

How It Works
JUDICIAL SELECTION IN THE STATES
Why it Matters



INSTITUTE FOR THE
ADVANCEMENT
OF THE AMERICAN
LEGAL SYSTEM

UNIVERSITY OF DENVER



The American Judicature Society (AJS) works to maintain the independence and integrity of the courts and increase public understanding of the justice system. We are a non-partisan organization with a national membership of judges, lawyers and other citizens interested in the administration of justice. AJS is headed by Executive Vice President Seth S. Andersen. For more information about AJS, please visit our website at www.ajs.org.



The Institute for the Advancement of the American Legal System (IAALS) at the University of Denver is a national, non-partisan organization, dedicated to improving the process and culture of the civil justice system. We provide principled leadership, conduct comprehensive and objective research, and develop innovative and practical solutions—all focused on serving the individuals and organizations who rely on the system to clarify rights and resolve disputes. IAALS is headed by Executive Director Rebecca Love Kourlis, a former Colorado Supreme Court Justice. For more information about IAALS, please visit our website at www.du.edu/legalinstitute.

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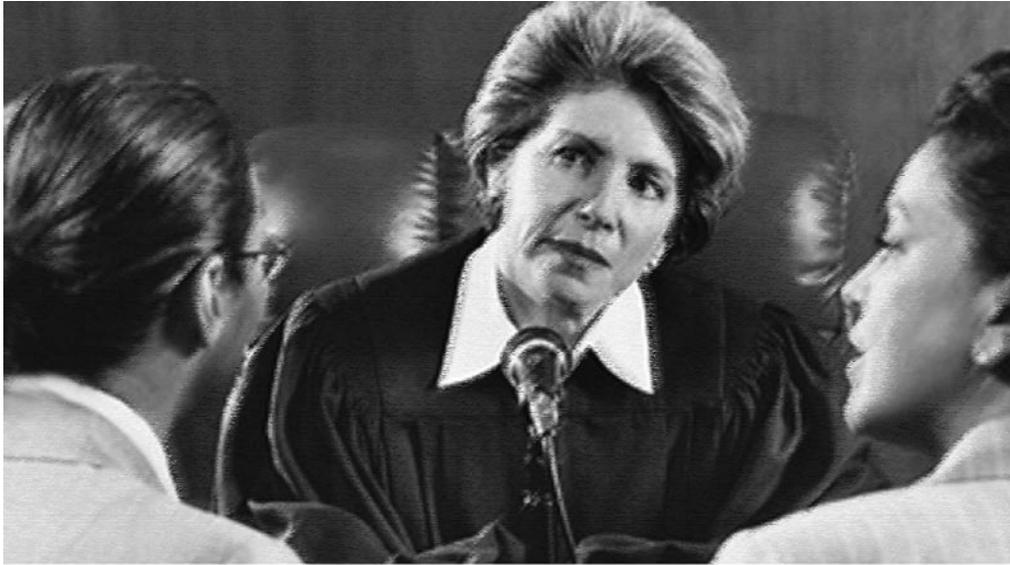


Rebecca Love Kourlis
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American Legal System

The debate over how America chooses its judges has escalated in the 21st century. Several states are evaluating their judicial selection systems with a view to altering their current processes. The United States Supreme Court has also contributed to this dialogue by rendering key decisions that impact this issue. While executive and legislative decision-makers grapple with concerns about the process for choosing judges from state-to-state, our citizens are seeking sound information and guidance on this vital topic—and for good reason. Our courts make decisions that affect virtually every aspect of our daily lives. This judicial selection guide was developed to provide greater clarity and understanding of this complex and critical issue. We are grateful for your interest.

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Every year, millions of Americans find themselves in state courts, whether called for jury service or to address a minor traffic offense or a small claims case. Sometimes, it's something more serious—they've been a victim of crime, they're facing criminal charges, or perhaps they're involved in a divorce or other family law matter.

Americans expect and deserve to be treated fairly in court. People who

According to the National Center for State Courts, approximately 100 million cases are heard in state and local trial courts each year. Ninety-seven percent of the cases heard in the U.S. are handled by state judges.

The most important factor in determining the public's evaluations of state courts and judges is the perceived fairness of court processes. Americans value fairness in court processes more than they do fairness in case outcomes.

Sources: *How the Public Views the State Courts* (National Center for State Courts, 1999); D.B. Rottman, *Public Trust and Confidence in the California Courts* (Administrative Office of the Courts, 2005).

have been in court express greater confidence in the judicial system, regardless of case outcomes, when they believe that the process is fair and transparent, that judges and court staff treat them with respect, and that they have a chance to be heard.

