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judge

Restoring Citizen Control to Judicial Selection

A Report of the Walsh Commission March 1996

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Chief Justice Barbara Durham, Washington State Supreme Court

State-of-the-judiciary address

January 23, 1995

“...the integrity of the judicial system depends on the quality of its members. Yet, how we choose quality judges has been a source of confusion...two-thirds of the [unintelligible] polled said that they [unintelligible] sufficient information [unintelligible] judicial candidates...”

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Restoring Citizen Control to Judicial Selection

A Report of the Walsh Commission March 1996

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Acknowledgment

The Commission thanks the many judges, lawyers and public officials who gave testimony, submitted articles and wrote letters. Their insight and ideas were invaluable.

The Commission is especially indebted to over 900 voters who participated in focus groups, the Judicial Town Hall Meeting and telephone surveys, and who testified, wrote letters and telephoned. Without their voices we could not have completed this report.

foreword

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**"Who shall be the judge
whether the prince or
legislative act contrary to
their trust?...The people
shall be judge; for who shall
be judge whether the trustee
or deputy acts well and
according to the trust
reposed in him, but he who
deputes him...."**

John Locke
The Second Treatise of Government
chap XIX (1690)

John Locke, the 17th century British philosopher whose influence is so pervasive in our own political history, stated the then-revolutionary idea that the people should be in control of the mechanisms of government. That principle is the keystone of our report and the effort to restore lost citizen control is at the heart of our recommendations.

We have achieved popular control of the executive and legislative branches of government. But there are special difficulties in imposing effective popular control of the judiciary. In part this is because of the technical character of the judge's work. In part it is because we are trying to, at the same time, protect the independence which is essential for the impartial dispensation of justice.

In recommending the best system for selecting Washington judges, the Commission noted that there are fundamental differences between the role of the judge in a democratic community and that of other elected officials.

- We elect legislators and governors to further our individual policy preferences, to make decisions that will further our personal interests and give voice to our vision of appropriate governmental action. Legislators and governors should be representative—strong champions of the preferences of their constituents. A *law-making* process marked by lively debate among conflicting policies leads to better and more accountable public policy.

- By sharp contrast, the *law-interpreting and applying* tasks entrusted to judges must be impartial. Judges serve the people through the impartial interpretation of laws made by a democratically elected legislature. It is not the role of the judge in a democratic community to make fundamental policy decisions, to express preferences for one policy over another, or to represent one group over another. To the contrary, impartiality means judges will *not* favor one view, one group or one policy over another. Indeed, when questions of constitutional authority are raised, judges need to be principled enough to defy current popular opinion in favor of the long run public values expressed in the constitution. So far as it is possible, judges should employ their best independent judgment, their experience and their legal skills in a principled, disciplined and impartial interpretation of the law.

This fundamental contrast in the role of judges as compared to “representative” officials raises important questions about our current system of selecting judges. A method of selection that works well for one kind of official may not be suitable for other kinds of officials. In Washington, judges reach the bench either by appointment or by contested election. As is detailed in the report that follows, both processes have serious problems in today’s world for the selection of the neutral, skilled professionals the people demand in their judiciary.

Each state’s judicial selection system reflects its judgment of the appropriate balance among competing goals: qualified judges; voter information and judicial accountability; and judicial independence. The people demand that the judicial selection process be open to all qualified candidates in the state; that all judges be selected on the basis of their honesty, knowledge and judgment; and that the process encourages qualified candidates to seek judicial office. For the selection process to be meaningful, voters must have more information about the candidates, their qualifications as well as their performance once on the bench. Yet neither the selection process nor the performance review process should undermine the ability of a judge to be impartial. The Commission has searched for practical methods of reaching these goals.

Applying the principle of citizen control to an accountable but not truly representative branch of government requires discerning analysis. Things are not always what they seem, and the issues are not resolved by reference to comfortable political slogans. Failure to look clearly at what is actually happening has resulted in a system in which the people are largely excluded from meaningful participation in decisions about judicial selection and tenure. The Commission’s recommendations are intended to restore some of that citizen control, to return to John Locke’s vision of a community where the people shall judge.

Ruth Walsh
Chair, The Walsh Commission
March 1996

summary of recommendations

introduction

Introduction – page 7

Recommendations for Qualified Judges

Length of Practice – page 17

All candidates for judicial office shall have been active members of the state bar and/or shall have served as a judicial officer for at least the stated time periods:

- *Supreme Court and Court of Appeals - 10 years*
- *Superior Court - 7 years*
- *District Court - 5 years*

Currently, a person need only to have passed the bar and be a registered voter to qualify for most judicial positions in Washington; yet the qualities of a good judge—balance, sensitivity, judgment—develop only through experience.

Voters consistently testified to the Commission that judges should be experienced lawyers, and should meet minimum requirements for years of legal practice.

The recommended experience requirements are within the range of those in other states that have addressed this problem.

Residency – page 19

All candidates for judicial office shall have resided in the judicial district or county for the stated time periods immediately preceding candidacy:

- *Supreme Court – 7 years in state*
- *Court of Appeals – 5 years in judicial district*
- *Superior Court – 5 years in judicial district*
- *District Court – 2 years in county*

Judges should know the communities they serve, and community members should have an opportunity to know their judges. A residency requirement establishes this connection.

Currently, judicial candidates have no significant residency requirement except to be registered voters.

The recommended residency requirements are within the range of those in other states that have addressed this problem.

Judicial Selection – page 21

Judges shall be selected either by appointment from recommendations made by nominating commissions or by contested election.

The opportunity to participate in selecting judges makes judicial decisions more acceptable to the people, and elections encourage judges to listen to the people.

The consistent frustration of voters in judicial elections shows that there is something broken in Washington's judicial selection system.

This recommendation responds directly to the need for a more open and informed appointment process—the method by which more than 60 percent of our judges are chosen.

Nominating commissions involve voters in the recruitment and assessment of qualified candidates for judicial positions.

Voters express the greatest frustration when asked to select new judges; a review of the newly appointed judge's first 12 months will help voters make a decision in the contested election.

The contested election ensures access for qualified candidates who, for whatever reason, do not secure a recommendation from the commission.

The combination of a nominating commission process, a judicial performance review system and a contested election provides reasonable assurance that high quality judges are initially selected.

Retention elections, combined with a published review of the judge's performance, provide voters an opportunity to register approval for all judicial candidates based upon objective information.

Judges confident that their performance lives

up to objective criteria need worry less about making unpopular decisions.

The proposed system will assure Washington voters of a system that produces high quality judges whose independence is enhanced and protected, and who remain accountable for performance.

Nominating Commissions – page 27

Volunteer citizen nominating commissions shall be created to review and compile a list of recommended candidates from which the appointing authority shall fill all judicial openings.

The nominating commission is a tested solution for promoting citizen participation in the appointment process. Members have the time and the information needed to make comprehensive and largely nonpartisan reviews of each applicant's qualifications for judicial office. The 30 states with such a system offer manuals, checklists and forms as models, and can also provide guidance.

Voters testified that nominating commissions must remain free of political influence. Consequently, their compositions reflect a balance between branches of government, have non-lawyers outnumbering lawyers, feature staggered terms for members, and are broadly based, diverse and representative of the people.

Nominating commissions will create the opportunity for 800 people to participate in the selection process for all judicial openings, with separate commissions serving each court level, and local people serving on local commissions. Currently more than 60 percent of judges in this state are appointed without any significant voter involvement.

A nominating commission will meet only when there is an opening to fill; other states indicate that administrative costs to support nominating commissions are not significant, and that people participate with great commitment.

Recommendations for Voter Information and Judicial Accountability

Judicial Performance Information – page 33

A process for collecting and publishing information about judicial performance shall be created under the authority of the Supreme Court.

Voters testified that they wanted more information about the performance of judges. The Commission recommends creating an objective, uniform, comprehensive method for providing voter information about judicial performance.

End-of-term reports will be used to provide information in the judicial voter pamphlet; judges may respond to the review prior to its release. Confidential mid-term reviews will provide the judges feedback for the purpose of self-improvement.

Many models and resources are available for establishing a program to report judicial performance. Most of the states use a commission-type body to oversee the process. The Commission recommends that members of such a group be appointed for limited, staggered terms and be well-trained, diverse, impartial and representative of lay people, judiciary and bar.

Performance review categories should include: legal knowledge, integrity, communication skills, decisiveness, impartiality, interpersonal skills and administrative ability.

Judicial Candidate Information – page 35

A process for collecting and publishing information about candidates for judicial office shall be created under the authority of the Supreme Court.

Published criteria and a standard disclosure statement will provide voters with relevant, verified information about all judicial candidates. The standardized format will facilitate candidate comparison.

The Commission encourages the Supreme Court to authorize a disclosure system in which candidates who fail to provide information are identified in the judicial voter pamphlet.

Judicial Voter Information – page 39

The Supreme Court shall authorize the publication of a judicial voter pamphlet and encourage other methods for distributing judicial candidate information.

In any given election, as many as 50 percent of those voting choose not to vote for judicial candidates. The Commission believes that widely disseminated information about candidates will have a positive effect on voter participation in judicial elections.

News media representatives reported that Canon 7 of the state *Code of Judicial Conduct* prevented candidates from taking positions on important issues. It is the Commission's view, however, that the Canons do allow candidates to state views on many important issues.

Because current state and county voter pamphlets are distributed after the primary and are under too many restrictions to offer voters comparable information about judicial candidates, a special judicial voter pamphlet should be established without those restrictions and delivered in a timely manner.

