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PUBLICLY FINANCED JUDICIAL ELECTIONS: AN OVERVIEW

Charles Gardner Geyh[*]

I. INTRODUCTION

To fund increasingly expensive judicial races, candidates are soliciting more contributions from lawyers, would-be litigants, and special interest groups, which creates the perception that judges are beholden to those contributors. One means to eliminate that perception would be to finance judicial elections with public funds and thereby obviate the need for private contributions altogether. Indeed the case for public financing is arguably more compelling for judicial elections than political branch races because unlike the latter, where constituent influence over political branch decision making is appropriate and desirable, the perception of external influence over *judicial* decision making is especially problematic.

Public financing programs have been introduced in over twenty states. Ambitious public funding legislation recently enacted in Arizona, Massachusetts, Maine, and Vermont suggests that interest in public financing programs is increasing.[1] However, only Wisconsin has made a serious effort to fund judicial races. The most serious hurdles to publicly funding judicial elections include:

- ensuring that the program is adequately funded;

* Professor of Law, Indiana University at Bloomington. The views expressed herein are mine alone and do not necessarily reflect those of the ABA Commission on Public Financing of Judicial Campaigns, on which I serve as reporter, the opinions of the National Center for State Courts, the Joyce Foundation, or the Open Society Institute. I would like to thank Philip Adam Davis for his excellent research assistance, and Luke Bierman, Eileen Gallagher, David Rottman, and Roy Schotland for their comments on earlier drafts.

1. *See* Mary M. Janicki, *Public Financing Update*, OLR RESEARCH REP. (Nov. 4, 1999), *at* http://www.cga.state.ct.us/ps99/rpt/olr/htm/99-r-1102.htm.

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

In an effort to facilitate discussion of public financing as one possible means to ameliorate some of the recent problems that have arisen in judicial elections, Part II of this paper summarizes the problems that public financing is intended to address, while Part III discusses public financing structures, their potential advantages, and their difficulties.

II. PROBLEMS WITH PRIVATELY FINANCED JUDICIAL ELECTION CAMPAIGNS

Six problems are associated with the private financing of judicial election campaigns.

A. The Cost of Running Judicial Election Campaigns Is Increasing Dramatically

"In the thirty-nine states that elect judges at some level," reported *The Nation* magazine in 1998, "the cost of judicial races is rising at least as fast as that of either Congressional races or presidential campaigns, as candidates for the bench pay for sophisticated ads, polls and consultants."[2] For example, the cost of running supreme court races in Alabama increased from $237,281 in 1986 to $2,080,000 in 1996; in Ohio costs rose from $100,000 in 1980 to over $2.7 million in 1986; and in Pennsylvania the cost went from $523,000 in 1987 to $2.8 million in 1995.[3]

2. Sheila Kaplan & Zoe Davidson, *The Buying of the Bench*, THE NATION, Jan. 26, 1998, at 11. Information presented here on privately financed judicial election campaigns has been drawn from articles published largely in the popular press of the referenced states, and may for that reason be inaccurate.

3. *See* Mark Hansen, *A Run for the Bench*, A.B.A. J., Oct. 1998, at 68, 69-70.

B. To Cover Their Costs, Judges Must Solicit Funds from Contributors Interested in Case Outcomes

As the cost of campaigning escalates, judicial candidates are required to raise more money from contributors who typically include lawyers, litigants, or organizations with an economic or political interest in the outcomes of cases to be decided by the courts where the candidates are seeking election—or reelection. In Illinois, for example, one recent supreme court candidate was criticized for receiving $80,000 in contributions from ten personal injury law firms, while another was called to task for accepting $35,000 from a real estate developer.[4] In Ohio, *The Plain Dealer* reported that $2.1 million of the $4.1 million in contributions received by supreme court justices from 1993 to 1998 came from lawyers and lobbyists.[5] And in Texas, a reform group study reported that $3.7 million of $9.2 million contributed to supreme court justices between 1994 and 1997 were "given by contributors who were closely linked to parties on the court docket."[6]

C. In Addition to Soliciting Contributions, Judges Often Take Out Loans to Make Up for Revenue Shortfalls During Their Campaigns

Judges who are not independently wealthy and who go into debt to underwrite their campaigns must later repay those debts with campaign contributions. The pressure on such judges to raise money is thus compounded—they must seek out contributors to ensure not only their reelection but their solvency as well.

