



Choosing Justice? The Need for Judicial Selection Reform

*A White Paper by the Committee for
Economic Development*

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Choosing Justice? The Need for Judicial Selection Reform

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In the first decade of the new millennium, state supreme court candidates raised nearly twice as much for their elections from the decade prior. Why they did had no correlation with any change in their job requirements and yet a proliferation of outside money, attack ads and other campaign tactics traditionally reserved for other elected officials flooded – and continues to flood – elections for state courts across the country.

The Committee for Economic Development of The Conference Board (CED) and its Members believe that selection by election is eroding citizens' and businesses' confidence in the integrity of their judges. CED has a long-standing history in researching and raising awareness about this issue. In 2002, *Justice for Hire: Improving Judicial Selection*, urged reforms that would move away from judicial elections toward appointive approaches. *Partial Justice: The Peril of Judicial Elections* (2011) warned that the threat to impartial justice had become more acute.

We continue to identify ways to restore balance and good faith in our state courts. Our new report, *Choosing Justice? The Need for Judicial Selection Reform*, outlines a four-step agenda to restore neutrality on the bench in states nationwide by encouraging an appointments-based system; regularly measuring state judges' performance; ensuring adequate pay; and supporting stricter recusal standards.

We would like to thank all of the CED Members who served on the Money in Politics Subcommittee, who oversaw the development of this report; Tony Corrado, who authored this report; and CED staff, in particular Joe Minarik, Senior Vice President and Director of Research, and Mike Petro, Executive Vice President, for their work in support of the Subcommittee's efforts.

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Choosing Justice? The Need for Judicial Selection Reform

Executive Summary

How judges are selected and placed on the bench is central to the impartial administration of the law and ultimately to the quality of justice in our legal system. The procedures for selecting those who hold judicial office should be designed to safeguard the integrity of the courts and insulate those who are chosen from political pressures or other influences that may undermine unbiased and impartial decisions in administering justice. However, throughout much of the nation, the procedures currently in place fail to uphold this fundamental requisite of an independent judiciary.

Almost 90 percent of state appellate court judges are initially placed in office or remain in office as a result of a decision made by voters. Only 12 states select judges to their highest state court through appointment processes that do not require judges to appear on the ballot. In 38 states, state supreme court judges are either elected to office in the first instance and then face regular re-election to remain in office or are initially appointed to office and then retain their positions after the completion of a specified term by standing for election. The Committee for Economic Development of The Conference Board (CED) believes that these systems of selection by election are antithetical to the notion of an independent judiciary. Elections encourage candidates to raise campaign contributions and appeal to voters, which exposes judges to partisan political pressures and interest group politicking aimed at influencing their behavior.

The damaging consequences of judicial elections have become increasingly evident and acute in recent elections due to the significant changes that have taken place in these contests. Many of these elections are becoming costly and divisive battlegrounds in which competing interests vie to elect candidates whom they perceive to favor their views—or defeat those whom they do not. As a result, the amounts of money involved in judicial campaigns have risen dramatically in the past

decade, with most of the campaign contributions coming from attorneys and other donors with a stake in the outcome of court decisions. In addition, interest groups are responsible for a growing share of the spending that takes place in these races. Interest groups have greater incentives than ever before to participate in these elections in hopes of influencing judicial outcomes. Their involvement has heightened the prospect of state judicial elections becoming entangled in the political thicket of national partisan and special interest politics. Examples from recent elections indicate that interest groups are responsible for a growing share of the money poured into these contests and are outspending the candidates in the most important races.

BUSINESS COMMUNITY CONCERNS

The business community is deeply concerned about the damaging effects of elections on the independence and integrity of our state courts. The risks posed by the influence of donor interests and political pressures are too great to guarantee unbiased outcomes or to maintain public confidence in the courts. Survey research commissioned by CED revealed that the vast majority of business leaders worry that campaign contributions have a major effect on the decisions rendered by judges, and found near universal concern that the demands of campaigning will make judges accountable to politicians and special interest groups rather than the law. These views are widely shared by the public.

Our concerns are reflected in the U.S. Chamber of Commerce's annual assessment of business perspectives on the litigation environment in the states. A growing majority of businesses now report that a state's litigation environment is likely to impact important business decision at their company. And it is not surprising that most of the states ranked as having the worse litigation environments are states that elect their judges.

Recent research supports these views. The most comprehensive empirical analyses conducted to date indicate that the growing demands of campaigning have a significant influence on the behavior and decisions of state judges. Selection by election thus entails inherent risks that pose a threat to the impartiality and integrity of the courts, and to the independence of the judiciary.

KEY RECOMMENDATIONS

We have concluded that fundamental reform of the judicial selection process is urgently needed and that appointment should be the basic principle applied to the selection of all judges. In reaching this conclusion, we have been mindful of the principle of judicial accountability and the need to hold judges accountable for their behavior and decisions. These are essential elements of an independent judiciary and effective rule of law.

- We believe a commission-based appointment process with appropriate mechanisms for holding judges accountable, similar to the commission used to identify and nominate judicial candidates in Arizona, would be the best means of selecting judges. Each state should establish a nonpartisan, independent judicial nominating commission that would be responsible for recruiting, reviewing, and recommending eligible nominees for judicial office. A nominating commission should be selected by multiple appointing authorities with provisions to guarantee diverse membership and transparent procedures. The commission would be responsible for preparing a list of nominees that would be the basis for judicial appointments to be made by a state's governor.
- To facilitate periodic review and evaluation of judges for purposes of reappointment, we support the establishment of independent and nonpartisan judicial performance evaluation commissions, similar to those now used in

Arizona and other states. Such commissions would be responsible for preparing a recommendation as to whether a judge should be retained in office that would be made available to the public and the relevant appointing authority.

- Commission-based appointment systems work best when a substantial number of highly qualified candidates agree to be considered by nominating commissions. Levels of salary and compensation must be appropriate to encourage such individuals to serve in judicial office. We encourage state officials to review current salaries to ensure that appropriate levels of compensation are provided to judges at all levels, and support the use of judicial compensation committees as a means of providing objective assessment of judicial salaries.

We acknowledge that most states will find it politically impracticable to move to a commission-based appointment system in the near future, even though the case for reform is compelling. We therefore support measures that will not resolve the core problems of judicial elections, but will make a major contribution in addressing their most deleterious effects.

- Recusal can resolve the problem of conflict of interest or bias that can result from campaign activities, and is a remedy widely supported by the business community. We support stricter recusal procedures and standards than those currently in place in many states.
- We also continue to support changes in current election practices, including the use of merit-based selection rather than contested elections, the elimination of partisan elections, longer terms of office to reduce the frequency of elections, and the use of judicial performance evaluation commissions, similar to those recommended for appointment-based selection, as a means of providing information to voters.

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CONCLUSION

Selection by election does not befit the role of a judge. With highly politicized judicial races spreading to more and more states, the risk to the impartiality and integrity of state judiciaries has become more severe. A bad system is becoming worse, and the risk of political influence on judicial behavior is escalating.

We urge public officials, members of the business community, judges, members of the legal profession, and community leaders in the states to join in our efforts to increase public understanding of the importance of an independent judiciary and the consequences of judicial elections. We call upon these leaders to work together to initiate needed reforms before the rule of law is further eroded and the public loses confidence in the impartiality of our courts.

Introduction

State courts handle more than 90 percent of all legal cases initiated in the United States, with 100 million cases arising in their jurisdictions on average each year.¹ These courts have the authority to decide virtually all types of cases involving citizens in their states, including civil and individual rights under state constitutions and laws, civil and criminal law prosecutions, and family law matters. Cases in state courts range from the enforcement of traffic violations to the standards and procedures essential to the guarantee of individual liberty. As the trend towards litigation has grown due to the willingness of trial attorneys to pursue matters in court, state judges have assumed a more active role in resolving social and economic disputes. This, in turn, has increased the incentives to challenge legislation in court, involving state judiciaries in partisan policy debates and disagreements over policy implementation. Consequently, state courts are increasingly called upon to resolve questions on such highly controversial policy matters as school funding, health care, environmental protection, election reform, and social issues.

State courts are also the primary venue for a wide range of legal issues important to business enterprises and economic development, including zoning regulations, tort and liability cases, contract disputes, and the application of state and local statutes to business transactions. Thus, state courts hear numerous cases relevant to the business community each year, and about one-third of state supreme court cases involve business litigants.² A recent review of supreme court opinions across all states found that 2,345 business-related cases were decided in the years from 2010 to 2012 alone.³

Given the effects court decisions may have on business decision-making and the business climate, an impartial judiciary is an essential element of a free market economy. In making financial and investment decisions, the business community depends on the independence and impartiality of the judicial system. Consistent and evenhanded

administration of the law is a critical element of a stable and prosperous business climate. An impartial judiciary allows economic actors to rely on existing legal frameworks in weighing the potential costs and benefits of investment decisions, reduces perception of risks, and promotes adherence to transparent rules of law. Confidence in the integrity of the courts facilitates longer-term economic decision-making that offers the prospect of greater enterprise value, enhanced productivity, lower transaction costs, and a greater number of welfare-enhancing transactions that are of benefit to the economy and society.

How judges are selected and placed on the bench is central to the impartial administration of the law and ultimately to the quality of justice in our legal system. The procedures for selecting those who hold judicial office should be designed to safeguard the integrity of the courts and insulate those who are chosen from political pressures or other influences that may undermine unbiased and impartial decisions in administering justice. However, throughout much of the nation, the procedures currently in place fail to uphold this fundamental requisite of an independent judiciary.

Almost 90 percent of state appellate court judges are initially placed in office or remain in office as a result of a decision made by voters.⁴ Only 12 states select judges to their highest state court through appointment processes that do not require judges to appear on the ballot. In 38 states, state supreme court judges are either elected to office in the first instance and then face regular re-election or are initially appointed to office and then retain their positions after the completion of a specified term by standing for election. The latter approach is commonly known as merit-based selection or the “Missouri Plan,” so-named for the state that originally adopted this method.

