

# CALIFORNIA INITIATIVE REVIEW

## California Judicial Campaigns: Feasibility of Publicly Funded Judicial Campaigns.

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## **I. Introduction**

Canon 1 of the California Code of Judicial Ethics states that an “[I]ndependent and honorable judiciary is indispensable to justice in our society.” Cal. Code of Jud. Ethics 1 (2007). Canon 1 places judges at the helm of upholding the integrity and independence of the California judiciary. However, the growing cost of judicial campaigns is an impediment to judicial independence. With the cost of judicial campaigns rising at least as fast as legislative and executive campaigns, many argue that judicial autonomy is under siege by private contributors and special interest groups. Am. B. Assn. Standing Comm. on Jud. Indep., *Report of the Commission on Public Financing of Judicial Campaigns*, 11 (2002) (citing Sheila Kaplan & Zoe Davidson, *The Buying of the Bench*, *The Nation* (1997)).

“The judiciary is uniquely structured to be independent and separate from the legislative and executive branches. Judges are required to be impartial, neutral decision-makers who apply the facts of the case to the law, without looking to the prevailing popular trends, without fear or favor.” *Id.* at 1. As such, special interest contributions to judicial candidates raise serious questions concerning notions of judicial independence and impartiality. Critics argue that such money jeopardizes the autonomy of the judiciary--worrying that a judge may give favorable treatment to those who donated to their campaign. *Id.* Others are concerned about the increased politicization of the judiciary, as the rising cost of campaigning forces judges to solicit contributions from private individuals and groups. *Id.* at 26. It is against this background that judicial campaign financing has come under close public scrutiny, leading some states to implement public financing of judicial campaigns in an effort to preserve an honorable and independent judiciary. *See* N.C. Gen. Stat. §§ 163-278.61 to 163-278.69 (West 2002), and N.M. Stat. §§ 1-19A-2 to 1-19A-14 (2007).

The purpose of this report is threefold. First, this report will examine the current state of judicial campaign finance in California. Second, this report will discuss the implementation of the North Carolina Judicial Campaign Reform Act, the first act in the United States to implement public financing of judicial campaigns. Finally, this report will examine the feasibility of implementing statewide public financing of judicial campaigns in California.

## **II. Current Situation in California**

### **A. Structure of the California Court System**

California's judicial system is comprised of three levels of courts: the Supreme Court, courts of appeal, and superior courts. Cal. Const. art. VI, § 1. Each level presides over specific areas of the law, such as civil, criminal or appellate. *See* Jud. Council of Cal., *Fact Sheet: California Judicial Branch*, [http://www.courtinfo.ca.gov/reference/documents/factsheets/Calif\\_Judicial\\_Branch.pdf](http://www.courtinfo.ca.gov/reference/documents/factsheets/Calif_Judicial_Branch.pdf) 1-4 (accessed Jan. 10, 2008) (discussing the jurisdiction of the Supreme Court, courts of appeal and superior courts). Currently, more than 2,000 judges preside over cases in roughly 450 courthouses across California. *Id.* at 1.

In 1998, California passed Proposition 220, permitting counties to merge their municipal and superior courts into one single superior court. Jud. Council of Cal., *Get Ready for Court*, <http://www.courtinfo.ca.gov/selfhelp/lowcost/getready.htm> (accessed Nov. 7, 2007). Superior courts have jurisdiction over criminal cases, civil cases, appeals from small claims court, and appeals from misdemeanor cases. *Id.* A majority of appeals, though, fall within the purview of the courts of appeal and the Supreme Court. *Id.* In all, six districts, eighteen divisions, and ninety-nine justices compose the California courts of appeal. *Id.* Finally, the Supreme Court consists of seven justices who hear appeals of decisions from the lower courts. *Id.*

California also divides courts in terms of how their judges come into office. The Governor appoints courts of appeal and Supreme Court judges to twelve-year terms. Cal. Const. art. VI § 16(a). At the end of their term, Supreme Court and courts of appeals justices face unopposed retention elections, remaining on the bench only if they receive a majority of voters' approval. Cal. Const. art. VI, § 16(d)(1). Should a majority of voters vote against a justice's retention, the Governor has the power to fill the vacancy by appointment. Cal. Const. art VI, §16(d)(2).

If not appointed, superior court judges compete in non-partisan elections and serve six year terms. Cal. Const. art. II, § 6 and Cal. Const. art. VI § 16(c). As is the case for ninety percent of superior court elections, a judge who runs unopposed in a June primary election does not appear on the primary or general election ballot. Jean Askham, *Voters Guide to Judicial Elections*, <http://ca.lwv.org/lwvc.files/judic/> (Dec. 8, 1997). Election is automatic for an unopposed judicial candidate after the primary. *Id.* In the event that more than one candidate runs in the June primary election, the candidate receiving more than fifty percent of the vote is the winner. Should no one judicial candidate win more than fifty percent, the two candidates receiving the most votes in the primary compete in a run-off election the following November. *Id.*

