

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0899

STATE OF WEST VIRGINIA, ex rel, ALLEN H. LOUGHRY II,  
candidate for the Supreme Court of Appeals of West Virginia,

Petitioner,

v.

NATALIE E. TENNANT, in her official capacity as West Virginia Secretary of State;  
NATALIE E. TENNANT, GARY A. COLLIAS, WILLIAM N. RENZELLI, and ROBERT  
RUPP, in their official capacities as members of the West Virginia State Election  
Commission; GLENN B. GAINER III, in his official capacity as West Virginia State  
Auditor; and JOHN PERDUE, in his official capacity as West Virginia State Treasurer,

Respondents.

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APPENDIX TO PETITION FOR WRIT OF MANDAMUS AND INCORPORATED  
MEMORANDUM OF LAW IN SUPPORT

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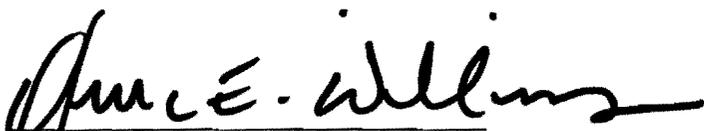
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**CERTIFICATE OF APPENDIX**

I, Marc E. Williams, Esq., hereby certify that the appendix as a whole is sufficient to permit the Court to fairly consider the questions presented in this petition.



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*West Virginia*  
Independent Commission on Judicial Reform

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# FINAL REPORT

November 15, 2009

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Justice, Supreme Court of Appeals of West Virginia, 1998-2000

**Mary McQueen**  
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**Caprice Roberts**  
Visiting Professor of Law, Columbus School of Law, The Catholic University of America  
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## INTRODUCTION

### *Creation of the Commission and Its Mission*

Citing the relative lack of fundamental changes to West Virginia's judiciary since 1974, Governor Joe Manchin III created the Independent Commission on Judicial Reform ("Commission") on April 3, 2009 to "evaluate and recommend proposals for judicial reform in West Virginia." Specifically, the Commission was convened

[T]o study the need for broad systemic judicial reforms including, but not limited to, adopting a merit-based system of judicial selection, enacting judicial campaign finance reforms or reporting requirements, creating an intermediate court of appeals, proposing constitutional amendments or establishing a court of chancery.<sup>1</sup>

The Commission members represented a broad spectrum of the legal community, including practicing lawyers, academics, and former jurists, in order to ensure that the Commission's recommendations were the product of diverse viewpoints and shared knowledge.

At its first meeting, the Commission adopted a proposed work plan designed to structure the Commission's work and processes in a manner consistent with the principles and objectives articulated in the executive order that created the Commission.<sup>2</sup>

First among these principles was a commitment to bolstering public trust and confidence in the judiciary and thus the legal system. The judiciary derives its legitimacy in large part, if not entirely, from the public's perception of its accuracy and impartiality. It was thus crucial that the Commission identify potential threats to the unprejudiced administration of justice and make recommendations targeted at improving both the performance of, and public faith in, the court system.

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<sup>1</sup> Executive Order No. 6-09.

<sup>2</sup> Proposed Work Plan for the Independent Commission on Judicial Reform.

Second, the Commission remained mindful of the independence of the judiciary, as well as the sanctity of the separation of powers among the three separate and coequal branches of government. The Commission recognizes that, as a creation of the Governor's office tasked with suggesting reforms to the judiciary, it is acted as an arm of one coequal branch recommending changes to another. The delicacy and respect required in such an undertaking has not been lost on this Commission, and at all times it has strived to acknowledge the shared roles of each branch in maintaining and improving the justice system while simultaneously reaffirming the independence that is one of the judiciary's greatest virtues. Similarly, while the Commission makes several recommendations requiring action by the Legislature, it does so respectfully with deference to the Legislature's own expertise and independence.

Finally, the Commission sought to undertake an objective examination of West Virginia's court system with the goal of proposing reforms that could modernize and improve West Virginia's judiciary. Aside from the creation of a Family Court system earlier this decade, West Virginia has not substantially altered its court system since the Judicial Reorganization Amendment of 1974. Since that time, however, the State has seen significant changes to the number and types of cases handled by its courts, the cost and tone of its judicial elections, and the public's perception of the efficacy and fairness of the judiciary, indeed the entire justice system. The time is right for several crucial reforms that will address the shifting landscape facing the State's judiciary.

### Context

In order to better understand the context in which the Commission was created, and thus the purposes that it was intended to serve, it is important to note several troubling trends facing the West Virginia judiciary.

The first is an erosion of the public's confidence in the State's justice system as a neutral and unbiased arbiter. Even in 1998, when the Commission on the Future of the West Virginia Judicial System published its report and recommendations, it was already clear that poor public perception of the courts was a growing concern.<sup>3</sup> In a telephone survey conducted for that report, 46% of respondents stated that they did not agree that West Virginia courts treated people equally (with only 30% agreeing), and roughly the same number disagreed that those who went before the courts received justice (with around 26% agreeing). In light of the increases in campaign spending since 1998 and a recent decision by the United States Supreme Court dealing with the impact of multimillion dollar campaign expenditures on the ability of judges to preside over certain cases,<sup>4</sup> it is certainly reasonable to assume that the public's perception of West Virginia's courts is no better today than eleven years ago, and perhaps even worse.

The second trend is the steadily increasing caseload before the Supreme Court of Appeals. While the number of cases heard by the State's circuit courts has remained relatively stable over the past decade, the Supreme Court of Appeals has seen its annual number of filings more than double over the past twenty-five years.

Third is the surge in judicial campaign expenditures in the past few years. Candidates running for a seat on the Supreme Court of Appeals in 2000 raised a total of \$ 1.4 million. In 2004 that number doubled to \$2.8 million, and in 2008 it was \$3.3 million.<sup>5</sup> As campaign spending has increased, so too has the perception that interested third parties can sway the court

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<sup>3</sup> Commission on the Future of the West Virginia Judicial System, Final Report, Dec. 1, 1998.

<sup>4</sup> *Caperton v. A.T. Massey Coal Company, Inc.*, No. 08-22, 556 U.S. \_\_\_ (June 8, 2009).

<sup>5</sup> National Institute on Money in State Politics, *available at* [http://www.followthemoney.org/database/state\\_overview.phtml](http://www.followthemoney.org/database/state_overview.phtml).

system in their favor through monetary participation in the election process. This perception strikes at the very heart of the judiciary's role in our society.

### *The Commission's Methods*

#### *Transparency and Public Participation*

In order to foster transparency and ensure its own accountability, the Commission sought to encourage public access to its work. The Commission's public hearings and meetings were conducted in accordance with open governmental proceedings laws.<sup>6</sup> Moreover, the Commission also established a website through which it could provide notification of meetings, detailed agenda items, and access to information and materials submitted to and considered by the Commission.

#### *Information Gathering*

Due to the time constraints placed upon the Commission's work the by Executive Order, it was imperative that the Commission accumulate as much data, professional knowledge, and public input as possible in a short interval. To that end, the work plan adopted at the Commission's first meeting outlined an intensive period of information gathering, which drew upon a wide variety of sources, including:

- State Bar Survey – The Commission electronically circulated survey questionnaires to members of the Bar in order to solicit feedback and suggestions from the State's practicing lawyers.
- Written Submissions – The Commission invited and encouraged submission of written comments via email, through the Commission's website, and during scheduled public hearings.

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<sup>6</sup> W. Va. Code § 6-9A-1, *et seq.*

- Review of Previous Studies – Though the Commission faced a condensed timeline for information gathering, it had the benefit of drawing upon the detailed and thorough studies prepared by groups that have undertaken similar evaluations of West Virginia’s judiciary over the past few years. While such studies are naturally the work product of their creators, who announced their own conclusions and recommendations, the research and data contained in these reports provided invaluable background to this Commission. In particular, the Commission was aided by the 1998 report of the Commission on the Future of the West Virginia Judicial System and the 2005 report of The West Virginia State Bar’s Judicial Selection Committee.
- Consultation with the Judicial and Legislative Branches – Recognizing that the opinions and suggestions of current judges would be of inestimable value to this study, the Commission invited members of West Virginia’s judiciary, through the West Virginia Judicial Association and the West Virginia Family Judicial Association, to offer their thoughts on the Commission’s work throughout the process, especially during the public hearings. Similarly, because many of this Commission’s recommendations would ultimately require approval or implementation by the Legislature, the Committee invited comments from several key legislators, including the Chair of the West Virginia Senate Committee on the Judiciary, and the Chair of the West Virginia House of Delegates Committee on the Judiciary, and encouraged them to attend and present during public hearings.
- Public Hearings – The Commission held three public hearings in three different cities across West Virginia in order to encourage public participation in the Commission’s information gathering process. The Commission invited several interested groups to these meetings, including practicing attorneys, representatives of organized labor, the West Virginia Chamber of Commerce, the American Bar Association, the West Virginia Association for Justice and the Defense Trial Counsel of West Virginia, as well as opening the meetings to the public generally.

On August 28, 2009, the Commission held a public meeting at Marshall University to explore issues of campaign finance in relation to judicial selection. On September 21, the Commission held a public meeting at the West Virginia University College of Law on the issue of judicial selection. Finally, on September 29, the Commission held a public meeting at the State Capitol on the issue of judicial structure. Each meeting featured presentations on the identified topics followed by an opportunity for public comments. Although each meeting had a primary focus, the Commission welcomed public comments on any issue at all of these meetings.

During these public hearings, the Commission was privileged to receive comments and presentations from many diverse perspectives, including current judges, labor and business representatives, professors, associations of judges and attorneys, state agencies, polling specialists, judicial candidates, court administrators, circuit clerks and speakers from other states confronting the same issues as West Virginia.

**Summary of the Commission's Recommendations**

After the information gathering stage, the Commission engaged in extensive discussion regarding those issues that the Commission believed to be of most pressing concern to West Virginia's judiciary. Each commissioner spent significant time studying, deliberating, and weighing issues that are both complex and hotly debated. In the end, we were able to reach consensus on certain recommendations with an eye towards improving the independence, impartiality, and effectiveness of the judiciary. With regard to some issues, the recommendations contained herein reflect the unanimous opinions of the members of the Commission; on others topics or the attendant details, there may have been a divergence of views among the members. However, it must be emphasized that the formal recommendations made in this Report reflect the work of the full Commission and represent the Commission's conviction that the recommended change is needed.

One could spend a lifetime studying and designing a perfect judiciary, and reasonable minds disagree. This Commission engaged in a best-efforts process to deliver specific recommendations for enhancement, including recommended experiments to test alternative methods that work in other states. In sum, the Commission's task was not to declare victory to any side of the judicial reform debates, but to offer a set of feasible recommendations to be considered by the Governor, the Legislature, the Judiciary, and the people of West Virginia.

Having thoroughly analyzed the data, presentations, academic papers, and public comment provided to it, and having considered and discussed the opinions and suggestions of all of its members, the Commission makes the following recommendations:

First, the Legislature should adopt a public financing pilot program for one of the two open Supreme Court of Appeals seats in the 2012 election. West Virginia has witnessed a steady and substantial increase in the amount of money raised and spent by candidates in elections for Supreme Court of Appeals seats. As campaign expenditures rise, so too does the threat of bias, and certainly the public perception of bias, as candidates face mounting pressure to accept donations from lawyers and parties that may appear before them once they take a seat on the bench. This Commission therefore recommends a public financing pilot program to investigate the potential for removing the specter of out-of-control and otherwise troublesome spending from judicial elections. In conjunction with implementation of this public financing experiment, the Commission recommends that the Secretary of State's office publish a "voter's guide" for judicial candidates, which will serve as a non-partisan source of information to supplement (and perhaps replace) advertisements and other information now paid for by individual campaigns.

Second, the Legislature should codify a version of the advisory committee process currently used by the Governor to assist in the appointment of candidates to fill interim vacancies in the judiciary. The Constitution (and by extension, a statutory provision) grants the executive the authority to appoint a successor when a vacancy occurs during a judicial term. Today, over forty percent of sitting circuit court judges were originally appointed in this manner. Governor Manchin, as well as his immediate predecessors, has utilized advisory committees to vet, interview, and recommend candidates for these positions. However, the specific role and procedures of these committees remains undefined. The Commission believes that this process

would benefit from a more standardized procedure, and therefore recommends that the Legislature codify these committees, establish membership and terms, and articulate uniform procedures for assisting the executive in filling such vacancies.

Third, the Legislature should act to establish an intermediate appellate court. By virtually any measure, the Supreme Court of Appeals is one of the busiest state appellate courts in the entire country. An intermediate court, comprised initially of appointed judges, would ease the burden on the Supreme Court of Appeals, free the high court to continue hearing a discretionary docket focused on important or novel legal issues and expand the core functions of our appellate judicial system. The Commission recommends that the proposed intermediate court employ a “deflective” form of case distribution, in which all cases will continue to be filed in the Supreme Court of Appeals, and then the Supreme Court, upon review of the case pursuant to rules and procedures it has established, can make a decision regarding whether to retain the case or to transfer (or “deflect”) the case to the intermediate court.

Finally, the Commission requests that Supreme Court of Appeals undertake a study of the feasibility of establishing a business court in West Virginia. While there is no imminent crisis with regard to the handling of business cases by West Virginia’s courts, such cases continue to grow more complex. As this trend continues, parties and judges alike will benefit from specific rules and judicial training aimed at handling cases brought under technical business statutes. Moreover, the success of business court pilot programs in other states, South Carolina in particular, warrants an investigation of the potential efficacy of such a system in this state.

The remainder of this Report contains the Commission's detailed recommendations on: Campaign Finance, Judicial Selection, Court Structure and an Intermediate Appellate Court, and a Business Court. The Report concludes with an acknowledgment section for the generous aid of individuals and organizations that contributed to our efforts.

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## CAMPAIGN FINANCE ISSUES IN JUDICIAL CAMPAIGNS

### History and Context

West Virginia, like many states, has seen a significant increase in expenditures on judicial election campaigns over the past several election cycles.<sup>7</sup> As judicial elections become more expensive, candidates must spend more time and energy fundraising and advertising, which may cause campaigns to take on a more aggressive tone. Of even greater concern, judicial candidates will necessarily continue to accept substantial donations from lawyers, individuals, or corporations who may subsequently appear before them, thereby putting our judges in the untenable situation of potentially having to preside over cases involving campaign donors. This is a serious threat, as impartiality and the appearance thereof are uniquely important to the integrity of a court system, and such actions undermine trust in the judiciary regardless of the outcomes or merits of specific cases.

In 2005, the Legislature passed sweeping changes to its campaign finance laws, the bulk of which were aimed at regulating so-called 527 organizations<sup>8</sup> by placing limits on the size of contributions to 527s, barring any 527 from soliciting or accepting contributions until it notified the Secretary of State of its existence and purpose, and requiring disclosure of the direct costs of

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<sup>7</sup> In the 2004 West Virginia Supreme Court of Appeals election, judicial candidates raised \$2.8 million. This is double the \$1.4 million raised by high court candidates in 2000. In addition, third parties spent approximately \$3.5 million during the 2004 campaign. Fundraising figures remained similarly high during the 2008 election cycle, with the respective candidates raising nearly \$3.3 million. National Institute on Money in State Politics, *State Overviews*, available at [http://www.followthemoney.org/database/state\\_overview.phtml](http://www.followthemoney.org/database/state_overview.phtml).

<sup>8</sup> For ease of reference, the phrase “527 organization” or “527” is used to refer to a political organization that enjoys tax exempt status under federal law in accordance with the provisions of 26 U.S.C. § 527.

purchasing, producing, or disseminating certain “electioneering communications.”<sup>9</sup> The legislation also required that every electioneering communication include a conspicuous statement that clearly identified the person making the expenditure for the electioneering communication and which indicated that the communication was not authorized by the candidate or the candidate’s committee. In 2007, the Legislature made additional revisions in an attempt to clarify several of the definitions and disclosure requirements embodied in the 2005 statute.

However, in 2008, the Legislature was forced to further modify campaign laws in an attempt to comply with an order by the U.S. District Court for the Southern District of West Virginia declaring that several of the finance provisions of the revised campaign statutes violated the First Amendment.<sup>10</sup> These changes included removing prohibitions on spending by corporations for advertising that was not “express advocacy” or its functional equivalent and clarifying that limits on corporate political expenditures applied only to communications which could only be interpreted as an appeal to vote for or against a specific candidate. The 2008 bill also removed disclosure requirements from several types of non-broadcast media (mass mailings, telephone banks, leaflets, pamphlets, flyers, outdoor advertising, newspapers, magazines, and other periodicals), as required by the federal court’s holding.

It is possible that further revisions may be necessary, depending on the United States Supreme Court’s upcoming decision in *Citizens United v. Federal Election Commission*. In that case, Citizens United – a non-profit corporation engaged in political advocacy – is challenging the FEC’s power under § 203 the Bipartisan Campaign Reform Act of 2002 to regulate

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<sup>9</sup> “Electioneering communications” were defined in the statute as paid communications made by broadcast, cable or satellite, mass mailing, telephone bank, leaflet, pamphlet, flyer or outdoor advertising or published in any newspaper, magazine or other periodical that: (1) referred to a clearly identified candidate, (2) was publicly distributed shortly before an election for the office that candidate is seeking, and (3) was targeted to the relevant electorate.

<sup>10</sup> See *Center for Individual Freedom v. Ireland, et. al.*, 1:08-cv-00190.

electioneering communications and corporate expression.<sup>11</sup> The suit also challenges the disclosure (§ 201) and disclaimer (§ 311) requirements of the same act.<sup>12</sup> If this suit is even partially successful, the result may be major changes or exceptions to the power of state and federal governments to regulate political speech or contributions by corporations and other third parties.<sup>13</sup> Thus, while the outcome of this case is pending, there is substantial uncertainty regarding the future of campaign finance laws.

### **Recommendation**

#### **The Legislature should adopt a campaign finance pilot program for one of the two Supreme Court of Appeals seats scheduled for election in 2012**

Something must be done to address the continued growth in spending on judicial campaigns in West Virginia. As spending by candidates and third parties increases, so too will the perception that “justice may be bought.” However, because the Legislature’s attempts to curb spending on judicial campaigns through direct limits have come up against First Amendment limitations, other potential solutions must be explored.

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<sup>11</sup> Specifically, Citizens United challenged the application of the statute to a 90 minute film it produced, titled “Hillary: The Movie” as well as advertisements for the film. The movie focused on several aspects of Hillary Clinton’s political career, portraying her primarily in a bad light, but did not expressly advocate for or against her election.

<sup>12</sup> Section 201 requires any corporation or union that spends more than \$10,000 in a year to produce or air such communications to file a report with the FEC revealing the names and addresses of anyone who contributed \$1,000 or more for the communication’s preparation or distribution. 2 U.S.C. § 434. Section 311 requires that broadcasts not supported by a candidate or political committee include a disclaimer which who is responsible for its content as well as the name and address of the group that produced it. 2 U.S.C. § 441d. *See generally* Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155.

<sup>13</sup> Because much of West Virginia’s campaign finance legislation is based on federal campaign finance laws, any ruling by the United States Supreme Court that finds the federal laws invalid or reduced in scope under the First Amendment could likely have the same affect on West Virginia’s laws.

After considering several options, this Commission recommends exploring the efficacy of publicly financing campaigns for the Supreme Court of Appeals. To that end, the Legislature should adopt a public financing pilot program for one of the two seats on the Supreme Court of Appeals that are scheduled for election in 2012, combined with the creation and publication of a voter guide for that election. A similar system has been implemented with success in North Carolina, a state which had been experiencing spending increases and related problems similar to those in West Virginia.

*Public Financing of Judicial Campaigns in North Carolina*

Like West Virginia, North Carolina witnessed ever-rising spending on judicial campaigns. The 2000 election for Chief Justice of North Carolina was the most expensive in North Carolina's history (just over \$2 million), and saw former Chief Justice Henry Frye spend over \$900,000 and still lose.<sup>14</sup> These increases in spending led many to doubt the impartiality of the elected judges. In one 2002 survey, 84% of North Carolina voters stated that they were concerned that lawyers who might appear before the judges being elected accounted for almost half of the contributions to North Carolina Supreme Court candidates.<sup>15</sup> As pointed out by Damon Circosta of the North Carolina Center for Voter Education, attorney donations to judicial campaigns leave judges in a no-win situation: If judges rule in favor of attorneys who contributed to their campaign, they risk the appearance of bias; if they rule against the same attorneys, the judge may be accused of merely trying to *avoid* the appearance of misconduct.

In an attempt to combat both the threat and appearance of corruption in judicial elections and their aftermath, North Carolina passed the Judicial Campaign Reform Act (JCRA) in 2002.

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<sup>14</sup> Damon Circosta, *Public Financing of Judicial Elections in North Carolina – A Brief History*, Presentation to the Commission, August 28, 2009.

<sup>15</sup> *Id.*

The JCRA established a public financing option for judicial candidates as part of a comprehensive reform program that also lowered the maximum amount of campaign contributions, made judicial elections non-partisan, and created a publicly funded voter guide.<sup>16</sup> Under the JCRA, candidates who chose public funding receive a public grant, which is now based on a “competitiveness formula,” as well as possible matching funds. Other provisions of the JCRA included expedited campaign reporting (to trigger matching funds), “surprise attacks” provisions, and fines and other penalties for violations. Financing for the public fund comes from a number of sources, including a voluntary income tax check-off, attorney surcharges, additional funds earmarked for publication of the voter guide, and general fund appropriations.

The JCRA was first implemented in North Carolina’s 2004 election. Twelve of sixteen candidates successfully qualified for the public financing program, and a total of just under \$1.5 million in public funds was provided to those candidates. Approximately \$800,000 of that total was spent on campaigns for two open Supreme Court seats, with the rest going to Court of Appeals candidates. Of the five winning candidates, four received public financing. In 2006, eight of twelve candidates qualified for the program, and five of six winners received public funding. The success of candidates opting for public financing shows that the program provides sufficient funds to run a campaign. The program continued in 2008 and was even extended to some executive branch offices.

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<sup>16</sup> To fully and accurately assess the merits of the public financing aspect of the JCRA, it is important to remain mindful of the comprehensive nature of the reforms embodied therein. Although it is appropriate to single out North Carolina’s efforts as an example of the positive effects of public financing on judicial elections, it is imperative that one also acknowledge that these effects may be equally attributable to the other reforms contained in the JCRA, including the adoption of nonpartisan elections. Accordingly, as the Legislature evaluates public financing systems and (if adopted) examines the performance of the pilot project recommended herein, it is equally important to continue studying the other aspects of North Carolina’s reform package.

The use of public financing through the JCRA had a major impact on the amount spent by special interest groups in North Carolina's judicial elections. From 2002 to 2004, contributions by the legal community dropped 58%, contributions by the business community dropped 42%, and contributions from "other professional groups" dropped by 43%.<sup>17</sup> The only category with a significant increase was small contributions under \$100. Equally important, funding for North Carolina's program appears to be stable.<sup>18</sup>

*The Legislature should adopt a public financing program similar to that contained in the proposed Senate Bill 311 from the 2009 regular session*

The Commission hereby recommends that the Legislature establish a public financing pilot project for one of the Supreme Court seats scheduled for election during the 2012 election cycle. In so doing, we would urge the Legislature to rely both on North Carolina's model, as well as the provisions of Senate Bill No. 311 from the 2009 Regular Session of the Legislature. Although we would defer to the discretion of the Executive and the Legislature in crafting the specifics of any such project, consideration should be given to the following elements:

- an exploratory period during which candidates could raise and spend money (up to a certain threshold) to determine the viability of their candidacy;

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<sup>17</sup> Circosta, *supra* note 14.

<sup>18</sup> A recent public opinion survey, conducted by Public Policy Polling, suggests that West Virginia voters might support the adoption of a program like North Carolina's. 73% of respondents stated that they would be in favor of adopting a program similar to the JCRA in North Carolina, while only 19% were opposed. Moreover, 74% of respondents stated that they felt judicial candidates were unable to accept financing from private entities without creating a conflict of interest, and 40% agreed (with 28% disagreeing) that a public financing system would be effective in reducing conflicts of interest. However, when asked if they supported public financing for judicial campaigns more generally, 56% of respondents said they did not. Despite this, it seems clear that voters might support the specifics of a plan like North Carolina's JCRA. Public Policy Polling, *West Virginia Voters Support N.C.'s System*, June 2, 2009.

- a requirement that candidates wishing to participate in the public financing program must raise a certain minimum amount of money during a qualification period in order to be eligible to receive public financing monies;
- the adoption of safeguards and restrictions on the collection and donation of contributions during both the exploratory and qualification periods;
- procedures and standards for the disbursement of moneys to qualifying candidates;
- provision for “rescue funds” to be disbursed if a non-participating candidate exceeds certain spending amounts; and
- enhanced campaign finance reporting for both participating and non-participating candidates in order to ensure compliance with program rules and prompt triggering of rescue provisions.

Although this Commission naturally defers to the Legislature as to its choice for funding such a program, a review of other public financing models suggests that a combination of user fees imposed on a variety of court filings, along with the consideration of some additional revenue streams such as those identified in Senate Bill No. 311,<sup>19</sup> could adequately cover the projected costs of implementing such a program here in the State of West Virginia.

Given the dramatic differences between public financing systems and West Virginia’s current model, it would be prudent to proceed with caution and implement the changes on a

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<sup>19</sup> Senate Bill No. 311’s proposed revenue system was derived primarily from the imposition of “Fair Administration of Justice” fees, and varying fees on civil filings, appeals, and petitions. These fees would have been supplemented by up to \$1 million a year for three years from the Treasurer’s Unclaimed Property Trust Fund, as well as a voluntary income tax check-off. The Department of Revenue estimates the revenue streams identified in Senate Bill No. 311, coupled with the systems used in other public financing models, could generate in excess of \$2 million annually.

temporary basis through the establishment of a pilot program for only one of the two open seats on the Supreme Court of Appeals during the 2012 cycle. To do so will require a division of seats on the Supreme Court of Appeals, with one being designated for the pilot program. Accordingly, the Commission hereby recommends that the seats on the Supreme Court of Appeals be, for election purposes, split into numbered divisions corresponding to the number of justices (in a manner similar to the divisions of circuit court judges within circuits as embodied in West Virginia Code § 51-2-1). The creation of such divisions is consistent with the temporary and “pilot program” nature of this initiative and, more importantly, will allow the Legislature to compare and contrast campaign expenditures and third party spending between the two races and to develop an estimate of the costs of publicly financing both seats in an election.

*The Commission also recommends the creation and publication of a voter guide for the 2012 judicial elections*

In conjunction with a public financing pilot program, the Legislature should also provide for the publication and distribution of a voter guide by the Secretary of State’s office for the 2012 judicial election cycle. Voter guides can facilitate the communication of essential information to the electorate. Voter guides also can be structured in a way to provide information in a relatively unbiased manner and can serve as an alternative to often misleading privately-funded advertising. Moreover, publication of a voter guide will ease the transition to a public financing model by reducing the need for candidates to raise and spend money in order to educate the public on their qualifications through other media.

Other states have found voter guides beneficial. North Carolina created a publicly funded voter guide as part of its JCRA, and in 2006, North Carolina spent \$650,000 to print and mail

four million voter guides for its general election.<sup>20</sup> A substantial portion of this cost, \$148,500, was provided by federal Help America Vote Act funds. Another voter guide success story is the state of Washington, which published its first voter guide in 1996. Prior to the 1996 election, two-thirds of voters stated that they had insufficient information on judicial candidates.<sup>21</sup> After the voter guide's first appearance, 71% of Washington voters said that they found it an important source of information, and nearly half of voters used it to learn about the candidates, making it the single most used information source.<sup>22</sup>

Given concerns about voter awareness, the likely reduction in third party information available in a publicly funded campaign, and the potential for bias or deception in third party advertising, a properly prepared and disseminated voter guide could provide an excellent new source of information about judicial candidates for West Virginia voters. A voter guide will not only help to educate the voting public on judicial candidates, but will also serve to elevate the profile of judicial elections in the public's mind. While the precise content of the voter guide may vary, as determined by the Legislature, a typical example may include a candidate's name, biographical information, qualifications, educational information, party identification, picture, and personal statement. This Commission recommends that voter guides be made available for

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<sup>20</sup> Circosta, *supra* note 14. West Virginia's current population is less than one-quarter of North Carolina's 2006 population. Compare U.S. Census Bureau, West Virginia Quick Facts, available at <http://quickfacts.census.gov/qfd/states/54000.html>, with N.Y. Times, General Information on North Carolina, available at <http://topics.nytimes.com/top/news/national/usstatesterritoriesandpossessions/northcarolina/index.html>.

<sup>21</sup> Daniel Becker & Malia Reddick, Judicial Election Reform: Examples from Six States, American Judicature Society, (2003).

<sup>22</sup> The difference in these numbers provides a cautionary tale. While a large majority of Washington voters considered the pamphlet important, 57% stated that they never found the pull-out pamphlet in their newspapers, leading Washington to create a more "eye-catching" design for the next election. Becker and Reddick, *supra* note 23.

both primary and general elections, particularly given that many judicial elections are more tightly contested at the primary level.

*The Legislature should continue its efforts to control independent expenditures*

As discussed above, the past several years have witnessed numerous efforts by the Legislature to modify certain perceived shortcomings in its state election and campaign finance laws, with a focus on at regulating so-called 527 political organizations. Yet, the State's attempts to reduce the flood of money from these 527 organizations into state campaigns have been rebuffed repeatedly by the application of prior federal court decisions that restrict the ability of states to regulate, restrict, and monitor the proliferation of independent expenditures by third parties. At the risk of oversimplifying a complex area of law and corresponding high court decisions, because the advertisements and campaign of 527s typically avoid "expressly advocating" support for or opposition to a particular candidate, they often escape regulation and disclosure requirements. Moreover, additional constitutional challenges to federal campaign finance laws remain pending, which suggests that the Legislature should tread carefully in undertaking any new campaign expenditure regulations.

Nevertheless, the Commission views the rapid influx of third party money into judicial campaigns as a significant threat to the integrity of the judiciary, and urges the Legislature to continue to seek ways to minimize the impact of spending by 527 organizations to the fullest extent allowed by law.

## JUDICIAL SELECTION

### History and Context

Currently, every judicial officer in West Virginia, including Supreme Court of Appeals justices, circuit court judges, family court judges, and magistrates are chosen through partisan elections. However, recent years have witnessed an ongoing debate among legal scholars, practitioners, and West Virginia residents as to the benefits of continuing this system of judicial selection or whether to explore another method, such as “merit selection”<sup>23</sup> or non-partisan elections. As the Commission on the Future of West Virginia Judicial System eloquently framed the issue nearly eleven years ago:

Obtaining qualified, competent, fair and impartial judges is, of course, the central concern under any judicial selection method. The ongoing debate in this State, as well as in other states, focuses upon which selection method best serves this end.<sup>24</sup>

Of course, in focusing on which “method best serves this end”, it is equally important for us to recognize and acknowledge that the State of West Virginia currently utilizes more than one method of judicial selection. Although the Constitution and state law requires the election of judicial officers,<sup>25</sup> merit selection is not alien to West Virginia’s judiciary. Indeed, the State has a constitutionally mandated *appointment process* for filling interim vacancies in the judiciary – a process that is invoked with great frequency. As Article VIII, § 7 of the Constitution provides:

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<sup>23</sup> Although the phrase “merit selection” is a somewhat loaded phrase (with its implicit connotation that other methods of selection are based on something other than “merit”), the Commission acknowledges that it is widely used to refer to a process by which judges, rather than campaigning for office and being selected by popular vote, are evaluated and considered by a non-partisan committee (whose task is to investigate and make recommendations regarding candidates) and then appointed to their seat by the Governor for a finite term of years (and in some states, thereafter subject to retention elections).

<sup>24</sup> Commission on the Future of West Virginia Judicial System (2008), p. 58.

<sup>25</sup> See W. Va. Const., art. VIII, § 3, § 5.

If from any cause a vacancy shall occur in the office of a justice of the supreme court of appeals or a judge of a circuit court, the governor shall issue a directive of election to fill such vacancy . . . and in the meantime, the governor shall fill such vacancy by appointment until a justice or judge shall be elected and qualified.<sup>26</sup>

Of particular note, approximately thirty-two (32) of the seventy (70) active circuit court judges in the state, over forty-five percent (45%), were originally selected in this manner.<sup>27</sup> This is an especially significant statistic, given the overwhelming rate at which incumbent judges are reelected.<sup>28</sup> As a result, it must be emphasized that at present the State of West Virginia does indeed have a “merit selection” process for judges, one that – although formally reserved for filling vacancies on the bench – is utilized with nearly as much frequency as the traditional election process itself.

Unfortunately, the state Constitution offers little guidance regarding the specific mechanics of the appointment process that it authorizes. Governor Manchin, as well as his immediate predecessors, has voluntarily created advisory committees to interview and vet candidates and to make recommendations pertaining to candidates when vacancies arise. Because these committees lack a statutory basis (and the uniform standards and procedures that such codification could supply), it cannot reasonably be expected that their advice and recommendations will engender the degree of public confidence commensurate with the role they play.

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<sup>26</sup> W. Va. Const. art. VIII, § 7.

<sup>27</sup> Thomas R. Tinder, *Judicial Selection in Practice*, Presentation to the Commission, Sept. 21, 2009.

<sup>28</sup> During the 2000 and 2008 election cycle, incumbent circuit judges were unopposed in 207 of 242 primary and general elections (85%)<sup>28</sup>. Incumbent judges also won 29 of 35 contested elections (83%). Altogether, incumbent circuit judges won a staggering 97% of their elections. It is thus significant that so many of the state’s active circuit judges were originally appointed. *Id.*

Nevertheless, West Virginia's primary method of judicial selection (and certainly the primary perceived method) is the partisan election process. The advantage of selecting judges in this manner is reported accountability to the voting public. Pointing to the "inherently political nature of judicial decision making", advocates of partisan elections assert that "judges have considerable discretion and should be held accountable for their choices, at least at the state level where we would expect a close connection between public preference and public policy[.]"<sup>29</sup> Conversely, critics of partisan elections point to the fact that partisan elections require aspiring judges to become immersed in partisan political tactics and alliances, and engage in extensive fundraising efforts to support their campaigns – all of which leads to questions of impartiality (real or perceived) and creates the possibility that judges will end up presiding over cases brought by parties or attorneys who made donations (or, perhaps equally important, did not make donations) to their campaigns.