D. When Judges Make Decisions That Favor Contributors, They Are Accused of Favoritism

Given the high volume of contributions to judicial campaigns from interested individuals and organizations, it is inevitable that members of the press or public will call attention to what they regard

4. *See* Scott Fornek, *High Court Candidates Spar Over Contributions*, CHI. SUN-TIMES, Feb. 4, 2000, at 18.

5. *See* T.C. Brown, *Majority of Court Rulings Favor Campaign Donors*, THE PLAIN DEALER (Cleveland), Feb. 15, 2000, at 1A.

6. Janet Elliott, *"60 Minutes" Visit Finds Court's Defenders in Hiding*, TEX. LAW., Aug. 24, 1998, at 1.

as a suspicious correlation between a judge's campaign contributions and the judge's subsequent, favorable treatment of the contributor. In New York, for example, the "Association of the Bar of the City of New York found an apparent correlation between campaign contributions to Surrogate Court judges and appointments as guardian ad litem."[7] In Ohio, *The Plain Dealer* reported on the assertions of a court reform group, that the "Ohio Supreme Court ruled favorably two-thirds of the time for clients of the 20 Cleveland area attorneys who gave the most to justices' political campaigns from 1993 through 1998."[8] In some cases, such as in Ohio, reported correlations may be questioned, and in other cases, true correlations may have perfectly innocuous explanations. Even if the reality of influence can be rebutted, however, appearance problems remain.

E. Irrespective of Whether Contributors Do in Fact Influence Judicial Decision Making, the Public Perceives That They Do

The public perception that judges are beholden to or influenced by their contributors is pervasive. In Louisiana, for example, a Baton Rouge survey found that 56% of voters thought that judicial decisions are influenced by campaign contributions, while only 33% thought that "for the most part judges rule impartially."[9] In Pennsylvania, a 1998 poll sponsored by a special commission appointed by the Pennsylvania Supreme Court found that nine out of ten voters believed that judicial decisions were influenced by large campaign contributions.[10] In Texas, a 1998 survey sponsored by the state supreme court found that 83% of Texas adults, 69% of court personnel, and 79% of Texas attorneys believed that campaign contributions influenced judicial decisions "very significantly" or "fairly

7. John Caher, *Forum Explores Judicial Election Funding Reform*, N.Y. L.J., Dec. 8, 1999, at 1.

8. Brown, *supra* note 5.

9. Lanny Keller, *Judicial Campaigns Undermine Respect*, THE ADVOCATE (Baton Rouge, La.), Jan. 13, 2000, at 9B.

10. *See* Dennis Chaptman, *Process of Electing Judges Debated; Officials From 17 States Study Campaign Finance, Threats to Independence*, MILWAUKEE J. SENTINEL, Dec. 10, 2000, at 2B.

significantly," while 48% of judges indicated that money had an impact on judicial decisions.[11]

F. Problems Associated With Private Campaign Fund-Raising May Discourage Exceptionally Qualified Judicial Candidates from Pursuing or Remaining in Judicial Office

Many judges have expressed distaste for fund-raising and discomfort with receiving contributions from lawyers and interested organizations. Some have resigned to avoid private fund-raising that they regard as threatening independence. Former Texas Supreme Court Justice Bob Gammage, for example, reportedly quit after one term because, in his view, the elections of judges in Texas had become too partisan and the politics of elections had influenced the state's judges.[12]

III. PUBLIC FINANCING AS AN ALTERNATIVE TO PRIVATELY FUNDED JUDICIAL ELECTION CAMPAIGNS: ADVANTAGES, OPTIONS, AND PROBLEMS

A. The Potential Advantages of Public Financing

For states that remain wedded to partisan or nonpartisan judicial elections, the potential advantages of underwriting judicial campaigns with public funds are relatively clear. The more money judges receive from public sources, the less they will have to raise from private groups and individuals who are interested in the outcomes of cases the judges decide. Thus, public funding reduces the potential for campaign contributions to influence judicial behavior and addresses the public perception that such influence occurs.

