

PUBLIC FINANCING OF JUDICIAL CAMPAIGNS: PRACTICES AND PROSPECTS

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I. INTRODUCTION

Over one hundred fifty years ago, the French writer and observer Alexis de Tocqueville noted that “there is hardly a political question in the United States which does not sooner or later turn into a judicial one.”¹ It is clear to even the most casual observer of the American political system that the transformation phenomenon about which de Tocqueville wrote has grown exponentially since the time he first observed it. The first years of the twenty-first century find judges embroiled in a host of highly important and controversial issues such as abortion, prison reform, religious liberty, education reform, and even determining the eventual victor in the 2000 presidential election. In addition, these judges regularly decide all sorts of more pedestrian issues, such as divorce, child custody, and guilt or innocence in criminal cases, that may ultimately be far more important to citizens’ lives than the landmark decisions taught in universities and law schools.

In short, courts are important factors in the lives of all Americans and it is no surprise that the methods used to select judges to these courts are highly conflictual and intensely debated. The debate centers not only on the relative competence of judges chosen under each system, but also on the basic tension between judicial independence and public accountability.

At the federal level, the Founders clearly came down on the side of judicial independence by providing that Article III judges would serve indefinitely, so long as they maintained “good behavior” (essentially life tenure), and by enacting a prohibition on the diminution of salary while these judges held office.² At the state level, however, most legislatures have opted for less judicial independence and more public accountability by requiring judges to stand for periodic reappointment or periodic election of one type or another; Massachusetts, New Hampshire, and Rhode Island are the only states affording judges life tenure.³ Although each state utilizes its own unique variation, there are generally five basic forms of judicial selection in the states.

The least common system, used by only South Carolina and Virginia, is legislative election of judges, which provides for the state legislature to choose judges. Slightly more popular is gubernatorial appointment, which is practiced in seven states, either with or without legislative consent. Partisan election,

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¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (George Lawrence trans., J.P. Mayer ed. 1969).

² U.S. CONST. art. III, § 1.

³ HARRY P. STUMPF & JOHN H. CULVER, *THE POLITICS OF STATE COURTS* 39 (1992).

whereby judicial candidates compete in election campaigns under the banner of their political party, can be found in eleven states. Nonpartisan elections and the merit system, or “Missouri Plan”, are equally popular methods of judicial selection, with each found in twenty states.⁴ Nonpartisan elections, such as those in Nevada, are competitive races in which candidate party affiliation, if any, is not included on the ballot. The merit system, in contrast, is one in which:

the governor appoints a judge from among several candidates recommended by a nominating panel of five or more people, usually including attorneys (often chosen by the local bar association), nonlawyers appointed by the governor, and sometimes a senior local judge. Either by law or by implicit agreement, the governor appoints someone from the recommended list. After serving for a short period of time, often a year, the newly appointed judge must stand for a special election, at which time he or she in effect runs on his or her record. (The voters are asked, “Shall Judge X be retained in office?”) If the judge’s tenure is supported by the voters, . . . the judge will serve for a regular and fairly long term.⁵

Clearly the most popular form of judicial selection among the states is competitive elections. Combining partisan and nonpartisan election states, thirty-one states utilize one or other of these methods.⁶ Given the popularity of elections for choosing judges, it is important to examine them more closely and discuss whether public financing of elections would make such elections better.

II. THE EFFICACY OF ELECTIONS AS A METHOD OF JUDICIAL SELECTION⁷

Those states utilizing judicial elections have made an explicit policy choice that the accountability of judges to the public outweighs any concomitant loss in judicial independence. Advocates of this position believe that, since judges affect the lives of a state’s citizens in significant ways, they are to be held accountable in the same way as other policymakers. As political scientist Harry P. Stumpf explains the rationale:

The familiar argument usually set forth in favor of electing judges is that (1) whereas America purports to be a democracy, (2) whereas democracy is usually defined as a governmental arrangement wherein policy-makers are held *accountable* to policy recipients, (3) whereas judges are policy-making officials, and (4) whereas elections are the usual method for ensuring or at least promoting political accountability, election is the preferred method of judicial selection, because such a system best assures

⁴ LAWRENCE BAUM, *AMERICAN COURTS PROCESS AND POLICY* 108, ex. 4.3 (5th ed. 2001). The total is greater than fifty because some states use more than one method depending upon the level of court.