Emphasizing the distinct differences between the role of judges and that of legislators or executive officers, advocates of merit selection contend that the judicial function can best be fulfilled if judges are able to avoid the many potentially compromising facets of partisan elections, such as party identification, pressure to take positions or stands pertaining to future cases, and the need to raise money from third parties that may appear before the court. A merit selection system, it is argued, frees judges to impartially interpret the law and the Constitution without worrying about the reaction of the electorate – except to the extent that a retention election (as is usually part of the appointment system) provides accountability to the voting public.

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<sup>29</sup> Chris W. Bonneau & Melinda Gann Hall, *In Defense of Judicial Elections*, Routledge (2008).

As the foregoing suggests, there is a longstanding debate and inherent tension between these competing ideals of “independence” and “accountability,” and the best method of selection by which to adequately preserve and foster each ideal. As some commentators have observed, “[b]ecause independence eliminates a judge's need to fear politically motivated punishments, the property is inherently at variance with judicial accountability. Indeed, in contrast to the notion of independence, accountability requires the public to have an important role in selecting and monitoring judges.”<sup>30</sup>

As a result, some have urged the adoption of non-partisan judicial elections in order to foster a middle ground between these competing views. Supporters of nonpartisan elections contend that nonpartisan elections retain public accountability through the electoral process and yet “depoliticize” the process by shielding candidates from some of the more unsavory elements associated with traditional partisan politics. Conversely, opponents insist that nonpartisan elections deprive voters of valuable information and frequently result in decreased voter participation in judicial elections. Similarly, many states utilize systems in which judges are initially appointed through a merit selection process and are then subjected to periodic “retention” elections. This system grants many of the benefits of merit selection – including avoidance of campaign-related bias and the chance to draw from a larger candidate pool – while still empowering voters to remove poorly performing judges.

### Recommendations

Given the relative benefits and drawbacks of these different methods of judicial selection, and in light of the frequent utilization of West Virginia’s constitutionally authorized “merit

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<sup>30</sup> Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 Wis. L. Rev. 21, 22 (2009) (citation omitted).

selection” process for filling judicial vacancies, the Commission makes the following recommendations.

**I. The Legislature should enhance and codify the advisory committee process utilized to fill interim judicial vacancies**

Given the sheer number of Article VIII, § 7 appointments and the frequency with which Governors are obligated to exercise this constitutionally delegated appointment authority, it would be beneficial to standardize the composition and procedures of the advisory committees in making such appointments. Therefore, the Commission recommends that the Legislature act to codify a form of those advisory committees utilized by recent governors in order to clarify the role of these committees and to identify and articulate standards regarding:

- the size and composition of the advisory committee;
- the qualifications, terms of service and requisite training for advisory committee members;
- a code of conduct for advisory committee members;
- defined processes for evaluating, interviewing and vetting applicants;
- guidelines regarding materials (i.e., letters of recommendation, etc.) to be considered by the committee;
- clear guidelines regarding those portions of the advisory committee’s work that may be open to the public as well as those portions to remain confidential; and
- procedures for formulating and forwarding the advisory committee’s recommendations on to the Governor and the nature/format of those recommendations.

In particular, the Commission would urge the Legislature to look to the process currently used, as well as look to the Model Judicial Selection Provisions published by the American

Judicature Society, for guidance in establishing these standards.<sup>31</sup> Although the selection of specific provisions will naturally be left to the judgment of the Legislature, several aspects of the judicial selection practices outlined in the Model Judicial Selection Provisions bear specific mention.

*Size and Composition of the Advisory Committee*

The advisory committee should be composed of a diverse group of individuals representing a broad cross-section of West Virginians, including representation among business groups, labor representatives, members of the bar, demographic diversity, and non-lawyer members.

*Transparency and Public Participation*

To foster transparency and ensure the Committee's accountability to West Virginia citizens, it is imperative to encourage public access to the Committee's work and to invite comment from members of the public. At the same time, however, there are equally compelling legal and policy justifications for maintaining the confidentiality of many of the materials considered by the Committee as part of its work, along with encouraging a candid exchange of views during the committee's deliberative process. Accordingly, we encourage a balanced approach, one that permits the committee to establish by rule which proceedings and materials (or portions thereof) should be open to the public, and which materials/proceedings contain confidential and personal information that weighs against disclosure by any member to anyone at any time.

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<sup>31</sup> American Judicature Society, Model Judicial Selection Provisions (2008).

*Recommendation of Candidates and Selection by the Governor*

Under the Constitution, the Governor is mandated to fill interim vacancies in the judiciary through appointment, and Article VIII, § 7 places little, if any, restrictions on the Governor's discretion in making such appointments. In establishing this advisory committee through legislative enactment, therefore, the Legislature should remain mindful of the broad delegation of authority that the Constitution expressly reserves for the executive. However, the process used by the advisory committee should be designed to ensure that the Governor fulfills his or her constitutional obligation by making a fully informed decision from among a talented and qualified group of candidates.

At the same time, the Commission would urge the Legislature to avoid establishing uniform criteria and requirements that the advisory committee would have to rigidly apply in every instance. As the American Judicature Society's Model Judicial Selection Provisions emphasize, "[e]ach judicial vacancy should be treated individually to the greatest extent possible." As such, the advisory committee should retain the flexibility to address the inevitable differences raised by different vacancies (including the composition of the committee itself).

**II. If an Intermediate Court of Appeals is established, the Legislature should authorize the initial appointment of intermediate court judges**

As discussed in more detail in the following section detailing the Commission's recommendation for the creation of an Intermediate Court of Appeals, the Commission recommends that the initial selection of judges for the proposed intermediate court of appeals be accomplished via a "trial" process. The Commission would urge the Legislature to require any such appointments to the intermediate court proceed through the recommended advisory committee on judicial nominations and be subject to that committee's guidelines and processes. In formulating the advisory process for the intermediate court, however, the Legislature is not

subject to the same constitutional constraints involved in codifying the advisory committees used to fill interim vacancies and would thus be free to craft more detailed rules regarding the composition and procedures of an advisory committee in connection with the consideration of candidates for a new intermediate court.<sup>32</sup> After establishing this process for the initial selection of ICA judges, the Commission recommends that the Legislature **defer its final decision on the permanent method of judicial selection** for these new ICA judgeships until a later date. At the expiration of a defined period of time, the Legislature could then revisit the issue, request additional study from the members of this Commission or a similar body, and make an ultimate determination regarding the preferred method of selection of these judges after their initial terms have expired.

Utilizing appointment for the initial selection of ICA judges will allow the Legislature to evaluate the efficacy of this selection model during the span of the initial terms of these judges before making a final decision regarding whether to continue to use merit selection, whether to expand it to other levels of the judiciary, or whether to establish partisan elections for the intermediate court.

There are several reasons why it makes sense for the Legislature to experiment with merit selection at this point in time. First, recent years have seen West Virginia's judicial system subjected to numerous national and local press stories that have exacerbated public concern about the potential bias inherent in partisan election of judges. These concerns suggest that it would be in the state's interest to at least conduct a trial merit selection program in order to better understand its potential application in West Virginia.

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<sup>32</sup> The broad *constitutional* authority of the Governor to fill interim vacancies is confined to filling vacancies on the Supreme Court of Appeals or circuit court judgeships. W.Va. Const. art. VIII, § 7. Although W. Va. Const., art. VIII, § 1 authorizes the Legislature to create intermediate appellate courts, the Constitution is silent as to the method of selection of judges to serve on such courts.

Second, the creation of an intermediate appellate court gives the Legislature a unique opportunity to explore merit selection *without affecting any existing judgeships*. By initially appointing judges to the intermediate court, the Legislature can investigate this selection model without having to alter any part of the present partisan election system. The Legislature is unlikely to have a similar opportunity again in the foreseeable future and should not let it pass now.

Third, the appointment model will expedite establishment of the intermediate appellate court. Creation of that court will be significantly delayed if it must await the procedural work required to organize new elections for each of the newly created judgeships. By using merit selection instead of partisan elections, at least for the first term of intermediate appellate court judges, the Legislature will be able to exercise substantially more flexibility in establishing an intermediate court.

The Commission is mindful of the controversy surrounding the debate between the election and appointment of judges. However, it is precisely this controversy that led the Commission to conclude that the Legislature should take advantage of this rare opportunity to explore the efficacy of merit selection. Though the Legislature may ultimately choose another method, it may not have a similar occasion to weigh the benefits of merit selection again.

## **JUDICIAL STRUCTURE AND THE NEED FOR AN INTERMEDIATE APPELLATE COURT**

### **The Appellate Process in West Virginia**

At the outset of any discussion regarding the accessibility and efficacy of West Virginia's appellate process, it is imperative that we offer a brief description of the Supreme Court of Appeals' discretionary review system and the mechanics of the petition process.

The Supreme Court of Appeals serves as the state's only level of appellate review and maintains a completely discretionary docket, with no appeal as of right.<sup>33</sup> The process for reviewing petitions for appeal begins when the petitioner files a designation of record, along with a petition for appeal containing the assignments of error, in a circuit clerk's office. The designation of record indicates what portion of the record made in the lower court that the petitioner would like the Supreme Court to review. The circuit clerk assembles the record for consideration on appeal and transmits it, together with the petition, to the Supreme Court. The petition is reviewed as to form and compliance with the Rules of Appellate Procedure and then docketed by the clerk's office. The petition and the designated record are carefully reviewed by staff counsel, and a summary of the arguments is prepared. The actual petition for appeal and the response, if one is filed, are circulated to all members of the Court, along with a summary prepared by staff counsel. Prior to consideration of the petition in conference, each Justice conducts an independent review of the petition, which often includes review of the record on appeal. Members of the Court often confer and discuss cases to be considered at conference.

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<sup>33</sup> See W. Va. Const., art. VIII § 4.

At regularly scheduled conferences, the members of the Court meet to discuss each petition. Some petitions are refused at conference, and others are granted and set for eventual oral argument. Other petitions are set for oral presentation on the Motion Docket, which is an opportunity for petitioner's counsel to make a presentation in open court as to why the petition should be granted. The petition for appeal and the response, if any, in cases set for the Motion Docket are circulated to the Justices a second time. Prior to consideration of the petition on the Motion Docket, each Justice's chambers once again conducts an independent review of the petition, which often includes renewed review of the record on appeal. After the Motion Docket is concluded, the members of the Court meet again in conference to discuss the cases and decide whether the petition for appeal should be refused or granted, in which case the matter will be argued before the Court.

The process for reviewing workers' compensation appeals is similar, but given the volume of petitions filed and the fact that few novel issues are presented, it is rare that a workers' compensation petition is placed on the Motion Docket. The petition and the response, together with the administrative record, are carefully reviewed by staff counsel and a detailed summary is prepared. Each member of the Court reviews the petitions individually and decides whether the petition should be granted or refused. From time to time, as appropriate issues develop, the Court will place a workers' compensation case on the regular Argument Docket.

### **History and Context**

Comparing West Virginia with case load statistics from other jurisdictions with a single appellate court reveals that our Supreme Court of Appeals one of the busiest appellate courts in the nation. A 2006 study by the National Center for State Courts shows that the Supreme Court of Appeals saw 3,631 cases filed that year, nearly 1,500 more than the next busiest state without

a permanent intermediate court (Nevada).<sup>34</sup> Indeed, “[n]o other comparable appellate court in the country handles as many cases as West Virginia’s court of last resort.”<sup>35</sup>

Over the past twenty-five years, the Court’s caseload has increased dramatically, from 1,159 filings in 1983 to a high of 3,954 filings in 2007. In large part, this growth is attributable to the explosion in worker’s compensation filings over the past decade and a half. However, even after a fifty percent (50%) drop in the number of worker’s compensation petitions from 2007 to 2008, there were still a total of 2,411 filings, more than double the number seen a quarter century ago.<sup>36</sup> This increase in filings is consistent with comparable increases in other states over the past several decades, leading many states to establish intermediate appellate courts to meet the increased demand on their court systems. Over the second half of the twentieth century, the number of states with intermediate appellate courts tripled: in 1950, thirteen (13) states had intermediate appellate courts; by 2001, thirty-nine (39) states had established such courts.<sup>37</sup> In the past ten years, three states with caseloads smaller than West Virginia’s (Mississippi, Nebraska, and Utah) have created intermediate appellate courts.<sup>38</sup>

The creation of an intermediate appellate could complement and assist the Supreme Court of Appeals in performing the core functions of an appellate system. As retired Judge J. Dickson Phillips of the United States Court of Appeals for the Fourth Circuit aptly described the roles played by appellate courts: “While there have been various formulations, most who have

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<sup>34</sup> Office of the Clerk, Supreme Court of Appeals of West Virginia, 2008 Statistical Report, available at <http://www.state.wv.us/WVSCA/clerk.htm>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

thought systematically about the matter identify the following two basic functions: (1) correction of error (or declaration that no correction is required) in the particular litigation; and (2) declaration of legal principle, by creation, clarification, extension, or overruling.”<sup>39</sup> As the aforementioned figures suggest, an intermediate court could help the Supreme Court of Appeals in accommodating the vast, and growing, appellate needs of West Virginia. An intermediate court would increase the ability to address potential errors by trial courts, and could also help to develop consistency in the law and provide additional guidance to lower courts and litigants alike.

### Recommendation

#### The Legislature should act to establish an Intermediate Court of Appeals

In order to increase review of circuit court decisions and facilitate the unification and development of the law, this Commission recommends that the Legislature act to establish an intermediate appellate court to which most litigants will have an appeal of right. Creation of such a court will allow the Supreme Court of Appeals to maintain a purely discretionary docket while the intermediate court manages the bulk of the appellate caseload.

This idea, of course, is not new. Over ten years ago, the Commission on the Future of the West Virginia Judicial System urged the Legislature to create an intermediate court of appeals, writing:

A full time intermediate appellate court would allow the justices of the Supreme Court adequate time to consider and write opinions that have a defining impact on matters of law and public policy. Moreover, the creation of an intermediate appellate court would relieve the Supreme Court from hearing and deciding routine cases that do not involve unresolved issues of law, constitutional challenges or public policy.

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<sup>39</sup> J. Dickson Phillips, Jr., *The Appellate Review Function: Scope of Review*, 47 L. & CONTEMP. PROBS. 1 (1984). See also Chad M. Oldfather, *Universal De Novo Review*, 77 Geo. Wash. L. Rev. 308, 316 (2009) (“Appellate courts serve two primary institutional functions – the correction of error in the initial proceedings, and the development of the law.”).

Similarly, this Commission now recommends the creation of an intermediate court of appeals (hereinafter sometimes referred to as “ICA”), which court should include the following attributes:

Single, statewide court – The Commission recommends that the ICA be a single intermediate appellate court covering the entire state, rather than multiple courts covering different geographic jurisdictions. However, the Commission would urge that the ICA be structured to permit the utilization of existing judicial facilities at various locations around the state, which would lessen costs, ease the burden on litigants located further from the seat of government, and expedite the appellate process.

Number of Judges – The ICA should be comprised of a sufficient number of judges, preferably six to nine, to allow the court to sit in panels of three. By using panels, the ICA can dispose of a greater number of cases, thereby expediting the appellate process and minimizing the concerns of litigants who fear that this additional step in the appellate process may create undue delay.

Qualifications of ICA Judges – The minimum qualifications for ICA judges should be the same as those constitutional qualifications for Supreme Court justices, including a residency requirement and at least ten years experience as a member of the West Virginia Bar. *See* W. Va. Const., art. VIII § 7. To increase public confidence and promote geographic diversity among the members of the ICA, the Commission urges the Legislature to consider implementing geographic districts for the selection of ICA judges (i.e., with a ceiling on the number of ICA judges who could hail from the same judicial circuit or designated judicial districts).

Term – ICA judges should serve for eight-year terms; however, the initial terms of IC judges should be staggered (i.e., four, six, and eight-year periods).

Initial Selection of ICA Judges – The Commission recommends that the initial selection of ICA judges be accomplished via an appointment process similar to that for filling interim vacancies in the judiciary. Insofar as the legislative establishment of the ICA would immediately create the judicial positions on the intermediate court, the accompanying legislation should also specify the manner in which these vacant positions are to be filled. As discussed extensively in the Commission’s recommendation regarding the codification of an advisory committee for judicial nominations, West Virginia has a constitutionally and statutorily mandated appointment process for filling interim vacancies in the judiciary.

Accordingly, the legislation creating the ICA should include the amendment and reenactment of W. Va. Code § 3-10-3, adding the ICA judgeships to those judicial positions that the Governor currently has the statutory authority to fill interim vacancies via appointment. In the initial selection of ICA judges, however, we are contemplating a similar, although distinct, approach. When creating new judicial positions, the Legislature often defers to this existing power and simply permits the newly created vacancies to be filled through the appointment process. Upon expiration of the initial appointed term, of course, the judgeships are then filled through election. For instance, earlier this year, the Legislature amended West Virginia Code § 51-2-1(a)(17), to increase the number of circuit judges in the 17<sup>th</sup> Circuit (Monongalia County) from two to three. The Governor was then charged with fulfilling his constitutional and statutory duty of filling this interim vacancy in the judiciary through appointment. Similarly, when the Legislature created the family courts in 2001, the implementing legislation expressly authorized the Governor to appoint all thirty-five of the new family court judges.<sup>40</sup>

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<sup>40</sup> At the same time, however, the Commission acknowledges that the Legislature has at least on one occasion opted for a different approach and expressly provided for new judicial vacancies to be filled through elections. When the Legislature created ten (10) new family court judge positions in 2007, the Legislature delayed the effective dates of the new positions until January

(i) *Interim appointments.* In this instance, the Commission would urge the Legislature to authorize the (extended) application of the vacancy appointment power embodied in section three, article ten, chapter three of the Code of West Virginia for the initial appointments to the ICA. The Commission would urge the Legislature to require any such appointments to proceed through the recommended advisory committee on judicial nominations and be subject to that committee's guidelines and processes (guidelines and processes that we again stress should draw inspiration from the procedure used currently and the Model Judicial Selection Provisions published by the American Judicature Society). Moreover, unlike the process for filling vacancies in the office of a Justice of the Supreme Court of Appeals or a circuit court judge, the advisory process for ICA judges is not constrained by the same broad constitutional discretion reserved to the executive in filling interim vacancies. Thus, the Legislature is free to craft more detailed rules regarding the composition and procedures of a nominating committee for the intermediate court than it is if it chooses to codify the advisory committee process for filling interim vacancies in existing judicial positions.

(ii) *Examination Period.* After establishing this process for the initial selection of ICA judges, the Commission would then recommend that the Legislature defer its final decision on the permanent method of judicial selection for these new ICA judgeships until a later date. At the expiration of a defined and finite period of time (i.e., the expiration of the first four-year

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1, 2009, and provided for the positions to be filled as part of the 2008 election cycle. *See* W.Va. Code § 51-2A-5(c). But again, for the reasons set forth herein, we strongly recommend use of the appointment method in this instance.

staggered terms), the Legislature, with or without further study or input from the members of the present Commission or a comparable body, could then revisit the issue and make an ultimate determination regarding the selection of ICA judges. Structuring the initial selection process in this manner would enable the Legislature, the Judiciary, members of the bar, and the public to study the appointive model of judicial selection *without requiring a change in the selection of any existing judgeships*; to weigh its relative advantages and disadvantages; to determine the success and continued justification for this method of selection; and to explore the feasibility and wisdom of its application to other judicial offices. Most importantly, it permits the Legislature to retain the flexibility to modify the system of selection after four short years.

“Deflective” case distribution to ICA – The Commission hereby expresses its preference for a “push-down” or “deflective” form of case distribution, in which all cases will continue to be filed in the Supreme Court, and then the Court, upon review of the case pursuant to rules and procedures it has established, can make a decision regarding whether to retain the case or to transfer (or “deflect”) the case to the ICA.<sup>41</sup>

Among the advantages to this model of appellate structure is the recognition of the constitutional discretion of the Supreme Court of Appeals to allow an appeal following consideration of the record and only upon finding that “there probably is error in the record, or that it presents a point proper for consideration of the court.” W. Va. Const., art. VIII, § 4. Although this constitutional provision would not necessarily prevent the Legislature from

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<sup>41</sup> In making this recommendation, we remain mindful of the Court’s constitutional rule-making power “to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law.” W. Va. Const., art. VIII, § 3.

requiring a newly created intermediate court to accept various types of appeals, structuring the case distribution to the ICA in this “deflective” manner may permit the State to realize the benefits of an intermediate appellate court without running afoul of the Supreme Court’s constitutional prerogatives.

From a review of those states that utilize a “deflective” system, one can identify a handful of similar elements in the initial processes of each: (i) The Supreme Court makes its decision to retain or transfer the case upon the close of briefing by the parties; (ii) the courts utilize staff to prepare and submit recommendations as to whether an individual case should be retained or transferred to the intermediate court; and (iii) a party dissatisfied by the transfer or deflection of a case to the intermediate appellate court may file a motion to reconsider that decision. If the Legislature decides to establish the Intermediate Court of Appeals, we would recommend that our Court consider implementing similar elements in its “deflective” process.

Similarly, it might also be helpful – both for the Court and litigants alike – for the Supreme Court of Appeals to exercise its constitutional rule-making authority to identify those categories of cases that should be retained. As a general proposition, in other states with a deflective model of case distribution, cases typically retained by the highest court include: (i) issues of first impression; (ii) issues of fundamental public importance; (iii) constitutional questions regarding the validity of a statute, municipal ordinance, or court ruling; and (iv) issues involving inconsistencies or conflicts among the decisions of lower courts.<sup>42</sup> In establishing the precise contours of the “deflective” process, the Commission would anticipate that our Supreme Court of Appeals would identify comparable categories of cases suitable for retention, while also

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<sup>42</sup> *Jurisdiction of the Proposed Nevada Court of Appeals*, Institute for Court Management, Court Executive Development Program, 2008-09 Phase III Project (May 2009), p. 26.

maintaining a level of flexibility to permit the “deflection” decision to be made on an individualized basis, taking into account the nature and complexity of each case.

In the event that a case is deflected to the ICA and the intermediate court issues a final decision, either party should be allowed subsequently to petition for further review in the Supreme Court of Appeals, which may be granted in the Court’s discretion.

Although this Commission recommends use of the deflective model, the Legislature and Supreme Court of Appeals might prefer a more “traditional” appellate structure in which cases are appealed from the circuit courts to the ICA, and then to the Supreme Court only after review at the ICA level. Such a system reduces the amount of administrative “screening” required by the high court and may allow for greater refinement of the factual and legal issues in each case prior to the initial petition for appeal to the Supreme Court. Nevertheless, the Commission recommends adoption of the deflective model at this time based on this model’s lesser fiscal impact, the ability to implement such a system with less disruption to the existing appellate process, and most importantly, the greater structural deference it affords to the Supreme Court of Appeals.

Appeal-of-right – As noted, the Commission acknowledges that the decision to grant an appeal is typically within the exclusive constitutional discretion of the Supreme Court of Appeals. *See* W. Va. Const., art. VIII, § 4. Nevertheless, the creation of an intermediate appellate court would be of little significance if litigants were not guaranteed one appeal as a matter of right either in the ICA or the Supreme Court of Appeals. Accordingly, the Commission respectfully urges that such a right be extended to all litigants either through legislative enactment or, if necessary, as part of the development of court rules and processes for the implementation of the intermediate court of appeals.

*Fiscal Impact* – Finally, to adequately consider this recommendation, it is appropriate for the Legislature to examine the costs associated with creating, implementing, and staffing an intermediate court of appeals. According to figures supplied to the Commission by the Department of Revenue, the estimated first year cost for establishing an intermediate appellate court would be \$8,614,284, with an estimate annual cost thereafter of \$7,806,784.<sup>43</sup>

In light of these figures, the Commission’s decision to recommend the creation of an intermediate court of appeals is not entered into lightly. In the best of economic times, securing budgetary funding for a project of this sort would be difficult, in light of the scores of important initiatives competing for finite resources. Today, gaining approval may prove even more daunting insofar as the current economic climate is challenging the ability of all state agencies to maintain adequate funding levels. At the same time, however, we should avoid the tendency to characterize the needs of our judicial system – and indeed the needs of our citizens to access this system – merely as another “competing” program vying for limited resources. The judiciary is a separate and equal branch of government, sufficient funding for which is necessary to preserve the separation of powers and ensure access to justice. Moreover, it is important to keep in mind that our judicial budget – one of three equal branches of government and the court system for all West Virginians – comprises only three percent (3%) of the state’s entire general revenue budget.

As an indispensable part of maintaining judicial independence and ensuring the viability of this new intermediate court, the Commission must acknowledge the pressing need to provide

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<sup>43</sup> West Virginia State Budget Office, *Intermediate Court – Estimated Cost*, September 29, 2009. Expanding access to the appellate process also should be expected to increase certain indirect costs associated with the likelihood that more parties may seek appellate relief. For instance, indigent criminal defendants that might not appeal certain convictions under the current process may be inclined to do so if an intermediate court is created, thereby placing increased strain on clerks’ offices around the State, as well as the budget of the Public Defender Services.

secure and adequate compensation for our judicial officers. As the Commission heard repeatedly during our public hearings, failing to adequately compensate our judges runs the risk of driving experienced judges from the bench and discouraging qualified lawyers to fill the void that is left behind, all of which will ultimately diminish the quality of our judiciary. These concerns are particularly acute when one considers that West Virginia ranks at or near the very bottom in salaries paid to its judges. Indeed, the National Center for State Courts' latest judicial salary survey (which included the District of Columbia) ranks West Virginia 45th for salaries paid to Justices of the Supreme Court of Appeals, 43rd for salaries paid to trial court judges, and comparable studies rank West Virginia last in family court judge salaries. Indeed, the Commission was informed that the salary level for family court judges is so paltry that were the Legislature to approve a \$20,000 increase in annual salary, they would still be the lowest paid family court judges in the country.

Still, the Commission would encourage the Legislature and the judicial branch to work together to consider measures that could minimize the fiscal impact of the ICA. Most notably, the Commission would urge the Supreme Court of Appeals to implement filing fees for the filing of all petitions for appeal. Our Court appears to be the only court of last resort in the entire country that currently does not assess a filing fee of any sort.<sup>44</sup> Implementing a modest filing fee the Supreme Court and the ICA (with exceptions that the Legislature and the Court deem

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<sup>44</sup> State Court of Last Resort Appellate Filing Fees, National Center for State Courts, (2008), <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/financial&CISOPTR=115>. Currently, circuit clerks impose a \$10 fee for "arranging the papers" in an appeal, W. Va. Code § 59-1-11(a)(8), but the Supreme Court of Appeals clerk assesses no comparable fee for the actual filing of a petition for appeal. By contrast, circuit clerks assess a \$145 fee on persons filing a civil action in circuit court, W. Va. Code § 59-1-11(a)(1), and \$260 for instituting an action for medical professional liability, W. Va. Code § 59-1-11(a)(2).

appropriate, including proceedings *in forma pauperis*, certain criminal matters, etc.) could be used to generate revenue for operational support of the ICA and the entire appellate system. Similarly, other cost saving measures should also be explored, particularly the use of existing judicial facilities around the state to house ICA proceedings.

## **THE FEASIBILITY OF ESTABLISHING A BUSINESS COURT**

### **History and Context**

While there is no immediate emergency in West Virginia with regard to the handling of “business cases” (as defined and discussed below), such cases continue to become larger, more complex, and more technical. Business cases often involve complicated relationships between sophisticated corporate entities and frequently require judges to interpret intricate, multifaceted statutes. Moreover, maintenance of a healthy economic atmosphere in any state (i.e., one in which companies will wish to do business) requires predictability in business case rulings, particularly where the sums at stake may be large. In light of this trend, several states have opted to create or experiment with specialized business courts.

The intended benefits of creating courts specifically dedicated to complex business cases are manifold: specialized training and education for business court judges would result in greater efficiency in the handling of these cases; rulings in business cases would become more timely, rational, accurate, and predictable; business courts could be required to publish written opinions, contributing to the development of case law; and finally, the increase in predictability, combined with the development of topical case law, will result in further efficiency gains, as well as an increase in the rate of settlement.

In evaluating business court programs, the Commission closely reviewed the experiences of two states: South Carolina and Maryland. South Carolina’s Business Court Pilot Program, begun in 2007, provided an excellent case study.<sup>45</sup> Under the program, three circuit court judges were assigned to preside over South Carolina’s Business Court. These judges received specific education and training on the handling of business cases and specific business statutes. Cases were eligible for assignment to the business court either by virtue of their principal claims being

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<sup>45</sup> Supreme Court of South Carolina, Administrative Order No. 2007-09-07-01.

brought pursuant to one of six listed statutes<sup>46</sup> or at the discretion of the Chief Justice. Qualifying cases could be assigned to the Business Court on the motion of one party (consent of all parties was not necessary) or *sua sponte* by the Chief Justice. Business court judges were granted exclusive jurisdiction over an assigned case and were required to issue written opinions for certain dispositions.

The State of Maryland recently pursued a similar business court initiative. In 2000, the Maryland General Assembly created the Maryland Business and Technology Court Task Force and charged the task force with considering the feasibility of establishing a specialized business court function within Maryland's Circuit Courts. After extensive research and investigation, the task force recommended "a statewide program with specially trained judges and mediators to resolve substantial disputes affecting business entities, including the unique and specialized issues involving technology."<sup>47</sup>

In establishing their programs, both South Carolina and Maryland conducted extensive research regarding the operation of business courts in other states, reviewed the procedures utilized in the creation and implementation of these business courts, and were able to identify a series of "best practices" that should be part of any such program:

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<sup>46</sup> (1) Title 33 – South Carolina Business Corporations Act; (2) Title 35 – South Carolina Uniform Securities Act; (3) Title 36, Chapter 8 – South Carolina Uniform Commercial Code: Investment Securities; (4) Title 39, Chapter 3 – Trade and Commerce: Trusts, Monopolies, and Restraints of Trade; (5) Title 39, Chapter 8 – Trade and Commerce: The South Carolina Trade Secrets Act; (6) Title 39, Chapter 15 – Trade and Commerce: Labels and Trademarks. When South Carolina's Evaluation committee recommended continuing the program in 2009, it specifically advised against expanding its coverage to broader forms of "business cases," such as employment cases, breach of contract cases, unfair trade practice cases, consumer cases, and mass torts. Report on South Carolina's Business Court Pilot Program, Sept. 8, 2009.

<sup>47</sup> Maryland Business and Technology Court Task Force Report (2002), p.1

- The assignment of a single judge to handle all aspects of a case from start to finish;
- Development of a body of case law through written opinions;
- Management of the business court program by a single “gatekeeper” who decided whether cases should be assigned to the business court; and
- Use of the business courts as a forum to promote the use of technology.<sup>48</sup>

Significantly, implementation of these programs required little if any additional resources. In South Carolina, for instance, the judges who were assigned to preside over “business court” cases continued to fulfill their other duties as circuit court judges with customary caseloads.

#### **Recommendation**

This Commission recommends that the Supreme Court of Appeals undertake a study to determine the need for and the feasibility of a business court pilot project similar to those discussed herein. Questions which should be particularly studied, based on their importance in the South Carolina and Maryland programs, include:

- an assessment of recent caseloads to determine the need for such a program;
- the specific subject matter jurisdiction of a proposed business court;
- the ability of judges assigned to the business court to handle entire cases from beginning to end;
- the potential for judges assigned to handle business court cases to balance the demands of their existing caseloads;
- the content of any proposed training program;
- the potential impact of requiring written opinions;
- possible methods of increasing awareness about the program to interested parties;

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<sup>48</sup> Report on South Carolina’s Business Court Program, at. 1-2, Sept. 8, 2009.

- ways to address concerns about “pro-business” leanings in a business court setting; and
  - methods of funding and staffing the business court.
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### Acknowledgements

This Report would not have been possible without the help of a large number of individuals and groups. Although impossible to acknowledge every single person who added in some way to the Commission's work, the Commission would like to recognize at least some of the efforts that contributed to this important endeavor.

First and foremost, the Commission would like to thank Justice Sandra Day O'Connor, whose knowledge, experience and dedication were invaluable assets to the Commission's deliberations and to this final report.

Equally important was the assistance and cooperation of the Supreme Court of Appeals and the entire judicial branch. Our sincere thanks to the Justices of the Supreme Court of Appeals and their staffs for their help in gathering statistics, sharing institutional knowledge, and offering suggestions that aided the Commission greatly in its understanding of the challenges facing West Virginia's courts and the best possible solutions to those challenges. In particular, the Commission would like to thank Steven Canterbury, Administrative Director, Administrative Office of the Courts, and Rory Perry, Clerk of the Supreme Court of Appeals.

Likewise, the Commission would like to extend its deepest appreciation to the Hon. O.C. Spaulding, President of the West Virginia Judicial Association, the Hon. Ronald Anderson, President of the West Virginia Family Judicial Association, and the Hon. Jack Alsop, President-elect of the West Virginia Judicial Association, for sharing their insights and those of their respective organizations throughout this process, especially during the three public hearings.

The Commission would also like to thank the Office of Governor Joe Manchin, III for providing staff support to this Commission as it organized a wide-reaching agenda, including scheduling multiple public hearings, bringing in presenters from across the country, collecting

data, surveying of members of The West Virginia State Bar, and gathering extensive public comment.

Similarly, the Commission must recognize the contributions of staff counsel Patrick Bocash. Patrick's research and insight were essential to the formulation of the recommendations contained in this Report.