When asked about the role of courts, Americans consistently express a desire to maintain fair and impartial courts that effectively promote and protect individual rights under the law.

State legislators play a vital role in ensuring high quality courts that inspire public trust and confidence. They can propose changes to judicial selection and retention methods, or introduce reforms to improve these processes. They can create new judgeships and staff positions in response to increased caseloads. They can pass laws to reinforce court decisions or clarify legislative intent. They can express public support for the work of their judiciaries and act promptly to address threats to the courts should they arise. State legislators are critical actors in preserving the fairness, impartiality, and integrity of state courts.



Recent trends in the processes for selecting and retaining judges have generated concern among citizens who believe in the impartiality—and the appearance of impartiality—of courts and judges.

Judicial elections for the last decade have been characterized by unprecedented campaign fundraising and spending.

Special interest groups have ramped up their efforts to influence the composition of state courts, making contributions to candidates, funding television ads, and pressuring candidates to speak publicly about their political views.

In the last four election cycles, candidates for state high courts have raised nearly double the amount raised by candidates in the 1990s.

Source: *The New Politics of Judicial Elections 2006* (Justice at Stake Campaign, 2007).

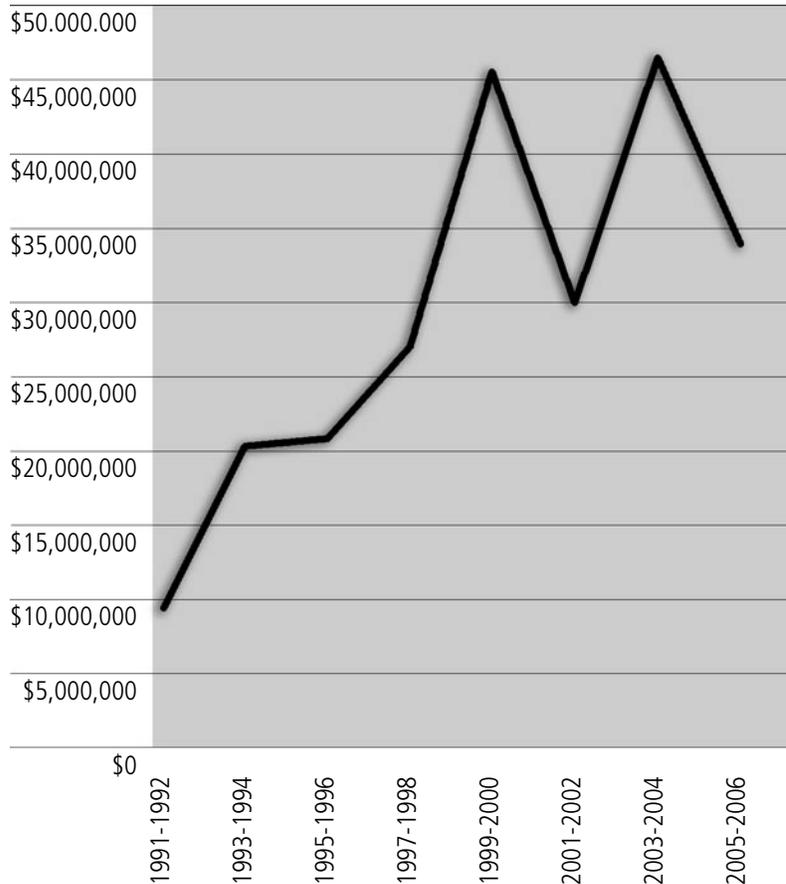
In 2005-2006, 44% of the contributions to state high court candidates came from business groups, and 21% came from lawyers.

Source: *The New Politics of Judicial Elections 2006* (Justice at Stake Campaign, 2007).

Sixty-nine percent of the public thinks that raising money for elections affects a judge's rulings to a moderate or great extent.

Source: *Public Understanding of and Support for the Courts* (Annenberg Public Policy Center, 2007).

Candidate Fundraising in Judicial Elections 1991-2007



Source: The National Institute on Money in State Politics, www.followthemoney.org

Recent court decisions have allowed judicial candidates to conduct campaigns that are similar to those waged by candidates for political offices.

For many citizens the line between the role of a judge and that of a politician has become blurred.

The extent to which judges are able to interpret and apply the law impartially depends upon their ability to remain free from undue political pressure. Judges are not politicians.



Across the nation, states use a variety of methods to select the judges who serve on their courts. There are five basic methods of judicial selection, but it is important to note that no two states use exactly the same selection method. In many states, more than one method of selection is used—for judges at different levels of the court system and even among judges serving at the same level. And when the same method is used, there are still variations in how the process works in practice.

