IS IT TIME TO CHANGE THE WAY NORTH CAROLINA SELECTS JUDGES?

by LOUIS ALFRED TROSCH, SR.*

I. INTRODUCTION

With the campaign and election of 2000, calls to reform North Carolina's judicial selection system of partisan elections are growing once again.[1] In this election, many races were extremely close, including the race for chief justice where the highly respected incumbent was

* Professor of Business Law, Belk College of Business Administration, University of North Carolina at Charlotte. The author acknowledges Nick Kendall, law student at University of North Carolina at Chapel Hill School of Law, who assisted diligently in researching this article.

[1] *See* Editorial, *Justice at stake?, Special interests and money threaten elected judiciary*, CHARLOTTE OBSERVER, Apr. 3, 2002, at 14A (advocating public financing system for appellate court races then pending in the state House); Eric Frazier, *3 judges endorse campaign funding*, CHARLOTTE OBSERVER, Mar. 15, 2002, at 6B (reporting endorsement by N.C. Supreme Court Justice G.K. Butterfield and N.C. Court of Appeals judges Wanda Bryant and Jim Wynn of public financing of appellate court campaigns); Robert Morgan, *Better elections for justice*, NEWS & OBSERVER (Raleigh, N.C.), Sep. 20, 2001, editorial (arguing for campaign finance reform for judicial races); *Choosing Judges, Bar association sees need for electoral reform*, CHARLOTTE OBSERVER, July 25, 2001, at 14A (preferring merit system, but advocating ABA's proposal for public financing of elections); *Making Democracy Work, Legislature Should Adopt Campaign Reforms*, CHARLOTTE OBSERVER, Jan. 31, 2001, at 14A (advocating a from of merit selection for appointment of state's judges); *Election Choices, N.C. Courts*, MORNING STAR (Wilmington, N.C.), Nov. 3, 2000, at 12A (advocating merit appointment due to lack of voter information); *see also* Thomas R. Phillips, *When money talks, judiciary must balk*, CHARLOTTE OBSERVER, Apr. 21, 2002, at 6D (chief justice of Texas Supreme Court discussing problems with campaign contributions in judicial elections generally).

defeated[2] after spending a record amount on his campaign.[3] Efforts at reform have been attempted since the 2000 election—the North Carolina General Assembly recently enacted legislation making district court elections nonpartisan and providing for public funding of statewide judicial elections.[4] This article will focus on judicial selection reform and offer proposals for the legislature to implement. Part II will begin with a discussion of why the issue of reform has gained momentum, including recent developments that have prompted current efforts for reform. Part III will give a historical overview of judicial selection in North Carolina, including past reform efforts, in order to give perspective to where the state has been. Part IV will discuss the problems with the current system. Finally, Part V will offer alternative proposals for reform. The purpose of this article is to propose sweeping reforms for a truly effective system of judicial selection; one that will result in the recruitment and retention of the highest quality of judges. However, in light of expected heavy opposition in the state legislature,[5] alternative proposals of less comprehensive electoral reform will be recommended as well.

II. WHY REFORM NOW?

The 2000 race saw a spending record broken in North Carolina judicial elections. The contest between then-Associate Justice I. Beverly

[2] Matthew Eisley, *Slim Margins the Rule in State Judicial Races*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 9, 2000, at A15. I. Beverly Lake (R) received 1,453,039 votes (51.36%) to incumbent Chief Justice Henry Frye's 1,375,820 (48.64%) to claim the position of Chief Justice.

[3] Gary D. Robertson, *New Twists on Public Financing Getting Interest in Raleigh*, ASSOCIATED PRESS NEWSWIRES, Jul. 16, 2001. For detailed campaign financial reports, go to http://www.sboe.state.nc.us/. The actual amounts spent in the 2000 Chief Justice race were $907,491.28 by Frye and $232,667.76 by Lake, for a total of $1,140,159.04.

[4] *See* An Act to Provide for Nonpartisan Election of District Court Judges, 2001 N.C. Sess. Laws 403 (adding district court judges to Article 25 of Chapter 163 of the General Statutes effective January 1, 2002); N.C. GEN. STAT. § 163-321 & 322 (2001) (providing for the nonpartisan election of superior and district court judges); *see also* An Act to establish a nonpartisan method of electing supreme court justices and court of appeals judges, 2002 N.C. Sess. Laws 1054 (adding supreme court and appellate court justices to Article 25 of Chapter 163 of the general statutes effective January 1, 2004); *see also* N.C. Gen. Stat. §163-321, 322 and 278 (2002) (providing for the nonpartisan election and public funding of appellate and supreme court justices).

[5] *See* David Rice, *Reform an Issue to Many, Poll Says; N.C. Voters Support Using Public Money for Political Races*, WINSTON-SALEM JOURNAL, Apr. 10, 2001 (reporting poll findings of support for campaign finance reform, but overwhelming 86 percent prefer to have judges run for election than to have the governor appoint them); *see also* Robertson, *supra* note 3 (quoting Bob Hall, Democracy South's research director as saying, "There's a strong sentiment among key Democrats and Republicans [in the General Assembly] that they want to keep electing judges.").

Lake and then-Chief Justice Henry Frye cost over $1.1 million.[6] Chief Justice Frye led the way by spending $907,000.[7] In addition, five candidates at the appellate level spent more than $200,000.[8] A simple comparison to previous elections reveals an alarming trend in spending. In the 1986 election, Supreme Court candidates vying for five of seven seats, including that of Chief Justice, spent $376,993 on their campaigns.[9] The total spending for statewide judicial races in that election was $716,238.[10] At the time, this represented a $144,979 increase in spending over the previous three elections *combined*.[11] The average amount spent had doubled from 1986 to 1992, while the cost in 2000 was over twelve times that of 1986. Thus, the trend in judicial elections is clearly that of rapidly escalating cost.[12]

The escalating costs of judicial elections around the country and the perceived improprieties of candidates accepting contributions from individuals and organizations interested in the outcomes of cases possibly being heard by those candidates has prompted the American Bar Association to establish the Commission on Public Financing of Judicial Campaigns. The Commission recently issued a draft report of its findings and recommendations.[13] Its primary recommendation was to finance judicial elections with public funds.[14] After analyzing these findings, the Commission set out principles in support of public financing including:

1. A sensitivity to Constitutional limitations on powers to regulate judicial campaign finance;
2. Recognition of state-by-state variations affecting the desirability and viability of public financing;

[6] Rob Christensen, *Financing Judicial Elections*, NEWS & OBSERVER (Raleigh, N.C.), Jul. 6, 2001, at A3.

[7] Robertson, *supra* note 3.

[8] *Id.*

[9] Exum, *Judicial Selection in North Carolina*, 35 N.C. ST. B.Q., Summer 1988, at 4, 6; *see also* Robert Moog, *Campaign Financing for North Carolina's Appellate Courts*, 76 JUDICATURE 68, 71-72 (1992) (describing the race as extraordinary in the amounts spent, at least by North Carolina standards).

[10] Exum, *supra* note 9, at 6.

[11] *Id.* Emphasis in original. The total spent for 1986 also represents a 200 percent increase over 1982, the highest single year of the three preceding election years. *Id.*

[12] *But see* Moog, *supra* note 9 at 76 (stating that "despite the fears and warnings of some," spending "has not escalated out of control."). Of course, this article was written in 1992, and the author may well have a different view now, especially in light of the 2000 election.

[13] Commission on Public Financing of Judicial Campaigns, Draft Report, American Bar Association Standing Committee on Judicial Independence, July 2001, at http://www.abanet.org/judind/report072001.pdf.

[14] *Id.* at iv, 31.

3. Introduction of public financing programs where the need is greatest (i.e., the selection of high court justices);
4. Creation of public funds sufficient to encourage candidates to run for a particular judicial seat;
5. Enactment of programs to limit eligibility to serious candidates in contested elections.[15]

North Carolinians recognize a problem with our current system of campaign finance. The North Carolina Center for Voter Education recently completed a survey to determine attitudes toward campaign finance reform for all elections. This statewide poll of likely voters revealed that sixty percent favored public financing of campaigns as long as candidates accept voluntary spending limits. Sixty-one percent of those polled indicated support of public financing to avoid corruption scandals.[16] Perhaps more importantly, the poll found that sixty-two percent of voters thought that "the influence of large campaign contributions is so corrupting that the governor and legislature need to deal with the issue before the next election."[17] While the poll did not specifically target judicial elections, the perception that large campaign contributions are corrupting should apply equally, if not more so, to judges.[18]

In response to these trends and developments, the North Carolina General Assembly is once again looking at possible reforms. The state Senate Republican Caucus recently endorsed a proposal entitled "The Voter-Owned Elections Act."[19] This plan would phase in publicly financed elections beginning with judicial races in 2004. A compromise proposal would have the judicial races financed by annual license fees imposed upon lawyers, and implement a $5 income tax check-off to finance other elections, allowing the taxpayer to opt-out. To receive the funding, candidates would have to agree to spending limits. While

[15] *Id.* at v, 38–65 (discussing a total of ten principles).