Finally, the Commission would like to extend a special thanks to all of the presenters, survey respondents, and commentators who added their voice to this project. The Commission's work would have been far less meaningful were it not for the wealth of experience, knowledge, data, ingenuity, and advice of all of those involved in the Commission's information gathering and deliberations. It is for the public good that this Commission was created, and it is appropriate that its success should rest so squarely on the public contributions to its efforts.

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**EXECUTIVE ORDER NO. 6-09**

**STATE OF WEST VIRGINIA**

**EXECUTIVE DEPARTMENT**

**CHARLESTON**

**EXECUTIVE ORDER NO. 6-09**

**By the Governor**

**WHEREAS**, following the establishment of the Supreme Court of Appeals and the State's first courts of limited jurisdiction in 1863, the State's judicial system remained largely unchanged for over a century; and

**WHEREAS**, in 1967, a committee of concerned citizens met in Charleston, West Virginia, to formulate a plan for the establishment of a modern court system; and

**WHEREAS**, the committee's efforts led to a constitutional amendment, known as the Judicial Reorganization Amendment of 1974, that established the current framework of our judiciary; and

**WHEREAS**, aside from the adoption of a constitutional amendment, known as the Unified Family Court Amendment, that created a family court system in 2000, the fundamental elements of West Virginia's judicial system, including the popular election of judges and current appellate practices, have changed little since 1974; and

**WHEREAS**, a comprehensive review of our State's court system may bolster public trust and confidence in the judiciary; and

**WHEREAS**, one of the fundamental principles of our representative democracy is the sanctity of the separation of powers among the three separate and coequal branches of government; and

**WHEREAS**, although the Constitution vests the judicial power of this State solely in our Supreme Court of Appeals and its inferior courts, the Constitution also contemplates the participation of the legislative and executive branches in matters touching upon the judicial sphere, including the establishment of intermediate appellate courts, W. Va. Const. Art. VIII, § 1; the decision to conduct the election of justices on a partisan or nonpartisan basis, W. Va. Const. Art. VIII, § 2; the scope of the jurisdictional powers of the Supreme Court of Appeals, W. Va. Const. Art. VIII, § 3; and the establishment of judicial circuits within the State and the number of judges within any particular circuit, W. Va. Const. Art. VIII, § 5; and

**WHEREAS**, the establishment of an independent commission composed of former jurists, attorneys, academics and other professionals to examine the State's court system may result, as it did in 1974, in the adoption of systemic reforms that will modernize and improve West Virginia's judiciary; and

**WHEREAS**, the success of a commission on judicial reform will depend upon the cooperation and leadership of all three branches of State government.

**NOW, THEREFORE, I, JOE MANCHIN III**, pursuant to the authority vested in me as the Governor of West Virginia, do hereby **ORDER** the following:

1. The Independent Commission on Judicial Reform (hereinafter "the Commission") is hereby established.
2. The Commission shall evaluate and recommend proposals for judicial reform in West Virginia.

3. The Commission shall be composed of nine persons. The Dean of the West Virginia University College of Law and the President of the West Virginia State Bar shall serve as *ex officio* members of the Commission. The remaining members of the Commission shall be appointed by the Governor and shall serve at his will and pleasure. Of the persons the Governor may appoint to serve as at-will members of the Commission, two persons shall be attorneys licensed to practice law in this State, two persons shall be qualified legal academics, two persons shall be former jurists and one person shall be appointed by the Governor to serve as Chair of the Commission.

4. The Governor may appoint a person of special expertise to serve as Honorary Chair of the Commission.

5. As soon as practicable after the effective date of this Order, the Commission shall convene to study the need for broad systemic judicial reforms including, but not limited to, adopting a merit-based system of judicial selection, enacting judicial campaign finance reforms or reporting requirements, creating an intermediate court of appeals, proposing constitutional amendments or establishing a court of chancery.

6. The Commission shall meet at times and locations to be determined by the Chair in consultation with the Commission members.

7. The Commission shall consult with the public and receive comment on the need for judicial reform in West Virginia. To this end, the Commission may conduct studies or surveys, within the limits of funds allocated by the Office of the Governor for such purposes, and may hold public hearings. The Commission is also encouraged to consult members of the judiciary, including the Justices of the Supreme Court of Appeals, circuit court judges, family court judges and magistrate judges; members of the State Legislature, including the Chair of the West Virginia Senate Committee on the Judiciary and the Chair of the West Virginia House of Delegates Committee on the Judiciary; the West Virginia State Bar; the West Virginia Chamber of Commerce; or voluntary associations of judicial or legal professionals, including the National Center for State Courts, the American Bar Association, the West Virginia Judicial Association, the West Virginia Association for Justice and the Defense Trial Counsel of West Virginia.

8. Members of the Commission shall receive no compensation.

9. A majority of members present at a meeting shall constitute a quorum.

10. The Commission shall submit a detailed report of its findings and recommendations, along with any proposed legislation or constitutional amendments, to the Governor by November 15, 2009. With respect to recommendations the Commission may make for the establishment of a new court or new courts of record in this State, the Commission shall set forth in its report detailed plans for such court or courts including, but not limited to, jurisdiction, composition, judicial selection and potential funding sources. Copies of the report shall be provided to the Chief Justice of the Supreme Court of Appeals, the President of the Senate and the Speaker of the House of Delegates.

11. Expenses necessary to transact the business of the Commission may be paid by the Office of the Governor with moneys allocated from the Office of the Governor's discretionary fund, provided that this Order may not be interpreted as requiring the Office of the Governor to allocate moneys for Commission expenses.

12. Executive branch agencies shall cooperate to provide the Commission with any support staff or office services it requires to perform its duties.

13. The Commission shall adjourn upon the completion of its report, but may be reconvened at the request of the Governor to conduct further studies and evaluations of West Virginia's judicial system. If reconvened in accordance with this paragraph, the Commission shall be composed of the *ex officio* members set forth in paragraph three of this Order and the Governor may reappoint, remove or appoint at-will members in accordance with the qualifications requirements for such members set forth in paragraph three of this Order.

14. The Governor may remove or replace at-will members of the Commission at his discretion.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of West Virginia to be affixed.

DONE at the Capitol, in the City of Charleston, State of West Virginia, this third day of April, in the year of our Lord, Two Thousand Nine, and in the One Hundred Forty-Sixth year of the State.



By the Governor

*Jeff Kanawha*  
GOVERNOR

*Walter E. Gammont*  
SECRETARY OF STATE

# **PROPOSED WORK PLAN**

## **Proposed Work Plan for the Independent Commission on Judicial Reform**

### **I. Follow the guiding principles and objectives of Executive Order No. 6-09.**

In creating the Independent Commission on Judicial Reform and setting forth the scope and parameters of the Commission's responsibilities, the Governor articulated certain principles and objectives that should guide the Commission's work in the coming months. The Commission therefore recognizes its responsibility to structure its processes in a manner that promotes these principles and strives to achieve these objectives:

- (i) Bolstering public trust and confidence in the judiciary.
- (ii) Preserving the independence of the judiciary, as well as the sanctity of the separation of powers among the three separate and coequal branches of government.
- (iii) Encouraging an objective examination of West Virginia's court system that may result in the adoption of systemic reforms that will modernize and improve West Virginia's judiciary.

### **II. Scope of Review.**

Executive Order No. 6-09 directs the Commission to "study the need for broad systemic judicial reforms including, but not limited to, adopting a merit-based system of judicial selection, enacting judicial campaign finance reforms or reporting requirements, creating an intermediate court of appeals, proposing constitutional amendments or establishing a court of chancery."

Pursuant to the terms and conditions of the Executive Order, the Commission must submit a detailed report of its findings and recommendations to the Governor by **November 15, 2009**. Given this compressed time frame, it may prove unlikely that the Commission will delve

into areas other than those three broad issues explicitly identified in Executive Order No. 6-09, which colloquially may be referred as:

- (i) judicial selection;
- (ii) judicial campaign finance; and
- (iii) structural/organizational issues and the right to appeal.

**III. Ensure Accountability to the Bench, the Bar, and the Public.**

To foster transparency and ensure the Commission's accountability to members of the judiciary, bar members, and all West Virginia citizens, it is imperative to encourage public access to the Commission's work. All Commission meetings will be conducted in public and notices of such meetings will be published in the State Register in accordance with the Open Governmental Proceedings Act, W. Va. § 6-9A-1, *et seq.* In addition, the Commission will undertake efforts to establish a website, which may then be utilized to provide notification of meetings, detailed agenda items, and access to information and materials submitted to and considered by the Commission in the course of its work.

**IV. Information Gathering.**

As part of any study of this sort, it is critical that the Commission undertake a period of intensive information gathering and data collection. However, the looming November deadline will necessarily restrict the time – and to some extent, the methods – that the Commission may employ to gather relevant information and collect pertinent data. Thus, unlike the study conducted in the late 1990s by the Commission on the Future of the West Virginia Judicial System, this Commission simply does not have the time to schedule dozens of meetings, conduct several public hearings, or submit questionnaires to every petit juror in the state.

One advantage we do have, however, is the ability to draw heavily from the research and analysis contained in the excellent 1998 report prepared by the Commission on the Future of the West Virginia Judicial System, along with comparable studies that have been conducted (or are being conducted) by The West Virginia State Bar, the West Virginia Bar Association, academic commentators, and others.

Moreover, our compressed timeframe should not prevent this Commission from taking several thorough and meaningful steps to gather information relevant to our tasks, including the following:

*State Bar Survey.*

Obviously, members of the Bar need to be given ample opportunity to express their thoughts, comments, and suggestions regarding the Commission's work. In light of the potential time delays that would accompany the mailing, distribution, and anticipated return of written surveys, the Commission would circulate survey questionnaires to Bar members electronically, thereby permitting members to return the questionnaires more quickly and efficiently.

*Written Submissions.*

The Commission will invite and encourage the submission of written comments via the mail, the Commission's website, and during the scheduled public hearings. To this end, the Commission will explore posting advertisements in bar publications and around various court locations to invite such submissions.

*Review of Previous Studies.*

As noted, the work of this Commission will benefit from the detailed and thorough reports prepared by those groups that have undertaken comparable studies of the West Virginia judiciary over the past few years. By definition, these reports are the work product of their

respective studies and, as such, they reach their own conclusions and propose their own recommendations. Irrespective of such conclusions or recommendations, however, the research and data embodied in each will provide immeasurable assistance to the work of this Commission.

***Consultation with Judicial & Legislative Branches.***

Executive Order No. 6-09 encourages the Commission to consult with all members of the judiciary and the participation of representatives of the judicial branch is imperative to the success of the Commission's work. Much of the information relevant to this Commission's work may be obtained from the judiciary, including recent details about judicial workload, case management, court processes, and filing trends. Moreover, the Administrative Office of the Supreme Court of Appeals will be able to offer significant insight into the logistical concerns that might accompany some of the Commission's recommendations. For these and many other reasons, it is imperative that the judiciary be invited to offer their thoughts on the Commission's work throughout the process, including during each public hearing. Likewise, the West Virginia Judicial Association, a voluntary association of West Virginia state court judges, should be invited to share its collective thoughts on the issue before the Commission, including the opportunity for representatives of the Association to speak during the public hearings.

Similarly, the involvement of legislators will also prove critical to this process, especially insofar as the Commission's recommendations may ultimately require legislative approval. The Committee should reach out to the legislative members, including the President of the Senate, Speaker of the House of Delegates, the Chair of the West Virginia Senate Committee on the Judiciary and the Chair of the West Virginia House of Delegates Committee on the Judiciary, invite their comment, and urge them to attend and speak during the public hearings.

***Public Hearings.***

Public hearings will allow interested groups and citizens to express their suggestions, concerns and beliefs to the Commission. The Commission will hold three meetings in different cities throughout West Virginia. Each meeting will focus primarily on one of the three broad issues identified in the Executive Order. Although each meeting will have a primary focus (*i.e.*, judicial selection), the Commission will welcome public comment on any issue during each meeting.

The Commission will invite interested groups to attend these hearings, including the West Virginia State Bar, representatives of organized labor, the West Virginia Chamber of Commerce, and voluntary associations of judicial or legal professionals such as the American Bar Association, the West Virginia Association for Justice and the Defense Trial Counsel of West Virginia.

***Targeted date for end of data collection: October 1, 2009.***

It is the goal of the Commission to complete the information gathering, data collection and educational phase of its work process by October 1, 2009, thereby permitting the Commission to spend the final six weeks analyzing the information gathered, considering options, and reaching a consensus on potential recommendations.

**V. Analysis & Study.**

The Commission will consider and analyze the information presented and gathered to create a concise and comprehensive report detailing its findings and recommendations regarding the three broad issues identified within the Executive Order. When developing its

recommendations, the Commission will strive to follow the guiding principles and objectives of the Executive Order.

**VI. Present Report.**

On or before November 15, 2009, the Commission will present its report to the Governor. The report will include recommendations regarding judicial selection; judicial campaign finance; and structural/organizational issues and the right to appeal. In accordance with the provisions of Executive Order No. 6-09, the Commission shall adjourn upon the completion of its report. To the extent that the Commission feels that further study of the judicial system is warranted, the report may contain a recommendation to the Governor that the Commission be reconvened.

## **MEETING AGENDAS**

**Independent Commission on Judicial Reform**

**Public Hearing – Judicial campaign finance and reporting**

August 28, 2009  
Memorial Student Center, Room 2W16  
Marshall University  
Huntington, West Virginia  
9:00am – 3:00pm

**I. Old Business**

- Approval of Minutes from July 10, 2009 meeting

**II. Overview of current system, campaign finance regulations.**

- The Hon. Natalie Tennant, Secretary of State

*Secretary Tennant will provide the Commission with a brief overview of the campaign finance laws and regulations in West Virginia.*

- The Hon. Fred Fox, 16<sup>th</sup> Judicial Circuit Judge; Chair, Judicial Investigative Commission

*Judge Fox will be invited to brief the Commission on additional ethics provisions governing judicial races and the manner in which judicial candidates are subject to requirements not imposed on non-judicial elections, namely the terms and conditions of Canon 5 of the Code of Judicial Conduct.*

**III. Regulating Independent Expenditures.**

- The Hon. Jeff Kessler, Chair, Senate Committee on the Judiciary
- The Hon. Carrie Webster, Chair, House Committee on the Judiciary  
Brian Skinner, Counsel, House Committee on the Judiciary

*The Chairs, or their designees, will be asked to brief the Commission on recent legislative efforts to regulate independent campaign expenditures, including any additional reforms currently under consideration.*

- The Hon. Darrell V. McGraw, Attorney General
- Fran Hughes, Chief Deputy Attorney General
- Thomas W. Smith, Managing Deputy Attorney General

*The Attorney General's office will be asked to discuss recent federal constitutional challenges to statutory provisions regulating certain independent expenditures.*

#### **IV. Broadcasters' Perspective on Campaign Finance Reform**

- David Barnette, Jackson Kelly PLLC, on behalf the WV Broadcasters Association

*Mr. Barnette will offer his perspective and that of the West Virginia Broadcasters Association on efforts to regulate and restrict independent campaign expenditures, as well as other campaign finance regulation involving the broadcast industry.*

#### **V. Public Financing of Judicial Elections.**

- The Hon. Jeff Kessler, Chair, Senate Committee on the Judiciary
- The Hon. Carrie Webster, Chair, House Committee on the Judiciary
- Rita Pauley, General Counsel, Senate Committee on the Judiciary

*The Chairs, or their designees, will be asked to brief the Commission on SB311, introduced during the 2009 Regular Session of the Legislature, which would have established a Supreme Court public campaign financing pilot program, as well as offer their general thoughts on the merits of public financing programs.*

- Mark Muchow, Deputy Secretary, Department of Revenue

*The Department of Revenue will brief the Commission on the fiscal impact of SB311, and discuss the projected viability of the revenue stream identified in the bill to fund the public financing project. Additionally, the Department will be asked to discuss comparable funding mechanisms used in other public financing proposals.*

- Damon Circosta, North Carolina Center for Voter Education

*Mr. Circosta will describe the contours of North Carolina's public financing system for judicial campaigns, as well as provide information regarding the formation and implementation of the system in North Carolina.*

- The Hon. Wanda Bryant, Judge, North Carolina Court of Appeals

*Judge Bryant will describe her own experiences running for elective judicial office using traditional campaign fundraising methods and the new public financing system.*

- Jonathan Crook, Public Policy Polling, University of North Carolina

*Mr. Crook will brief the Commission on a recent poll of 1,366 West Virginia voters regarding the adoption of a public financing program for the state's judicial system.*

#### **VI. Legal Issues Surrounding Campaign Finance Reform**

- Kenneth A. Gross, Skadden, Arps, Slate, Meagher & Flom, LLP

*A nationally renowned authority on campaign law compliance, gift and gratuity rules, lobby registration provisions, and securities laws regulating political activity and municipal securities transactions, Mr. Gross counsels numerous Fortune 500 corporations and political candidates at the state and federal level. As former associate general counsel of the Federal Election Commission (FEC), Mr. Gross headed the general counsel's Enforcement Division and supervised the legal staff charged with the review of the FEC's Audit Division.*

*Mr. Gross will offer his perspective on the regulation of independent expenditures, the legal issues surrounding public financing programs and other judicial campaign developments in the law governing campaign contributions.*

#### **VII. Judicial Input Regarding Campaign Finance**

- Steve Canterbury, Administrative Director, Supreme Court of Appeals

*Mr. Canterbury will be invited to offer thoughts on behalf of the court system regarding campaign finance regulation and any logistical issues raised by the potential modification of such regulations.*

- The Hon. O.C. Spaulding, West Virginia Judicial Association
- The Hon. Ronald Anderson, West Virginia Family Judicial Association

*Judge Spaulding and Judge Anderson represent the voluntary association of West Virginia state court judges and the voluntary association of state family court judges, respectively. Having been through the judicial electoral process themselves, they – and their members – can provide unique insight into the advantages and disadvantages of the current system, the merits of proposed reforms, and the effect that such proposals could have in specific instances.*

**VIII. Public Comment**

**IX. Committee Discussion & Next Steps.**

**Independent Commission on Judicial Reform**

**September 21, 2009 Public Hearing – Judicial selection**

**West Virginia University College of Law**

**I. Overview of constitutional & statutory provisions governing Judicial Selection**

- Professor Robert M. Bastress, WVU College of Law

*Professor Bastress will brief the Commission on the current constitutional and statutory provisions that establish and govern West Virginia's system of judicial selection.*

**II. Judicial Selection in Practice**

- Tom Tinder, Executive Director, West Virginia Bar Foundation

*Mr. Tinder will explore the practical application of Article VIII, §7 of the Constitution, which requires the Governor to fill vacancies in judicial positions by appointment, including an overview of the number of current judicial officers that were initially selected in this manner.*

**III. The "Missouri Plan" – Appointment & Retention Elections**

- The Hon. Laura Denvir Stith, Supreme Court of Missouri

*Judge Stith will brief the Commission on the so-called "Missouri plan," a judicial selection method that combines appointment and retention elections, offer some insight into how the system works, and describe her personal experience in being appointed and then standing for retention election.*

**IV. Nonpartisan Elections**

- Damon Circosta, North Carolina Center for Voter Education

*Mr. Circosta will describe the contours of North Carolina's 2002 judicial reform efforts, which included a switch from partisan elections to nonpartisan elections for appellate court races. Additionally, Mr. Circosta will describe the subsequent expansion of this reform to all judicial positions in 2004.*

## **V. Considering Reform --**

- Dr. Rachel Paine Caufield, Ph.D., Associate Professor, Opperman Center at Drake University; The American Judicature Society

*Dr. Paine Caufield will focus her presentation on the theoretical and practical issues surrounding judicial selection reform initiatives, as well describe her research into the best practices for judicial nominating commissions.*

- Norman L. Greene; Schoeman, Updike & Kaufman, LLP

*The focus of Mr. Greene's presentation will be on the consistency of existing or proposed methods of judicial selection with the rule of law, including how such methods relate to the concepts of judicial accountability and judicial independence and whether they are consistent with a judiciary which is fair and impartial and otherwise in line with recognized notions of judicial quality; and supplemental means for achieving such goals.*

- Dr. Tom Clark, Ph.D., Assistant Professor, Emory University

*Dr. Clark will offer his perspective on judicial selection reform efforts, largely based on his empirical research regarding the impact of nonpartisan elections on judicial independence.*

- Dr. Chris W. Bonneau, Associate Professor of Political Science, University of Pittsburgh

*Dr. Bonneau, coauthor of the recently published "In Defense of Judicial Elections," will brief the Commission on his extensive research into nearly two decades of state judicial elections data.*

## **VI. Public opinion on judicial selection**

- Mark Blankenship, Mark Blankenship Enterprises.

*Mr. Blankenship will brief the Commission on recent public opinion surveys conducted by his firm that may illuminate how West Virginian voters perceive issues surrounding our current method of judicial selection and proposed reforms.*

**VII. Input from the bar**

- Allan Karlin; Immediate Past President, West Virginia Association for Justice
- Thomas J. Hurney, Jr.; Immediate Past President, West Virginia Defense Trial Counsel

**VIII. Input from Business & Labor**

- Kenny Perdue; President, West Virginia AFL-CIO
- Brenda Nichols Harper, Vice President and General Counsel, West Virginia Chamber of Commerce

**IX. Judicial Input regarding methods of judicial selection.**

- Steve Canterbury, Administrative Director, Supreme Court of Appeals

*Mr. Canterbury will be invited to offer thoughts on behalf of the court system regarding judicial selection, as well as any logistical issues raised by the potential transition to another system of selection.*

- The Hon. O.C. Spaulding, West Virginia Judicial Association
- The Hon. Ronald Anderson, West Virginia Family Judicial Association

*Judge Spaulding and Judge Anderson represent the voluntary association of West Virginia state court judges and the voluntary association of state family court judges, respectively. Having been through the judicial electoral process themselves, they – and their members – can provide unique insight into the advantages and disadvantages of the current system, the merits of proposed reforms, and the effect that such proposals could have in specific instances.*

**X. Legislative Input**

- The Hon. John Doyle, West Virginia House of Delegates

**XI. Public Comment.**

**XII. COMMITTEE DISCUSSION & NEXT STEPS.**

## Independent Commission on Judicial Reform

September 29, 2009 Public Hearing -- The Structure of our Judicial Branch

Charleston, West Virginia

### I. Overview of constitutional & statutory provisions

- Professor Robert M. Bastress, WVU College of Law

*Professor Bastress will brief the Commission on the constitutional and statutory provisions that established the organization and structure of West Virginia's judiciary, including a discussion on how the 1974 Judicial Reorganization Amendment delegated to the Legislature the authority to establish intermediate courts.*

### II. Presentation by Joint Committee on Judicial Selection and Reform

- Benjamin L. Bailey, Bailey & Glasser, Charleston, West Virginia

*On behalf of The West Virginia Bar Association's Committee on Judicial Selection and Reform, Mr. Bailey will address the topic of intermediate appellate courts, as well as update the Commission on the nature and work of his committee and the other topics they have been considering over the past several months.*

### III. Intermediate Appellate Court

- Mark Sadd; Lewis Glasser Casey & Rollins, Charleston, West Virginia

*Mr. Sadd will discuss his recently published article The Rule of Law: Perspectives on Legal and Judicial Reform in West Virginia in which he recommends the creation of a system of intermediate appellate courts.*

- Julie Terry, President, Vision Shared Inc.

*Ms. Terry will discuss a recent economic analysis and proposed work plan commissioned by her organization (and prepared by Market Street Strategies, Inc.) that, among other recommendations, urged the State to establish an intermediate court of appeals.*

- Jack Rogers, Executive Director, Attorney, Public Defender Services

*Mr. Rogers will brief the Commission on the current appellate review process and offer his perspective for the need to establish an intermediate appellate court with an appeal of right in criminal cases.*

- Michael D. Evans, Oklahoma Administrative Director of the Courts

*Mr. Evans will offer one state's perspective on judicial organization, describing Oklahoma's system of trial courts, a criminal appellate court, an intermediate court of appeals, an administrative appellate court, and its state supreme court.*

- Victor Schwartz, Shook Hardy & Bacon, LLP

*Mr. Schwartz's discussion will focus on a comparison between West Virginia and other jurisdictions that have intermediate court systems and provide for an appeal as a matter of right.*

- Rita Helmick, Board of Review, West Virginia Workers' Compensation

*Ms. Helmick will brief the Commission on the creation of the Board of Review for workers' compensation appeals, discuss the Board's jurisdictional scope and the manner in which workers' compensations cases proceed through the judicial system.*

- Mike McKown, Department of Revenue.

*The Department of Revenue will brief the Commission on the fiscal impact of establishing an intermediate appellate court system, and discuss potential sources of revenue that could be dedicated to fund such a system.*

#### **IV. Creating a Business Court**

- Hon. Steven Platt, The Platt Group, former Maryland Circuit Court judge

*Judge Platt will describe his experiences serving on the Maryland Business and Technology Court Task Force, which was created by the Maryland General Assembly to consider the feasibility of establishing a specialized court function within Maryland's Circuit Courts and ultimately recommended the creation of a statewide program with specially trained judges to resolve substantial disputes affecting business entities.*

- Cory E. Manning, Partner, Nelson Mullins

*Mr. Manning will discuss South Carolina's 2007 Business Court Pilot Program, which created a business court within South Carolina's existing state circuit court system with jurisdiction over certain business and commercial cases.*

**V. Judicial Input.**

- Steve Canterbury, Administrative Director, Supreme Court of Appeals

*Mr. Canterbury will be invited to offer thoughts on behalf of the court system regarding the structure of the judicial branch, as well as provide critical caseload information that must be relied upon in evaluating proposals for the establishment of additional courts.*

- The Hon. O.C. Spaulding, West Virginia Judicial Association
- The Hon. Ronald Anderson, West Virginia Family Judicial Association

*Judge Spaulding and Judge Anderson represent the voluntary association of West Virginia state court judges and the voluntary association of state family court judges, respectively.*

**VI. Public Comment.**

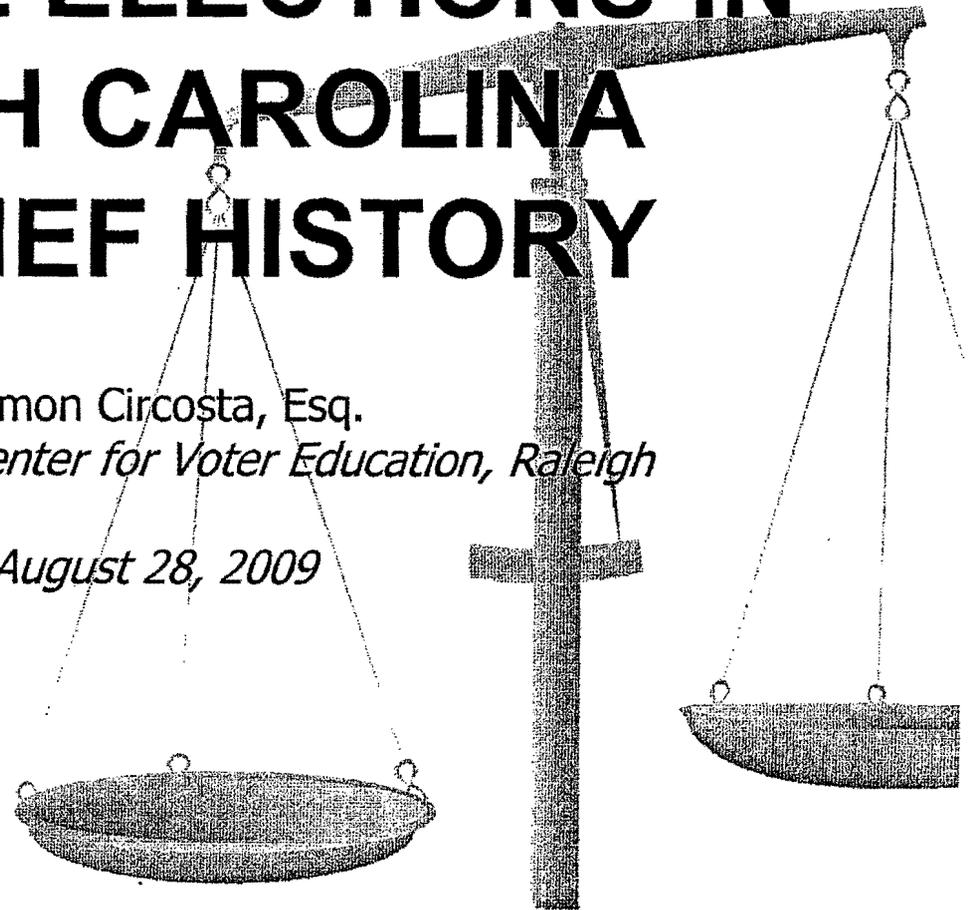
**VII. COMMITTEE DISCUSSION & NEXT STEPS.**

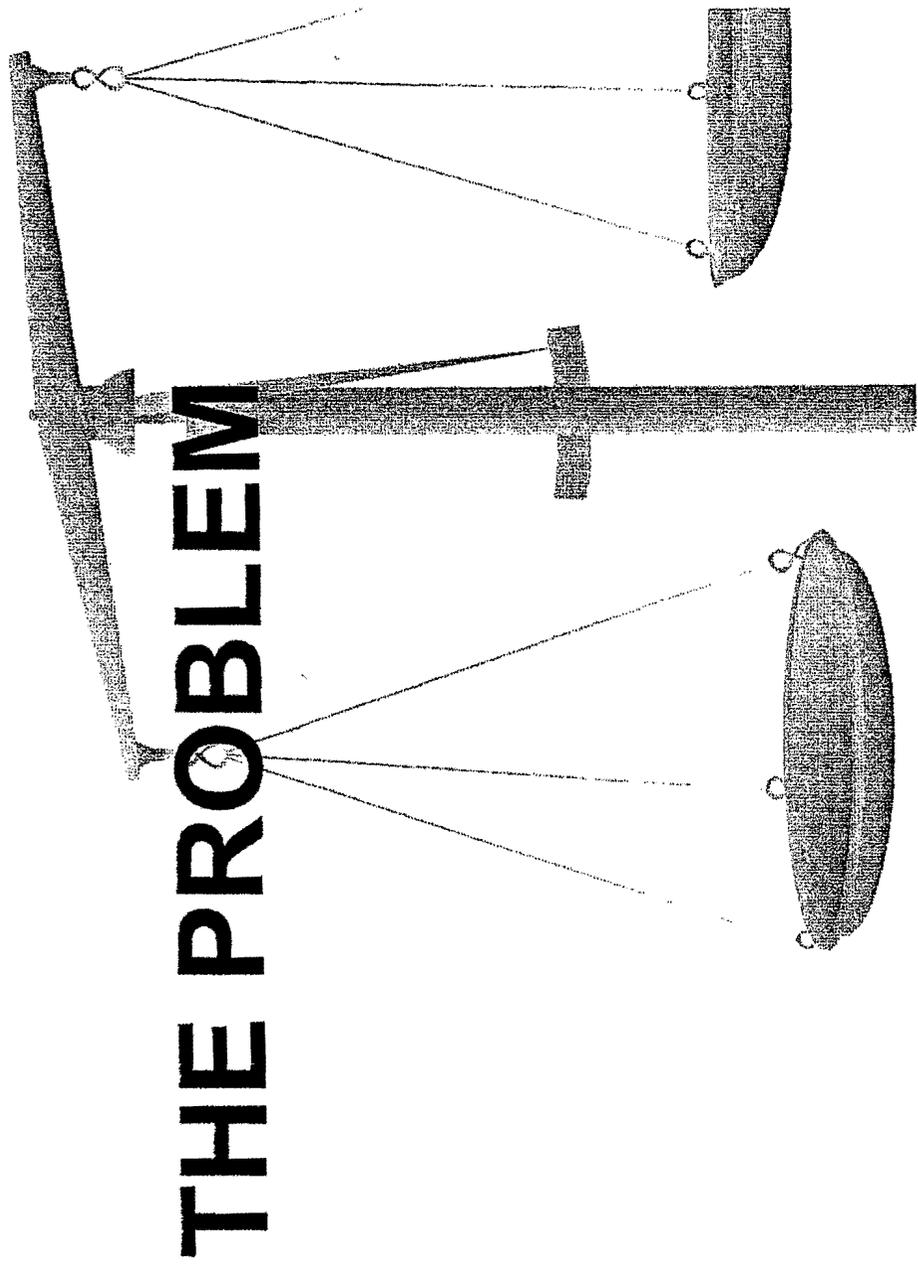
**DAMON CIRCOSTA**  
**PRESENTATION TO THE**  
**COMMISSION**  
**AUGUST 28, 2009**

# **PUBLIC FINANCING OF JUDICIAL ELECTIONS IN NORTH CAROLINA - A BRIEF HISTORY**

Damon Circosta, Esq.  
*North Carolina Center for Voter Education, Raleigh*

*August 28, 2009*

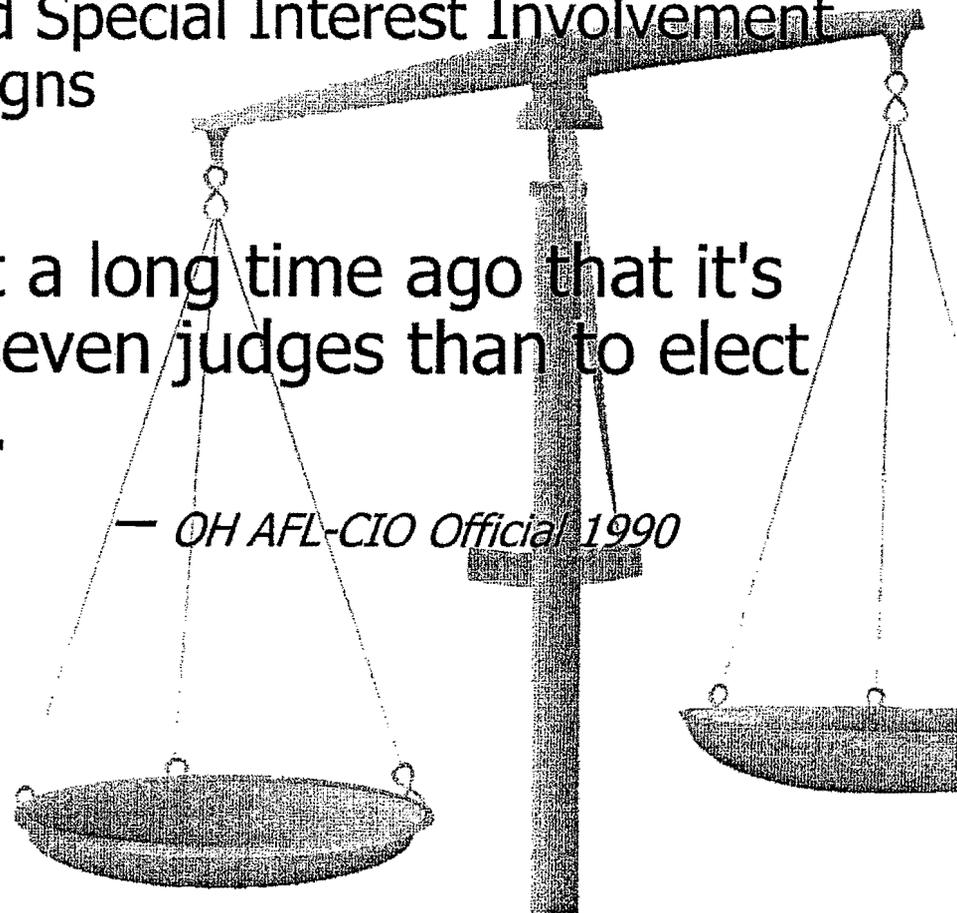




# Disturbing National Trends

- An Unprecedented Special Interest Involvement in Judicial Campaigns
- "We figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators".

