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Judicial Selection in Southern States

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Introduction

Throughout America's history, there has been protracted debate over the best method of selecting judges. The dilemma has been how to select judges by means consistent with the nation's democratic values, and at the same time insulating the bench from political and special interest influence. The debate has come to the forefront in recent years as judicial elections in a number of states have become increasingly costly, contested and negative.

Judicial authority has long relied on its independence and impartiality in following the rule of law to gain public trust and legitimacy. As the judicial branch increasingly is viewed as a mechanism to resolve nettlesome policy issues, the attendant perception of its power as a political instrument also is increasing. Courts, in turn, have garnered the attention of interest groups hoping to shape various policies. As financial resources are funneled into judicial elections, particularly state supreme court races, contests are becoming increasingly partisan. This trend impacts the public's view of a fair, independent and impartial judiciary and leads many to perceive that big campaign donors unduly influence judicial decisions.

Recognizing the rise of partisan and expensive judicial contests, many groups, including the American Bar Association, National Center for State Courts, Democracy South, The Institute on Money in State Politics, and Justice at Stake Campaign, among others, are spearheading current judicial reform efforts in the United States. Reforms such as moving to nonpartisan elections, public financing for judicial candidates, and judicial campaign conduct committees have been proposed, all of which recently have been adopted in various forms by Southern states.

This Southern Legislative Conference *Regional Resource* examines state judicial selection methods, primarily in the South,

along with the opinions of several legal scholars and practitioners. Primary focus is on judicial elections; case studies involving their increasing costs; means proposed to depoliticize elections; judicial campaign conduct; and an array of related issues. While each judicial selection method has its merits, all have distinct drawbacks and, despite efforts to remove politics from judicial selection, each method has inherent political overtones. Whether states opt to elect judges or appoint them through merit selection, striking a balance in order to maintain judicial independence and impartiality is most often the desired end result, and also the most challenging to achieve.

Judicial Selection in Southern States

State judicial selection methods vary widely in the United States, falling into three general categories: appointment, election and merit selection, with various systems employed within these categories. The appointment system simply provides for either the legislative or executive appointment of judges without a judicial nominating commission. Judicial elections may be either partisan or nonpartisan, whereby a candidate's party either appears or is absent on the ballot. The merit selection process combines both the appointive and election systems, involving a judicial nominating commission that selects a slate of qualified candidates from which a legislative or gubernatorial appointment must be made. At one end of the spectrum judicial elections are issue-oriented campaigns designed to absorb voters' attention and at the other are life-time appointments, as is the case with United States federal courts. Proponents and critics see advantages and disadvantages with all selection methods, with little consensus on which one is best.

Appointment

The appointment method of judicial election was established by states early in America's history, carrying over from English tradition of selection by the king during the colonial era. Today, six states (California, Maine, New Jersey, New Hampshire, South Carolina and Virginia) continue the practice of selecting judges either by executive or legislative appointment without going through what most consider a nominating committee. Among Southern states, the South Carolina General Assembly appoints the state's appellate and circuit court judges. Since 1997, judges have been selected from a list submitted by the state Judicial Merit Selection Commission which is composed of 10 members: five appointed by the Speaker of the House of Representatives; three appointed by the Chairman of the Senate Judiciary Committee; and two appointed by the President Pro Tempore of the Senate. However, the American Judicature Society does not officially recognize this body as a nominating commission as it "is not far removed from the ultimate appointing body, and cannot be considered to be nonpartisan as control over member nominations is vested in majority party leadership."¹ The Virginia General Assembly

selects judges for the state's Supreme Court, Court of Appeals and Circuit Courts. Judges do not face retention elections in either state; legislative reappointment is required in both.

Judicial Elections

While states initially selected judges through the appointment process, the 19th century witnessed a period of growing resentment by many that judgeships were awarded, as many other offices were, through patronage. Even if judicial appointments came from state executive and legislative branches, reformers were of the opinion that the process of appointing the bench was based on service to the party, and efforts to reform the appointment process began.² In 1832, Mississippi was the first state to require the election of all of its judges, with a wave of support for the popular election of the judiciary in other states following between 1840 and 1886. During these 46 years, 19 of 30 states adopted constitutions calling for the election of trial and appellate judges.

Proponents of judicial elections, then and today, stress America's democratic principles, arguing that voters should have the right to elect the judiciary. Election advocates point out that the merit selection and appointment processes do not take political influence out of the judicial selection process, nor do they result in greater judicial independence. Merit and appointment systems, it is argued, close the doors to candidates who are not part of the system.³

Merit Selection and Appointments

Merit selection, also known as the Missouri plan, is a judicial reform incorporating parts of both the appointive and elective selection processes. In short, merit selection is a process whereby a judicial nominating commission recruits candidates, assesses their qualifications, then submits a list of three to five qualified candidates to the legislature or governor from which an appointee is selected to fill a vacant judgeship. The judge then serves an initial term, often of one year or until the next general election, then runs in a retention (yes-or-no) election, unopposed, in order to be "retained" and serve a longer, full term. Subsequent retention elections are then required. Nominating commissions are selected by different means, often consisting of a mix of lawyers, appointed by the state bar; non-lawyers, selected by the

governor; and sometimes judges. Commissions for state supreme court nominations range in size from a high of 17 in Maryland to a low of seven, a number favored by several states.

Proponents of merit selection argue that trial and appellate judges are required to be impartial arbiters of laws, rules and regulations, and that judges should remain nonpolitical, overseeing the executive and legislative branches in light of individual rights and state constitutions. In this position, merit selection serves as the best means to remove politics from the selection process; prevent money, which has become increasingly important in judicial elections, from influencing judicial campaigns; allow judges to serve based on merit rather than political connections; and provide, through a retention vote, a mechanism by which judges may be removed from office.

According to the National Center for State Courts (NCSC), a nonprofit organization based in Williamsburg, Virginia, that “provides information and assistance to court leaders that helps them better serve the public,” 47 percent of state appellate court judges initially are selected through the appointment process, but only 11 percent of appellate court judges are appointed for their subsequent terms. Thus, the vast majority of appointed judges eventually face election, but do so through the retention process as is the case under merit selection. Overall, 43 percent of state appellate court judges in 16 states face retention elections to serve subsequent terms in office.⁴ In addition, several states use merit selection to fill interim supreme court and appellate judgeships or to select lower court judges. In the case of the former, the appointed judge must then run again for the post under the state’s other judicial selection process. As examples in the South, Georgia and Kentucky use merit selection to fill midterm appellate court vacancies; and Alabama initially selects circuit and district courts by merit in six of its 67 counties.

By way of background, merit selection was first debated in 1913 following intense displeasure among citizens, judges and lawyers that political machines and party bosses had taken control of the judicial selection process and could use their clout to unseat any judges who issued unfavorable rulings. However, it was not adopted in any form by a state until Missouri did so in 1940. Alaska followed, implementing a merit selection in 1956.

During the next several decades, despite broad reform efforts and political support, voters in at least 10 different states failed to approve merit selection. In more recent decades, however, several states adopted merit selection, with 15 states choosing appellate court judges through this process today. Among them are the Southern states of Florida, adopted in 1972; Maryland, 1970; Missouri, 1940; Oklahoma, 1967; and Tennessee, 1971. In all of these states, governors make judicial appointments and are required to select a judge from the list submitted by the respective nominating commission. In no state is legislative confirmation required.⁵

In recent years, however, the move toward adopting merit selection has subsided, with attempts experiencing less success:

- » Following a 2001 Supreme Court race in which both parties’ candidates spent more than \$1 million each, former Pennsylvania Governor Tom Ridge convened three summit meetings and proposed a constitutional amendment to appoint rather than elect appellate judges. That measure failed;
- » Also in 2001, Governor John Engler of Michigan proposed replacing elections for state Supreme Court judges with appointments. The bill, Senate Joint Resolution 4, never made it out of that chamber’s Government Operations Committee. This legislation came on the heels of Michigan’s 2000 Supreme Court race for three seats – the state’s most expensive – when candidates, political parties and outside interests spent a combined \$16 million;⁶
- » In Florida, a 2000 ballot measure gave the state’s voters an opportunity to have trial judges appointed rather than elected. The measure was defeated in every county, with the average affirmative vote being only 32 percent;⁷ and
- » A constitutional amendment was introduced during the Louisiana Legislature’s 2003 session that would have provided for the merit selection of state appellate and district judges but was later withdrawn. Merit selection proposals also were considered in 1999 and 1997, but never made it to the ballot.

