

# JUDICIAL RETENTION ELECTIONS†

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## I. TRENDS IN JUDICIAL RETENTION ELECTIONS

Judicial retention elections have been part of the selection and retention process in many states for over thirty years. Twenty states use some form of judicial retention election for appellate court judges and justices, and twelve states use retention elections for at least some of their trial court judges.<sup>1</sup> Researchers and policy analysts have been able to identify trends in retention elections, some of which are disturbing, if not alarming, and discuss remedies for the problems that have beset this form of judicial election.

### *A. High Rates of Retention*

The then relatively short history of judicial retention elections limited a 1987 attempt by Aspin and Hall to describe trends in judicial retention elections.<sup>2</sup> That research included ten retention states where trial judges stand for retention elections.<sup>3</sup> The authors found

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1. A brief history of judicial retention elections is available in the Appendix to this paper for the reader who is unfamiliar with their meaning, origin, development, and variations.

2. See William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340 (1987).

3. See *id.* at 343.

only twenty-two retention election defeats out of 1864 retention elections (approximately 1%).<sup>4</sup>

An update article published last year included an analysis of 3912 elections for the thirty-year period from 1964 to 1994 in the same ten retention election states.<sup>5</sup> Of those 3912, only fifty judges were defeated (approximately 1%). Twenty-eight of those fifty judges were defeated in Illinois, the only state that sets the threshold for retention at 60%.<sup>6</sup> Further, only one of the twenty-eight judges defeated in Illinois received less than a 50% affirmative vote, the more common threshold.<sup>7</sup>

### B. Declining Total Affirmative Votes

While the existence of relatively few defeats in judicial retention elections may provide some notion of security for judges, analysis of affirmative vote trends reveals a different story. The average vote to retain judges for states in the study fell almost fifteen percentage points from 1964 to 1992, recovering only slightly in 1994.<sup>8</sup> In 1964, the affirmative vote was almost 85%; in 1992, it was 69%.<sup>9</sup> Although this figure is well above the threshold, even in Illinois, and has not produced an explosion in the number of judicial retention election defeats, the downward trend signals a greater vulnerability to defeat than previously known in judicial retention elections.

### C. Substantial “Rolloff” in Voting for Judges

“Rolloff” in voting is the tendency of voters to refrain from vot-

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4. *See id.* at 344.

5. Larry Aspin & William K. Hall, *Thirty Years of Judicial Retention Elections: An Update*, 37 SOC. SCI. J. 1, 3 (2000). The states included in the study include Alaska, Arizona, Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, and Wyoming. *See id.*

6. *See id.* at 8-10.

7. *See id.* at 10. The rate of rejections of judges accelerated in Illinois. In the five elections before 1986, ten judges were defeated—a rejection rate of two per election. In more recent elections, between 1986 through 1994, eighteen judges lost in retention elections—a rejection rate of three per election. *See id.* at 9-10.

8. *See id.* at 4.

9. *See id.* at 5 fig.1.

ing on judges at all.<sup>10</sup> Although abstention from voting for or against judges standing retention elections declined in the years just prior to and including the 1994 elections, an average of more than one-third of the total voters rolled off and failed to vote for judges in all retention elections from 1964 through 1994.<sup>11</sup>

A recent analysis of this phenomenon concludes that rolloff rates do not correlate with the rate of affirmative votes, or with issues of trust or lack thereof, and do not necessarily respond to programs intended to educate voters about judicial retention elections.<sup>12</sup> Rather, the rate of rolloff appears to turn on the population of the locale—the greater the population of the voting district, the greater the rolloff.<sup>13</sup>

#### *D. Increasing Politicization of Retention Elections*

Beginning as early as 1986 in California, another major trend started, one considered alarming, or even dangerous, by some. The usually sedate world of judicial retention elections began to look like an ideological battleground over judicial philosophies and specific decisions, or series of decisions, as special interest groups and politicians targeted specific state supreme court justices for defeat. This relatively recent development has turned some otherwise low-salience contests of little import to voters into well-funded, hard-fought, and emotionally charged contests, as highly salient as races for overtly political offices.<sup>14</sup>

Some prominent examples follow:

##### 1. 1986 California Supreme Court retention election

Since the adoption of its system of retention elections in 1934, California voters had never failed to retain a justice of its supreme court.<sup>15</sup> However, in the 1986 general election, Chief Justice Rose

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10. See Hall & Aspin, *supra* note 2, at 346-47.