Judicial information could also be disseminated on the Internet, with fax-on-demand, with "800" numbers, through symposiums, etc. conducted by local civic groups, and through the media.

The voter information process established by an Ohio Supreme Court rule requires each judicial candidate to file a disclosure statement. The Commission recommends a similar process for Washington.

Public Education – page 43

More information shall be made available to students, the public and news media about the nature of the judicial system and the character of the judicial office.

It was clear from people's testimony that public knowledge about the judiciary was far less than that about the legislative and executive branches of government.

Early education is key. In-school programs would acquaint students with judges and the judicial system. Student knowledge and interest may also increase their parents' participation in judicial elections.

Recommendation for Judicial Independence

Campaign Finance – page 45

Canon 7 of the Code of Judicial Conduct shall be revised to impose limits on campaign contributions by persons or organizations and impose aggregate limits on expenditures by a judicial candidate's campaign committee.

The current state laws and court rules that regulate campaign fundraising and finance reporting for judicial candidates do not impose any limits on contributions and expenditures. Yet testimony from special interest groups indicated that money can and does effect the outcome of judicial elections.

The Commission struggled with the needs for: maintaining both the fact and the appearance of judicial impartiality, encouraging campaign conduct compatible with the nature of the judicial office, and providing adequate time for campaigns without interfering with the business of deciding cases.

Because limits raise constitutional issues, the Commission patterned its recommendation on the Ohio court rule which selects those kinds of spending restraints and contribution limits that promise some benefit and are relatively certain to meet constitutional requirements.

Other types of limits should be explored in the process of redrafting Canon 7 of the *Code of Judicial Conduct*, for example, time limits for judicial campaigns, time limits for fundraising, and limitations on retention campaign spending.

Conclusion – page 51

Conclusion

introduction

"A judge has no constituency except the...lady with the blindfold and the scales, no platform except equal and impartial justice under the law."

M. Rosenberg

Texas Law Review

June 1966

In her State-of-the-Judiciary speech to a joint session of the Washington State Legislature on January 23, 1995, Chief Justice Barbara Durham announced the formation of a judicial selection review commission. Members would be appointed by all three branches of government to "review all aspects of judicial selection."

The 24-member Walsh Commission, named for the chair, Ruth Walsh, met for the first time on March 31, 1995. Recognizing the complexities of the judicial selection process, the Commission formed four subcommittees to concentrate on specific aspects: judicial qualifications, judicial selection, judicial performance and voter information.

The Walsh Commission goes to the people

During an 11-month period, the subcommittees held more than 25 work sessions. They identified concerns with the current process and considered alternatives. They reviewed research material and heard testimony from diverse interest groups including the business community, labor and education groups, minority bar associations, county bar associations, federal judges, Washington state judges, governors' counsel, the media and others.

While the subcommittees gathered information, the full Commission sought testimony and comments from Washington voters, other states and the media. In September 1995, the Commission hosted a "Judicial Town Hall Meeting," produced by the University of Washington (UWTV) and broadcast statewide. The interactive program enabled people to phone in suggestions and comments about voter information and judicial selection directly to Commission members. The program also generated numerous written and facsimile comments.

To understand the experience of states that have adopted alternatives to selecting judges by contested election, the Commission held a video-teleconference with the judicial nominating committees in Arizona and Colorado. This provided an opportunity to discuss the practical implications of citizen-based selection systems, and their perceived affects on the accountability and independence of the judiciary.

Because the media can play an important role in the selection of judges, the Commission took several steps to obtain their input. A survey mailed to media groups in July 1995 requested their suggestions for improving the information available to voters. At its August 1995 meeting, the Commission invited representatives of the print and broadcast media to discuss their views on coverage of judicial elections. In October 1995, the Commission met with the Bench-Bar-Press Committee of Washington to further explore ways to provide voters with more information on judicial candidates.

As the Commission moved toward completion of its work in late 1995, it again turned attention to the people. Focus groups in Seattle, Spokane and Vancouver provided randomly selected voters the opportunity to react to problems and potential solutions identified by the Commission. The focus groups confirmed what the Commission had heard throughout its deliberation: *voters want more information about the judges they elect*. The Commission concluded from the focus groups that a combination of changes in our selection system would simplify the process for voters.

A historical perspective on judicial selection

The founders of the Republic clearly distinguished between elected officials such as legislators who were to be truly representative, and those such as judges whose jobs required some independence. Sir Edward Coke's Seventeenth Century battles with the British kings—immortalized in Catherine Drinker Bowen's *The Lion and the Throne*—showed the importance of an independent judiciary in the preservation of democratic rights. Drafted in the shadow of recent British history, the federal and state constitutions generally provided for an appointive judiciary.

By the 1830s, however, the idea of an appointive judiciary began to be seen as "elitist." Under the sway of Jacksonian democracy, states began to abandon the appointment of judges and move to elective systems. Supporting the elective systems were the newly consolidated legal profession and the populism of the Granger movement. The legal profession believed that elections would produce better quality judges than purely political appointment had provided. The Granger movement sought more direct involvement of the people. The move reached full flowering at the end of the century. Not surprisingly, the Washington constitution adopted in 1889 called for the selection of judges through partisan elections.

By the start of the Twentieth Century, partisan elections were falling into disfavor nationally. Elements of the so-called Progressive Movement urged the adoption of nonpartisan elections. Washington again joined the reform, adopting nonpartisan elections for all judicial races in 1912.

As the country became more urbanized, it became increasingly difficult for voters to know judicial candidates. Many thought that without even party affiliation to help sort out candidates, elections were unlikely to produce the highest quality judges. For the first time, too, money began to have an unhealthy influence in judicial elections.

By the 1940s, a national reform movement was underway. A compromise of the judicial appointive and elective systems was designed to minimize political influence while retaining an element of popular control. Named after one of the first states to adopt it, the "Missouri Plan" called for a citizen commission to select a group of candidates from

Washington Court System

which the governor would appoint judges. At the end of their terms, the appointed judges would run unopposed and voters would decide whether or not they should be retained.

Today, 34 states use variations on the Missouri Plan for some or all of their judges. Because of this widespread adoption, the practical issues of implementation have been resolved for the most part. Significantly, no state that has moved toward this system has ever returned to its previous system.

This last step in judicial selection reform has bypassed Washington. While the idea has had its local proponents and has been actively debated in past years, Washington today retains essentially the same system adopted in 1912.

The judicial system and selection today

Washington's judicial system includes four court levels:

- The Supreme Court hears appeals from the Court of Appeals and the lower courts, and administers the state court system through its rule-making authority.
- The Court of Appeals sits in three divisions and hears the majority of appeals from the Superior Courts.
- The Superior Courts are the state's general jurisdiction courts, hearing civil matters, domestic relations and juvenile cases, felony criminal cases, and appeals from the courts of limited jurisdiction.
- The courts of limited jurisdiction—County District Courts and Municipal Courts—hear misdemeanor cases, civil cases of \$25,000 or less, small claims and traffic cases.

The Supreme Court

Nine Justices: six-year terms

Appeals from the Court of Appeals



Court of Appeals

19 judges: six-year terms

Division I, Seattle

Division II, Tacoma

Division III, Spokane

Appeals from lower courts except those in jurisdiction of the Supreme Court



Superior Court

157 judges: four-year terms

30 judicial districts

Civil matters

Domestic relations

Felony criminal cases

Juvenile matters

Appeals from courts of limited jurisdiction



Courts of Limited Jurisdiction

111 district court judges: four-year terms

Misdemeanor criminal cases

Traffic, non-traffic, and parking infractions

Domestic violence protection orders

Civil actions of \$25,000 or less

Small claims

With the exception of the Municipal Courts, the Walsh Commission included all court levels in its review of judicial selection issues. Although the Commission did not view Municipal Courts as within the scope of its charge, it concluded that the principles considered and the recommendations of the Commission should apply with equal force to the Municipal Courts.

Supreme Court Justices and Court of Appeals Judges serve six-year terms. Superior and District Court Judges serve four-year terms. Except for certain District Court jurisdictions with populations under 5,000, all judges must be admitted to practice law in Washington. In addition, Court of Appeals Judges must have been admitted to practice in Washington for five years before taking office, and must have been a resident of the district for one year.

Over 60 percent of all sitting judges initially reach the bench by gubernatorial appointment. (See charts on pages 14-15.) These appointments occur when judges leave the bench mid-term, usually as a result of retirement or death. At the end of the term, an appointed judge must stand for a non-partisan election which may or may not be contested. Incumbents are retained in 90 percent of those cases. All judges who complete their terms and wish to serve another term must stand for a non-partisan, contestable election.

The campaign practices of incumbent judges and judicial candidates are governed by Canon 7 of the

Code of Judicial Conduct. Canon 7 prohibits candidates for judicial office from making statements “with respect to cases, controversies or issues that are likely to come before the court”.

Problems in the judicial selection process

To evaluate the existing selection process, the Commission measured it against three goals: **qualified judges; voter information and judicial accountability; and judicial independence**. For each goal, the comparison revealed gaps in the system that were acknowledged as problems.

Qualified judges

Washington’s largely appointive process for selecting judges might be more effective if it followed established criteria, was open and public, was subject to review, was required to comply with minimum statutory qualifications for the office, and contained safeguards to protect against wholly partisan appointments. Washington’s system has none of these protections.

