cold feet because some of the language in *Nixon v. Shrink-PAC*. There were some concurring opinions that said maybe it's time to rethink the issue of expenditure limits.")

¹⁰⁵ *Id.* at 223.

not matter all that much that “the candidate is outspent by the opponent or independent expenditures.”

Insofar as the “trigger” for distribution of supplemental public funds to a candidate is the expenditure of a comparable dollar amount by an independent organization on behalf of that candidate’s opponent, the matter of how to calculate the amount of an independent organization’s campaign expenditures becomes an issue. One obvious solution is to require independent organizations to report their expenditures. This is clearly permissible with respect to independent expenditures on advertising that urges viewers to “elect” or “vote for” a particular candidate, and so employs the so-called “magic words” specified by the Supreme Court in *Buckley v. Valeo*. To the extent, however, that independent organizations craft the text of their advertising to avoid the use of such “magic words,” courts have characterized the speech as issue advocacy that may not—consistent with the First Amendment—be made subject to reporting requirements. All of this lends credibility to the third concern with supplemental funding plans: unless reportable independent campaign expenditures are redefined to better reflect the reality of advertising in judicial races, the effectiveness of those plans may be impaired.

To address this issue, Deborah Goldberg of the Brennan Center advocated resort to a new “bright line” definition of reportable independent expenditures. Goldberg’s proposed definition would capture a broader range of advertising by defining independent expenditures to “include proximity to the election, a clear reference or depiction of a candidate [and] a specification of the media that would be used...”¹⁰⁶ Many lower courts interpreting the *Buckley* decision, however, have rejected attempts to impose reporting requirements on the producers of advertising that does not employ the “magic words” that *Buckley* specified. As emphasized elsewhere in this report, the Commission is not constituted of members whose expertise enables them to second-guess the conclusions of these courts on issues of First Amendment doctrine. The Commission therefore takes no position on proposals such as that advocated by Ms. Goldberg.

There remains the possibility, alluded to in the fourth criticism, that supplemental funding programs could be undermined by independent organizations running intentionally counterproductive advertising in “support” of a candidate they oppose, thereby triggering supplemental funds for the candidate’s opponent whom the group actually favors. Although it is difficult to assess the extent to which this is likely to occur, to the extent it does, it could impair the ability of supplemental funding mechanisms to achieve their goals. States should be alert to this potential problem

¹⁰⁶ *Id.* at 237-38.

and consider taking the steps to detect and correct it. As discussed in greater detail below--that election commissions be adequately staffed to ferret out abuses, which can help to ensure that supplemental funds are disbursed only to candidates legitimately entitled to receive them. In addition, as Kevin Kennedy of the Wisconsin Election Commission suggested, it may be possible to place some of the responsibility for proving or disproving entitlement to supplemental funds on the campaign committees themselves, thereby alleviating some of the burden on the election commission.¹⁰⁷

8. Principle: Public financing programs should distribute funds in the form of bloc grants to candidates and should also provide voter guides to the electorate.

The most obvious means to distribute public funds in conventional public financing programs is through simple bloc grants to the candidate. Other means, however, include: awarding bloc grants to the political parties for distribution to the candidates; grants that match private contributions; reimbursing contributors with vouchers or tax breaks, as is done in Minnesota; or delivering benefits in-kind, in the form of voters guides or television time for debates.¹⁰⁸

The Commission recommends that full public funding be provided in the form of simple bloc grants to the candidates' election committee.

The Commission has concluded that full-public funding programs that offer candidates the option to forego significant private fund-raising altogether are preferable to partial public funding alternatives. For that reason, matching grants, which, by definition, supplement private contributions with matching public funds are obviously inappropriate. The Commission's view that judicial elections should, to the maximum extent possible, be conducted in a non-partisan manner counsels against distributing monies to judicial candidates through the political parties. Voucher systems, in which contributors are reimbursed dollar for dollar for their contributions could conceivably be effective if contributions were capped at levels below that giving rise to the perception that the contribution could buy influence, and if the amount generated by such a system were sufficient to fund campaigns adequately. The problem with this approach, is that it would require the candidates to spend considerable time and public money soliciting contributions. Disbursing funds in the form of general bloc grants to the candidate's election or reelection

¹⁰⁷ *Commission Hearing*, March 23, 2001 at 135.