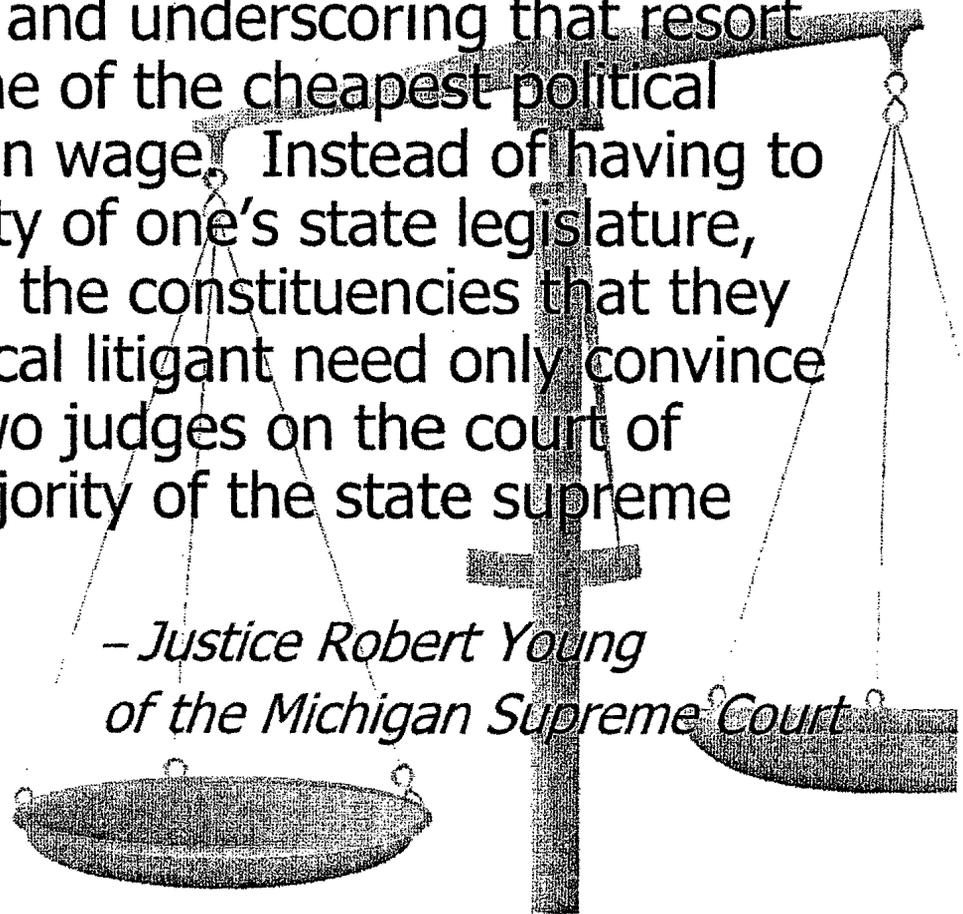
— OH AFL-CIO Official 1990



# The New Philosophy for Influencing Policy

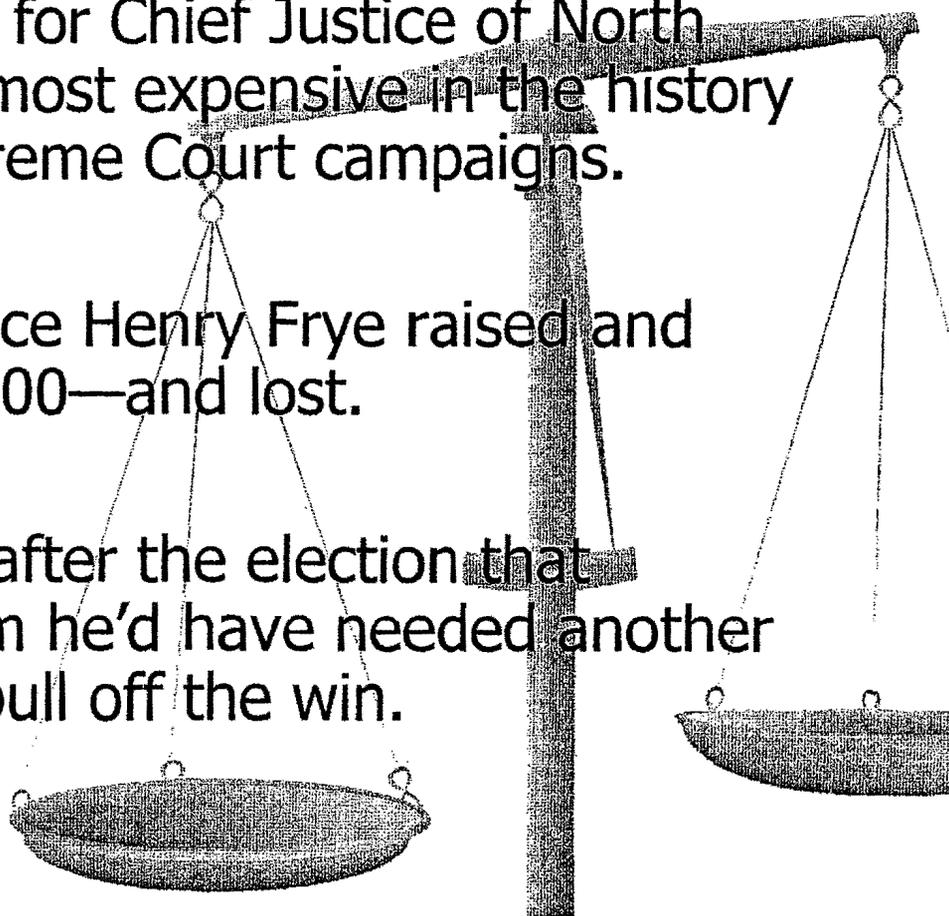
- "It's worth noting and underscoring that resort to the courts is one of the cheapest political campaigns one can wage. Instead of having to convince a majority of one's state legislature, the governor, and the constituencies that they represent, a political litigant need only convince one trial judge, two judges on the court of appeals and a majority of the state supreme court."

*– Justice Robert Young  
of the Michigan Supreme Court*



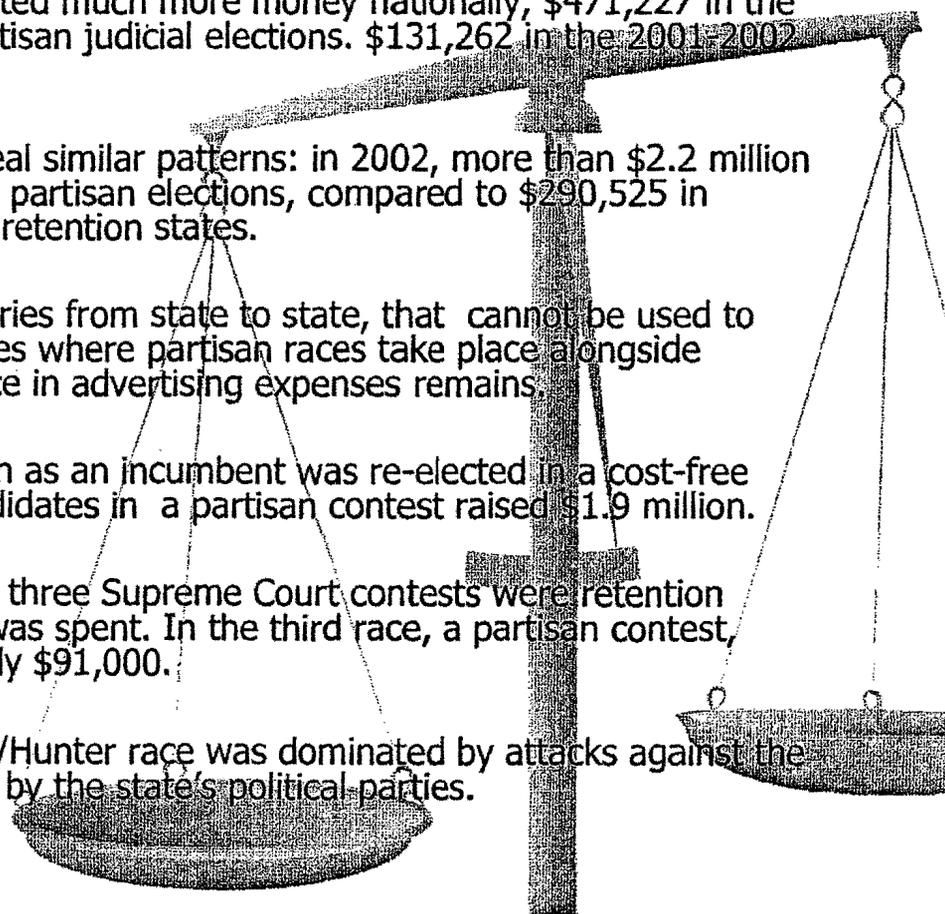
# In North Carolina

- The 2000 election for Chief Justice of North Carolina was the most expensive in the history of the state's Supreme Court campaigns.
- Former Chief Justice Henry Frye raised and spent over \$900,000—and lost.
- He told reporters after the election that confidants told him he'd have needed another million dollars to pull off the win.



# Increasingly Partisan Elections

- Partisan judicial elections attracted much more money nationally, \$471,227 in the 2001 - 2002 cycle, than nonpartisan judicial elections. \$131,262 in the 2001-2002 cycle.
- Television advertising buys reveal similar patterns: in 2002, more than \$2.2 million was spent on ads in states with partisan elections, compared to \$290,525 in nonpartisan states and none in retention states.
- While the cost of advertising varies from state to state, that cannot be used to explain these variances. In states where partisan races take place alongside nonpartisan races, the difference in advertising expenses remains.
  - In Illinois in 2002, even as an incumbent was re-elected in a cost-free retention contest, candidates in a partisan contest raised \$1.9 million.
  - In New Mexico, two of three Supreme Court contests were retention elections - no money was spent. In the third race, a partisan contest, candidates raised nearly \$91,000.
- In North Carolina, the 2002 Orr/Hunter race was dominated by attacks against the candidates' ethics and behavior by the state's political parties.

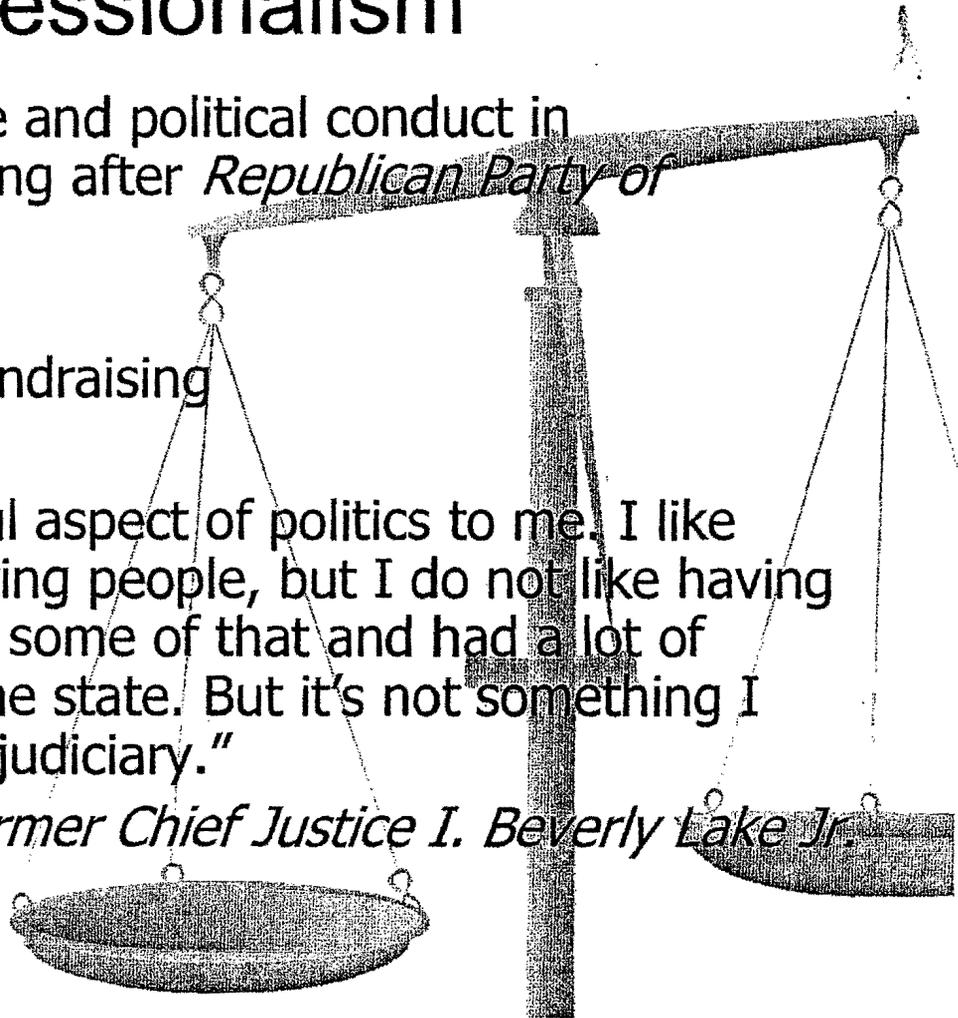


# Disruption of Judicial Professionalism

- More aggressive tone and political conduct in campaigns – increasing after *Republican Party of Minnesota v. White*
- More emphasis on fundraising

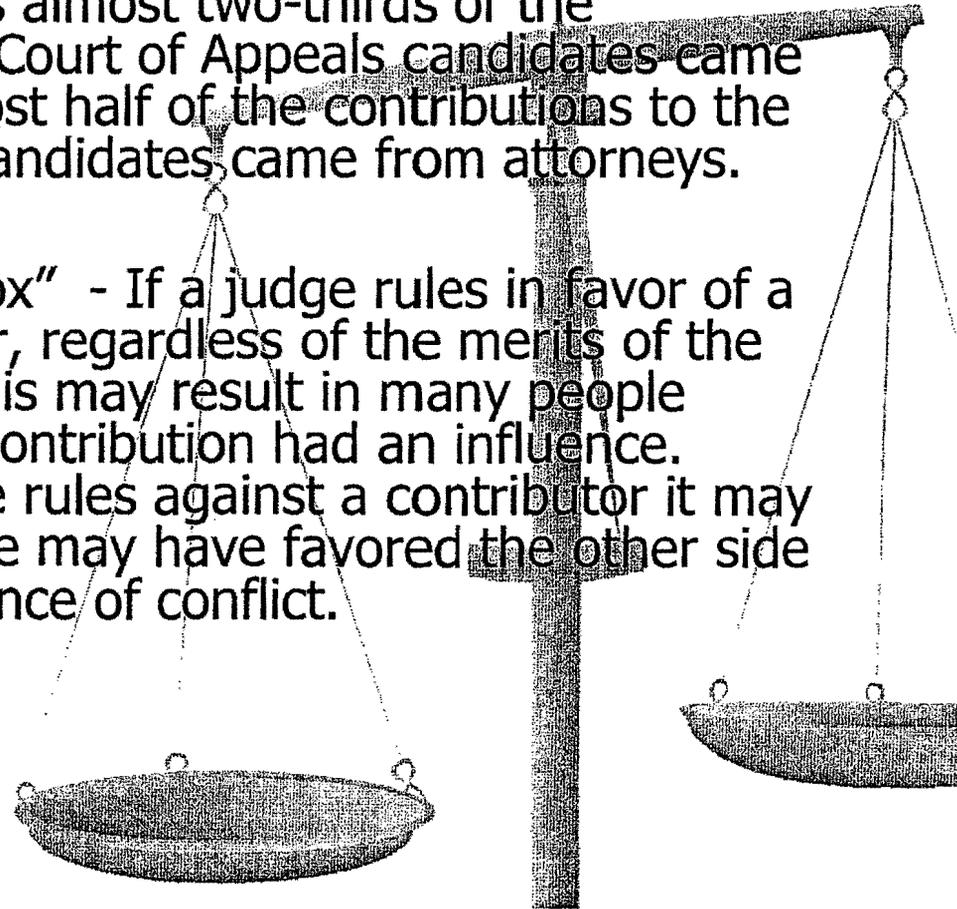
“It’s the most distasteful aspect of politics to me. I like getting out and meeting people, but I do not like having to raise money. I did some of that and had a lot of fundraisers around the state. But it’s not something I think is good for the judiciary.”

- *Former Chief Justice I. Beverly Lake Jr.*



# Public Confidence vs. Campaign Contributions

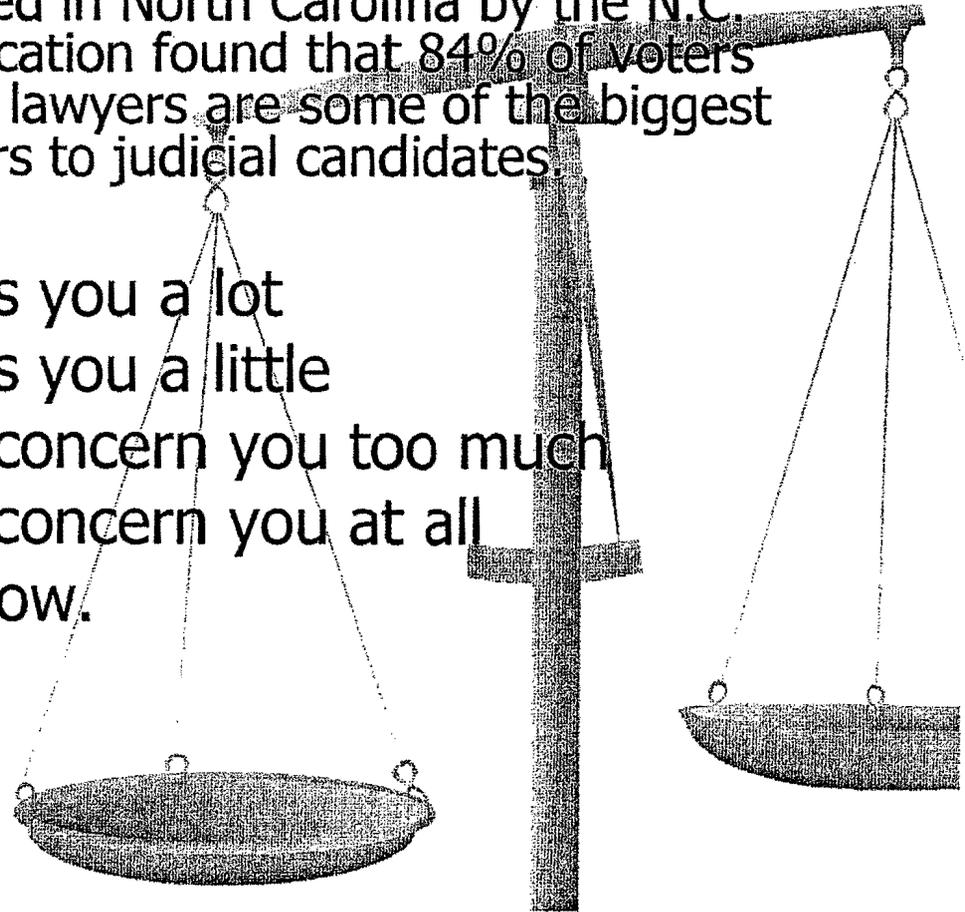
- In the 2000 elections almost two-thirds of the contributions to NC Court of Appeals candidates came from attorneys. Almost half of the contributions to the NC Supreme Court candidates came from attorneys.
- The "Fairness Paradox" - If a judge rules in favor of a campaign contributor, regardless of the merits of the contributor's case, this may result in many people suspecting that the contribution had an influence. Likewise, if the judge rules against a contributor it may appear that the judge may have favored the other side to avoid the appearance of conflict.



# Public Opinion

A 2002 survey conducted in North Carolina by the N.C. Center for Voter Education found that 84% of voters were concerned that lawyers are some of the biggest campaign contributors to judicial candidates.

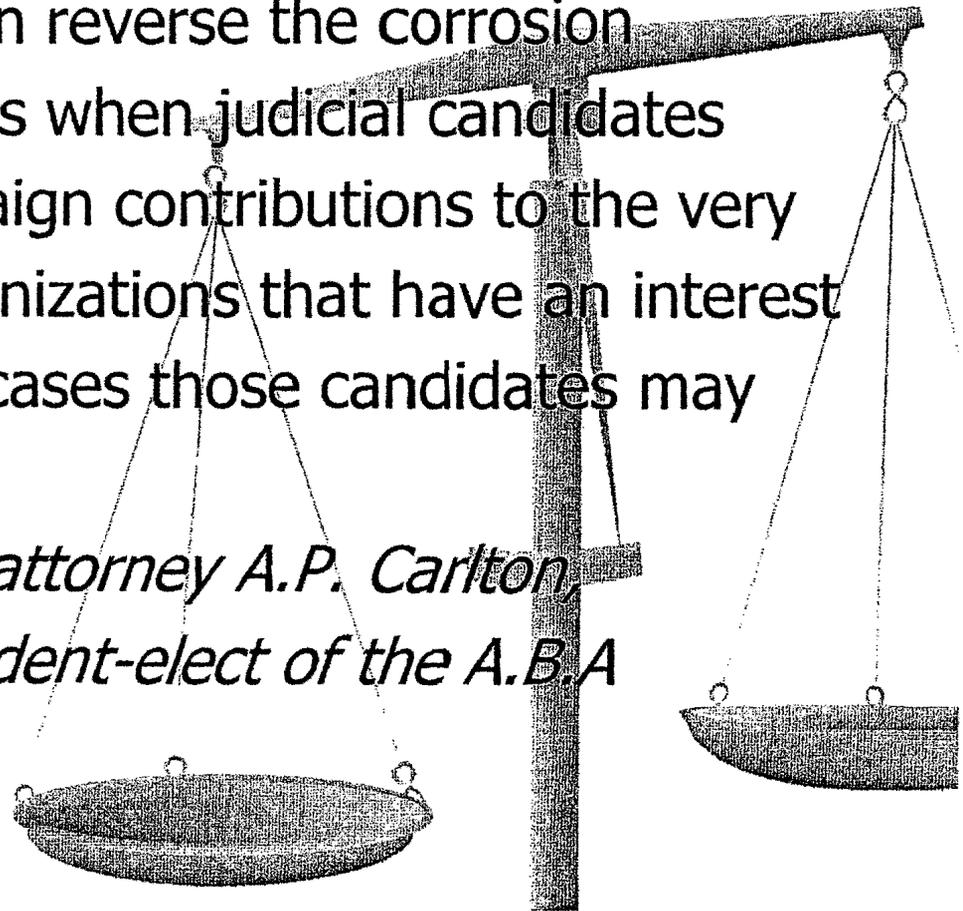
- 64% Concerns you a lot
- 20% Concerns you a little
- 5% Doesn't concern you too much
- 7% Doesn't concern you at all
- 3% Don't know.



# Public Campaign Financing Offers a Solution

"Public funding... can reverse the corrosion that taints our courts when judicial candidates must turn for campaign contributions to the very individuals and organizations that have an interest in the outcomes of cases those candidates may decide as judges."

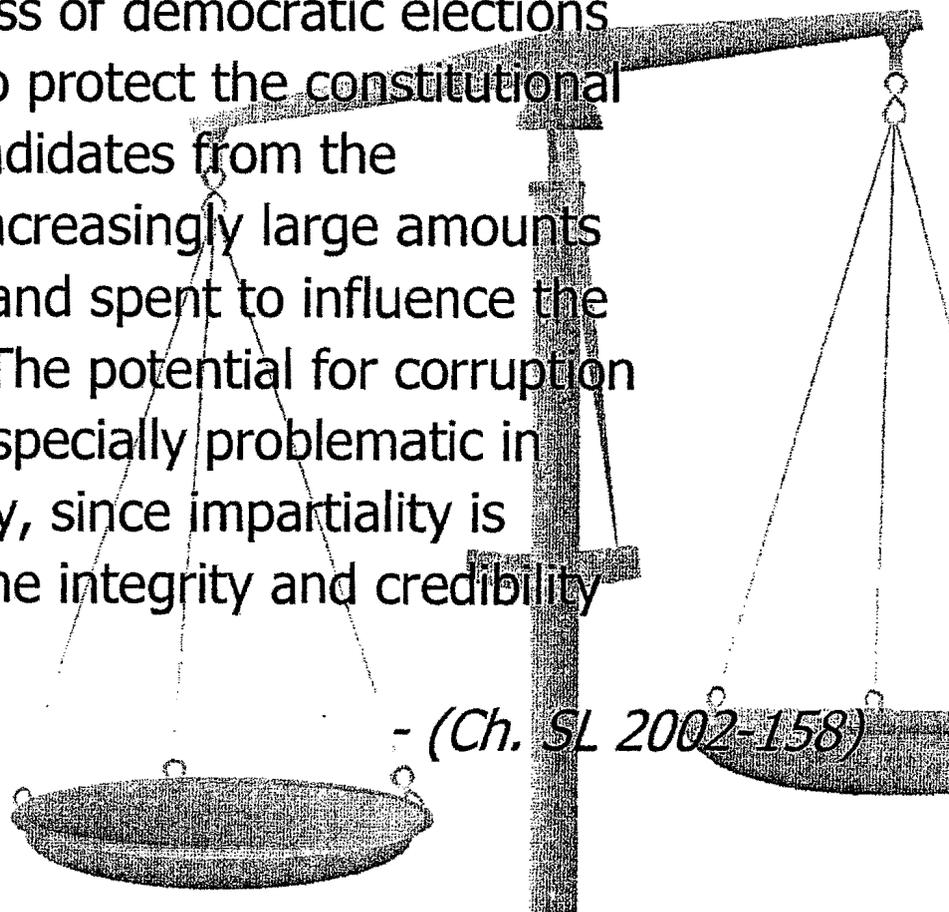
*- Raleigh attorney A.P. Carlton,  
then president-elect of the A.B.A*



# The Purpose of the JCRA

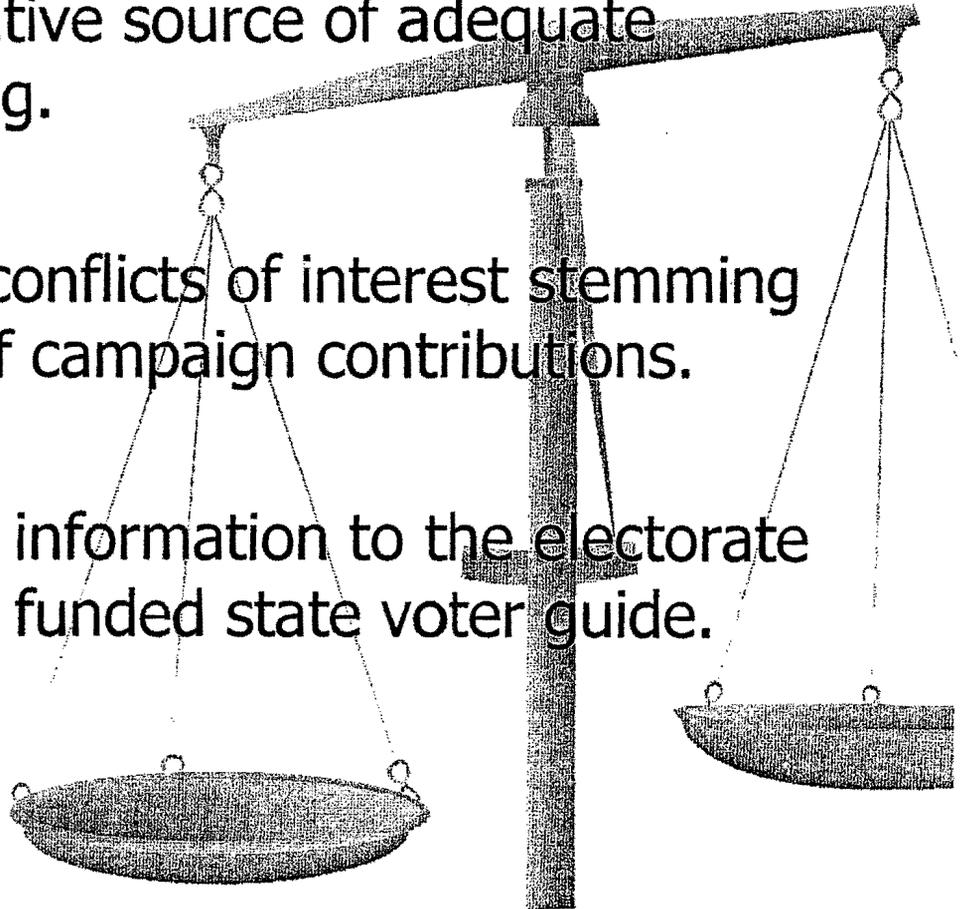
"...To ensure the fairness of democratic elections in North Carolina and to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections. The potential for corruption and its appearance is especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts."

- (Ch. SL 2002-158)



# Methods for Accomplishing this Purpose

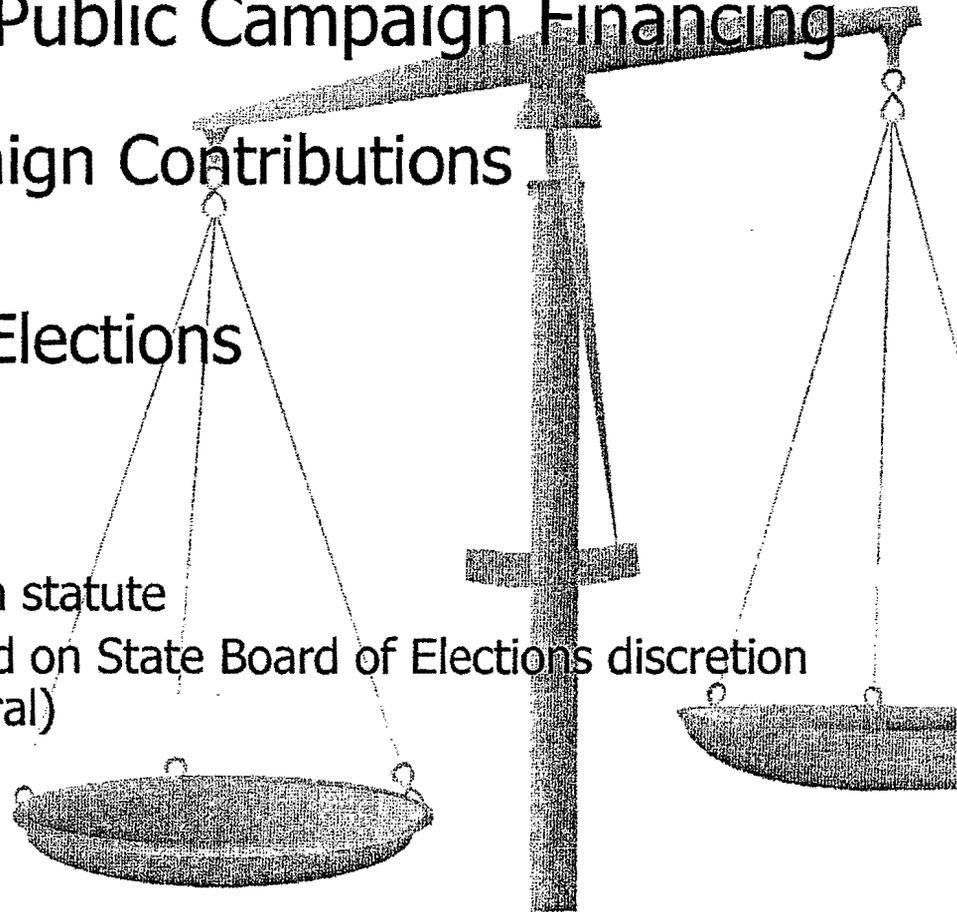
- Provide an alternative source of adequate campaign financing.
- Reduce potential conflicts of interest stemming from the source of campaign contributions.
- Increase essential information to the electorate through a publicly funded state voter guide.