Southern State Judicial Selection Methods and Length of Term Appellate Courts 2003

State	Selection Process	Initial Term of Office (years)	Method of Retention: Term (years)
Alabama	Partisan election	Supreme Court: 6 Court of Appeals: 6	Supreme Court: Reelection: 6 Court of Appeals: Reelection: 6
Arkansas	Nonpartisan election	Supreme Court: 8 Court of Appeals: 8	Supreme Court: Reelection: 8 Court of Appeals: Reelection: 8
Florida	Merit selection through nominating commission	Supreme Court: 1 Court of Appeals: 1	Supreme Court: Retention election: 6 Court of Appeals: Retention election: 6
Georgia	Nonpartisan election	Supreme Court: 6 Court of Appeals: 6	Supreme Court: Reelection: 6 Court of Appeals: Reelection: 6
Kentucky	Nonpartisan election	Supreme Court: 8 Court of Appeals: 8	Supreme Court: Reelection: 8 Court of Appeals: Reelection: 8
Louisiana	Partisan election	Supreme Court: 10 Court of Appeals: 10	Supreme Court: Reelection: 10 Court of Appeals: Reelection: 10
Maryland	Merit selection through nominating commission	Courts of Appeals: Until first general election, following the expiration of one year from date of vacancy	Court of Appeals: Retention election: 10 Court of Special Appeals: Retention election: 10
Mississippi	Nonpartisan election	Supreme Court: 8 Court of Appeals: 8	Supreme Court: Reelection: 8 Court of Appeals: Reelection: 8
Missouri	Merit selection through nominating commission	Supreme Court: 1 Court of Appeals: 1	Supreme Court: Retention election: 12 Court of Appeals: Retention election: 12
North Carolina	Nonpartisan election	Supreme Court: 8 Court of Appeals: 8	Supreme Court: Reelection: 8 Court of Appeals: Reelection: 8
Oklahoma	Merit selection through nominating commission	Supreme Court: 1 Court of Appeals: 1	Supreme Court: Retention election: 6 Court of Appeals: Retention election: 6
South Carolina	Legislative appointment without nominating commission	Supreme Court: 10 Court of Appeals: 6	Supreme Court: Reappointment: 10 Court of Appeals: Reappointment: 6
Tennessee	Merit selection through nominating commission	Supreme Court and Court of Appeals: Until the next biennial general election	Supreme Court: Retention election: 9 Court of Appeals: Retention election: 9
Texas	Partisan election	Supreme Court: 6 Court of Appeals: 6	Supreme Court: Reelection: 6 Court of Appeals: Reelection: 6
Virginia	Legislative appointment without nominating commission	Supreme Court: 12 Court of Appeals: 8	Supreme Court: Reappointment: 12 Court of Appeals: Reappointment: 8
West Virginia	Partisan election	Supreme Court: 12 No other court of appeals	Supreme Court: Reelection: 12

Notes: In 2004, North Carolina will begin selecting supreme and appellate court judges through nonpartisan election; 2002 marked the last year for partisan contests.

Source: Judicial Selection in the States: Appellate and General Jurisdiction Courts, American Judicature Society
Internet site: <http://ajs.org/js/>, accessed September 8, 2003.

table 1

Partisan vs. Nonpartisan Judicial Elections

More recent judicial reform efforts involve attempts to depoliticize judicial elections. These attempts not only focus on switching from elections to merit selection, but also are aimed within elective systems themselves. Included among proposed reforms are the adoption of nonpartisan judicial elections, campaign finance reforms, and overseeing judicial campaign conduct, among others.

Overall, according to the National Center for State Courts, 53 percent of state appellate judges and 66 percent of trial judges must run in contested elections for their initial terms.⁸ Currently, eight states nationwide select supreme and appellate court judges through partisan ballot, whereby judicial candidates belong to a political party, with five of those being in the South: Alabama, Louisiana, North Carolina, Texas and West Virginia. A total of 13 states initially elect trial and appellate court judges in nonpartisan elections, including the Southern states of Arkansas, Mississippi, Georgia and Kentucky.

Critics of partisan elections contend that, as the political parties become more ideologically divided, some judicial campaigns are subject to the same influences, requiring more financial resources and entertaining special interests and party involvement. Nonpartisanship, it is argued, will reduce the competitiveness of judicial races and, thus, the need for large campaign contributions; lessen dependence on interest groups and parties and lead to less negative campaigning; as well as narrow the ideological differences among judicial candidates.⁹ Critics of nonpartisan elections most often cite that political designations are helpful to voters who may otherwise have little or no information on judicial candidates. In addition, there have been instances when political parties have objected to nonpartisan elections because of the attendant reduction of funds that would be received through election filing fees.

While the 19th century witnessed a trend of states implementing judicial elections, the middle of the 20th century saw a movement toward the merit selection process. However, as measures aimed at replacing judicial elections with appointive systems recently have waned, reform groups have focused their attention on other methods to depoliticize judicial elections and limit campaign

contributions. During the closing decades of the 20th century, and continuing today, many states opting to retain judicial elections have moved to nonpartisan contests, a shift urged by the National Summit on Improving Judicial Selection, a working group of the National Center for State Courts comprising judicial, legislative and other policymakers from the 17 most populous states with judicial elections (see page 11). Examples of Southern states recently adopting nonpartisan elections include:

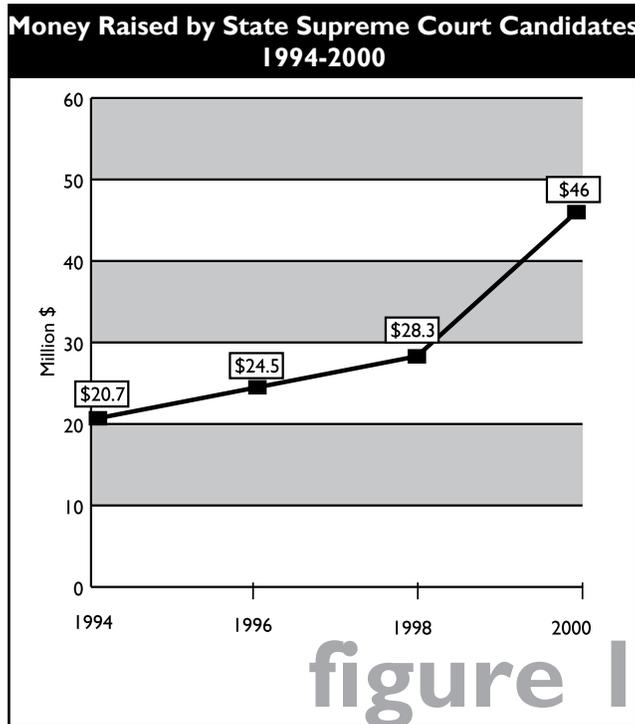
- » Arkansas, where judges had run on a partisan ballot through 2000, until voters approved Amendment 3 with a 57 percent majority, changing the state's constitution to implement nonpartisan judicial elections, among other judiciary provisions;
- » Mississippi, which had elected judges via partisan ballot since 1910, but changed to nonpartisan contests in 1994 following the passage of the Nonpartisan Judicial Election Act; and
- » North Carolina, which passed legislation in 2002 providing for a nonpartisan election system for appellate and supreme court judges starting in 2004.