Indeed, the case for public financing of judicial elections is arguably more compelling than for legislative or executive branch races. Governors and legislators are, by design, the people's representatives. They are not expected to insulate themselves from the electorate, but are supposed to be influenced by and to reflect their

11. *See* Lawrence N. Hansen, Editorial, *Contribution Limits Protect Democracy*, CHI. SUN-TIMES, Jan. 30, 2000, at 28.

12. *See* Ross Ramsey, *Justice Gammage to Resign, Blasts Judge Election Process*, HOUSTON CHRON., Aug. 25, 1995, at A32.

constituents' point of view. For this reason, political branch office-seekers publicize the decisions they intend to make so that voters have a basis upon which to cast their ballots. The peril of financing such races with private funds is not that it enables contributors to influence governmental decision making, but that it enables contributors to influence governmental decision making more than other constituents. Judicial candidates, in contrast, are *not* representatives. They are supposed to be—and appear to be—impartial, to apply the law as it is written regardless of whether it is popular with voters, and are subject to discipline if they make campaign promises to decide particular cases in particular ways. Because virtually *any* external influence over a judge's independent decision making is inappropriate, the need to immunize judges from the influence—and the appearance of influence—of campaign contributions may be all the more pressing.

The six problems associated with privately funded judicial campaigns, that were summarized in the preceding section, have arisen not only in states that select judges in partisan and nonpartisan elections, but also in "merit selection" states where appointed judges have had to raise substantial sums in campaign contributions to fend off opposition in their retention elections.[13] At the same time, however, merit selection states are different in ways that warrant separate analysis.

First, the problems that public financing seeks to address will, on average, be less acute in merit selection states. In such states, election-related problems are eliminated from the initial selection process because the judges are appointed (although judges are also often initially appointed to fill vacancies in contested election states). When judges later stand for reelection, they run against their records rather than competing candidates. This assures that contentious, expensive elections will occur only when voters are dissatisfied with the judge's performance, and not every time another candidate wants the judge's job. Moreover, because voters cannot be sure that a more satisfactory replacement will be appointed if they vote an incumbent

13. *See* Hansen, *supra* note 3, at 70 (stating "in many cases judges who are appointed through merit selections are still subject to retention elections, with the same high costs and the partisan nature of most elective campaigns.").

out, significant opposition to a judge's retention is likely to arise only when dissatisfaction levels are high.

Second, in retention elections, there are no "opponents" to finance. Publicly funding such elections in conventional ways would thus involve one of three equally problematic alternatives: 1) to underwrite judges only, and be accused of "stacking the deck" in the incumbents' favor; 2) to give an equal share of the public funds to private opposition groups, for the purpose of subsidizing advertising campaigns attacking the decisions of incumbent judges, who are subject to ethics rules that will often forbid them from responding; or 3) to regulate the issues that opposition groups may address as a precondition to receipt of public funds, and be accused of attempting to censor them.

This does *not* mean that public financing has no place in merit selection states. The objections raised in the preceding paragraph might be overcome to some extent, if funded opposition groups were required to abide by the same rules as incumbents. Thus, in exchange for public funds, an opposition group might be required to honor Code of Judicial Conduct restrictions on its campaign-related speech. At a minimum, alternative forms of public funding—such as subsidized voter guides or publicly disseminated judicial performance evaluations—might be appropriate.

B. Public Funding Options

1. Basic features of alternative public funding systems[14]

There are several basic questions that any public financing system must address—questions that have generated a daunting array of possible answers from states that have implemented or considered implementing such systems. The variety of public financing programs is captured in an excerpt to a Connecticut Office of Legislative Research memorandum, attached as Appendix A to this paper. The excerpt presents a graphic summary of public funding systems implemented in different states.

14. For an excellent general discussion of public funding alternatives, see ELIZABETH DANIEL, SUBSIDIZING POLITICAL CAMPAIGNS: THE VARIETIES & VALUES OF PUBLIC FINANCING (Brennan Center for Justice) (2000), *available at* http://www.brennancenter.org/resources/resources_cfseries.html.

Which races should be publicly funded? Almost all states that have implemented public funding programs have confined their applicability to nonjudicial elections: gubernatorial races, other statewide races, or, less frequently, legislative races.[15] If judicial races are included, should trial court races be publicly funded, or only supreme court or court of appeals contests? Should public funding apply only to general elections, or primary elections as well?