11. See Aspin & Hall, *supra* note 5, at 12.

12. See *id.* at 12-13.

13. See *id.* at 13.

14. See Traci V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68 (1999) (discussing the politicization's threat to judicial retention elections).

15. See Philp Hager, *No Opposition, Little Notice for 5 State Justices Up*

Bird and Justices Joseph Grodin and Cruz Reynoso were ousted.<sup>16</sup> None of the elections were close.<sup>17</sup> Bird was rejected by 66% of voters, Reynoso by 60%, and Grodin by 57%.<sup>18</sup>

In particular, it was their voting records in death penalty cases that were the subject of the campaign. Bird had voted to reverse every one of the sixty-one death penalty cases that came before the court since her appointment nine years earlier.<sup>19</sup> Reynoso and Grodin had voted with her in nearly all of those cases.<sup>20</sup> A highly organized opposition campaign focused on this issue in painting the Justices as soft on crime.<sup>21</sup>

In a high profile and intense campaign, “foes and friends of Bird spent more than \$11 million on TV commercials, mailings, and other campaign [material].”<sup>22</sup> Republican Governor George Deukmejian and a group of district attorneys from across the state spearheaded the campaign to unseat Bird.<sup>23</sup>

After the defeats of Bird and the other justices, many analysts feared that California’s judicial retention process was forever tainted, and that justices would have to run in bitter political campaigns that would affect their independence. However, just four years later, when five justices were up for retention, no organized opposition formed to unseat them.<sup>24</sup> In fact, none of the candidates had to spend much beyond the \$2300 election-filing fee to run.<sup>25</sup>

It was not until 1998 that state supreme court justices once again faced serious organized challenges. In that election, Chief Justice Ronald M. George and Justice Ming W. Chin were targeted by right-to-life groups for their votes to strike down a state law requiring pa-

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*for Election*, L.A. TIMES, Nov. 4, 1990, at A3.

16. See Ann Levin, *Rose Bird, Two Others Lose Posts*, SAN DIEGO UNION-TRIB., Nov. 5, 1986, at A1.

17. See *id.*

18. See *id.*

19. See *id.*

20. See *id.*

21. See *id.*

22. See Hager, *supra* note 15.

23. See *id.*

24. See *id.*

25. See *id.*

rental consent for minors' abortions.<sup>26</sup> This opposition forced George and Chin to raise substantial war chests and mount active campaigns to retain their positions.<sup>27</sup> This time, however, the opposition was not as well-focused or organized and did not enjoy the support of a political party.<sup>28</sup> George won retention with approximately 75% of the vote, while Chin garnered approximately 69%.<sup>29</sup>

California's contentious 1986 retention election, resulting in a distinctly different high court for the state provoked a thoughtful and productive exchange. This pre- and postelection debate centered around the role of judicial retention elections in general and around criteria voters should and should not employ in voting for or against a supreme court justice standing for retention.<sup>30</sup> For example, according to former Justice Grodin, permissible criteria include a judge's "subjective value judgments" and various possible "objective considerations," but not the results reached by the judge in a particular case or category of cases.<sup>31</sup>

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26. See Robert Greene, *High Retention Numbers Show Voters Got Message, George Says*, METRO. NEWS-ENTERPRISE, Nov. 5, 1998, at 1, LEXIS, News Library, Newspaper Stories, Combined Papers File.