## **B. Rules and Regulations Governing Judicial Campaign Fundraising**

Though most judges in California are appointed, all judges must face reelection or retention at the end of their current term in order to keep their seats. J. Clark Kelso, *Judicial Elections: Practices and Trends*, Inst. for Legis. Prac. 3 (1999). Several authorities govern California judicial elections. The California Code of Judicial Ethics governs the ability of a candidate to engage in political speech. Cal. Code of Jud. Ethics 5 (2007). The California

Election Code, in conjunction with the California Fair Political Practice Commission, governs campaign-funding regulations. *See* Cal. Elec. Code § 20203 (West 2007); and Cal. Fair Pol. Prac. Commn., *Political Reform Act 2007*, <http://www.fppc.ca.gov/index.html?id=51> (accessed Oct. 18, 2007).

Under the California Code of Judicial Ethics, a judge or justice may not solicit funds for any political campaign or non-judicial candidate. Cal. Code of Jud. Ethics 5(A)(3). Judges cannot contribute more than \$1,000 to such campaigns in one year or more than \$500 to any one candidate in one calendar year. *Id.* However, no such limitations apply to personal contributions to one's own campaign, nor to the ability to solicit such contributions. *Id.* Further, judicial candidates are subject to the same regulations that govern all public office candidates, such as those regarding fundraising committees and limits placed on the amount an individual can contribute to a campaign. Cal. Govt. Code § 82013 (West 2007); *See generally* Cal. Govt. Code §§ 85300 – 85321 (providing limits on individual contributions).

In 1990, passage of Proposition 73 amended the Political Reform Act to provide that “No public officer shall expend and no candidate shall accept any public moneys for the purpose of seeking elective office.” Cal. Govt. Code §85300.

### **C. Cost Trends in California Judicial Elections**

California judicial candidates rarely face contested elections, as most superior court candidates face unopposed reelection and appellate level justices only face retention elections. Civ. Just. Assn. of Cal., *A Study of Campaign Contributions to the California Judiciary*, [http://www.cjac.org/research/1998/final\\_report\\_1.html](http://www.cjac.org/research/1998/final_report_1.html) (Apr. 1998) [hereinafter CJAC, *Campaign Contributions 1998*]. The relatively small number of contested elections

has led some to minimize the impact that special interest groups can have on judicial autonomy in California. North Carolina Center for Voter Education, *Voters Believe Money Influences Courts, Support Bold Reforms, Says New Study by N.C. Center for Voter Education*, [http://www.ncjudges.org/media/news\\_releases/7\\_28\\_05.html](http://www.ncjudges.org/media/news_releases/7_28_05.html) (Jun. 28, 2005).

However, recent studies on judicial campaign cost trends suggest this is an oversimplification of the issue, as the cost of running contested and retention elections is on the rise.

The cost of running a contested judicial election in California has dramatically increased over the past four decades. CJAC, *Campaign Contributions 1998, supra*. For example, the average cost of Los Angeles superior court elections increased 2,000% over a twenty-year period, from \$3,000 in 1970 to \$70,000 in 1990. Am. B. Assn. Standing Comm. on Jud. Indep., *Report of the Commission on Public Financing of Judicial Campaigns* at 12. In 1998, the Civil Justice Association of California (CJAC) examined campaign contributions in contested judicial elections in Los Angeles, Sacramento, San Diego and San Francisco. CJAC, *Campaign Contribution 1998, supra*. Citing a 1995 report by the California Commission on Campaign Financing, the CJAC found that fifty-one percent of the funds raised by judicial candidates were from the candidates themselves. *Id.* Of the remaining funds raised, forty-five percent came from attorneys, of which, sixty-four percent came from Plaintiff's attorneys. *Id.* The study further found that while the number of contested elections did not significantly change between 1993 and 1996, combined contribution totals exceeded \$2.5 million in superior court races between those years. *Id.* The average cost of such races jumped forty-seven percent from the period of 1989-1992. *Id.*

The most recent CJAC report studied contested judicial elections from 1997 – 2000. Civ. Just. Assn. of Cal., *A Study of Campaign Contributions to the California Judiciary*,

<http://www.cjac.org/research/2000/finalrept2000.pdf>, 3 (accessed Oct. 18, 2007) [hereinafter CJAC, *Campaign Contributions 2000*]. Here, the CJAC found one candidate for the Sacramento County Superior Court-Office 1 raised \$750,000 while her opponent raised \$200,000 (Table B). *Id.* at 37. The report again found that while the number of contested elections had remained largely unchanged from 1997 to 2000, there was a marked increase in the funding. Total contributions rose from \$2.5 million in 1993- 1996 to \$3.1 million in 1997-2000. *Id.* at 13-14. The CJAC report selected some particular races to use as examples. Those examples are reproduced here in the tables below.