[16] Rice, *supra* note 5. More information on the survey is available from the N.C. Center for Voter Education at http://www.ncvotered.com/.

[17] *Id.*

[18] It should be noted that the same poll conducted for the N.C. Center for Voter Education found overwhelming support for the election of judges, with 86 percent favoring judges running for election. *Id.* On the other hand, the Commission for the Future of Justice and the Courts in North Carolina reported that the appointment of judges received majority support in their telephone survey. *See* Commission for the Future of Justice and the Courts in N.C., *Without Favor, Denial or Delay: A Court System for the 21st Century*, at 9 (1996) [hereinafter FUTURES COMMISSION REPORT]. The Futures Commission also found support for change among judges. By a two-to-one margin they would prefer appointment to election and over 70 percent would endorse a merit selection/retention system. *Id.*

[19] Rob Christensen, *GOP Puts Democrats on the Spot*, NEWS & OBSERVER (Raleigh, N.C.), Jul. 27, 2001, at A3.

Democrats are less than enthusiastic about the plan, the Senate Democratic leader said there might be support for passing a pilot version of the plan covering the races for the Supreme Court and Court of Appeals because many leaders agree there is a strong need to insulate judges from political pressures.[20]

The trend of escalating costs of judicial races in North Carolina, the ABA's attention to reforming judicial elections around the country, support for campaign finance reform in the state, and the General Assembly's recent moves to implement reforms all indicate that now is the time to reform North Carolina's judicial selection process. The next section will discuss the history of judicial selection in North Carolina and past efforts to reform it.

III. HISTORY OF JUDICIAL SELECTION AND EFFORTS AT REFORM IN NORTH CAROLINA

North Carolina currently elects all of its judges.[21] The current Constitution was adopted by the voters in 1970 and took effect in 1971.[22] This section will begin with the colonial period and briefly trace the evolution of the state's judicial selection method through its three constitutions. Efforts at reform over the past three decades will also be discussed.

During colonial times, the British Crown appointed judges in North Carolina.[23] Both the Lords Proprietors and the colonists disapproved of this practice, as the former viewed it as an infringement on their powers, while the latter believed they should have control of their own affairs.[24]

[20] *Id.*

[21] "Justices of the Supreme Court, Judges of the Court of Appeals, and regular Judges of the Superior Court shall be elected by the qualified voters and shall hold office for terms of eight years and until their successors are elected and qualified." N.C. CONST. Art. IV, § 16. "Each district judge shall be elected by the qualified voters of the district court district in which he is to serve at the time of the election for members of the General Assembly." N.C. GEN. STAT. § 7A-410 (2000).

[22] *See* John J. Korzen, *Changing North Carolina's Method of Judicial Selection*, 25 WAKE FOREST L. REV. 253, 264 (1990) (referring to NORTH CAROLINA GOVERNMENT 795-96, 798, 801-06 (J. Chene, ed. 1975)).

[23] Samuel Latham Grimes, *"Without Favor, Denial, or Delay": Will North Carolina Finally Adopt the Merit Selection of Judges?*, 76 N.C. L. REV. 2266, 2274 (1998) (referring to Jack Betts, *Still Waiting in the Legislative Wings*, N.C. INSIGHT, June 1987, at 15); *see also* Kurt E. Scheuerman, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 464-65 (1993) (describing the King's control and abuse of the judiciary and a statute finally passed in 1761 that provided for judicial tenure that survived the death of the monarch but did not apply to the colonies).

[24] Grimes, *supra* note 24, at 2274.

The American Revolution brought opportunity for change and North Carolina adopted its first constitution in 1776.[25] While the proceedings of the 1776 Provincial Congress are sketchy, judicial selection could not have been a divisive issue at the time.[26] Since direct election of judges was unheard of at the time, the choice was between legislative and executive selection.[27] The North Carolina drafters finally opted to follow the legislative method with respect to judicial selection.[28] The North Carolina Constitution thus provided that "the true center of power lay in the General Assembly," which would choose all judges to serve for life.[29] Though the 1776 Constitution was extensively overhauled in 1835, changes in judicial selection were not even considered.[30]

After the Civil War, North Carolina was required to adopt a new constitution to re-enter the Union. Due to the numerous problems faced by North Carolina during Reconstruction, its constitutional convention spent only one day debating the issue of judicial selection.[31] The debate centered on three proposals – election by the people, election by the General Assembly, and appointment by the Governor.[32] In the end, the proposal for election of judges by the people won 56 to 34 for Justices of the Supreme Court and 63 to 15 for Superior Court Judges.[33] The transcript of the 1868 constitutional convention is very instructive, as many of the arguments made by the delegates are the same ones made today for the various systems of judicial selection.

While partisan elections have been the constitutionally mandated method of selection since 1868, in practice the system has worked quite differently:

> In practice the system of selection . . . has been in almost all instances one of pure gubernatorial appointment. Since Reconstruction almost all judges have been Democrats, initially appointed by Democratic governors, and, once appointed, almost never challenged electorally. . . . In practice, then, the system for judicial selection *and* retention in

[25] Korzen, *supra* note 23, at 264 (referring to NORTH CAROLINA GOVERNMENT 795 (J. Cheney ed. 1975)).

[26] *See* John V. Orth, *Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges, A Transcript of the Debates from the 1868 Constitutional Convention*, 70 N.C. L. REV. 1825, 1826 (1992).

[27] *Id.*

[28] *Id.*

[29] Korzen, *supra* note 23, at 264; *see also* Grimes, *supra* note 24, at 2274 (cites N.C. CONST. of 1776, 13).

[30] Orth, *supra* note 28, at 1826.

[31] Orth, *supra* note 28, at 1825.

[32] *Id.* at 1837.

[33] *Id.* at 1850.

> North Carolina has for the most part and for almost all judges been gubernatorial appointment and tenure for life or retirement.[34]

The reality that the governor has *de facto* control via appointments, prompted the North Carolina Courts Commission, in 1971, to recommend the establishment of a merit selection system.[35] The change would have required legislative approval of constitutional amendments, and while repeated attempts were made during the 1970's, all met with failure.[36] The proposed amendments could not gain the three-fifths vote required, although they did receive majority support in both houses.[37]

In 1977, the North Carolina Bar Association was the principal sponsor of another effort to adopt a nonpartisan merit plan, which gained the endorsement of then-Chief Justice Susie Sharp.[38] Once again the reform measure failed, but this time it was only a few votes short of the three-fifths majority required for a constitutional amendment.[39] The populist origin of judicial elections surfaced as opponents claimed that merit selection departed from the principles of Jacksonian Democracy.[40] Opponents also felt that the nominating committee in the proposal was not sufficiently representative.[41] The North Carolina Courts Commission recommended a merit selection plan in its 1985 report, but again the General Assembly did not adopt the recommendation.[42]

[34] Exum, *supra* note 9, at 5 (emphasis in original).

[35] Korzen, *supra* note 23, at 265 (referring to REP. OF THE N.C. COURTS COMM'N TO THE GEN. ASSEMBLY, at 4, 11-16, 1971)). Prior to 1971, there had been isolated proposals for reform. The "Bell Commission" [Committee on Improving and Expediting the Administration of Justice in North Carolina formed by the North Carolina Bar Association for major court reform] had proposed that the new district judges be appointed by the chief justice, but the legislature opted for local elections instead. Also, a subcommittee proposed to have all judges appointed, but this did not even make it to the final report. *See* FUTURES COMMISSION REPORT, *supra* note 19, at 78-79.

[36] *Id.* at 265 (referring to 1987-88 N.C. ANN. REP. OF THE ADMIN. OFFICE OF THE COURTS, 8-9).

[37] *Id.*

[38] Grimes, *supra* note 24, at 2300-01 (referring to C.E. Hinsdale, in NORTH CAROLINA LEGISLATION 1977, at 91 (Joan G. Brannon ed., 1977) and Jack Betts, *Still Waiting in the Legislative Wings*, N.C. INSIGHT, Jun. 1987, at 16).

[39] *Id.* at 2301 (referring to C.E. Hinsdale, in NORTH CAROLINA LEGISLATION 1977, at 91 (Joan G. Brannon ed., 1977)).

[40] *Id.*

[41] *Id.*

[42] Korzen, *supra* note 23, at 267-68 (referring to REP. OF THE N.C. COURTS COMM'N TO THE GEN. ASSEMBLY, at 25-37 (1985) [hereinafter 1985 COMMISSION REPORT] and REP. OF THE N.C. COURTS COMM'N TO THE GEN. ASSEMBLY, at 2 (1987) [hereinafter 1987 COMMISSION REPORT]).