While there are procedural variances among the states, three basic types of election are used in the 38 states that employ the ballot in some form. In

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eight states, all judges are initially selected and then run for re-election in partisan elections, which require candidates to run on a party line on the ballot.⁵ Fourteen states hold nonpartisan elections in which candidates compete without identifying a party affiliation. In the remaining sixteen states, which use merit-based systems, state high court judges are initially appointed to office and then, upon completing their initial term of office, face the electorate in an uncontested retention election. In these elections, judges appear on the ballot without opposition and voters are asked to vote for or against retaining the judge for another term.⁶

In addition, a few states that use merit-based appointment processes with retention elections for the highest court use partisan or nonpartisan elections to select judges for some if not all of their lower appellate courts and general jurisdiction trial courts. In Florida and South Dakota, circuit court judges are selected through nonpartisan elections. In Arizona, Missouri, and Indiana, different types of elections are used to select lower court judges depending on the county or judicial district involved.⁷ So, overall, selection by election tends to be a slightly more common method for choosing judges who serve in the lower courts than is the case for those who serve on the highest courts.

Over the course of the past two decades, the character of these elections, which typically were low profile, inexpensive and civil contests, has changed in an alarming manner. Far too many of these contests are becoming costly and divisive political battlegrounds in which competing interests vie to elect candidates whom they perceive to favor their views—or defeat those who do not. With each new election year, judges find it more and more necessary to mount expensive campaigns to gain or retain a seat on the bench, or find themselves drawn into the political fray as they become targets of increasingly large campaign expenditures. Interest groups are focusing more of their political spending on judicial contests, undertaking concentrated and coordinated efforts to shift state courts in a preferred direction or enhance the likelihood of singular preferred

outcomes. And in the most competitive judicial campaigns, expensive television advertisements, particularly negative attack ads, have become the principal means of communicating messages to voters. In short, many judicial races are now indistinguishable from the campaigns waged for statewide political offices or seats in state legislatures. The business community shares the view of many Americans that this transformation is a matter of great concern.

CED first highlighted our concerns about the state of judicial elections in 2002, when the changing political landscape of these elections was just becoming apparent. At that time we concluded that this method of selection posed a serious threat to the impartiality, integrity, and independence of the judiciary. We issued a comprehensive study, *Justice for Hire: Improving Judicial Selection*, which urged reforms that would move away from judicial elections toward appointive approaches. In 2011, we revisited this topic in the wake of the U.S. Supreme Court's decisions in the *Citizens United* and *Caperton* cases, which had important implications with respect to judicial campaigns, and issued a report, *Partial Justice: The Peril of Judicial Elections*, in which we found that the threat to impartial justice had become more acute.

Since then, judicial elections have continued to evolve, developing in ways that make them increasingly indistinguishable from elections for political office. More states are experiencing high-spending judicial contests and such contests are no longer confined to partisan races or highly competitive nonpartisan elections. In a number of states, retention elections are now becoming costly affairs in large part due to electioneering by national political organizations and interest groups. While national interest groups or organizations have been involved in specific judicial races in the past, what is new is the scope of interest group activity. Most notably, national organizations have begun to incorporate judicial elections into their broader partisan or political strategies, establishing operations specifically designed to influence the composition of state courts. These

groups target races in which the outcome may shift the perceived direction of a court or provide the marginal vote or votes needed to improve the prospects of a preferred policy outcome. Given their resources, they are able to outspend the candidates by substantial amounts and at times dominate the discourse that takes place in these elections, since they are responsible for most of the advertising broadcast to voters. In short, national political groups are now approaching judicial elections in much the same way that they approach state legislative elections—intervening in races where they believe their electioneering can make a difference in swing contests.

These more concerted national efforts to influence judicial elections suggest that a new stage in the politics of judicial elections is taking shape. Judicial elections are increasingly becoming embroiled in partisan and special interest politics, which raises the risk of partisan political considerations influencing judicial opinions or of judges viewing particular cases as political litmus tests. What's more, this heightened risk comes at a time when safeguards designed to insulate judges from the most pernicious effects of campaign fundraising are facing legal challenge and may be struck down by the U.S. Supreme Court, thereby further exposing candidates for judicial office to the influence of campaign donors.

The U.S. Chamber of Commerce's Institute for Legal Reform's State Liability Ranking Study, which regularly assesses the perspectives of the business community on the litigation environment in states, reflects our concern about the effects of judicial elections. In 2012, 70 percent of the businesses

polled reported that the litigation environment in a state is likely to impact important business decisions at their company. This compares to 63 percent in 2009 and 57 percent a year earlier. Not surprisingly, in the overall rankings of states, seven of the eight states considered to have the worse litigation environments are among those which elect judges to office, including four that hold partisan elections and two that hold partisan elections in certain instances. Of the top eight states considered the best environments, only one holds contested elections for judges.⁸

That more and more business leaders view the litigation environment as a factor in their decision-making is one indication of the imperative need to maintain the independence of courts. We thus continue our efforts to bring to the fore the alarming consequences of the relatively rapid transformation of judicial elections taking place. A bad system is becoming worse, and the risk of political influence on judicial behavior is escalating.

CED has concluded that a commission-based appointment process, similar to that which is used in Arizona, should be adopted to replace selection by election. We also support the creation of judicial performance evaluation commissions as a means of holding judges accountable for their actions in office. In addition, stricter recusal rules than those currently in place in most states are needed to avoid the conflicts of interests and perceptions of bias that can undermine public confidence in the impartiality of the courts. In our view, these fundamental reforms are urgently needed if an independent judiciary is to be preserved.

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The Problem of Judicial Elections

In our constitutional system of government, the role of a judge is fundamentally different from that of a legislator or other elected official. Judges are not placed in office to serve as the representatives of a particular constituency, to be advocates of a particular cause, or to make decisions with electoral consequences in mind. They do not have a responsibility for expressing the views of others or adopting stances that reflect the preferences or interests of those who elect them to office. Our legal system is predicated on the idea that a judge will serve as a neutral and dispassionate arbiter and administrator, indifferent to popular opinion, responsible only to the law. This duty to administer justice without bias or favoritism distinguishes the judiciary from the other branches of government. Judges are to apply and interpret law, treating all who come before them similarly, giving fair hearing to all parties, and basing their decisions solely on the law and the facts of the matter before them. Impartiality, fairness, and unbiased procedural order—both in actuality and in appearance—are embedded in the principle of due process. An independent judiciary is the cornerstone of effective rule of law.

Further, the judiciary is uniquely dependent on perceptions of its probity and unbiased adherence to the law. The authority of the courts is grounded on the respect accorded to its judgments. In our adversarial system, judges will often make decisions that do not satisfy all litigants. Their resolution of disputes may prove to be unpopular or result in outcomes that fail to match the expectations of major interests within society. Indeed, in exercising their responsibilities to uphold the protections afforded individual rights under law and to review the constitutionality of government actions, they are likely to reach conclusions that are contrary to prevailing public attitudes and the decisions of legislative majorities. Acceptance of a court's decision, both by the parties directly involved in disputes and by those who may be affected by an outcome, relies in no

small part on the perception that decisions were reached through an unbiased and even-handed process, and based solely on the application of law to the facts and matters of a case at hand. This perception of the impartiality and probity of a court is essential to voluntary compliance and adherence to the law. The public must have confidence that “justice has been done.”

We believe that choosing judges by election is antithetical to this understanding of the role of an independent judiciary. Elections, especially contested elections in which candidates compete against each other to win office, encourage sitting judges and judicial contenders to raise campaign contributions and appeal to voters. They place judges in an environment in which their statements and behavior on the bench are cast in a political context, exposing them to reprisal at the polls and the efforts of outside interests hoping to politicize their actions and influence judicial behavior. Citizens are provoked to view judges not as dispassionate guardians of the law or neutral arbiters, but as politicians who are most concerned about securing their vote. Campaign fundraising and electioneering thus create reasonable perceptions among those who represent litigants in court or have an interest in the outcome of cases before a court, as well as among the public as a whole, that a judge's decisions, either consciously or unconsciously, will be influenced by the preferences of campaign contributors or by the political support they have received in seeking office. In these ways, elections pose a significant threat to the integrity and impartiality of the judiciary, and diminish public confidence in the judicial process.

The business community is deeply concerned about the damaging effects of judicial elections on the independence and integrity of our state courts. The risks posed by the influence of donor interests and political pressures are too great to ensure unbiased outcomes or to maintain public

confidence in the courts. A 2007 poll by Zogby International commissioned by CED revealed that four out of five business leaders worry that campaign contributions have a major effect on decisions rendered by judges. The survey also found near universal concern that campaign contributions and political pressure will make judges accountable to politicians and special interest groups rather than the law.⁹ This view is widely shared by the public. A 2009 Gallup poll found that 89 percent of voters think the influence of campaign contributions on judges is a problem, and 90 percent believe that a judge should not hear a case involving an individual or group that contributed to a judge's campaign. A 2010 Harris poll indicated that more than 70 percent of Americans feel that campaign contributions influence courtroom decisions.¹⁰

One does not have to look hard to see the potential conflicts of interest and abuses that may result when judges need to be elected to office. For example, a recent review of empirical analyses submitted in a brief to the U.S. Supreme Court by a group of academic experts in law, economics, and political science who study the effects of judicial elections noted that numerous studies have shown that campaign contributions can be correlated with favorable decisions in cases before recipient judges.¹¹ One nationwide study of 21,000 state supreme court decisions published between 1995 and 1998 found that campaign contributions from attorney groups, medical groups, business groups, and labor groups were associated with favorable decisions in relevant cases before recipient judges selected through partisan elections.¹² A more recent empirical analysis of 175,000 contribution records and more than 2,000 state supreme court opinions in business-related cases published between 2010 and 2012 found that the likelihood of ruling in favor of business interests rose significantly as the share of a judge's campaign money from business interests increased. This relationship, however, was only found in partisan and nonpartisan systems; there

was no significant relationship between money and decisions in retention election systems.¹³ Similarly, a study of pro-plaintiff donors to justices on the Ohio, Kentucky, and Alabama Supreme Courts found that justices who received higher amounts of campaign money from these donors were more than five times more likely to find for tort claimants than were those who received smaller amounts from pro-plaintiff sources.¹⁴