**Table A: Contributions for the 2000 San Diego County Superior Court-Office 46 Election**

Candidate Name (% votes received)	Charles G. Rogers (52.64%)	Dennis Shaw (33.19%)	Richard P. Miller (14.17%)
Total Contribution Dollars	\$30,004.79	**\$19,645.00	**\$10,0093.00
Plaintiff Attorney Dollars	\$2,450.00	0.00	0.00
Other Attorney Dollars	\$16,920.00	0.00	\$100.00
Non-Attorney Dollars	\$5,975.00	4,339.00	\$2,349.00
Money Contributed without ID (less than \$100)	\$4,002.00	\$430.00	0.00
Contribution "Loans" from Self/Family	\$657.79	\$11,947.00	\$6,644.00
"Loans" from Financial Institutions/Other	0.00	0.00	0.00

*Id.* at 33-34.

**Table B: Contributions for the 2000 Sacramento County Superior Court-Office 1 Election**

Candidate Name	Trena Burger	Don Steed	***Julius M. Engel

(% votes received)	(46.7%)	(40.7%)	(12.5%)
Total Contribution Dollars	730,366.00	**209,402.00	N/A
Plaintiff Attorney Dollars	19,800.00	7,005.00	N/A
Other Attorney Dollars	43,125.00	36,324.00	N/A
Non-Attorney Dollars	82,003.00	90,199.00	N/A
Money Contributed without ID (less than \$100)	*7,438.00	13,368.00	N/A
Contribution "Loans" from Self/Family	578,000.00	31,250.00	N/A
"Loans" from Financial Institutions/Other	0.00	0.00	N/A

\*\*In some cases the sum of "Plaintiff Attorney Dollars," "Other Attorney Dollars," "Non-Attorney Dollars," and "Loans from Self/Family" may not equal "Total Contribution Dollars" because some of the reports were not available at the Secretary of State's Political Reform Division.

\*\*\*Contributions not reported.

*Id.* at 40.

The rise in campaign costs is not limited only to contested elections, as retention elections face soaring costs as well (see Tables C and D). Though judges often face little to no organized opposition, recent retention election spending seems to suggest a shift in that trend. In 1986, California voted to remove Supreme Court Chief Justice Bird, Justice Grodin and Justice Reynoso. Am. Judicature Socy., *Judicial Selection in the States: California*, <http://www.ajs.org/js/CA.htm> (accessed Nov. 8, 2007). Special interest groups spent \$11.5 million campaigning for and against retention of the justices, an amount never before seen in a judicial election. *Id.* Recent retention elections have seen similar efforts to unseat judges, though not to the same extent as in 1986, and not with the same success. *Id.*

In addition, the margin of victory in retention elections is on the decline. In 1980, the average margin of victory was 76.8%. *Id.* However, the average margin of victory dropped

to only 60.1% in 1994. *Id.* Inversely proportional increases in election expenditures coupled with decreased margins of victory suggest that future retention election costs will remain on the rise. Increased opposition in retention elections may force justices to raise and expend larger amounts of money in order to defeat special interest groups. Again, the CJAC report selected as an example particular retention elections and the data collected is reflected in the Tables below. These two judicial candidates for retention election appear to be typical of other justices in the amounts and sources of contributions.

**Table C: Contributions for the 1998 Associate Justice California Supreme Court Retention Election**

<b>Hon. Ming Chin Associate Justice</b>	
Total Contribution Dollars	\$710,139
Plaintiff Attorney Dollars	\$101,453
Other Attorney Dollars	\$223,146
Non-Attorney Dollars	\$337,577
Money Contributed without ID (less than \$100)	\$41,445
Contribution Loans from Self/Family	\$1,518
Loans from financial institutions/other	\$5,000

**Table D: Contributions for the 1998 Appellate Court Justice 2nd District, Division 6 Retention Election**

<b>Hon. Arthur Gilbert</b>	
Total Contribution Dollars	\$241,141
Plaintiff Attorney Dollars	\$84,974
Other Attorney Dollars	\$124,947
Non-Attorney Dollars	\$30,301
Money Contributed without ID (less than \$100)	\$919
Contribution Loans from Self/Family	\$0
Loans from financial institutions/other	\$0

CJAC, *Campaign Contributions 2000*, *supra* at 41, 42.

### **III. A National Movement for Change**

#### **A. ABA Commission on Judicial Independence**

In 1999, the American Bar Association (ABA) convened the Standing Committee on Judicial Independence to research the feasibility of states' efforts to provide public financing for judicial campaigns. Am. B. Assn. Standing Comm. on Jud. Indep., *Report of the Commission on Public Financing of Judicial Campaigns* at viii. After a two-year study, the ABA delivered its report in February 2002. *Id.* at 2. In a unanimous finding, the Committee recommended that:

[S]tates which select judges in contested elections [should] finance judicial candidates with public funds, as a means to address the perceived impropriety associated with judicial candidates accepting private contributions from individuals and organizations interested in the outcomes of cases those candidates may later decide.

*Id.* at 9.