How much public funding should be provided? Public funds may be used to partially or fully fund judicial and other races. In either case, the issue is how much public money to make available. Because participation in public funding systems must ordinarily be voluntary to satisfy First Amendment requirements, the success of such programs depends on keeping funding levels high enough to entice candidates to opt in.[16]

Which candidates should be eligible to receive public funds? For obvious reasons, the availability of public money should be limited to serious candidates. There are a number of ways in which that can be done. One is to limit eligible candidates to those who gather a minimum number of petition signatures. Another is to require grant applicants to generate a minimum number or amount of small campaign contributions. A third option is to limit grant eligibility to candidates who received—or whose party received—a minimum percentage of the vote in a previous election.

What conditions, if any, should be imposed on candidates who receive public funds? Although states may not require candidates to accept public funds, they may condition the distribution of public funds to candidates who choose to receive them, on the candidates' agreement to abide by specified conditions. Such conditions may include imposing limits on campaign contributions and spending, or requiring candidates to participate in debates.

How can excessive spending by or on behalf of a publicly funded candidate's opponent be addressed? Special problems arise when publicly funded candidates bound by spending limits are opposed by candidates who are not bound by spending limits because they do not

15. *See infra* app. A.

16. For a discussion of the First Amendment requirement of voluntary participation in public funding systems, see *Buckley v. Valeo*, 424 U.S. 1, 85-109 (1976).

receive public funds, or who are supported by independent groups that campaign for the candidate on their own. In such situations, publicly funded candidates may be authorized to receive supplemental public funds or to exceed their private spending limits to ensure that they are not unfairly disadvantaged.

How should public funds be dispersed? The most obvious means to distribute public funds is through simple block grants. Other means, however, include awarding candidates grants that match private contributions; reimbursing contributors with vouchers or tax breaks; or delivering benefits in-kind, in the form of television time or voters guides.

How should revenues needed to fund a public financing system be generated? As discussed below, adequately funding public financing programs may be the single biggest problem such programs confront. Possibilities include general tax revenues, tax checkoffs—which allow taxpayers to earmark a dollar amount of their tax liability to the campaign fund; tax add-ons—which allow taxpayers to add to their tax liability with a contribution to the campaign fund; criminal fine or civil penalty surcharges; court fees; or attorney licensing fees.

How and by whom should a public financing program be administered? Independent agencies are often responsible for administering state election laws, including public funding programs. In the case of judicial elections, the issue is whether the judiciary's institutional independence might be undermined by locating the regulatory entity outside the judicial branch.

What are the First Amendment impediments to publicly funded elections? In *Buckley v. Valeo*,[17] the United States Supreme Court held mandatory spending limits unconstitutional, but in a footnote observed that Congress could condition voluntary public funding on candidates' willingness to abide by expenditure ceilings.[18] Unanswered questions remain, however, concerning how coercive "voluntary" programs can be, and how extensively states may limit contributions to, and spending by, publicly funded candidates before running afoul of the First Amendment.[19]

17. 424 U.S. 1 (1976).
18. *See id.* at 57 n.65.
19. *See id.* at 24-25.

2. Public funding of judicial elections: the Wisconsin experience

a. a description of the Wisconsin program

Although several states have ostensibly provided for publicly financed judicial elections, only Wisconsin has made a significant move in that direction.[20] Under the Wisconsin system, a Wisconsin Election Campaign Fund has been created with revenues generated by a one dollar state tax return checkoff.[21] Eight percent of the fund is earmarked for grants to supreme court candidates in years when there is a supreme court election.[22] The remainder of the fund underwrites campaigns for governor, lieutenant governor, attorney general, state treasurer, secretary of state, superintendent of public instruction, and the legislature.[23]

To be eligible to receive public funds, supreme court candidates must be opposed, and must have raised contributions totaling slightly less than $11,000—5% of the authorized disbursement limitation—in increments of $100 or less.[24] The maximum public grant available for a supreme court candidate is $97,031, which represents 45% of a $215,625 spending limit that, together with specified contribution limits, candidates must agree to honor in exchange for accepting public funds.[25] In the event that a grant recipient is opposed by a candidate who has not accepted public funds and has not agreed to comply with spending and contribution limits voluntarily, the grant recipient will be relieved of the duty to abide by spending and contribution limits.[26]