After a heated race for chief justice in 1986, the General Assembly, on the recommendation of the N.C. Courts Commission,[43] created the Judicial Selection Study Commission (JSSC).[44] After two years of work, the JSSC recommended the elimination of partisan judicial elections in favor of a system where all judges would be appointed by the governor,[45] subject to the advice and consent of both houses of the General Assembly.[46] The JSSC also proposed a "reconfirmation process"[47] for retention, whereby after an initial term of four years, a judge would be evaluated by the Judicial Standards Commission,[48] which would recommend to the General Assembly whether to reconfirm. The General Assembly could only overturn this recommendation with a two-thirds vote in both houses.[49] Judges would serve eight-year terms after reconfirmation.[50] After numerous and significant changes to the plan were made in the Senate Constitution Committee,[51] the Senate bill to amend the constitution passed, but the implementing legislation did not pass, nor did either bill make it out of the Rules Committee in the House.[52] Once again, judicial selection reform was defeated in the General Assembly.

The last major efforts at reform came in the mid-1990's. In 1994, then-Chief Justice Exum created the Commission for the Future of Justice and the Courts.[53] While the Commission worked, the Senate tried to implement a judicial appointment bill in 1995.[54] This plan provided for gubernatorial appointment of appellate judges with

[43] *Id.* at 255 (referring to the 1987 COMMISSION REPORT, at 4-5) (the Commission recommended "that a special study commission be created to study [the] issue [of judicial selection] in more depth than ever before," and "that the special commission be directed to investigate how other states select their judges . . . and to determine the views of the citizens of this state about how their judges should be selected.")

[44] *Id.* (referring to Study Commissions and Committees Act of 1987, ch. 873, part 19A, 1987 N.C. Sess. Laws 2181, 2216).

[45] *Id.* at 255-56 (referring to REPORT OF THE JUDICIAL SELECTION STUDY COMM'N, at 3, 12 (1989) [hereinafter JSSC REPORT]

[46] *Id.* at 256 (referring to S. 218, 1989 N.C. Gen. Assembly, §§ 1-4 (amendment proposed by the JSSC) [hereinafter JSSC Amendment]).

[47] *Id.* (referring to JSSC REPORT, *supra* note 59, at 10).

[48] *Id.* (referring to JSSC REPORT, *supra* note 59, at 11).

[49] *Id.* (referring to JSSC REPORT, *supra* note 59, at 12).

[50] *Id.* (referring to JSSC Amendment, *supra* note 60, § 5 at 3).

[51] *Id.* at 256-57 (referring to S. 218, 1989 N.C. General Assembly) (the Senate's amendment to the constitution would only allow the governor to appoint appellate judges, leaving partisan elections in place for superior and district court judges).

[52] *Id.* at 257.

[53] FUTURES COMMISSION REPORT, *supra* note 19, at iii.

[54] Grimes, *supra* note 24, at 2306 (referring to S.B. 971, 1995 N.C. General Assembly, Reg. Sess. (1995)).

legislative confirmation and periodic retention elections.[55] The bill passed the Senate and received majority support in the House, but failed to reach the decisive three-fifths majority for constitutional amendment.[56]

The Futures Commission released its report in 1996 after spending two years studying North Carolina's courts and concluded that a major redesign of the system was necessary to meet the needs of the future.[57] The Commission proposed reforms to many aspects of the court system, including the appointment of all judges by the governor from names nominated by a neutral panel.[58] The reasoning given for this recommendation was that "[p]artisan elections are inconsistent with an independent and accountable judiciary," and "the present election scheme does not provide accountability."[59] The Commission also proposed the use of retention elections as a check on the judiciary and a way to allow voter participation.[60] The major differences between these recommendations and those made by the JSSC in 1989 were initial "merit" appointments from nominations rather than straight appointments as well as the use of retention elections rather than "reconfirmations" by the legislature. The Futures Commission did recommend the use of performance evaluations, whereby the State Judicial Council would make a recommendation for or against retention at the election.[61] The General Assembly introduced the proposed constitutional amendment and the enabling legislation in April 1997 and appointed special committees to consider the bills, but no action was taken on either bill.[62]

[55] *Id.* The bill as introduced included trial judges in the appointment process, but the final version sent to the House only dealt with appellate judges. *Id.* at 2306 n.326 (referring to Joan G. Brannon & Thomas H. Thornburg, in NORTH CAROLINA LEGISLATION 1995, at 7-5 (Joseph S. Ferrell, ed., 1995)). This may have indicated that Republicans were confident of their growing electoral power and wanted to try to gain more trial judgeships at the polls, while Democrats were not yet ready to concede their dominance. *See id.*

[56] Grimes, *supra* note 24, at 2307 (referring to Joan G. Brannon & Thomas H. Thornburg, in NORTH CAROLINA LEGISLATION 1995, at 7-5 (Joseph S. Ferrell, ed., 1995) and John L. Sanders, in *id.*, at 6-5).

[57] FUTURES COMMISSION REPORT, *supra* note 19, at iii.

[58] *Id.* at 32.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* at 2323 (citing H.B. 741, 1997 N.C. General Assembly, Reg. Sess. (1997) (constitutional amendment); H.B. 742, 1997 N.C. General Assembly, Reg. Sess. (1997) (enabling act); S.B. 834, 1997 N.C. General Assembly, Reg. Sess. (1997) (constitutional amendment); S.B. 835, 1997 N.C. General Assembly, Reg. Sess. (1997) (enabling act)); *see also* Andrea Weigl, *Ethics of Lawyers' Donations to Judges Questioned*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 4, 2000, at B1 (reporting that bills introduced in 1998 and 1999 to have the governor appoint appellate judges never got out of committee).

In summary, judicial reform regularly has been on the agenda in North Carolina for the past thirty years. From the first recommendation for merit selection by the Courts Commission in 1971 to the Futures Commission Report in 1996, suggestions for abandoning the partisan election of judges have been constant. However, the General Assembly has consistently failed to enact the proposed reforms, often coming only a few votes short of the three-fifths majority required for a constitutional amendment. The following section explores the problems with North Carolina's current system of partisan elections for which reform is so often proposed.

IV. PROBLEMS WITH CURRENT SYSTEM OF JUDICIAL ELECTIONS IN NORTH CAROLINA

This section will focus narrowly on specific issues that may have a direct impact on the quality of the judiciary and the public's perception thereof, including the selection process itself. Additional problems with elective judiciaries will be covered in a later section, when the disadvantages of partisan elections in general are discussed.[63]

A. Increasing Campaign Costs and the Problems with Campaign Financing

In general, critics of partisan judicial elections argue that the increased cost of campaigns and problematic funding sources "create an image of justice going to the highest bidder."[64] In the past, judicial elections in general have been low-key events, and thus, relatively inexpensive.[65] This was especially true in North Carolina, where for years the Democratic Party dominated the judiciary, resulting in few contested elections.[66] However, as judicial races have taken on a more partisan nature, their cost has rapidly escalated.[67] North Carolina's move to a two-party state contributed significantly to this increase.[68] Furthermore, because candidates for North Carolina's appellate courts must compete statewide, it forces many judges to "manage professional,

[63] *See infra* Part V, Section 2 on partisan elections.

[64] Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1204–05 (2000).

[65] *See* Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U.L. REV. 1, 19 (1995) (referring to Mark Hansen, *The High Cost of Judging*, A.B.A. J., Sep. 1991, at 45).

[66] *See* Exum, *supra* note 9, at 4; *see also supra* notes 43–48 and accompanying text (discussing previous *de facto* control by governor over the judiciary when Democratic Party dominated state government).

[67] *See generally* Webster, *supra* note 79, at 19–24 (discussing rising cost of judicial elections in general); Grimes, *supra* note 24, at 2293–96 (discussing increased campaign costs in North Carolina).

[68] Grimes, *supra* note 24, at 2293.

extensive, and expensive campaigns in order to attract a statewide electorate."[69] The rising cost of elections magnifies problems associated with campaign financing.[70] According to one commentator, the solicitation of campaign contributions by judges, whether large or small, "undermines judicial integrity because it (1) fosters corruption; (2) allows contributors to legally buy access to the bench; and (3) creates the appearance of impropriety even where judges are able to maintain their independence and impartiality."[71] It has also been argued that the "appearance of impropriety that results from the receipt of money by judges is incompatible with the notion of an independent, fair, and competent judiciary."[72]

As noted earlier, the rising cost of judicial elections is one of the key factors behind recent calls for reform in North Carolina.[73] This trend of increasing campaign cost has been clearly visible during the period between 1986 and 2000.[74] The average spent by a candidate in 2000 of $463,716.67 represents an 1160.14% increase over the average spent in 1986. The average cost per vote also increased dramatically over this period, rising from a nickel in 1986 to thirty-three cents in 2000,

[69] Traciel V. Reid, *PAC Participation in North Carolina Supreme Court Elections*, 80 JUDICATURE 21, 21 (1996) (referring to ADAMANY, CAMPAIGN FINANCING IN AMERICA (N. Scituate, Ma.: Duxbury Press, 1972)).

[70] *See* Moog, *supra* note 9, at 70.