The ABA based its recommendation on its findings that, among the most important for the purposes of this report: (1) the cost of judicial campaigns is dramatically rising, (2) the increasing cost of judicial campaigns is forcing judges to accept donations from special interest groups, (3) the public heavily scrutinizes judges' rulings if groups or individuals that donated to that judge's campaign were at the favorable end of a ruling, (4) judicial independence is at risk, and (5) qualified judicial candidates who do not have wealthy contributors are prevented from running because of campaign costs. *Id.* at ix.

To execute its primary recommendation of public financing, the Committee noted that implementation must be coupled with: (1) sensitivity to Constitutional limitations, (2) sensitivity to states' election structures, (3) public financing solely for states' high court and

appellate court elections, and (4) reservation of public finances for candidates that have met specific election requirement that indicate a certain level of support. *Id.* at x.

It is against this background that states took to reform their judicial election apparatus. Armed with the ABA's recommendation that states should publicly fund judicial campaigns, as well as procedural implementation suggestions, many states have formed committees and panels to investigate the feasibility of implementing public financing of judicial campaigns. *See* Just. at Stake Campaign, *North Carolina Adopts Public Financing for Supreme Court and Appellate Judicial Campaigns*, <http://faircourts.org/files/NCsigning.pdf> (Oct. 10, 2002) [hereinafter Just. at Stake, *North Carolina*]. Already, North Carolina and New Mexico have implemented programs modeled after the ABA's recommendations. Just. at Stake Campaign, *New Mexico Acts to Protect its Judicial Elections from Special Interest Influence*, <http://faircourts.org/files/041307NM.pdf> (Apr. 13, 2007) [hereinafter Just. at Stake, *New Mexico*].

## **B. North Carolina's Public Financing of Judicial Campaigns**

### **1. The Law**

Within months of the ABA's recommendation to publicly fund judicial campaigns, North Carolina Governor Mike Easley signed Senate Bill 1054, entitled "The North Carolina Judicial Campaign Reform Act," (Act). Doug Bend, Student Author, *North Carolina's Public Financing of Judicial Campaigns: A Preliminary Analysis*, 18 *Geo. J. Leg. Ethics* 597, 598 (2005). The Act had the practical effect of making North Carolina the first state to provide public financing for judicial candidates running for the North Carolina Supreme Court or the Court of Appeals. Just. at Stake Campaign, *North Carolina*, *supra* at

10. Reflecting the ABA's recommendations, the Act amended §163-278.61 of the North Carolina General Statutes to read:

The purpose of this Article is 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, those effects being especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts.

N.C. Gen. Stat. § 163-278.61 (West 2002).

Aside from the general purpose stated in §163-278.61, three components of the Act are apparent. First, the Act limits the availability of public funds to Supreme Court and Court of Appeals candidates, as it does not provide any funds for trial court elections. *Id.* Secondly, the Act requires candidates to set up a minimum threshold of public support before public financing is available. N.C. Gen. Stat. § 163-278.64(b). After declaring their intention to use public funds, candidates must raise at least thirty times the filing fee requirement by obtaining contributions from at least 350 registered voters in the state. *Id.* This provision seeks to preserve state resources, as it reserves funds for only viable candidates.

Finally, public financing is purely voluntary, as the Act essentially allows candidates to opt into public financing. N.C. Gen. Stat. § 163-278.61. Such a provision is most likely necessary to avoid a First Amendment violation under *Buckley v. Valeo*, U.S. 1 (1976). In *Buckley*, the Supreme Court held that statutory restrictions on campaign expenditures ran afoul of the First Amendment by limiting the quantity and depth of political expression. *Id.* at 19. Thus, *Buckley* prohibits statutory limits on campaign spending, though it permits candidates to voluntarily accept campaign limits in exchange for public funds. *Id.* Candidates who decide against public financing are still able to raise private funds for their

elections. *See* N.C. Gen. Stat. § 163-278.64(a), (d) (requiring only those candidates who intend to, or qualify for, public funding to abide by financing restrictions). However, candidates that qualify for public financing cannot accept donations from special interest groups or private donations. N.C. Gen. Stat. § 163-278.64(d)(1)-(7).

To combat the significant differences that can arise between a candidate who has opted into public financing and one that has not, rescue funds are available to publicly funded candidates. N.C. Gen. Stat. § 163-278.67(a)(1)-(2). Rescue funds essentially level the playing field between publicly funded candidates and non-publicly funded candidates by providing additional monies to a publicly funded candidate when a privately funded candidate has raised, or expended, more than the amount that public funds provided a publicly funded candidate. *Id.*

Funding comes from several sources, such as a check-off provision on state tax forms, and from voluntary \$50 donations made by attorneys who are re-registering with the North Carolina Bar Association. N.C. Gen. Stat. § 163-278.63(b).

The Act also provides for the publishing of a Judicial Voter Guide. N.C. Gen. Stat. § 163-278.69(a). The Judicial Voter Guide contains background information on the candidates, such as their educational and professional credentials, as well as a 150-word candidate statement. *Id.* at (b)(1)-(7). The primary purpose of the Judicial Voter Guide is to educate voters on the candidates running for office. North Carolina Center for Voter Education, *N.C. Judicial Voter Guide*, [http://www.ncjudges.org/voter\\_guide/index.html](http://www.ncjudges.org/voter_guide/index.html) (accessed October 16, 2007).