Looking beyond campaign fundraising, judicial behavior may be influenced by other electoral pressures. The prospect of an election in itself introduces the possibility that political considerations will affect a judge's opinion. It raises the risk that a judge will be mindful of voter opinion or the potential political consequences of a particular ruling. This risk is especially great when judges anticipate a contested election, particularly a partisan contest, in which decisions are likely to be scrutinized by challengers with an eye towards political gain. The problem is further compounded by the behavior of special interests, which may decide to target a judicial candidate and spend substantial sums in hopes of electing a preferred candidate or ousting a sitting judge they perceive as not favoring their interests. Conduct in a campaign and the expenditures made within them can thus create perceptions of bias that lead to questions about the integrity of judges and extend beyond donor interests into other areas of law. For example, one tactic often employed by interest groups in judicial campaigns is the broadcast of advertisements casting a judge as "soft on crime." Recent research based on more than 3,000 criminal appeals decided in state supreme courts in 32 states and published opinions from 2008 to 2013 revealed that the more television ads aired during an election, the less likely justices are to vote in favor of criminal defendants. Moreover, this analysis, which included the period before and after the *Citizens United* decision that struck down the prohibition on corporate and union electioneering in 23 of these states, indicated that the removal of these prohibitions is associated with, on average, a seven percent decline in voting in favor of criminal defendants.¹⁵

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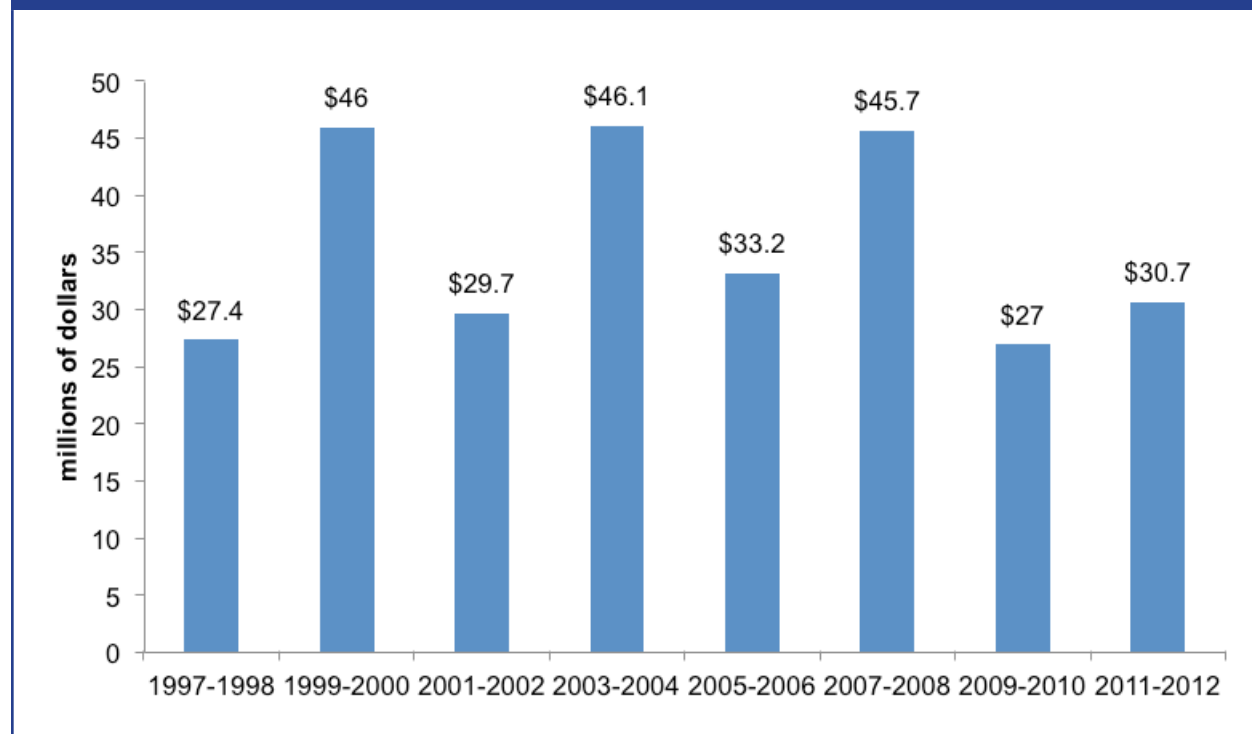
The Evolving Character of Judicial Elections

The changes that continue to take place in the financing of judicial campaigns further exacerbate these already damaging consequences. High-spending races are more frequent in a growing number of states, turning many judicial races into highly competitive, politicized, and polarized electoral battles. The more competitive the race, the greater the demand for money, and this is especially the case in elections in which the funds are being used to pay for television advertising. Both of these factors, greater competition and a growing reliance on costly advertising, have become a common feature of judicial elections in recent years.

Thus it is no surprise that the amount of money flowing into judicial elections has risen substantially. Throughout the 1990s, state supreme court candidates raised a total of \$83 million;

in contrast, from 2000-2009, candidates raised almost \$207 million, or more than double the total of the previous decade.¹⁶ This surge in campaign fundraising is a result of the growing number of races in which candidates are raising substantial sums to finance campaign efforts in contested elections. It also reflects a rise in the number of high-spending races in which total spending reached one million dollars or more. In the 1990s, 26 supreme court contests reached the million dollar mark. All but two of these races occurred in the states of Alabama, Pennsylvania, and Texas, three of the states that select judges in partisan elections. In the more recent decade, 66 races held in a dozen states reached or exceeded one million dollars, and in 20 of the 22 states that hold contested elections the amounts spent in the most expensive contests surpassed all previous records.¹⁷

Candidate Fundraising in State Supreme Court Elections, 1998-2012



Source: Justice At Stake, Brennan Center, National Institute of Money in Politics, *The New Politics of Judicial Elections*, 2000-2009 (2010) and 2011-2012 (2013).

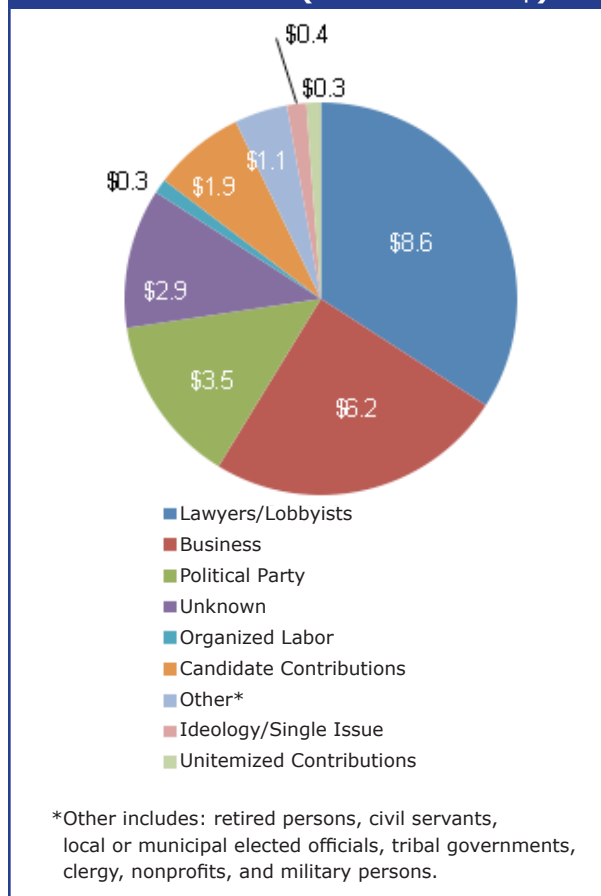
In the 2011- 2012 elections (the most recent years for which aggregate data is available), the total amount raised by candidates did decline as compared to other recent presidential year elections. Yet the candidates still raised a sizable sum, bringing in about \$31 million as compared to more than \$45 million in 2007-2008. The decline was primarily due to a slight drop in the number of competitive races and the absence of candidates who raised unusually large sums. In all, about half (48 percent) of the judicial races were contested, with one out of four candidates involved in financially competitive campaigns, as opposed to 56 percent four years earlier, when almost one out of three candidates were involved in financially competitive campaigns. Nonetheless, in 2011-2012, more than half (52 percent) of the 31 seats on state supreme courts up for election featured financially competitive contests.¹⁸ So while candidate fundraising was lower, these candidates overall still raised a substantial amount of money. The decline was a result of the particular races involved rather than a reversal in candidate behavior. In our view, recent elections foreshadow little change in the emphasis on money in judicial elections in the years to come.

Litigants before the courts have the greatest incentive to make contributions to judicial contenders, especially those involved in high-stakes appeals cases. Those who appear regularly before a court or who may have an interest in a case that could end up before a judge also have strong incentives to give. Most of the money donated to judicial candidates thus comes from trial attorneys and members of the business community. No other social or economic group matches the level of their donations, and this has been the case for some time.

What has changed in recent elections is the relative share of funding that comes from these sources. A decade ago, the business community was the largest source of donations to judicial candidates, responsible for 44 percent (\$15.2 million) of the total sum raised by judicial candidates in 2006, which was more than double the 21 percent share (\$7.4 million) that came from attorneys.¹⁹ By this time, judicial races, especially in states with

partisan elections, had often become contests in which civil plaintiffs' lawyers and members of the civil defense bar were likely to support different candidates. Or personal injury lawyers were likely to be at odds with attorneys who represented businesses or professional organizations. Some state courts actually came to be known publicly as favoring plaintiffs, these perceptions fueled by campaign contributions made to individual judges by members of the trial bar.²⁰ The business community, led by the Chamber of Commerce and its state affiliates, responded to the developments by defending their interests and seeking to address the imbalances emerging in state courts by becoming aggressively more active in judicial campaigns.

Sources of Contributions to Supreme Court Candidates (in millions of \$)



Source: Brennan Center for Justice, Justice At Stake, National Institute on Money in State Politics, The New Politics of Judicial Elections, 2009-2010 (2011). Data based on an analysis of the 2010 election cycle.