# MECHANICS OF JCRA

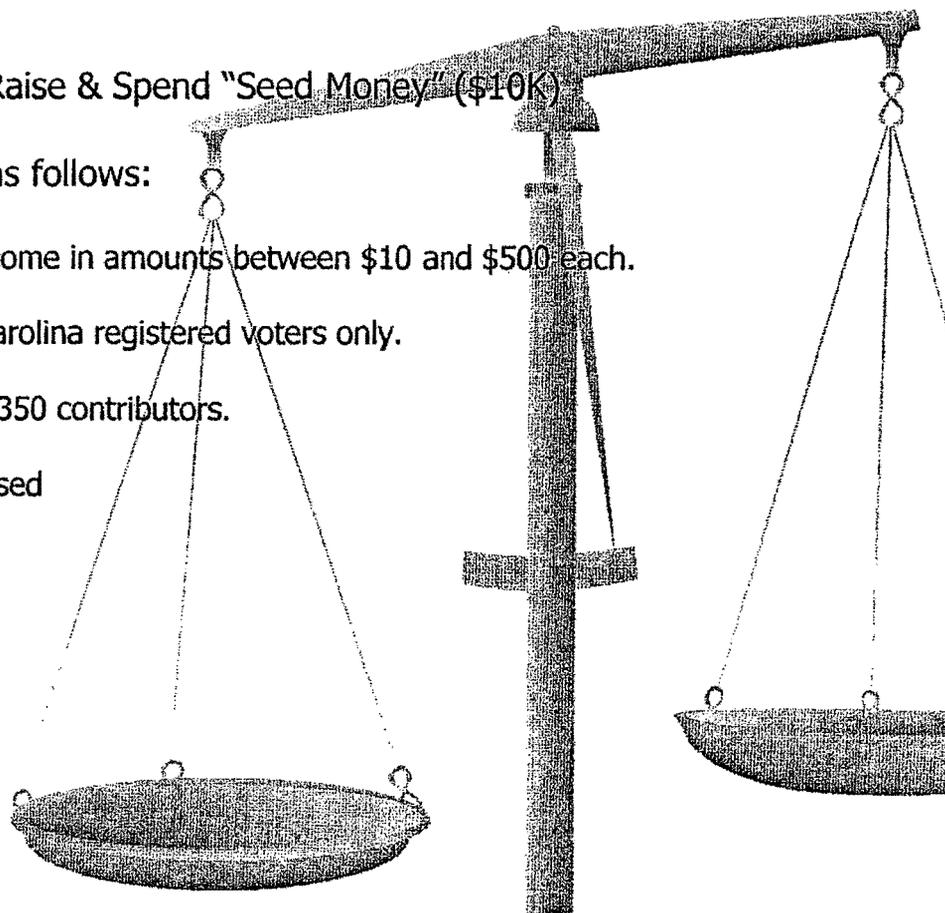
## Changes Beyond Public Campaign Financing

- Lower Campaign Contributions
- Nonpartisan Elections
- Voter Guide
  - Content based on statute
  - Distribution based on State Board of Elections discretion (primary v. general)



# Qualifying for Public Campaign Financing

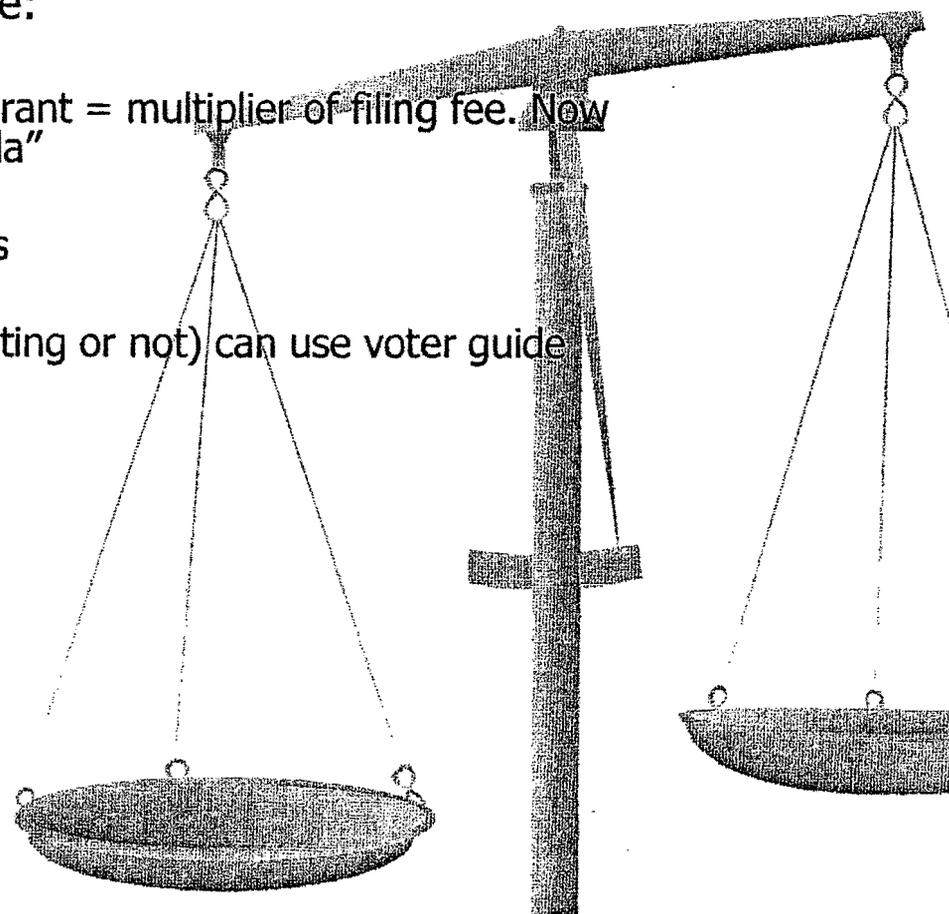
- Voluntary Participation
- Declare Intent to Participate / Raise & Spend "Seed Money" (\$10K)
- Raise Qualifying Contributions as follows:
  - Qualifying contributions must come in amounts between \$10 and \$500 each.
  - They must come from North Carolina registered voters only.
  - They must come from at least 350 contributors.
  - Limits on how much can be raised



# Benefits of Participation

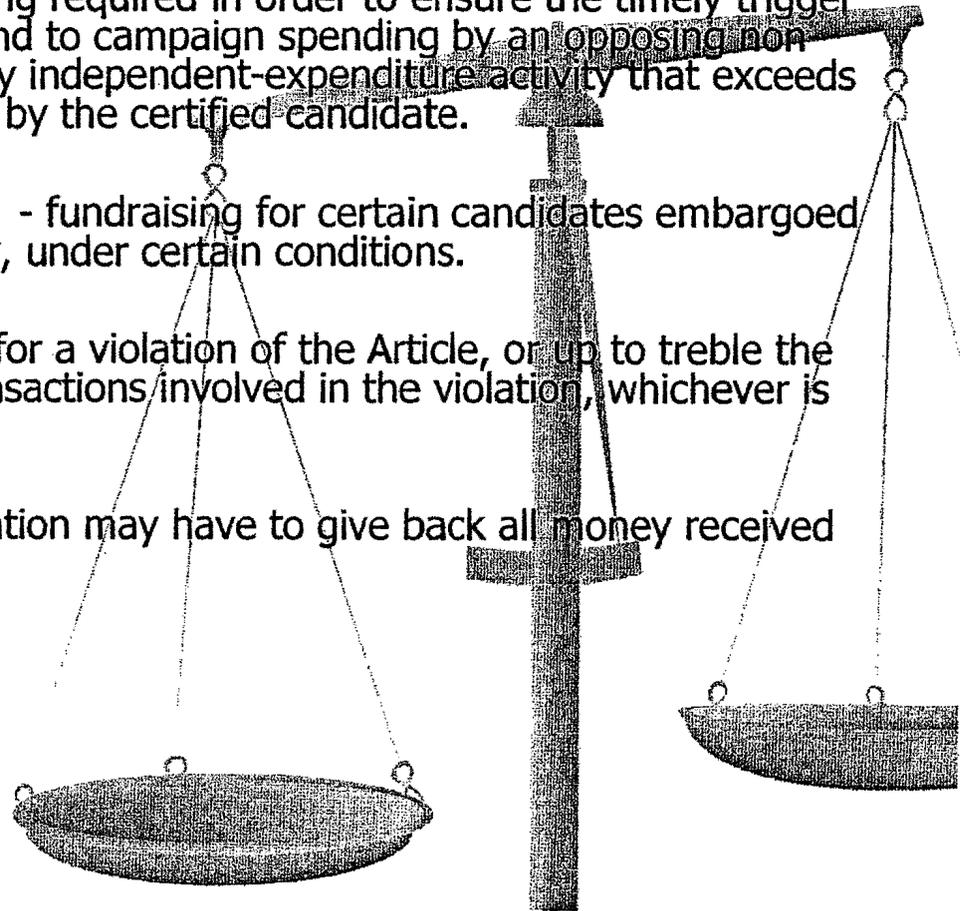
Qualifying candidates receive:

- Public Grant (in JCRA, grant = multiplier of filing fee. Now "competitiveness formula")
- Possible Matching Funds
- All candidates (participating or not) can use voter guide



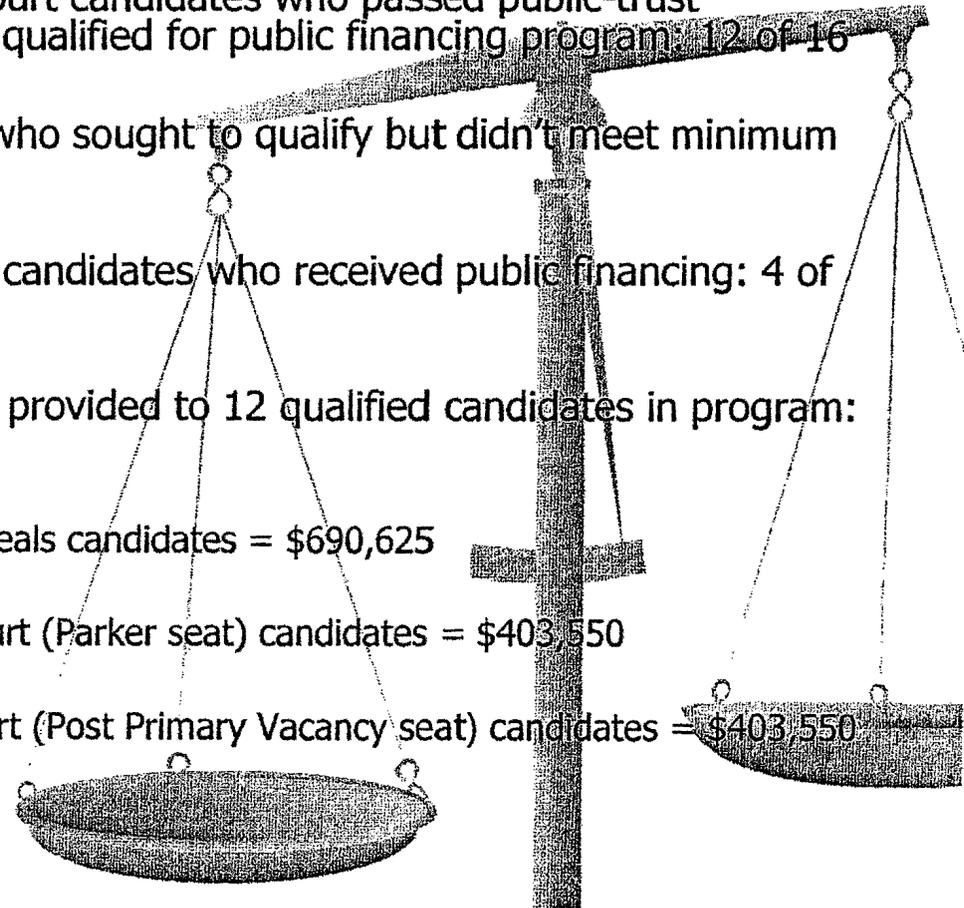
# Other Provisions of JCRA

- Expedited campaign reporting required in order to ensure the timely trigger of Matching Funds to respond to campaign spending by an opposing non-certified candidate and/or by independent-expenditure activity that exceeds the spending limit accepted by the certified candidate.
- "Surprise Attacks" provision - fundraising for certain candidates embargoed 21 days before Election Day, under certain conditions.
- Civil fines of up to \$10,000 for a violation of the Article, or up to treble the amount of any financial transactions involved in the violation, whichever is greater.
- A certified candidate in violation may have to give back all money received from the Fund.



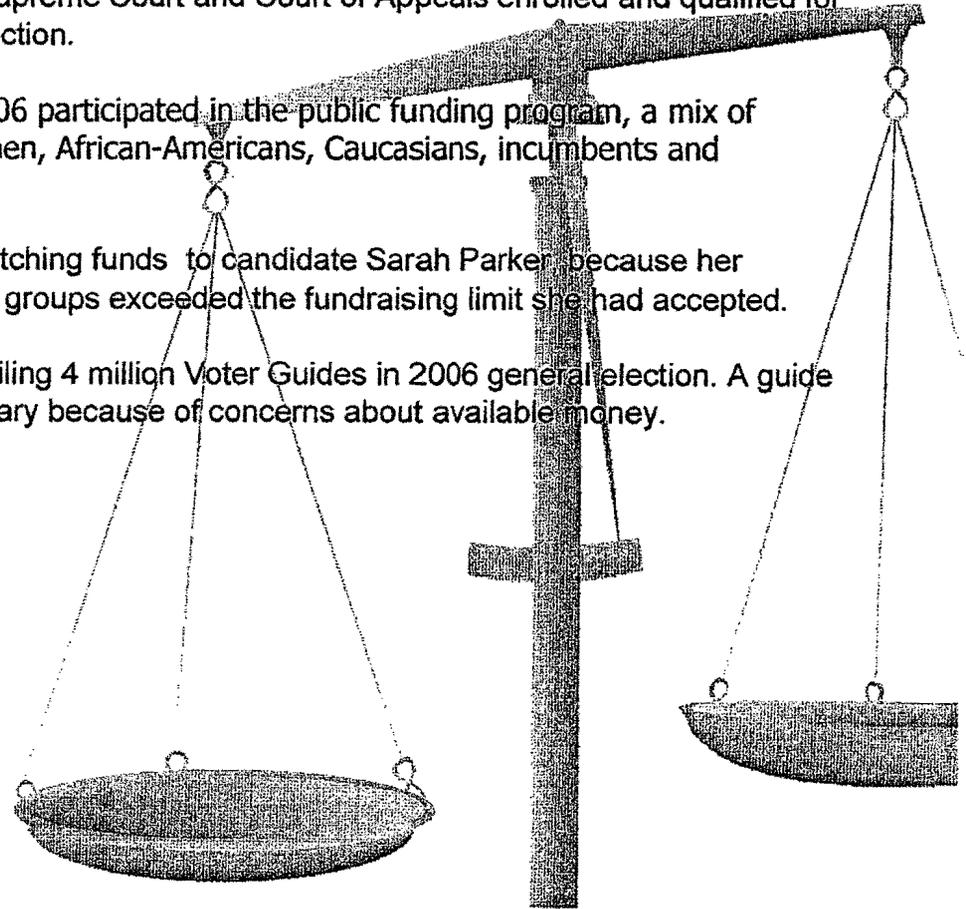
# First run 2004

- The number of Appellate Court candidates who passed public-trust thresholds and successfully qualified for public financing program: 12 of 16
- The number of candidates who sought to qualify but didn't meet minimum thresholds: 2
- The number of the winning candidates who received public financing: 4 of the 5 winners
- The amount of public funds provided to 12 qualified candidates in program: \$1,497,725
  - \$138,125 x 5 Court of Appeals candidates = \$690,625
  - \$201,775 x 2 Supreme Court (Parker seat) candidates = \$403,550
  - \$ 80,710 x 5 Supreme Court (Post Primary Vacancy seat) candidates = \$403,550



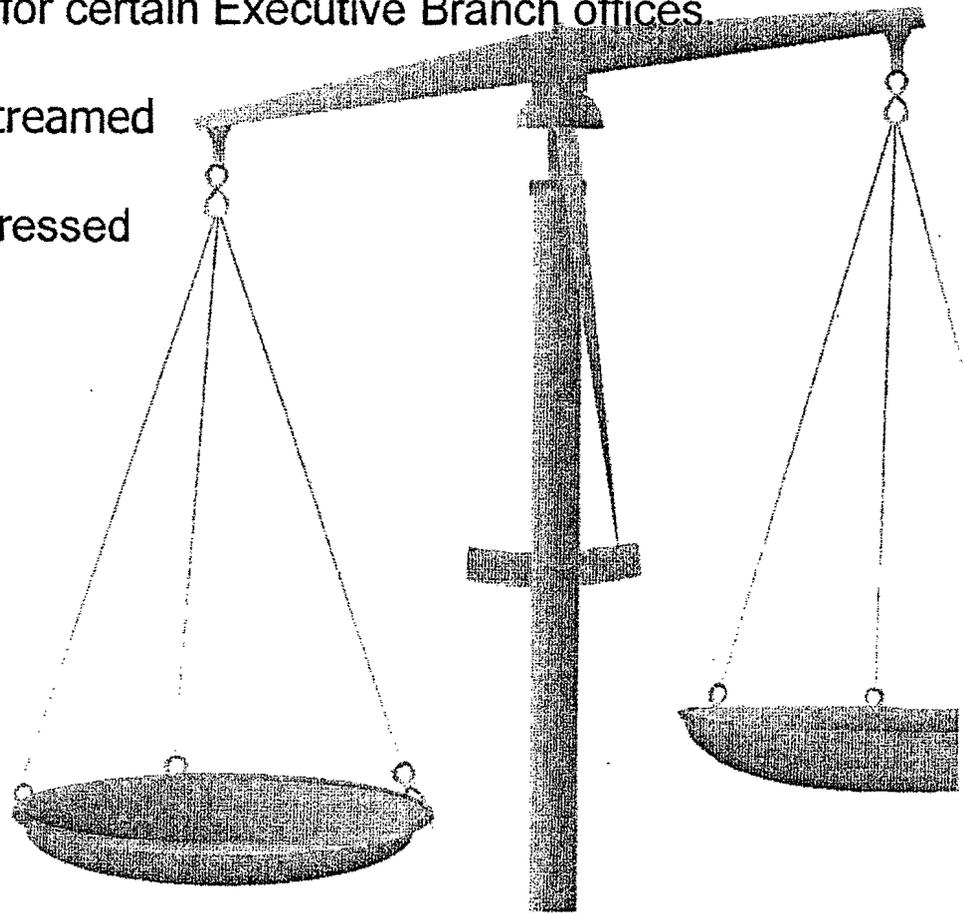
# Round 2: 2006

- 8 of the 12 candidates for the NC Supreme Court and Court of Appeals enrolled and qualified for the program in the 2006 general election.
- 5 of the 6 winning candidates in 2006 participated in the public funding program, a mix of Democrats, Republicans, men, women, African-Americans, Caucasians, incumbents and challengers.
- \$155,000 awarded as additional matching funds to candidate Sarah Parker because her opponent (Rusty Duke) and outside groups exceeded the fundraising limit she had accepted.
- \$650,000 spent for printing and mailing 4 million Voter Guides in 2006 general election. A guide was not mailed to voters in the primary because of concerns about available money.



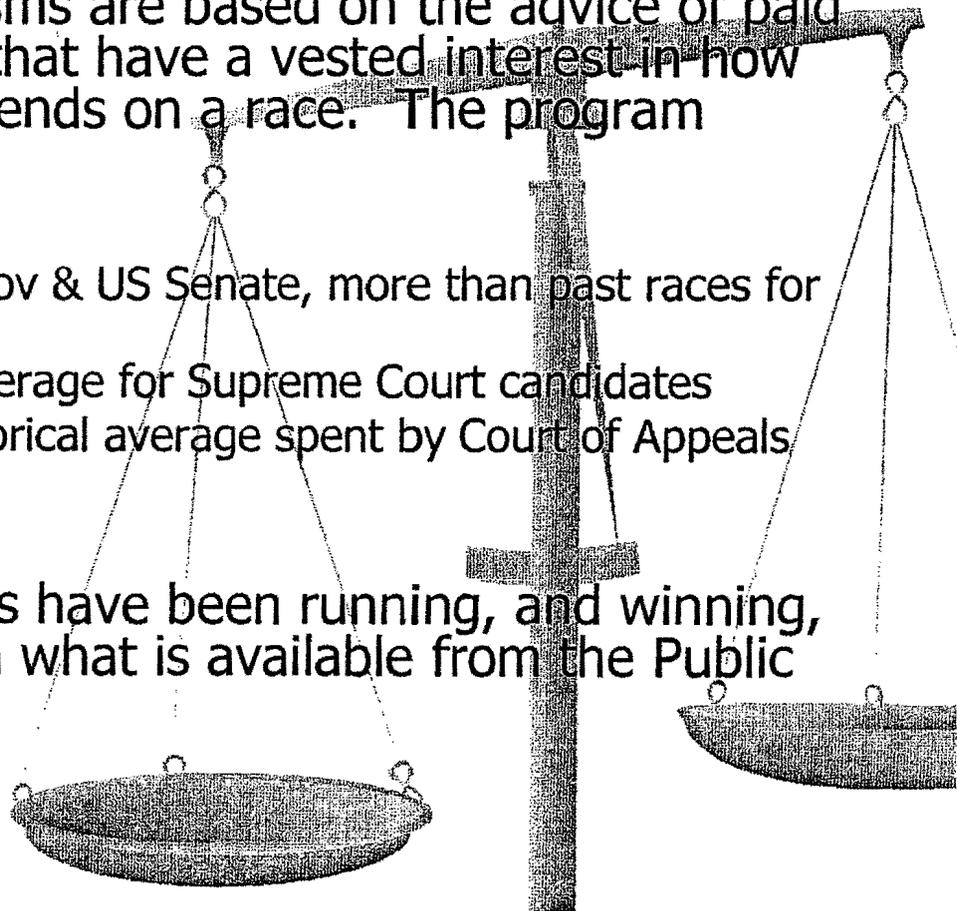
# Round 3: 2008

- Similar Program created for certain Executive Branch offices
- Program becomes mainstreamed
- Minor technical fixes addressed



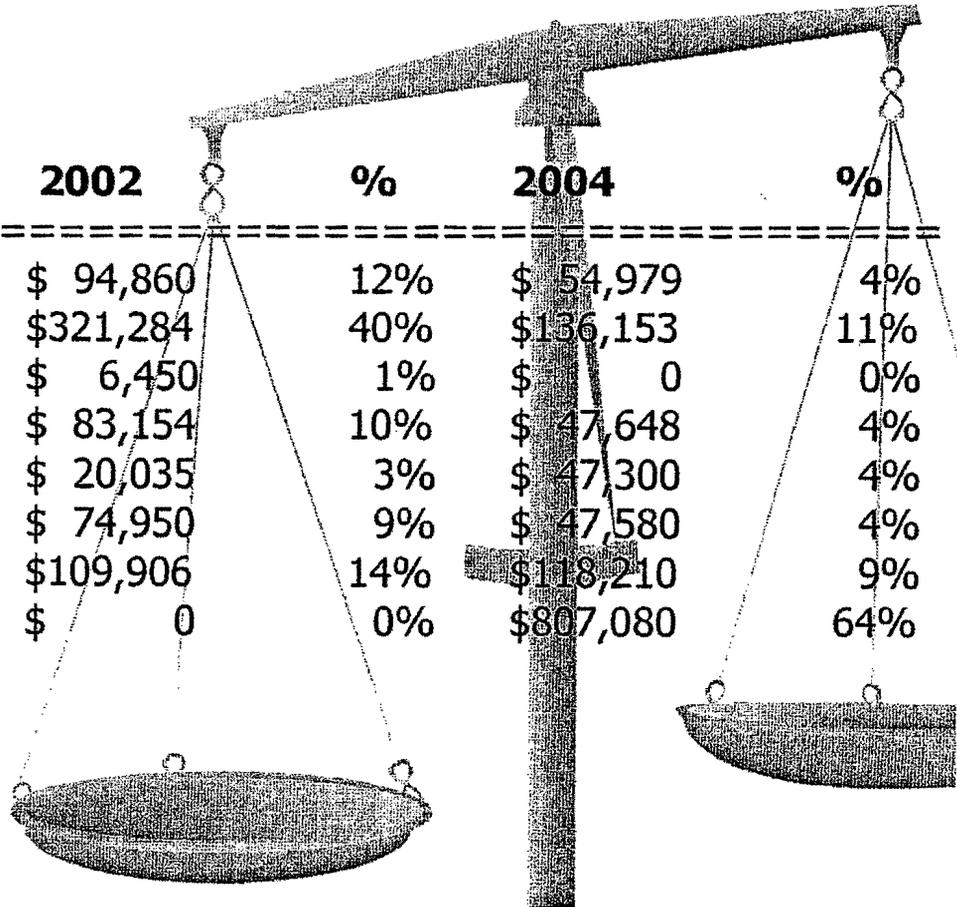
# “Is the money sufficient to run a campaign?”

- Many of these criticisms are based on the advice of paid political consultants that have a vested interest in how much a candidate spends on a race. The program provides:
  - Less than races for Gov & US Senate, more than past races for judge.
  - Over the historical average for Supreme Court candidates
  - Almost twice the historical average spent by Court of Appeals candidates.
- NC judicial candidates have been running, and winning, with less money than what is available from the Public Campaign Fund.



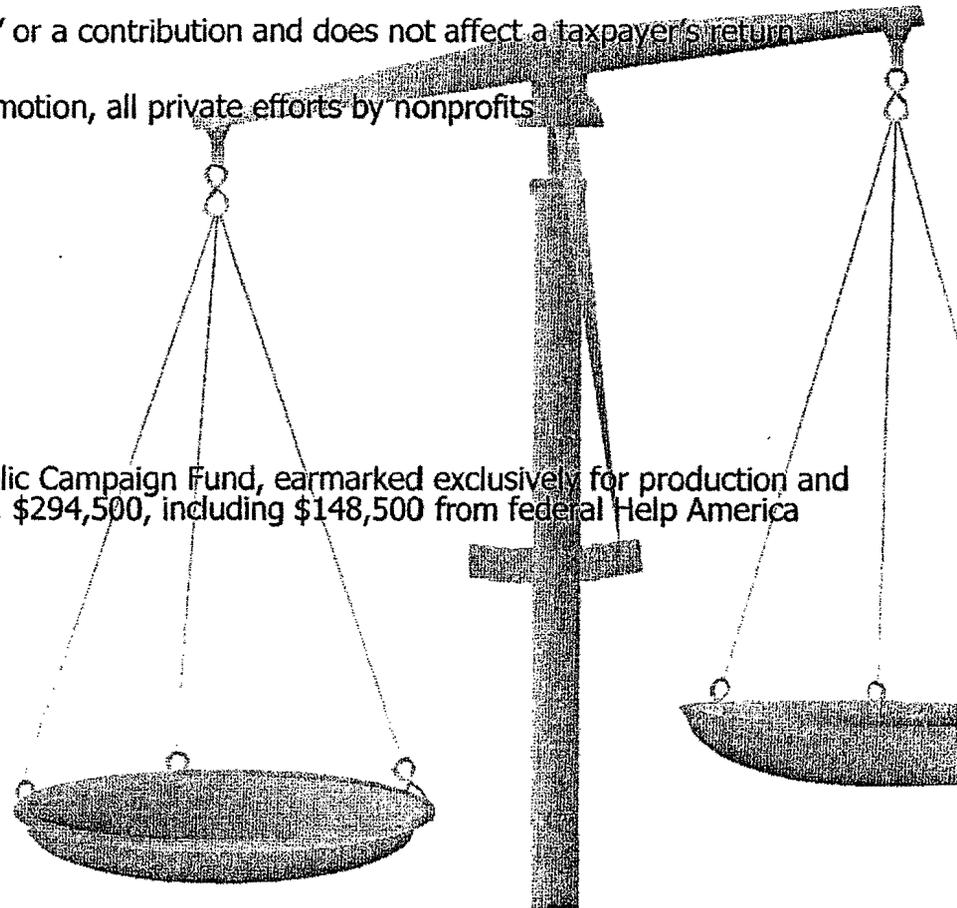
# Impact on Special Interest Group Financing of Judicial Races

SECTOR	2002	%	2004	%
Business Community	\$ 94,860	12%	\$ 54,979	4%
Legal Community	\$321,284	40%	\$136,153	11%
Labor Community	\$ 6,450	1%	\$ 0	0%
Other Professional Groups	\$ 83,154	10%	\$ 47,648	4%
Small Contributions (Under \$100)	\$ 20,035	3%	\$ 47,300	4%
Candidate	\$ 74,950	9%	\$ 47,580	4%
Unknown	\$109,906	14%	\$118,210	9%
Public Campaign Fund	\$ 0	0%	\$807,080	64%



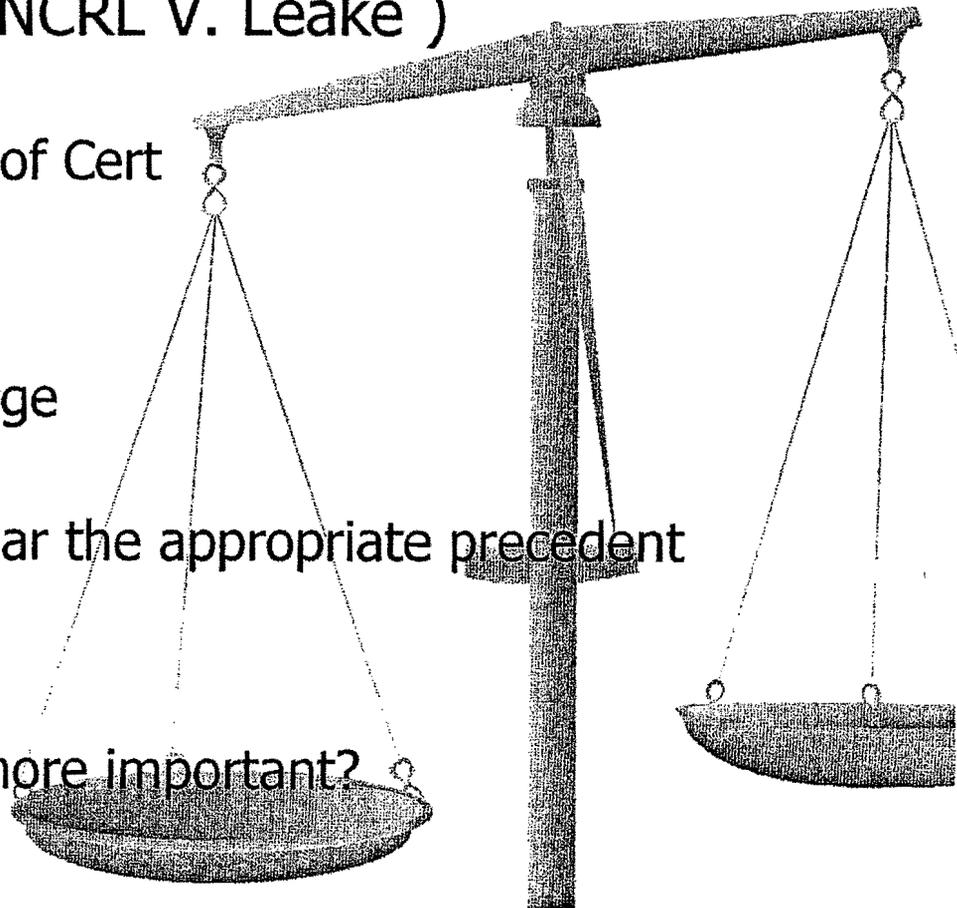
# Financing the Public Fund

- Income tax Check-off box
  - a Designation, not an “add-on” or a contribution and does not affect a taxpayer’s return
  - No public money spent on promotion, all private efforts by nonprofits
- Attorneys surcharge contributions
  - \$50 dollars
  - Mandatory vs. voluntary
  - El Khorri V. State Bar
- Additional funds donated to the Public Campaign Fund, earmarked exclusively for production and distribution of the state voter guide: \$294,500, including \$148,500 from federal Help America Vote Act funds.
- General Fund appropriation



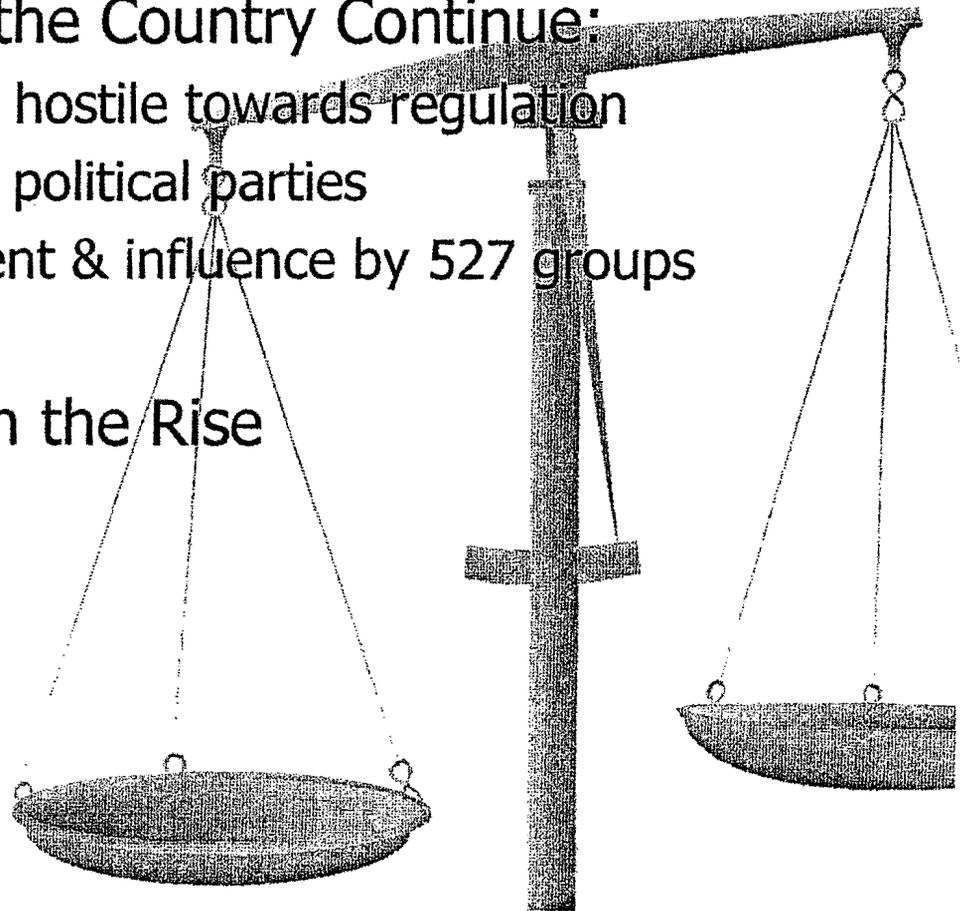
# Litigation

- Jackson v Leake (NCRL V. Leake )
  - 4th Circuit ruling
  - Post Davis Denial of Cert
- El Khorl
  - \$50 dollar surcharge
  - Tax v surcharge
  - IS Keller v State Bar the appropriate precedent
- Citizens United
  - Public Financing more important?