Judicial Campaign Cost and Funding

During the past decade, the cost of state judicial campaigns in many states, particularly for supreme court seats, has increased substantially, with the year 2000 being a watershed year in terms of money raised and spent. Ushering in the new millennium, state supreme court candidates nationwide raised \$46 million, setting records in 10 of the 20 states holding supreme court elections that year. This marks a 61 percent increase from candidate funds raised during states' 1998 supreme court elections, also a record-setting year; twice the money spent in 1994; and a 297 percent increase over 1990. In 2000, the average campaign costs for state supreme court candidates was \$430,529, with 16 supreme court candidates running campaigns with budgets exceeding \$1 million.¹⁰

Candidate spending in the five states with the most heated elections (Alabama, Illinois, Michigan, Mississippi and Ohio) surpassed \$34 million, with third-party spending in those states totaling more than \$16 million. According to researchers, most of the rising

cost in supreme court races is attributable to an increasing reliance on campaign consultants, radio and television advertising, and special interest groups – primarily business, lawyers, unions and the medical profession – that have fueled expenses through campaigning for and against certain judicial candidates in order to advance particular interests.



Source: Roy A. Schotland, "Financing Judicial Elections, 2000: Change and Challenge," *Michigan State University-Detroit College of Law Review*, Volume 3 (2001), 849-899.

The Alabama Experience

In 2000, Alabama had 13 candidates running for five Supreme Court seats, including that of chief justice. Candidates' campaign expenses totaled more than \$13 million, averaging over \$1 million each.¹¹ While the average cost of running for the state's 2000 Supreme Court race was substantially

higher than it was for the state's 1986 contest (\$237,000), it was actually less than the state's record-breaking 1996 Supreme Court race, in which the two candidates raised more than a combined \$4.5 million for a single seat.¹²

The expensive and high profile campaigns for the Alabama Supreme Court, as is the case for many states' high court races, largely have pitted the business, medical and insurance industries against trial lawyers and consumer groups over tort reform measures passed in recent years. In Alabama, the Legislature passed significant tort reforms in 1987, capping punitive damages at \$250,000; limiting attorney fees; and restricting counties where cases could be filed. The Alabama Supreme Court subsequently ruled many of the reforms unconstitutional. Coincidentally, money spent on Supreme Court races increased substantially, both from interests supporting tort reform and those opposed. The competitiveness of Supreme Court seats escalated accordingly.

According to Jim Wooton, president of the Institute for Legal Reform at the U.S. Chamber of Commerce, an organization spending more than \$1 million for advertising in Alabama and several other states' supreme court races in 2000, "our focus was on states where companies say they are plagued by frivolous lawsuits and there is a danger that courts might block tort reform... Advertising was needed because judicial systems were trying to waylay business interests and were posing a serious threat to the national economy."¹³ The state's nine-member Supreme Court has metamorphosed from an all Democratic body in 1994, to a five-to-four Democratic majority in 1997, to an eight-to-one Republican majority in 2000, with all five of the candidates endorsed by the Chamber of Commerce winning seats that year. As of 2003, the Court maintained its eight-to-one Republican majority.

	Total Raised	From Business	From Law Firms	From Democratic Party	From Republican Party
Republican Candidate (winning challenger)	\$2,683,968	\$1,370,000	\$49,000	--	\$855,000
Democratic Candidate (general election opponent)	\$1,762,122	\$4,600	\$532,000	\$1,130,000	--

Source: Laura Stafford and Samantha Sanchez, *Campaign Contributions and the Alabama Supreme Court*, The Institute on Money in State Politics, May 5, 2003.

Preceding the 2000 contest, in 1998, nearly \$4.5 million was spent in races for three Alabama Supreme Court seats, with five of the seven candidates raising more than \$1 million each. This is particularly significant considering that only 13 judicial candidates in the nation raised over \$1 million that year – the top three of those 13 were Alabamians.¹⁴ Prior to this, the state's 1996 Supreme Court race pitted a sitting Democratic associate justice against a Republican challenger. Out of the challenger's \$2,683,968 war chest, 51 percent came from business interests and 31 percent came from the Republican Party. Less than 2 percent of the total was contributed by attorneys. Of the incumbent's campaign funds, 30 percent came from trial lawyers and 64 percent came from the Democratic Party. Business contributions equaled less than 0.1 percent.

On the heels of the 1996 election, legislation was introduced in 1997 that would have changed the state's judicial elections to nonpartisan contests. Though reported favorably from committee in both the state House and Senate, the bills were postponed. The Alabama Supreme Court did, however, create a Judicial Campaign Oversight Committee to advise candidates regarding campaign conduct during the 1998 and 2000 elections.¹⁵

The Mississippi Experience

Although Mississippi has selected Appellate Court judges by nonpartisan ballot since 1994, the state also has witnessed a dramatic increase in money spent for Supreme Court races in recent years. In 2000, nine candidates vying for three Supreme Court seats raised a combined \$3,418,551, with individual campaigns averaging over \$379,000 each. Expenditures for one race exceeded \$965,000.¹⁶

As has been the case in many state supreme court races in the last decade, outside money played a significant part in Mississippi's 2000 Supreme Court election, with the U.S. Chamber of Commerce spending an estimated \$1 million to support four candidates they considered friendly, and trial lawyer groups contributing more than \$500,000 to support those same candidates' opponents.¹⁷ Such contributions have raised a considerable stir in the state. Late in the 2000 race, a Mississippi court blocked some of the Chamber of Commerce's television ads while investigating whether the group had violated corporate

spending limits under state election law. The United States Supreme Court intervened to allow the ads to continue, arguing that they were protected as free speech. The U.S. High Court subsequently refused to decide a case brought by the state over whether the Chamber of Commerce should have been forced to follow the state's campaign finance reporting law.¹⁸

Mississippi's 2002 election for a sole Supreme Court seat proved to be even more costly, marking the most expensive race in the state's history. The three candidates raised a total of \$1,816,014, averaging over \$600,000 each, in another battle focused largely on state tort reform and pitting trial lawyers against the medical, business and insurance communities. The winner raised over \$1 million for his successful campaign against the incumbent, who had raised \$633,513. This defeat is noteworthy because the winning candidate was one of only two to oust a sitting state supreme court judge in the nation that year, the other case occurring in North Carolina.¹⁹

Third-party money played a significant part in Mississippi's 2002 Supreme Court race as well. According to the Brennan Center for Justice at the New York University School of Law, the Law Enforcement Alliance of America (LEAA) spent more than \$190,000 on television and radio commercials to unseat the incumbent.²⁰ Altogether, money spent on television and radio advertising for the state's 2002 race, over \$390,000, nearly quadrupled the amount expended in 2000.²¹

The Texas Experience

Texas, one of only three states nationwide to select all trial and appellate judges by partisan ballot, was among the first states to witness expensive judiciary elections. In 1980, the state became the first in which the cost of a judicial race exceeded \$1 million, with campaign contributions to candidates in contested appellate court races increasing by 250 percent between 1980 and 1986. In 1988, the 12 candidates running for six Supreme Court seats raised a (state) record \$12 million. Then, between 1992 and 1997, the seven candidates who won their Supreme Court posts raised more than a total of \$9 million, of which more than 40 percent was contributed by parties or law firms with cases before the Court or by contributors linked to those parties, according to the American Judicature Society.²²

Many in the state have urged reforming the state's judicial selection process in recent years, arguing that high-dollar elections have created the suspicion of corruption and have caused Texans to lose confidence in their judiciary.²³ Examples of legislation aimed at reforming the judicial election process, but failing, include:

- » a Senate passed resolution in 1995 that would have let voters decide to give the governor the power, with Senate confirmation, to appoint appellate court judges. The bill died in House committee;
- » a 1997 resolution that would have made appellate court races nonpartisan passed the House but stalled in the Senate; and
- » resolutions passing the Senate in 2001 and 2003 that would have replaced judicial elections with merit selection. In addition, another unsuccessful 2001 measure would have made state appellate judicial elections nonpartisan and would have set up a public finance system similar to North Carolina's.

Other States

While some Southern states have witnessed an increase in hotly-contested judicial elections in recent years, the cost and controversy surrounding other state supreme court races have been less dramatic, and still other states' races continue to experience relatively quiet, inexpensive contests. Table 3

illustrates the average amount of money raised by supreme court victors in Southern states electing those offices in 2002, be they through partisan, nonpartisan or retention elections.