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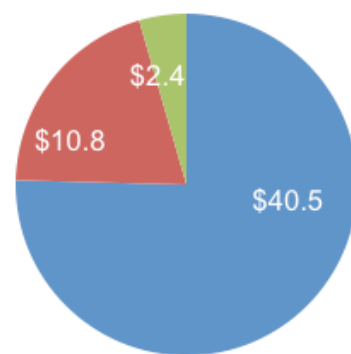
In the most recent elections, attorneys and members of the business community have continued to be the major sources of contributions in judicial campaigns. But, conversely, attorneys are now responsible for the largest share of donations to candidates. In the 2009-10 elections, supreme court candidates raised \$27 million. The National Institute on Money in State Politics, a nonprofit campaign finance research organization, identified the source of all but \$2.9 million (11 percent) of this sum and found that \$8.6 million (32 percent) came from attorneys and \$6.2 million (21 percent) from business donors. The next largest identifiable sources of funding were political parties, which contributed \$2.9 million (13 percent), and the candidates themselves, who spent \$1.9 million of their own funds. Small contributions from individuals that are not itemized in financial reports accounted for a mere fraction of the money received by these candidates, totaling less than \$300,000. A comparable breakdown of contributions in the 2011-12 elections is not yet available, but the National Institute's initial findings indicate that attorneys and members of the business community were again responsible for more than half of the money contributed to supreme court candidates, with attorneys donating \$10.2 million (31 percent of the total) and business donors contributing \$7.3 million (23 percent).²¹

A more notable and troubling change is the rising share of campaign spending that comes from interest groups and political parties. Contributing money to a candidate's campaign committee is only one way that those with stakes in judicial elections can attempt to influence outcomes. Interest groups, party organizations, and political committees can also spend money independently in support of a preferred candidate or against a candidate they oppose. In the most recent elections, they embraced this strategy to an unparalleled extent and in ways that signal a transformation in the political dynamics of judicial elections.

An analysis of the 2011-12 elections conducted by the Brennan Center for Justice, National Institute on Money in State Politics, and Justice

at Stake concluded that interest groups and party organizations spent a combined \$24.1 million in supreme court races, which represented 43 percent of the total spending by all actors in these contests, including the candidates. In comparison, groups and parties accounted for 22 percent (\$12.8 million) of all spending in 2007-2008 and 30 percent (\$11.4 million) in 2009-2010. Viewed in a longer perspective, the \$24.1 million total was nine times the amount spent by interest groups and parties (\$2.7 million) ten years earlier. Interest groups were responsible for most of the non-candidate spending. These groups spent a record \$15.4 million, which made up 27 percent of the funding in supreme court elections, well above the previous high water mark of \$9.8 million in 2003-2004 (\$11.8 million when adjusted for inflation), which at the time constituted 16 percent of all spending. Party committees made independent expenditures in two judicial election states, Michigan and Ohio, with the bulk of the spending done in Michigan, where party spending reached \$8.4 million.²²

Spending in Judicial Elections, 2011-2012 (in millions of \$)



- Partisan: candidates listed on the ballot with party affiliation
- Nonpartisan: candidates listed on the ballot with no party affiliation
- Retention: voters choose whether or not the incumbent remains in office

Source: National Institute on Money in State Politics; Linda Casey, *Courting Donors*, 2014.

Independent spending campaigns provide interest groups with strategic advantages that make them a powerful influence in elections. This approach allows them to operate outside of the constraints of campaign finance limits. They may raise contributions of unlimited amounts and spend unlimited amounts, so long as they do not coordinate their efforts with the candidates. As a result of the U.S. Supreme Court's 2010 decision in *Citizens United*, they may use corporate and labor union contributions to finance these expenditures, or corporate entities and unions can make expenditures directly, since one effect of the ruling was to strike down the prohibitions on corporate expenditures that previously existed in 24 states. Furthermore, such spending is typically concentrated in select races where groups see realistic opportunities to advance their particular interests, especially races where they have a clear preference based on a candidate's rulings on a particular issue, or where they perceive an opportunity to shift the partisan balance or perceived ideological leanings of a court to their advantage.

In practice, the millions of dollars interest groups are pouring into judicial elections highlights their role in these contests, but fails to capture the impact of their influence in particular races. Expenditures are concentrated in races where they are expected to have the greatest impact, often allowing a group or coalition of groups to dominate the advertising and electioneering in a race. In 2011-12, for example, interest groups and parties spent money independently in supreme court elections in only eleven states. In six of these states, interest group and/or party spending greatly exceeded the combined spending of all candidates.²³ In two states where supreme court justices were facing retention votes, Iowa and Oklahoma, interest groups spent hundreds of thousands of dollars, while the candidates spent no money at all.

Similarly, a preliminary analysis of television advertising in the 2014 judicial elections estimated that interest groups and parties spent \$8.2 million

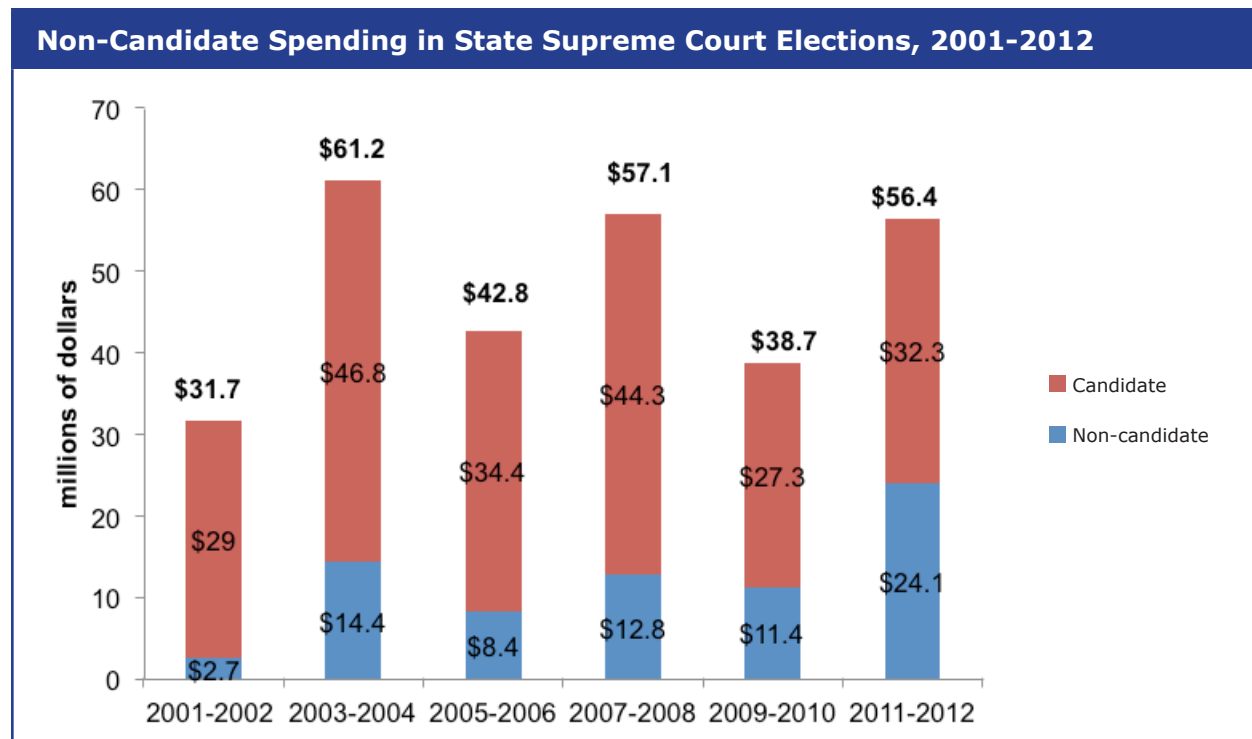
on advertising in 2014 alone, which represented 59 percent of all advertising expenditures (\$13.8 million including the candidates) that year. These interests and political committees spent money on advertising in every state where television ads were aired in the general election, as well as in seven of the nine states (including primaries and elections held before November) in which any advertising appeared. In five of these seven states, advertising expenditures by groups were significantly greater than the sums candidates spent on advertising.²⁴

Interest groups therefore play the predominant role in most of the races they decide to target. In these instances, the major voices heard by the electorate are not those of the candidates, but rather the biased perspectives of competing interests. Even more, these groups are no longer devoting most of their efforts to partisan elections, which are typically the most competitive contests and account for the major share of judicial election spending. Rather, they are mounting campaigns wherever they see a viable opportunity to advance their particular interest. In 2011-12, 90 percent of television expenditures financed by special interests were focused on nonpartisan elections in three states (Mississippi, North Carolina, and Wisconsin) and retention elections in three others (Florida, Oklahoma, and Iowa).²⁵

We recognize that interest group electioneering in judicial races is not new. However, we see changes underway that signal alarming developments in interest group politicking that further heighten the serious threat to the impartiality and integrity of courts that already exists.

A decade ago, organizations associated with trial lawyers and business or union-backed groups within states were the source of most of the interest group campaigning that occurred in judicial contests. Few national organizations focused on judicial elections, with the U.S. Chamber of Commerce one notable exception. But in recent years state courts have often been presented with cases related to issues that are focal points of national policy debate, such as the implementation of the Affordable Care Act.

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Source: Data from the New Politics of Judicial Elections series prepared by the Brennan Center for Justice, National Institute on Money in State Politics, and Justice At Stake.

In addition, the divisive partisan atmosphere that is corroding our national politics has led partisan interests to attribute high political stakes to the decisions of state courts, particularly with regard to the willingness of the judiciary to adjudicate and approve politically controversial legislation.