¹⁰⁸ *Information Session*, *supra* note 8 at 34 (testimony of Dr. Ruth Jones).

committees has the advantage of providing candidates with a simple and certain source of revenue.

It is only natural that states might consider earmarking grants for particular purposes, such as television advertising, or candidate debates, to ensure that public funds are spent wisely, which would come close to constituting a form of in-kind public support. As noted in Principle 6, above, every state with a meaningful public funding program requires that monies disbursed be used only for legitimate campaign purposes, which the Commission regards as a necessary and proper restriction. To go further, however, and dedicate funds for specified uses would constitute a form of micro-management that states should avoid because the candidates themselves are in the best position to decide how to reach the electorate with their message. The Commission therefore recommends that public monies be disbursed as bloc grants that may be used for any legitimate campaign purpose.

The Commission recommends that all states with contested or retention elections provide the electorate with voter guides on the candidate(s).

Although the Commission has recommended against public financing programs that ear-mark funds for specific uses, one exception concerns voter guides. Professor Roy Schotland made a special point of endorsing voters guides in his testimony before the Commission. As he told the Commission: “Voter pamphlets, which have pictures and little descriptions of each candidate for each office, have been in place and enormously popular in the four west coast states for almost a century.” The effectiveness of voter guides, he noted, is reflected in exit polling data, which shows that “voters regard [voter pamphlets] as their favorite source of information.” Because voter pamphlet programs are comparatively inexpensive and have been successfully implemented in several states, Professor Schotland concluded that exporting such programs to other jurisdictions would be quite feasible.¹⁰⁹

The Commission agrees with Professor Schotland. The preparation of voter pamphlets would occur in a process that is separate and distinct from the disbursement of public monies via general bloc grants for use by the candidates in running their campaigns. Every state that selects or retains judges by election is encouraged to devote public monies to the development and distribution of such guides to better inform voters in advance of elections.

¹⁰⁹ *Commission Hearing*, January 27, 2001 at 113-16.

9. Principle: Public financing programs should be funded from a stable and sufficient revenue source.

Potential sources of funding for public financing programs are many and varied. Several states derive revenues from multiple sources. Alternatives include: general tax revenues, as is done in Florida, Kentucky, Maine, Minnesota, Nebraska, New Jersey, Rhode Island and Vermont; tax check-offs (in which tax-payers may earmark a dollar amount of their tax liability to the campaign fund), which are used in Arizona, Hawaii, Maine, Massachusetts, Minnesota, Nebraska, New Jersey, Rhode Island and Wisconsin; tax add-ons (in which taxpayers may add to their tax liability with a contribution to the campaign fund), which are used in Maryland; surcharges on fines and civil penalties, which Arizona Maine and Vermont use to generate funding revenue; lobbyist fees, which underwrite publicly funded elections in Arizona, Maine, Nebraska and Vermont; candidate filing fees, which are used in Arizona, Florida and Wisconsin; and tax rebates, as used in Minnesota, where citizens who make private contributions of up to \$50 are eligible for a tax rebate in the amount of the contribution. Additional sources of funding might also be considered, such as court filing fees or attorney licensing fees.¹¹⁰

The experience of virtually all states that have tried them demonstrates that tax add-ons are ineffective; experience in Wisconsin and other states suggests that tax check-offs are likewise problematic. Check-off proponents, however, have pointed to Minnesota—where a \$5 check-off is supplemented with other public funds to generate seven times more money for legislative races than in Wisconsin, and where 99% of legislative candidates opt into the program—in support of the argument that tax check-offs can be made to work.

The Commission recommends that whenever possible public financing programs should be funded by general revenues, but that when necessary states ought to consider a multiplicity of funding sources.