Following those in Alabama, Mississippi and Texas, winning judges in North Carolina raised the most money, averaging \$162,250 in the state's partisan election campaigns; Georgia judges, in nonpartisan contests, raised an average of \$141,138; followed by Louisiana judges in partisan elections, averaging \$132,102 in funds raised. Winning judges in Florida, Kentucky, Missouri and Oklahoma raised no campaign contributions. Kentucky is the only one of these states not using merit selection, electing judges through nonpartisan ballot.

Among the quietest of Southern state supreme court races, the American Judicature Society (AJS) notes that Arkansas' judicial contests usually feature a lack of competition, even when the state held partisan judicial elections, and that campaigns are substantially funded by the candidates themselves. The AJS cites 88 percent of judicial candidates in the state ran unopposed from 1976 to 1988; in 1992, all but one of 79 judges running for reelection did not face an opponent; and, in 1994, only 6 percent of judicial races were contested. In 2002, the winning Supreme Court candidate raised a mere \$16,295 for his campaign.

Southern State Supreme Court Campaign Expenses 2002, Winning Candidates

State	Alabama	Arkansas	Florida	Georgia	Kentucky	Louisiana
Seats Contested	One	One	Two	Three	One	One
Winning Candidate(s)	\$1,590,797	\$16,295	\$0	\$141,138	\$0	\$132,102

State	Mississippi	Missouri	North Carolina	Oklahoma	Texas
Seats Contested	One	One	Two	Four	Seven
Winning Candidate(s)	\$1,005,380	\$0	\$162,250	\$0	\$406,949

Notes: If there was more than one judge elected, amount shown is the average cost per winning candidate. Judges in Alabama, Louisiana, North Carolina and Texas were elected via partisan ballot; judges in Arkansas, Georgia, Kentucky and Mississippi faced nonpartisan elections; and judges in Florida, Missouri and Oklahoma were up for retention elections.

Source: *Follow the Money*, The Institute on Money in State Politics Internet site: <http://www.followthemoney.org/index.phtml>, accessed September 23, 2003. Data is based on campaign finance reports filed by the candidates with respective state disclosure agencies.

table 3

Campaign Contributors

In an Alabama case study on the possible influence campaign contributors have on the bench by the Institute on Money in State Politics, based in Helena Montana, 63 percent of the cases decided by the Alabama Supreme Court from 1994 and 1998 involved parties or attorneys who had contributed to a winning court candidate before their case was decided. Of the 900 cases decided in which contributors appeared before the court, contributors won 30 percent of them; they lost 25 percent. Contributions came from both the winning and losing parties in 28 percent of the cases.

During this same time period, political parties contributed the most to Alabama Supreme Court candidates, over 34 percent of total funds, with the Democrat and Republican parties contributing about equally; business groups gave about 32 percent of total contributions, with 87 percent underwriting Republican candidates; and attorneys contributed about 22 percent of the total, with 93 percent earmarked to Democratic candidates. The study also pointed out that only 12 percent (\$13.4 million) of the total campaign money raised by successful judicial candidates during this period came from parties who later appeared before the court.²⁴

Like other political office holders, the majority of judges who run for election feel pressure to raise campaign dollars. A November 2001 national survey of 2,428 judges, jointly carried out by American Viewpoint, based in Alexandria, Virginia, and Greenberg Quinlan, Washington, D.C., found that 57 percent of state supreme court judges, 49 percent of intermediate appellate court judges and 40 percent of trial judges admitted to being under a “great deal” of pressure to raise money for their campaign during election years. Thirty-three percent of supreme court judges, 32 percent of appellate court judges and 40 percent of trial court judges described themselves as being under “some pressure” to raise funds.

As often referenced by reformers, many in the public view campaign contributions as having an influence on judicial decisions. In a survey undertaken in 2001 by American Viewpoint and Greenberg Quinlan, slightly more than 38 percent of the public felt campaign contributions had a great deal of influence on judges’ decisions; 42 percent felt that contributions had some influence; and 14 percent felt there was a little influence. Despite

these beliefs, the survey response reveals that over 80 percent of the public believes that judges should be elected to office, indicating that, although most citizens feel that campaign contributors influence the bench, a majority of them, nonetheless, have faith in judicial elections. From the judicial perspective, only 5 percent of judges thought that campaign contributions had a great influence on judicial decision making; 28 percent of judges believed there was some influence; and 23 percent responded that campaign contributions had little influence on decisions.²⁵

Outside Contributions

In addition to more money being raised and spent by judicial candidates themselves, the participation of noncandidates/third parties in judicial races has increased substantially in recent years. Often this support is in the form of broadcasting television and radio advertisements against candidates; comes from political, business and attorney interests; and, unlike those from candidates, these ads are not usually subject to states’ canons of judicial conduct. One study found that more than 80 percent of special interest ads in 2000 attacked judicial candidates, far outstripping negative ads run by candidates themselves and even political parties. The study points out that almost 99 percent of interest groups’ ads avoid using such words as “elect” and “defeat,” thus sidestepping being defined as campaign ads, falling under the purview of state campaign finance laws, and having to disclose their source of funding.²⁶

Public Financing of Judicial Campaigns

For states continuing to elect judges, either through partisan, nonpartisan or retention elections, other approaches have been recommended to reduce judicial candidates’ dependency on campaign contributions from groups having interests before the court. For the most part, judicial candidates are subject to the same state campaign finance laws governing those running for other political offices. However, seven states have contribution limits specifically for judicial campaigns (Alaska, Idaho, Kansas, Missouri, Ohio, Texas and Wisconsin).²⁷ Missouri limits political action committees (PAC) and individual contributions to supreme court candidates to \$1,175, making the state among the South’s most restrictive. Texas caps individual contributions at \$5,000 for a

Southern State Judicial Campaign Contribution Caps Per Candidate, Per Election

State	Political Action Committee	Individual	Notes
Alabama	None	None	The state has no limits on judicial campaign contributions other than a \$500 cap from corporations.
Arkansas	\$2,500	\$1,000	Political parties may not contribute more than \$2,500.
Florida	\$500	\$500	
Georgia	\$5,000	\$5,000	
Kentucky	\$1,000	\$1,000	Contributions from corporations are prohibited.
Louisiana	\$5,000	\$5,000	Large PACs may contribute up to \$10,000, but candidates may not accept more than \$80,000 in PAC money.
Maryland	\$4,000	\$4,000	Individuals and PACs cannot contribute more than \$10,000 to all candidates.
Mississippi	\$5,000	\$5,000	Corporations cannot contribute more than \$1,000.
Missouri	\$1,175	\$1,175	There are no limits on contributions from corporations and labor unions.
North Carolina	\$1,000	\$1,000	Family members may contribute up to \$2,000. Corporate contributions are prohibited. Full public financing is available, entailing other campaign requirements.
Oklahoma	\$5,000	\$5,000	Campaign financing regulations apply only in retention elections when candidates are opposed. Contributions from corporations are prohibited.
South Carolina	Judges are appointed for initial and subsequent terms.		
Tennessee	\$5,000	\$1,000	
Texas	Candidates may accept up to \$300,000 in total PAC contributions	\$5,000	Contributions from law firms and members of law firms are limited to \$50 if their aggregate exceeds six times the maximum individual contribution for that judicial office.
Virginia	Judges are appointed for initial and subsequent terms.		
West Virginia	\$1,000	\$1,000	Contributions from corporations and regulated industries are prohibited.

Source: American Judicature Society, *Judicial Selection in the States*, from the Internet site: <http://www.ajs.org/js/>, accessed October 7, 2003.

table 4

statewide judicial office and places aggregate limits on contributions from a single law firm.²⁸ Unique among Southern states, Texas does not limit the amount a political action committee (PAC) can give to a particular candidate per se, but does cap the total amount a candidate may receive from all PAC contributions at \$300,000.