⁵ ROBERT A. CARP & RONALD STIDHAM, *JUDICIAL PROCESS IN AMERICA* 274 (5th ed. 2001).

⁶ See Baum, *supra* note 4. Merit system states are not included in this count given that elections in such states are not competitive and, although they are used for judicial retention, such elections are not a part of the mechanism for actually selecting judges. Including non-competitive retention elections in Missouri Plan states in this count would increase the number of states using judicial elections for purposes of retention or selection to forty-two.

⁷ Arguments and evidence in this section appeared previously in a slightly amended form in Michael W. Bowers, *Judicial Selection in the States: What Do We Know and When Did We Know It?* 2 RESEARCH ON JUDICIAL SELECTION 1, 6-10 (Am. Judicature Soc’y ed. 2002).

accountability and, hence, is the most consistent with principles of democratic government.⁸

The empirical data suggest, however, that judicial elections do not, in fact, achieve the goal of accountability. What these data do show is that (1) large percentages of judges in election states are initially appointed, not elected to the bench; (2) once there, judges are rarely challenged and even more rarely defeated; and (3) voters tend to have low levels of information and low turnout for such elections.

A. *Initial Accession to the Bench*

Although the goal of judicial election systems is to ensure that judges reach the bench by a democratic election process, it is not uncommon to find large percentages of judges in these election states initially appointed to the bench by the governor to fill a midterm vacancy. There are some notable empirical studies on this topic. For example, analyzing the thirty-six states utilizing judicial elections between 1948 and 1957, James Herndon found that fifty-six percent (56%) of those who became supreme court justices during that decade had initially acceded to the bench through gubernatorial appointment to fill a midterm vacancy. In three of these states all of the supreme court justices during this period (i.e., 100%) were appointed by the governor.⁹ Furthermore, examining state supreme courts in non-Southern states between 1948 and 1974, Philip L. Dubois determined that fifty-three percent (53%) of these justices were initially placed on the states' high courts by gubernatorial appointment to fill a midterm vacancy.¹⁰

The pattern is similar for trial court judges as well. In one study, researchers found that in partisan election states, thirty percent (30%) of trial court judges, and in nonpartisan election states, fifty-seven percent (57%) of trial court judges, had been initially appointed by the governor.¹¹ Additionally, from 1864 until 1988, somewhat less than half of Nevada Supreme Court justices, forty-one percent (41%), had been appointed to the bench by the governor.¹²

B. *Judicial "Elections"*

Those who favor judicial elections argue that it makes little difference that judges in large numbers are appointed to the bench by the governor. What is significant, and what makes them accountable, is the fact that they must run in competitive elections where voters have the power to reelect them to, or

⁸ HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* 147 (2d ed. 1998).

⁹ James Herndon, *Appointment as a Means of Initial Accession to Elective State Courts of Last Resort*, 38 N.D. L. REV. 60, 64 (1962).

¹⁰ See Stumpf, *supra* note 8, at 148 n.50 (citing PHILIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* 105-106 (1980)).

¹¹ See Stumpf, *supra* note 8, at 148 n.51 (citing John Paul Ryan, Allan Ashman, & Bruce D. Sales, *Judicial Selection and its Impact on Trial Judges' Background, Perceptions, and Performance*, paper presented at the 1978 annual meeting of the Western Political Science Association, Los Angeles, California).

¹² Michael W. Bowers, *The Impact of Judicial Selection Methods in Nevada: Some Empirical Observations*, NEVADA PUBLIC AFFAIRS REVIEW 6 (1990).

remove them from, the bench. Once more, however, the data show a very different picture. In fact, incumbent judges are rarely challenged and, in those few cases in which they are, the incumbent is almost always victorious over his or her challenger. Political scientist Henry Glick observes that:

Of the total number of judicial elections held in the fifty states, closely contested, partisan "unjudicial" judicial elections probably constitute no more than five to seven percent of the total. Figures from other research show that few judges are ever challenged, and almost never face a close, hard-fought campaign. Even after the election is over, no matter how it was fought, the incumbent usually comes out the winner.¹³