20. California permits supreme court candidates to make free statements in the state ballot pamphlet. *See* CAL. ELEC. CODE § 13307 (2001). North Carolina, Texas, and Utah provide limited public funds to political parties that could be, but have not been, used for judicial candidates. *See* Craig Byron Holman, Remarks to the American Bar Association Commission on Public Financing of Judicial Campaigns 121 (Sept. 8, 2000). Montana has abandoned a tax add-on funded program for supreme court candidates. *See id.*

21. *See* WIS. STAT. § 71.10(3)(a) (2000).

22. *See id.* § 11.50(3)(a)(2) (2000).

23. *See id.* § 11.50(4)(b) (2000).

24. *See id.* § 11.50(2)(a)(5) (2000).

25. *See id.* §§ 11.26(9)(b), 11.31 (2000).

26. *See id.* § 11.50(2)(i) (2000).

The Wisconsin Election Campaign Fund is administered by the Elections Board. The board is comprised of eight members variously selected by the governor, the chief justice, the assembly speaker, the senate majority leader, the minority leaders of both houses, and the chairs of the two major political parties.

b. the effectiveness of the Wisconsin program

Taxpayer participation in the Wisconsin checkoff system declined from close to 20% in 1979 to 8.7% in 1998—which reflected a slight rebound from the all time low of 8.1% set in 1996.[27] The resulting fund has been inadequate to provide candidates with the $97,031 grants authorized by the program. As a consequence, after 1989, when both supreme court candidates were fully funded, the grants given to nine participating supreme court candidates have averaged only $45,354.[28] As the size of the grants diminish, the incentive to opt into the system and abide by spending and contribution limits in exchange for public funds is reduced. Not surprisingly, then, the percentage of candidates opting into the Wisconsin public funding program declined from a high of 55% in 1986 to just 14% in 2000.[29] In 1999 the challenger for a supreme court seat declined to accept public funds—the total sum available was $27,005—or voluntarily abide by spending limits, which authorized the incumbent to receive that whole sum available and to exceed her spending limit.[30] Combined spending in the race exceeded $1.36 million.[31] The reaction of the press, public, and legal community to the sometimes mean-spirited tenor of the 1999 campaign was negative, and in part for that reason, the two candidates in the 2000 campaign agreed to

27. *See More Supporting Publicly Financed Elections in State*, CAP. TIMES (Madison), Aug. 14, 1999, at 2A.

28. See *infra* app. B, "Campaign Funding and Expenditures in Contested Wisconsin Supreme Court Elections 1979-1997," which reflects Wisconsin's declining election fund disbursements over time.

29. *See Few Take State Campaign Funds, Attached Strings* (Oct. 21, 2000), *at* http://www.jsonline.com/news/state/oct00/camp22102100a.asp.

30. *See* Richard P. Jones, *Abrahamson Camp Urges Rival to Show Restraint in Campaign Ads*, MILWAUKEE J. SENTINEL, Feb. 27, 1999, at 2.

31. *See* Sarah Wyatt, *Court Candidates OK Spending Cap; Sykes and Butler to Accept Public Campaign Money and Agree to a Spending Limit of $215,625*, WIS. ST. J., Feb. 23, 2000, at 3B.

abide by the $215,625 spending limit in exchange for grants of $13,500.[32]

Given the woeful state of the election campaign fund, proposals have been made to increase the size of the checkoff, and to provide better information to the public about the program funded by the checkoff.[33] Even if the election fund were sufficient to underwrite the grants contemplated by the program, however, candidates would still raise 55% of the dollars needed to fund their campaigns from private contributions;[34] in cases where one candidate declines to accept public money, all limits are off. For that reason, the Wisconsin Commission on Judicial Elections and Ethics issued a 1999 report recommending that all supreme court and court of appeals races be fully funded.[35]