National organizations are therefore taking a greater interest in state judiciaries. Judicial elections are becoming infused with national politics as groups incorporate these contests into their broader political and legislative strategies. In the 2011-12 elections, a number of national groups from different points on the political spectrum spent money in judicial contests. Those that either spent money directly or made contributions to groups that did included the Judicial Crisis Network, National Organization for Marriage, Focus on the Family, Human Rights Campaign, American Tort Reform Association, American Future Fund, Republican State Leadership Committee, the National Rifle Association-

affiliated Law Enforcement Alliance of America, and the union-supported progressive organization, America Votes. A recent analysis by the Center for Public Integrity offers an example of the role of these groups. The Center's review of ten high-profile supreme court elections held in 2012 and 2013 found that at least a third of the \$11.7 million spent by independent groups came from outside of the election states, mostly from organizations based in Washington, D.C.²⁶

One example of the attention national groups are giving to judicial elections is the Republican State Leadership Committee's decision to launch a "Judicial Fairness Initiative," which was announced in advance of the 2014 elections. The Republican State Leadership Committee (RSLC), a national political committee focused on electing "down-ballot, state-level conservatives," stated that the purpose of the initiative would be to provide information to voters, thereby "educating them to better understand the ideology of candidates up

for judicial branch elections.” More specifically, the committee said the initiative would “focus on supporting conservative judges and candidates at the state level and provide research, resource unification and voter contact to support them.”²⁷ In the 2014 elections, the RSLC financed efforts concentrated on supreme and county court races in five states, including retention elections in Illinois and Tennessee, and spent a total of \$3.4 million.²⁸ On election night, the committee heralded its initial success, noting that candidates it supported won a close retention election in Illinois, as well as races in Ohio, Michigan, North Carolina, and Texas, which allowed Republicans to hold majorities in those states’ courts.²⁹

The willingness of well-established interest groups to intervene in judicial races when it serves their policy or political agendas sends a clear message to elected judges that they need to be mindful of the political consequences of their rulings and should be wary of rendering decisions that are at odds with popular sentiment or the views of special interests. Even in those states in which judicial elections have been relatively low-key affairs in the past, the new reality is that any election at any time may become a political battleground. No judge exposed to a decision by voters is free of the risk of becoming enmeshed in a hotly contested race, regardless of whether they face the voters in a partisan, nonpartisan or retention election.

Our concerns about the state of judicial elections are encapsulated in the experience of the 2012 election in Florida and a 2014 circuit court race in Missouri. These elections offer stark examples of how quickly a special interest group or political committee can change the dynamics of an election and turn it into a lightning rod for controversy in today’s highly charged political atmosphere. They also demonstrate the changes that are causing the spread of high-spending campaigns and the reasons why even those candidates who have not experienced the need to mount significant campaigns in the past are learning that they may have to do so in future if they hope to retain their positions on the bench.

The 2012 Florida Supreme Court Election

The 2012 Florida Supreme Court retention election proved to be radically different from previous retention elections in the state. The retention decision became a high-spending contest characterized by unprecedented campaign fundraising by the three justices facing a retention vote. More notably, the race became a priority for liberal judicial advocates, who spent substantial sums of money to keep the three justices, who were perceived to be members of the “liberal wing” of the court, on the bench. As a result, the monies spent by liberal groups overwhelmed the *combined* campaign spending of those opposing the candidates and the candidates themselves, producing the most expensive judicial race in Florida’s history and one of the most expensive judicial elections in the country.

Three of the seven justices on Florida’s Supreme Court faced a retention vote in 2012. Justices Barbara Pariente and R. Fred Lewis had initially been appointed to the court by former Democratic governor Lawton Chiles. The third justice, Peggy Quince, had been nominated by Governor Chiles during a transition period and was appointed by Republican governor Jeb Bush. These three had previously been on the ballot in 2000 and 2006, and had retained their seats in low-cost elections that drew relatively little interest, as had been the case in most retention elections in Florida since the state ended partisan elections as a means of judicial selection in 1976 and adopted a merit-based appointment process in the wake of a series of scandals involving popularly elected partisan judges.³⁰

In 2010, the Florida Supreme Court invalidated the language of a proposed ballot initiative challenging the implementation of the Affordable Care Act in Florida. The initiative involved a nonbinding amendment that would have provided Floridians with the option of refusing the purchase of mandatory health insurance.³¹ The decision provoked conservative criticism of the court, which

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led some groups to oppose retention of the three justices. For the first time since the adoption of merit-based selection, the Florida Republican Party took a position in a retention election, announcing that it would oppose the retention of the three justices.³² Democrats claimed that these efforts were about politics, not jurisprudence, and were aimed at providing Governor Rick Scott with an opportunity to make three new appointments to replace the three sitting justices.³³ Liberal groups rallied to the justices' cause and the race quickly morphed into a partisan political battle, albeit a highly lopsided one.

Expecting a challenge to their retention, the justices scrapped their previous practice of largely foregoing any active campaigning. They launched major fundraising efforts, building sizable campaign war chests in hopes of ensuring the majority vote needed to remain in office. The scope of their fundraising was noteworthy, especially when compared to other recent retention elections. Prior to 2012, Florida Supreme Court justices had raised \$7,500 *in total* between 2000 and 2010, all of which was raised in 2000. In 2012, the justices' campaigns raised more than \$1.5 million and engaged in an extensive amount of campaigning.³⁴

Liberal advocates supplemented the candidates' resources by mounting an independent campaign to encourage a "yes" vote on the three justices. Defend Justice from Politics, a pro-retention group backed by trial lawyers, unions and progressive advocacy groups, spent more than \$3 million in support of a "yes" vote.³⁵ This group received a substantial share of its funding from law firms and the national liberal advocacy group, America Votes, which is backed by labor unions. The group received more than \$1 million from eight Florida law firms that each gave at least \$100,000 and \$300,000 from America Votes.³⁶ The money was used in part to finance a television advertising campaign that sought to turn the retention vote into a partisan political contest, rather than a consideration of the merits of the justices' performance. Defend Justice from Politics broadcast ads that accused opponents of "trying to remove three fair and impartial Supreme Court

justices so they can replace almost half the court with judges who will let them bend the rules" and urged voters to "stand up for our justices against this political power grab."³⁷

Defend Justice from Politics alone spent more than twice the amount spent by the candidates' own campaigns and far more than the groups that spent money in support of a "no" vote. Conservative groups did oppose retention of the three justices, with the leading organization being a grassroots conservative group, Restore Justice 2012, which sought to encourage Florida residents to vote "no", and the Florida affiliate of the national organization, Americans for Prosperity, which financed a television advertisement and direct mailings highlighting the court's decision on the Affordable Care Act amendment.³⁸ In all, Restore Justice 2012 spent about \$70,000, while Americans for Prosperity spent an estimated \$155,000.³⁹ By the end of the election, pro-retention groups, led by Defend Justice from Politics, had spent more than \$3.3 million as compared to less than \$300,000 by opposition groups, and were responsible for a large share of all spending in a race that cost, with candidates included, nearly \$5 million. Thus, the candidates and their allies outspent their opponents by a margin of more than 10-to-1. Given this extraordinary financial advantage, it is not surprising that all three justices were retained and continue to serve on the high court.

The 2014 Election in Cole County, Missouri

Missouri is known for the merit-based approach it uses to select supreme court judges. But judges on the lower courts are selected in a different way. Metropolitan counties operate under a nonpartisan court plan; Cole County and most rural counties select judges in partisan elections.⁴⁰ The Cole County 19th Judicial Circuit Court has jurisdiction over a county of 75,000 people, but it includes the state capitol, Jefferson City, which gives the court

jurisdiction over major questions involving state laws and regulations, political corruption cases, and ballot initiative wording. In 2014, the lone Democrat on the court, Judge Patricia Joyce, who had served on the circuit court bench for 20 years, was seeking reelection in a contest against Republican Brian Stumpe. She was the only circuit court judge in the state facing a general election opponent, and had last faced a general election challenge when she first sought a seat on the bench in 1994.

Judge Joyce had drawn criticism from conservatives for a 2012 decision on the wording of a proposed ballot initiative on tax reform, which had the effect of halting the placement of the initiative on the ballot. Even so, the consensus was that she would be reelected. However, in the first week of October, the race was suddenly thrust into the political spotlight. The RSLC contributed \$100,000 to her opponent, whose campaign committee had \$58 left in the bank at the time and a debt of \$13,000. Judge Joyce's campaign at this point had raised \$42,000 and had a balance of \$17,000.⁴¹ In addition, the RSLC launched a major television advertising campaign against Joyce, broadcasting an ad entitled "Groovy" that cast the judge as a liberal supported by "radical environmentalists" and featured a picture of the judge surrounded by a brightly-colored, tie-dyed wall. In all, the RSLC spent more than \$170,000 on advertising.⁴² Its participation eventually attracted national attention to the race. Judge Joyce eventually spent \$117,000 and ultimately withstood the attacks, winning reelection by a margin of only 1,343 out of a total of almost 23,000 votes cast.⁴³

The campaign activities that took place in Cole County and in Florida are but two examples of the changing politics and tactics that are becoming all too common features of judicial elections across the states. In both instances, the campaigns provoked strong partisan reactions and extensive public debate. Differing opinions on the propriety and effects of out-of-state money, the fairness of the ads broadcast to voters, and the influence of campaign spending on the behavior of judges were widely voiced during the weeks leading up

to the election. These elections encouraged voters to view judges as politicians in robes, rather than as impartial jurists. Consequently, these elections gave voters little reason to have confidence in the impartiality of the courts. For example, a public opinion survey of registered voters in Cole County conducted prior to the election found that 73 percent were concerned about the influence of campaign contributions on judges' decisions. When asked if "politically charged judicial elections might put pressure on judges to decide cases based on public opinion rather than the facts of the case and the law," more than two-thirds agreed with the statement. A similar percentage expressed concern that individuals may decide not to become judges or decide not to seek reelection because the "position has become too political."⁴⁴

Williams-Yulee v. The Florida Bar: A Greater Risk?

The problems in judicial elections have become more acute in part due to the erosion of safeguards designed to insulate judges from the influence of the most intense partisan and political influences generated by campaigns for office. The most important measures established for this purpose are judicial codes of conduct or canons that set forth the norms and standards that govern those who sit on the bench or seek a seat on the bench.

Courts in the past have struck down specific protections within these codes or canons that had been established to limit the political and partisan behavior of judges. Most notably, the U.S. Supreme Court in the 2002 decision in *Republican Party of Minnesota v. White* ruled unconstitutional a canon of judicial conduct adopted by the Minnesota Supreme Court that prohibited a candidate for judicial office from announcing his or her views on disputed legal or political issues. This restriction was designed to ensure that candidates did not express views—and thus create perceptions of pre-judgment—on specific issues before hearing or deciding a case. Yet the Court

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decided the free speech rights of a candidate seeking elective office outweighed the protection against partiality offered by this canon. In a 5-4 ruling, the Court found this restriction to be in violation of the First Amendment.⁴⁵

The view of the majority in *Republican Party of Minnesota v. White* highlights an important aspect of any system of judicial elections: the need to recognize and respect the First Amendment rights of candidates. If judges are to be selected through election, they need to be able to share their views with the electorate and undertake the activities required in political campaigns. Their rights to free speech must be protected and, as the Supreme Court has long noted, may only be limited to the extent needed to serve a compelling state interest. Thus, for example, since the *Buckley v. Valeo* decision in 1976, the Court has held as a matter of doctrine that the free speech rights of candidates associated with campaign fundraising may only be limited if the restrictions placed on campaign funding serve the state interest in protecting the political system against corruption or the appearance of corruption, and do not unduly restrict a candidate's right of free speech.⁴⁶ In short, one change that has affected judicial elections is the greater relevance of First Amendment liberties and the emphasis placed on the right of free speech by the Supreme Court when considering the constitutionality of any limitations placed on candidates.