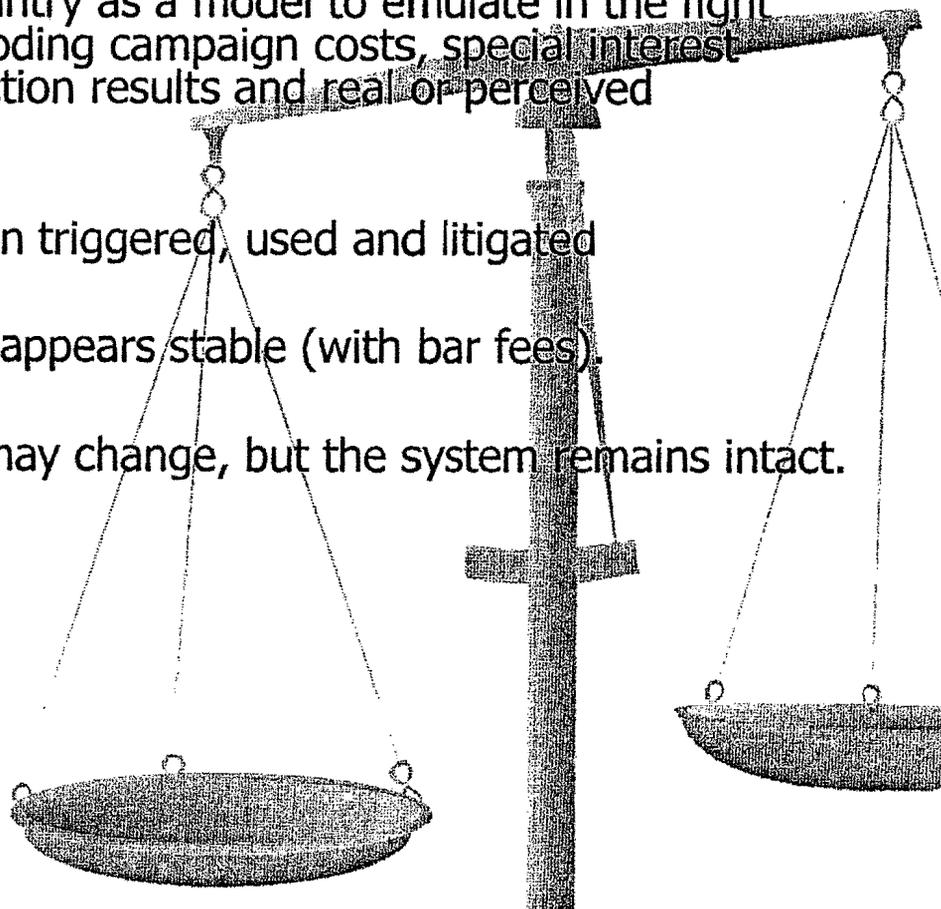
# The Future

- Problems around the Country Continue:
  - Court increasingly hostile towards regulation
  - More spending by political parties
  - Greater involvement & influence by 527 groups
- Public financing on the Rise
  - New Mexico
  - Wisconsin
  - Michigan



# NC has Escaped the Trends

- Regarded around the country as a model to emulate in the fight against problems of exploding campaign costs, special interest group influence over election results and real or perceived impropriety.
- matching funds have been triggered, used and litigated
- Funding for the program appears stable (with bar fees).
- Some details of the law may change, but the system remains intact.



# *For More Information...*

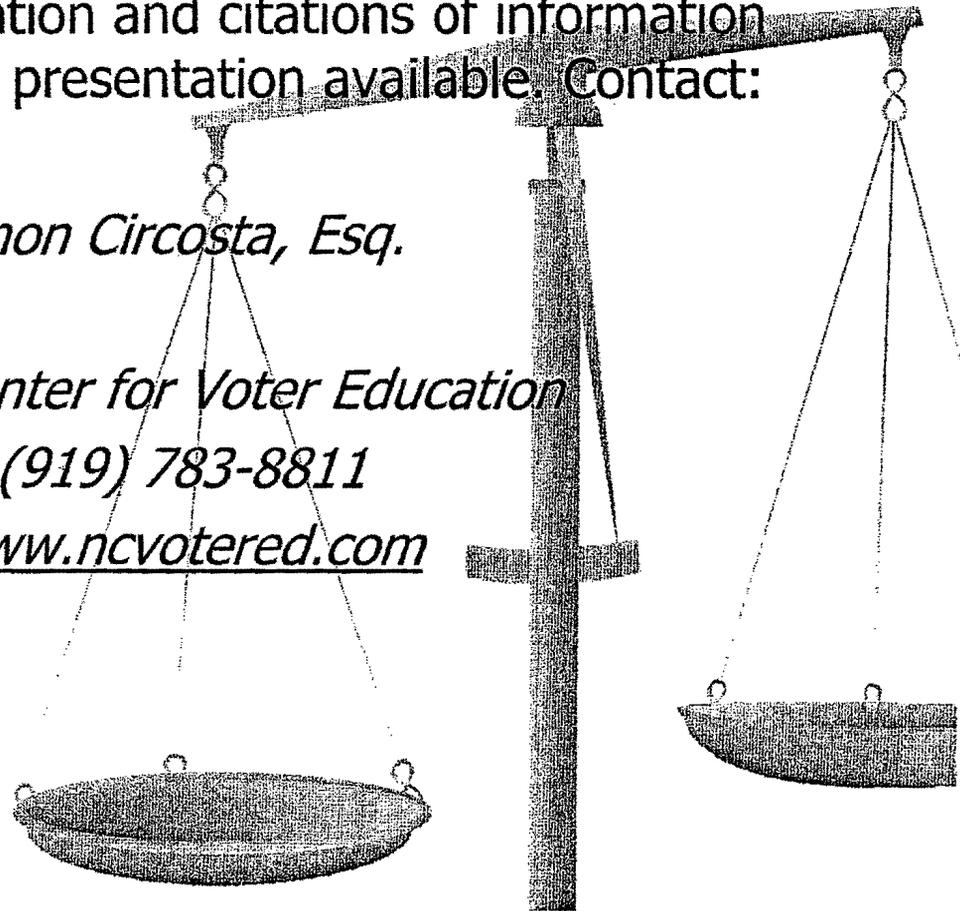
Complete documentation and citations of information contained within this presentation available. Contact:

*Damon Circosta, Esq.*

*The NC Center for Voter Education*

*(919) 783-8811*

*[www.ncvotered.com](http://www.ncvotered.com)*



**PUBLIC OPINION SURVEY –**  
**PUBLIC FINANCING 2009**



**Public Policy  
Polling**

**FOR IMMEDIATE RELEASE**

**June 2, 2009**

**INTERVIEWS: JONATHAN CROOK (252)-206-6192**

**QUESTIONS ABOUT THE POLL: TOM JENSEN (919)-744-6312**

### **West Virginia Voters Support N.C.'s System**

**Raleigh, N.C.** – Although voters in West Virginia may not necessarily agree with public finance for elections in general, Public Policy Polling finds they are overwhelmingly in favor of their state adopting a program similar to that in North Carolina's state judicial system.

73% of respondents say that they would be in favor a potential adoption by West Virginia of the public funding system in place in North Carolina, while only 19% are opposed. The law includes full public funding for candidates who agree to spending limits and reject funds from Political Action Committees, while also making the elections nonpartisan and providing voter guides to citizens.

Voters in West Virginia also believe that a public funding system would be effective in reducing conflicts of interests in the state's Supreme Court of Appeals, with 40% saying that such a law would help, and 28% saying it wouldn't.

However, PPP also found that 56% of voters are against public funding in general, with only 23% saying that they are for it.

"Although respondents claimed that they are against the concept of public finance systems, it seems they are for many of the upsides that such programs can produce," said Jonathan Crook of Public Policy Polling. "North Carolina's public finance law offers more than simply money to candidates who opt into the system, which is why it may be more attractive to West Virginia voters than typical public finance programs."

West Virginia voters also want stricter spending limits for candidates running in the Supreme Court of Appeals elections, with 67% saying that they are in favor of such a measure and 16% saying they are not.

PPP surveyed 1,366 West Virginia voters on May 26<sup>th</sup> and 27<sup>th</sup>. The survey's margin of error is +/-2.6%. Other factors, such as refusal to be interviewed and weighting, may introduce additional error that is more difficult to quantify.

If you would like an interview regarding this release, please contact Jonathan Crook at (252) 206-6192.

###

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Public Policy Polling  
3020 Highwoods Blvd.  
Raleigh, NC 27604

Phone: 888 621-6988  
Web: [www.publicpolicypolling.com](http://www.publicpolicypolling.com)  
Email: [Information@publicpolicypolling.com](mailto:Information@publicpolicypolling.com)





### West Virginia Poll

- Q1** Do you agree with the concept of public funding in general for candidates in state, federal, or judicial elections? If yes, press 1. If no, press 2. If you're not sure, press 3.
- Yes ..... 23%
  - No ..... 56%
  - Not Sure ..... 21%
- Q2** North Carolina currently has a law that gives statewide judicial candidates the option of accepting public campaign funding if they agree to spending limits and refuse money from Political Action Committees. It also makes judicial elections nonpartisan and provides voter guides to explain judicial candidates' qualifications. What would your position be on West Virginia adopting a similar program? If you strongly favor it, press 1. If you somewhat favor it, press 2. If you somewhat oppose it, press 3. If you strongly oppose it, press 4. If you're not sure, press 5.
- Strongly Favor ..... 38%
  - Somewhat Favor ..... 35%
  - Somewhat Oppose ..... 13%
  - Strongly Oppose ..... 6%
  - Not Sure ..... 9%
- Q3** Would you be in favor of any kind of public finance system for West Virginia's Supreme Court of Appeals elections? If yes, press 1. If no, press 2. If you're not sure, press 3.
- Yes ..... 25%
  - No ..... 45%
  - Not Sure ..... 30%
- Q4** Do you feel like judicial candidates are able to accept campaign financing from private entities like lawyers and law firms without creating a conflict of interests? If yes, press 1. If no, press 2. If you're not sure, press 3.
- Yes ..... 13%
  - No ..... 74%
  - Not Sure ..... 13%
- Q5** Do you think that a public finance system would be effective in reducing conflicts of interest in West Virginia's Supreme Court of Appeals? If yes, press 1. If no, press 2. If you're not sure, press 3.
- Yes ..... 40%
  - No ..... 28%
  - Not Sure ..... 32%
- Q6** Do you think that there should be more strict spending limits for West Virginia's Supreme Court of Appeals elections? If yes, press 1. If no, press 2. If you're not sure, press 3.
- Yes ..... 67%
  - No ..... 16%
  - Not Sure ..... 18%
- Q7** Would you describe yourself as a liberal, moderate, or conservative? If liberal, press 1. If moderate, press 2. If conservative, press 3.
- Liberal ..... 17%
  - Moderate ..... 41%
  - Conservative ..... 43%
- Q8** If you are a woman, press 1, if a man, press 2.
- Woman ..... 52%
  - Man ..... 48%

May 26-27, 2009

Survey of 1,366 West Virginia voters

3020 Highwoods Blvd.  
Raleigh, NC 27604

information@publicpolicypolling.com / 888 621-6988





**Public Policy  
Polling**

**Q9** If you are a Democrat, press 1. If a Republican, press 2. If other, press 3.

<i>Democrat</i> .....	51%
<i>Republican</i> .....	36%
<i>Other</i> .....	13%

**Q10** If you are white, press 1. If you are African-American, press 2. If other, press 3.

<i>White</i> .....	93%
<i>African-American</i> .....	4%
<i>Other</i> .....	3%

**Q11** If you are 18 to 29 years old, press 1 now. If you are 30 to 45, press 2. If you are 46 to 65, press 3. If older, press 4.

<i>18 to 29</i> .....	16%
<i>30 to 45</i> .....	26%
<i>46 to 65</i> .....	40%
<i>Older than 65</i> .....	18%

**May 26-27, 2009**

Survey of 1,368 West Virginia voters

3020 Highwoods Blvd.  
Raleigh, NC 27604

information@publicpolicypolling.com / 888 621-6988





	Base	Ideology		
		Liberal	Moderate	Conservative
<b>Public Funding in General</b>				
Yes	23%	42%	26%	13%
No	56%	37%	55%	64%
Not Sure	21%	21%	20%	22%

	Base	Ideology		
		Liberal	Moderate	Conservative
<b>West Virginia Adopting N.C.'s System</b>				
Strongly Favor	38%	39%	37%	37%
Somewhat Favor	35%	34%	39%	31%
Somewhat Oppose	13%	14%	12%	13%
Strongly Oppose	6%	5%	3%	8%
Not Sure	9%	8%	8%	10%

	Base	Ideology		
		Liberal	Moderate	Conservative
<b>Public Funding for Supreme Court of Appeals</b>				
Yes	25%	37%	26%	20%
No	45%	35%	45%	48%
Not Sure	30%	28%	29%	32%

	Base	Ideology		
		Liberal	Moderate	Conservative
<b>Accepting Money Without Conflict of Interests</b>				
Yes	13%	20%	10%	13%
No	74%	68%	75%	75%
Not Sure	13%	12%	15%	12%





	Base	Ideology		
		Liberal	Moderate	Conservative
<b>Can Public Finance Reduce Conflicts of Interests</b>				
Yes	40%	48%	44%	33%
No	28%	21%	26%	34%
Not Sure	32%	31%	31%	33%

	Base	Ideology		
		Liberal	Moderate	Conservative
<b>Stricter Spending Limits</b>				
Yes	67%	68%	68%	65%
No	18%	14%	15%	17%
Not Sure	18%	18%	17%	18%

	Base	Gender	
		Woman	Man
<b>Public Funding in General</b>			
Yes	23%	22%	25%
No	56%	52%	60%
Not Sure	21%	26%	16%

	Base	Gender	
		Woman	Man
<b>West Virginia Adopting N.C.'s System</b>			
Strongly Favor	38%	35%	40%
Somewhat Favor	35%	36%	34%
Somewhat Oppose	13%	13%	13%
Strongly Oppose	6%	4%	8%
Not Sure	9%	13%	5%

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	Base	Gender	
		Woman	Man
<b>Public Funding for Supreme Court of Appeals</b>			
Yes	25%	23%	28%
No	45%	40%	50%
Not Sure	30%	37%	23%

	Base	Gender	
		Woman	Man
<b>Accepting Money Without Conflict of Interests</b>			
Yes	13%	15%	11%
No	74%	68%	80%
Not Sure	13%	17%	9%

	Base	Gender	
		Woman	Man
<b>Can Public Finance Reduce Conflicts of Interests</b>			
Yes	40%	40%	40%
No	28%	21%	36%
Not Sure	32%	39%	24%

	Base	Gender	
		Woman	Man
<b>Stricter Spending Limits</b>			
Yes	67%	68%	66%
No	18%	10%	22%
Not Sure	18%	22%	12%





	Base	Party		
		Democrat	Republican	Other
<b>Public Funding in General</b>				
Yes	23%	30%	15%	20%
No	56%	48%	65%	61%
Not Sure	21%	22%	20%	19%

	Base	Party		
		Democrat	Republican	Other
<b>West Virginia Adopting N.C.'s System</b>				
Strongly Favor	38%	37%	38%	40%
Somewhat Favor	35%	37%	35%	26%
Somewhat Oppose	13%	12%	15%	11%
Strongly Oppose	6%	4%	5%	11%
Not Sure	9%	9%	8%	11%

	Base	Party		
		Democrat	Republican	Other
<b>Public Funding for Supreme Court of Appeals</b>				
Yes	25%	29%	19%	26%
No	45%	41%	52%	40%
Not Sure	30%	30%	29%	34%

	Base	Party		
		Democrat	Republican	Other
<b>Accepting Money Without Conflict of Interests</b>				
Yes	13%	15%	10%	10%
No	74%	70%	80%	75%
Not Sure	13%	15%	10%	15%





	Base	Party		
		Democrat	Republican	Other
<b>Can Public Finance Reduce Conflicts of Interests</b>				
Yes	40%	43%	36%	38%
No	28%	25%	34%	27%
Not Sure	32%	32%	30%	35%

	Base	Party		
		Democrat	Republican	Other
<b>Stricter Spending Limits</b>				
Yes	67%	64%	69%	70%
No	16%	16%	17%	10%
Not Sure	18%	20%	14%	20%

	Base	Race		
		White	African-American	Other
<b>Public Funding in General</b>				
Yes	23%	23%	27%	24%
No	56%	56%	54%	38%
Not Sure	21%	21%	19%	38%

	Base	Race		
		White	African-American	Other
<b>West Virginia Adopting N.C.'s System</b>				
Strongly Favor	38%	38%	36%	40%
Somewhat Favor	35%	35%	46%	21%
Somewhat Oppose	13%	13%	12%	24%
Strongly Oppose	6%	6%	3%	8%
Not Sure	9%	9%	4%	7%





**Public Policy  
Polling**

	Base	Race		
		White	African-American	Other
<b>Public Funding for Supreme Court of Appeals</b>				
Yes	25%	26%	19%	23%
No	45%	45%	51%	31%
Not Sure	30%	30%	30%	48%

	Base	Race		
		White	African-American	Other
<b>Accepting Money Without Conflict of Interests</b>				
Yes	13%	13%	9%	14%
No	74%	75%	68%	68%
Not Sure	13%	13%	22%	18%

	Base	Race		
		White	African-American	Other
<b>Can Public Finance Reduce Conflicts of Interests</b>				
Yes	40%	40%	26%	44%
No	28%	28%	53%	22%
Not Sure	32%	32%	21%	34%

	Base	Race		
		White	African-American	Other
<b>Stricter Spending Limits</b>				
Yes	67%	68%	51%	60%
No	16%	15%	29%	18%
Not Sure	18%	17%	19%	22%

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**Public Policy  
Polling**

	Base	Age			
		18 to 29	30 to 45	46 to 65	Older than 65
<b>Public Funding in General</b>					
Yes	23%	22%	22%	25%	22%
No	56%	50%	62%	57%	50%
Not Sure	21%	29%	16%	18%	28%

	Base	Age			
		18 to 29	30 to 45	46 to 65	Older than 65
<b>West Virginia Adopting N.C.'s System</b>					
Strongly Favor	38%	38%	33%	41%	35%
Somewhat Favor	35%	34%	33%	35%	37%
Somewhat Oppose	13%	14%	13%	12%	12%
Strongly Oppose	6%	4%	10%	5%	3%
Not Sure	9%	10%	11%	6%	13%

	Base	Age			
		18 to 29	30 to 45	46 to 65	Older than 65
<b>Public Funding for Supreme Court of Appeals</b>					
Yes	25%	32%	24%	25%	22%
No	45%	37%	45%	47%	46%
Not Sure	30%	30%	32%	28%	32%

	Base	Age			
		18 to 29	30 to 45	46 to 65	Older than 65
<b>Accepting Money Without Conflict of Interests</b>					
Yes	13%	23%	11%	11%	11%
No	74%	58%	79%	79%	69%
Not Sure	13%	19%	10%	10%	20%

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	Base	Age			
		18 to 29	30 to 45	46 to 65	Older than 65
<b>Can Public Finance Reduce Conflicts of Interests</b>					
Yes	40%	35%	41%	43%	35%
No	28%	28%	35%	27%	24%
Not Sure	32%	37%	24%	31%	40%

	Base	Age			
		18 to 29	30 to 45	46 to 65	Older than 65
<b>Stricter Spending Limits</b>					
Yes	67%	65%	66%	71%	61%
No	16%	19%	17%	14%	16%
Not Sure	18%	16%	17%	16%	23%

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**THOMAS R. TINDER**  
**PRESENTATION TO THE**  
**COMMISSION**  
**SEPTEMBER 21, 2009**

**WEST VIRGINIA  
INDEPENDENT COMMISSION ON  
JUDICIAL REFORM**

JUDICIAL SELECTION IN PRACTICE  
THOMAS R. TINDER, ESQ.

PUBLIC MEETING ON JUDICIAL SELECTION  
WEST VIRGINIA UNIVERSITY COLLEGE OF LAW  
MORGANTOWN, WEST VIRGINIA  
SEPTEMBER 21, 2009

## LEGAL AUTHORITIES

The Constitution of W.Va., Article VIII, Section 5, states that:

The judge or judges of each circuit court shall be elected by the voters of the circuit for a term of eight years, unless sooner removed or retired as authorized in this article. The Legislature may prescribe by law whether the election of such judges is to be on a partisan or nonpartisan basis.

In addition to the election process, the W.Va. Constitution provides a mechanism by which judicial vacancies shall be filled. Article VIII, Section 7 provides:

If from any cause a vacancy shall occur in the office of a justice of the supreme court of appeals or a judge of a circuit court, the governor shall issue a directive of election to fill such vacancy in the manner prescribed by law for electing a justice or judge of the court in which the vacancy exists, and the justice or judge shall be elected for the unexpired term; and in the meantime, the governor shall fill such vacancy by appointment until a justice or judge shall be elected and qualified. If the unexpired term be less than two years, or such additional period, not exceeding a total of three years, as may be prescribed by law, the governor shall fill such vacancy by appointment for the unexpired term.

Although the Constitution of W.Va. does not provide specific guidance as to how the Governor is to carry out the duty of filling vacancies, by using the power granted by the Constitution of W.Va., Article VII, Section 5, which provides that “[t]he chief executive power shall be vested in the governor, who shall take care that the laws be faithfully executed”, Governors have used executive orders to set up a judicial selection advisory committee process when Circuit Court Judge vacancies occur.

DISCLAIMER- This focus of this presentation is on the position of Circuit Court Judge where the legal and discretionary processes listed above have been normally followed through the years. For Supreme Court Justice vacancies, Governors have used individual procedures. The position of Family Court Judge has been both appointed and elected during its short existence. Magistrate vacancies are filled by Circuit Court Judges.

## FACTS AND FIGURES

Circuit Court Judge election results at the West Virginia Secretary of State's office show that, from the implementation of the Judicial Reorganization Act in 1976 and through the following two eight year election cycles in 1984 and 1992, more than 70% of the Judges were appointed by a Governor and then ran unopposed in their ensuing judicial election. Approximately 90% of the sitting elected Judges during this time period were re-elected when they ran, either opposed or unopposed, for the position.

In further reviewing the election results on the West Virginia Secretary of State's official website on the Internet, as well as information provided by the West Virginia Supreme Court of Appeals Administrative Office, the figures for Circuit Court Judge elections in the 2000 and 2008 Primary and General Elections are placed below:

### CIRCUIT COURT JUDGE ELECTIONS

	Uncontested Incumbent	Contested Won	Incumbent Lost	No Incumbent
2000 Primary Election	47	12	3	3
2000 General Election	53	8	1	3
2008 Primary Election	55	3	1	6
2008 General Election	52	6	1	6

In the 2000 primary election cycle, 75% of all incumbents were unopposed and 95% of all incumbents won their election contest. These figures for the 2000 general election are 85% unopposed and 98% winning the election.

For the 2008 election cycle, 93% of all incumbents were unopposed and 98% of all incumbents won in the primary election. For the general election, the figures are 88% unopposed and 98% winning the election.

Overall, for both the 2000 and 2008 primary and general elections, there were a total of 260 Circuit Court Judge races with only 18 elections having no incumbent judge involved. Of the 242 Circuit Court judicial races, 207 or 85% were unopposed and 236 or more than 97% of the incumbent judges won the election.

Currently, there are 70 sitting circuit court judges in West Virginia with 38 of them having been elected and 32 of them having been appointed by the governor. The majority of the 38 elected judges have assumed that position in the past two elections – 10 in the 2000 election and 8 in the 2008 election. For the 32 appointed judges, 12 have been appointed since the 2000 election.

Interestingly, of the 6 incumbent circuit court judges who have been defeated in the 2000 and 2008 election cycles, 2 were originally appointed and 4 were originally elected.

## ANALYSIS

It is extremely difficult to successfully challenge an incumbent Circuit Court Judge and win the election here in West Virginia.

Approximately equal numbers of Circuit Court Judges have initially attained the position either by gubernatorial appointment or by election since the last major change in West Virginia's judicial system in 1976.

The vast majority of the Circuit Court Judges retain those positions through being unopposed in the ensuing primary and general elections.

Only an extremely small number of all incumbent Circuit Court Judges have been defeated in hundreds of judicial elections since 1976.

The citizens of West Virginia have had knowledgeable and respected persons serve as Circuit Court Judges from 1976 through today and the citizens have overwhelmingly retained them at election time.

**AJS MODEL JUDICIAL  
SELECTION PROVISIONS**

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# MODEL JUDICIAL SELECTION PROVISIONS

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*Revised 2008*



Model Judicial Selection Provisions  
Revised 1994, 2008

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AJS Stock Number 292

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## DEDICATION

*These provisions are dedicated to the late Judge John L. Hill, Jr., who worked tirelessly toward judicial selection reform in his home state of Texas and who provided the inspiration and funding to make this revision possible. Judge Hill was firmly committed to the principle that the selection of judges should be based upon qualifications and experience rather than politics and money.*

*Judge Hill is the only person in Texas history to serve as Secretary of State, Attorney General, and Chief Justice of the Supreme Court. He resigned from the Court in 1988 to campaign for changes in the method for selecting Texas' judges.*

*Judge Hill served on the AJS Board of Directors and as President of the Texas State Chapter of AJS. He was also the recipient of the AJS Herbert Harley Award, an award given to individuals whose outstanding efforts result in substantial, long-term improvement to the state justice system.*

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## PREFACE TO THE 2008 REVISION

First compiled in 1985 and revised in 1994, the American Judicature Society's Model Judicial Selection Provisions offer exemplary language for establishing judicial nomination and evaluation processes of the highest quality. In early 2007, with the guidance of AJS staff, an outstanding advisory committee of members of the AJS Board of Directors began the task of updating the model provisions. The 2008 revisions represent American Judicature Society policy as to the "best practices" in selecting, retaining, and evaluating judges.

While earlier versions of the model provisions offered a variety of alternatives regarding the role and composition of judicial nominating and evaluation commissions, this version limits the availability of alternative provisions to provide for the strongest possible processes. Earlier versions also offered language for establishing judicial nominating commissions by constitutional provision, or by statute or executive order. With this version, in order to create a nomination process with the greatest stability and legitimacy, model constitutional or statutory language is provided in Part I and model language for an executive order process is offered in the Appendix.

New provisions have been added to require that nominating commissions establish written procedural rules and that members participate periodically in education and training programs. Provisions encouraging diversity among nominating and evaluation commission members, and in the recruitment of judicial applicants, have been strengthened.

New commentary accompanying these provisions addresses current concerns faced by judicial nominating commissions, such as the importance of striking an appropriate balance between providing transparency in the screening process and protecting applicant privacy, and relevant considerations as to whether nominating commissions should have a majority of lawyer or non-lawyer members.

The most significant additions are found in Parts III and IV regarding judicial performance evaluation. Establishing provisions and procedural rules for judicial performance evaluation, and accompanying commentary, have been expanded substantially with these revisions.

These provisions reference complementary AJS materials where appropriate, including the *Handbook for Judicial Nominating Commissioners* and *Judicial Merit Selection: Current Status*. These resources and others are available online on AJS' Judicial Selection in the States website at [www.judicialselection.us](http://www.judicialselection.us). Links to state

constitutional and statutory provisions and court rules regarding judicial nomination and evaluation are also available on the website.

This revision would not have been possible without the committed efforts of the advisory committee:

**Marty Belsky**, Dean and Randolph Baxter Professor of Law, The University of Akron School of Law

**Hon. Kevin Burke**, Judge, Fourth Judicial District of Minnesota

**Momi Cazimero**, President/Owner, Graphic House

**Dennis Courtland Hayes**, Interim President and CEO, NAACP

**Bill Johnston**, Young, Conaway, Stargatt & Taylor LLP

**Alex Reinert**, Assistant Professor of Law, Benjamin N. Cardozo School of Law

**Hon. Peter Webster**, Judge, Florida First District Court of Appeal

An electronic version of the *Model Judicial Selection Provisions* is available for download at [www.judicialselection.us](http://www.judicialselection.us).

Malia Reddick

AJS Director of Research and Programs \*

Staff Liaison to the MJSP Advisory Committee

## I.

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### ESTABLISHING A COMMISSION PLAN FOR APPOINTMENT TO OFFICE

#### *Commentary*

These provisions provide for the establishment of a merit selection process by constitution or statute. In several jurisdictions, merit plans have been established by executive order, but the stability of a constitutional or statutory system is preferable.

#### **Section \_\_\_\_ Commission-Based Appointment to Judicial Office**

##### **Section \_\_\_\_01. Nomination and Appointment.**

The governor shall fill any vacancy in an office of \_\_\_\_ court justice or \_\_\_\_ court judge by appointing one person nominated by the judicial nominating commission [for the district/circuit where the vacancy occurs]. The judicial nominating commission shall nominate no more than five nor less than two best qualified persons for each vacancy. If the governor fails to fill a vacancy within 30 days from the day the names are submitted, the [chief justice] [presiding judge for that district/circuit] shall appoint one of the nominated persons.

#### *Commentary*

Each judicial vacancy should be treated individually to the greatest extent possible. If the positions to be filled require specialized knowledge and legal experience (i.e. family law, juvenile matters), individual consideration of applicants for each vacancy becomes even more important. Although the number of names submitted to the governor need not be capped at five, the number should be sufficiently low that the commission nominates only the best qualified candidates. Five names appears to be an appropriate maximum because it gives, and limits the governor to, the best qualified candidates. Commissions in less populated areas may have difficulty finding five best qualified nominees and should therefore be allowed the flexibility to submit fewer names. In most states, the names submitted to the governor are listed in alphabetical order to avoid any indication of a commission's preference. Thirty days is allowed as a reasonable amount of time for the governor to conduct an investigation of the nominees. In the event that the governor fails to act within that reasonable time period, a judicial officer may appoint from the commission's list. This provision ensures that the final appointment will be made within

a reasonable time and from the list of nominees. This separation of functions allows for independent and nonpartisan evaluations and nominations by a responsible commission and final appointment by a governor who is politically accountable. If necessary, Section \_\_\_\_01 may be adapted to allow for filling midterm vacancies. For information on how merit-plan jurisdictions deal with these variables, see Tables 2 and 3, *Judicial Merit Selection: Current Status* (AJS: 2008), at [http://www.judicialselection.us/judicial\\_selection\\_materials/](http://www.judicialselection.us/judicial_selection_materials/). For example, only five states permit as many as six or seven nominees; the great majority require between two and five names. The majority of merit-plan states specify that the list be submitted in alphabetical order.

**Section \_\_\_\_02. Judicial Nominating Commission.**

[The] [Each] judicial nominating commission shall consist of seven members. Four attorney members shall be selected for six-year terms by the bar of the [state] [judicial district/circuit], except as provided by Section \_\_\_\_03. Three lay members shall be appointed [from among the residents of the district/circuit] for six-year terms, except as provided in Section \_\_\_\_03, by the governor. [The] [Each] commission shall choose one of its members to serve as chair for a term of three years. Appointments and elections to the commission[s] shall be made with due consideration to geographic representation and to ensure that no more than a simple majority of commissioners are of the same political party. All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the diversity of the jurisdiction (e.g., racial, ethnic, gender, and other diversity). Vacancies shall be filled for an unexpired term in like manner. No member of [the] [a] nominating commission may hold any other office under the United States, the State, or other governmental entity for which monetary compensation is received. No member shall be eligible for appointment to a state judicial office so long as he or she is a commission member and for [four] [three] years thereafter.

*Commentary*

In a democratic society it is important that public bodies such as judicial nominating commissions are broadly representative of the communities they serve. Care should be taken to ensure that the composition of the commission is reflective of the geographic and demographic makeup of the state or district and that neither political party has more than a simple majority of commission members. A balanced commission will include attorneys who can advise on the needs of the court and the professional qualifications of applicants. Lay members represent the public and have useful links to the community when screening and investigating applicants, and their non-legal perspective lends the process credibility and legitimacy in the eyes of the public. For these reasons, some jurisdictions have opted for a majority of lay members on the commission. If a judge is a commission member, s/he should have limited power so as to avoid exercising undue influence over other commission members. A method for selecting the attorney members is not specified here since bar organizations vary significantly from state to state. Many

states hold elections to select the attorney members, while in other states bar leaders make the appointments. Members should serve for a period long enough to enable them to develop selection skills. No member of a commission should seek judicial office until a sufficient amount of time has passed to ensure a commission's objectivity and preserve public confidence. Large jurisdictions or those with many vacancies to fill each year may want to expand the number of commissioners to nine in order to facilitate the commission's work of recruiting, screening, and investigating applicants. *Judicial Merit Selection: Current Status*, Table 1, at [http://www.judicialselection.us/judicial\\_selection\\_materials/](http://www.judicialselection.us/judicial_selection_materials/), details commission composition in jurisdictions with commission-based appointment of judges.

**Section \_\_.03. Terms of Initial Commission Members.**

The initial members of [the] [each] judicial nominating commission shall serve for terms as follows: one lay member and one attorney member for two years, one lay member and one attorney member for four years, and one lay member and two attorney members for six years.

*Commentary*

Commissioners' terms are staggered to balance the new perspectives of incoming members with the expertise and experience of continuing members. Staggered terms also help deter the development of blocs in the commission; such blocs may subvert the goal of nominating only the best qualified candidates.