## 2. The Act's Effectiveness

The Act has been in effect for two election cycles. Wanda Bryant, *The View from North Carolina*, <http://www.lawdragon.com/index.php/newdragon/fullStory/411> (Sept. 10, 2007). Though many supporters point to its early successes, some remain skeptical as to whether the Act has fulfilled its aims or whether the Act should have been put in effect to begin with. Bend, 18 Geo. J. Leg. Ethics at 603-604.

Proponents of the Act's success cite judicial candidates' wide use of public funds in the last two election cycles. Bryant, <http://www.lawdragon.com/index.php/newdragon/fullStory/411> (accessed Sept. 10, 2007). Of the twenty-eight total appellate court candidates since 2002, twenty of the candidates qualified for, and used, public funds for their campaigns. *Id.* Of those twenty-eight candidates, nine won seats. *Id.*

What may be an even more important statistic though is the limited role private contributors now play in North Carolina judicial campaigns. For example, special interest groups accounted for seventy-three percent of contributions to campaign funds in 2002. *Id.* After passage of the Act, special interest group contributions accounted for only fourteen percent of campaign funds in 2004. *Id.* The decreased influence of special interest money in judicial campaigns has gained much approval from the North Carolina electorate. North Carolina Center for Voter Education, *Voters Believe Money Influences Courts, Support Bold Reforms, Says New Study by N.C. Center for Voter Education, supra.* A recent North Carolina Center for Voter Education poll shows that if judicial candidates were alike in all other respects, forty-nine percent of North Carolinians would vote for a candidate that accepted public funds over a candidate that accepted special interest money. *Id.*

Opponents, however, argue that the Act is under-inclusive, under-funded, and does not completely remove private money from judicial campaigns. Bend, 18 Geo. J. Leg. Ethics

at 603-04. Critics assert that the threshold requirements needed to gain access to public funds prevent qualified candidates from accessing public funds. *Id.* at 603. Also, funds used to subsidize the campaigns lacked public support. *Id.* In 2003, less than ten percent of taxpayers contributed to the fund through the tax form check off system. *Id.* at 604. Further, only twelve percent of attorneys donated \$50 to the fund when renewing their bar membership. *Id.*

Perhaps the opponent's largest criticism hits at the heart of the main reason for publicly funding judicial campaigns: limiting the influence of private contributions. Critics note that special interest groups are still prominent spenders in judicial campaigns. *Id.* at 603. Because accepting public funds is purely voluntary, candidates can still opt to accept private contributions. *Id.* Further, candidates must still raise sufficient private funds in order to qualify for public funds. *Id.* Here, even candidates who intend to use public funds must still solicit and accept private and special interest money. *Id.*

### 3. Legal Challenges

In 2005, two potential North Carolina judicial candidates, as well as two political action groups, challenged the Act in federal court. Brennan Center for Just., *Jackson v. Leake*, [http://www.brennancenter.org/stack\\_detail.asp?key=102&subkey=9457&init\\_key=82](http://www.brennancenter.org/stack_detail.asp?key=102&subkey=9457&init_key=82) (accessed Jan. 10, 2008). Specifically, the plaintiffs alleged that the rescue funds provision, the reporting requirements and the \$50 mandatory surcharge on bar admission violated the First Amendment and Equal Protection clause of the United States Constitution. *Id.* The federal district court subsequently dismissed the case for lack of standing. *Id.* At the time of this report's publication, the 4<sup>th</sup> Circuit is scheduled to hear the

plaintiff's appeal of the dismissal. The constitutionality of the Act has yet to be considered by the 4<sup>th</sup> Circuit. *Id.*

### **C. A Model for Change**

In April 2007, New Mexico passed legislation providing public funding for Supreme Court and courts of appeal candidates. Just. at Stake, *New Mexico, supra*. New Mexico and North Carolina's public funding acts bear a striking resemblance to each other, demonstrating the influence of the ABA's recommendation, as well as the success of North Carolina's public funding.

However, differences in the structure of the New Mexico and North Carolina judiciary required differences in the respective states' public funding programs. For example, all judges and justices in North Carolina face contested reelection at the end of each term, whereas New Mexico provides for retention elections for Supreme Court, appeals court and district court judges. N.C. Gen. Stat § 163-322 (West 2004) and N.M. Const. art. VI § 33(A)-(C) (All New Mexico judges face contested elections for their first term and retention elections thereafter). Interestingly, New Mexico opted to refuse public funding of retention elections, thereby limiting funding to contested elections. N.M. Stat. § 1-19A-13(I).

Currently, New Mexico and North Carolina are the only states providing public funding for judicial campaigns. However, California, Georgia and Washington have committees actively studying the feasibility of implementing public funding in their respective states. Deborah Goldberg, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts* 9 (Brennan Center for Just. at NYU Sch. of L.