The need for increased funding potentially gives rise to or exacerbates a number of problems, including: (1) the perception of justice for sale as the number of contributors, as well as the amounts they contribute, increase; (2) discouraging qualified individuals who do not want to be involved in a major fund-raising effort; (3) magnifying the fund-raising advantage of incumbency; and (4) the need for some to resort to self-financing, which may leave candidates in serious debt. *Id.*

[71] J. David Rowe, *Limited Term Appointments: A Proposal to Reform Judicial Selection*, 2 TEX. WESLEYAN L. REV. 335, 345 (1995). Rowe also describes the infamous Texaco v. Pennzoil case:

Texaco representatives contributed campaign funds totaling $72,700 to seven justices [of the Texas Supreme Court] while an appeal in the $11 billion Pennzoil lawsuit against Texaco was pending before the court. Pennzoil lawyers countered, contributing $315,000 to their campaigns. Further, four justices who received contributions from the parties did not even face re-election.

Id. Chief Justice Exum also describes this fiasco. *See* Exum, *supra* note 9, at 6. While North Carolina has yet to experience a scandal like this, it is important to realize that such corruption can easily occur with the elective system, which makes contributions essential for most judges who cannot afford to use only personal funds.

[72] Maura Anne Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 842 (1994).

[73] *See supra*, Part II. This has been a concern for some time now. *See* Moog, *supra* note 9, at 70.

[74] *See* Moog, *supra* note 9.

representing a 548.34% increase.[75] Professor Moog, writing in 1992, concluded "that any fear of an uncontrolled upward spiraling of costs has not been justified, at least through the 1990 elections."[76] However, the data since 1990 indicate the opposite conclusion. Spending in Supreme Court races is certainly spiraling upward.[77]

Campaign expenditure data for Court of Appeals races between 1986 and 2000 reveal a trend of increasing costs, but at a much less dramatic pace than Supreme Court races.[78] The average spent by a candidate in 2000 of $67,709.70 represents a 192.5% increase over the average spent in 1986.[79] In spite of this, the average cost per vote has fluctuated and increased at a slow pace in the appellate court races, with the exception of the 1994 election.[80] One factor that could account for this apparent inconsistency between average expenditure and average cost per vote is the varying level of voter turnout in presidential and mid-term election years.[81] Thus, with varying degree, Supreme Court and Court of Appeals elections are increasing in cost and there are no indications that the trend is about to stop. This trend creates difficulties because judges and challenging candidates must devote more time and effort to fundraising.[82] Furthermore, those who give money are most often attorneys or other individuals and organizations that will have business before the courts.[83]

[75] The 1994 election merits further discussion. First, Republicans won in landslides, cementing North Carolina's status as a two-party state. The Republican candidates were able to win while being outspent by their opponents. This was undoubtedly due to the strong showing of Republicans nationwide in the 1994 mid-term elections. The so-called "sweep factor" is discussed *infra* and reveals a very sharp increase in average cost per vote from 1992 to 1994. This is due to lower total votes (mid-term election as compared to a presidential election) combined with very heavy spending, consistent with the overall spending trend.

[76] Moog, *supra* note 9, at 71.

[77] A more detailed picture of these Supreme Court races reveals the extreme amounts spent on Chief Justice races.

[78] *See* Moog, *supra* note 9, at 72..

[79] *See supra* note 86 for discussion of the 1994 election.

[80] The average cost per vote in 2000 was only a 66.16% increase over that of 1986.

[81] Upswings in average cost per vote during the 1994 and 1998 mid-term elections should be noted. While the 1994 election is considered exceptional due to its very high expenditures, the fact that it was a mid-term election with lower voter turnout compounded the increase in average cost per vote.

[82] *See* Grimes, *supra* note 24, at 2294 (referring to Jason Miles Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 MICH. L. & POL'Y REV. 71, 75 (1997)).

[83] *See id.* at 2295, 2295 n.240 (referring to Joseph Neff, *Change in Selection of Judges Advances*, NEWS & OBSERVER (Raleigh, N.C.), June 14, 1995, at A3, noting that in North Carolina, most contributions come from trial lawyers and businesses that often appear in the courts); *see also* Schoshinski, *supra* note 86, at 842–43 (noting that in addition to money, lawyers often contribute time to a judge's campaign, and when they then appear

B. Uninformed Electorate

The Futures Commission found that the public knows little about the courts, how judges are selected, or any knowledge about the candidates running.[84] A 1995 telephone survey of 805 North Carolinians conducted for the Commission revealed that only 40 percent knew that the Supreme Court was an elected body.[85] Further, of the 60 percent who said they voted in 1994, only half remembered voting for judges, and of that half, three-fourths could not name a single judge on the ballot.[86] The Commission concluded, "These findings suggest that the public accountability supposedly gained through elections is a myth."[87]

A significant consequence of this lack of information about judicial candidates is the tendency of voters to rely solely on the candidate's party affiliation.[88] This can lead to the "sweep factor," a theory "that large numbers of voters select judges of the same party as that of the most popular Presidential candidate or candidate for other high office."[89] The 1985 Courts Commission recognized this problem and concluded that judicial candidates may lose because of their party's unpopular candidate for President or Senate, instead of being evaluated on their own judicial qualifications.[90] The evidence in North Carolina since 1985 tends to support this conclusion. The 1994 election in which two Supreme Court seats and two Court of Appeals seats were contested is a shining example. All four Republican candidates won with comfortable margins of at least ten percent. These candidates prevailed despite the fact that three of the four were heavily outspent by their Democratic opponents.[91] Clearly, the advances made by Republican candidates for national office in this election had an effect in these races. The 1988 election may provide another example of a judicial candidate benefiting from the strong showing of candidates for higher office. In this election, Presidential candidate George Bush swept the state gaining 58 percent of the vote, Governor Jim Martin was reelected with 56 percent, and Jim Gardner became the first Republican in the century to win the

before the judge in court this may create the impression that the lawyer has a special position of influence with that particular judge).

[84] *See* FUTURES COMMISSION REPORT, *supra* note 19, at 8.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] Grimes, *supra* note 24, at 2297; Korzen, *supra* note 23, at 262 (both referring to the 1985 COMMISSION REPORT, *supra* note 56, at 27); Exum, *supra* note 9, at 8.

[89] Korzen, *supra* note 23, at 262 (citing Spears, *Selection of Appellate Judges*, 40 BAYLOR L. REV. 501, 520).

[90] *Id.* (citing 1985 COMMISSION REPORT, *supra* note 56, at 27).

[91] *Id.*.

lieutenant governorship with 51 percent.[92] Further down the ballot, Republican Judge Robert Orr, a Martin appointee, defeated his Democratic challenger to become the first Republican elected to the Court of Appeals in the century.[93] Professor Moog assesses Orr's victory as partly due to the coattails of Bush and Martin.[94] Thus, a strong showing by a political party in higher, more visible offices may help judicial candidates lower on the ballot. The practice of casting a straight-ticket ballot for one party certainly compounds this phenomenon.

Former Chief Justice Exum warned of the dangers posed by the excessive influence of party affiliation.[95] Having commented on the growing voting strength of the Republican Party in North Carolina, he warned that "challenges will not be based on the respective merits of the incumbent and the challenger. They will be based purely on the challenger's assessment of whether his or her party affiliation can carry the election."[96] Exum also reported that this phenomenon had already been occurring in the 25th Judicial District since 1966. In this district, where all district judges run in the same year, Democratic candidates won all the judicial seats in 1966, lost all of them in 1970, won all of them again in 1974, and then lost four of five in 1986.[97] Exum commented that "this kind of fruit-basket-turn-over in the judiciary is not healthy," and warned that if the trends he had identified[98] continued and the system of judicial selection and retention was not changed, the problems of judicial elections in the 25th Judicial District "could become a statewide reality."[99] The 1985 Courts Commission cited this prospect of being voted out based upon a political party's performance in a given

[92] Moog, *supra* note 9, at 69.

[93] *Id.*

[94] *See id.* at 69-70 (stating "Certainly the coattails of George Bush and those of a popular incumbent Republican governor had an effect on the fortunes of other Republican candidates in 1988," but that Judge Orr also "received significant endorsements from teachers' and lawyers' organizations as well as several African-American political organizations throughout the state, some of which ordinarily would be expected to endorse the Democratic candidate," and that "[h]e also may have drawn a relatively weak Democratic opponent, who two years previously had lost a Democratic primary for a superior court seat. Orr also had the advantage of incumbency, while outspending his challenger by better than a five-to-one ratio").

[95] *See* Exum, *supra* note 9, at 8.

[96] *Id.*

[97] *Id.* Exum also mentioned other politically volatile districts, such as the 18th and the 21st, which "have had frequent political challenges to sitting District Court judges," although not as severe as that in the 25th. *Id.*

[98] *See id.* at 7–8 (outlining trends of increasing public interest in and attention to judicial actions and the growing voting strength of the Republican Party in North Carolina).

[99] *Id.* at 8.

year as a factor that discourages good lawyers from seeking spots on the bench.[100] Therefore, the excessive influence of party affiliation can affect not only judicial elections, but can also lower the quality of the pool of candidates seeking judgeships.[101]

It is important to note that at least one commentator has taken the opposite view of party affiliation as it relates to judicial elections.[102] Dubois argues that "voters' reliance on the partisan label choices is, in a very real sense, a rational act,"[103] and "[w]here the party label is not present, such as in nonpartisan and merit retention elections, voters face more difficulty in making voting decisions."[104] Thus, it is important to keep in mind that the elimination of this voting cue would need to be countered with a concerted effort to inform the public before elections.