Florida's campaign contribution caps are the South's most restrictive, limiting the amount a judicial or other political candidate can receive from both individuals and PACs at \$500 per election. Also at the lower end, as part of a judicial reform package adopted in 2002, North Carolina limits campaign contributions for all appellate court judge candidates to \$1,000 per individual contributor, joining the states of Arkansas, Kentucky, Tennessee and West Virginia in this area. Alabama places no limit on the amount candidates can receive from political parties, political action committees or individuals. The state does, however, limit corporate campaign contributions to \$500 per candidate, per election. Georgia, Louisiana and Oklahoma allow both PACs and individuals to contribute up to \$5,000 per candidate, and Tennessee allows up to this amount from PACs, while capping individual contributions at \$1,000.

In addition to limiting judicial campaign contributions, a reform which has been widely advocated is that of publicly financing judicial campaigns, though only two states, Wisconsin and North Carolina, have implemented such programs. The National Summit on Improving Judicial Selection urges states in which candidates compete for judicial positions to consider adopting public funding. According to summit participants, a public funding system should be "sufficiently generous to encourage participating candidates to forego all other sources of campaign funds." Proponents argue that the more money that judicial candidates raise from public funds, the less they are beholden to contributions from special interests, and the less influence they may be under when issuing decisions.

Critics of public financing have raised the concern that publicly-funded campaigns ultimately lead to coerced speech, and that public funding favors current officeholders by denying to challengers the financial resources needed to overcome the advantages of incumbency; is opposed by taxpayers; is tied to prior vote counts or fund raising,

thereby penalizing new candidates; and may divert resources to fringe candidates.²⁹ Other concerns have been raised that the availability of public funds would have the effect of increasing challenges to sitting judges, including those whose performance is exemplary. This, in turn, would force sitting judges to take time away from their duties to campaign and raise contributions, thus exacerbating the problems public financing is intended to alleviate.

Currently, 24 states provide some public funding for political campaigns, directly to candidates and/or to political parties. However, most of these limit funds to nonjudicial elections. These states rely on a variety of means to generate money for public financing, including through general fund appropriations, income tax checkoffs and add-ons, tax deductions, fees, election law penalties and fines.³⁰ Until recently, Wisconsin was the only state to subsidize judicial elections, offering partial public financing to state Supreme Court candidates since the 1970s through its Election Campaign Fund.

Under Wisconsin's program, qualified Supreme Court candidates have their grants reduced on a dollar-for-dollar basis by the amount of PAC funding they accept, and candidates are required to abide by voluntary spending limits. To fund its program, Wisconsin relies in large part on a \$1 checkoff box on state tax forms. Over the years, however, funding of and interest in the program have waned. In the late 1970s, soon after the state's public financing program was implemented, more than 19 percent of state taxpayers contributed. By 1999, less than 9 percent of taxpayers checked the voluntary contribution box and, accordingly, the program has been unable to fully fund all judicial candidates who qualify and apply for it.³¹ To help revive the program, some have suggested requiring lawyers to contribute to the fund through increased license fees, and political parties to contribute through increased filing fees or surcharges on criminal fines and civil penalties.³²

According to Charles Gardner Geyh, a professor of law at Indiana University in Bloomington, the most serious hurdle to publicly-funded judicial elections is ensuring that programs are adequately funded. Other challenges listed by Geyh include: "making certain that only serious candidates qualify

for public funds; offsetting the impact of excessive independent expenditures on behalf of candidates whose publicly-funded opponents have agreed to limit their spending; and balancing the benefits to judicial independence of diminishing the impact of private money in judicial elections with the costs of increased competition in judicial races.”³³

Public Financing, The North Carolina Model

The public financing reform drive recently was reinvigorated when, in October 2002, North Carolina passed the Judicial Campaign Reform Act, the nation’s first fully-funded public finance system for judicial candidates. Labeled by some as a historic achievement for campaign finance reform and the most sweeping judicial reform in the country, the Act came as a result of wide discontent with candidates for the 2000 chief justice race having spent more than \$1 million for their campaigns.³⁴ According to A.P. Carlton, President of the American Bar Association, “North Carolina makes history as the first state to create a viable alternative electoral system for state appellate judges.”³⁵

In addition to switching to nonpartisan elections for state Supreme Court and Court of Appeals judges in 2004, the law enables judicial candidates for both courts to receive public funding for their general election campaigns, provided they accept fund raising and spending limits in their primary. To be eligible for the public funding, up to a total of \$738,000, judicial candidates cannot raise or spend more than \$10,000 on their campaign in the year preceding the election; must have received contributions from at least 350 registered voters, totaling no more than \$500 each; raised such contributions during the election’s qualifying period, beginning September 1 of the year before the election and ending primary day; and the total of all qualifying contributions must remain within a range pegged to a multiple of the filing fee. In addition, candidates may spend only up to the qualifying contribution cap during the primary and agree to spend only public funds and remaining qualifying funds in the general election. Outside the public financing component, the law also provides for a voter’s guide regarding appellate court candidates to be distributed to households and lowers the individual contribution limits for judicial candidates not in the public financing program from \$4,000 to \$1,000 per election.

The chief funding mechanisms of North Carolina’s program are a voluntary \$50 contribution solicited from attorneys when they pay their annual privilege license tax; a voluntary \$3 solicitation by residents on individual state income tax forms; and general contributions. As such contributions are voluntary, there is no guaranteed source of funds and, as Wisconsin discovered under its program, contributions may decline over the years, creating a need for a more secure and adequate source of funds. Nonetheless, many hold high hopes for the success of the program.

Judicial Campaign Conduct and Free Speech

There has long been debate on what constitutes acceptable judicial campaign conduct, particularly over whether or not candidates can stake out their positions on issues that may appear before the court. Traditionally, states have significantly limited judicial conduct in order to shield judicial races from political stances that might compromise judges’ impartiality. As judicial decisions are seen as being based on law and precedent, judicial predetermination has not been strongly encouraged. These restrictions, however, may have the end result of impeding judicial candidates’ free speech rights. Underlying critics’ concerns over judicial campaign conduct limitations is that judicial candidates should not be treated any differently from candidates running for other political offices. Herein lies the great challenge: encouraging fair elections, while at the same time allowing candidates to freely communicate with the electorate.

As of 2002, of the nearly 42 states nationwide that elected some of their judges (for partisan, nonpartisan or retention election), most restricted judicial campaign speech. In most states, judicial candidates have been bound by a canon of ethics, preventing them from divulging their views on issues that might come before the court. Nine states (Arizona, Colorado, Iowa, Maryland, Minnesota, Mississippi, Missouri, New Mexico and Pennsylvania) further restrict campaign speech and ban judicial candidates from announcing any views on “disputed legal or political issues.”³⁶ In all of these cases, candidates were expected to focus their campaign speech on such topics as rules within the courts, their experience and credentials. The American Bar Association and many legal groups approve

of such restrictions, believing they protect the impartiality of judicial candidates.

Many such limitations, however, were declared unconstitutional as a result of the United States Supreme Court's 2002 ruling in *Party of Minnesota v. White* (122 S. Ct. 2528). The *White* decision – the Court's first ever on judicial elections – lifted restrictions on what judicial candidates may say during elections, with the majority arguing that candidates' speech cannot be limited because of due process protections. In siding with the majority, Justice Sandra Day O'Connor wrote that, by adopting judicial elections, the state had voluntarily "taken on the risks to judicial bias." In dissent, Justice John Paul Stevens wrote that "the judicial reputation for impartiality and open-mindedness is compromised by electioneering that emphasizes the candidate's personal predilections rather than his qualifications for judicial office." Joining the dissent was Justice Ruth Bader Ginsburg, arguing "judges are not politicians, and the First Amendment does not require that they be treated as politicians simply because they are chosen by popular vote."

By way of background, the American Bar Association issued its Model Code of Judicial Conduct in 1924, 1972 and 1990. Provisions spell out inappropriate conduct for judicial candidates with some form of the code adopted in every state. At issue in the *White* case was the "announce" clause of Canon 5 of the Minnesota Code of Judicial Conduct, modeled after the 1972 ABA Code. Minnesota had interpreted Canon 5 rather broadly, and prohibited judicial candidates from announcing their views on disputed legal or political issues, thus prohibiting most commentary in these areas. At that time, eight other states had canons containing clauses such as Minnesota's.