C. Potential Problems with Publicly Funded Judicial Elections

There are several hurdles that public financing systems must overcome to be effective, as reflected in the Wisconsin experience. First and foremost is the need for an adequate source of public funds. The experience of virtually all states that have tried them demonstrates that tax add-ons are ineffective; experience in Wisconsin and other states suggests that tax checkoffs are likewise problematic.[36] Checkoff proponents, however, have pointed to Minnesota—where a five dollar checkoff is supplemented with other public funds to generate seven times more money for legislative races than in Wisconsin, and where 99% of legislative candidates opt into the program—to support the argument that tax checkoffs can be made to work.[37] Further, without minimizing the political and philosophical issues it

32. *See id.*

33. *See* Richard P. Jones, *Campaign Finance Bill Would Raise Checkoff*, MILWAUKEE J. SENTINEL, Jan. 15, 1999, at 2.

34. *See* WIS. STAT. § 11.26(9)(a) (2000).

35. *See* Sarah Wyatt, *Group: Public Should Finance Court Races Ethics Commission Report Says that Would Foster Public Trust in Bench*, WIS. ST. J., Aug. 5, 1999, at 3B.

36. See *infra* app. C, "Tax Form Political Contribution 1990-1993," which reflects somewhat dated but nonetheless revealing data on revenues generated by add-ons and checkoffs in different states.

37. *See* Mike McCabe, *Tax Checkoff Improves System*, CAP. TIMES (Madison), Apr. 12, 2000, at 6A.

raises, there would be a certain logic to funding judicial elections from monies generated by court system users: lawyers, through increased licensing fees, and parties, through increased filing fees or surcharges on criminal fines and civil penalties.

A second, closely related problem is that systems of partial public funding may be of dubious value. To the extent that judges must continue to raise significant sums of money from lawyers and organizations with an interest in the outcomes of cases the judges will be deciding, the appearance problem will persist. Contribution limits may help to reduce that perception, as may new recusal standards recently adopted by the ABA.[38] Full, or nearly full, public funding is another possible solution, but one that places an even greater premium on the need for an adequate source of funds.

Third, how to account for the expenditures of independent organizations or political parties when imposing spending limits on publicly funded candidates is an especially difficult problem to solve. Authorizing publicly funded candidates to raise and spend more private money to counter independent expenditures on their opponents' behalf undermines the purpose of the program. Resort to supplemental public funds is therefore preferable, but public funds are finite, and upper limits must be imposed on the supplemental grants that compliant candidates may receive and spend to counteract the effects of excessive spending by opponents who have elected not to receive public funds, or who are the beneficiaries of independent expenditures. To the extent that the maximum supplemental public

38. In 1999, the ABA adopted Canon 3(E)(1)(e), which calls on a judge to disqualify herself if the judge knows or learns that a party or a party's lawyer has made aggregate contributions to a judge's campaign in excess of an amount to be specified by the individual states. *See* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(e) (1999) (amending ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990)). In the new Canon 5(C)(3), judicial candidates are told to "instruct his or her campaign committee(s). . . not to accept campaign contributions for any election that exceed, in the aggregate," an amount to be specified by the individual states. *See* ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5(C)(3) (1999) (amending ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1990)). The success of these new standards is likely to turn in no small part on whether the public's perception of the maximum contribution a judicial candidate can receive without compromising her impartiality coincides with the state supreme courts' perception when they establish maximum allowable contributions.

grants given compliant candidates are unable to keep pace with the private spending of opposing candidates—or the parties or independent organizations that support them—the imbalance will persist. Moreover, all of this assumes that independent organizations are campaigning on "behalf" of their candidate in good faith, which may not always be the case. If an organization attempts to undermine a candidate by running consciously ham-handed commercials on the candidate's behalf, such an act of sabotage should not entitle the opposing candidate—the candidate secretly favored by the organization responsible for the commercials—to receive additional funds to counter the sham ads. Election commissions must prepare to undertake the complicated task of verifying the authenticity of independent expenditures that trigger the disbursement of supplemental funds.

A fourth problem concerns the impact of public financing on competition. To the extent that the availability of public money makes running for elective office more attractive, publicly financed judicial elections will tend to increase competition for judicial office. On the one hand, increased competition is salutary in that it expands voter choice. On the other hand, increased competition may undermine ongoing efforts to cool judicial campaign rhetoric and dissuade candidates and the electorate from compromising judicial independence by turning elections into referenda on the popularity of incumbent judges' isolated decisions.