Once again, the empirical studies tell the tale. In their study of Texas courts between 1940 and 1962, Bancroft Henderson and T.C. Sinclair found that sixty-six percent (66%) of judges were appointed to the bench by the governor and ninety-six percent (96%) of them were re-elected in the first election following their appointment; eighty-six percent (86%) failed to even draw a challenger.¹⁴ In a subsequent summary of various single-state studies, Lawrence Baum concluded that trial court judges in Ohio were challenged twenty-seven percent (27%) of the time; in Michigan, twenty-six percent (26%) of the time; and in California, only seven percent (7%) of the time. Of those few who do face opposition, the incumbents "win most of the time."¹⁵ In addition, a fifty-state study of courts of last resort by Melinda Gann Hall found that, between 1980 and 1995, state supreme court incumbents were challenged 44.2% of the time in nonpartisan election states and 61.1% of the time in partisan election states.¹⁶ It should be noted, however, that because these data include any challenger, regardless of viability, they tend to overestimate the extent to which judicial incumbents face serious challenges.

Furthermore, in a study of Nevada courts between 1894 and 1984, I found that only forty-two percent (42%) of Nevada's district court races were contested. At the state supreme court level, only fifty-eight percent (58%) of these races were contested between 1864 and 1988. During that same time frame, ninety-two percent (92%) of incumbent supreme court justices running for reelection won; fifty-eight percent (58%) of these victorious incumbents failed to draw even a single challenger.¹⁷ The last incumbent justice of the Nevada Supreme Court to be defeated was Noel Manoukian in 1984.

If anything, these trends, at least in Nevada, have increased in the years since the 1990 study was published. For example, in the 2002 elections, two state supreme court seats were on the ballot. Only one of these races was contested. As one would expect based on the studies noted above, the incumbent, William Maupin, easily defeated his challenger, Don Chairez, by a margin of 59% to 33%. The other seat was an open one that drew only one candidate, Mark Gibbons.

¹³ Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 519 (1978).

¹⁴ BANCROFT C. HENDERSON & T.C. SINCLAIR, *THE SELECTION OF JUDGES IN TEXAS: AN EXPLORATORY STUDY* 71-74 (Public Affairs Research Center, University of Houston ed. 1965).

¹⁵ See BAUM, *supra* note 4.

¹⁶ Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 317-18, Table 1 (June 2001).

¹⁷ Bowers, *supra* note 12, at 5.

As the 1990 study showed, competition for judicial seats in the inferior courts is even less likely to occur; that pattern held true for the 2002 elections as well. In Clark County (Las Vegas), twenty-one district court seats were on the ballot; only eight (38%) were contested. Of these eight in which there was a contest, half of them involved challenges to an incumbent. Out of the four races in which an incumbent judge was challenged, three of the incumbents (75%) easily defeated their opponents; only incumbent Jeffrey Sobel was defeated, and only after an incredibly expensive campaign by his challenger, Jackie Glass. Altogether, then, in 2002 seventeen incumbent district court judges ran for reelection in Clark County, only four (23.5%) drew opponents, and only one lost. Thus, the chances of loss for an incumbent district court judge in Clark County in the 2002 election was one out of seventeen, or 5.9 percent (5.9%).¹⁸

Reasons given for the high reelection rates for incumbent judges vary. Stumpf suggests that there is, within the legal profession, an "unwritten rule . . . that once an attorney has given up his or her practice for the bench, that person is to be treated with some deference." Potential challengers may also be frightened off by the fear of reprisals in later appearance before the judge, and by the fact that incumbent judges have greater name recognition and a superior ability to raise campaign funds.¹⁹

C. Voter Information and Roll-Off

Although partisan judicial elections provide a party label for voters, non-partisan elections do not. This lack of partisan cues raises the costs to the voter of acquiring information about the candidates. In response, many choose simply not to vote in judicial races. Studies of nonpartisan elections have shown that voters were more likely to have an opinion about a candidate if they were given knowledge of his or her party affiliation.²⁰ In addition, nonpartisan elections not only reduce participation, but also increase the advantage of sitting judges because the lack of a partisan label leads voters to use incumbency as their cue for whom to vote.²¹ Furthermore, separate studies by Christopher C. Blunt and Monika L. McDermott concluded that low information level elections, such as judicial elections, cause voters to cue on the candidates' names, ascribing a more liberal stereotype to women and minorities than to white males.²² In turn, they cast their votes on this basis, with Democrats and liberals

¹⁸ *Id.* Family court judgeships in Clark County tend to be more competitive than the district court with five of the six seats being contested; only incumbent Art Richie avoided a race. Of these five contested seats, four featured incumbents; all were reelected. Thus, even though family court judgeships were more likely to result in a contested race, incumbents were still victorious in every single race in which they sought reelection. Two Clark County justices of the peace were on the ballot for reelection as well; neither drew an opponent.