Except for the single requirement that Court of Appeals judges must have practiced law for five years, the governor can appoint any Washington lawyer to the bench regardless of experience. The selection is not always based upon:

- quality and credentials;
- the need for particular legal expertise;
- an appreciation of the importance of ethnic, cultural or geographic diversity; or
- a sensitivity to the value of voter input in the judicial selection process.

Even when governors base appointments on true judicial quality irrespective of political considerations, voters perceive the process—which varies significantly from governor to governor—as a game for insiders. Qualified people unknown to the governor or the governor’s advisors stand little chance of consideration. Few local bar associations, or civic groups outside the state’s urban areas have a formal screening process to provide the governor with names of highly qualified candidates. This is especially troublesome for minority and woman professionals interested in judicial office. *Voters would not tolerate the unguarded political selection of police officers or school teachers in this way. Judges are hardly less important.*

After a judge has reached the bench, voters decide to retain or replace him or her in a contested election. This process offers voters no choice at all if no one opposes an incumbent judge. Unless an attorney is persuaded to run against an incumbent, voters have no way to express a preference that another candidate fill the position. The Commission heard repeatedly that the expense, uncertainty, disruption or intimidation of a contested election discourages potential opponents.

As for the potential challenger, voters are provided little or no information beyond what the candidate chooses to reveal. Typically, voters do not know the candidate’s number of years in law practice, areas of expertise, community service activities or other information. Without even the assurance of a minimum number of years of experience, the voter has little information for meaningfully comparing candidates and deciding who is the best qualified.

A number of individuals testified that Washington’s judicial election system discourages some highly qualified persons from seeking office. In part, the problems were simply financial. While fundraising is a problem for all elected officials, it poses a unique problem for judges. Maintaining impartiality is difficult when one must seek very substantial financial help from special interest groups. (See “Judicial independence” on page 13 for details on this problem.)

Another problem is the time required for campaigning. Again, while this is a problem for all elected officials, it imposes a special cost on sitting judges. Judges are not collegial policy makers with large discretion over their time. Each judge must personally manage a high volume case load on a daily basis. Serious intrusions on their time, even during weekends and evenings, will affect their ability to manage their critically important decision making responsibilities.

Benefits to the democratic process flow from the legislative campaign, but are largely absent in the judicial campaign. While campaigning enables legislators to learn more precisely about the policy preferences of their constituents, the judge’s job is not representational in the same way. Instead, the judge’s real constituent is “the lady with the blindfold and the scales.”

With neither technical criteria nor policy debates to help voters make choices, elections have a capricious character which makes both the initial contest and continued tenure highly uncertain. Understandably, qualified candidates may hesitate to give up a professional law practice in the face of such uncertainty.

Voter information and judicial accountability

For the voter making decisions about judicial candidates in contested elections, a variety of compounding problems exists. In most of our population centers and rapidly-growing rural areas, voters are less and less likely to have knowledge of the candidates. That lack of familiarity coupled with an absence of reliable, objective information leaves voters frustrated. From 30 to 50 percent of Washington voters do not vote for judges at all.

The Commission heard from hundreds of voters who reported their uncertainty about the choice of candidates. Voter frustration seems due partly to unfamiliarity with how the judicial system works and what judges do, and partly to a lack of information about the qualifications, experience, and performance of judicial candidates. The problems also vary between rural and urban areas.

The state voter pamphlet offers no solution. It comes too late for primary elections where many judges are elected. (At most levels, a judge winning a majority in a primary appears uncontested on the general election ballot.) The pamphlet covers only statewide races, not Superior or District Court races, and by law is restricted to unverified information provided by the candidates. Even in races where the pamphlet could be useful, it does not require the uniform disclosure of professional and biographical information that would facilitate voter comparison.

Local voter pamphlets also offer no solution. They are available in only eight of Washington's 39 counties, arrive too late for the primaries, are restricted to information supplied by the candidates, and may be eliminated due to growing printing and mailing costs. Even with the pamphlets' limited potential to provide useful information about judicial candidates, there is currently no means for collecting consistent, objective information. Candidate submissions alone cannot produce the level of objective and uniform information a voter needs to meaningfully compare candidates.

Further complicating the voters' ability to get information about judicial candidates are the numerous inconsistent and confusing election statutes. They can allow for a short campaign period prior to election, and can result in a general election with four or five candidates on the ballot for a single office. This permits victory by a candidate with votes well short of a majority.

The Commission was surprised to learn that many newspaper editors and broadcasters believe that judicial elections are "not news." Because judges are not representative in the usual sense, debates about issues that may detract from impartiality have no place in judicial campaigns. Canon 7 of the *Code of Judicial Conduct* properly restricts candidates from discussing issues which might come before their courts. Those candidates who interpret Canon 7 most strictly surely make the least interesting candidates from the media's perspective. In the absence of other mechanisms for evaluating a judge's work, this circumstance provides voters with yet another roadblock in their decision making efforts.

Judicial independence

By the very nature of their duties, judges must be independent. *A judge should not decide a case on the basis of outside pressures.* Yet the role of money in all political campaigns is a matter of concern. High-cost media, special interest involvement, single-issue campaigns, defensive advertising and the like have driven the cost of political campaigns to enormous heights.

Still, as the United States Supreme Court held in *Buckley v. Valeo*, 424 US 1, 96 S Ct. 612 (1976), campaign spending is a form of political expression which is protected under the First and Fourteenth Amendments. While one may regret its magnitude, spending is speech and is not to be restricted without great care.

However difficult this problem is for elected officials in truly representative positions, it causes special problems for judicial candidates. Judges, whose behavior should reflect both the fact and appearance of impartiality, should not incur the obligations that are necessarily linked to raising large sums of money. Voter confidence in the impartiality of the judiciary surely erodes when judges become identified with various interest groups without whose support a campaign is increasingly out of reach.

In simpler times, campaign spending was not a dramatic problem in judicial elections. Early judicial elections were seldom the subject of elaborate campaigns and the amount of spending was not

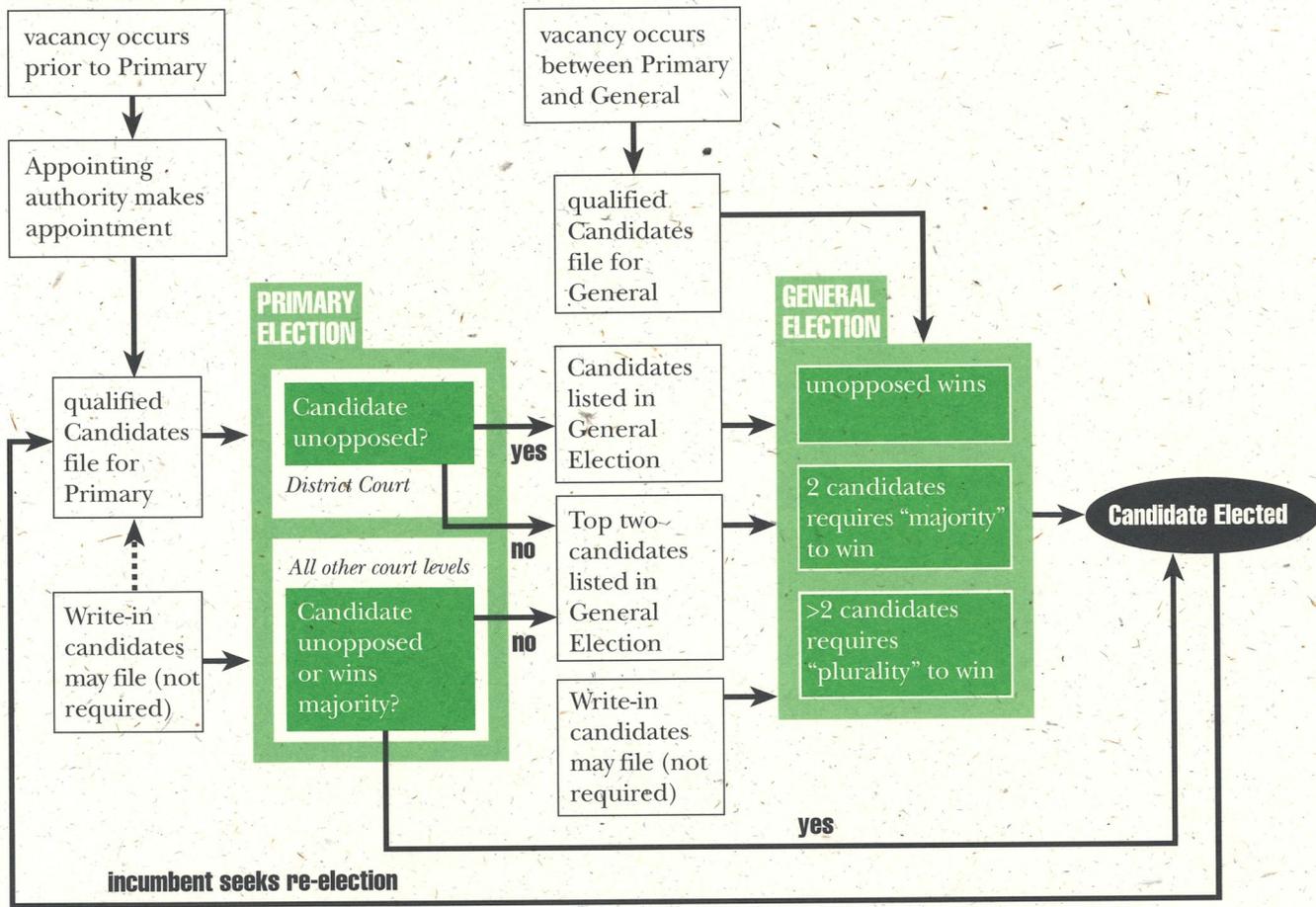
generally significant. Today, however, judicial campaign expenses nationwide are escalating sharply. In Washington, campaigns for urban trial court positions may expect to cost from \$50,000 to \$80,000. One recent candidate for District Court Judge spent \$113,000, and a candidate for a Washington Supreme Court seat spent \$400,000. Experience in other states suggests this upward trend will continue.