2002). Further, Illinois and Wisconsin have introduced public funding bills, though neither has enacted the legislation. *Id.*

#### **IV. Feasibility of Public Financing of Judicial Campaigns in California**

On September 4, 2007, California Supreme Court Chief Justice Ronald George announced the formation of the Commission for Impartial Courts. Jud. Council of Cal., *Chief Justice George Names Statewide Commission for Impartial Courts*, <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR50-07.PDF> (Sep. 4, 2007) [hereinafter Jud. Council of Cal., *Commission for Impartial Courts*]. Seeking to preserve the independence of the California judiciary, Chief Justice George noted, “The manner in which judges are selected, retained, and removed can have a serious impact on the independence of the judiciary. It is essential that we make every effort to avoid politicizing the judiciary so that public confidence in the quality, impartiality, and accountability of judges is protected and maintained.” *Id.*

##### **A. Special Interest’s Impact on the Appearance of Impartiality**

According to J. Clark Kelso, “the appearance and reality of impartiality can not be guaranteed unless the judiciary retains a measure of independence from the coordinate branches of government and from the people. The public’s perception that the judiciary acts impartially will be compromised if the courts are perceived as being...the captive of narrow, special interest groups.” Kelso, *Judicial Elections: Practices and Trends* at 6. To determine the feasibility of implementing public financing of judicial campaigns in California, one must first address the impact special interests have on judicial autonomy and impartiality. To do so requires discussion of both the public’s perspective, as well as a judicial perspective.

Between 2001 and 2002, Justice at Stake conducted a national survey of 2428 state judges, including 188 Supreme Court justices, 527 appellate court judges, and 1713 lower court judges. Just. at Stake, *National Survey of State Judges: California 1*, <http://www.justiceatstake.org/files/SurveyPullOutCalifornia.pdf> (2002). Based on the data collected from California judges, Justice at Stake relayed several California-specific conclusions in their report. *Id.* The survey showed that eighty percent of California judges are concerned that special interests are trying to use the courts to shape policy to their own ends. *Id.* Further, eighty-one percent are concerned with the lack of restrictions on special interest spending and its potential to create an appearance of impropriety. *Id.* Finally, the study found that fifty-three percent of California state judges support a generic proposal to provide public funds for judicial elections. *Id.*

The public is also concerned with preserving the perception of impartiality. A 2001 Justice at Stake survey of 1000 American voters showed seventy-six percent believe campaign contributions play at least some influence in judicial decisions. Just. at Stake, *Frequency Questionnaire 4*, <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf> (2001). Should the national trend hold true in California, it appears that there is indeed a risk that special interest contributions create a facade of impropriety.

Such apprehension is not baseless, as recent elections reflect the influence special interests play in judicial elections. For example, according to the CJAC study, “the candidate who raises the most money wins. In 82% of the races (14 of 17), the candidate with the most money won the election.” CJAC, *Campaign Contributions 2000*, *supra*, at 11. The

correlating success of judicial campaigns compared to funds raised bolsters concerns in judicial elections.

Most special interest contribution data in judicial elections centers on the most prominent contributors—attorneys. The CJAC commission noted that:

[i]dentifying the occupation of the individual contributor often required follow up research....[A]lthough campaign reporting law requires candidates to identify contributors' occupation on the contribution report, this information is frequently omitted (a phenomenon also encountered in contribution research in legislative races. Plaintiff attorneys were identified by matching attorney and firm names with advertisements and utilizing practice profile information.

*Id.* at 6.

Unfortunately, available data only divides special interest into two general categories: attorney and non-attorney contributions. Despite the lack of information on other special interest contributions, such data is still particularly helpful here for two reasons. First, CJAC studies indicate that attorney contributions comprise the largest bulk of special interest group contributions to judicial candidates. *Id.* Second, because of the relationship between judges and attorneys (i.e., attorneys appear before judges on a daily basis), such contributions have the largest ability to create the appearance of impropriety.

Though the CJAC study notes a three percent decrease in contributions from attorneys in 1997-2000, attorneys still comprise forty-five percent of identifiable, non-candidate contributions (see Table C above). *Id.* at 10. It is clear that attorneys continue to represent a major special interest contribution group. Certainly, such high levels of attorney contributions can create the appearance of impropriety.

## **B. Public Financing of California Judicial Elections**

The structure of the California judiciary generates many questions concerning the implementation of public funding of judicial elections. Should California fund both contested and retention elections? What sort of procedural issues would arise? Also, how would such a program receive adequate funding?

Initially, implementation of public financing for California judicial campaigns requires revision of the ban on public funding contained in California Government Code §85300. Any question as to the ability to revise §85300 is quickly answered by the legislation itself, which provides for amendment by two-thirds majority of the legislature and approval of the Governor. Cal. Gov. Code §85300. Alternatively, a subsequent initiative could effectively revise § 85300. Cal. Const. art. II § 10(c).