Name recognition is often cited alongside party affiliation as a voting cue that typically comes into play when voters know little about the candidates from which they must choose.[105] North Carolina has some interesting recent examples of this phenomenon occurring in its judicial elections. First, in the 1998 Democratic state Supreme Court primary, Jim Martin, a District Court Judge, defeated Court of Appeals Judge Joseph John. Martin acknowledged that the name recognition of the former Republican governor helped him win.[106] To further capitalize on the name recognition, Judge Martin even used campaign signs resembling those used by the former governor in 1984 and 1988.[107] While one can never be sure, more informed voters likely would not have voted for Martin over the experienced John had they been better informed and made their decisions based on qualifications for office. For instance, voters likely did not know that Judge Martin was twice reprimanded by the Supreme Court for improper conduct as a lower court judge. In 1993 he was censured for convicting two men charged with DWI on reckless driving charges, despite the fact that such lesser convictions had been banned in 1983, and in 1995, he was censured for improper communications in two cases involving the children of

[100] Grimes, *supra* note 24, at 2298 (citing 1985 COMMISSION REPORT, *supra* note 56, at 27).

[101] *See id.*

[102] *See* Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections,* 40 SW. L. J. 31 (1986).

[103] *Id.* at 44.

[104] *Id.*

[105] *See* Maute, *supra* note 78, at 1222 (2000); *see also* Rowe, *supra* note 84, at 348 (describing example from West Virginia).

[106] *See Judicial Upset Stirring Attention,* THE INSIDER, NORTH CAROLINA STATE GOVERNMENT NEWS SERVICE, V. 6, No. 88, May 7, 1998. Available: http://www.ncinsider.com/insider/1998/may/insd0507.html.

[107] *Id.*

friends.[108] While Judge Martin may well have been just as qualified as Judge John, it seems very likely that voters chose him in the primary without regard to qualifications, about which they had very little knowledge.[109]

Name recognition played a role in the recent 2000 race for Chief Justice. At the beginning of the race, the incumbent Chief Justice Henry Frye, was concerned that his opponent, I. Beverly Lake, would have an advantage because he had run statewide in contested elections three times, compared to Frye's one time.[110] Frye is quoted as saying, "In the down-ballot races, name recognition is the key in most elections. Because of his exposure to the voters – three times that of mine – I feel like I need to get my message out through the media. That costs money."[111] Indeed, it did cost money. Frye spent a record amount, over $907,000, and still lost.[112] Thus, even if name recognition played no role in Lake's victory, it still caused his opponent to spend much more on his campaign than otherwise would have been necessary, as was likely the case in the 1998 Associate Justice race between Mark Martin and Jim Martin.[113]

Finally, the state of Texas provides a disturbing example of how name recognition can lead to the election of a bad judge. John Hill, a former Chief Justice of the Texas Supreme Court, in arguing against the election of judges in favor of a merit selection system, related observations made in the 1940's regarding the political landscape in Texas and how name recognition can affect a judge's chances for reelection.[114] Hill then described how those observations are still true:

[108] *Id.*

[109] Jim Martin lost to Court of Appeals Judge Mark Martin in the general election in what must have been another confusing choice for voters. Mark Martin outspent Jim Martin by a heavy margin, likely to neutralize the name recognition effect, and won by a comfortable margin. Thus, even if name recognition did not affect the voters' actual decision in the general election, it most likely did contribute to the heavy campaign spending by Mark Martin.

[110] Elizabeth G. Cook, *State's Chief Justice Faces Unexpected Challenge*, THE SALISBURY POST, October 29, 2000.

[111] *Id.*

[112] Frye lost by a thin margin of 77,219 votes, or 2.73%.

[113] *See supra* note 102.

[114] *See* Hill, *supra* note 35 at 350-51 (1988) (referring to Graves, *Selection and Tenure of Appellate Court Judges*, 12 TEX. B.J. 13, 13–14 (1949)) ("The people simply cannot know, and cannot be adequately informed, about that many judicial candidates. The vote-getting name, the preferential position on the ballot and other irrelevancies will inevitably prevail, on occasion. Besides, why should any judge of one of these high courts be bedeviled, for a period of, say, two years before the event, by the impending nightmare of such an orderal? To be sure, we expect a judge to maintain a mental attitude of serenity, independence, fortitude and disinterestedness. But pray, how can he ever forget that it may be his lot to be opposed by Stonewall Nimitz Jackson, if not by Ike Eisenhower Marshall.").

> [Judge Graves's] observations about the role of name recognition in judicial elections preceded by three decades the unfortunate election of Don Yarbrough to the Texas Supreme Court in 1976. This election came at a time when Yarbrough was the subject of numerous lawsuits and a disbarment proceeding. Yarbrough was undoubtedly confused by the voters with a well-known gubernatorial candidate with the same name, spelled 'Yarborough,' or possibly with the long-time Texas senator, Ralph Yarborough. At any rate, Don Yarbrought [sic] won the election, displacing a well-respected jurist; later he would end his political days in a Texas state prison.[115]

Fortunately, North Carolina has never had an example that ended with a judge landing in prison, but it is not inconceivable. The Texas example serves to point out just how much the electorate may rely on name recognition as a voting cue. Further, even disregarding Yarbrough's fate, the election still resulted in a well-respected jurist being defeated and losing his seat on the bench.

C. Politicization

The 1996 Futures Commission Report felt that the first issue to be addressed was how to protect the judiciary from politicization.[116] As early as 1906, in an address to the American Bar Association entitled "Causes of Popular Dissatisfaction with the Administration of Justice," Roscoe Pound stated that "putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."[117] Along these same lines, the Futures Commission warned that "we can expect increasing criticism of the courts as part of campaigns, which will lead to even more negative perceptions and greater public distrust."[118] This lack of confidence and

[115] *Id.* at 351 (citations omitted). In addition to the inconsistent spelling above, Hill refers to a couple of articles which cause further confusion about just how the man's name was spelled. *See* Champagne, *The Selection and Retention of Judges in Texas*, at 49 (National Symposium on Judicial Selection, Feb. 21, 1986), at 49; *see also* Holder, *That's Yarbrought-- Spelled with an 'O'; A Study of Judicial Misbehavior in Texas*, in PRACTICING TEXAS POLITICS 447 (E. Jones, J. Ericson, L. Brown & R. Trotter, eds. 1980).

[116] FUTURES COMMISSION REPORT, *supra* note 19, at 10. The Commission also envisioned a court system where "Judges are not, nor perceived to be, political." *Id.* at 17.

[117] Hill, *supra* note 35, at 349 (citing Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 8 BAYLOR. L. REV. 1, 23 (1956))

[118] FUTURES COMMISSION REPORT, *supra* note 18, at 6. The Commission also warns that with the increasing competitiveness of elections and less visibility than other offices on the ballot, "elections for these court officials are more likely to be influenced by special interest groups with narrow agendas," and that "[w]e can also expect, as we already are beginning to see, the restraints on the political decorum of the past begin to fade in these elections."

loss of respect due to politicization of the judiciary would be a very grave consequence.[119] As North Carolina becomes a true two-party state with increasingly competitive elections, politicization of the judiciary likely will continue to increase.[120]

The political climate in North Carolina has changed over the past 25 years. In the past, the Democratic Party firmly controlled the state government, including the judiciary.[121] As the Republican Party becomes more competitive, it "is hungry for public offices, including, if not especially, judicial offices."[122] Exum added, "This is a natural and proper hunger."[123] The transformation to a two-party state inevitably has resulted in increased politicization of the judiciary. The 1986 election is a great example. Republican Governor Jim Martin had previously appointed the incumbent Chief Justice Rhoda Billings, in contravention of a long-standing tradition that the governor would elevate the most senior associate justice to the top post.[124] In addition to that appointment, Governor Martin

> . . . politicized these contests by mounting an aggressive campaign to fill five of seven seats with Republican candidates. Citing Republican support for the death penalty, the governor campaigned that the election of Republican justices would produce the type of conservative decisions most North Carolinians supported. In response, the Democratic candidates in television, radio, and newspaper ads emphasized the importance of judicial independence and integrity in judicial selection and decision making.[125]

Id

[119] On the consequences of the public's loss of confidence in the judiciary, *see* Amy M. Craig, *The Burial of An Impartial Judicial System: The Lifting of Restrictions on Judicial Candidate Speech in North Carolina*, 33 WAKE FOREST L. REV. 413, 435 (1998) ("Even if all judges are purely impartial, our society is put in grave danger if the public does not believe this to be true. The stability of our judiciary, as well as our country, rests on public confidence that justice can come through peaceful means.").

[120] *See id.*

[121] *See* Exum, *supra* note 9, at 5.

[122] *Id.* at 6.

[123] *Id.*

[124] *See* Grimes, *supra* note 24, at 2288 n.193 (citing James C. Drennan, *Judicial Reform in North Carolina*, in JUDICIAL REFORM IN THE STATES 27 (Anthony Champagne & Judith Haydel, eds., 1993)).