Returning judicial selection to the people

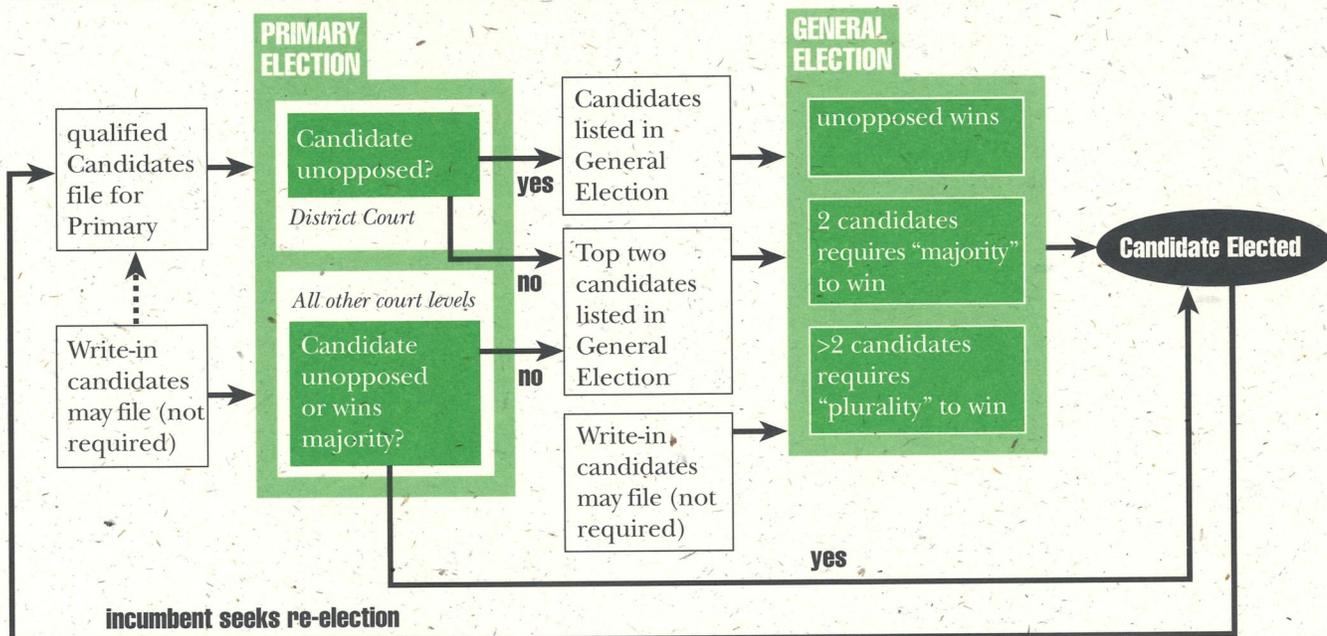
In Washington, time and events have combined to turn a once sensible system into a selection scheme with major problems in achieving the goals of **qualified judges, voter information and judicial accountability, and judicial independence.** The people of Washington deserve a system that guarantees that the most highly qualified candidates are considered for judicial office. They also deserve a system which allows them to judge their judges on the basis of objective criteria. Finally, they deserve an absolute assurance that judges are free from the influence of special interest money to decide cases exclusively on the basis of merit.

Washington's current judicial selection system

Mid-term Vacancy (under current system)

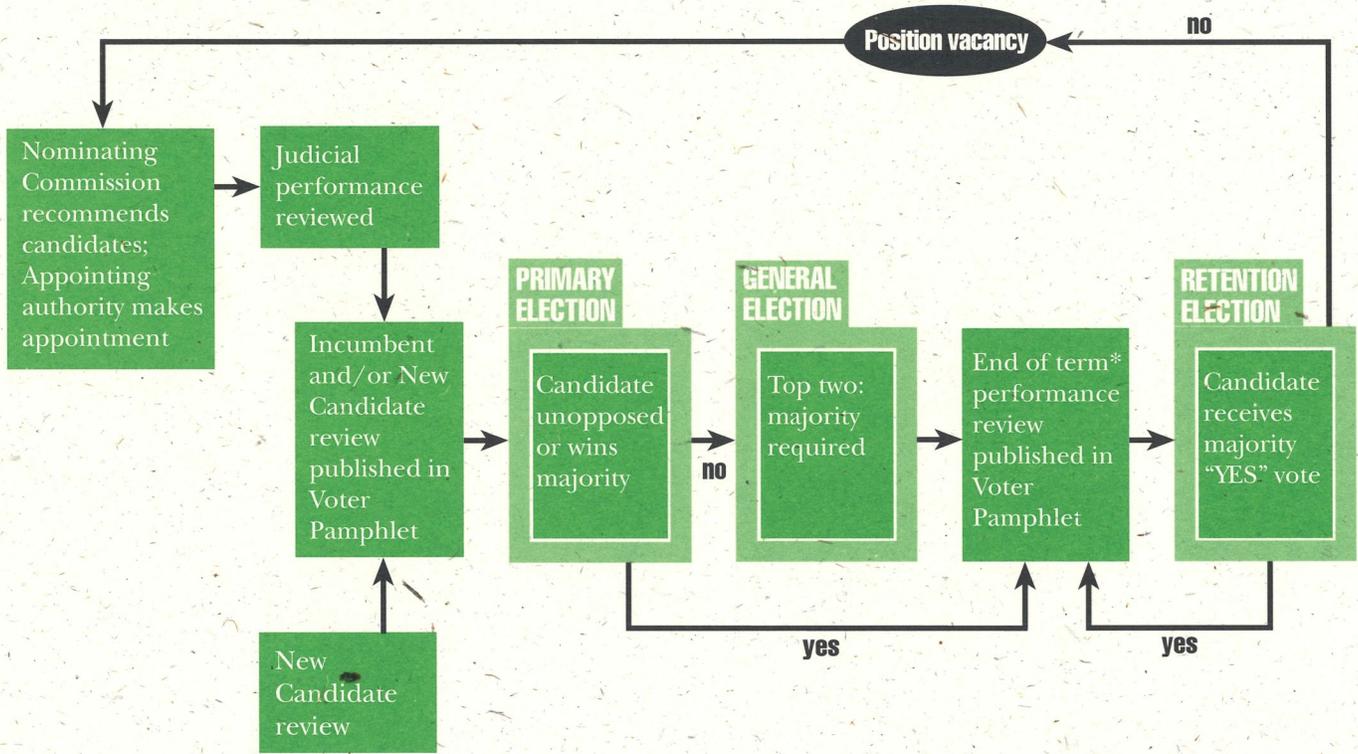


End-of-term Vacancy (under current system)



Walsh Commission's proposed judicial selection system

Walsh Commission Proposal



 Citizen Involvement

*Supreme Court and Court of Appeals - 6 year term
Superior and District Court - 4 year term

1 length of practice

Washington Voter

Focus Group

December 1995

“A Judge should be well-rounded in various areas. They should have some years in the profession before they get to the Supreme Court.”

All candidates for judicial office shall have been active members of the state bar and/or shall have served as a judicial officer for at least the stated time periods:

- **Supreme Court and Court of Appeals – 10 years**
- **Superior Court – 7 years**
- **District Court – 5 years**

COMMENTARY

The requirements for a judicial position should extend beyond mere completion of a law degree. The qualities of a good judge—balance, sensitivity, judgment—develop only through experience. To enhance the likelihood of selecting individuals with such characteristics, the Commission recommends minimum length of practice requirements for judicial candidates at each court level. Currently, only one court level—the Court of Appeals—requires a length of practice in Washington, and it is only five years.

People who testified before the Commission strongly believed that judges should be experienced lawyers before reaching the bench, and that judicial candidates should meet minimum standards for years of legal practice. Focus group members were surprised to learn that any recent law school graduate who has passed the bar, is a registered voter, and resides in the state may run for the state's Supreme Court.

The substantial experience requirements recommended are within the range of those in other states that have addressed the problem. Among other states, 11 require 10 years of legal practice for Appellate Court Judges, and 27 require between five and 10 years for Superior or District Court Judges.

The Commission intends that the length of practice requirements need not be consecutive.

REFERENCES

Bureau of Justice Statistics, *State Court Organizations 1993*

American Judicature Society, *Handbook for Judicial Nominating Commissioners*, 1985

2 residency

Washington Voter

Focus Group

December 1995

“A person needs to live in the area for a certain amount of time to know the area. Just passing the bar doesn’t mean they understand...the area.”

All candidates for judicial office shall have resided in the judicial district or county for the stated time periods immediately preceding candidacy:

- **Supreme Court – 7 years in state**
- **Court of Appeals – 5 years in judicial district**
- **Superior Court – 5 years in judicial district**
- **District Court – 2 years in county**

COMMENTARY

The Commission recommends minimum lengths of residence for judicial candidates at all court levels to increase the opportunities for judges to know and be known by their communities. Judges should be familiar with the communities they serve, and community members should have an opportunity to know their judges. Placing residency requirements on judicial candidates is one way of establishing this connection.