Funding public financing programs from general revenues is optimal because it constitutes a stable, fair funding source. Funds generated by other means such as check-offs, add-ons, surcharges and fees may vary significantly from year to year and so constitute less dependable funding sources. Moreover, asking lawyers, litigants, or criminal and civil defendants to bear a disproportionate share of the burden in funding public financing programs may raise fairness concerns, given that the ultimate benefit of such programs—an impartial and independent judiciary—is

¹¹⁰ *Information Session, supra* note 8 at 37-39 (testimony of Dr. Ruth Jones).

enjoyed by all citizens of the state. In the case of increased court filing fees, the fairness problem is compounded by the possibility that citizens of limited means would have their access to courts compromised. The Commission recognizes, however, that it may not always be feasible to secure the monies needed to fund public financing programs from general revenues alone. As Ohio Chief Justice Thomas Moyer testified before the Commission, in his state, where the budget is constrained, “it would be difficult to even propose that we establish a fund for retention of justices of the Supreme Court.” That being the case, Justice Moyer concluded that the only feasible program would be one that raised revenue from “a combination of sources,” including general revenue, tax check-offs, lawyer registration fees, and possibly increases in court filing fees.¹¹¹

Accordingly, the Commission encourages states to consider a multiplicity of funding sources when general revenues alone are unavailable or inadequate.

10. Principle: Public financing programs should be administered by an independent and adequately staffed entity.

Although state supreme courts have traditionally been responsible for promulgating and enforcing rules governing campaign conduct by judicial candidates, the Commission believes that public financing programs should be administered independently of the judicial branch for two reasons. First, independent election commissions have an established track record in states that provide public financing to candidates in political branch races, as well as in Wisconsin--the one state to have provided significant public funding in judicial branch campaigns. Second, giving the judiciary control over the distribution of funds to candidates for judicial office would invite suspicion that the program was being administered in self-serving ways. The obvious alternative is to delegate administration of the program to an independent entity.

Over and above the need for the commissions that oversee the administration of public financing programs to be independent, is the need for them to be adequately staffed. If public financing systems are to be effective, staff support must be available to:

- Review applications for public funds to confirm that eligibility requirements have been satisfied;
- Oversee timely disbursement of public funds to eligible candidates;

¹¹¹ *Commission Hearing*, March 23, 2001 at 104.

- Monitor the campaign expenditures of participating candidates to ensure that public funds are being expended for legitimate campaign purposes;
- Enforce independent expenditure reporting requirements;
- Provide timely disbursement of supplemental funds to counter independent expenditures and additional expenditures of non-participating candidates; and
- Investigate and enforce violations of rules regulating public funding programs.

IV. CONCLUSION

In 1906, Roscoe Pound observed that “Dissatisfaction with the administration of justice is as old as law.” While emphasizing that some measure of dissatisfaction is unavoidable, he warned that:

[T]oo much of the current dissatisfaction has a just origin in our judicial organization and procedure. The causes that lie here must be heeded. Our administration of justice is not decadent. It is simply behind the times.

So it is today, some 95 years later. The past century has witnessed extraordinary changes in the administration of justice: a relentless rise in state and federal court caseload; a concomitant increase in the number of state and federal judges and a proliferation of other judicial officers--magistrates, special masters, and administrative law judges; increases in the cost and complexity of pretrial litigation and changes in the very nature of the judicial function and the legal profession itself, brought about by improvements in technology, shifts in legal culture and differences in the kinds of cases that come before the courts.

Against this backdrop of perpetual change, the need to preserve a judiciary that is independent of and yet accountable to the people it serves has remained a constant. The push and pull of judicial independence and accountability in a justice system that is always in flux, make some measure of public dissatisfaction with the courts unavoidable and all but assure that the struggle to keep from falling behind the times will be a continuous one.

The inevitability of dissatisfaction, however, counsels vigilance, not complacency. As our judicial system continues to change in fundamental ways, it is all the more critical that we strive to make certain that our judges remain independent, accountable and above ethical reproach, and that the system they serve continues to provide equal and impartial access to justice.