[125] Reid, *supra* note 83, at 23. Reid also states that these five contests were characterized by uncharacteristically aggressive campaigning. *Id.*; *see also* Moog, *supra* note 9, at 69-70 (describing the increased competitiveness of Republicans from the 1970's through 1990).

The signature issue in the race between Billings and Associate Justice Exum became the death penalty, with former Republican Governor Jim Holshouser leading a group known as Citizens for a Conservative Court, which vigorously attacked Justice Exum's record and stance on the issue.[126] Democrat Exum won the race, and one commentator attributes his victory partly to a backlash of voters who resented this politicization of the courts.[127] While the 1990 elections brought about aggressive political advertisements and accusations that the Democratic Supreme Court was soft on crime,[128] the results of the 1994 election erased any doubts that North Carolina was a two-party system. Republican candidates won all four appellate court seats by sizable margins.[129]

Politicization was present as well in the 2000 elections. In what has become the norm, all appellate court seats available were contested, including that of Chief Justice. Henry Frye had been appointed Chief Justice in August 1999 and did not expect opposition from his fellow justices.[130] Republican Justice Lake stated that he was initially reluctant to challenge his friend, but his party urged him to run. He was also concerned that if 2000 turned out to be a big year for Republicans, some one else might beat Frye and not be up to the job.[131] Thus, political calculation was the overriding factor in the decision to challenge the highly respected Chief Justice. Former Chief Justice Exum's warning

[126] *See* Grimes, *supra* note 24, at 2288 n.195 (referring to Jack Betts, *Still Waiting in the Legislative Wings*, N.C. INSIGHT, June 1987, at 20)). Hot button issues like the death penalty and abortion have become increasingly visible in judicial elections. Justice Penny White of the Supreme Court of Tennessee was attacked and defeated in 1996 primarily over her decisions regarding the death penalty. *See* Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROB. 79, 110 (1998). Probably the most famous example came in the 1986 California Supreme Court retention election. Three justices were defeated due to a highly coordinated campaign against them based on their opposition to the death penalty. *See* Erwin Chemerinsky, *Comment: Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1986–87 (1988) ("Television and radio commercials explicitly asked voters to cast their ballots against these justices and to vote for the death penalty. A carefully orchestrated media campaign employed family members of crime victims who recounted stories about how the California Supreme Court had reversed the death sentences of murderers of their loved ones. No mention was made in these or any other commercials concerning whether the death sentences should have been reversed based on the legal merits of the cases. Nor was any mention made of the fact that in the vast majority of these death penalty cases there were egregious errors committed by the trial courts -- as reflected in the fact that forty of sixty-one death penalty cases were unanimous and another sixteen were either six-to-one or five-to-two decisions to reverse the death sentence.").

[127] *See* Grimes, *supra* note 24, at 2289 (referring to Betts, *Still Waiting in the Legislative Wings*, N.C. INSIGHT, Jun. 1987, at 20)).

[128] *See id.* at 2289 (discussing 1990 election).

[129] *See* Cook, *supra* note 123.

[130] *See Id.*

[131] *Id.*

that challenges would be based purely on the assessment of whether one's party affiliation could carry the election rang true.[132] Another aspect of the politicization of this race was the effort by some to inject race into the campaign.[133] In the end, Lake won the campaign, and became the first elected Republican Chief Justice in a century.[134] Like the 1988 and 1994 elections, 2000 became another milestone for Republicans, all the more indication that competitive, politicized judicial races are here to stay.

Another ill effect of the politicization of the judiciary and elections is the prospect that good politicians do not always make good judges. Former Chief Justice Exum commented on this problem when he addressed the Judicial Selection Study Committee:

> The skills needed for the job of judging have little or no relation to the skills needed to win elections. Although there are good judges who can also win elections, there are many potentially excellent judges who, for one reason or another, cannot, or do not want to try. The skills needed to be a good judge are not readily discernable in the electoral process.[135]

John Hill, former Chief Justice of the Texas Supreme Court offered a similar assessment:

> The qualities that make a good judge are different from the qualities that make a good politician, and it is by no means always the case that the two sets of qualities exist in the same person. When they do not, the chances are that in the primary election the less capable judicial candidates will be nominated.[136]

Political charisma on the campaign trail is not necessarily an indicator of judicial performance and may overshadow the quiet and deliberative personality of a highly qualified candidate.[137] The election of judges thus opens up the bench to unqualified candidates and can also shut out those

[132] *See* Exum, *supra* note 9, at 8; *see also* discussion of party affiliation, *supra* Part IV, Section 2.

[133] *Id.* (describing statements made at an NAACP banquet that race was a factor in the decision to challenge Frye, but noting Frye has asked his supporters not to make such statements).

[134] Eisley, *supra* note 2.

[135] Exum, *supra* note 9, at 8.

[136] Hill, *supra* note 35, at 349 (referring to McKnight, *How Shall Our Judges Be Selected*, 5 TEX. L. REV. 470, 472–73 (1928)).

[137] *See* Maute, *supra* note 78, at 1225 (arguing that good politicians can make bad judges and noting that "[s]uperb judges may be charismatically challenged.").

who are exceptionally qualified but not as well suited to the rigors of campaigning.

Another factor contributing to the politicization of judicial races is the recent relaxation of restrictions on the speech of judicial candidates. Prior to 1997, North Carolina's Judicial Code of Conduct contained a prohibition on discussion of legal or political issues, the so-called "announce" clause.[138] Neither the North Carolina Judicial Standards Commission, which enforces the Code against incumbent candidates,[139] nor the North Carolina State Bar, which regulates nonincumbent attorney candidates,[140] recognized a violation of Canon 7B(1)(c) until the campaign of attorney Mark Brooks in 1996.[141] During this campaign, Mark Brooks received a reprimand from the State Bar for announcing that he was "pro-life," and in response, he brought suit in the United States District Court, challenging the constitutionality of Canon 7B(1)(c).[142] In May 1997, before the case went to trial on the merits, the North Carolina Supreme Court met to revise Canon 7B(1)(c).[143] The Court removed the "announce" clause, the section under which Mark Brooks was reprimanded.[144] What this means for judicial elections is that candidates have more latitude to discuss issues on the campaign trail. Candidates may speak in a more partisan fashion with less fear of reprimand from either the Judicial Standards Commission or the State Bar. Some of the expected consequences are an increase in the number of opportunistic candidates "playing to the public"[145] and an

[138] *See* Amy M. Craig, *supra* note 133, at 426, 430 (referring to *In re* Nowell, 293 N.C. 235, 243, 237 S.E.2d 246, 252 (1977), North Carolina adopted the ABA's 1972 Model Code of Judicial Conduct in 1973).

[139] *See* N.C. GEN. STAT. Ch. 7A, Art. 30 (2000).

[140] Craig, *supra* note 133, at 426 (referring to N.C. Rules of Professional Conduct Rule 8.2(b), which states: "A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.").

[141] *See id.* at 426 (referring to Ertel Berry, *Judicial Candidate Takes on Gag Rule*, N.C. LAW. WKLY., Oct. 28, 1996, at 1).

[142] *See id.* at 427 (referring to Verified Complaint for Injunctive Relief and Declaratory Judgment at 1, Brooks v. North Carolina State Bar, (M.D.N.C. 1996) (No. 2:96CV00857)). *See id.* at 427–430 for a very detailed account of the case.

[143] *Id.* at 430 (referring to Joseph Neff, *Judicial Elections Ungagged*, NEWS & OBSERVER (Raleigh, N.C.), Jul. 16, 1997, at A1). Craig argues that this was a move from one extreme to the other (no speech to free-for-all), and that NC should adopt the middle ground approach of Canon 5A(3)(d) of the 1990 ABA Code of Judicial Conduct. *See id.* at 431-38 for a discussion of the constitutionality of the 1990 ABA Code and an argument for its adoption in NC.

[144] *Id.*

[145] *Id.* at 436 (interview with Thomas W. Ross, Resident Superior Court Judge for Guilford Co., N.C., in Concord, N.C. (Jan. 13, 1998)).

increased use of deceptive soundbites on radio and television.[146] Clearly, the relaxed standards only serve to increase the politicization of judicial elections in North Carolina.

V. ALTERNATIVE PROPOSALS FOR REFORM

As stated earlier in this article, sweeping reform is necessary in order to improve the administration of justice in the state of North Carolina. In the words of the Futures Commission, ". . . it is time for an overhaul rather than a tune-up."[147] Former Chief Justice Exum, in a speech to the Judicial Selection Study Committee in 1988 stated very clearly the goals of a judicial selection system:

> [D]evise a system that you think will be acceptable to the people and will best enable North Carolina to attract, select, and retain a stable judiciary composed of learned, impartial, strong, independent and career minded judges, who, as a whole, are broadly representative of the state's people in terms of their race, sex, and politics.[148]

Exum believed ". . . that the best method of judicial selection is pure gubernatorial appointment with approval of the legislative branch."[149] We agree with the former Chief Justice and propose that North Carolina adopt an appointive system, with modifications.