A judicial district defines who can vote in judicial races. The Supreme Court judicial district is the entire state, and all voters can cast a ballot. The Court of Appeals judicial districts are established by the legislature. There are 30 Superior Court judicial districts; a largely populated county usually comprises one district, and several less populated counties may comprise one district. For District Courts, the judicial district is usually the entire county unless the local legislative authority establishes smaller districts; the Commission recommends the county as the residency requirement for District Court.

Currently, judicial candidates in Washington have no significant residency requirement except to be registered voters. Among other states, 20 require from one to 10 years of residency for Appellate Judges, and 22 require from one to five years of residency for Superior or District Court Judges.

REFERENCES

Bureau of Justice Statistics, *State Court Organizations 1993*

American Judicature Society, *Handbook for Judicial Nominating Commissioners, 1985*

3 judicial selection

Washington Voter

Judicial Town Hall Meeting

September 1995

“...I think, that if you select them [judges] on merit with a panel evaluating them you get rid of some of the political appointments problems. And if you have a retention election up or down, you protect yourself from judges being elected by organized factions that want people because they want them to correct some specific one-issue problem.”

Judges shall be selected either by appointment from recommendations made by nominating commissions or by contested election.

(3.1) *Selection by Appointment.* When an opening occurs during a term or at the end of a term the appointing authority shall appoint from a list of candidates submitted by the appropriate nominating commission. If the appointment is not made within 30 days of receipt of the list of candidates, the chief justice shall appoint a candidate from the list.

(3.1.1) Candidates appointed to fill openings under section 3.1 will be subject to challenge in a contested election at the primary election following the first 12 months of their service.

(3.1.2) A review of the appointed judge's performance shall be prepared and published prior to the primary election.

(3.2) *Selection by Contested Election.* Qualified candidates seeking judicial office may oppose any judge selected under section 3.1 at the election described in section 3.1.1.

(3.2.1) A review of the candidate(s) shall be prepared and published prior to the election.

(3.3) *Retention Elections.* Appointed judges who are elected at their first election shall face retention elections thereafter at the end of each term of office. Elected judges who reached the bench through contested elections shall also face retention elections thereafter at the end of each term of office.

COMMENTARY

A judge's authority flows from people's respect for the law and a judge's impartiality. The opportunity to participate in the selection of a judge—including the initial appointment—makes judicial decisions more acceptable to the people. And elections, whether contested or retention with performance reviews, encourage judges to listen to the people.

Voters take voting seriously, and want to carry out their responsibilities diligently. The consistent frustration of voters in judicial elections shows that there is something broken in Washington's judicial selection system.

This recommendation deals with how judges are selected and how voters have input into that process. It responds directly to the need for a more open and informed appointment process—the method by which more than 60 percent of our judges are chosen. The governor

will appoint judges only from a list of candidates submitted by a citizen nominating commission. (Recommendations four, five and six detail the process leading up to judicial selection, and how voters get information to assist in their decision making.)

Voters express the greatest frustration when they are asked to select new judges. Not much is known about a new candidate's skill, impartiality, decisiveness, industry, and the other qualities that distinguish the excellent judge. They have not served before on the bench—or on *that* bench, and have no judicial track record. Voters have little on which to base a judgment. To assess a new candidate's suitability, a voter personally would have to conduct a methodical review including references, interviews, etc.—a prohibitive process for most people. The unsuitable alternatives include: voting on the basis of (at best) second hand information, deferring to the pull of a political slogan or familiar name, or not voting at all.

The Commission resoundingly rejected a federal life-appoint system for selecting judges. Instead, the Commission sought to change those aspects of the current system that limit the information available to voters, and those that place at risk the critically important impartiality of judges. Toward those ends, the Commission recommends a combination of strategies:

- After completing their first year, information about every appointed judge's performance will be published and presented to voters before the contestable election.
- An objective process will be developed to collect and disseminate information about both incumbent judges and candidates prior to all end-of-term judicial elections.
- While the Commission does not recommend reducing the number of elections, it does recommend a combination of contested and retention elections.

The Commission believes that reducing the number of contested elections will reduce some of the problems they cause. Similarly, widely disseminated information about both incumbent judges and judicial candidates will reduce the lack of information which marks contested elections today.

Under the proposal, every judge will be subject to challenge in one contestable election. If the judge keeps the seat at the open election occurring after the first year on the bench, the judge will subsequently stand in retention elections.

There is one sharply focused issue in retention elections: does the judge's proven record warrant continuing on the bench? Before the retention election, voters will receive a published review of the judge's performance to help them make a determination. This objective information diminishes, if not eliminates, the influence of personality contests, slogans and name familiarity. It also reduces the influence of money. For these reasons, retention elections supplemented by a published review of performance provide voters the opportunity to register their approval for all judicial candidates based upon objective information.

The Commission heard conflicting claims about the affect of retention elections on incumbent judges. Some believe that retention elections are too *easy* on sitting judges – that judges are very difficult to remove without an opposing candidate. The insider political folk wisdom is that “you can't beat somebody with nobody.” On the other hand, some claim that retention elections are too *hard* on sitting judges—that judges can be too easily targeted by disaffected special interest groups. The folklore here is that “you can't run against a phantom candidate.”

Obviously, both claims cannot be simultaneously true. No significant data show that the “phantom candidate” has been a problem in other states. On the contrary, judges in retention elections have a high retention rate. A study of 2,641 retention elections nationwide from 1980 through 1990 showed that only 34 judges who stood for reelection were defeated (Lusking, *Judicature*, May-June 1994). However, this 98 percent retention rate is probably an overstatement because it does not account for judges who chose not to run after receiving a negative performance review. One might reasonably conclude that the retention rate for judges under a retention system is a little higher than the 90-plus percent retention rate for incumbent judges generally.

Is this retention rate too high? Several reasons suggest it is not:

- When judges reach the bench through a properly functioning nominating commission process, one would expect high retention rates. This would signal that a successful nominating process is placing high quality judges on the bench.
- In states that combine retention elections with published performance information, non-retention is sometimes recommended. In such cases, the judge often does not stand for reelection or, if the judge does, is usually defeated.
- A slightly higher retention rate after the more rigorous candidate review which occurs at initial selection promises an appropriate degree of judicial independence. Judges confident that their performance lives up to objective criteria need worry less about making unpopular decisions.

The popularity of retention elections over contested elections in other states raises the question: should contested elections be eliminated altogether? Most other states using nominating commissions have done so. But the Commission was sensitive to people who expressed a strong view that contested elections offer access for persons interested in judicial office who, for whatever reason, are unable to secure a recommendation from the nominating commission.

The Commission concluded that the following combination will assure Washington voters of a system that produces high quality judges whose independence is enhanced and protected, and who remain accountable for performance:

- Nominating commissions for initial selection;
- A process for providing voters with uniform, objective information about judges and candidates before all elections; and
- A combination of retention and contested elections.

REFERENCES

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Unanimous Action May Not Survive Constitutional Scrutiny,"
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- "Judicial Nominating Commissions - the Need for Demographic Diversity,"
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- The Success of Women and Minorities in Achieving Judicial Office: The Selection Process*,
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4 nominating commissions

Washington Voter

Focus Group

December 1995

“I think you can be pretty well assured you’re going to get good people as judges with the nominating commission.

You’re going to get people who want the job. You’ll pick the best for the job. You’re not going to get a ringer in there. They’ll be qualified without the political bias.”

Volunteer citizen nominating commissions shall be created to review and compile a list of recommended candidates from which the appointing authority shall fill all judicial openings.

(4.1) *Nominating commissions functions.*

(4.1.1) Criteria used by the commissions for evaluating candidates shall be formulated under the authority of the Supreme Court and be made available to the public.

(4.1.2) The state court administrator shall notify the appropriate commission when a judicial opening exists. The appropriate commission shall then publish, solicit and otherwise make the opening as widely known as possible.

(4.1.3) The nominating commissions shall consider each candidate equally and fairly. The commissions shall seek public input, conduct interviews, and consider other information.

(4.1.4) Commissions representing a population of less than 300,000 shall send a list to the appointing authority of not less than two nor more than five candidates, unranked, which represent in the commission's view the most highly qualified applicants. Commissions representing a population of 300,000 or more shall send to the appointing authority a list of five candidates in the same manner.

(4.2) *Nominating commissions composition.*

(4.2.1) Supreme Court (a 15 member commission)

9 lay members

3 (1 each) from the 3 Court of Appeals

Commissions, selected by the membership

4 selected on a nonpartisan basis by the legislature

2 selected on a nonpartisan basis by the governor

6 lawyer members

3 (1 each) from the 3 Court of Appeals

Commissions, selected by the membership

3 selected by the state bar

(4.2.2) Court of Appeals (an 11-member commission in each division)

7 lay members

4 selected on a nonpartisan basis by the legislature

2 selected on a nonpartisan basis by the governor

1 selected by the chief justice

4 lawyer members

1 selected on a nonpartisan basis by the governor

3 selected by the relevant county bar

(4.2.3) Superior Court (an 11-member commission in each district)

7 lay members

4 appointed on a nonpartisan basis by the county legislative body

2 appointed on a nonpartisan basis by the governor

1 appointed by the chief justice

4 lawyer members

1 appointed on a nonpartisan basis by the governor

3 appointed on a nonpartisan basis by the county bar(s)

(4.2.4) District Court (an 11-member commission in each district)

7 lay members appointed on a nonpartisan basis by the county legislative body

4 lawyer members appointed by the county bar

(4.2.5) Appointments to the commissions shall be racially, geographically and gender balanced.