This report has focused on an important piece in the dynamic puzzle of judicial administration: dissatisfaction with the administration of justice that arises when the public perceives that judges are influenced by contributors to their re-election campaigns, and how public funding might serve to alleviate that source of dissatisfaction. It is crucial, however, to view our project in the larger context that we have just described--as part of an ongoing effort to preserve, protect and guarantee justice for all, now and in the future.

Appendix 1

Report and Recommendation of the Commission on Public Financing of Judicial Campaigns

Submitted to the ABA House of Delegates

February 2002

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON JUDICIAL INDEPENDENCE

SECTION OF FAMILY LAW

SECTION OF REAL PROPERTY PROBATE & TRUST LAW
COALITION FOR JUSTICE

LITIGATION SECTION

SECTION OF BUSINESS LAW

SECTION OF TORT & INSURANCE PRACTICE

JUDICIAL DIVISION

STANDING COMMITTEE ON ELECTION LAW

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that the American Bar Association, while reaffirming its long-standing support of selection of judges by merit selection, urges states and territories that select judges in contested elections to finance judicial campaigns with public funds.

FURTHER RESOLVED, that the American Bar Association adopts the following principles concerning public financing of judicial elections and supports legislation that incorporates these principles:

1. Public financing programs must be sensitive to Constitutional limitations on states' power to regulate judicial campaign finance.
2. Public financing programs should be designed to best suit the particular needs of a particular state or territory.
3. **Public financing programs are most suitable for primary and general election campaigns of high court judges, and in some cases, intermediate appellate judges.**
4. **Public financing programs should provide judicial candidates with full public funding in amounts sufficient to encourage participation.**
5. **Public financing programs should be restricted to serious candidates in contested elections who have met specified criteria indicating a certain level of support.**

6. Public financing programs should be conditioned on the candidates' agreement to forego private financing and to limit their use of public funds to legitimate campaign purposes.
7. States and territories should address the impact of independent campaign expenditures and recognize the impact of general issue advocacy on public financing programs.
8. Public financing programs should distribute funds in the form of bloc grants to candidates and should also provide voter guides to the electorate.
9. Public financing programs should be funded from a stable and sufficient revenue source.
10. **Public financing programs should be administered by an independent and adequately staffed entity.**

REPORT

The American Bar Association Commission on Public Financing of Judicial Campaigns was convened by the ABA Standing Committee on Judicial Independence in accordance with a directive from the ABA House of Delegates in 1999 to examine the feasibility of public financing of judicial elections. Its membership includes representatives from the League of Women Voters, the Conference of Chief Justices, the ABA Judicial Division and the ABA Standing Committee on Election Law. The Commission held three public hearings and heard testimony from 25 expert witnesses, reviewed numerous documents and circulated its report extensively to ABA entities and other organizations.

Background

“Persons who undertake the task of administering justice impartially should not be required - indeed they should not be permitted - to finance campaigns...”
Justice John Paul Stevens, ABA Annual Meeting, Opening Assembly, 1996

While there are many threats to judicial independence, one of the more pervasive problems is the nature and cost of running for the bench. Campaign battles may be necessary for legislative and executive branch elections, where people are being elected to represent viewpoints of a constituency and advocate on their behalf. They are not natural, though, for the judiciary. The judicial branch is uniquely structured to be independent and separate from the legislative and executive branches. Judges are required to be impartial, neutral decision-makers who apply the facts of the case to the law, without looking to the prevailing popular trends, without fear or favor. Respect for the rule of law is what sets our country apart and makes our system of government an example for all. Judges should not be elected because they favor a particular industry, philosophy or stand on crime. They cannot campaign on a platform, nor should they be elected as representatives of a particular interest.

Unfortunately, though, due to the cost of campaigning for a seat on the bench, judicial candidates are forced to turn to others for support. By turning to others for financial support to run an election, judges open the door to comparisons with races for legislative and executive offices. Questions are asked about where the money comes from and what is expected in return for the money. A detrimental consequence of this is the erosion of public trust and confidence that the judicial branch can and does perform its duties with neutrality and impartiality, without regard to prevailing trends or outside influences.