**Section \_\_.04. Reimbursement, Compensation, and Administrative Assistance.**

(a) Members of [the] [each] judicial nominating commission shall be reimbursed for all expenses incurred in carrying out their official duties.

(b) Compensation also may be prescribed by law.

(c) All resources necessary to carrying out [the] [each] commission's official duties shall be provided, including staff, equipment, and materials.

*Commentary*

Offering compensation could help increase commission diversity, as it will provide an incentive to encourage those with lower incomes, those who must travel a significant distance, and/or those who would otherwise be reluctant to serve. To foster an effective commission, essential services must be made available. These services should include staff support to coordinate commission travel, meetings, conference calls, and candidate interviews; office services; and any other necessary support so that commissions receive timely assistance. In some jurisdictions, the state or local court administrator provides this support; in others, the commission chair's administrative assistant coordinates commission activities.

**Section \_\_.05. Powers of the Judicial Nominating Commission.**

[The] [Each] judicial nominating commission shall have the power to adopt written rules to formalize and standardize its procedures for selecting the best qualified nominees for judicial office.

### *Commentary*

The benefits of standard, written procedures are many. Written rules guide commissioners and applicants. They help ensure that all applications are handled similarly, and reassure the public that the process is fair and will withstand scrutiny. Written rules governing commissioner ethics have been adopted by a number of states. Examples include specific provisions requiring disclosure of personal, business, or professional relationships with applicants and commissioner recusal in instances of close relationships; impartiality in selecting nominees; and adherence to commission confidentiality requirements. Alaska, Idaho, Missouri, Nebraska, and Rhode Island require new commissioners to take an oath of office. Additionally, Florida, Hawaii, and Tennessee have adopted specific ethical guidelines. Many other states have adopted rules regarding criteria to be used in evaluating applicants, investigating and interviewing them, and voting for the final nominees, as well as other commission procedures. A number of states post their written rules on state court websites. Rules may also be laid out in statutory language or in a governor's executive order. For details about various commissions' written procedural and ethical rules, see the relevant chapters on these topics in the *Handbook for Judicial Nominating Commissioners* (AJS: 2004) at [http://www.judicialselection.us/judicial\\_selection\\_materials/](http://www.judicialselection.us/judicial_selection_materials/).

### *Alternative retention provisions:*

#### **Section \_\_.06. Retention Elections.**

Any judge who seeks additional terms for the same judicial office shall be retained in office by vote of the electorate. The retention election shall be nonpartisan, shall require the affirmative vote of a majority of those voting on the question to retain the judge, and shall be coupled with a judicial performance evaluation program that will provide information to voters in retention elections. (See Section \_\_.07 below.)

### *Commentary*

Only one state, New Mexico, requires a supermajority of 57% of votes cast to retain a "merit-selected" judge in office. The nonpartisan court plan, or merit selection, is designed to initially select the best qualified persons for judgeships, and then provide appropriate public accountability through uncontested retention elections. Because of the increasing involvement of interest groups that oppose judges in retention elections and threaten their decision-making independence, a simple affirmative majority of votes cast is designed to safeguard that independence.

#### **Section \_\_.06. Retention by Reappointment.**

Any judge who seeks additional terms for the same judicial office shall be retained in office by a finding of the appointing authority that the judge has served competently and with integrity.

*Commentary:*

The competence of all judges should be periodically reviewed, although methods of retention may vary. In some jurisdictions it may be preferable to hold retention elections, in others to allow the appointing authority (usually the governor) to make the retention decision. Regardless of the form it takes, judicial retention should be designed to ensure that only qualified judges remain on the bench. A judicial performance evaluation program (see Section \_\_.07) may be implemented to inform the reappointing authority's decision.

**Section \_\_.07. Retention Evaluation of Justices and Judges.**

The [supreme court] [judicial council] shall establish, after public hearings, a process for evaluating judicial performance for all justices and judges who file a declaration to be retained in office, and shall provide information gathered in the evaluation process [to the public at a time reasonably prior to the election, but in no event less than 60 days before the election] [to the reappointing authority]. The rules governing the evaluation process shall include written performance criteria and call for performance reviews that survey opinions of persons who have knowledge of the justice's or judge's performance. The public shall have a full and fair opportunity to participate in the evaluation process.

## II.

---

### IMPLEMENTING A COMMISSION PLAN FOR APPOINTMENT TO OFFICE

#### Rule \_\_\_\_ . JUDICIAL NOMINATING COMMISSION

##### Rule \_\_\_\_ .01. Written rules.

[The] [Each] commission shall adopt written rules that formalize and standardize all operating procedures and ethical practices.

##### *Commentary*

If the commission does not have written ethical and procedural rules and explicit, measurable selection criteria, commissioners should develop and adopt them. The use of written, uniform rules reassures the public and potential applicants that the process is designed to treat all applicants equally and to nominate the best qualified persons. A copy of the rules should be given to all applicants and made available to the public on request, by posting on a court website, distributing through the media, or disseminating in a manner best suited to the jurisdiction. The commission rules should explicitly address, for example, situations that pose a conflict of interest to a commissioner, such as when a business or law partner or a close relative applies for a judgeship. Commission rules should also clarify the confidentiality of commission proceedings such as deliberations and voting. For detailed instruction on commission ethics and examples of ethics provisions adopted by various commissions across the country, see Chapter 1: Ethics, in the *Handbook for Judicial Nominating Commissioners* at [http://www.judicialselection.us/judicial\\_selection\\_materials](http://www.judicialselection.us/judicial_selection_materials). Subsequent chapters address the importance of the organizational meeting, measurable evaluative criteria, screening and investigation of applicants, interviewing candidates, voting for the nominees, and submitting the names to the appointing authority.

##### Rule \_\_\_\_ .02. Vacancy.

The commission shall meet and submit a list of no more than five nor less than two persons best qualified for the judicial office to the governor within 60 days of the occurrence of a vacancy.

##### *Commentary*

Commissions in most jurisdictions submit between two and five names to the appointing authority. For a comparative overview, see *Judicial Merit Selection: Current Status*, Table 3, at [http://www.judicialselection.us/judicial\\_selection\\_materials/](http://www.judicialselection.us/judicial_selection_materials/).

**Rule \_\_\_\_03. Quorum.**

The commission cannot act unless a quorum exists. A quorum consists of a majority of the commission plus one.

*Commentary*

In light of the importance of the nominating commission’s role in judicial selection, more than a simple majority of commission members should participate in the commission’s deliberations and decision making.

**Rule \_\_\_\_04. Chair.**

The chair shall convene and preside at all meetings. When the chair is absent, the commission shall choose a member to act as temporary chair.

*Commentary*

The role of the chair is to call commission meetings, keep commission members notified of commission business, act as a spokesperson for the commission, monitor commission activities, and ensure that all commissioners and applicants abide by commission rules.

**Rule \_\_\_\_05. Open meetings.**

(a) All organizational meetings of the judicial nominating commission shall be open to the public. An “organizational meeting” is an initial meeting to discuss the commission’s procedures and requirements for the vacancy. The commission shall make available copies of its written rules. A notice outlining the topics to be discussed should be given to the public 72 hours prior to the meeting. Public participation should be encouraged at each organizational meeting.

(b) All final deliberations of the judicial nominating commission shall be secret and confidential.

(c) The confidentiality of other proceedings of the judicial nominating commission shall be determined by commission rule.

*Commentary*

Among states that use judicial nominating commissions, what is treated as confidential and what is made public (applications, interviews, deliberations, voting) varies greatly. For more information on state practices, see *Judicial Merit Selection: Current Status*, Table 4, at [http://www.judicialselection.us/judicial\\_selection\\_materials/](http://www.judicialselection.us/judicial_selection_materials/). Finding the appropriate balance between preserving the privacy of judicial applicants and providing transparency in the screening process is one of the greatest challenges that nominating commissions face. Applicants should be protected from public scrutiny regarding their private lives and from public embarrassment that could result from failure to receive a nomination. At the same time, the public should have sufficient knowledge of the nominating process to maintain confidence in that process. Commission proceedings should be as open as possible. However, the final deliberations and selection of nominees should remain confi-

dential to encourage free and open discussion of the candidates' qualifications. To preserve confidentiality of these proceedings, some states may need to exempt the final deliberations from the state Open Meetings Act.

**Rule \_\_\_\_06. Publicity.**

When a judicial vacancy occurs or when it is known that a vacancy will occur at a definite date, the chair shall publicize the vacancy and solicit the submission of names of qualified individuals by press release to the media; notice to state, local, women, and minority bar associations; and posting in the courthouse[s] of the [state] [district] [circuit].

*Commentary*

These requirements are minimal and should be supplemented with active recruitment techniques. Special effort should be made to circulate the notice of vacancy to women and minority bar associations and organizations of public-sector attorneys.

**Rule \_\_\_\_07. Recruiting applicants.**

Commissioners shall recruit qualified individuals to apply for judicial appointment.

*Commentary*

If the commission reflects the geographic and demographic makeup of the jurisdiction, its members will have links to various communities. Therefore, in a further effort to broaden and diversify the applicant pool, commissioners should seek out and encourage applications from highly qualified individuals who might not actively seek a judicial appointment. See Chapter 4: Notice of Vacancy and Recruitment, in the *Handbook for Judicial Nominating Commissioners* at [http://www.judicialselection.us/judicial\\_selection\\_materials/](http://www.judicialselection.us/judicial_selection_materials/). However, it is imperative that commissioners indicate to recruited applicants that they are soliciting applicants on behalf of the entire commission, and that the recruited applicant will be subject to the same evaluative scrutiny as other applicants.

**Rule \_\_\_\_08. Submitting names of nominees to the appointing authority.**

- (a) The names of nominees shall be submitted to the appointing authority in alphabetical order.
- (b) A memorandum may accompany the list of nominees and may state facts concerning each of the nominees listed.
- (c) Upon submission of the names to the appointing authority, the appointing authority shall make the names public and public comment shall be encouraged.

*Commentary*

Once the names of nominees are submitted to the appointing authority, the commission may provide additional information only on request of the appointing authority. The commission's written rules should address how the commission

responds to any post-nomination communications from the appointing authority. If the commission would like to provide supplemental background information on the nominees, it may do so in a memo without indicating any commission preference. A substantial majority of states also allow for public comment at this point in the selection process. This is the point at which public preferences are appropriately voiced. By providing the opportunity for public participation, the appointing authority also fosters public confidence in the final appointment.

**Rule \_\_.09. Candidacy and selection of commission members.**

(a) Any individual wishing to serve on the judicial nominating commission can declare his or her candidacy as follows:

Any person may be considered for an attorney position by declaring his or her candidacy in writing to the \_\_ at \_\_, if that person has been a resident of this state for 3 years and is licensed to practice law in this state.

Any person may be considered for a lay position by declaring his or her candidacy in writing to the governor's office at \_\_, if that person has been a resident of this state for 3 years.

(b) Declarations of candidacy must be submitted within 30 days after publication of notice of the vacancy and should be accompanied by descriptions of the candidates' qualifications for service on the commission.

(c) A commission member's term shall commence on \_\_, the day of appointment. A commissioner may remain on the commission until his/her replacement has actually been appointed.

*Commentary*

The process for declaring an interest in serving on the judicial nominating commission should be open and accessible. A residency requirement of three years' duration has been included to ensure that commissioners have knowledge of the state and the community.

*For those states using retention elections add:*

**Rule \_\_.10. Judicial retention ballot.**

A separate nonpartisan judicial ballot shall be designed for each judicial district in which a justice or judge is seeking an additional term. The ballot shall be divided into \_\_ parts corresponding to the court to which the candidate is seeking to be retained. Within each part the ballot shall read:

"Shall \_\_ be retained as [justice] [judge] of the \_\_ court for \_\_ years?  
 \_\_Yes \_\_No"

**Rule \_\_.11. Commissioner education.**

Every [two] [three] years, the [commission chair] [state court administrator] shall conduct an educational program for commissioners in which the mission of the judicial nominating commission[s] and [its] [their] policies and procedures are thoroughly reviewed and discussed.

*Commentary*

It is important that commissioners have the opportunity periodically to step back from their work to assess what they are doing and how they are doing it. Given that most commissioners have staggered terms, an educational program every two or three years will orient new commissioners to the process, and give experienced commissioners time to reflect on their past work. Commissioners can discuss ethical and procedural challenges they have encountered and whether or how they need to revise their rules to meet those challenges. If a state has an appellate commission and a number of local ones, commissioners can discuss and learn from the challenges and successes of members of other commissions. Finally, education reinforces the commission's role as an independent body with a mission to nominate the best qualified candidates for judgeships.

### III.

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## ESTABLISHING A PERFORMANCE EVALUATION PROGRAM FOR RETENTION IN OFFICE

### Section \_\_\_\_ Judicial Performance Evaluation for Retention in Office

#### Section \_\_\_\_01. Purposes.

These provisions are intended to establish a judicial performance evaluation program that will (1) provide fair, responsible, and constructive information about judicial performance [to persons voting on the retention of justices and judges] [to the authority responsible for reappointing justices and judges]; (2) facilitate self improvement of all such justices and judges; and (3) ensure judicial integrity and competence. Any commission established under these provisions also may conduct midterm evaluations of judges not then standing for retention.

#### *Commentary*

Judicial performance evaluation programs are and should be designed for the purposes of reaffirming the integrity and competence of the judiciary. At the same time, such programs should be implemented in a manner that preserves judicial independence. The evaluation process should be designed so as to avoid partisan, political, and other external influences that could undermine these fundamental goals. To that end, judges should be evaluated according to whether they demonstrate the qualities that all judges should possess—e.g., knowledge of the law, impartiality, professionalism—rather than whether they make decisions with which the public agrees. Judicial performance evaluation programs have additional benefits as well, in that they may identify the need for and improve the content of judicial education programs and increase public awareness of the work of the judiciary.

#### Section \_\_\_\_02. Appellate Commission on Judicial Performance Evaluation.

The periodic evaluation of appellate judges subject to retention shall be conducted by the Appellate Commission on Judicial Performance Evaluation. The appointment of commissioners and the activities and operations of the commission shall be governed by the following provisions:

(a) *Appointment of Commissioners:* The commission shall consist of nine (9) members appointed by the [supreme court] [judicial council]. There shall be adequate representation of laypersons on the commission, but at least five members of the

commission shall be attorneys. The appointing authority shall make reasonable efforts to ensure that the commission substantially reflects the diversity of the jurisdiction (e.g., racial, ethnic, gender, and other diversity). Commission members shall choose one of their number to serve as chair.

(b) *Terms.* All members of the commission shall serve staggered terms of four years except that, of those first appointed, four members shall serve terms of two years. No member may serve more than two terms. A member appointed to fill an unexpired term shall serve the remainder of that term.

(c) *Powers and Duties of the Commission.* The powers and duties of the commission shall be as follows:

(1) To develop techniques for evaluating all justices and judges subject to retention on relevant performance criteria which include, but are not limited to, legal ability, integrity and impartiality, communication skills, professionalism and temperament, and administrative capacity.

(2) To assist trial court commissions in identifying additional evaluation criteria appropriate for trial judges;

(3) To develop uniform statewide evaluation procedures;

(4) To develop performance evaluation surveys of lawyers, jurors, litigants, other judges, court personnel, and others who have recently had direct contact with justices and judges;

(5) To employ agents to distribute, collect, and tabulate surveys;

(6) To produce and distribute to [the public] [the authority responsible for retention] no later than [60 days before the retention election] [[90] [120] days before the judge's term expires] pertinent information concerning each justice or judge subject to retention.

(7) To develop a procedure for justices and judges to receive and respond to their evaluation reports before they are made public.

(8) To promulgate, subject to approval by the [supreme court] [judicial council], rules necessary to implement the provisions of this legislation.

***Optional provision for midterm evaluations:***

(9) To conduct confidential midterm evaluations of the performance of appellate judges not then standing for retention. The results shall be shared only with the reviewed judge and an appropriate supervising judge or justice as determined by the commission.

***Commentary***

The size of currently operating commissions varies substantially, from 7 to 30 members. One factor that should be considered in determining the size of the commission is the number of judges to be evaluated. Commissions should also be large enough to represent the demographic and geographic diversity of the juris-

diction. The process for appointing commissioners varies from state to state. While most states call for a single appointing authority, others allow multiple entities (e.g., the governor, legislative leaders, the bar) to nominate and/or to appoint commission members. To prevent political or special interests from influencing the composition or work of the commission, commission members should be appointed by a single authority within the judicial branch. Having a single appointing authority should also facilitate diversity on the commission.

These criteria represent qualities that all justices and judges should possess and demonstrate. Justices and judges demonstrate their "legal ability" in their legal reasoning skills and knowledge of substantive and procedural law. "Integrity and impartiality" is evidenced by the fair and respectful treatment of all litigants, the avoidance of impropriety and the appearance of impropriety, and the rendering of decisions based solely on law and fact. "Communication skills" encompass the ability to communicate effectively orally and in written orders and opinions. Justices and judges demonstrate their "professionalism" not only in the courtroom and in their chambers, but also in the legal community and in the public arena. Their "temperament" is indicated by the extent to which they treat those with whom they interact with courtesy and patience. "Administrative capacity" represents control over judicial proceedings, docket management and timely case disposition, and effectiveness in dealing with other participants in the judicial process. Performance evaluation criteria should also address particular skills required for the level of court on which a justice or judge sits (trial or appellate) and knowledge required for justices or judges of courts with specialized jurisdiction. Evaluation criteria should not include whether justices and judges make decisions that have political or popular support. The commission should take appropriate steps (e.g., developing a website) to make the public aware of the evaluation program and to allow public comment. When the commission receives written information from an identified individual who has had recent direct contact with a justice or judge being evaluated, the commission should share that information with the justice or judge if it is considered in the evaluation.

**Section \_\_\_\_03. Trial Court Commissions on Judicial Performance Evaluation.**

(a) *Appointment of Commissioners:* There is hereby established in each judicial [district] [circuit] a trial court commission on judicial performance evaluation. Each such commission shall consist of nine (9) members appointed by the [supreme court] [judicial council]. There shall be adequate representation of laypersons on the commission, but at least five members of the commission shall be attorneys. Appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the diversity of the jurisdiction (e.g., racial, ethnic, gender, and other diversity). Commission members shall choose one of their number to serve as chair.

(b) *Terms.* All members of the commission shall serve staggered terms of four years except that, of those first appointed, four members shall serve terms of two years. No member may serve more than two terms. A member appointed to fill an unexpired term shall serve the remainder of that term.

(c) *Powers and Duties of the Commissions.* In addition to other powers and duties conferred on the trial court commissions by this legislation, a trial court commission has the following powers and duties:

- (1) To oversee the distribution of questionnaires and interview judges under the state commission's direction;
- (2) To produce and distribute [to the public] [to the authority responsible for retention] no later than [60 days before the retention election] [90/120 days before the judge's term expires] pertinent information concerning each judge subject to retention.

*Optional provision for midterm evaluations:*

(3) To conduct confidential midterm evaluations of the performance of trial court judges not then standing for retention. The results shall be shared only with the reviewed judge and an appropriate supervising justice or judge as determined by the commission.

**Section \_\_\_\_04. Dissemination of Performance Evaluations of Justices and Judges.**

(a) The state appellate commission and each trial court commission shall conduct an evaluation of each justice or judge who is subject to retention. Evaluations shall be completed and a narrative profile prepared for communication to the justice or judge no later than thirty days prior to the last day on which a justice or judge can declare his or her intent to stand for retention. The justice or judge shall have the opportunity to meet with the appropriate commission or respond in writing to the evaluation, at his or her discretion, no later than ten days following receipt of such evaluation. If such a meeting is held or response is made, the commission may revise its evaluation.

(b) After the requirement in paragraph (a) is met, a factual report concerning each justice or judge subject to [retention election shall be released to the public] [reappointment shall be given to the authority responsible]. The report shall include a narrative summary of the evaluation findings, and shall state whether the judge meets or fails to meet performance criteria.

*Commentary*

In some jurisdictions, the commission also makes a recommendation to the public or to the authority responsible for retention as to whether the judge should be retained or not retained.

**Section \_\_\_\_05. Administrative Assistance.**

(a) All resources necessary to carrying out [the] [each] commission's official duties shall be provided, including staff, equipment, and materials.

(b) Commission members shall receive no compensation, but shall be reimbursed for all reasonable expenses incurred in carrying out their official duties.

**Section \_\_\_\_06. Privilege and Immunity.**

All documents and information obtained by or submitted to the committee and all results of judicial evaluations are absolutely privileged, and no lawsuit predicated thereon may be brought. Statements made to the commission are absolutely privileged, provided, however, that this absolute privilege does not apply to statements made in any other forum. Members of the committee and staff shall be immune from suit and liability for any conduct in the course of their duties.

## IV.

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### IMPLEMENTING A PERFORMANCE EVALUATION PROGRAM FOR RETENTION IN OFFICE

#### Rule \_\_. JUDICIAL PERFORMANCE EVALUATION

##### Rule \_\_.01. Meetings, Majority, Minutes.

The commission shall meet at the call of the chair and shall conduct no business except upon the attendance of at least five members. Members shall be permitted to attend and participate in meetings by telephone or videoconference. All meetings shall be open to the public except as provided in Rule \_\_.03 below. All actions shall require a majority vote of those present, except for a determination of whether a justice or judge meets or fails to meet performance criteria. That determination shall require a majority vote of the commission. Except for the requirements of Rule \_\_.03, minutes of meetings of the commission shall be considered public documents.

##### *Commentary*

If the commission is empowered to make a retention recommendation, such action should also require a majority vote of the commission.

##### Rule \_\_.02. Executive Session.

The commission shall meet in executive session at the time of (1) presentation and discussion of a judge's written response or the results of any interview with a justice or judge concerning the commission's draft evaluation; (2) discussion of whether a justice or judge meets or fails to meet performance criteria; and (3) voting on whether the narrative report shall say the justice or judge meets or fails to meet performance criteria. The commission may meet in executive session at any other time upon two-thirds vote of commission members then in attendance. The substance of deliberations in executive session shall be confidential.

##### Rule \_\_.03. Removal of Commissioners.

Any member may be removed from the commission by the [chief justice] [judicial council] for conduct that substantially interferes with the performance of the commission's duties.

**Rule \_\_\_\_04. Commissioner Impartiality and Disqualification.**

- (a) A commissioner shall perform his or her duties in an impartial and objective manner.
- (b) A commissioner is disqualified from taking any action with respect to a justice or judge who is a family member, spouse, or domestic partner within the third degree of consanguinity, or a justice or judge who was a commissioner's business associate, attorney, or client within the preceding four years.
- (c) A commissioner shall disclose to the full commission any relationship with a justice or judge being evaluated, whether business, personal, or attorney-client, or any other cause for conflict of interest, and the commission shall determine whether a commissioner shall be disqualified.
- (d) A commissioner shall promptly report to the full commission any information conveyed to him or her concerning any justice or judge under review. The commissioner also shall promptly report to the full commission any attempt by any person or organization to influence him or her other than by fact or opinion.
- (e) No commissioner shall complete a survey for any justice or judge.

**Rule \_\_\_\_05. Data Collection.**

- (a) The commission [shall] [may] employ a qualified contractor whose duty it shall be to prepare the surveys referred to herein, process the survey responses, and compile the statistical reports of the survey results in a manner that will ensure the confidentiality and accuracy of the process.
- (b) The commission also may formulate a justice's or judge's self-evaluation questionnaire, contact the state's judicial conduct commission, interview the reviewed justice's or judge's colleagues on the bench, and seek other relevant information that will ensure a full and fair evaluation process.

*Commentary*

Additional sources of information that may be used in the evaluation process include case management statistics, courtroom observation, and participation in mandatory judicial education.

**Rule \_\_\_\_06. Confidentiality and Disclosure of Records.**

- (a) All information, completed survey forms, letters, notes, memoranda, and other data obtained and used in the course of any judicial performance evaluation shall be strictly confidential and shall not be disclosed by any commissioner, staff person, or agent except as provided herein. All survey forms and other evaluation information shall be anonymous.
- (b) Under no circumstances shall the data collected or the results of the evaluation be used to discipline an individual justice or judge or be disclosed to authorities charged with disciplinary responsibility, unless required by law or by the state's code of judicial conduct.
- (c) Notwithstanding the foregoing, information disclosing a criminal act may be provided to law enforcement authorities at the direction of the supreme court.

Requests for such information in the possession of a commission shall be made by written petition setting forth the specific information needed. All information and data provided to law enforcement authorities pursuant to this paragraph shall no longer be deemed confidential.

## APPENDIX

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### ESTABLISHING A COMMISSION PLAN FOR APPOINTMENT TO OFFICE BY EXECUTIVE ORDER

#### *Commentary*

As noted in Part I, the stability of a constitutional or statutory plan is preferable, but if such a plan is not in place, governors and other appointing authorities may establish a commission plan by executive order. The following provisions lay out the essential components of an executive order establishing a commission plan, leaving some aspects to the discretion of the appointing authority. Accompanying commentary provides an overview of existing executive order-based plans.

I, \_\_\_\_\_, [Governor] [Mayor] of the [State] [City] of \_\_\_\_\_, desiring to maintain the highest quality of justice in [State] [City], establish a Judicial Nominating Commission to nominate the best qualified lawyers through a fair and open process that promotes a judiciary representative of the racial, ethnic, gender, and other diversity of [State] [City].

#### **Section 1. Nomination and Appointment.**

The [Governor] [Mayor] shall fill any vacancy in an office of \_\_\_\_\_ court justice or \_\_\_\_\_ court judge by appointing one person nominated by the judicial nominating commission [for the district/circuit where the vacancy occurs]. The judicial nominating commission shall nominate no more than \_\_\_\_\_ nor less than \_\_\_\_\_ best qualified persons for each vacancy.

#### *Optional provision for filling interim vacancies only:*

#### **Section 1. Nomination and Appointment.**

The [Governor] [Mayor] shall fill an interim vacancy in an office of \_\_\_\_\_ court justice or \_\_\_\_\_ court judge by appointing one person nominated by the judicial nominating commission [for the district/circuit where the vacancy occurs]. The judicial nominating commission shall nominate no more than \_\_\_\_\_ nor less than \_\_\_\_\_ best qualified persons for each vacancy.

#### *Commentary*

In jurisdictions with commission plans established by executive order, the number of nominees submitted to the appointing authority varies from 2 to 7. For more

information, see *Judicial Merit Selection: Current Status*, Table 3, at [http://www.judicialselection.us/judicial\\_selection\\_materials/](http://www.judicialselection.us/judicial_selection_materials/).

### **Section 2. Judicial Nominating Commission.**

(a) [The] [Each] judicial nominating commission shall consist of \_\_\_ members appointed by the [Governor] [Mayor]. Commission members shall serve \_\_\_-year terms at the pleasure of the [Governor] [Mayor]. Appointments and elections to the commission[s] shall be made with due consideration to [geographic] [community] representation and without regard to political affiliation. The [Governor] [Mayor] shall make reasonable efforts to ensure that the commission substantially reflects the diversity of the jurisdiction (e.g., racial, ethnic, gender, and other diversity). No member of [the] [a] nominating commission may hold any other office under the United States, the State, or other governmental entity for which monetary compensation is received. No member shall be eligible for appointment to a state judicial office so long as he or she is a commission member and for \_\_\_ years thereafter.

#### *Commentary*

In a democratic society it is important that public bodies such as judicial nominating commissions be broadly representative of the communities they serve. Care should be taken to ensure that the composition of the commission is reflective of the demographic makeup of the jurisdiction. No member of a commission should seek judicial office until a sufficient amount of time has passed to ensure a commission's objectivity and preserve public confidence. In states with commission plans by executive order, the size of the nominating commissions varies from 9 to 21 members. Governors appoint most or all commission members in these states, with the state bar association appointing some members in some states. Under most executive order plans, commission members serve terms of up to three years and/or at the governor's discretion. For more information, see *Judicial Merit Selection: Current Status*, Tables 1 and 2, at [http://www.judicialselection.us/judicial\\_selection\\_materials/](http://www.judicialselection.us/judicial_selection_materials/).

### **Section 3. Reimbursement and Administrative Assistance.**

- (a) Members of [the] [each] judicial nominating commission shall be reimbursed for all expenses incurred in carrying out their official duties.
- (b) All resources necessary to carrying out [the] [each] commission's official duties shall be provided, including staff, equipment, and materials.

#### *Commentary*

To foster an effective commission, certain minimal services should be made available. These services should include staff support to coordinate commission travel, meetings, conference calls, and candidate interviews; office services; and any other necessary support so that commissions receive timely assistance.

**Section 4. Powers of the Judicial Nominating Commission.**

[The] [Each] judicial nominating commission shall have the power to adopt written rules to formalize and standardize procedures for selecting the best qualified nominees for judicial office.

*Commentary*

In some states with executive order plans, procedural rules are provided in the executive orders. In others, commission chairs or members adopt their own rules.

**Section 5. Vacancies.**

Within \_\_\_\_ days of the occurrence of a vacancy, the judicial nominating commission shall meet and submit a list of not more than \_\_\_\_ nor less than \_\_\_\_ best qualified candidates for the judicial office.

*Commentary*

Some executive order plans require the commission to submit the list of nominees within a certain timeframe, ranging from 60 to 90 days, following the announcement of the vacancy. For more information, see *Judicial Merit Selection: Current Status*, Table 3, at [http://www.judicialselection.us/judicial\\_selection\\_materials/](http://www.judicialselection.us/judicial_selection_materials/).

**Section 6. Quorum.**

The commission cannot act unless a quorum exists. A quorum consists of a majority of the commission plus one.

*Commentary*

In light of the importance of the nominating commission's role in judicial selection, more than a simple majority of commission members should participate in the commission's deliberations and decision making.

**Section 7. Chair.**

The [Governor] [Mayor] shall appoint one commission member to serve as chair.

*Commentary*

The role of the chair is to order commission meetings, notify commission members of commission business, and act as a spokesperson for the commission.

**Section 8. Publicity.**

When a judicial vacancy occurs or when it is known that a vacancy will occur at a definite date, the chair shall publicize the vacancy and solicit the submission of names of qualified individuals by press release to the media; notice to state, local, women, and minority bar associations; and posting in the courthouse[s] of the [state] [district/circuit].

***Commentary***

These requirements are minimal and should be supplemented with active recruitment techniques.

**Section 9. Open Meetings.**

(a) All organizational meetings of the judicial nominating commission shall be open to the public. An "organizational meeting" is an initial meeting to discuss the commission's procedures and requirements for the vacancy. A notice outlining the topics to be discussed should be given to the public 72 hours prior to the meeting. Public participation should be encouraged at each organizational meeting.

(b) All final deliberations of the judicial nominating commission shall be secret and confidential.

(c) The confidentiality of other proceedings of the judicial nominating commission shall be determined by commission rule.

***Commentary***

Commission proceedings should be as open as possible. The final deliberations and selection of nominees should remain confidential to encourage free and open discussion of the candidates' qualifications. To preserve confidentiality of these proceedings, some states may need to exempt the final deliberations from the state Open Meetings Act.

**Section 10. Submitting Names of Nominees to the [Governor] [Mayor].**

(a) The names of nominees shall be submitted to the [Governor] [Mayor] in alphabetical order.

(b) A memorandum may accompany the list of nominees and may state objective facts concerning each of the nominees listed.

(c) Upon submission of the names to the [Governor] [Mayor], the [Governor] [Mayor] shall make the names public and shall encourage public comment.

***Commentary***

Once the names of nominees are submitted to the appointing authority, the commission should provide additional information only on request of the appointing authority. If the commission would like to provide supplemental background information on the nominees, it may do so in a memo without indicating any commission preference. A substantial majority of states also allow for public comment at this point in the selection process. By providing the opportunity for public participation, the appointing authority can foster public trust in the final appointment.

## THE AMERICAN JUDICATURE SOCIETY'S ELMO B. HUNTER CITIZENS CENTER FOR JUDICIAL SELECTION

The American Judicature Society (AJS) works to maintain the independence and integrity of the courts and increase public understanding of the justice system. AJS is a nonpartisan, nonprofit organization with a national membership of judges, lawyers, and other citizens interested in the administration of justice.

AJS' Elmo B. Hunter Citizens Center for Judicial Selection was founded in 1991 to further the American Judicature Society's historic interest in judicial selection issues. The Hunter Center provides nonpartisan public education and outreach, conducts applied research, and offers expertise and assistance in support of judicial selection reform. The Center serves its core audiences—state court administrators, lawmakers, the media, the legal and academic communities, and court reform organizations—in a number of ways:

- Maintaining the Judicial Selection in the States website ([www.judicialselection.us](http://www.judicialselection.us)), the leading resource for information about the selection and retention of judges nationwide.
- Conducting groundbreaking research on such topics as demographic diversity in the merit selection process, the prevalence of midterm appointments in states that utilize contestable elections for judicial office, and the use of nominating commissions by U.S. senators to identify potential nominees for federal judgeships.
- Working with other court-related organizations to increase public awareness of, and involvement with, state justice issues through forums and public discussions. The Center convened the first national forum on judicial selection in Washington, D.C. in 2000. A follow-up program was held in Birmingham, Alabama in 2006. A symposium on federal judicial selection was held in Washington, D.C. in 2002.
- Monitoring and providing assistance to grassroots judicial reform efforts in the states. Center staff works closely with state-based reform groups to promote the adoption of judicial merit selection.
- Educating international visitors on methods of judicial selection in the United States and their respective implications for judicial independence and accountability.
- Organizing meetings and conferences for AJS members and others on judicial selection topics of current interest. In 2006, AJS presented a program on rethinking strategies for judicial selection reform.