27. See *id.*

28. See *id.*

29. See *id.*

30. See, e.g., Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969 (1988) (arguing that voters should not regard a judge as too liberal or conservative, unless the judge's views are so extreme that they lie outside the mainstream of legal thought and community values); Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate*, 59 S. CAL. L. REV. 812 (1988) (arguing that retention elections are a matter of accommodating judicial independence with judicial accountability); Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007 (1988) (arguing that the process of judicial selection is inherently unfair to judges); Gerald F. Uelmen, *Commentary: Are We Reprising a Finale or an Overture?*, 61 S. CAL. L. REV. 2069 (1988) (arguing that retention elections are unfair to judges because the challenger, unlike the incumbent judge, has no limits on election tactics or fund-raising).

31. See Grodin, *supra* note 30, at 1976-79.

## 2. Tennessee Supreme Court 1996

In 1996, Tennessee Supreme Court Justice Penny White lost her seat in the first unopposed retention election under Tennessee's newly adopted merit selection system.<sup>32</sup> The experience in Tennessee is important, not only as an example of the effects of issue politics in retention elections, but also for the lesson learned in its transition from traditional judicial elections to retention elections.

The Governor appointed Justice White to the state supreme court in 1994 to fill a vacancy on the court that had four years remaining on its term.<sup>33</sup> Under the new merit plan, she was to face a retention election in the next statewide election, which took place in 1996, to fill out the rest of the term.<sup>34</sup> Before the election, two lawyers filed suit to have the 1996 election conducted according to the old system, a contested partisan election, on the grounds that her appointment did not involve a judicial evaluating commission as called for by the new plan.<sup>35</sup> A specially constituted appellate court eventually ruled that the new plan's retention election provisions applied to Justice White's candidacy.<sup>36</sup>

Justice White endured politically and emotionally charged attacks maintaining that she was "soft on crime," and that she would not vote in favor of the death penalty.<sup>37</sup> The campaign against her centered on her concurrence in the opinion that overturned the death sentence in a case many thought deserved the death penalty.<sup>38</sup>

She was defeated in the retention election, receiving only a forty-five percent favorable vote.<sup>39</sup> Three other judicial candidates on the same statewide ballot from Tennessee's intermediate appellate courts were returned to the bench by significant margins.<sup>40</sup> In each

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32. *See Results in Tennessee*, COM. APPEAL, Aug. 3, 1996, at 6A, LEXIS, News Library, Newspaper Stories, Combined Papers File.

33. *See Reid*, *supra* note 14, at 70.

34. *See id.* at 76.

35. *See Tennessee, ex rel. Hooker v. Thompson*, No. 01S01-9605-CH-00106, 1996 Tenn. LEXIS 839, at \*19-21 (Oct. 2, 1996).

36. *See id.* at \*27.

37. *See Reid*, *supra* note 14, at 70-72.

38. *See id.*

39. *See id.* at 71.

40. *See Results in Tennessee*, *supra* note 32. Judge Jerry L. Smith of the

of the three intermediate appellate court retention elections, between 430,000 and 442,000 total votes were cast.<sup>41</sup> The consistency in the number of affirmative votes among the three intermediate appellate court candidates, each between 282,000 and 288,000, is dramatic when compared to the number of affirmative votes cast for Justice White, which only approximated 238,000.<sup>42</sup> Many voters faced with the same ballot were able to cast affirmative votes for other judicial candidates, while voting not to retain Justice White.<sup>43</sup> Tennessee's judicial performance evaluation process was not in place until 1998, leaving voters to rely on media advertising and material distributed by the judge and the opposition—here, through direct mail and mass faxing—for candidate information.<sup>44</sup>

### 3. 1996 Nebraska Supreme Court

Also, in 1996, Judge David Lanphier became the first supreme court judge in Nebraska history to lose a retention election.<sup>45</sup> This was his first retention vote after having been appointed to the court in 1992.<sup>46</sup> He lost by nearly a two-to-one margin.<sup>47</sup> Lanphier's defeat was the result of a well-funded opposition campaign that focused on Lanphier's votes on two particular issues, the state's second-degree murder statute and term limits.<sup>48</sup>