¹⁹ See Stumpf, *supra* note 8, at 148-49.

²⁰ Peverill Squire & Eric R.A.N. Smith, *The Effect of Partisan Information on Voters in Nonpartisan Elections*, 50 J. OF POL. 169 (1988).

²¹ Brian F. Schaffner et al., *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POL. RES. Q. 7, 8 (March 2001).

²² See Christopher C. Blunt, *Can Voters Judge? Voting Behavior at the Extreme of Low Information* (paper presented at the 1999 annual meeting of the Western Political Science

more likely than Republicans and conservatives to vote for candidates who are easily identifiable by name as women and minorities.

Judicial elections of any type tend to be low-key. In part this is a result of a lack of issues allowed in judicial campaigns under the American Bar Association's Model Code of Judicial Conduct. Canon 5 of the Code, for example, prohibits "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court"²³

The consequences of this lack of available issues in judicial campaigns are two-fold. On the one hand, a lack of issues may lead candidates to engage in personal attacks and negative campaigns in order to diminish their opponent's support while bolstering their own. On the other hand, the lack of issues means that voters are hard-pressed to distinguish between the candidates. As a result, voters, who are often unwilling to engage in the difficult and time consuming work necessary to be fully informed about the differences between the candidates, simply choose in large numbers not to vote in judicial races. The difference between the number of voters participating in top ballot races, such as for president and governor, and the number voting in judicial races is referred to as "roll-off." These roll-off rates tend to be quite dramatic.

For example, in his studies, Allen T. Klots found a roll-off rate of between twelve percent (12%) and twenty-five percent (25%). Frighteningly, he discovered that, of those who voted in the judicial races, only thirty percent (30%) of them could remember the name of even one candidate for whom they had voted.²⁴ Lawrence Baum found a roll-off rate in Ohio judicial elections at around twenty percent (20%). Similar to Klots's research, he also found that many of those who voted in a state supreme court race could not remember for whom they had voted, or in some cases, whether they had voted or not. As Baum charitably notes, "[m]ost of those voters probably had little basis for their choices."²⁵

These trends hold true in Nevada as well. For example, in the 2002 election for state supreme court between Maupin and Chairez, the two contenders had a combined total of 360,216 votes. In the gubernatorial race at the top of the ticket, however, 464,894 people voted, representing a roll-off of approxi-

Association, Seattle, Washington) (on file with author); Monika L. McDermott, *Race and Gender Cues in Low-Information Elections*, 51 POL. RES. Q. 895 (December 1998).

²³ MODEL CODE OF JUD. CONDUCT CANON 5A(3)(d)(ii) (1990). It is possible that state judicial races will become more issue oriented as a result of the U.S. Supreme Court's decision in *Republican Party of Minnesota v. White*, 535 U.S. 765 (2002), in which the Court held that the Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal or political issues violated the First Amendment. The effects of this decision in Nevada may be even greater, given that the state supreme court recently issued rules allowing judicial candidates in nonpartisan races to disclose their party affiliation.

²⁴ Allen T. Klots, *The Selection of Judges and the Short Ballot*, 38 J. AM. JUDICATURE SOC'Y 134, 136 (1955).

²⁵ Lawrence Baum, *Electing Judges*, in CONTEMPLATING COURTS 21 (Lee Epstein ed., 1995).

mately twenty-three percent (23%).²⁶ At the district court level, the roll-off may reach even higher.

What, therefore, are we to conclude from this wealth of data? What we know, based on decades of empirical research, is that large numbers of judges in elective states initially arrive on the bench through gubernatorial appointment, that once on the bench they rarely draw challengers and are even more rarely defeated, and that voters in large numbers choose not to vote in judicial elections or, worse, vote blindly. It is, therefore, quite difficult to conclude that elections achieve the accountability that their proponents suggest. At most, judicial elections merely allow public “control over the broad outlines of judicial policy[.]”²⁷ That judicial elections fail to hold judges accountable is not the end of the matter, however. They also raise serious questions of conflicts of interest in the pursuit of campaign contributions.