(4.2.6) Commission members shall serve staggered terms.

COMMENTARY

The task of a nominating commission is to present the governor with the best candidates for a judicial appointment. Now used by 30 states, this approach involves voters in recruiting and assessing qualified candidates for judicial positions. Serving in a volunteer capacity, commission members review each applicant by interviewing, reading letters of recommendation, soliciting voter comment, and using other resources.

Commission members have the time and the information needed to make comprehensive and largely nonpartisan reviews of each applicant's qualifications for judicial office. The governor appoints judges from the nominating commission's recommendations.

The Commission's review of the many states that use citizen nominating commissions shows their value. Moreover, this review shows that the practical and administrative problems of managing this process have been worked out. Manuals, checklists and forms are available as models for designing a system for Washington. Discussion with nominating commissions in other states can also provide guidance. The nominating commission is a tested solution for promoting voter participation in the appointment process.

Opponents of nominating commissions were in the minority of those testifying before the Commission. The Commission weighed their concerns about political patronage against the value of creating more voter access to the initial selection process. The Commission proposals will *minimize* the influence of partisan considerations by providing: a wide range of input sources for commission membership, a deliberate weighting of membership to prevent domination by the bar, and an affirmative insistence that the commissions be broadly representative of the people of the state. Commission members will serve staggered terms, further minimizing the political influence of any one appointing authority. The patronage concern is further addressed by prohibiting nominating commission members from seeking or holding public or judicial office while serving.

Some who testified expressed concern that the proposed system of judicial selection would simply replace the current exclusive, insider system with another. The Commission concluded that this would not be the case for the following reasons. The proposed system will:

- Assist the governor and county commissions by conducting more thorough investigations of the qualifications of the applicants;
- Provide more input from the non-legal community;
- Reduce the influence of politics and pressure groups; and
- Allow equal opportunity for all applicants, creating an open atmosphere in the selection process.

Nominating commissions will create the opportunity for 800 people to participate in the selection process for all judicial openings. Currently, more than 60 percent of judges in this state are appointed without any significant voter involvement. The Commission purposefully designed an approach that relies upon many people for three persuasive reasons:

1. The groups must be large enough to be balanced. A jury-sized commission meets this requirement.
2. Local commissions composed of local people offer the best strategy for identifying candidates to fill local court positions.
3. One centralized state commission for all recommendations did not seem the proper route to real voter involvement.

Recognizing the importance of local input for Superior Court districts that comprise more than one county, bar member appointments to the nominating commission will be agreed upon by each of the county bar associations involved. If agreement cannot be reached, the state bar will make the bar appointments. Each of the Court of Appeals nominating commissions will select one member to participate on the Supreme Court nominating commission to bring additional geographic diversity to that body.

The Commission concluded that nominating commissions will not create a new bureaucracy. In fact, testimony from commission members in other states indicates that administrative costs to support nominating commissions are not significant, and most important, that people embrace this opportunity to participate in the judicial selection process. Commissions will meet only when there is a judicial opening that the appointing authority must fill.

REFERENCES

- Guidelines for Reviewing Qualifications of Candidates for State Judicial Office*, American Bar Association, 1983
- Handbook for Judicial Nominating Commissioners*, American Judicature Society, 1985
- Judicial Merit Selection: Current Status*, American Judicature Society, 1994
- "Judicial Nominating Commissions – The Need for Demographic Diversity," *Judicature*, Vol. 74, No. 5, Feb-Mar.1991
- State Court Organizations*, National Center for State Courts
- Walsh Commission's video teleconference with Arizona and Colorado nominating commissions, July 14, 1995

5 judicial performance information

Washington Voter

Focus Group

December 1995

“I have never worked at a job where I didn’t need to be on probation for a period of time. This would give us a chance to see how a judge performs.”

A process for collecting and publishing information about judicial performance shall be created under the authority of the Supreme Court.

(5.1) Information about the performance of judges shall be provided to judges for self-improvement and to voters for election decisions.

(5.2) Information collected mid-term shall be the basis of a confidential report to the judge for the purposes of self-improvement.

(5.3) Information collected at end of term shall be the basis of a report to be published in the judicial voter pamphlet prior to all elections.

(5.4) Judges shall have the opportunity to respond to the performance information prior to publication.

(5.5) The process for collecting the information shall be regularly reviewed.

(5.6) The report published in the voter pamphlet shall include information on judges without recommendations, ratings or rankings.

COMMENTARY

Washington does not have an objective, uniform, comprehensive method for gathering and providing information to voters about the performance of sitting judges. The Commission determined it necessary to establish a process in the middle of judges' terms to provide feedback regarding their performance. Mid-term information should be confidential for the purpose of self-improvement. Information collected near the end of the judges' terms would be provided to voters in a judicial voter pamphlet. Judges would be afforded the opportunity to respond to the performance information prior to release.

Many models and resources are available for establishing a program to report judicial performance. The Commission studied the American Bar Association's *Guidelines for the Evaluation of Judicial Performance* as well as programs established in Alaska, Arizona, Colorado, Hawaii, New Jersey, Tennessee and Utah. The Commission also reviewed the pilot project for Judicial Performance Evaluation conducted in Washington in 1991.

Most of the states use a commission-type body to oversee the performance information process. If this system is used in Washington, commission members should be volunteers appointed for limited, staggered terms. They should be well-trained, diverse, impartial and representative of lay people, judiciary and bar.

Performance information categories should include: legal knowledge, integrity, communication skills, decisiveness, impartiality, interpersonal skills and administrative ability. Methods used by other states to collect this information include public hearings, interviews, and surveys of jurors, litigants, victims and lawyers.

REFERENCES

- ABA, *Guidelines for the Evaluation of Judicial Performance*, 1985
- Arizona State Judicial Performance Program
- Colorado State Judicial Performance Program

6 judicial candidate information

Washington Voter

Letter to the Walsh Commission

October 1995

“...the main weakness of our current system is that so little information is presented to the voters about judicial candidates.”

A process for collecting and publishing information about candidates for judicial office shall be created under the authority of the Supreme Court.

(6.1) All candidates for judicial office shall be required to submit a standard disclosure statement, pursuant to the *Code of Judicial Conduct*, containing questions relevant to voter assessment of judicial qualifications.

(6.2) The process shall be citizen-managed to formulate criteria, verify the disclosure statements, conduct interviews and prepare the report for the public. The information gathered through this process shall be published in the judicial voter pamphlet.

(6.3) The report shall include information on candidates without recommendations, ratings or rankings.

COMMENTARY

This recommendation assures that voters receive independent, uniform information about all candidates for judicial office. Published criteria and a standard disclosure statement will provide voters with considerably more relevant, verified information about judicial candidates than is now available. The standardized format will make candidate comparison easier. See the insert on page 36 for the disclosure statement required by court rule in Ohio.

While a mandatory disclosure system assures maximum voter information, it may have constitutional risks. Given the importance of informed voters, however, the Commission—after much deliberation—concluded the disclosure process should be mandatory if it is constitutional. The Commission would prefer that a candidate who has not filed a good faith response to the disclosure statement not appear on the ballot. But at a minimum, the Commission encourages the Supreme Court to authorize a disclosure system in which candidates who fail to provide information are identified in the voter pamphlet.

REFERENCES

- ABA, *Guidelines for the Evaluation of Judicial Performance*, 1985
- Arizona State Judicial Performance Program
- Colorado State Judicial Performance Program

**OHIO CODE OF JUDICIAL CONDUCT,
CANON 7, SECTION (B)(6)(A-J)**

(6) To facilitate greater public knowledge and information about judicial candidates, each judicial candidate shall file a statement of his or her qualifications. The statement shall be filed with the clerk of the court specified in division (C)(9) of this canon, on a form provided by the Board of Commissioners on Grievances and Discipline, within thirty days of becoming a judicial candidate. A judicial candidate shall provide his or her education and employment background, including years engaged in the practice of law and years in judicial service, a description of the nature of

practice and judicial service, including courtroom experience, the number of trials, and the types of cases or legal matters handled, an explanation of any sanctions issued by the Supreme Court or the lawyer or judicial disciplinary authority of another state, and a complete list of other public offices held, whether elected or appointed. A judicial candidate shall be responsible for determining the additional information contained in his or her statement, which may include the following:

(a) Pro bono or public service commitment demonstrated through cases or clients, membership on community boards, participation in charities, and

other activities, including bar association membership and activities;

(b) Scholarly achievements, including authorship of articles and books, and teaching at continuing legal education programs, college, or law school;

(c) Trial memoranda, appellate briefs, judicial decisions, or publications that can be read and reviewed;

(d) Information relevant to demonstrating that the judicial candidate has the temperament to serve as a justice or judge;

(e) Financial background, including bankruptcy, litigation as a party in a case, and potential conflicts of interest arising from

ownership interests and management responsibility;

(f) A personal statement on judicial philosophy, goals for the judicial office sought, and the motivation for seeking judicial office;

(g) Personal or professional accreditations, honors, or recognitions;

(h) Results of judicial performance polls;

(I) Service as a mediator or arbitrator;

(j) A summary of relevant judicial statistics submitted to the statistical reporting section of the Supreme Court.