The dominant issue in Lanphier's retention campaign was the supreme court's series of decisions that redefined Nebraska's second-degree murder statute.<sup>49</sup> Lanphier had voted with the majority

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Court of Criminal Appeals, Judge William M. Barker of the Court of Criminal Appeals, and Judge Holly Kirby of the Court of Appeals were each retained by affirmative votes of 66%, 65%, and 65% respectively. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. *See* Telephone Interview with Spruell Driver, Staff Member, Tennessee Administrative Office of the Courts (Oct. 9, 2000).

45. *See* Leslie Boellstorff, *Lanphier Loses Seat on Supreme Court*, OMAHA WORLD-HERALD, Nov. 6, 1996, at 1, LEXIS, News Library, Newspaper Stories, Combined Papers File.

46. *See id.*

47. *See id.*

48. *See id.*

49. *See* Editorial, *Foes Blaming Lanphier Too Much; Voters Should Keep Him in Office*, OMAHA WORLD-HERALD, Nov. 2, 1996, at 40, LEXIS, News

in decisions that overturned second-degree murder convictions for lack of malice.<sup>50</sup> The new interpretation of the statute resulted in the vacating of many murder convictions and the freeing of some previously convicted of murder.<sup>51</sup>

The second issue of note in Lanphier's retention election was that of term limits. In 1994, Lanphier authored a unanimous court opinion that overturned a term limit amendment that voters had approved in 1992.<sup>52</sup> Two years later, Lanphier voted with a four-member majority to keep a new term limit amendment, along with four other amendments, from the 1994 ballot, because it had been submitted to the secretary of state one day beyond the statutory deadline.<sup>53</sup>

These two issues helped to swing public opinion against Lanphier.<sup>54</sup> A well-financed opposition campaign spent an estimated \$200,000 in the counties that voted on Lanphier's retention.<sup>55</sup> His supporters unsuccessfully tried to paint his opposition as being secretly financed by out-of-state interests.<sup>56</sup> His opponents labeled Lanphier "soft on crime," among other things.<sup>57</sup>

Were these highly visible retention defeats unique, or were they harbingers of things to come? One can argue that the bitterly contested retention elections in California, Tennessee, and Nebraska turned on local issues, personalities, and judicial politics. However, for some serious commentators, the similarities suggest that judicial rulings on politically hot-button issues—such as the death penalty, abortion, and term limits—have accounted for, and in the future will

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Library, Newspaper Stories, Combined Papers File.

50. *See id.*

51. *See id.*

52. *See id.*

53. *See Duggan v. Beerman*, 515 N.W.2d 788 (Neb. 1994).

54. *See Reid, supra* note 14, at 70-71.

55. *See Reid, supra* note 14, at 72. In Nebraska, each judge is chosen to represent certain counties, and thus, faces retention election in only those areas. *See* NEB. REV. STAT. § 24-201.02 (1995).

56. *See Boellstorff, supra* note 45. Lanphier's main opposition refused to file campaign finance statements with the state election commission, claiming that retention campaigns were exempt from the law requiring disclosure of campaign finance statements. *See id.*

57. *See Reid, supra* note 14, at 72.



likely set off, heated and expensive retention contests.<sup>58</sup> According to some observers of retention elections, the phenomenon is very unfortunate and a danger to judicial independence, since it amounts to the imposition of decisional accountability on the courts and holds judges to “standards that . . . are incompatible with the institutional integrity of the judiciary.”<sup>59</sup>

#### *E. Lack of Voter Information*

Traditionally, state judicial elections in general had been thought of as inconspicuous and lacking in controversy.<sup>60</sup> The conventional wisdom held that a “benevolent public” returns a judicial candidate to office for lack of a reason to turn the judge out.<sup>61</sup> While these conditions may have provided judicial retention candidates with some sense of security, the lack of voter information about judicial candidates has been cause for growing concern among commentators.<sup>62</sup>

Recent public opinion and voting behavior studies have indicated that voters wish they had more information about judicial candidates.<sup>63</sup> The available evidence shows that voters know little about their choices. In fact, some voter surveys reveal that most voters had difficulty recalling the names of judicial candidates.<sup>64</sup> Most judicial

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58. *See id.* at 68-69.