IV. CONCLUSION

At a luncheon meeting of the ABA Commission on Separation of Powers and Judicial Independence that I attended in 1996, Judge Abner Mikva observed in passing that "just throwing money at a problem is highly underrated." His point rings especially true in the context of publicly financed judicial elections. With sufficient resources, states could fully fund judicial elections at levels that no rational candidate would decline. Independent expenditures on behalf of any given candidate could be countered by offering additional public money to that candidate's opponent, thereby minimizing the impact of private money on election outcomes. Public financing proposals raise a variety of issues alluded to in this paper, but the most critical among them is whether the political will can be found to

commit the public funds necessary to make public financing systems solvent and workable.

The Wisconsin program—the only state program to subsidize judicial elections—is now on the brink of financial failure, which has fueled skeptics' suspicion that public financing is infeasible. Such a conclusion may, however, be premature. First, campaign finance reform has become a high profile issue in presidential politics, indicating a general need for finance reform. Second, significant public financing programs have recently been adopted in Arizona, Maine, Massachusetts, and Vermont,[39] which indicates that the political will to create such programs exists. Third, the constitutionality of the Maine program was recently upheld by the First Circuit,[40] which may encourage other states to implement similar programs. Fourth, judicial elections have received an unprecedented volume of negative national press in recent years, which may energize reform efforts and lead more states to consider including judicial races within the ambit of their public financing initiatives. For states that are unwilling to jettison elections in favor of an appointive method of judicial selection, public financing should remain on the table as an alternative means to control some of the adverse effects of private fund-raising on judicial elections.

39. *See* Janicki, *supra* note 1.

40. *See* Daggett v. Comm'n on Govt'l Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000).

APPENDIX A

SUMMARY OF PUBLIC FINANCING PROVISIONS[41]

STATE	YEAR LEGISLATION PASSED	FUNDING SOURCE	RECIPIENTS	OFFICES COVERED	ELECTIONS
AL	1983	Tax add-on	Political parties		
AR	1988	Tax add-on	Political parties		
	1998 Initiative	Tax checkoff, lobbyists' fees, fines, and penalties	Candidates	Statewide and legislative	Primary and general
FL	1985 (Program expired)	Political contribution taxes and candidate filing fees	Candidates	Governor and Cabinet	Primary and general
	1998 Constitutional Amendment	Appropriation, voluntary fees, other moneys	Candidates	Governor and Cabinet	Primary and general
HA	1978	Tax checkoff, appropriation, other moneys	Candidates	All nonfederal elective offices	Primary and general
ID	1975	Tax checkoff	Political parties		
IN	1976	Vanity license plate fees	Political parties		

41. *See* Janicki, *supra* note 1, at tbl.1.

STATE	YEAR LEGISLATION PASSED	FUNDING SOURCE	RECIPIENTS	OFFICES COVERED	ELECTIONS
IA	1973	Tax checkoff	Political parties		
KY	1976	Tax checkoff	Political parties		
	1992	Appropriation, candidate filing fees, committee surplus funds	Candidates	Governor/ lieutenant governor slates	Primary and general
ME	1973	Tax add-on	Political parties		
	1996 Initiative	Appropriation, qualifying contributions, tax checkoff, donations, and fines	Candidates	Governor and legislative	Primary and general
MD	1974	Tax add-on	Candidates	Governor/lieutenant governor	Primary and general
MA	1975	Tax checkoff	Candidates	Statewide	Primary and general
	1998 Initiative	Appropriation, tax checkoff, election fines, and penalties	Candidates	Statewide, legislative, and Governor's Council	Primary and general
MI	1976	Tax checkoff	Candidates	Governor	Primary and general
MN	1974	Appropriation, income or property tax checkoff, excess anonymous contributions	Candidates and political parties	Statewide and legislative; state party committees	Primary and general