While the striking of such restrictions in the *White* decision was significant, the National Center for State Courts' (NCSC) Ad Hoc Advisory Committee on Judicial Election Law points out that the ruling was limited in scope, and did not invalidate all regulation of judicial campaign conduct. In the case, the Court expressly declined to hold that the First Amendment requires that judicial elections be governed by the same rules that apply to elections for other political offices.³⁷ The most significant distinction is that the announcement clause differs from a "pledge

or promise clause," which the Supreme Court did not rule on. A pledge or promise clause, which has been adopted by all states, forbids judicial candidates or judges from making pledges or promises as to how they would rule or conduct themselves in office. The NCSC also points out that nothing in *White* addresses or invalidates campaign conduct committees that would criticize statements by judicial candidates that are considered to be inconsistent with judicial impartiality.³⁸ Nonetheless, *White* has significant implications for judicial candidates wishing to "announce" their views on some of today's hot-button issues.

The U.S. Supreme Court was not the only federal court to strike down judicial conduct limitations in 2002. In October of that year, a three-judge panel of the 11th Circuit Court of Appeals in Atlanta set even further restrictions on judicial canons, overturning two sections of Georgia's judicial ethics canons relating to free speech. In *Weaver v. Bonner*,³⁹ the 11th Circuit struck down portions of the Georgia Judicial Qualifications Commission's canon barring judges from personally soliciting endorsements and campaign funds. Prior to this, judicial candidates in Georgia could not ask entities for money or support, instead relying on an election committee to serve that purpose – a prohibition that had been adopted by approximately 30 other states. In its decision, the Court asserted that "successful candidates will feel beholden to the people who helped them get elected regardless of who did the soliciting of support." The Court also ruled that a judicial candidate cannot be reprimanded for criticizing an opponent unless the candidate is found to have made malicious or reckless false statements.⁴⁰

In *Weaver*, the Court held that "the distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that the distinction, if there truly is one, justifies greater restriction on speech during judicial campaigns than during other types of campaigns." Following the ruling, Atlanta lawyer George Weaver, who had brought the lawsuit following his reprimand for engaging in "unethical, unfair, false and intentionally deceptive" campaign practices, stated "I think it will make it easier to have more open and honest judicial elections. Voters can't have a choice if the candidates can't say anything."⁴¹

Erwin Chemerinsky, professor of public interest law at the University of Southern California, also is against restrictions on judicial candidates' speech, believing them to be unconstitutional. In a briefing paper presented to the Symposium on Judicial Campaign Conduct and the First Amendment, Chemerinsky argues that restrictive campaign conduct laws are not necessary in ensuring judicial impartiality, reasoning that an individual's views affect how he or she acts on the bench as a judge and should be aired. Furthermore, those selecting or evaluating a judicial candidate should consider the views of the individual as they relate to likely performance on the bench and restrictions on speech prevent judicial candidates from expressing their views and thus prevents voters from learning of them. Thus, these codes are content-based restrictions on political speech and, as such, must meet strict scrutiny.⁴²

Both critics and proponents of the *White* and *Weaver* decisions acknowledge that they likely will lead some judicial candidates to increasingly voice their opinions on such issues as the death penalty, gun control, abortion or others to gain favor with portions of the electorate. Such speech, many believe, further distracts from the bench's ability to be impartial. Robert E. Hirshon, president of the American Bar Association, considers *White* a bad decision, lamenting "it will open a Pandora's box. We will now have judicial

candidates running for office by announcing their positions on particular issues, knowing that voters will evaluate their performance in office on how closely their ruling comports with those positions."⁴³

As a result of the *White* and *Weaver* decisions, several states have had to revamp their canons on judicial campaign conduct. As a state example, in September 2003, the Georgia Supreme Court was welcoming comment on its proposed changes to Canon 7 of the state Code of Judicial Conduct. Among revisions, and in response to *White*, the proposals would strike out the language "shall not announce their views on disputed legal or political issues," and would instead prevent judicial candidates from making statements that "commit the candidate with respect to issues likely to come before the court." In response to *Weaver*, the new proposals would enable judicial candidates to "personally solicit campaign contributions and publicly stated support" provided that they "not use or permit the use of campaign contributions for the private benefit of themselves or members of their families." Further addressing *Weaver*, the Georgia Supreme Court's proposal would prevent state judicial candidates from using a false statement concerning another candidate only if the candidate did so "with knowledge of the statement's falsity or with reckless disregard for the statement's truth or falsity."⁴⁴

Judicial Campaign Conduct Committees, Alabama, Florida and Georgia 1998			
State	Alabama	Florida	Georgia
Committee Type	Appointed by Supreme Court	Official	Official
Membership	In 1998, the committee consisted of 12 lawyers and non-lawyers; in 2000, it consisted of 26 judges and lawyers	Judicial Ethics Advisory Committee: 10 judges and one attorney Staff: Senior attorney in State Courts Administration	Special Committee of Judicial Qualification Commission Staff: Director of JQC
Since	1998	1998	1998
Forms of Action	-Outreach to candidates; -Hotline; -Receives complaints; -Can initiate investigations and actions; -Can refer to disciplinary bodies; and -Can make public statements.	-Educates candidates; -Hotline; and -Can refer to disciplinary bodies.	-Receives complaints; -Can initiate investigations and actions; -Can make public statements; and -Can refer to disciplinary bodies.

Source: Barbara Reed and Roy A. Schotland "Judicial Campaign Conduct Committees," *Indiana Law Review*, Vol. 35 (2002), 781-804.

Judicial Campaign Conduct Committees

Another major reform in attempts to rid judicial elections of what many consider to be inappropriate conduct has been the establishment of campaign conduct oversight committees, either through state supreme courts, bar associations or as part of a state's judicial disciplinary body. According to the ABA, these committees can "undertake a number of initiatives designed to improve public trust in the judiciary, provide a tempering voice amid the myriad campaign advertisements, and provide clear guidance to judicial candidates and others regarding campaign and ethics requirements."⁴⁵

Encouraged and supported by the National Center of State Courts, judicial campaign conduct committees serve such functions as resolving issues relating to improper conduct during judicial campaigns and participating in setting the tone of judicial elections in their respective states.⁴⁶ The organization's Ad Hoc National Advisory Committee's purpose is to enhance the quality of judicial campaigns and candidate behavior through encouraging the establishment and supporting the work of conduct committees. The NCSC favors the official governmental body format, believing this form of committee is more likely to resolve complaints expeditiously. Others list the advantages of official conduct committees as their durability, resources, and carrying the potential of official sanctions for misconduct.⁴⁷ Ten states nationwide, including the Southern states of Florida, Georgia, and Mississippi, have established statewide official, governmental judicial campaign conduct committees.

In this area, Florida's Judicial Ethics Advisory Committee (JEAC) is heralded by many reformers as a model campaign conduct committee. The JEAC, established in 1998, is made up of 10 judges and one attorney. Among its responsibilities, it renders advisory opinions to inquiring judges on the propriety of contemplated judicial and non-judicial conduct, and conducts campaign conduct forums in circuits with contested judicial elections for candidates and campaign consultants. In addition, JEAC provides timely responses to campaign questions, posting opinions on its Internet site.

Other states, such as Alabama, Louisiana and Mississippi, have quasi-official judicial conduct committees, and states such as

North Carolina have established unofficial committees. In these cases, committees have no power to sanction violators but can provide such services as issuing public statements; providing candidate education; establishing "hotlines" to answer candidate queries; seeking candidate pledges of conduct; forming contacts with leaders of civic organizations, political parties and other groups to establish bounds of acceptable campaign conduct; and presenting to the public their views on why certain conduct is inappropriate.