Financing of judicial campaigns raises many distinct and complicated issues. Approximately 80% of this country's state and local judges must stand for election in some manner. Whether it is the initial path to the bench or a retention election, or both, the cost of running a campaign has increased significantly over the past decade.

The ABA has long supported the need for improvements in judicial campaign financing. In 1997 the ABA created a Task Force on Lawyers' Political Contributions to examine lawyers' contributions to the campaigns of government officials, judges and judicial candidates. The Task Force studied these areas and submitted two separate reports to the ABA House of Delegates. In 1998 the Task Force issued the second of its reports, which dealt with lawyers' contributions to judicial campaigns. Recommendations dealing with this report were submitted to the ABA House of Delegates at the 1998 Annual Meeting but were withdrawn. Then-ABA President Philip Anderson created an Ad Hoc Committee on Judicial Campaign Finance to review the recommendations of the Task Force and to recommend to the ABA House of Delegates how these recommendations might best be given effect. At the ABA Annual Meeting in August 1999 the report and recommendations of the Ad Hoc Committee were presented to and adopted by the ABA House of Delegates. The recommendations modify the ABA Model Code of Judicial Conduct. Both the initial Task Force report and the Ad Hoc Committee report touch on public financing of judicial elections as a viable alternative. Due to the depth of study needed, though, both reports defer the matter. The Ad Hoc Committee report as adopted by the House of Delegates specifically assigns the task of additional study on the issue of public financing to the ABA Standing Committee on Judicial Independence.

The ABA has long supported merit selection systems in which judges are initially appointed and later stand for retention election as striking the right balance between judicial independence and accountability. At first blush, the report of this Commission, which evaluates the desirability of public financing in states that employ conventional elections, might seem at odds with an ABA position that eschews such elections in favor of merit selection. However, the ABA recently reaffirmed its preference for merit selection but has adopted policy designed to improve judicial elections in recognizing the impediments to adopting merit selection in many states.

The Commission unanimously recommends that states that elect judges in contested elections finance judicial elections with public funds. In reaching this conclusion, the Commission recognizes that judicial elections are unique from elections for legislators and executives. These latter public officials are elected to be representative of and responsive to constituencies whereas judges are not representative officials but are responsive to the rule of law rather than

constituencies. The Commission concludes that public financing of judicial elections will address the perceived impropriety associated with judicial candidates accepting private contributions from individuals and organizations interested in the outcomes of cases those candidates may later decide as judges. In support of its recommendation, the Commission makes several findings and offers several principles to help guide the development of a public financing scheme for judicial elections. The Standing Committee on Judicial Independence has endorsed the Commission's report and now submits this resolution to the House.

Commission Findings

The Commission's findings take up where those of its predecessor commissions left off. The Commission finds that the cost of running judicial campaigns has increased dramatically as judicial races are being contested with increasing frequency and intensity. Judicial candidates must cover that added cost by taking out larger loans or accepting more campaign contributions from lawyers, prospective litigants and interest groups. The public suspects that judges are influenced by their contributors, and allegations of *quid pro quo* are becoming more common. For their part, many judges and prospective judges are uncomfortable with this escalating "arms race" in judicial elections; to avoid it, some sitting judges have gone so far as not to seek reelection, and some highly qualified persons have been discouraged from seeking judicial office in the first place. Furthermore, some qualified candidates who lack connections to wealthy contributors may be impaired in their ability to compete effectively for judicial office. Clearly, the size of a judicial candidate's campaign war chest is an imperfect indicator of that candidate's qualifications or intrinsic popularity with a vast majority of voters who make no contributions. The size of that war chest, nevertheless, exerts an often decisive impact on election results.

The American Bar Association's multi-year effort to address ongoing threats to judicial independence is driven by the recognition that the judiciary is not a political branch of government and should not be treated as one. To the extent that candidates for judicial office are obligated to run for office like political branch candidates, to solicit, accept and spend contributions from interest groups like political branch candidates, it is inevitable that the critical distinction between judges and "politicians" will begin to blur.

The net effect of these developments has been to create the impression that judges are no more "impartial" than other elected officials, which threatens to further politicize the judiciary and undermine public confidence in the courts.