**Publications and resources offered by the Hunter Center include the following:**

- *Model Judicial Selection Provisions*, revised in 2008, offer exemplary language for establishing judicial nomination and evaluation processes of the highest quality and represent AJS policy as to the “best practices” in selecting, retaining, and evaluating judges.
- *Judicial Selection in the States: How It Works, Why It Matters* is a guide prepared for state legislators to promote greater understanding of the complex and critical issue of selecting state court judges.
- *Judicial Merit Selection: Current Status* is a detailed description of selection provisions in states with “merit selection,” or commission-based appointment, of judges at some level of court.
- *Judicial Selection in the States: Appellate and General Jurisdiction Courts* is a set of tables that provide basic information about the initial selection and subsequent retention of state judges.
- *Judicial Selection Reform: Examples from Six States* examines successful judicial selection reform efforts in six states, discussing the nature of each reform and its implementation in other states, the events that provided the impetus for reform, and the actors who were instrumental in bringing about the reform.
- *Judicial Selection in the United States: A Special Report* describes the historical evolution of judicial selection in the U.S.
- *Handbook for Judicial Nominating Commissioners, 2nd Edition* leads commissioners through each step of the nominating process—getting organized, establishing evaluative criteria, publicizing the judicial vacancy, investigating and screening applicants, interviewing, voting, and submitting names to the appointing authority. The revised and updated 2nd edition offers two expanded chapters that address specific ethics considerations and privacy and confidentiality concerns.
- *Merit Selection: A Review of the Social Scientific Literature* synthesizes existing social science research on “merit selection” of judges.
- *Research on Judicial Selection* is a two-volume, peer-reviewed series featuring studies of unexplored and under-explored aspects of judicial selection.
- *Ensuring Judicial Excellence* is a video that describes the benefits of judicial merit selection through interviews with voters, judges, attorneys, and judicial nominating commissioners.
- *Judicial Selection in the United States: A Compendium of Provisions* is a compilation of state statutory and constitutional provisions relating to judicial selection.

**WEST VIRGINIA STATE**  
**BUDGET OFFICE**  
**INTERMEDIATE COURT –**  
**ESTIMATED COST**

West Virginia Intermediate Court  
Estimated Cost  
One Location

FOR DISCUSSION ONLY

		Amount	1 Court Location	
			FTE	Cost
Judges	Average Estimated Salary	\$120,000	7	\$840,000
	Employee Benefits (41%)			344,400
Law Clerks (2 per judge)	Average Estimated Salary	75,000	14	1,050,000
	Employee Benefits (41%)			430,500
Judicial Executive Assistants (2 per judge)	Average Estimated Salary	60,000	14	840,000
	Employee Benefits (41%)			344,400
Deputy Clerks (1 per judge)	Average Estimated Salary	45,000	7	315,000
	Employee Benefits (41%)			129,150
Security Personnel (1 per judge)	Average Estimated Salary	60,000	7	420,000
	Employee Benefits (41%)			172,200
Court Reporter	Average Estimated Salary	45,528	1	45,528
	Employee Benefits (41%)			18,666
Information Services (one centralized office)	Average Estimated Salary	50,000	5	250,000
	Employee Benefits (41%)			102,500
Court Administrator	Average Estimated Salary	100,000	1	100,000
	Employee Benefits (41%)			41,000
Additional Administrative Staff (payroll, purchasing/procurement)	Average Estimated Salary	45,000	3	135,000
	Employee Benefits (41%)			55,350
Law Library	Average Estimated Salary	48,000	8	384,000
	Employee Benefits (41%)			157,440
	Other Annual Expenses			850,000
Other Current Expenses/Mtce				450,000
Rent (18,425 square feet based on 67 FTEs)				331,650
Estimated Annual Cost			67	\$7,806,784
Estimated Onetime Expenses				
Site Renovations (wiring, server closets)				137,500
Furniture (\$5,000 per FTE)				335,000
Fixtures & Equipment (computers, monitors, printers, copiers) \$5,000 per FTE				335,000
Estimated 1st Year Cost			67	\$8,614,284

9/28/2009

STATE OF WEST VIRGINIA

EXECUTIVE DEPARTMENT

CHARLESTON

**EXECUTIVE ORDER NO. 6-09**

**By the Governor**

WHEREAS, following the establishment of the Supreme Court of Appeals and the State's first courts of limited jurisdiction in 1863, the State's judicial system remained largely unchanged for over a century; and

WHEREAS, in 1967, a committee of concerned citizens met in Charleston, West Virginia, to formulate a plan for the establishment of a modern court system; and

WHEREAS, the committee's efforts led to a constitutional amendment, known as the Judicial Reorganization Amendment of 1974, that established the current framework of our judiciary; and

WHEREAS, aside from the adoption of a constitutional amendment, known as the Unified Family Court Amendment, that created a family court system in 2000, the fundamental elements of West Virginia's judicial system, including the popular election of judges and current appellate practices, have changed little since 1974; and

WHEREAS, a comprehensive review of our State's court system may bolster public trust and confidence in the judiciary; and

WHEREAS, one of the fundamental principles of our representative democracy is the sanctity of the separation of powers among the three separate and coequal branches of government; and

WHEREAS, although the Constitution vests the judicial power of this State solely in our Supreme Court of Appeals and its inferior courts, the Constitution also contemplates the participation of the legislative and executive branches in matters touching upon the judicial sphere, including the establishment of intermediate appellate courts, W. Va. Const. Art. VIII, § 1; the decision to conduct the election of justices on a partisan or nonpartisan basis, W. Va. Const. Art. VIII, § 2; the scope of the jurisdictional powers of the Supreme Court of Appeals, W. Va. Const. Art. VIII, § 3; and the establishment of judicial circuits within the State and the number of judges within any particular circuit, W. Va. Const. Art. VIII, § 5; and

WHEREAS, the establishment of an independent commission composed of former jurists, attorneys, academics and other professionals to examine the State's court system may result, as it did in 1974, in the adoption of systemic reforms that will modernize and improve West Virginia's judiciary; and

WHEREAS, the success of a commission on judicial reform will depend upon the cooperation and leadership of all three branches of State government.

NOW, THEREFORE, I, JOE MANCHIN III, pursuant to the authority vested in me as the Governor of West Virginia, do hereby ORDER the following:

1. The Independent Commission on Judicial Reform (hereinafter "the Commission") is hereby established.
2. The Commission shall evaluate and recommend proposals for judicial reform in West Virginia.

3. The Commission shall be composed of nine persons. The Dean of the West Virginia University College of Law and the President of the West Virginia State Bar shall serve as *ex officio* members of the Commission. The remaining members of the Commission shall be appointed by the Governor and shall serve at his will and pleasure. Of the persons the Governor may appoint to serve as at-will members of the Commission, two persons shall be attorneys licensed to practice law in this State, two persons shall be qualified legal academics, two persons shall be former jurists and one person shall be appointed by the Governor to serve as Chair of the Commission.

4. The Governor may appoint a person of special expertise to serve as Honorary Chair of the Commission.

5. As soon as practicable after the effective date of this Order, the Commission shall convene to study the need for broad systemic judicial reforms including, but not limited to, adopting a merit-based system of judicial selection, enacting judicial campaign finance reforms or reporting requirements, creating an intermediate court of appeals, proposing constitutional amendments or establishing a court of chancery.

6. The Commission shall meet at times and locations to be determined by the Chair in consultation with the Commission members.

7. The Commission shall consult with the public and receive comment on the need for judicial reform in West Virginia. To this end, the Commission may conduct studies or surveys, within the limits of funds allocated by the Office of the Governor for such purposes, and may hold public hearings. The Commission is also encouraged to consult members of the judiciary, including the Justices of the Supreme Court of Appeals, circuit court judges, family court judges and magistrate judges; members of the State Legislature, including the Chair of the West Virginia Senate Committee on the Judiciary and the Chair of the West Virginia House of Delegates Committee on the Judiciary; the West Virginia State Bar; the West Virginia Chamber of Commerce; or voluntary associations of judicial or legal professionals, including the National Center for State Courts, the American Bar Association, the West Virginia Judicial Association, the West Virginia Association for Justice and the Defense Trial Counsel of West Virginia.

8. Members of the Commission shall receive no compensation.

9. A majority of members present at a meeting shall constitute a quorum.

10. The Commission shall submit a detailed report of its findings and recommendations, along with any proposed legislation or constitutional amendments, to the Governor by November 15, 2009. With respect to recommendations the Commission may make for the establishment of a new court or new courts of record in this State, the Commission shall set forth in its report detailed plans for such court or courts including, but not limited to, jurisdiction, composition, judicial selection and potential funding sources. Copies of the report shall be provided to the Chief Justice of the Supreme Court of Appeals, the President of the Senate and the Speaker of the House of Delegates.

11. Expenses necessary to transact the business of the Commission may be paid by the Office of the Governor with moneys allocated from the Office of the Governor's discretionary fund, provided that this Order may not be interpreted as requiring the Office of the Governor to allocate moneys for Commission expenses.

12. Executive branch agencies shall cooperate to provide the Commission with any support staff or office services it requires to perform its duties.

13. The Commission shall adjourn upon the completion of its report, but may be reconvened at the request of the Governor to conduct further studies and evaluations of West Virginia's judicial system. If reconvened in accordance with this paragraph, the Commission shall be composed of the *ex officio* members set forth in paragraph three of this Order and the Governor may reappoint, remove or appoint at-will members in accordance with the qualifications requirements for such members set forth in paragraph three of this Order.

14. The Governor may remove or replace at-will members of the Commission at his discretion.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of West Virginia to be affixed.

DONE at the Capitol, in the City of Charleston, State of West Virginia, this third day of April, in the year of our Lord, Two Thousand Nine, and in the One Hundred Forty-Sixth year of the State.



By the Governor

*[Handwritten Signature]*  
GOVERNOR

*[Handwritten Signature]*  
SECRETARY OF STATE



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## Governor Makes Appointments To Independent Judicial Reform

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6/15/2009

CHARLESTON, W. Va. -- Gov. Joe Manchin today announced his appointments to the Independent Commission on Judicial Reform, including the Honorable Sandra Day O'Connor, retired U.S. Supreme Court Justice, to serve as the Honorary Chairwoman.

"We are truly honored that Justice Sandra Day O'Connor has accepted my invitation to serve as the Honorary Chairwoman of this important commission," Gov. Joe Manchin said. "She brings special expertise and a wealth of knowledge to this panel."

The nine-member commission will be chaired by Carte Goodwin, former general counsel for Gov. Joe Manchin and currently an attorney at Goodwin & Goodwin. Other members include: Joyce McConnell, Dean of West Virginia College of Law; Sandra Chapman, President West Virginia State Bar; Thomas Heywood, Esq.; Marvin Masters, Esq.; Mary McQueen, President National Center for State Courts; Andy MacQueen, Esq.; John McCuskey, Esq.; and, Caprice Roberts, Associate Dean West Virginia University College of Law.

"This Independent Commission on Judicial Reform is charged with evaluating West Virginia's judicial system and its current practices," the governor added. "All of the appointees are extremely qualified to serve on this commission, and I look forward to reviewing their findings and presenting them to the Legislature."

The Commission will study the need for judicial reforms, such as, but not limited to: adopting a merit-based system of judicial selection, enacting judicial campaign finance reforms or reporting requirements, creating an intermediate court of appeals, proposing constitutional amendments or establishing a court of chancery.

The commission's findings will be presented to the governor by Nov. 15, 2009.

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Tweet



Allen H. Loughry II  
820 Scenic Drive  
Charleston, WV 25311

January 31, 2012

The Honorable Natalie E. Tennant  
State Capitol Bldg. 1, Suite 157-K  
1900 Kanawha Blvd. East  
Charleston, WV 25305

Secretary Tennant:

Pursuant to W.Va. Code § 3-12-10, please allow this letter to serve as my sworn statement and application for certification to receive public financing under the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program for the 2012 election cycle.

My campaign has complied and will continue to comply with all requirements set forth in W.Va. Code throughout the applicable campaign.

I have signed and filed a declaration of intent as required by W.Va. Code § 3-12-7.

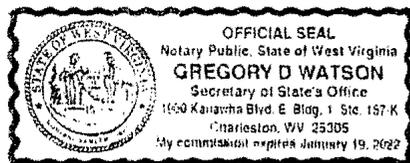
My campaign has obtained the required number and amount of qualifying contributions as required by W.Va. Code § 3-12-9. My campaign has collected 676 qualifying contributions for a total of \$36,295.00, which exceeds the requirements by 176 qualifying contributions and \$1,295.00. Moreover, of the 676 contributions, 254 are in the 1<sup>st</sup> Congressional District, 297 are in the 2<sup>nd</sup> Congressional District, and 125 are in the 3<sup>rd</sup> Congressional District. As such, the minimum requirement that ten percent of the total qualifying contributions be collected from each congressional district has been met and exceeded by my campaign.

I have complied with the contribution restrictions of W.Va. Code § 3-12-1 through § 3-12-17, and am therefore eligible, as provided in W.Va. Code § 3-5-9, to appear on the primary and general election ballot.

I have met all other requirements of the W.Va. Code that pertain to this program.

Sincerely,

  
Allen H. Loughry II



State of West Virginia,  
County of Kanawha,  
Subscribed and sworn to  
before me this 31<sup>st</sup> day  
of January 2012.  


**State Election Commission Meeting  
Friday, February 3, 2012 – 2:00 p.m.  
Secretary of State Conference Room  
Minutes**

**Attendees:**

**Members**

The Honorable Natalie E. Tennant, Secretary of State (In person)  
Dr. Robert Rupp, Member (Chair) (By teleconference)  
Mr. Gary Collias, Member (By teleconference)  
Mr. William N. Renzelli, Member (By teleconference)

**Others Attending**

Ms. Ashley Summitt, Chief Counsel – Secretary of State  
Mr. Tim Leach, Assistant General Counsel – Secretary of State  
Mr. Dave Nichols, Manager – Elections Division  
Ms. Missi Kinder, Campaign Finance Specialist – Elections Division  
Mr. Greg Watson, Campaign Finance Specialist – Elections Division  
Mr. Alan Loughry – Candidate for WV Supreme Court of Appeals

The State Election Commission (SEC) met on Friday, February 3, 2012 at 2:00 p.m. by teleconference in the Secretary of State's Conference Room in the State Capitol Building. Dr. Rupp called the meeting to order at 2:18 p.m.

Mr. Leach addressed the commission concerning Mr. Loughry's application for obtaining funds through the West Virginia Supreme Court of Appeals Campaign Financing Pilot Program. He attests that Mr. Loughry achieved the minimum number of signatures and contributions required to gain access to these funds. West Virginia Code states that a State Election Commission meeting is to be held within three days of the Secretary of State's acceptance of the candidate's receipts and reports through this program.

Mr. Loughry has met the following requirements:

1. Submitted 676 qualifying contribution receipts (500 minimum);
2. Each qualifying contribution must be in the amount of \$1-100 and must total more than \$35,000. \$36,295 was raised;
3. More than the required 10% of receipts came from each of the state's three congressional districts;
4. Declaration of Intent form was submitted to the Secretary of State's office on October 13, 2011;
5. There were no duplication of contributors, and none were received before October 13, 2011 or after January 28, 2012;
6. No non-compliance items were found within the receipts.

Finding the candidate has met all requirements set forth by West Virginia Code; Mr. Collias made the motion to grant funds to Mr. Loughry with Mr. Renzelli seconding the motion. With no discussion the motion passed unanimously.

Mr. Leach informed the commission that Secretary Tennant will draft, sign and forward the required documents to the State Auditor's office. The State Auditor's office will issue the funds to the candidate's treasurer in the amount of \$13,705 within two business days. Dr. Rupp made a motion giving permission to Secretary Tennant to prepare and sign the documents on behalf of the commission with Mr. Collias seconding the motion. Motion passed unanimously.

Dr. Rupp thanked the staff of the Secretary of State's office for their efforts and hard work with this historic action. Secretary Tennant thanked the commission and the candidate as well.

With no further business, Mr. Renzelli moved to adjourn with Mr. Collias seconding the motion. Meeting adjourned at 2:33 p.m.

**State of West Virginia  
Supreme Court Public Campaign Financing Disclosure  
(2012 Election Year)**

Name of Candidate Robin Jean Davis  
 Political Party Democratic  
 Name of Treasurer Mark A. Ferguson  
 Treasurer Contact Number 304.342.9180

Between May 9, 2012 and June 30, 2012, have your campaign's combined expenditures and obligations exceeded \$420,000?

Yes, I have exceeded \$420,000

If you answered yes to the above question then continue to fill out the following section:

Total Obligations	—
Total Expenditures	494,471.46
<b>Total of Both Items</b>	<b>494,471.46</b>

Oath and Affirmation

I, Mark Ferguson (treasurer's name), swear or affirm that the attached statement is true and correct, to the best of my knowledge, of all financial transactions occurring within the period covered by this statement, as required by West Virginia Code §3-12-13(e)(3).

  
 Signature of Treasurer

07.10.2012  
 Date

Revised June 22, 2012

July 17, 2012

0

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## Deadlocked vote halts financing for Supreme Court candidate

By Phil Kabler

CHARLESTON, W.Va. -- On a 2-2 deadlocked vote Tuesday, the state Elections Commission failed to approve a \$144,471 payment of additional public campaign financing funds to Supreme Court candidate Allen Loughry.

Afterward, Loughry - the only candidate participating in the public financing pilot project this election -- accused the four-member panel of failing to follow state law, and indicated he will pursue legal action.

"The state Election Commission, as a body, is in violation of the West Virginia law," Loughry said after Tuesday's emergency meeting.

"What happens next will become apparent very soon," he said when asked whether he will seek a court order mandating that the commission release the supplemental campaign funds.

"Ironically, this law was enacted to address the appearance of corruption in our judiciary, and yet out state Elections Commission refused to follow a valid and non-challenged law," he said.

The Supreme Court candidates' public campaign financing pilot project stemmed from recommendations of a judicial reform panel appointed by then-Gov. Joe Manchin, and was proposed as a way to reduce the appearance of impropriety from having lawyers contribute to judicial candidates' campaigns.

In March, Loughry's campaign received \$350,000 of public financing for the general election, and under the law, is eligible to receive up to \$400,000 in supplemental funds to match campaign spending by opponents in the November election.

At an emergency meeting Tuesday, the commission voted 4-0 that Justice Robin Davis had triggered the first threshold for supplemental, or "rescue" funds, with a financial disclosure showing that her campaign had spent \$494,471 between May 9 and June 30.

However, the committee deadlocked on whether to authorize the additional \$144,471 supplemental payment to Loughry's campaign over concerns regarding a U.S. Supreme Court ruling last fall that overturned a public financing law in Arizona as unconstitutional.

Commissioner Robert Rupp moved to authorize the payment, contending the commission is obligated to follow state law.

"If this goes to court, I'd rather be in the position of defending a West Virginia statute, than on the other side," he said.

Secretary of State Natalie Tennant, participating via teleconference, seconded the motion, noting, "There are many statutes in which we execute the law, and defend what the West Virginia Legislature has put into place."

However, Charleston lawyer Gary Collias was outspokenly opposed to the motion. He argued that between the U.S. Supreme Court ruling, and a state attorney general's opinion issued in February regarding its impact on the West Virginia law, he believes the public financing pilot project is not constitutional.

"I can't in good conscience vote to disperse public money based on a law I think is invalid," he said, also via teleconference.

Ultimately, a vote on approving the supplemental payment was rejected on a 2-2 deadlock, with commissioner Bill Renzelli - who did not comment on the issue before the vote - joining Collias in voting no.

The commission, which by law is a five-member panel, currently has one unfilled vacancy, creating the tie vote.

Loughry, a lawyer for the state Supreme Court and author, noted that the Arizona public financing law that was struck down applied to executive and legislative branch elections, and said he believes the state's judicial election pilot project will withstand a constitutional challenge.

"This legislation, which is unchallenged, says it is mandatory, that once these trigger points are reached, the state Elections Commission shall release these funds," said Loughry, one of two Republicans running for the Supreme Court.

Reach Phil Kabler at [ph...@wvgazette.com](mailto:ph...@wvgazette.com) or 304-348-1220.

110300100

# State of West Virginia PRECANDIDACY REGISTRATION FORM

## For All Statewide, Legislative, County and Municipal Offices

I will accept contributions and spend money toward my possible candidacy for public office, as permitted by West Virginia Code §3-8-5e.

Date: \_\_\_\_\_ Office: WV Supreme Court of Appeals District #: \_\_\_\_\_ Political Party: Republican

Name: Allen Hayes Loughry II Election Year: 2012

Residence Address: 820 Scenic Drive

City: Charleston, WV Zip Code: 25311 County: Kanawha

Telephone: (home) 304.546.6316 (work) 304.546.6316

Mailing Address: Same

Email: ahloughry@hotmail.com

Committee Name: Loughry for Supreme Court

### My treasurer or financial agent will be:

NOTE: A judicial candidate cannot act as treasurer or financial agent for his or her campaign.

Name: George Manahan

Residence Address: 3016 Ridgeview Drive

City: Charleston State: WV Zip Code: 25303-1632

Telephone: (home) 304.343.2800 (work) 304.343.2800

Mailing Address: The Manahan Group, 222 Capitol Street, Suite 400, Charleston, WV 25301

Email: gmanahan@manahangroup.com

- Check here to enroll your committee in the Campaign Finance Reporting System which will allow you to file the committee's finances via an internet service provided by the Secretary of State. This service is only available for committees that file with the Secretary of State.

I understand that every financial transaction related to my precandidacy or candidacy is subject to the requirements of the WV Code and the Rules & Regulations promulgated by the Secretary of State, including all reporting requirements. This document will serve as the oath for all electronically filed reports associated with the above listed campaign, if applicable.

Allen H. Loughry II  
Precandidate's signature

George Manahan  
Treasurer's Signature



Published by:  
The Office of the Secretary of State  
Natalie E. Tennant  
Bldg. 1, Suite 157-K  
1900 Kanawha Blvd. East  
Charleston, WV 25305  
(304) 558-6000  
E-mail: [elections@wvsos.com](mailto:elections@wvsos.com)  
Internet Address: [www.wvsos.com](http://www.wvsos.com)

File this form with **Secretary of State** if a candidate for statewide, legislative, or multi-county judicial office.  
File this form with **County Clerk** if a candidate for county office or single-county judicial office.  
File this form with **Municipal Clerk/Recorder** if a candidate for municipal (city or town) office.

Official Form F-1  
Revised 6/09

**SUPREME COURT OF APPEALS PUBLIC CAMPAIGN FINANCING**

**DECLARATION OF INTENT**

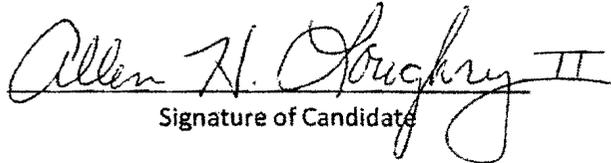
**State of West Virginia  
State Election Commission**

State Election Commission  
Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0770

Phone: (304)558-6000  
Toll Free: 1-866-767-8683  
Fax: (304)558-8386  
Email: sec@wvsos.com

Date 10/13/11

I, Allen H. LOUCHRY II, a candidate for the office of Justice of the West Virginia Supreme Court of Appeals, hereby declare my intention to participate in the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Project as provided in W.Va. State Code §3-12-1. I attest I am eligible to be placed on the ballot, and if elected, to hold the office sought. I further attest, I have, and will continue to, comply with all the requirements of article twelve, chapter three, of the West Virginia Code, including contribution and expenditure restrictions.

  
Signature of Candidate

---

If seeking nomination by primary, the declaration of intent must be filed no later than January 28, 2012.

If seeking nomination by certificate of nomination as provided in W.Va. Code §3-5-23, the declaration of intent must be filed no later than October 1, 2012.

In either case, the declaration of intent must be filed before receiving any qualifying contributions.

For office use
Received: 



STATE OF WEST VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL  
CHARLESTON 25305

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL

July 28, 2011

(304) 558-2021  
FAX (304) 558-0140

The Honorable Natalie E. Tennant  
Secretary of State  
State Capitol, Suite 157-K  
1900 Kanawha Boulevard, East  
Charleston, WV 25305

Re: Opinion Request of June 30, 2011

Dear Secretary Tennant:

We have received your letter of June 30, 2011, requesting an Opinion of the Attorney General on the following legal issue:

Is the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program constitutional in light of the recent United States Supreme Court ruling on the Arizona law?

Following our review of the law, and specifically *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, Secretary of State of Arizona*, Nos. 10-238 & 239 (U.S. Supreme Court, June 27, 2011), we have concluded that the "matching funds" provisions of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program constitute a substantial burden on the speech of privately financed candidates and are therefore violative of the United States Constitution, amend. I.

Those matching funds provisions are found at West Virginia Code §§ 3-12-11(e) - (f):

(e) If the commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that a nonparticipating candidate's campaign expenditures or obligations, in the aggregate, have exceeded by twenty percent the initial funding available under this section any certified candidate running for the same office, the commission shall authorize the release of additional funds in the amount of the reported excess to any opposing certified candidate for the same office.

(f) If the State Election Commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that independent expenditures on behalf of a nonparticipating

candidate, either alone or in combination with the nonparticipating candidates's campaign expenditures or obligations, have exceeded by twenty percent the initial funding available under this section to any certified candidate running for the same office, the commission shall authorize the release of additional funds in the amount of the reported excess to any certified candidate who is an opponent for the same office.

(g) If the commission determines from any reports filed pursuant to this chapter or by other reliable and verifiable information obtained through investigation that independent expenditures on behalf of a certified candidate, in combination with the certified candidate's campaign expenditures or obligations, exceed by twenty percent the initial funding available under this section to any certified candidate running for the same office, the State Election Commission shall authorize the release of additional funds in the amount of the reported excess to any other certified candidate who is an opponent for the same office.

(h) Additional funds released under this section to a certified candidate may not exceed \$400,000 in a primary election and \$700,000 in a general election.

(i) In the event the commission determines that additional funds beyond the initial distribution are to be released to a participating candidate pursuant to the provisions of the section, the commission, acting in concert with the State Auditor's office and the State Treasurer's office, shall cause a check for any such funds to be issued to the candidate's campaign depository within two business day.

In *Arizona Free Enterprise Club*, the United States Supreme Court examined the Arizona Citizens Clean Elections Act, which created a public financing system to fund the primary and general election campaigns of candidates for state office. Speaking for a majority of the Court, Chief Justice Roberts summed up the Court's opinion as follows:

Under Arizona law, candidates for state office who accept public financing can receive additional money from the State in direct response to the campaign activities of privately financed candidates and independent expenditure groups. Once a set spending limit is exceeded, a publicly financed candidate receives roughly one dollar for every dollar spent by an opposing privately financed candidate. The publicly financed candidate also receives roughly one dollar for every dollar spent by independent expenditure groups to support the privately financed candidate, or to oppose the publicly financed candidate. We hold that Arizona's matching funds scheme substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment.

*Arizona Free Enterprise Club*, *supra*, at 1-2. Further:

We have repeatedly rejected the argument that the government has a compelling state interest in “leveling the playing field” that can justify undue burdens on political speech.

*Id.* at 24. Further:

[E]ven if the ultimate objective of the matching funds is to combat corruption – and not “level the playing field” – the burdens that the matching funds provision imposes on protected political speech are not justified.

*Id.* at 26. Finally:

[T]he goal of creating a viable public financing scheme can only be pursued in a manner consistent with the First Amendment. The dissent criticizes the Court for standing in the way of what the people of Arizona want. *Post.* at 2-3, 31-32. But the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority. When it comes to protected speech, the speaker is sovereign.

*Id.* at 29.

In response to the various arguments made by the State of Arizona, the United States Supreme Court held, as a threshold matter, that “the matching funds provision ‘imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s] . . .,’” citing *Davis v. Federal Election Comm’n*, 554 U.S. 724, 739 (2008), and that “‘the vigorous exercise of the right to use personal funds to finance campaign speech’ leads to ‘advantages for opponents in the competitive context of electoral politics.’”

Second, the Court held that because each dollar spent by a privately funded candidate in excess of the initial public financing cap “can create a multiplier effect . . . [because] each dollar spent by the privately funded candidate would result in an additional dollar of campaign funding to each of that candidate’s publicly financed opponents.” *Arizona Free Enterprise Club* at 11-12.

Third, the Court held that the privately funded candidate is at a severe disadvantage in terms of strategy and coordination of expenditures, because “[e]ven if that candidate opted to spend less than the initial public financing cap, any spending by independent expenditure groups to promote the privately financed candidate’s election – regardless whether such support was welcome or helpful – could trigger matching funds. What is more, that state money would go directly to the publicly funded candidate to use as he saw fit.” *Id.* at 12.

Fourth, the Court held that the burden on independent expenditure groups was potentially greater than the burden on the privately funded candidate, because it could only avoid triggering

matching funds by “changing its message from one addressing the merits of the candidates to one addressing the merits of an issue, or refrain from speaking altogether.” *Id.* at 13. This, the Court concluded, burdened the fundamental right of a speaker (the independent expenditure group) “to choose the content of [its] own message.” *Id.*

Fifth, the Court held that Arizona’s avowed intent to foster free, open and robust debate was not a compelling state interest, because “even if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups.” *Id.* at 15.

Sixth, the Court was unpersuaded by Arizona’s argument that if providing all the available money to publicly funded candidates up front does not burden speech, then providing it incrementally would not do so either and serves the purpose to ensure that public funding is not under- or over-distributed. The Court held that “[t]hese arguments miss the point. It is not the amount of funding that the State provides to publicly financed candidates that is constitutionally problematic in this case. It is the manner in which that funding is provided - in direct response to the political speech of privately financed candidates and independent expenditure groups.” *Id.* at 21.

Seventh, the Court gave short shrift to the argument made by the United States as *amicus* that providing funds to a publicly funded candidate does not make a privately funded candidate’s speech any less effective, and thus does not substantially burden speech. “Of course it does. One does not have to subscribe to the view that electoral debate is zero sum . . . to see the flaws in the United States’ perspective. All else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted.” *Id.* at 21-11.

Turning to the matching funds provisions of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. Va. Code §§ 3-12-(e)-(1), we conclude that these provisions violate the United States Constitution, amend. I, under *Arizona Free Enterprise Club*.

The matching funds are triggered by the expenditures of either a privately funded candidate or an independent expenditure group.

The matching funds have a multiplier effect, as matching funds that are triggered by information relating to one publicly funded candidate are available to “any certified [publicly funded] candidate who is an opponent for the same office.”

Although the total amount of matching funds is capped, that would appear to be irrelevant in light of the Supreme Court’s observation that “[i]t is not the *amount* of funding that the State provides to publicly financed candidates that is constitutionally problematic in this case. It is the

manner in which that funding is provided -- in direct response to the political speech of privately financed candidates and independent expenditure groups.”

In the “Legislative Findings and Declarations,” which are a part of the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. Va. Code § 3-12-2, the West Virginia Legislature notes the “unlimited amounts of money raised from private sources” for judicial elections, the public perception that “contributors and interested third parties hold too much influence over the judicial process,” and the “especially problematic” nature of judicial elections, where the perceived impartiality of candidates is uniquely important to voters. None of these findings and declarations would appear to materially distinguish the law’s matching fund provisions from the those contained in the Arizona law struck down in *Arizona Free Enterprise Club, supra*.

Further, nothing in the recent jurisprudence of the United States Supreme Court would lead us to predict a “judicial exception” to the Court’s political speech line of cases. If combating corruption is not a compelling state interest - and the Court held in no uncertain terms in *Arizona Free Enterprise Club* that it is not - we cannot envision it finding the perception of possible judicial partiality to be sufficient.

Although the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, W. Va. Code §§ 3-12-1 *et seq.*, is silent as to the severability of its provisions, we believe that the statutory scheme “can reasonably function as an autonomous whole without the invalid provision[s] . . .,” i.e., the matching fund provisions contained in Code §§ 3-12-11(e)-(1). *Louk v. Cormier*, 218 W. Va. 81, 96, 622 S.E.2d 788, 803 (2005), citing Israel E. Friedman, *Inseverability Clauses in Statutes*, 64 U. Chi. L. Rev. 903-04 (1997). The applicable principle of statutory construction is as follows:

A statute may contain constitutional and unconstitutional provisions which may be perfectly distinct and separable so that some may stand and the others will fall; and if, when the unconstitutional portion of the statute is rejected, the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained.

*Louk v. Cormier*, 218 W. Va. at 96-97, 622 S.E.2d at 803-04; Syl. Pt. 6, *State v. Heston*, 137 W. Va. 375, 71 S.E.2d 481 (1952).

Whether the amount of public funding available for certified candidates should be increased, in the absence of the matching funds provisions, is a policy question upon which we express no opinion.<sup>1</sup>

Finally, although we disagree with the decision of the United States Supreme Court in *Arizona Free Enterprise Club*, the Court's opinions are the "supreme law of the land" pursuant to the West Virginia Constitution, art. I, § 1, and therefore binding on all branches of government in this State. We wish to state that we are in accord with the Legislature's "Legislative Findings and Declarations" set forth in West Virginia Code § 3-12-2, and particularly the Legislature's desire to "ensure the fairness of democratic elections in this state, protect the Constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, protect the impartiality and integrity of the judiciary, and strengthen public confidence in the judiciary. . . ."

In summary, it is the opinion of this Office that pursuant to the decision of the United States Supreme Court in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, Secretary of State of Arizona*, Nos. 10-238 & 239 (U.S. Supreme Court, June 27, 2011), the provisions of West Virginia Code §§ 3-12-11(e)-(f), the matching funds provisions contained in the West Virginia Supreme Court of Appeals Public Campaign Financing Pilot Program, are violative of the United States Constitution, amend. I.

Please feel free to call this office if you have any questions.

Very truly yours,

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL

By: 

BARBARA H. ALLEN  
MANAGING DEPUTY ATTORNEY GENERAL

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<sup>1</sup>Pursuant to West Virginia Code §§3-12-11(a)(1) & (2) and 3-12-11(b)(1) & (2), a certified candidate in a contested primary election receives \$200,000.00 in initial campaign financing from the fund, minus his or her qualifying contributions; a certified candidate in an uncontested primary election receives \$50,000.00, minus his or her qualifying contributions; a certified candidate in a contested general election receives an amount not to exceed \$350,000.00; and a certified candidate in an uncontested general election receives \$35,000.00.