The balance between a candidate's right of free speech and the interest in safeguarding against corruption or protecting the integrity of the courts was again at issue in a recent case involving a key provision of many judicial codes: the restriction on direct solicitation of campaign contributions by a judicial candidate. Thirty of the states that rely on elections to choose or retain judges have prohibitions in some form, set forth either in law or an ethics code provision, on the direct solicitation of campaign contributions by judicial candidates.⁴⁷ These bans are based on the rationale that direct solicitation and receipt of contributions by those who may serve on the bench poses a threat to the integrity of the courts and raises

appearances that undermine public confidence in the impartiality of the courts. In states where these provisions exist, campaign fundraising is not prohibited. Instead, a campaign committee may be established and this committee is responsible for any fundraising activities. In this way, the rules create a separation between a candidate and campaign donors, relieving judges and donors from the most intense pressures associated with campaign fundraising.

The prohibition on direct solicitation by judicial candidates has been challenged in a number of courts, resulting in diverse outcomes and differing opinions. At its core the legal debate involves the question of whether this safeguard is justified by the state interest in preserving the integrity of the courts or whether it restricts judicial candidate activity in ways that unjustifiably interfere with that candidate's right of free speech. This question was resolved in April of 2015 when the Supreme Court decided *Williams-Yulee v. The Florida Bar*, which held that the prohibition on personal solicitation of campaign donations in the Florida Code of Judicial Conduct was permissible under the First Amendment.⁴⁸

Lanell Williams-Yulee, a Tampa lawyer, sought the seat of county court judge in Hillsborough County, Florida in 2009. In announcing her campaign, she sent out a letter noting that the "time has come for me to seek elected office," which included an appeal for contributions in amounts ranging from \$25 to \$500.⁴⁹ The letter did not produce any campaign contributions.⁵⁰ Nonetheless, the Florida Bar filed a complaint charging that the mass mailing violated the Florida Code of Judicial Conduct's prohibition on personal solicitation of contributions by candidates. The Florida Supreme Court, the ultimate arbiter of attorney discipline in the state, rejected William-Yulee's argument that the canon violated her First Amendment rights. The court held that the provision had proven to serve "a compelling state interest in preserving the integrity of the judiciary and maintaining public confidence in an impartial judiciary."⁵¹ Further, the Court reprimanded her for violating the rule and ordered her to pay the costs of the disciplinary proceeding.⁵² Williams-Yulee then

petitioned the U.S. Supreme Court, which decided to hear her case.

On April 29, 2015 the Supreme Court ruled in a 5-4 decision that a state may prohibit judicial candidates from personally asking supporters for campaign contributions. Chief Justice John Roberts wrote the majority opinion, which distinguished judges from other elected officials. The Court held that “judges are not politicians, even when they come to the bench by way of the ballot. And a State’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office.”⁵³ In the view of the Court, the role of a judge is fundamentally different from that of other elected political officials because a judge is not to follow the preferences of supporters or campaign donors, but instead must observe “strict neutrality and independence” in the performance of his or her duties.⁵⁴ The judiciary’s authority depends in large measure “on the public’s willingness to respect and follow its decisions,” which requires confidence in the impartiality of the courts. Consequently, “public perception of judicial integrity is ‘a state interest of the highest order’” and this interest “extends beyond [a State’s] interest in preventing the appearance of corruption in legislative and executive elections.”⁵⁵ A state may therefore “regulate judicial elections differently than they regulate political elections, because the role of judges differ from politicians.”⁵⁶

The Court reaffirmed that First Amendment rights of candidates command the highest level of constitutional protection. But in the case of judicial elections, these rights must be weighed against the interest in maintaining public confidence in the impartiality of the courts. The Court determined that a ban on direct solicitation of contributions is a regulation that “aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests

for money by judges and judicial candidates.”⁵⁷ Further, it is a reasonable measure affecting only a narrow slice of speech, which still allows fundraising by a campaign committee and places no restrictions on a candidate’s ability to share views with the public or engage in other campaign activities. The Court thus concluded that the restriction “advances the State’s compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through a means narrowly tailored to avoid unnecessarily abridging speech. This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny.”⁵⁸

We share the Supreme Court’s view. Direct solicitation of campaign contributions by judicial candidates presents a severe threat to the impartiality and integrity of the courts. Allowing a judge to personally solicit or accept donations promotes a reasonable perception among those solicited that the response will influence a judge’s view: that those who give will be viewed favorably, while those who do not will not. Further, it can create the perception that a judge is seeking funds in return for favorable treatment or, at a minimum, that a donation might make favorable treatment more likely due to a judge’s bias, whether conscious or unconscious, towards those who made a contribution in response to a direct personal request. Conversely, those who fail to give in response to a personal appeal may fear that a judge will be biased against them or those whom they may represent in the legal process. The perceived risks associated with a decision to contribute are particularly pronounced given that those most likely to be asked to give are lawyers and others who appear before the courts or those who may have a stake in judicial outcomes. Permitting a judge to solicit or accept contributions thus inevitably places those solicited in a position that makes the risks associated with not complying too great for many to resist.

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A Business Agenda for Reform

CED believes that fundamental reform of the means for selecting judges is urgently needed. We have concluded that appointment should be the basic principle applied to the selection of all judges. In reaching this conclusion, we have been mindful of the principle of judicial accountability, as well as the principle of judicial independence. Any system of judicial selection must provide a means of holding judges accountable for their behavior and answerable for their decisions. Indeed, the need for accountability is the primary rationale typically advanced to justify elections as a means of judicial selection. Retention votes in merit-based systems are based on the notion that they provide citizens with a means of holding judges who are placed in office by appointment accountable for their performance. The principle of accountability also is reflected in codes of judicial conduct and other rules governing judicial behavior.

Any system of judicial selection must promote the values of independence and accountability. In our view, elections are far from the best means of fulfilling this goal. Selection by election, most especially in the case of partisan or nonpartisan elections that require candidates to face off against each other, entail inherent risks that pose an ever growing threat to the impartiality and integrity of the courts, and thus the independence of the judiciary. Systems based on contested elections also necessarily restrict the pool of potential candidates to those who are willing to stand for election, which increasingly means those who are willing to enter the political fray and all that may come with it. Given recent developments in judicial elections, we would not be surprised to find that many individuals with strong qualifications for office already do not find this prospect appealing.

Establish a Commission-Based Appointment Process

We believe that a commission-based appointment process with appropriate mechanisms for holding judges accountable, similar to the commission used to identify and nominate judicial candidates in Arizona, is the best means of promoting judicial independence and accountability. All states should select judges through an appointment-based process. Specifically, states should adopt a commission-based appointment system without retention elections. In this approach, each state would establish a nonpartisan, independent judicial nominating commission that would be responsible for recruiting, reviewing, and recommending eligible nominees for judicial office. All appointments to judicial positions would be made from the lists of candidates prepared by the commission.

A commission-based appointment process in some form is currently used in two-thirds of the states to select at least some supreme court judges, although in most states the use of a commission is part of a merit-based system that requires those who are initially appointed to office to face the voters in a retention election to remain in office.⁵⁹ In eight states these commissions are only used when filling interim appointments.⁶⁰ The authority, composition, and procedures found among these commissions vary widely.

The value of a judicial nominating commission depends on how it operates. The composition and procedures of a commission must promote public confidence in the process and encourage highly qualified applicants to apply. To promote these objectives, a nominating commission should be structured to operate in a nonpartisan and independent way. However, in some states, nominating commissions that have been established as part of appointment systems or merit-based selection systems do not operate in this manner. Too often, state bar associations or trial attorneys control

nominations to these commissions, or nominations are based on partisan considerations that serve to politicize the work of these commissions, leading to special interest influence and political cronyism in the appointment of commission members, which in turn influences the choice of judicial nominees. Of the thirty states that have established nominating commissions, five have rules governing the composition of the commission that grant a majority of appointments to attorneys. Ten others require that a majority consist of attorneys and one (or more) judge. Only six states require that a majority of the commission be composed of individuals who are not attorneys. Furthermore, half of these states (15 of 30) do not require partisan balance in nominating commission membership, which leaves open the possibility of a highly partisan commission determining the individuals who are to be nominated for office and presented to a governor or other authority for appointment to judicial office.⁶¹

A nonpartisan, independent judicial nominating commission would facilitate balanced, rigorous review of the merits of potential appointees. To serve this end, a commission should be based on procedures that ensure diverse membership. Members of a nominating commission should be selected by multiple appointing authorities (e.g., some combination of two or more of such authorities as the governor, legislative leaders, state bar, Chief Justice, or judicial conference), so to ensure that a single person or entity does not determine the commission membership. A majority of the members should be non-attorneys with a range of professional backgrounds and experiences, so to ensure that the commission is not constituted of a majority of any one interest or group. Members should also be selected with consideration for partisan balance, so that members of one party do not constitute more than half of a commission's membership. Finally, members should serve limited, staggered terms to avoid complete turnover of a commission's membership and provide new members with the benefit of the existing members' experience.

Another common criticism of current nominating commissions is that they often operate in secrecy,

with little or no transparency provided in their proceedings, allowing them to make decisions without appropriate public accountability. In our view, nominating commissions should adopt rules and procedures that ensure an appropriate level of transparency and accountability that balances the need for applicant confidentiality with its responsibility of openness to the public. For example, commissions should disclose their criteria for selecting judges to the public, make available the names of applicants for judicial office, and adopt mechanisms that allow for public comment on potential judicial nominees.

In nominating individuals for judicial office, a commission should provide a list with a number of nominees so to offer a meaningful choice to an appointing authority, which should be the state's governor. These nominees should be submitted to the governor for appointment within a set period of time after a vacancy occurs and the governor should be required to make an appointment from the list of nominees submitted by the commission. Also, a default provision should be established that names another appointing authority if the governor fails to act within an appropriate, specified time period.