7 judicial voter information

Washington Voter

Judicial Town Hall Meeting

September 1995

*“I have absolutely no
idea who any of them
[judicial candidates] are.
I’m embarrassed to say
but I couldn’t tell you a
single name.”*

The Supreme Court shall authorize the publication of a judicial voter pamphlet and encourage other methods for distributing judicial candidate information.

(7.1) Information from the candidate disclosure statement, as required by the *Code of Judicial Conduct*, shall be included in the judicial voter pamphlet. The judicial voter pamphlet shall also include information about the judicial system, the judicial selection process, the candidate and information about end of term judicial performance. The judicial voter pamphlet shall be distributed before every judicial primary election.

(7.2) The news media shall be provided with sample interview topics allowable under Canon 7 of the *Code of Judicial Conduct*. Judicial candidate forums, a clearinghouse for private organizations' ratings of judicial candidates, and town meetings with judicial officers shall be explored.

(7.3) The Office for the Administrator for the Courts shall immediately establish a designated liaison to work with the media, libraries, and other appropriate groups to improve information available to voters about judges, candidates for judicial office, and the judicial system.

COMMENTARY

In any given election in Washington state, as many as 50 percent of those who cast votes for other candidates choose *not* to vote for judicial candidates on the same ballot. The Commission believes that widely disseminated information about candidates will have a positive effect on voter participation in judicial elections.

Commission members heard repeatedly that insufficient information about candidates creates a serious barrier for voters wishing to make informed choices for judges. Testifying to this fact were focus group participants in three areas of the state, people appearing before the Commission, and people in televised "man-on-the-street" interviews. Results of two professionally conducted, statewide surveys also confirmed this view.

On several occasions, news media representatives told the Commission that judicial elections were "not news." They said that restrictions placed on candidates by Canon 7 of the state *Code of Judicial Conduct* had a chilling effect on the willingness of candidates to make declaratory statements, or take personal stands on important issues of the day. It is the Commission's view, however, that the Canons do allow candidates to state views on many important issues. For example, the King

County Bar Association currently supplies the media with sample questions permissible under Canon 7 for judicial candidates to answer.

Under this recommendation, special judicial voter pamphlets would be free of the restrictions imposed on the voter pamphlets now distributed by the Secretary of State and by some county governments. Currently, those pamphlets are prohibited by law from carrying any information other than that supplied by the candidate, and that information is unverified. The same law also prohibits county-level pamphlets from including information about state-level judicial candidates – those running for positions on the Supreme Court or Court of Appeals. In addition, the current voter pamphlets are distributed after primary elections and, therefore, after many judges have been elected.

The Commission debated at length the distribution methods for special judicial voter pamphlets. Distribution need not be limited to official mail. At least one newspaper has indicated a willingness to distribute judicial candidate information; if supplied with properly formatted material, others would likely follow. Other states save postage by having volunteers deliver printed pamphlets to a variety of locations – e.g., supermarkets, malls and libraries – where voters can pick them up. In some states (like Washington), special judicial home pages have been established on the Internet. The Internet is a low cost mechanism for distributing information about judges and candidates to voters. Fax-on-demand programs and “800” phone numbers could also be used to distribute judicial information.

Who should collect and compile candidate information? As proposed in recommendations five and six, a process for gathering information on candidates and disseminating it to voters will be developed under the authority of the Supreme Court.

What type of information should be included in the printed and electronic pamphlets? One model the Commission found helpful was that established by an Ohio Supreme Court rule (see page 36), which requires each prospective candidate to file a disclosure statement. The form asks for information about education, personal background and public offices held. It also asks for employment information: the

number of years in law practice, the nature of that practice, courtroom experience, times at trial, types of cases handled, and an explanation of any sanctions imposed by any lawyer disciplinary body. Candidates may also submit information about their *pro bono* or donated work, scholarly or professional achievements, and personal statements on judicial philosophy.

The Commission also recommends that various civic, legal and "good government" organizations host election-time events such as community forums and panel discussions. TVW, Washington state's equivalent of C-SPAN, can telecast programs about current judicial issues and about the judicial system generally.

REFERENCES

- Alaska, "Official Election Pamphlet"
- Arizona Commission on Judicial Performance Review, "You Be the Judge," (Voter's Pamphlet)
- Colorado, Commission on Judicial Performance, "Voter Information," (Voter's Pamphlet)
- Focus groups conducted in Seattle, Spokane and Vancouver, WA,
GMA Research, Bellevue, WA, Dec. 1994
- Follow-up sessions with the three 1994 focus groups, GMA Research,
Bellevue, WA, Nov. 1995
- "Issues Considered," handout prepared by Voter Information Subcommittee
for Walsh Commission meeting, Aug. 11, 1995
- "Judicial Elections – News or Not," combined meeting of Bench-Bar-Press Committee
of Washington and Walsh Commission members, Oct. 9, 1995
- "Judicial Performance Review Voter Information Plan," Arizona, 1994
- "Judicial Town Meeting," statewide cable TV broadcast,
University of Washington, Sept. 18, 1995
- "Judicial Town Meeting," transcript, Sept. 18, 1995
- Ohio State Code of Judicial Conduct, Canon 7*
- "Questions for Candidates in Judicial Elections," news release
by King County Bar Association, Aug. 1994
- "Quick Polls," conducted statewide, GMA Research, Bellevue, WA, Jan. 1995
- Surveys of media and the bar, Voter Information Subcommittee,
Walsh Commission, summer 1995
- "Video Teleconference with Colorado and Arizona," July 14, 1995
- "Walsh Commission: Media and Public Comments," compilations of media and bar
surveys, plus responses to Judicial Town Meeting cable TV broadcast,
Sept. 18, 1995 and miscellaneous letters
- Washington State Judicial Survey – Final Report*, GMA Research, Bellevue, WA, 1988

8 public education

Washington Voter

Letter to the Walsh Commission

September 1995

“...I used to enter the voting booth believing that I had been educated...but often I would be taken by surprise... I discussed this with many other people and without exception they admitted to the same problem.”

More information shall be made available to students, the public and news media about the nature of the judicial system and the character of the judicial office.

COMMENTARY

Commission members realized during their deliberations that public knowledge about the judiciary was far less extensive than for the other two branches of government. The names of executive and legislative branch personalities are household words; judges—what they do and who they are—remain part of the judicial “mystique.”

Early education is the key. The liaison established in recommendation seven will work with the Superintendent of Public Instruction to provide students with information about judges and the judicial system. In-school programs would acquaint students with aspects of the voting process, using the punch-card voting machines that would otherwise sit idle in county warehouses between elections. Students could elect their own leaders, and cast straw ballots on current adult issues and candidates, including judicial aspirants. Students could share what they learned with their families, broadening the entire election process and perhaps instilling a new habit in students and adults alike: voting for judges.

In-school programs that teach judicial principles and processes already exist at the K-12 level in Washington state. “Judges in the Classroom,” which pairs teachers with judges to instruct students about the basics of justice, has involved many teachers and judges in the past several years. Since 1989, the YMCA Mock Trial Competition has involved more than 400 high school students a year in practicum-style exercises that teach trial processes and critical-thinking skills. Practicing attorneys coach the students, and real judges preside over the trials.

REFERENCES

- “Finding Their Voice,” YMCA Youth & Government, Olympia, WA
- “Judges in the Classroom – Connecting the Courts and the Schools,”
Office of the Administrator for the Courts
- Judges in the Classroom Curriculum, Office of the Administrator for the Courts
- Law Related Education Task Force Recommendations,
Board for Trial Court Education
- Legal Information Institute, US Supreme Court World Wide Web Home Page
(<http://www.law.cornell.edu/>)
- YMCA Mock Trial Competition – Official Competition Kit,
YMCA Youth & Government, Olympia, WA, 1996

9 campaign finance

Washington State Judge

Judicial Town Hall Meeting

September 1995

“I think we have to be very careful to maintain a certain degree of judicial independence where a judge doesn’t always have to be looking over his or her shoulder at the political wind that’s blowing with regard to each decision – or perhaps be forced into rendering a political decision rather than a decision of justice.”

Canon 7 of the *Code of Judicial Conduct* shall be revised to impose limits on campaign contributions by persons or organizations and aggregate limits on expenditures by a judicial candidate's campaign committee.

COMMENTARY

The Commission struggled with the serious issues surrounding campaign finance in judicial elections. These included: maintaining both the fact and the appearance of judicial impartiality, encouraging campaign conduct compatible with the nature of the judicial office, and providing adequate time for campaigns without interfering with the business of deciding cases. Testimony from representatives of special interest groups indicated that money can and does effect the outcome of judicial elections. Most campaign contributions for judicial candidates come from lawyers or corporations having an interest in influencing decisions.

State laws and court rules regulate how candidates for judicial office raise funds and report campaign finances. Missing are limitations on contributions and expenditures for judicial candidates. Such limitations raise delicate constitutional issues. In 1976, the United States Supreme Court in *Buckley v. Valeo* seemed to hold that overall expenditure caps would violate First and Fourteenth Amendment principles protecting political expression. However, *Buckley* appears to permit contribution limits if they are reasonable and serve substantial government interests.