*California Common Cause v. Fair Political Practices Commission*, 221 Cal.App.3d 647 (3rd Dist. 1990) challenged the validity of the ban on public funding of elections. In *California Common Cause*, the plaintiffs argued that the two-thirds vote required for revision of the statute was unconstitutional under article IV, section 8(b) of the California Constitution, which requires simply a majority of each house to approve statutory amendment. *Id.* at 651-652.. The court rejected plaintiff's argument, stating that article II, section 10(c) grants the legislature the authority to determine the process of statutory amendment. *Id.* Thus, the court upheld the two-thirds requirement, as well as §85300. *Id.*

### **1. Retention Elections**

It is interesting to note that the 2002 ABA recommendation suggests that California is not a good candidate for public financing of judicial campaigns. The ABA recommended against funding of retention elections and for funding only courts of appeal and Supreme Court elections. Am. B. Assn. Standing Comm. on Jud. Indep., *Report of the Commission on*

*Public Financing of Judicial Campaigns* at 40. This suggestion eliminates the California judiciary from the ABA's recommendation as courts of appeal and Supreme Court justices only face retention elections.

The ABA argues that justices who face retention simply run against their judicial record and do not face competing candidates. *Id.* This suggests expensive and contentious elections will only occur when special interest groups oppose retention. According to the ABA, though, contentious retention elections are rare. *Id.* Because justices facing retention elections are initially appointed, special interest groups may be wary to mount organized efforts to oppose the retention. *Id.* Faced with the uncertainty of a future appointment, contentious retention elections only occur when voters are so dissatisfied with a justice's record that they are willing to 'gamble' on the appointment of a new justice. *Id.*

Finally, the ABA argues that funding retention elections would not serve to end any appearance of impartiality. "[P]roviding public funds exclusively to incumbents might end one appearance problem, only to create another: that the government is 'stacking the deck' in favor of incumbent retention." *Id.* at 41. The ABA argues that funding retention elections would serve to simply perpetuate an appearance of impropriety--only now the impropriety would be publicly funded.

Though the ABA suggests that expensive and contentious retention elections are rare, recent trends in California suggest the opposite. As noted above, 1986 marked the beginning of increased special interest spending in California retention elections. Since then, proponents argue that contentious retention elections are becoming the norm, rather than the exception.

Further, proponents argue that public funding of retention elections can decrease special interest influence. *Id.* at 40-41. Testifying before the ABA committee, Deborah Goldberg argued that public funding of retention elections would be a constitutional means to eliminate the appearance of impropriety created by judges accepting money from interested contributors. *Id.* To alleviate an appearance of “stacking the deck,” proponents suggest equal sharing of funds to both candidates as well as opposition groups. *Id.* at 41. The ABA, however, countered that such a provision would subsidize opposition criticism of judicial decision, for which judicial ethics rules would limit a justices’ ability to respond. *Id.*

## **2. Contested Elections**

The ABA also recommends funding only courts of appeal and Supreme Court candidates. *Id.* at 42. Data tends to suggest that such elections demonstrate the greatest need for public funding, as they demonstrate the highest rise in campaigning costs. *Id.* Further, the ABA worries that as public funding programs become widely available, more candidates will run for office and place a large burden on the funding system:

Were trial court races to be publicly funded...the number of races at issue would increase geometrically, as would the cost of publicly funding such races, the complexities of administering a program that vast, and the potential for unintended consequences to make the public funding cure worse than the private funding disease.

*Id.*

Such concerns are exponentially exemplified by the significant number of superior court seats in California—over 2000. However, roughly ninety percent of superior court seats are uncontested. Askham, *Voters Guide to Judicial Elections*. As such, many superior court elections would not require public funding for judicial campaigns.

Though the ABA suggests courts of appeal and Supreme Court elections demonstrate the greatest need for public funding, California superior court campaigns demonstrate very large cost increases. As noted above, superior court campaign costs rose 2,000% between 1970 and 1990. Am. B. Assn. Standing Comm. on Jud. Indep., *Report of the Commission on Public Financing of Judicial Campaigns* at 12. Further, superior court contributions rose from \$2.5 million in 1993-1996 to \$3.1 million in 1997-2000. CJAC, *Campaign Contributions 2000*, *supra* at 11..Such drastic increases suggest California superior courts are also in need of public funding.

### **3. Funding Sources**

In 2003, North Carolina's funding of judicial campaigns was met with low levels of public support. Only ten percent of taxpayers checked off a provision on their 2003 tax forms that would redirect state funds into the fund for judicial campaigns. Bend, 18 Geo. J. Leg. Ethics at 604. Such low levels of participation resulted in only \$1 million of state tax dollars being diverted into the campaign fund. *Id.*

Should the California Legislature pass laws that publicly fund judicial campaigns, low levels of public participation could lead to under-funding of campaigns. To combat this, California can create an opt-out check off system on tax forms. *See* Bend, 18 Geo. J. Leg. Ethics at 607. Such a program would automatically divert tax revenue to the judicial campaign fund unless a taxpayer chose otherwise. Further, using a \$4 check off provision would generate substantially more revenue than using a \$3 check off provision, as North Carolina did.