Commission-based appointment (also known as “merit selection,” “the Missouri Plan,” or the “Nonpartisan Court Plan”): The process by which judicial applicants are evaluated by a nominating commission, which then sends the names of the best qualified candidates to the governor. The governor appoints one of the nominees submitted by the commission.

Contested election: An election in which multiple candidates may seek the same judicial position. Voters cast ballots for judicial candidates as they do for other public officials.

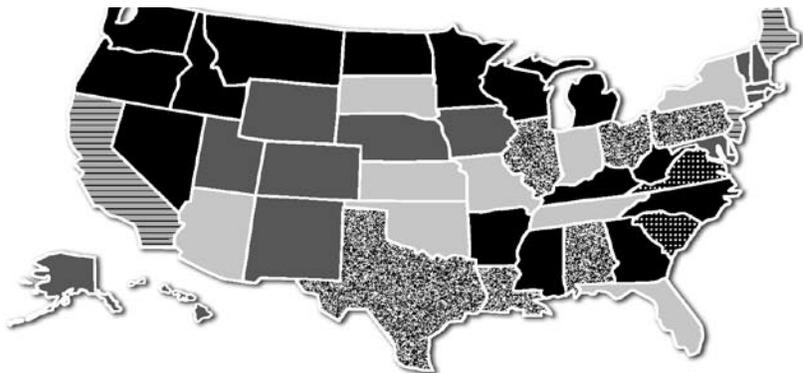
- **Nonpartisan election:** An election in which a judicial candidate’s party affiliation, if any, is not designated on the ballot.
- **Partisan election:** An election in which candidates run for a judicial position with the official endorsement of a political party. The candidate’s party affiliation is listed on the ballot.

Gubernatorial appointment: The process by which a judge is appointed by the governor (without a judicial nominating commission). The appointment may require confirmation by the legislature or an executive council.

Legislative appointment/election: The process by which judges are nominated and appointed or elected by legislative vote only.

Formal Selection of Judges

- Combined commissioned-based appointment & other*
- Commission-based appointment
- Partisan election
- Non-partisan election
- Gubernatorial appointment
- Legislative appointment



* In these states, appellate court judges are chosen through commission-based appointment, and trial court judges are chosen through commission-based appointment or in partisan or nonpartisan elections.

Source: AJS' Judicial Selection in the States, www.judicialselection.us

State constitutions and statutes prescribe judges' terms of office and the method for determining whether they will remain on the bench at the completion of their terms.

In most commission-based appointment systems, judges run unopposed in periodic retention elections, where voters are asked whether the judge should remain on the bench. In most states with contested elections, judges regularly stand for election where they may face a challenger. In some states, judges are reappointed for additional terms, and in a few states, judges have lifetime tenure.

Retention of Judges

| | |
|--------------------|-----------|
| Reelection | 20 States |
| Combined* | 11 States |
| Reappointment | 9 States |
| Retention election | 8 States |
| Lifetime tenure | 3 States |

* In these states, appellate court judges stand in retention elections, and trial court judges stand in retention elections or for reelection.

Source: AJS' Judicial Selection in the States, www.judicialselection.us



In recent years, states have adopted a variety of reforms to improve their judicial selection and retention systems, including public financing of judicial campaigns, voter guides for judicial elections, and commission-based appointment systems.

To maintain the highest quality judges, a number of states have established judicial performance evaluation (JPE) programs, where those who have interacted professionally with a judge—attorneys, jurors, court staff, other judges—are asked to assess the judge’s legal ability, integrity, communication skills, judicial temperament, and administrative capacity. Evaluation results are provided to the judge to promote self-improvement, and in some states, they are also provided to those who decide whether the judge should remain in office.

A survey of voters in four states with JPE found that publication of evaluation results added to voters' confidence in the quality of judicial candidates. Voters with access to JPE results were also more likely to vote in judicial retention elections.

Source: Kevin M. Esterling and Kathleen M. Sampson, *Judicial Retention Evaluation Programs in Four States* (American Judicature Society, 1998).

Judicial Performance Evaluation Programs



- Evaluation officially authorized and results given to judge and decisionmakers*
- Evaluation officially authorized and results given to judge
- Evaluation conducted by bar association, civic group, or newspaper**

*In some states, only some judges are evaluated.
 **A pilot program is forthcoming in North Carolina.

Source: Institute for the Advancement of the American Legal System

JPE programs have the potential to increase public confidence in the judiciary.

In the end, all Americans want state court judges who are capable, qualified, fair, and impartial, and who will act to ensure equal justice for all citizens. While no method of judicial selection, retention, or evaluation is perfect, a candid and regular examination of the methods used on a state-by-state basis will help to ensure that these goals are met.

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