59. *Id.* at 77.

60. *See* DAVID W. NEUBAUER, JUDICIAL PROCESS: LAW, COURTS & POLITICS IN THE UNITED STATES 144-45 (1991) (discussing low voter awareness in judicial elections). *See generally* Anthony Champagne & Greg Theilemann, *Awareness of Trial Court Judges*, 74 JUDICATURE 271 (1991) (discussing problematic aspects of the lack of voter awareness in judicial elections); Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain their Decisions*, 75 JUDICATURE 300 (1992) (discussing the results of telephone surveys with Wyoming and Ohio voters conducted postjudicial elections).

61. *See* NEUBAUER, *supra* note 60, at 145-46.

62. *See* NEUBAUER, *supra* note 60, at 145; Hojnacki & Baum, *supra* note 60, at 300.

63. *See, e.g.*, Robert G. Boatright & Kevin M. Esterling, *Methodological Issues in the Study of Judicial Selection: A Critique of the Empirical Research and Suggestions for Future Directions*, in RESEARCH ON JUDICIAL SELECTIONS 1999, at 77, 101 (American Judicature Society ed., 2000).

64. *See* Hojnacki & Baum, *supra* note 60, at 300.

retention elections have traditionally been even less visible than their contested counterparts, and therefore, more prone to problems relating to lack of voter information.<sup>65</sup> Because a judge does not face an opponent, but instead runs on his or her record, there are usually no campaigns, no issues, and no combative personal confrontations.<sup>66</sup> Judicial retention elections tend to be issueless and colorless,

generally failing to generate much publicity, positive or negative, about incumbent judges.<sup>67</sup>

Further evidence suggests that judicial voters rely heavily on cues, such as name recognition and information provided on the ballot itself.<sup>68</sup> For instance, ballots in contested elections often place the title “Judge” on the ballot next to the incumbent, inadvertently discouraging challengers.<sup>69</sup> Also, partisan judicial elections indicate party affiliation on the ballot, which may be a primary cue for many judicial election voters.<sup>70</sup>

#### *F. Growth in Judicial Performance Evaluation Programs*

Five states—Alaska, Arizona, Colorado, Tennessee, and Utah—have responded to the problem of lack of voter information by adopting official performance evaluation mechanisms for judicial retention election candidates.<sup>71</sup>

Judicial Performance Evaluation Commission (JPEC) reports generally have two audiences, voters and judges, serving the following dual purposes: (1) informing voters in their decision of whether or not to retain a judge, and (2) providing relatively objective feed-

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65. *See id.*

66. *See id.*

67. *See* NEUBAUER, *supra* note 60, at 144.

68. *See* Hojnacki & Baum, *supra* note 60, at 300-01.

69. *See* NEUBAUER, *supra* note 60, at 145.

70. *See id.* at 144.

71. *See* CITIZENS FOR INDEPENDENT COURTS, UNCERTAIN JUSTICE: POLITICS AND AMERICA’S COURTS: THE REPORTS OF THE TASK FORCES OF CITIZENS FOR INDEPENDENT COURTS 99 (2000), available at [http://www.constitutionproject.org/ci/reports/uncertain\\_justice.pdf](http://www.constitutionproject.org/ci/reports/uncertain_justice.pdf) [hereinafter UNCERTAIN JUSTICE].

back to judges in areas they may need to improve.<sup>72</sup> Typically, the membership of JPECs are a healthy mix of judges, lawyers, and members of the public-at-large.<sup>73</sup> To underscore the importance of a diverse evaluation commission, the Arizona Supreme Court, under its rules, states that the commission membership should reflect