One example of an approach that is in accord with these basic standards is the judicial nominating commission in Arizona. In this state, the commission consists of sixteen members, including both lawyers and non-lawyers, with those who are not lawyers constituting two-thirds of the membership. The State Bar is responsible for nominating five lawyers and the Governor is responsible for nominating ten non-lawyers to the commission. All members are appointed by the governor and confirmed by the state senate. The chief justice of the state supreme court or a designated associate justice serves as commission chair, but does not vote except when necessary to break a tie. The rules also limit the number of members who may belong to the same political party or who are residents of the same county. Commission members serve staggered, four-year terms. When a judicial vacancy occurs, the commission publicly announces the availability of the position to

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encourage a broad spectrum of applicants. After recruiting and reviewing candidates, the Commission submits a list of at least three nominees to the governor, no more than 60 percent of whom may be members of the same political party. If the governor fails to make an appointment within 60 days, the Chief Justice can make the appointment.⁶²

Establish Judicial Performance Evaluation Commissions

Judges appointed to office must be held accountable for their actions in office. In this regard, a judge's performance on the bench is the appropriate focus of those given the authority to determine whether a judge should receive another term.⁶³ To facilitate periodic review and evaluation of judges, we support the creation of judicial performance evaluation commissions.

Performance evaluation commissions are now established in some form in seventeen states, with seven states using the results of such evaluations to provide information to voters for use in retention elections and three providing results to those responsible for reappointing judges.⁶⁴ The assessments produced by these commissions have become a meaningful part of the selection process in the states that have adopted this approach. This method of evaluation has been well received by judges and recent studies indicate "public confidence in judicial candidates and the judiciary as a whole is bolstered when voters receive such information through [judicial performance evaluation] programs."⁶⁵

We believe that a judicial performance evaluation commission should be an independent and nonpartisan entity. The members should be selected in a manner similar to that which we have outlined for judicial nominating commissions so to ensure that membership is determined by multiple appointing authorities, consists of a majority of individuals who are not attorneys, reflects diverse backgrounds, is nonpartisan, and is based on staggered terms.

An independent evaluation commission would conduct a comprehensive, objective review of a judge's performance in office as a judge nears the end of a term. For example, judicial performance evaluation commissions now in place consider such factors as command of relevant law and procedural rules, administrative skills, and judicial temperament. Evaluations may also be based in part on surveys of diverse groups of people who use the court system, including court employees, jurors, and witnesses.⁶⁶ The commission would then evaluate performance based on set criteria that are generally understood to be characteristics of an effective judge and prepare an evaluation report and a recommendation as to reappointment. This information would be provided to the governor or other appointing authority in a state for use in making a decision on reappointment and be made available to the public. In order to ensure such regular evaluation, judges would serve for a limited term of office.

Arizona again offers a model for the type of commission that we propose. Arizona has a Commission on Judicial Performance Review (JPR) that was established to conduct periodic reviews of appointed judges and prepare evaluation reports that are made available to the public. Their reports are distributed to judges to help them improve their performance and made available to voters to facilitate informed decisions in retention elections. Members of the public form the majority of the JPR, which is composed of eighteen members of the public, six attorneys and six judges. Members served staggered, four-year terms. The commission evaluates judges on the basis of specified performance standards and works under procedures adopted by the state's Supreme Court. The commission considers a broad range of material in evaluating each judge, particularly surveys distributed to those who have contact with a judge during a prescribed period of time. Those surveyed include jurors, litigants, attorneys, witnesses, court staff, other judges, and parties who have contact with presiding judges. The JPR also holds public hearings during the election year and accepts written comments from the public at any time. The information gathered is then compiled, using coded numbers so that the

names of the judges are not disclosed to commission members, and members are asked to vote in a public meeting on whether a judge meets or does not meet set performance standards. These standards include legal ability and promptness of rulings; the fairness, ethics, and uniformity of rulings; communication skills; judicial temperament; and administrative skills in managing the courtroom and the responsibilities of office. The commission's evaluation of each judge is then distributed to the public through the commission's website and the voter information pamphlet issued by the Secretary of State.⁶⁷

A performance evaluation commission with a comparable role to that of the commission in Arizona has also been established in Colorado. The Colorado State Commission on Judicial Performance, however, uses a different method for appointing commission members. In Arizona, the Supreme Court appoints JPR members with the chair appointed by the Chief Justice. In Colorado, multiple authorities have a role in commission appointments. The Colorado State Commission consists of ten members, including six non-attorneys and four attorneys, who serve staggered four-year terms. The Governor and Chief Justice each appoint one attorney member and two non-attorneys, and the Speaker of the House and President of the Senate each appoint one attorney member and one non-attorney. Colorado thus offers an example of how multiple appointing authorities may be used in selecting commission members. Otherwise, the Colorado commission operates in a similar manner to that in Arizona, evaluating judges on the basis of set performance criteria. The commission relies in large part on surveys from court staff, attorneys, and other judges, as well as judges' self-evaluations, courtroom observations of judges, and reviews of judicial decisions. The survey results, a narrative about the performance of a judge and a recommendation as to whether a judge should be retained are made available to the public and distributed through a voter guide and the commission's website.⁶⁸

Provide Appropriate Compensation to Judges

Commission-based appointment systems work best when nominating commissions have the opportunity to review a substantial number of highly qualified candidates. Indeed, the quality of our judiciary is a function of the quality of the individuals who are willing to serve in office. Many current and prospective judicial officials have other career options, and levels of compensation offered for judicial office may discourage highly qualified candidates from pursuing such service. The levels of compensation for appellate judges are often well below those of the attorneys litigating a case before them.⁶⁹ In Massachusetts, for example, trial court judges are paid less than the salary paid to first year associates at 33 Massachusetts law firms. In fact, more than 4,000 state, city and town workers in Massachusetts are paid more than state trial judges.⁷⁰ The effect inadequate compensation may have on current or prospective judges is suggested by the periodic review of judicial turnover and salaries that is required in Texas. About 8 percent of the judges in Texas voluntarily left office from 2011 through 2013. Surveys of those who left indicate that salary was one of the principal factors that influenced their decision and nearly three-quarters of those who voluntarily stepped down indicated that a change in salary would have compelled them to continue serving.⁷¹

State officials should review current salaries and ensure that appropriate levels of compensation are provided to judges at all levels. One method of conducting compensation reviews is through the use of official judicial compensation committees comparable to those already used in 27 states to make recommendations on judicial salaries.⁷² A compensation committee approach offers a more objective assessment of salary levels than that which may result from budget deliberations in state legislatures.

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Strengthen Standards for Recusal

We acknowledge that most states will find it politically impracticable to move to a commission-based appointment system in the near future, even though the case for this reform is compelling. A fully appointed judiciary requires a fundamental transformation of the judiciaries in most states. In addition, voters continue to support elections; they are not yet willing to relinquish their primary role in the selection process.

Where there are elections, there will be campaigns and campaign fundraising. We therefore support measures that will not resolve the core problem of judicial elections, but will make a major contribution towards addressing their most deleterious effects.

First and foremost, we support stricter standards for recusal. Recusal resolves the problem of conflict of interest or bias that results from campaign donations, and is a remedy widely supported by the business community. The 2007 Zogby International survey conducted for CED found that 97 percent of the business leaders surveyed thought that judges should recuse themselves in cases involving parties who have contributed financially to their campaigns.⁷³ Recusal provides an effective and necessary means of avoiding bias or conflict of interest in those cases that may involve a campaign donor or major source of financial support. It is the best available means of addressing public concerns over the influence of campaign funding on judicial decisions and of ensuring that litigants will receive a fair hearing before an impartial judge.

Every state permits litigants to ask for another judge to hear a case if there is a reasonable question as to whether they can receive an impartial hearing. Each state also has provisions in its statutes, judicial codes or other authorities that govern challenges to judges in particular matters and set forth guidelines or standards to assist a judge in determining whether to recuse herself or himself in a particular case. As noted by the Conference of Chief Justices, which is comprised of the Chief Justice or Chief Judge of the highest courts of each state, these rules for recusal

or disqualification have become “an increasingly important tool for assuring litigants that they will receive a fair hearing before an impartial tribunal,” given the changing character of judicial elections and the First Amendment decisions that have struck down “several provisions of the States’ judicial conduct codes.”⁷⁴ Recusal is the “most reliable” means for maintaining both the reality and appearance of judicial impartiality because “through tailored case-by-case recusals, decided under clearly articulated standards, States can accomplish the same goals they have sought to achieve through speech, contribution or spending limitations, yet with little risk of First Amendment challenges.”⁷⁵

Both the procedures and standards used to disqualify a judge vary greatly from state to state. In many states, recusal is linked to the receipt of campaign contributions from a party involved in a case and disqualification is automatic when contributions exceed a preset level, which varies widely from jurisdiction to jurisdiction. The most criticized practice in recusal rules is the fact that in many states, the judge presented with a recusal request is solely responsible for the decision to step aside from a case without any procedure for review, thus permitting a judge to act as judge of his or her own case.⁷⁶ Both of these aspects of recusal practice were involved in a recent U.S. Supreme Court case that considered whether a judge should have recused himself from a case in which a major financial supporter had a substantial interest.

In its 2009 decision in *Caperton v. A. T. Massey Coal Co.*, the U.S. Supreme Court ruled that a litigant’s due process rights can be violated when an elected judge refuses to recuse himself or herself from a case involving a case in which the judge received significant campaign support from a litigant.⁷⁷ In this instance, the relevant litigant, the CEO of the Massey Coal Company, had donated \$1,000 to the judge’s campaign, but also had spent a substantial sum of money independently in support of the judge. In all, Massey’s CEO spent \$3 million in support of Judge Brett Benjamin, who was running for a seat on the West Virginia State Supreme Court of Appeals, which would consider the appeal of a

\$50 million damages award against Massey Coal Company. Judge Benjamin won the election and cast the tie-breaking vote to overturn the \$50 million in damages. The Supreme Court majority in *Caperton* concluded that given the support provided Massey, Judge Benjamin should have recused himself from the case, since there was a “serious, objective risk of actual bias that required . . . recusal,” even though the financial support primarily consisted of independent expenditures rather than a campaign contribution.⁷⁸ The Court also urged states to adopt stricter recusal rules that go beyond any minimum necessary constitutional requirement, such as a violation of due process rights.