Commission Principles

Based on the above-mentioned findings, the Commission recommends that states which select judges in contested elections finance judicial elections with public funds, as a means to address the perceived impropriety associated with judicial candidates accepting private contributions from individuals and organizations interested in the outcomes of cases those candidates may later decide as judges. This recommendation is supported by a number of principles.

For states that elect their judges, the potential advantages of underwriting judicial campaigns with public funds are clear. The more money judges receive from public sources, the less they will have to raise from private groups and individuals who are interested in the outcomes of cases the judges decide, which will reduce the potential for campaign contributions to influence judicial behavior and address the public perception that such perceived influence may promote. Indeed, the case for public financing of judicial elections may be more compelling than it is for the legislative or executive branch races, notwithstanding the fact that almost all public funding programs have confined themselves to political branch contests.

The Commission recognizes the established Constitutional limits on a state's ability to regulate judicial campaign finance. Courts have recognized campaign spending as a form of political expression that is fully protected by the First Amendment freedoms of speech and association and applicable to the states through the due process clause of the Fourteenth Amendment. Public financing programs coupled with voluntary spending limits are completely consistent with the letter and the spirit of the First Amendment. Public funding programs give candidates a choice: to limit private spending on campaign related speech in exchange for public funding, or to forego public funding and spend without limit. As long as candidates make that choice freely, it is theirs to make.

The Commission recognizes that the states have different constitutions providing for different forms of judicial elections conducted in different legal cultures, that may affect which form of public financing is best suited to the needs of a particular jurisdiction. Given the variety of selection methods, the Commission recommends that states which employ partisan or non-partisan judicial elections provide full public financing to judicial candidates. The Commission does not recommend in favor of full public financing for states that select judges by appointment, followed by retention election. Although the Commission concludes that conventional public financing is not advisable in retention elections, this does not mean that public funds should have no role in retention election states. The Commission recommends publicly subsidized voter guides in all judicial elections, including retention elections. Additionally, in the unique context of retention elections, the Commission notes that

several states have implemented publicly funded judicial performance evaluation programs.

The Commission also recommends that public financing programs be introduced where the need is greatest and implementation is most feasible, which will ordinarily be the case in primary and general election campaigns for high courts, and in some cases, intermediate appellate courts. Additionally, public funds should be provided for primary as well as general elections. Campaign races for the state's high court have the highest public profile and the problems such races have encountered have attracted the most media attention; there are a manageable number of races to fund; and as compared to trial court races that are often uncontested, high court races are already quite competitive, so that any increase in competition encouraged by public funding is likely to be marginal only. Were trial court races to be publicly funded, the number of races at issue would increase geometrically, as would the cost of publicly funding such races, the complexities of administering a program that vast, and the potential for unintended consequences to make the public funding cure worse than the private financing disease.

Public financing programs should provide judicial candidates with full public financing in amounts sufficient to encourage them to opt into the program and voluntarily forego private fundraising. The only way that judicial candidates will find it worth their while to forego private fundraising voluntarily in exchange for the receipt of public funds is if they receive public funds in amounts sufficient to enable them to reach voters effectively. Perfect parity in spending among the candidates is unnecessary, as long as the level of funds is adequate to permit all of them to communicate their message to the electorate.

Public financing programs should take steps to limit eligibility for public funds to serious candidates in contested elections. It is recommended that states limit eligibility to candidates who have succeeded in generating a minimum number of small contributions. Virtually every state with a significant public financing program limits candidates eligible to receive public funds to those who have raised a minimum number or dollar amount of qualifying contributions. This approach is preferable to a petition process because it requires a tangible display of support that petitions do not, which can ensure that only serious candidates succeed in generating the requisite number of contributions. In order for that to be the case, it is important that candidates be required to generate a significant number of contributions in an amount that, while not large enough to create a perceived impropriety, is still large enough to constitute a showing of *bona fide* support.