D. Campaign Contributions and Conflicts of Interest

Although judicial campaigns frequently lack issues, one thing that is not lacking, at least in those campaigns in which there is a contest, is a need for funding often reaching into the hundreds of thousands, if not millions, of dollars. Candidates, consequently, must either be wealthy enough to finance their campaign or must solicit others for contributions. Unfortunately, those most likely to give to judicial candidates are also those most likely to appear in the judge’s court: attorneys, developers, insurance companies, and, in Nevada, gaming corporations. Solicitation of, and contributions by, those who are likely to appear before the successful judicial candidate creates, at best, the perception of a conflict of interest and, at worst, a true conflict. A Texas study found that 175 out of 246 attorneys responding to a survey disagreed with the statement that “[p]olitical campaign contributions do not affect a judge’s decision-making.”²⁸ Similarly, a study commissioned by the Pennsylvania Supreme Court “found that nine out of ten voters believed that judicial decisions were influenced by large campaign contributions.”²⁹

Perceptions of a conflict of interest are widespread. However, links between campaign contributions and judges’ decisions have been less common, but nonetheless extant. There have been several studies in this area. For example, an analysis by the *Philadelphia Inquirer* into that city’s municipal and common pleas courts found that “defense lawyers who had either worked in or

²⁶ The combined votes for Maupin and Chairez do not include those who voted for “None of the Above” (NOTA) while the tally of gubernatorial race votes does. This is neither misleading nor inappropriate given the purpose is to determine how many people in the state voted compared to how many voted for a supreme court candidate. It is likely that many of those voting for NOTA in the supreme court race did so because they knew so little about the candidates, not because they disliked them.

²⁷ PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 239 (1980).

²⁸ Donald W. Jackson & James W. Riddlesperger, Jr., *Financing Partisan Campaigns for Judicial Office: The 1988 Election of the Chief Justice of the Texas Supreme Court* (paper presented at the 1990 annual meeting of the Western Political Science Association, Newport Beach, California) (on file with author).

²⁹ Charles Gardner Geyh, *National Summit on Improving Judicial Selection: Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1470 (June 2001).

contributed money to judges' campaigns won 71 percent (71%) of their cases before those judges. Yet in the same municipal courts, an average of only 35 percent (35%) of the defendants won their cases."³⁰ A survey commissioned by the Texas State Bar found that "30 percent (30%) of judges said they knew colleagues who assigned counsel because they contributed to their judicial election campaigns."³¹ Additionally, an analysis of election campaigns for the Texas Supreme Court between 1994 and 1998 found that the justices were "four times more likely to accept an appeal filed by a campaign contributor" and that "the more money that a petitioner contributed to the justices the more likely that they were to accept a given petition."³²

Furthermore, a study of arbitration law in the Alabama Supreme Court found "a strong correlation between a justice's source of campaign funds and how that justice votes in arbitration cases."³³ The study concluded that even "seemingly bland questions of contract formation, interpretation, and waiver are apparently battlegrounds between the interest groups. Arbitration law in Alabama seems to . . . have no doctrinal integrity that survives the vicissitudes of the interest group battle."³⁴

Although it is true that "correlation does not prove causation"³⁵ and that "true correlations may have perfectly innocuous explanations,"³⁶ such correlations do certainly give rise to the concern that justice is being bought in state courts. At the very least, it raises perceptions of conflict of interest and judicial vote-buying that can be as seriously damaging to the prestige and legitimacy of the courts as if they were proven true. Based upon the studies noted above, this perception is held not only by the public but by attorneys and judges alike.

Finally, the cost of elections and the necessity to solicit contributions from prospective litigants may have consequences beyond the creation of a perceived conflict of interest. It is likely that they may serve to discourage competent and highly ethical individuals from running for judicial positions. Not only is the amount needed to run a campaign often staggering, but many might find the notion of soliciting potential litigants and their attorneys for contributions to be ethically distasteful. Although no definitive data exist on this issue, it is arguable that these concerns drive away from the bench those who would make fine, competent judges.