According to Barbara Reed, Counsel and Policy Director of the Constitution Project's Court's Initiative, and Roy Schotland, Professor of Law at Georgetown University Law Center, unofficial judicial campaign conduct committees have several distinct advantages over their official counterparts. To Reed and Schotland, though unofficial committees lack the power of enforcement and are not designed to resolve complaints against judicial candidates during elections, they are better able to encompass more diversity and credibility as a voluntary body; more likely to be regarded as neutral, rather than as political appointees charged with protecting favorites; and are free from constitutional requirements – thus, they cannot be sued on constitutional grounds. No matter what model states employ, Reed and Schotland see all forms of judicial campaign conduct committees as beneficial, noting "a committee's mere existence is likely to help inhibit improper [judicial campaign] conduct."⁴⁸

Terms in Office

Unlike federal judges who serve for life, the vast majority of state judges are elected, or appointed and retained, for a fixed number of years. Those favoring shorter judicial terms most often cite the need for holding judges accountable through the election or reappointment process. Reformers, however, point out that short judicial terms require judges to continually campaign and raise contributions. Longer terms, as argued during the National Summit on Improving Judicial Selection, could create a distance between potential influence by lawyers or litigants who are involved in cases before the court, thus increasing judicial independence and impartiality.⁴⁹

Judicial terms vary throughout the United States. Nationwide, 45 percent of elected appellate judges serve six-year terms; 16 percent have eight-year terms and the

remaining 38 percent serve terms of 10 years or longer. Of the four Southern states electing appellate court judges in partisan elections, West Virginia provides for the longest terms, 12 years; followed by Louisiana, 10 years; then Alabama and Texas, where judges in both states serve six-year terms. Among Southern states holding nonpartisan appellate court elections, Arkansas, Kentucky, Mississippi and North Carolina (beginning nonpartisan elections in 2004) provide for eight-year terms and Georgia for six-year terms. Of the five Southern states using merit selection, full terms for appellate court judges in Missouri are the longest, 12 years; followed by Maryland, 10 years; Tennessee, nine years; and Florida, six years.

No matter the judicial selection process employed by states, it is important to note that many judges initially are selected to fill midterm vacancies through the appointment process, usually by the governor either with or without a nominating committee. Nationally, appointments provide about 34 percent of initial judgeships, with 11 states using nominating commissions for vacancy appointments, while 28 states do not.⁵⁰ In these cases, appointees must face reelection soon after being appointed to the bench, with many initial terms being relatively short.

Appellate Court Term Lengths: Nationally 1988					
Term Length for All State Appellate Judges, Nationwide			Term Length for Elected Appellate Judges, Nationwide 1998		
Length of Term	Initial Term	Subsequent Term	Length of Term	Initial Term	Subsequent Term
2 years or fewer	25.9%	--	2 years or fewer	28.2%	--
3-4 years	3.2%	0.8%	3-4 years	3.5%	0.9%
6 years	29.4%	44.5%	6 years	30.6%	44.8%
7-8 years	12.8%	16.9%	7-8 years	8.2%	15.8%
10 years	14.3%	19.7%	10 years	14.2%	19.6%
11-15 years	11.7%	15.4%	11-15 years	15.3%	18.9%
15 years or more	2.6%	3.4%	15 years or more	--	--

Source: Roy A. Schotland, Comment, 61 Law & Contemporary Problems, Volume 149, Summer 1998, p. 154.

SLC State Section

The following pages briefly summarize aspects of judicial selection processes for supreme courts, courts of appeal and trial courts in 16 Southern states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia. In addition to outlining judicial selection, judicial retention, term lengths, methods by which midterm vacancies are filled, and the selection process for supreme court chief justices, among other related topics, are highlighted.⁵¹

Alabama

Since 1867, as prescribed by the state constitution, Supreme Court judges are elected by partisan election for a six-year term. Judges are retained by winning reelection, again serving for six years. The Supreme Court chief justice is selected by popular election, also for a six-year term. Judges for the state's two other appellate courts, the Court of Civil Appeals and Court of Criminal Appeals, and the Circuit Court (of general jurisdiction) also are selected by partisan election to serve six-year terms. The governor makes appointments to fill vacancies in the above courts.



Arkansas

Constitutionally, judges for the Supreme Court and Court of Appeals are selected by nonpartisan election for initial and subsequent eight-year terms in office. Supreme Court chief justices are selected through popular election for a three-year term and can succeed themselves. Circuit Court (trial courts of general jurisdiction) judges are selected by nonpartisan election for four-year terms, facing reelection for subsequent four-year terms. Gubernatorial appointments fill unexpired terms. Judicial elections were partisan until 2000, when a constitutional amendment was passed implementing nonpartisan contests.



Florida

As prescribed by the state's constitution, judges of the Supreme Court and District Courts of Appeal are appointed by the governor, who is bound to select a judge among those recommended by a nine-member nominating commission. Legislative confirmation is not required. Judges serve an initial term of one year, facing retention elections every six years. The Supreme Court chief justice is selected by the Court for a two-year term, with the opportunity for succession. Circuit Court judges are selected by nonpartisan elections for four-year terms. Midterm vacancies in all courts are filled by merit selection. In 2000, a local option for merit selection and retention of trial judges was put before voters, but failed in every jurisdiction of the state.



Georgia

Supreme Court and Court of Appeals judges are selected by nonpartisan elections to serve six-year terms as prescribed by the state's 1983 constitution. They may be reelected for subsequent six-year terms. The Supreme Court selects its chief justice to serve a four-year term, with no provision for succession. Superior Court judges also are selected in nonpartisan elections, but for four-year terms. The governor, bound by recommendations from a judicial nominating commission, fills midterm judgeship vacancies for all courts. Legislative confirmation is not required under this mechanism.



Kentucky

Constitutionally, Supreme Court, Court of Appeals and Circuit Court judges all are selected by nonpartisan elections for initial and subsequent eight-year terms. The governor fills midterm vacancies and is required to select one of three recommendations forwarded by a judicial nominating commission. Legislative confirmation of these appointments is not required. The Supreme Court chief justice is selected by the Court to serve a four-year term. Succession is allowed.



Louisiana

Under the state's constitution, judges for the Supreme Court and Court of Appeals are selected by partisan election to serve initial terms of 10 years. They may be retained by reelection for additional 10-year terms. The Supreme Court chief justice is determined by seniority on the Court, with that term to last the duration of the judgeship. The Supreme Court selects judges to fill unexpired terms, with that judge being ineligible to run for the position in the next election. District Court judges are selected by partisan elections for an initial term of six years, followed by reelection for subsequent six-year terms. While these elections are partisan inasmuch as a judicial



candidate's party affiliation is listed on the ballot, primaries are open to all candidates, and judicial candidates generally do not solicit party support for their campaigns.



Maryland

Under the state's constitution, judges on the Court of Appeals and Court of Special Appeals are appointed by the governor, who is bound by executive order since 1970 to select a judge from five to seven recommendations forwarded by the judicial nominating commission. Judges must then be confirmed by the state Senate. The judge's initial term lasts until the first general election following the expiration of one year from the date of the occurrence of the vacancy. Appellate judges may be retained through subsequent retention elections for 10-year terms. The governor also selects the state's Court of Appeals chief justice, with succession an option. Circuit Court judges also are appointed by the governor, based on merit, through a nominating commission with the consent of the Senate. While their initial term is the same as for Appeals judges, they must be retained through nonpartisan elections for 15-year terms.



Mississippi

Prescribed by the state's constitution, Supreme Court and Court of Appeals judges are selected by nonpartisan elections for an initial eight-year term. They may be retained by reelection for subsequent eight-year terms. Supreme Court chief justices serve based on seniority on the Court, with their term lasting the duration of their service. Midterm vacancies are filled by gubernatorial appointment. Chancery and Circuit Court judges also are selected by nonpartisan elections, but their initial term in office is four years. They may be retained by reelection for subsequent four-year terms. The governor appoints judges to fill unexpired terms.