However, since then, many states have failed to strengthen their recusal guidelines. We urge the relevant authorities in states to review their recusal procedures and standards to ensure that this vital protection against judicial partiality is effective. Most importantly, recusal guidelines and judicial disqualification rules should recognize that a judge’s impartiality may be reasonably questioned and disqualification from a case warranted not only in instances where a litigant or attorney or the law firm of the attorney involved in a case has made a contribution, but also when a litigant or attorney or the law firm of an attorney has made significant independent expenditures in support of a judge. This principle would promote public confidence in the judiciary by acknowledging that perceptions of the impartiality and integrity of the courts can be affected by political expenditures as well as contributions.

In this regard, Georgia’s recent revision of its Judicial Code of Ethics offers an example of a comprehensive rule outlining relevant considerations that may require a judge to step aside from hearing a case. The Georgia rule incorporates criteria for review that have been recommended by the Conference of Chief Justices.⁷⁹ The rule notes that a judge’s impartiality might reasonably be questioned because:

[T]he judge has received an aggregate amount of campaign contributions or support so as to

create a reasonable question as to the judge’s impartiality. When determining impartiality with respect to campaign contributions or support, the following may be considered: (i) amount of the contribution or support; (ii) timing of the contribution or support; (iii) contributor’s or supporter’s relationship to the parties; (iv) impact of contribution or support; (v) nature of the contributor’s prior political activities or support and prior relationship with judge; (vi) nature of case pending and its importance to the parties and counsel; (vii) contributions made independently in support of judge over and above the maximum amount which may be contributed directly to the candidate; (viii) any other factor relevant to the issue of campaign support that causes the judge’s impartiality to be questioned.⁸⁰

The Code further notes that a judge shall recuse when he or she knows or learns through a timely motion that a party, a party’s lawyer, or law firm of a party’s lawyer has made aggregate contributions in an amount greater than the maximum amount permitted to a candidate by law in the immediate or preceding election cycle.⁸¹ In this way, the rule accounts for any large contributions that may be given to finance independent expenditures and sets a threshold for when recusal may be appropriate. The Code also considers other aspects relevant to a judge’s electioneering, noting that a judge’s impartiality may be reasonably questioned if “the judge has made pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office, or statements that commit the candidate with respect to issues likely to come before the court.”⁸²

In addition, recusal rules should ensure an objective, disinterested consideration of disqualification requests by providing a prompt review of any decision by a challenged judge in which a request for recusal is denied. In this way, the challenged judge retains the responsibility for the initial review of a recusal request and determines whether recusal is warranted. However, if the judge decides not to recuse, a procedure for

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reviewing the decision should be in place, either by providing for automatic review by another judge or group of judges, or by allowing the party seeking recusal to appeal the denial to another judge or group of judges. For example, under the rules of the Supreme Court of Georgia, if a judge subject to a disqualification request declines to recuse, the remaining justices decide whether recusal is necessary. In Mississippi, if a judge denies a motion requesting recusal, the decision is subject to review by the entire court upon the filing of a motion for reconsideration.⁸³ A procedure for disinterested review is essential to ensuring the efficacy of recusal and assuring those involved in a case, as well as the public, that they can have confidence in the fairness and impartiality of judicial decisions.

Considering Election Reform

We recognize that most states are not yet willing to move to appointive systems as a means of selecting judges, despite the increasingly apparent deleterious effects of elections and the risks they pose to the impartiality and independence of courts. Accordingly, we also continue to support a number of measures geared towards ameliorating the most damaging aspects of election systems, which we first advanced in our report, *Justice for Hire: Improving Judicial Selection*.

- As an alternative to appointive systems, we prefer merit-based selection systems because they have the virtue of appointing judges in the first place. We regard appointment as the grounding principle of reform and merit-based selection is the alternative that best reflects this principle.
- Judges should not be selected in partisan elections in which candidates run under party labels. This method of selection encourages the electorate to view judges as partisan advocates and engenders substantial electioneering by party organizations or their interest group allies on behalf of the party nominee.
- Lengthening terms is a necessary step to strengthen the caliber and independence of state courts. Judges should serve terms of office long enough to safeguard against a need to regularly seek reelection. As a general rule, the length of term for justices on the highest court in a state should be a minimum of twelve years and the term for trial and appellate court judges a minimum of eight years. Longer terms of office will provide a better balance between the principles of judicial independence and accountability than those commonly found in many current state systems.
- States should establish judicial performance evaluation commissions, similar to those we have recommended for appointed judges. Commission evaluations can serve as a means of improving the information available to voters in states that hold elections and should be made available to the public for use in making voting decisions. In this way, citizens will have a source of objective and unbiased information, which will facilitate their ability to make a decision based on a judgment as to a judge's merits and overall performance, rather than a judge's fundraising ability, television advertisements, decision in a particular case or appeal to specific interests. Performance evaluations offer a necessary alternative to the biased claims made by special interests in support of judicial candidates and invite the general public to see judges not as politicians, but as guarantors of a fair process.

Conclusion

Selection by election weakens confidence in the impartiality and integrity of the judiciary. It does not benefit the role of a judge. With highly politicized judicial races spreading to more and more states, the risk to the impartiality and integrity of state judiciaries has become more severe. Interest groups have greater incentives than ever before to participate in these elections in hopes of influencing judicial outcomes, which has heightened the prospect of state judicial elections becoming entangled in the political thicket of national partisan and special interest politics. A change to commission-based appointment selection systems offers substantial and meaningful advantages over

the current system of judicial election employed in most states. We have concluded that there is a compelling case for such reform.

We urge public officials, members of the business community, judges, members of the legal profession, and community leaders in the states to join in our efforts to increase public understanding of the importance of an independent judiciary and the consequences of judicial elections. We call upon these leaders to work together to initiate urgently needed reforms before the rule of law is further eroded by the perception that justice is for sale and the public loses faith that “justice will be done.”

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Notes

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² Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions* (American Constitution Society for Law and Policy, June 2013), 9. Available at www.acslaw.org/state-courts/justice-at-risk.

³ *Ibid.*, 10.

⁴ Joanna Shepherd and Michael S. Kang, *Skewed Justice: Citizens United, Television Advertising and State Supreme Court Justices' Decisions in Criminal Cases* (American Constitution Society for Law and Policy, 2014), 2.

⁵ For the purposes of this report, West Virginia is included among the eight states that hold partisan elections. The West Virginia legislature approved a bill in 2015 that will move the state from partisan elections to nonpartisan elections for the selection of judges for the supreme court, circuit courts, and family courts. West Virginia is the fourth state since 1994 to move from partisan to nonpartisan elections, joining Arkansas, Mississippi and North Carolina. See Bill Raftery, "West Virginia Becomes 4th State in Last 2 Decades to End Most or All Partisan Judicial Races; State Could Get First of Its Kind Public Financing of Trial Court Races Too," *Gavel to Gavel Blog*, February 24, 2015, <http://gaveltogavel.us/2015/02/24/west-virginia-becomes-4th-state-in-last-2-decades-to-end-most-or-all-partisan-judicial-races-state-could-get-first-of-its-kind-public-financing-of-trial-court-races-too/>, and Chris Dickerson, "Judicial Elections in West Virginia Will Now Be Nonpartisan," *Legal Newsline Legal Journal*, April 1, 2015, <http://legalnewsline.com/news/255608-judicial-elections-in-west-virginia-will-now-be-nonpartisan>.

⁶ American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (1986-2013; updated 2013), www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf. For the purposes of this summary, a state's court of last resort is called the supreme court for convenience with the recognition that only 48 states use this appellation for the high court. New Mexico is included in the listing of partisan election states, which fills vacancies through a merit selection system and then requires the appointee to run in a partisan election to serve the remainder of the unexpired term. Thereafter the winning candidate faces a retention election at the completion of the term. Ohio is also categorized as a partisan election state, since candidates are nominated in partisan primaries but run without party affiliation designated on the ballot in the general election.

Michigan is included among the nonpartisan election states, although the party does have a role in nominating candidates.

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⁹ CED, *Partial Justice: The Perils of Judicial Elections* (2011), 1.

¹⁰ These survey results are cited in Cliff Collins, "Judicial Selection and Its Consequences," *Oregon State Bar Bulletin*, August 2012.

¹¹ Amicus Brief of Professors of Law, Economics, and Political Science in Support of Respondent, *Williams-Yulee v. The Florida Bar*. U.S. Supreme Court, No. 13-1499.

¹² Joanna M. Shepherd, "Money, Politics and Impartial Justice," *Duke Law Journal* 58 (2009) cited in *Amicus Brief*, 10.

¹³ Michael S. Kang and Joanna M. Shepherd, "The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions," *New York University Law Review* 86 (April 2011).

¹⁴ Eric N. Waltenburg and Charles S. Lopeman, "Tort Decisions and Campaign Dollars," *Southeastern Policy Review* 28 (2000) cited in *Amicus Brief*.

¹⁵ Joanna Shepherd and Michael S. Kang, *Skewed Justice*.

¹⁶ James Sample, et al., *The New Politics of Judicial Elections 2000-2009* (Brennan Center for Justice, National Institute of Money in State Politics, and Justice At Stake, 2010), www.brennancenter.org/publication/new-politics-judicial-elections-2000-2009-decade-change.

¹⁷ *Ibid.*

¹⁸ Linda Casey, *Courting Donors: Money in Judicial Elections, 2011 and 2012* (National Institute on Money in State Politics, March 2014).

¹⁹ CED, *Partial Justice: The Peril of Judicial Elections* (2011), 2.

²⁰ Charles Kolb, "Jukebox Justice: American Judges for Sale," *Huffington Post*, February 28, 2011.

²¹ Casey, *Courting Donors*.

²² Alicia Bannon, Eric Velasco, Linda Casey, and Lianna Reagan, *The New Politics of Judicial Elections 2011-12* (Brennan Center for Justice, Justice at Stake, and National Institute on Money in State Politics, October 2013), 3-4.

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⁸⁰ Georgia Code of Judicial Conduct, Section 3(E)(1)(d). The listing in the code is reformatted as a paragraph.

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