III. ALTERNATIVES TO COMPETITIVE JUDICIAL ELECTIONS

Given that elections do not achieve their stated goal of judicial accountability, and that they have the added disadvantages of conflicts of interest and campaign financing, it has been suggested that they be replaced in Nevada with

³⁰ STUMPF & CULVER, *supra* note 3, at 44.

³¹ Amy Bach, *Justice on the Cheap*, THE NATION 25, 27 (May 21, 2001).

³² TEXANS FOR PUBLIC JUSTICE, PAY TO PLAY: HOW BIG MONEY BUYS ACCESS TO THE TEXAS SUPREME COURT 1 (2001).

³³ Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 661 (1999).

³⁴ *Id.* at 685.

³⁵ *Id.* at 661.

³⁶ See Geyh, *supra* note 29, at 1470.

some other system such as the Missouri Plan. Proposals to do so appeared on the state's general election ballot in 1972 and 1988; both were easily defeated.

In part, this may be due to the fact that the merit system, like elections, also does not achieve its stated goals. As I have noted elsewhere³⁷ the merit system does not, as proponents argue, take "politics" out of the selection process. Instead, it merely transforms the overt politics of election systems into what has been referred to as a "subterranean" process of bar and bench politics.³⁸ Rather than open, public campaigning, the politics of judicial selection in merit-system states occur behind closed doors, in the selection of commission members and the panel of names ultimately sent to the governor. Likewise, the merit system does not result in better judges. A veritable multitude of studies on the topic all reach the same conclusion: "[n]ot only is there little evidence of the superiority of judges selected by the 'merit' system, . . . but also there is little to show that judicial selection mechanisms make any difference at all."³⁹ And finally, use of the merit system does not necessarily balance accountability and independence. Noncompetitive retention elections rarely result in an incumbent's ouster (thus lacking accountability) and are, at least on occasion, a battleground for political parties and interest groups to target judges with whom they disagree on a particular issue (thus lacking independence).⁴⁰

It is also the case that various factors more specific to the Nevada political culture weigh against adoption of the merit system.⁴¹ First, voters and key lawmakers perceive no major problems with the system (e.g., no state judges have been convicted or even accused of bribery or vote selling) and are, thus, less than motivated to change the current electoral process. Second, Nevada voters, urged on by Las Vegas's two major daily newspapers, are adamant that they want judges held accountable, and they perceive competitive elections as the most efficacious way of doing so. And third, the groups most likely to finance and support a campaign for adoption of the merit system are lawyers and judges. Given that lawyers are generally not held in high regard by the public, and judges would be seen as attempting to avoid their rightful judgment by the voters, it is unlikely that an organized movement will occur. Certainly, in the 1972 and 1988 elections, there was no organized bench and bar campaign to adopt merit selection, even though a survey in the 1980s found overwhelming support for it among the legal class.⁴²

³⁷ See Bowers, *supra* note 7, at 10-14.

³⁸ RICHARD A. WATSON & RONALD G. DOWNING, *THE POLITICS OF THE BENCH AND BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN 4* (1969).

³⁹ See Stumpf, *supra* note 8, at 143.

⁴⁰ See, e.g., Traci V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68 (1999) (the cases of Penny White and David Lanphier); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987) (the case of Rose Bird and her colleagues on the California Supreme Court); and R. Darcy, *The New Era of Oklahoma Judicial Elections* (paper presented at the 1999 Summer Judicial Conference, Oklahoma City, Oklahoma) (on file with author).

⁴¹ For a full discussion of these factors, see Michael W. Bowers, *Judicial Selection in Nevada: A Modest Proposal for Reform*, 43 NEV. HIST. SOC'Y Q. 100, 101-02 (Spring 2000).

⁴² See Michael W. Bowers, *Judicial Selection in Nevada: Choosing the Judges*, 11 HALYCON: A JOURNAL OF THE HUMANITIES 85, 100-101 (1989).

Since the 1988 election loss, there has been no serious attempt to replace Nevada's current system of judicial elections with the merit system. Consequently, if any reform is to be wrought in the state's method of selecting judges, it is clear that it must occur within the current framework of nonpartisan elections.