Missouri

As required by the state's constitution, Supreme Court and Court of Appeals judges are appointed by the governor, selected by merit through a judicial nominating commission, to serve an initial one-year term. They may be retained through a retention election for a 12-year term. Midterm vacancies are filled by the governor through merit selection as well – legislative confirmation is not required. The Supreme Court selects its own chief justice to serve a two-year term. While this selection typically is rotated among the judges, chief justices may succeed themselves. Circuit Court judges in Jackson, Clay, Platte and St. Louis Counties (Kansas City and St. Louis) are appointed by the governor, based on merit through a nominating commission, for an initial term of one year. They may then be retained through retention elections for six-year terms. Circuit Courts in all other counties of the state have judges selected through partisan elections for initial and subsequent six-year terms.



North Carolina

Beginning in 2004, judges for the Supreme Court and Court of Appeals will be selected by nonpartisan election for an initial eight-year term. While elections are established by the state's constitution, nonpartisan elections were established by statute. Judges may be retained by reelection for additional eight-year terms. The governor appoints judges to fill unexpired terms. The public elects the Supreme Court chief justice, also for an eight-year term, and chief justices may succeed themselves. Partisan judicial elections had been the process for Appellate Court judges from 1868 until 2002. Nonpartisan elections were implemented for District Court races in 2001 and for Superior Court races in 1996. Superior Court judges are elected for initial and subsequent eight-year terms.



Oklahoma

As prescribed by the state's constitution, judges for the Supreme Court, Court of Criminal Appeals and Court of Appeals are appointed by the governor, who must appoint a judge from among three recommendations forwarded by a judicial nominating commission – legislative confirmation is not required. Initial terms last one year, with judges facing a retention election for a six-year term. The Supreme Court chief justice is selected by the Court to serve a two-year term, and is eligible to succeed himself or herself. District Court judges are selected by nonpartisan elections for initial and subsequent four-year terms. The governor makes appointments to fill vacancies in all above courts, with recommendations coming from a judicial nominating commission.

South Carolina

Under the state's constitution, judges for the Supreme Court are appointed by the General Assembly through an election requiring a majority vote of both chambers meeting in a joint session. The judge elected by the General Assembly must be one of three recommendations forwarded by the Judicial Merit Selection Commission, and serves an initial 10-year term. They may then be retained by legislative reappointment. Midterm vacancies are filled in the same manner. Supreme Court chief justices also are elected by the General Assembly to serve a 10-year term. They may succeed themselves. Court of Appeals and Circuit Court judges also serve through this appointment process, but for six-year terms, followed by subsequent reappointments.



Tennessee

By statute, judges for the Supreme Court, Court of Appeals and Court of Criminal Appeals serve under merit selection, appointed by the governor, who must select a judge from among the three recommended by a judicial nominating commission. Legislative confirmation is not required. Judges serve their initial term until the next (biennial) general election, then face a retention election to serve an eight-year term. Unexpired terms are filled through the same process. Supreme Court chief justices are selected by the court for four-year terms and may succeed themselves. Judges for the state's Chancery, Criminal and Circuit Courts are selected through a partisan election for eight-year terms, then may be reelected. The governor fills midterm vacancies.



Texas

Judges for the Supreme Court, Court of Criminal Appeals and Court of Appeals are selected through a partisan election for initial six-year terms. Judges then face reelection for subsequent six-year terms. Vacancies are filled through gubernatorial appointment. Supreme Court chief justices also are selected by popular election for a six-year term and may succeed themselves. District Court judges are elected in partisan elections for initial and subsequent four-year terms. Midterm vacancies are filled by gubernatorial appointment with the consent of the Senate.



Virginia

By constitutional authority, the General Assembly appoints Supreme Court judges for initial 12-year terms. Judges may then be reappointed for subsequent 12-year terms. Unexpired terms also are filled through legislative appointment. The most senior member of the Supreme Court serves as chief justice, the term lasting indefinitely. Court of Appeals and Circuit Court judges also are legislatively appointed and reappointed, serving eight-year terms.



West Virginia

Pursuant to the state's constitution, judges for the Supreme Court are elected by partisan (determined statutorily) elections to serve initial and subsequent 12-year terms. The governor appoints judges to fill midterm vacancies, with that appointment effective only until the next election year, at which time the appointee may run for election for any remaining portion of the unexpired term. Supreme Court chief justices serve one-year rotating terms, based on their seniority. Circuit Court judges also serve through partisan elections, but for initial and subsequent eight-year terms. Vacancies are filled by the governor.



Summary

Since the founding of our country, states have debated the best means by which to select judges and at the same time maintain judicial independence and impartiality. While judicial elections initially were championed by judicial reformers as means to remove political patronage from the appointment processes adopted by states, judicial campaigns in many states have become increasingly costly and partisan. As an example, in the watershed year of 2000, state supreme court candidates nationwide spent more than \$40 million on their campaigns – a 60 percent increase from 1998 court contests – with candidates setting spending records in 10 of the 20 states holding supreme court elections, and 16 candidates each spending in excess of \$1 million.

Aimed at depoliticizing the judicial selection process, merit selection, respecting parts of both the appointment and democratic systems, was first adopted by Missouri in 1940. While 14 other states have since implemented merit selection, recent adoption efforts have failed in large part due to respect for America's democratic values, confidence in the election process, and a recognition that all selection systems have inherent drawbacks. According to one Southern state senator in debating a failed measure to switch to a merit system, "I think judges should not be selected on the golf courses. They should be selected in the voting booths... You don't solve the problem by giving 25 people the power that 4 million

people had yesterday."⁵² This sentiment has been shared by policymakers throughout the South in rejecting merit selection proposals in recent years.

In 2004, a total of 24 judges will be elected to serve on 11 Southern state supreme courts. Seven of these judges will be selected by partisan election in Alabama, Louisiana and Texas; 10 will be selected via nonpartisan ballot in Arkansas, Georgia, Kentucky, Mississippi and North Carolina; and seven will face retention elections in Florida, Missouri and Oklahoma. Costly elections likely will occur in several of these states as courts are increasingly involved in an array of public policy issues, and various interests hope to shape this policy through contributions to these judicial contests. Studies suggest that large contributions to judicial campaigns erode public confidence in an independent and impartial judiciary, and there is a perception that large donors exercise undue influence over judges. For these reasons, judiciary reformers are likely to continue advocating the removal of partisanship and special interest influence from judicial races.

Among recently implemented reforms to depoliticize the selection process in states that continue to elect judges have been: switching to nonpartisan elections, making available public campaign funds, and establishing judicial campaign conduct committees. In addition, all states have adopted canons

restricting some judicial campaign speech and conduct, though the U.S. Supreme Court's *White* decision and the 11th Circuit Court of Appeals' *Weaver* ruling have forbidden aspects of these laws, particularly speech restrictions on "announcing" political views and on personally soliciting campaign contributions, respectively. Many experts in the field believe that *White* will have broad implications, leading to even more bitter and politically-driven judicial campaigns. However, others argue that judicial candidates likely will continue to abide by certain speech conduct norms, believing it in their interest not to alienate voters.

If judicial candidates do not restrain from what many consider to be inappropriate campaign conduct, some think that *White* may have another effect on state judicial elections. Tony Mauro, who covers the U.S. Supreme Court for American Lawyer Media, Inc., notes that the *White* ruling may trigger a chain of events that leads to states changing the way they select judges. Mr. Mauro suggests that, in the 39 states that elect some or all of their judges, "if campaigns now become intolerably raucous and inappropriate, the reform pendulum may swing again. States now reluctant to give up electing their judges could

move toward merit selection and appointment, rather than election."⁵³

As many state supreme and appellate court judicial candidates are spending record campaign sums each year, efforts to replace partisan elections will continue. Whichever judicial selection method is used, removing politics from the process is just as unlikely as is reaching a consensus on the proper role of politics in selecting judges. Critics point out that judicial appointments also are political by their very nature, noting that governors, legislatures and judicial nominating commissions can pack the courts with those of similar viewpoints. Others maintain that moving from partisan to nonpartisan contests is political positioning itself, with attempts at change primarily coming from one political party trying to stem the other's gains in the judiciary.

As Southern states continue to wrangle with challenges facing judicial selection and ensuring an impartial bench, finding a middle ground among advocates of judicial elections, appointments and merit selection will unquestionably be on the agendas of policymakers in the years to come, as it has throughout the nation's history. **RR**

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