“to the extent possible, the geographic, ethnic, racial, and gender diversity. . .” of the state.<sup>74</sup>

Strategies for public dissemination of JPEC reports vary from state to state.<sup>75</sup> For example, Alaska, Arizona, Colorado, and Utah mail findings to all registered voters as a part of the voter guide for each election cycle.<sup>76</sup> In Alaska, Arizona, and Colorado, findings are placed on Web pages.<sup>77</sup> In addition, in Alaska and Colorado, findings are run in advertisements in local newspapers.<sup>78</sup>

Despite state efforts to disseminate information, many voters are not receiving or making use of the evaluation reports.<sup>79</sup> A study of retention elections in 1996 found that, in Alaska and Colorado, just 58% and approximately 55% of voters, respectively, reported awareness of judicial performance evaluation reports.<sup>80</sup> Exit polls in Arizona and Utah indicated even less awareness of such reports among voters.<sup>81</sup> Further, the study showed that even fewer voters took advantage of information in these reports.<sup>82</sup> While these statistics are

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72. See KEVIN M. ESTERLING & KATHLEEN M. SAMPSON, JUDICIAL RETENTION EVALUATION PROGRAMS IN FOUR STATES: A REPORT WITH RECOMMENDATIONS 21 (1998). See also UNCERTAIN JUSTICE, *supra* note 71, at 98-99 (discussing the need to remedy the lack of information in voter retention elections).

73. See UNCERTAIN JUSTICE, *supra* note 71, at 98.

74. ESTERLING & SAMPSON, *supra* note 72, at 23 & tbl.III-1.

75. See *id.* at 28, 29 tbl.III-4.

76. See *id.* at 29 tbl.III-4.

77. See *id.*

78. See *id.*

79. See *id.* at 37 tbl.IV-1.

80. See *id.*

81. See *id.* In Arizona and Utah, approximately 30% and approximately 50%, respectively, reported awareness of judicial performance evaluation reports. See *id.*

82. See *id.* The question asked at exit polls was “Did you obtain any information based on this official report?” Affirmative responses: Anchorage

from relatively small samples, the implications are discouraging, considering state efforts to disseminate evaluation reports.

## II. CURRENTLY PENDING REFORM PROPOSALS

Many of the reforms advocated for traditional judicial elections have also been suggested for retention elections when the incumbent has significant opposition. For example:

### 1. Expand and Improve Judicial Performance Evaluation (JPE)

At a minimum, judges standing retention should receive a thorough performance evaluation before each election—the results of the JPE to be used for the judge's self-improvement, the training and education of other judges, and for the education of the electorate.<sup>83</sup> Proponents of JPE stress that the JPE commission needs to be public, independent, and firm but fair.<sup>84</sup> JPE is discussed at greater length in another article in this issue.<sup>85</sup>

### 2. Regulate Campaign Fund-Raising and Expenditures

Campaign contributions and expenditures, on behalf of and in opposition to a judge whose retention is actively opposed, should be subject to full public disclosure in forms readily accessible to the public both before and after the election.<sup>86</sup> In addition, public financing of contested retention elections ought to be seriously considered.<sup>87</sup>

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(approximately 33%), Phoenix Suburbs (approximately 11%), Denver (approximately 36%), Salt Lake City (approximately 35%). *See id.*

83. *See* A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 650-51 (1998).

84. *See* ABA STANDING COMM. ON JUD. INDEP., COMM'N ON JUD. SELECTION STANDARDS 25 (2000) ("A retention evaluation body should operate in a manner that is consistent with the goal of achieving and maintaining a qualified, inclusive, and independent judiciary."); UNCERTAIN JUSTICE, *supra* note 71, at 99-100 (discussing the need for adequate funding for proper conducting, interpreting, and dissemination of results). *See also* SARA MATHIAS, *ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS* 20-22 (1990) (discussing various judicial performance evaluation programs); Reid, *supra* note 14, at 77 (discussing the use of objective evaluations to offset the effect of special interest groups in retention elections).