IV. PUBLIC FINANCING OF JUDICIAL ELECTIONS

If one assumes the continued practice of judicial elections in Nevada, one possible alternative for reform is to eliminate the source of, and perceptions of, conflicts of interest by replacing private fundraising with publicly financed campaigns. Although public financing legislation has been introduced in over twenty states,⁴³ only two have such a system. Since 1977, Wisconsin has had partial public financing for supreme court candidates, and, in 2002, North Carolina passed the Judicial Campaign Reform Act to provide full public financing for all appellate court candidates beginning in 2004.⁴⁴

The primary advantage of a public financing system is that the more money judges receive from public sources, the less they will have to raise from private groups and individuals who are interested in the outcome of cases the judges decide. Thus, public funding reduces the potential for campaign contributions to influence judicial behavior and addresses the public perception that such influence occurs.⁴⁵

The necessity to remove such perceptions is particularly acute among judges. Unlike legislators or executive branch officials, their role is to act as neutral arbiters of the law and not simply representatives of the majority of voters or their campaign contributors. Because candidates who might otherwise be deterred from running might do so, it is also possible that public financing would increase competitiveness in judicial elections and make them a greater tool for accountability.

At the same time, however, there are practical problems in implementing such a system.⁴⁶ Implementation of such a system would require that several questions be addressed:

- Which races should be publicly funded (e.g., Supreme Court, District Court, Justice Court, Municipal Court)? Should funding apply to general elections only or to primary elections as well?
- How much public funding should be provided (i.e., full or partial funding)?
- Which candidates should be eligible to receive public funds (e.g., how does the state define "serious" candidates)?
- What conditions should be imposed on the candidates for funding?
- How can excessive spending by or on behalf of a publicly funded candidate's opponent be addressed?

⁴³ See Geyh, *supra* note 29, at 1467.

⁴⁴ American Judicature Society, *North Carolina Adopts Public Financing for Judicial Elections* (2003), available at http://www.ajs.org/selection/sel_pubfin.asp (last visited Aug. 19, 2003).

⁴⁵ See Geyh, *supra* note 29, at 1471.

⁴⁶ *Id.* at 1473-1475.

- How should these public funds be disbursed?
- How should revenue to fund this system be generated?
- Who in the state should administer this program?

As Table 1 indicates, Wisconsin and North Carolina have answered these questions in somewhat different ways:

TABLE 1: PUBLIC FINANCING OF JUDICIAL CAMPAIGNS:
WISCONSIN AND NORTH CAROLINA⁴⁷

ISSUE OF CONCERN	WISCONSIN	NORTH CAROLINA
Applicable Races	Supreme Court	Supreme Court & Intermediate Appellate Courts
Funding Amounts	Partial funding of \$97,031 out of total \$215,625 that may be spent	Full funding of \$200,000 for supreme court and \$140,000 for intermediate appellate court
Eligibility	Must raise \$11,000 in increments of no more than \$100	Must raise \$33,000 in increments of no more than \$500 from at least 350 individuals
Conditions Imposed on Recipients	Must agree to spending contribution limits	Can spend no more than \$69,000 in primary; spend only public money in general election plus leftover from primary
Remediation for Excessive Spending by Opponent	Candidates opposed by those not accepting public funds not bound by spending and contribution limits	Candidates opposed by those not accepting public funds receive "rescue funds" up to twice original amount
Generation of Revenue	\$1 check-off on state tax return	\$3 check-off on state tax return and optional contributions of \$50 by attorneys paying annual license fee

Given that the North Carolina public financing system will not begin until 2004, it is unknown at this point whether it will be successful. However, the evidence on the Wisconsin system suggests that it is severely dysfunctional. Taxpayer participation in the one dollar check-off system has declined from twenty percent (20%) in 1979 to less than nine percent (8.7%) in 1998. Consequently, the Wisconsin Election Campaign Fund is deficient in resources neces-

⁴⁷ For Wisconsin data, see Charles Gardner Geyh, *National Summit on Improving Judicial Selection: Publicly Financed Judicial Elections: An Overview*, 34 *LOY. L.A. L. REV.* 1467 (2001). For North Carolina data, see Eric Dyer, *Lawmakers Approve Bill Altering Judicial Elections: Nonpartisan Publicly Financed Campaigns for Appellate Court Posts Could Start in 2004*, *GREENSBORO NEWS RECORD*, October 2, 2002.