STATE	YEAR LEGISLATION PASSED	FUNDING SOURCE	RECIPIENTS	OFFICES COVERED	ELECTIONS
NE	1992	Appropriation, tax checkoff, penalties, and fees	Candidates	1998: Legislative 2000: Adds Boards of Regents and Education, and Public Service Commission 2002: Adds all other statewide officials	General
NJ	1974	Appropriation, tax checkoff	Candidates	Governor	Primary and general
NM	1992	Tax add-on	Political parties		
NC	1975	Tax checkoff	Political parties		
	1988	Tax checkoff	Candidates	Governor	General
OH	1987	Tax checkoff	Political parties		
RI	1973	Tax checkoff	Political parties		
	1988	Appropriation, tax checkoff	Candidates	General office (statewide)	General
UT	1973	Tax checkoff	Political parties		
VT	1997	Appropriation,tax checkoff, lobbyists' assessment, and corporation filing fees	Candidates	Governor, lieutenant governor	Primary and general
VA	1982	Tax add-on	Political parties		
WI	1977	Tax checkoff	Candidates	Statewide and legislative	General

APPENDIX B

CAMPAIGN AND EXPENDITURES IN CONTESTED WISCONSIN SUPREME COURT ELECTIONS 1979-1997

YEAR	NUMBER OF CANDIDATES	TOTAL RECEIPTS OF ALL CANDIDATES	WECF[42] GRANT MONEY RECEIVED BY ALL CANDIDATES	TOTAL EXPENDITURES OF ALL CANDIDATES
1979	2	$101,708	$39,953	$102,564
1980	4	$194,393	$65,624	$200,691
1983	2	$269,050	$58,188	$283,113
1989	2	$362,114	$194,062	$428,496
1990	2	$389,564	$76,038	$386,398
1994	3	$284,581	$67,536	$289,725
1995	5	$709,041	$30,953	$907,953
1996	7	$824,228	$26,398	$825,453
1997	2	$899,074	$26,148	$898,310
1999	2 (only 1 participating)	$___,___	$27,005	$1,325,000
2000	2		$30,000	$4 ,000

42. Data from Wisconsin Election Campaign Fund, supplied by Roy A. Schotland.

APPENDIX C

TAX FORM POLITICAL CONTRIBUTIONS 1990-1993[43]

	1990		1991		1992		1993	
Add On States	Amount	% of Returns	Amount	% of Returns	Amount	% of Returns	Amount	% of Returns
Alabama	$13,597	1	$11,602	*	$10,020	*	NA	
Arizona	16,195	*	16,508	*	19,897	*	$18,898	*
California	188,238	*	169,358	*	157,970	*	127,188	*
Louisiana	**		**		1,410	*	1,042	*
Maine°	19,152	1	17,681	1	19,927	1	17,603	1
Massachusetts	69,446	2	60,995	2	59,258	2	56,648	2
New Mexico	**		**		1,542	*	1,370	*
North Carolina°	26,633	*	23,287	*	20,699	*	21,811	*
Virginia	37,632	1	35,110	1	34,818	1	14,842	*
	370,893		334,541		325,541		259,402	
Check Off States								
Hawaii°	$419,338	38	$456,952	40	$386,418	34	$375,965	35
Idaho	44,111	10	38,698	9	36,888	8	35,848	8
Iowa+	224,973	9	179,124	7	167,918	7	153,234	8
Kentucky	281,948	7	264,024	6	215,104	7	201,022	7
Michigan°	1,534,600	19	1,483,800	18	1,306,000	16	1,474,000	12
Minnesota+	1,878,310	15	1,683,405	13	1,638,530	13	1,544,190	12
New Jersey°	1,263,831	34	1,191,487	33	1,112,066	31	1,024,911	29
North Carolina	505,935	17	424,239	15	398,350	13	423,991	14
Ohio	1,064,105	21	1,090,456	21	987,161	19	946,429	19
Rhode Island+	376,595	9	265,270	8	202,468	6	201,057	6
Utah	80,389	12	94,135	14	69,656	10	69,646	9
Wisconsin°	431,478	17	407,179	16	378,824	15	359,662	14
	8,105,613		7,578,769		6,899,383		6,809,955	

*Less than 0.5% of returns

** Fund not in effect for that year

° In these states, the money goes into an election fund that is then allocated to candidates.

43. Data supplied by Ruth S. Jones, Arizona State University School of Law.

[+] In these states, tax payers have options to give to political parties or to a general election fund.
Note: percentages for Hawaii represent taxpayers, not returns.