85. *See* Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375 (2001).

86. *See* UNCERTAIN JUSTICE, *supra* note 71, at 94; Reid, *supra* note 14, at 76.

87. *See* MATHIAS, *supra* note 84, at 45-47 (evaluating the pros and cons of

### 3. Police Campaign Statements and Tactics

The fairness and accuracy of campaign statements and materials should be fostered by guidelines, voluntary or otherwise, and monitored by committees with the mandate and authority to publicize violations on a timely basis.<sup>88</sup> State judicial ethics rules ought to be examined to ensure that the judge challenged in a retention election setting has sufficient latitude to make effective responses.<sup>89</sup>

### 4. Impose Filing Deadline for Opponents (Proposal Unique to Retention Elections)

Filing deadlines should be imposed for opponents of incumbent judges. This call for change is relevant only to retention elections, since existing laws already provide deadlines for the filing of one's candidacy in traditional judicial elections. However, apparently there is no such requirement for those wishing to actively oppose an incumbent judge's retention. A serious student of judicial elections recommends that a timely notice of such an intent be required by law so that the appropriate public officials agencies, or committees; the candidate; and public-at-large have reasonable notice.<sup>90</sup>

## III. CONCLUSION

Despite the twin and somewhat contradictory concerns about the efficacy of judicial retention elections—voter frustration and apathy on the one hand, and the threat posed by politicization over hot-button issues on the other hand—some say that the retention form comes the closest to striking an appropriate balance between the competing goals of judicial independence and accountability to the public.<sup>91</sup> It has also been said that “contested retention elections are the most unfair system of all judicial elections.”<sup>92</sup>

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public funding programs).

88. *See id.* at 31-43.

89. *See Reid, supra* note 14, at 76 (favoring the approach taken in the Tennessee Code of Judicial Conduct adopted in 1997).

90. *See id.* at 76.

91. *See id.* at 77 (discussing advantages of judicial retention elections if incorporated with merit selection).

92. Uelmen, *supra* note 30, at 2073 (discussing implications of California's 1986 retention election).

Whatever one's ultimate view on the efficacy of retention elections, enough states have had sufficient experience with the retention system to permit us to identify both its strengths and weaknesses and to work for needed improvement.

## APPENDIX

### I. A BRIEF HISTORY OF RETENTION ELECTIONS

The first judicial selection and retention system to use retention elections appeared in 1934 in California.<sup>93</sup> That system called for judicial vacancies to be filled by gubernatorial appointment with approval by a commission.<sup>94</sup> After a short period of time, the newly appointed judge would face an uncontested retention election where voters would be presented with the question, "Should Judge X be retained in office, Yes or No?"<sup>95</sup> In 1937, the American Bar Association endorsed retention elections for judges.<sup>96</sup>

Missouri refined and adopted a different version of California's selection and retention plan in 1940.<sup>97</sup> The "Missouri Bar Plan," also termed "merit selection," and its later variants, combine elements of gubernatorial appointment, popular election, citizen involvement, and a formal role for the legal profession in the selection process.<sup>98</sup> Under the Missouri Bar Plan, a commission consisting of lawyers and laypersons nominates qualified judicial candidates.<sup>99</sup> The commission's candidate list then goes to the governor who selects a candidate from the list to fill the position.<sup>100</sup> Finally, similar to the California system, the judge faces a retention election during the next election cycle and at regular intervals thereafter.<sup>101</sup>

By 1966, five states had adopted some form of the Missouri Bar Plan to select appellate court judges and justices.<sup>102</sup> Other states, like

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93. See Grodin, *supra* note 30, at 1972.

94. See NEUBAUER, *supra* note 60, at 144.

95. Grodin, *supra* note 30, at 1971 (discussing the federal model of judge selection).

96. See R. Darcy, *Conflict and Reform: Oklahoma Judicial Elections 1907–1998*, 26 OKLA. CITY U. L. REV. (forthcoming 2001).