A. Adopt Modified Gubernatorial Appointment System

North Carolina should amend its constitution to provide for gubernatorial appointment of all judges from a pool of applicants screened by a "State Judicial Council"[150] subject to Senate confirmation.

[146] *Id.* (referring to *Judges on the Stump?,* NEWS & OBSERVER (Raleigh, NC), July 18, 1997, at A14).

[147] FUTURES COMMISSION REPORT, *supra* note 19, at 69.

[148] Exum, *supra* note 9, at 8; *see also* Scheuerman, *supra* note 24, at 467–70 (discussing goals of qualified judiciary, representativeness, and political accountability).

[149] Exum, *supra* note 9, at 10. Exum also proposed very long terms, somewhere in the range of 15 to 25 years, after which the judge must retire and cannot be reappointed. He listed the advantages of his proposal as simplicity, avoiding the squabbling over composition of the nominating commission in a merit selection plan, that it would put responsibility on elected representatives, and it would avoid all the problems with judicial elections. *Id.*

[150] This "State Judicial Council" should be modeled after the one proposed by the Futures Commission. Thus, it would be composed of the chief justice, chief judge of the Court of Appeals, a district attorney appointed by the district attorneys (the Futures Commission also proposed a unified circuit, but for our purposes we will use districts), a public defender chosen by that group, a district judge selected by district judges (circuit judge in FUTURES COMMISSION REPORT), two lawyers appointed by the State Bar, one lawyer and one nonlawyer appointed by the chief justice, and three members (two nonlawyers and one lawyer) appointed by each of the following: the governor, the speaker of the House, and the

The screening process is a variation on the nomination process found in traditional merit selection systems, where a judicial nominating commission presents a list of nominees to the governor, usually three to five names, and the governor chooses one. With our plan, the State Judicial Council would constantly accept applications from attorneys, examine their qualifications, and make determinations as to their fitness for judicial office. As part of this screening process, the Council would apply stringent standards regarding qualification, experience, and integrity. Applicants for trial judgeships would be required to have adequate trial experience, and appellate experience would be required of applicants to appellate judgeships.[151] Once approved, the attorney's name would be added to a pool of qualified applicants from which the governor would choose to fill a judicial vacancy. After nomination by the governor, the nominee would face the Senate, where a simple majority vote would be required for confirmation. This would place another check on the governor's appointment power[152] and further the goal of accountability.[153] Under our plan, judges would serve ten-year terms.[154]

president pro tem of the Senate (these nine, would thus represent half the members). *See* FUTURES COMMISSION REPORT, *supra* note 19, at 34.

[151] The amounts of experience required should be determined by the State Judicial Council. The Council could also institute some type of examination, modeled after the Bar exam, as part of the screening process. If nothing more, this would increase public confidence in the qualifications of judges. *See also* Maute, *supra* note 78, at 1226 (suggesting the use of "special examinations to be administrated to all judicial aspirants, whether elected or appointed, and to those up for retention or renewal of appointment. The National Conference of Bar Examiners, or another professional test-drafting organization, could be commissioned to design an exam format to test for competent mastery over the categories of law encountered by different types of courts, making distinctions among trial and appellate courts, and the context in which procedural, substantive and ethical questions are likely to arise.").

[152] Korzen compares this check to that of the nominating commission in Missouri plan jurisdictions. He also points out that the General Assembly, in its implementing legislation, would need to address recess appointments since it is not in session for several months in odd numbered years and for almost all months in even numbered years. *See* Korzen, *supra* note 23, at 284, 284 n.333.

[153] Exum, in describing his plan for gubernatorial appointment with legislative confirmation, states that it "puts responsibility for selection squarely on our elected representatives." Exum, *supra* note 9, at 10. Exum also discusses generally the proposition that elections are not necessary to hold judges accountable for what they do, noting that all North Carolina judges are susceptible to administrative removal by action of the Judicial Standards Commission. *See id.*; *see also* Carrington, *supra* note 140, at 114 (stating that "citizens who disapprove the selections know which elected politicians to blame for appointments they disapprove and can punish them if they stand for reelection.").

[154] Currently judges of the Supreme Court, Court of Appeals, and Superior Court serve terms of eight years. N.C. CONST. Art. IV § 16 (2000). District Court judges serve four year terms. N.C. GEN. STAT. § 7A-140. Former Chief Justice Exum advocated longer terms, albeit nonrenewable. *See* Exum, *supra* note 9, at 10.

Furthermore, all judicial vacancies would be filled through this same process for simplicity.

A "reconfirmation" process should be instituted for retention purposes. To serve an additional term, the judge would be subject to a performance evaluation conducted by the State Judicial Council.[155] As proposed by the Futures Commission, the Council should establish uniform standards for judicial performance by drawing on recommendations from the ABA,[156] and information should be collected from other judges, litigants, attorneys and jurors who appeared before the judge, as well as a self-evaluation provided by the judge.[157] The Futures Commission proposal called for using this evaluation to make a recommendation to be used in a retention election.[158] However, we propose that the Council's recommendation go to the Senate for "reconfirmation." The Council's recommendation would be accorded "extraordinary" weight, requiring a two-thirds vote of the Senate for reversal.[159] After reconfirmation, the judge would serve another ten-year term and could repeat the process once more, resulting in a limit of three terms. The three-term limit is desirable for several reasons. First, it would avoid the problem of a judge losing touch with the real world, as may happen with life tenure.[160] Second, it would provide for reasonable

[155] Judicial performance evaluations are used in several merit selection states to provide information to voters in retention elections. *See* Grimes, *supra* note 24, at 2322 (referring to *Editorial, The Need for Judicial Performance Evaluations for Retention Elections,* 75 JUDICATURE 124, 124 (1991)). Hawaii's Judicial Selection Commission uses performance evaluations in deciding the question of retention. Goldschmidt, *supra* note 161, at 76; *see also* Rottman *et al.*, *supra* note 173, at 64–66 (describing the various methods of judicial performance evaluation used around the country with constitutional and statutory provisions in Table 11. Judicial Performance Evaluation).

[156] The ABA's recommendation included evaluating judges on the following characteristics: "Integrity; Knowledge an understanding of the law; Communication skills; Preparation, attentiveness and control over proceedings; management skills; Punctuality; Service to the profession and the public; Effectiveness in working with other judges of the court." FUTURES COMMISSION REPORT, *supra* note 19, at 36. We also propose including provision for efficiency, the idea being to encourage judges to try to reduce the time it takes a case to make its way to a final disposition. This would serve to prevent a judge from becoming lazy due to confidence he will pass the performance evaluation.

[157] *See* FUTURES COMMISSION REPORT, *supra* note 19, at 36.

[158] *See id.*

[159] The Judicial Selection Study Commission made a similar proposal in 1989. Under that proposal, the Judicial Standards Commission would recommend to both houses whether to reconfirm the judge. The recommendation would be given "extraordinary" weight, with a two-thirds vote in both houses required for reversal. *See* Korzen, *supra* note 23, at 256 (citing JSSC REPORT, *supra* note 59, at 10-12). *See supra* notes 58–66 and accompanying text.

[160] *See* Exum, *supra* note 9, at 10 (making this same point in arguing for a very long, single term).

turnover in the judiciary. [161] Finally, practically speaking, with the stringent qualification and experience requirements, a judge will likely reach the bench in her mid-thirties to early-forties, thus making thirty years a natural time for retirement.

To further enhance accountability, there should be a provision for recall elections, initiated by citizen petition.[162] During the transition to this new selection method, judges already in office will simply stand for Senate reconfirmation at the expiration of their current term. Our plan offers many of the advantages of a merit selection system without the problems associated with nominating commissions. The State Judicial Council will provide the benefits of merit based screening without the politicization so often associated with nominating commissions. The plan preserves accountability through the Senate confirmation and reconfirmation processes and enhances judicial independence by eliminating judicial elections and the attendant campaign financing problems.

Two specific obstacles stand in the way of our proposed reforms. First, North Carolina's constitution must be amended to change the way judges are selected. Three-fifths of the General Assembly must approve the amendment,[163] followed by majority approval by the public in a referendum.[164] Thus, a great effort must be made to educate legislators and the public as to the benefits of the proposed appointment system. In addition to highlighting the problems of judicial elections, proponents of the plan should point out that, due to interim appointments to fill vacancies, our system quite often operates like an appointive system.[165] To the encouragement of many proponents of reform, the General Assembly adopted nonpartisan elections for Superior Court judges beginning with the 1998 elections.[166] While nonpartisan elections are

[161] *See id.*

[162] This would retain the possibility for voter participation in retention decisions. *See* Webster, *supra* note 79, at 41.

[163] *See* Grimes, *supra* note 24, at 2324. Judicial appointment bills have gained the required number of votes in the Senate on three occasions (1989, 1991, and 1995), but have never passed the House, the best showing being 62 votes in 1995. *Id.* (referring to Jack Betts, *The Debate over Merit Selection of Judges*, in NORTH CAROLINA FOCUS: AN ANTHOLOGY ON STATE GOVERNMENT, POLITICS, AND POLICY 327 (Mebane Rash Whitman & Ran Coble, eds., 1996)).