Brennan Center for Just., *Jackson v. Leake*, *supra*. In 2005, 13.8 million Californian's filed tax returns. Cal. Fran.Tax Bd., *Annual Report 2005* 11, <http://www.ftb.ca.gov/aboutftb/>

annrpt/2005/2005AR.pdf (Feb. 2007). A \$4 opt out check off provision could generate sufficient funds to jumpstart judicial funding legislation.

Further, mandatory attorney contributions could help ensure adequate funding. In North Carolina, only ten percent of attorneys donated \$50 to the fund when renewing their bar membership. Bend, 18 Geo. J. Leg. Ethics at 607. Proponents of a mandatory contribution justify their position by noting that attorneys benefit disproportionately from an impartial judiciary and should bear part of the burden to ensure one. *Id.* Whether such provisions would violate the First Amendment is an issue now pending before the 4<sup>th</sup> Circuit Court of Appeals. Brennan Center for Just., *Jackson v. Leake*, *supra*.

Finally, it may be prudent for the legislature to enact public funding legislation immediately after the 2010 judicial election cycle. As such, there will be roughly three and a half years until the next primary election cycle would need funding. Directing tax funds into a judicial campaign fund for 3 years may help to ensure adequate funds for judicial campaigns.

### **C. Limiting the Influence of Special Interest Contributions**

As Chief Justice George noted, the central purpose of the Commission for Impartial Courts is to ensure an independent and impartial judiciary. Jud. Council of Cal., *Commission for Impartial Courts*, *supra*. Together, the 2002 ABA recommendation and recent legislation enacted in New Mexico and North Carolina reflect widespread concern over the influence special interests play in judicial elections. Providing public funding of California judicial campaigns may serve to significantly limit the impact special interests have in judicial elections, while having the practical effect of preserving an autonomous judiciary. *See* Bryant, *supra*.

## 1. Trial Court

Effective elimination of special interest influence requires its suppression at every step of the election cycle. At the trial court level, the legislature may want to look into qualification requirements that do not require a threshold amount of voters to donate funds to the trial court candidate's campaign. Instead, it may be prudent to investigate non-monetary methods of showing a trial court candidates' viability. For example, gathering a threshold amount of voter signatures can show a candidate's viability. Candidates that declare their intention to use public funds can receive a small fund to gather these signatures. The legislature should also prohibit the use of special interest funds to gather signatures, effectively limiting special interest influence while candidates show their viability. The size of the district in which the candidate is running, in addition to the threshold amount of signatures needed should dictate the amount of the dispersed fund. Further, the legislature must be conscious of this recommendation's fiscal impact. Giving even \$1,000 to each candidate could prove to be very costly, especially if the number of judicial candidates increases.

Another approach could include an impartial peer review committee, much like the system the governor uses when appointing new judges and justices. *See Am. Judicature Socy., supra* (discussing the State Bar of California's Commission on Judicial Nominees evaluation process). Here, the committee can review questionnaires and interviews of the candidate's peers, both inside and outside of the legal community. Candidates will receive public funding only after showing an adequate threshold of community support. A peer review committee would serve to limit special interests influence, as the committee would insulate the qualification process from outside special interest power.

## **2. Courts of Appeal and the Supreme Court**

The need for peer review committees and signature gathering appear uniquely suited for trial court candidates. This is not to suggest that special interest groups do not create the appearance of impropriety in courts of appeal and Supreme Court retention elections. As described in section IV above, special interest spending is at least partially to blame for the rise in retention election costs. While *Buckley* limits California's ability to limit funds spent in opposition of a justice's retention, California still can diminish special interest's ability to create an appearance of impropriety. To combat special interest in retention elections, California can provide public funds to justice's retention campaigns upon a showing of need.

While states cannot limit candidate's ability to collect contributions from special interest groups, the electorate seems uniquely poised to influence candidate's funding decisions. As previously discussed, a recent survey of North Carolina voters demonstrates the electorate's bias against candidates who accept special interest money as opposed to public funds. Should the same hold true in California, a candidate's decision to accept special interest money could prove to be strategically devastating.

## **V. Conclusion**

North Carolina and New Mexico currently provide public funds for appellate level courts. With numerous other states currently investigating their ability to use public funds for judicial campaigns, it is evident that the ABA's recommendations have had a large impact on states' approach to judicial campaigns. The implementation of North Carolina's Judicial Campaign Reform Act has effectively limited special interest money in North Carolina. It remains to be seen whether public financing could have the same effect in California.

While California's judicial election system has done much to curb judicial campaign expenditures by establishing an appointment system for appellate and superior court positions, the implementation of public financing for judicial campaigns could further help to curb the rising costs of judicial elections. The prominence of special interest contributions, primarily those of attorneys, call into question the appearance of impartiality of the California judiciary. California seems primed for a change, however. Under the guidance of Chief Justice George and the Commission for Impartial Courts, the California judicial election system may soon undergo major changes.