States should condition the distribution of public funds on the candidates' promise to forego private funding and limit their use of public funds to legitimate campaign purposes. If public financing programs are to reduce the perceived impropriety associated with judges receiving private contributions from individuals and organizations with a political or financial interest in the outcomes of cases those judges decide, it is imperative that the private contributions giving rise to that perception be eliminated.

States should address the impact of independent expenditures and recognize the impact of general issue advocacy on public financing programs. The Commission concludes that making supplemental public funds available to candidates for the purpose of enabling them to respond to speech sponsored by independent campaign expenditures is the most workable means to encourage robust debate in judicial campaigns and preserve public financing as a viable option for judicial candidates. The Commission recognizes, however, that the Constitutionality of this approach is not free from doubt, for which reason the Commission's recommendation in favor of such an approach is made subject to final resolution of constitutional uncertainties.

The Commission recommends that public funds should be disbursed in a form that best effectuates the goals of the public financing program under consideration, thus recommends that full public funding be provided in the form of simple bloc grants to the candidates' election committee. This method has the advantage of providing candidates with a simple and certain source of revenue. Additionally, the Commission recommends that all states with contested or retention elections provide the electorate with voter guides on the candidates. The preparation of voter guides would occur in a process that is separate and distinct from the disbursement of public monies via general bloc grants for use by the candidates in running their campaigns. Every state that selects or retains judges by election is encouraged to devote public monies to the development and distribution of such guides to better inform voters in advance of elections.

Public financing programs should be funded from a stable and sufficient revenue source. The Commission recommends that, whenever possible, public financing programs should be funded by general revenues, but that, when necessary, states ought to consider a multiplicity of funding sources. Funding public financing programs from general revenues is optimal because it constitutes a stable, fair funding source. The Commission recognizes, though, that it may not always be feasible to secure the monies needed to fund public financing programs from general revenues alone. Accordingly, the Commission encourages states to consider a multiplicity of funding sources when general revenues alone are unavailable or inadequate.

The state entity that administers public financing programs should be adequately staffed and independent. Although state supreme courts have traditionally been responsible for promulgating and enforcing rules governing campaign conduct by judicial candidates, the Commission believes that public financing programs should be administered independently of the judicial branch. Over and above the need for the commissions that oversee the administration of public financing programs to be independent, it is necessary for them to be adequately staffed. If public financing systems are to be effective, staff support must be available to review applications, oversee disbursement of funds, monitor campaign expenditures, enforce independent expenditure reporting requirements, and investigate and enforce violations of rules regulating public financing programs.

The findings and principles of the Commission are extensively detailed in the Commission's full report. This report can be obtained by request of the Standing Committee on Judicial Independence or by accessing the Standing Committee's website at www.abanet.org/judind.

Conclusion

The past century has witnessed extraordinary changes in the administration of justice: a relentless rise in state and federal court caseload; a concomitant increase in the number of state and federal judges and a proliferation of other judicial officers – magistrates, special masters, and administrative law judges; increases in the cost and complexity of pretrial litigation and changes in the very nature of the judicial function and the legal profession itself, brought about by improvements in technology, shifts in legal culture and differences in the kinds of cases that come before the courts.

Against this backdrop of perpetual change, the need to preserve a judiciary that is independent of and yet accountable to the people it serves has remained a constant. The push and pull of judicial independence and accountability in a justice system that is always in flux, make some measure of public dissatisfaction with the courts unavoidable and all but assure that the struggle to keep from falling behind the times will be a continuous one.

The inevitability of dissatisfaction, however, counsels vigilance, not complacency. As our judicial system continues to change in fundamental ways, it is all the more critical that we strive to make certain that our judges remain independent, accountable and above ethical reproach, and that the system they serve continues to provide equal and impartial access to justice.

This report has focused on an important piece in the dynamic puzzle of judicial administration: dissatisfaction with the administration of justice that arises when the public perceives that judges are influenced by contributors to their re-election campaigns, and how public funding might serve to alleviate that source of dissatisfaction. It is crucial, however, to view our project in the larger context that we have just described as part of an ongoing effort to preserve, protect and guarantee justice for all, now and in the future.

Respectfully submitted,

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