sary to provide candidates with the maximum \$97,031 grant to which they are entitled. Since 1989, grants to supreme court candidates have generally averaged less than half that amount, about \$45,000. Consequently, large numbers of candidates have simply been opting out of the program and its concomitant contribution and spending limits.⁴⁸

Not only do many candidates opt out of this poorly funded system, but Wisconsin's partial funding plan is equally unsuccessful in removing the appearance of a conflict of interest. Even if judges were to receive the maximum public funding allowed by law, they are allowed to raise an additional \$118,594 from lawyers, interest groups, and others likely to appear in that judge's courtroom.⁴⁹ In other words, even with full funding, candidates opting into the public financing program will likely acquire over half of their campaign funding needs from the very entities that create the conflicts of interest the system was designed to avert.

As noted in Table 1, North Carolina hopes to remedy the lack of sufficient funds in the public financing pool by instituting a dual source of revenue (i.e., state income tax check-off and contributions by attorneys) and making the check-off three times the amount of the program in Wisconsin. The conflict of interest problem will, ideally, be eliminated by providing full funding for those candidates that are eligible. However, candidates will be responsible for raising campaign funds for the primary election, albeit in smaller increments than in the past.

V. PROSPECTS FOR NEVADA

Nevada has rarely been in the forefront of political reform and it is unrealistic to believe that the state will adopt public financing of judicial campaigns. As noted above,⁵⁰ most Nevadans are likely to believe that no problem exists. And even if they did, the anti-tax and anti-spending political culture of the Silver State would be unlikely to support such an expensive proposition.

As of June 2002, Nevada had fifty-six (56) district court judges and seven (7) supreme court justices, totaling sixty-three (63).⁵¹ The cost of fully financing races for these sixty-three seats could be large by Nevada standards. For example, if each of two candidates in each of these races were provided with \$100,000, the total would be over twelve million dollars (\$12,600,000) during a six-year period, or an average of roughly two million dollars per year. Nevadans, who are quite satisfied to be at the bottom of every list of spending on social services, health, education, and welfare among the fifty states, and who are facing lean budgets in the 2003-2005 biennium, are highly unlikely to divert scarce financial resources to an area that most do not perceive a problem. Even the \$1,400,000 needed to finance seven supreme court seat elections at

⁴⁸ See Geyh, *supra* note 29, at 1477.

⁴⁹ *Id.* at 1477-1479. The \$118,594 figure is what remains from the mandated spending cap of \$215,625 after the public financing increment of \$97,031 is deducted.

⁵⁰ See text accompanying notes 42-43.

⁵¹ *The Work of Nevada's Courts July 1, 2000 – June 30, 2001*, ANNUAL REPORT OF THE NEVADA JUDICIARY, Fiscal Year 2001-2002, at 6 (available at: <http://nvcourtaoc.state.nv.us/pdf/fy01annualrpt.pdf>) (last visited Aug. 19, 2003).

\$100,000 per candidate (a paltry amount) would likely be considered too expensive by the state's taxpayers.

Furthermore, due to Nevada's lack of a state income tax, there would not be an effective way to collect these funds. A check-off system would be impossible, and simply urging Nevadans to send an annual check to the fund would be utter failure in a state lacking civic consciousness. Use of general revenues for this purpose would be highly problematic since this would require biennial re-appropriation by the legislature. Funding would likely be continually threatened and enmeshed in the politics of every legislative session, thus making it unstable and unreliable. It might be possible to finance the system from court fees, but many of these are already committed to worthwhile programs. Those fees are used to finance the operations of the state courts themselves. Raising the licensing fees for attorneys and placing this additional revenue in the election fund is also a possibility, although it is unlikely to generate anywhere near the amount needed for full funding of these judicial races.

VI. CONCLUSION

The prognosis for judicial election reform in Nevada is bleak. Voters have twice indicated that they have no desire to abandon competitive nonpartisan elections for the noncompetitive retention elections of the merit system. Similarly, voters are unlikely to support public financing of judicial, or any other, campaigns.

Consequently, it is likely that the state will continue its current path unless or until a crisis develops that Nevadans perceive to be serious enough to require remediation. The current path will include a lack of competitiveness in judicial races, high rates of incumbent reelection, low voter turnout, low levels of information about candidates, and continuing conflicts of interest and perceptions of conflict of interest in pursuit of campaign contributions.