97. See DAVID W. NEUBAUER, *AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM* 191 (6th ed. 1999) [hereinafter *AMERICA'S COURTS*].

98. See *id.*

99. See *id.*

100. See *id.*

101. See *id.*

102. See Darcy, *supra* note 96. Those states include Alaska, Iowa, Kansas, Missouri, and Nebraska. See *id.*

California, had also incorporated retention elections into the selection and retention process; however, those selection processes were driven solely by gubernatorial appointment, rather than by commission nomination.<sup>103</sup>

## II. THE CURRENT STATE OF RETENTION ELECTIONS

Currently, twenty states use retention elections at the appellate court level; however, not all strictly adhere to the Missouri Bar Plan.<sup>104</sup> Three states—Maryland, Pennsylvania, and Utah—added the requirement of senate approval.<sup>105</sup> California has a Commission on Judicial Appointment that may veto the gubernatorial appointment after determining that the chosen candidate is not qualified.<sup>106</sup>

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103. See NEUBAUER, *supra* note 60, at 144.

104. See DAVID B. ROTTMAN ET AL., U.S. DEP'T OF JUSTICE, STATE COURT ORGS. 1998, at 21-25 tbl.4 (2000); *infra* Table 1.

105. See *id.*

106. See Stephen R. Barnett, *California Justice*, 78 CAL. L. REV. 247, 259 n.51 (1990) (reviewing JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE (1989)). The members of the commission are the state's chief justice, the senior judge of the court of appeals, and the attorney general. See *id.*



TABLE 1 – INITIAL APPOINTMENT OF APPELLATE COURT JUDGES IN RETENTION ELECTION STATES

Gubernatorial Appointment				Contestable Election
From a Judicial Nominating Commission		No Nominating Commission		No Nominating Commission
<i>No Consent of the State Required</i>	<i>Consent of the State Required</i>	<i>No Consent of the State Required</i>	<i>Consent of the State Required</i>	<i>No Consent of the State Required</i>
Alaska Arizona Colorado Florida Indiana Iowa Kansas Missouri Nebraska Oklahoma South Dakota Tennessee Wyoming	Maryland Utah	California	Pennsylvania	Illinois (Partisan) Montana* (Non-partisan) New Mexico (Partisan)

Note: Table derived from data contained in the State Court Organization 1998<sup>107</sup>

\* Montana utilizes retention elections only if the incumbent runs unopposed.

At the trial court level, retention elections are utilized in twelve states.<sup>108</sup> Initial judicial appointments resemble the Missouri Bar Plan in nine states, while two states, Pennsylvania and Illinois, utilize partisan popular elections to make initial selections. Only two of these twelve states use retention elections for all of their trial court judges. Four states limit the use of judicial retention elections based on the trial court’s geographical location, while nine states limit the use of judicial retention elections based on trial court type. Arizona,

107. See ROTTMAN, *supra* note 104, at 21-25 tbl.4.

108. See *id.* at 34-49, tbl.7; *infra* Table 2.

for example, uses retention elections only for its superior court judges, and only in its two largest counties. Kansas uses the Missouri Bar Plan in seventeen of its district courts, while using partisan elections for both selection and retention in the other fourteen districts.<sup>109</sup>

TABLE 2 – INITIAL APPOINTMENT OF TRIAL COURT JUDGES IN RETENTION ELECTION STATES

Gubernatorial Appointment from a Judicial Nominating Commission	Magistrate Commission Appointment	Contested Election
Alaska† Arizona†* Colorado† Iowa† Kansas†* Missouri†* Nebraska Utah* Wyoming†	Idaho†	Illinois (Partisan) Pennsylvania (Partisan)†

Note: Table derived from data contained in State Court Organizations 1998<sup>110</sup>

\* Limited use of retention elections based on the trial court's geographical location.

† Limited use of retention elections based on trial court type.

109. *See id.*

110. *See id.*