The Commission has patterned its "Code of Judicial Conduct Recommended Revisions" (see below) on the Ohio court rule which selects spending restraints and contribution limits that promise some benefit and are relatively certain to meet constitutional requirements. Partial expenditure limits (i.e., limits on some organizations) are consistent with *Buckley*. As an example, the Commission would recommend limits of this sort:

- Court appointees (\$250)
- Individuals other than the candidate
(\$250-\$1,000 depending on court level)
- Organizations (\$2,500-\$5,000 depending on court level)
- Candidate campaign committee expenditures
(\$100,000 to \$500,000 depending on court level)

Other types of limits should be explored in the Canon 7 redrafting process. For example, the *ABA Code of Judicial Conduct* includes time limits for judicial campaign fundraising of no earlier than 90 days before and no later than 90 days after an election. The redrafting of Canon 7 should also address limitations on retention campaign spending.

REFERENCES

ABA, Code of Judicial Conduct

American Judicature Society, *Electing Justice: The Law and Ethics of Judicial Election Campaigns*, 1990

Buckley v. Valeo, 424 US 1, 96 S. Ct. 612 (1976)

Ohio State Code of Judicial Conduct, Canon 7

**CODE OF JUDICIAL CONDUCT
RECOMMENDED REVISIONS**

Canon 7(B) (2):

**Campaign Solicitations
and Expenditures**

(1) A judicial candidate shall prohibit employees subject to his or her direction or control from soliciting or receiving campaign fund contributions.

(2) (a) A judicial candidate personally shall not solicit or receive campaign funds. A judicial candidate may establish a committee to secure and manage the expenditure of funds for his or her campaign and to obtain statements of support for his or her candidacy. The campaign committee shall not directly or indirectly, receive for any political or personal purpose any of the following:

(i) A contribution from any employee of the court or person who does business with the court in the form of a contractual or other arrangement in which the

person, in the current year or any of the previous six calendar years, received as payment for goods or services aggregate funds or fees regardless of the source in excess of two hundred fifty dollars. The committee may receive campaign contributions from lawyers who are not employees of the court or doing business with the court in the form of a contractual or other arrangement.

(ii) A contribution from any appointee of the court unless the campaign committee, on its campaign contribution and expenditure statement, reports the name, address, occupation, and employer of the appointee, identifies the person as an appointee of the court, and indicates whether the appointee, in the current year or in any of the previous six calendar years, received aggregate compensation from court appointments in excess of two hundred fifty dollars.

(b) As used in (2) (a) (i) and (ii):
(i) "Appointee" does not include a person whose appointment is approved, ratified, or made by the court based on an intention expressed in a document such as a will, trust agreement, or contract.

(ii) "Court" means the court for which the judicial candidate is seeking election and, if applicable, the court on which he or she currently serves.

(iii) "Compensation" does not include reasonable reimbursement for travel, meals, and other expenses received by an appointee who serves in a volunteer capacity.

(3) A judicial candidate shall not participate in or receive campaign contributions from a judicial fund-raising event that categorizes or identifies participants by the amount of the contribution made to the event.

(4)(a) The campaign committee of a judicial candidate shall not directly or indirectly solicit or receive a campaign contribution aggregating more than the following:

(i) From an individual other than the candidate or a member of his or her immediate family, one thousand dollars in the case of a judicial candidate for justice of the Supreme Court, five hundred dollars in the case of a judicial candidate for the court of appeals, or two hundred fifty dollars in the case of all other judicial candidates.

(ii) From any organization, five thousand dollars in the case of a judicial candidate for justice of the Supreme Court or two

thousand five hundred dollars in the case of all other judicial candidates.

(b) For purposes of (4)(a) of this canon:

(i) In-kind contributions consisting of goods and compensated services shall be assigned a fair market value by the campaign committee and shall be subject to the same limitations and reporting requirements as other contributions.

(ii) A loan made to a campaign committee by a person other than the judicial candidate or his or her spouse shall not exceed an amount equal to two times the applicable contribution limit, and amounts in excess of the applicable contribution limit shall be repaid within the fund-raising period. A debt remaining

at the end of the fund-raising period shall be treated as a contribution and subject to the applicable contribution limit.

(iii) A debt incurred by a judge or judicial candidate in a previous campaign for public office and forgiven by the individual or organization to whom the debt is owed shall not be considered a campaign contribution.

(5)(a) The total amount of expenditures made in the fund-raising period by the campaign committee of a judicial candidate shall not exceed the following:

(i) Five hundred thousand dollars in the case of a judicial candidate for justice of the Supreme Court;

(ii) Two hundred thousand dollars in the case of a judicial candidate for the court of appeals;

(iii) One hundred thousand dollars in the case of all other judicial candidates.

(b) An expenditure made in a primary election period by the campaign committee of a judicial candidate shall be included in determining the total amount of expenditures made by the campaign committee in the fundraising period.

(6) On or before the first day of December beginning in 1998 and every four years thereafter, the Administrator for the Courts shall determine the percentage change over the preceding forty-eight months in the Consumer Price Index for All Urban Consumers, or its successive equivalent, as determined by the United States Department of Labor, Bureau of Labor Statistics, or its successor in responsibility,

for all items, Series A. That percentage change shall be applied to the contribution and expenditure limitations then in effect. The result of that calculation, rounded to the nearest twenty-five dollars, shall be the contribution and expenditure limitations applicable to the campaign committees of judicial candidates seeking office in the four year period that begins on the ensuing first day of January. The Administrator shall notify the Secretary of State, the auditors of each county, and all courts in Washington of the revised contribution and expenditure limitations. The Supreme Court shall publish the revised contribution and expenditure limita-

tions in the Washington Reports. (7) A judicial candidate shall not expend funds in a judicial campaign that have been contributed to him or her to promote his or her candidacy for a nonjudicial office. A judge or judicial candidate shall not contribute or expend campaign funds in support or opposition to a candidate for a public office, other than the public office to which the judge or judicial candidate is seeking election. (8) Expenditures of over \$5,000 within 21 days of the primary or general election shall be preceded by filing a statement of intent to make those expenditures.

conclusion

Washington Voter

Focus Group

December 1995

*“It’s a great idea,
but it will take a lot
of education.”*

The Commission believes that the current political climate in Washington is ready to seriously consider the recommendations in this report. However, leading scholars of judicial reform (e.g., Philip Dubois, Ed., *The Analysis of Judicial Reform*, 1982, and Abraham, *The Judicial Process*, 6th ed, 1993) make it clear that such proposals face difficult obstacles. Chief among them is political resistance to change. We do not underestimate the strength of the opposition. But Washington has a tradition of farsighted political leaders who have permitted voters to consider proposals such as these: With the support of those leaders, progress is possible.

To further that progress, the Commission recommends the following immediate actions:

- Legislative committees should hold hearings to review the recommendations;
- The Supreme Court should take action to adopt rules to implement a Judicial Voter Pamphlet, performance information process and judicial campaign reform;
- Political leaders should give voters an opportunity to consider these recommendations by approving the prerequisite constitutional amendments;
- Commission members should volunteer to speak before civic and professional groups to explain the recommendations; and
- Civic and professional organizations should begin to build coalitions to support the recommendations.

Adoption of the Commission's recommendations is a first step toward restoring voter control to judicial selection. Given our state's commitment to the ideals of citizen control, it is ironic that our judicial selection system excludes meaningful voter input and frustrates informed voting. With the support of farsighted political leaders, we can put in place a system in which, once again, the people shall judge.

Actions needed to implement recommendations

RECOMMENDATION	ACTION	RESPONSIBLE FOR ACTION
1 Length of Practice	Amend Constitution, Art. IV, Sec. 17	Legislature/Public
	New Section RCW 2.04	Legislature
	Amend RCW 2.06.050	Legislature
	New Section RCW 2.08	Legislature
2 Residency	Amend RCW 3.34.060	Legislature
	Amend Constitution, Art. IV, Sec. 17	Legislature/Public
	New Section RCW 2.04	Legislature
	Amend RCW 2.06.050	Legislature
3 Judicial Selection	New Section RCW 2.08	Legislature
	Amend RCW 3.34.060	Legislature
	Amend Constitution Art. IV, Sec. 3, 5 & 29	Legislature/Public
	Amend RCW 2.04.071	Legislature
	Amend RCW 2.04.100	Legislature
	Amend RCW 2.06.070	Legislature
	Amend RCW 2.06.075	Legislature
	Amend RCW 2.06.076	Legislature
	Amend RCW 2.06.080	Legislature
	Amend RCW 2.08.060	Legislature
	Amend RCW 2.08.069	Legislature
	Amend RCW 2.08.070	Legislature
	Amend RCW 2.08.120	Legislature
	Amend RCW 3.34.050	Legislature
	Amend RCW 3.34.070	Legislature
	Amend RCW 3.34.100	Legislature
	Amend RCW 29.04.180	Legislature
Amend RCW 29.15	Legislature	
Amend RCW 29.21	Legislature	
Amend RCW 29.30	Legislature	
4 Nominating Commissions	New Section Constitution	Legislature/Public
	New Section Statute	Legislature
	New Section Court Rule	Supreme Court
5 Judicial Performance Information	New Section Statute	Legislature
	New Section Court Rule	Supreme Court
6 Judicial Candidate Information	New Section Statute	Legislature
	New Section Court Rule	Supreme Court
7 Judicial Voter Information	New Section Statute	Legislature
	Amend Code of Judicial Conduct, Canon 7	Supreme Court
8 Public Education	None Needed	
9 Campaign Finance	Amend Code of Judicial Conduct, Canon 7	Supreme Court