[164] *See* N.C. CONST. art. XIII, § 4 (cited in Grimes, *supra* note 24, at 2324).

[165] *See supra* notes 44–49 and accompanying text; *see also* Korzen, *supra* note 23, at 277 (noting that a system of gubernatorial appointment does not radically change current practice).

[166] *See* Grimes, *supra* note 24, at 2308 (citing Act of Aug. 2, 1996, ch. 9, 7–20, 1996 N.C. Sess. Laws 2d Extra Sess. 536, 541–54).

considered by many as worse than partisan elections,[167] this may indicate a willingness to change.[168]

Second, the Voting Rights Act of 1965[169] may be another possible obstacle to reform. While the Supreme Court specifically stated in *Chisom v. Roemer*[170] that "Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed,"[171] commentators have suggested that such a shift itself is subject to a Section 2 challenge.[172] Section 5 of the Voting Rights Act requires covered jurisdictions to obtain either judicial preclearance from the U.S. District Court for the District of Columbia or administrative preclearance from the Department of Justice before implementing new voting practices.[173] Our proposal could run into problems if proponents cannot guarantee that a sufficient number of African-Americans and other minorities would be appointed by the governor.[174] Thus, "the Voting Rights Act essentially gives African-American legislators a veto, or at least significant leverage, over any appointive system which the General Assembly attempts to implement."[175]

In summary, both political parties must agree to the proposed plan in order to reach the required votes in the House for the constitutional

[167] *See* Part IV, Section 3 for discussion of nonpartisan elections.

[168] *See* Grimes, *supra* note 24, at 2328. Grimes points out that these changes were essentially in response to litigation and may not be an indicator of General Assembly's willingness to change the system. *Id.* at 2328 n.498.

[169] 42 U.S.C. 1971, 1973 to 1973bb-1 (1988). A detailed discussion of the Voting Rights Act is beyond the scope of this article, but we mention it to draw attention to a possible problem. *See generally* Goldschmidt, *supra* note 161, at 70–75.

[170] 111 S. Ct. 2354 (1991).

[171] *Id.* at 2367 (quoted in Goldschmidt, *supra* note 161, at 72).

[172] *See* Goldschmidt, *supra* note 161, at 72 (referring to Brenda Wright, *The Bench and the Ballot: Applying the Protections of the Voting Rights Act to Judicial Elections*, 19 FLA. ST. U.L. REV. 669, 689 (1992) (noting that according to H.R. Rep. No. 227, 97th Cong., 1st Sess. 18 (1981), "shifts from elective to appointive office" were given as an example of "practices or procedures in the electoral process" that may violate Section 2 under the "totality of circumstances" test)). Another commentator remarked, "There is something rather sinister about removing the power to vote for judges at the very time litigation under the Voting Rights Act promises that minority citizens will finally have their fair share of that power." Robert B. McDuff, *Judicial Elections and the Voting Rights Act*, 38 LOYOLA L. REV. 931, 978 (1993) (quoted in Goldschmidt, *supra* note 161, at 72–73).

[173] *See* 42 U.S.C. 1973(c) (cited in Grimes, *supra* note23, at 2280 n.118). Forty of North Carolina's 100 counties are covered jurisdictions. *See* 28 C.F.R. 51 (2001).

[174] *See* Grimes, *supra* note 24, at 2326 (noting also that this is particularly problematic in the Superior Court Division where, under Chapter 509, ten superior court districts should produce African-American judges under an election system, referring to Act of June 29, 1987, Ch. 509, 1987 N.C. Sess. Laws 769).

[175] *Id.* (referring to James C. Drennan, *Judicial Reform in North Carolina, in* JUDICIAL REFORM IN THE STATES 40 (Anthony Champagne & Judith Haydel, eds., 1993)).

amendment, while provision must be made for adequate minority representation on the bench in order to withstand scrutiny under the Voting Rights Act. Due to these obstacles and the fact that major change inevitably takes time, the following section will discuss modest reforms to the current system that have a higher likelihood of immediate implementation.

B. Electoral Reform

If the system of partisan judicial elections is not abandoned, then two reforms should be made immediately. They are campaign finance reform, specifically public funding of judicial races, and the adoption of a middle ground approach to judicial campaign speech restrictions.[176]

First, with the costs of campaigning increasing at a dramatic rate,[177] there is an urgent need for campaign finance reform. As the cost of elections rise, so too does the influence of those who contribute to these campaigns. Public funding would eliminate the perceived impropriety of judges accepting campaign contributions from lawyers and others who regularly appear before the courts. Voluntary spending limits should be a condition to receiving the public funds, which would keep the costs of judicial elections at a reasonable limit.[178] As noted earlier, the General Assembly recently adopted a system of public financing of judicial elections.[179] We urge the legislature to take further action and implement the Voter-Owned Elections Act.[180]

[176] *See supra* notes 152–60 and accompanying text (discussing recent relaxation of North Carolina's restrictions on judicial candidate speech as it relates to politicization of judicial races).

[177] *See supra* notes 78–97 and accompanying text (discussing rising costs of judicial campaigns).

[178] Spending limits are constitutional if adopted voluntarily. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

[179] *See supra* note 4 and notes 20–21 and accompanying text. A statewide poll conducted in March, 2001 found 60 percent of voters favored public financing of campaigns if candidates voluntarily accepted spending limits. *See* Rice, *supra* note 5.

[180] This would phase in publicly financed elections starting with statewide judicial races and most Council of State races in 2004. *See* Christensen, *supra* note 20. The legislature could also use the Commission on Public Financing of Judicial Campaigns, Draft Report, American Bar Association Standing Committee on Judicial Independence as a guide. *See supra* notes 13–16 and accompanying text. While Democrats are wary to give up their overall advantage under the current system of campaign fundraising, Democrat Marc Basnight, President Pro Tempore of the Senate, recently stated that he supported a pilot program to establish public financing of judicial elections, "so we can judge for ourselves what kind of effect public financing has in our state." *See* Marc Basnight, *Editorial, State Senate Leads in Cleaning Up Campaigning*, THE NEWS & OBSERVER (Raleigh, N.C.), Aug. 3, 2001, at A18. Another proposed compromise would increase attorney license fees to finance judicial elections, but critics complain that lawyers are not the only ones who would benefit. *See* Robertson, *supra* note 3.

Second, the judicial candidate speech restrictions in the Code of Judicial Conduct should be tightened to reduce the politicization of judicial races.[181] The changes made in 1997 "moved from a restrictive canon completely prohibiting discussion of all legal or political issues to a free-for-all canon with no limits on such discussion."[182] We propose that the Supreme Court adopt the "middle ground" approach of Canon 5A(3)(d) of the ABA's 1990 Code of Judicial Conduct.[183] The new "likely to come before the court" clause of Canon 5A(3)(d) has been upheld as constitutional.[184] In addition to reducing the politicization of judicial races, this constitutional restriction on speech would prevent judicial candidates from saying things during an election that would appear to commit them to ruling a certain way in cases coming before their court, thus enhancing the public's perception of the impartiality of the judiciary.[185] In summary, these two proposed electoral reforms would help mitigate two of the most corrosive features of our system of partisan judicial elections—the role of money and the politicization of campaigns.

VI. CONCLUSION

North Carolina has elected judges for over 130 years, and the system has provided a high quality judiciary over this time. However, this is not a vindication of the system, as it has operated more like an appointive system with near total control by Democratic governors. As the Republican Party gains strength and elections become more politicized, the system will no longer work as smoothly, resulting in much more judicial turnover and public mistrust. Our proposal to adopt an appointive system will do much to remedy these problems and should be adopted by the North Carolina General Assembly. Alternatively, if the elective system is not abandoned, we propose adopting modest electoral

[181] *See supra* notes 152–60 and accompanying text (discussing recent relaxation of North Carolina's restrictions on judicial candidate speech as it relates to politicization of judicial races). A full discussion and analysis of restrictions on judicial candidate speech is beyond the scope of this article; *see generally* Craig, *supra* note 133; Matthew J. O'Hara, *Student Note and Comment: Restriction of Judicial Election Candidates' Free Speech Rights After Buckley: A Compelling Constitutional Limitation?*, 70 CHI.-KENT. L. REV. 197 (1994).

[182] Craig, *supra* note 133, at 431.

[183] The ABA revised the Code in 1990 after the 1972 Code's proscriptions on judicial candidate speech were attacked as overbroad. The old Canon 7B(1)(c), containing the so-called "announce" clause, was replaced with 5A(3)(d):

A candidate for judicial office . . . shall not (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.

Id. (referring to Model Code of Judicial Conduct Canon 5A(3)(d) (1990)).

[184] *See* Craig, *supra* note 133, at 432–33.

[185] *See id.* at 433–37.

reforms to lessen the effects of increased campaign costs and the politicization of judicial races. Some type of reform is essential because the judiciary is too important an institution to allow it to slip into the throes of unrestrained partisanship.