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Judicial Elections:
Changes and Challenges

Jan Witold Baran

Today, myriad approaches for selecting judges exist and few states—if any at all—use identical schemes. In many states, the selection methods vary depending on whether the judge is a trial or appellate judge, or an initial selection or an incumbent. As will be seen, the vast majority of state judges are elected. Recently, judicial campaigns have become increasingly controversial while traditional restraints have fallen to the wayside. This article will address the variety of election methods, the challenges that recent constitutional decisions have presented to the ABA Code of Judicial Conduct, and whether innovations, such as public financing, offer a solution.

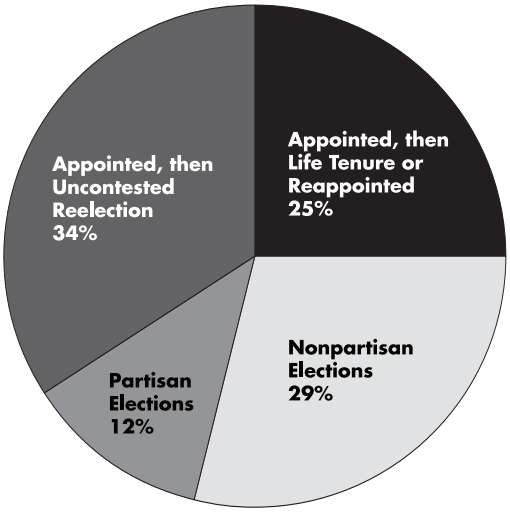

FIGURE 1: SELECTION METHODS FOR STATE HIGH COURT JUDGES

MODERN STATE SCHEMES

Despite the wide variance among states and the fact that no two states go about judicial selection exactly the same, it's possible to classify the different methods by general category. The following summary, largely from the American Bar Association's Standing Committee on Judicial Independence (ABA), considers state high courts, intermediate appellate courts, and trial courts separately.

STATE HIGH COURTS

Called "supreme courts" in 48 states, these courts typically represent the highest level of judicial review that a state offers. According to the ABA, 38 states have some type of judicial election at this highest level. Six states[1] have partisan elections, 15 have nonpartisan elections,[2] and 17 have uncontested retention elections[3] after an initial appointment. The remaining 12 states either grant life tenure to judges, or use some form of reappointment.[4] States that appoint judges to an initial term without an election still undertake the process differently. In 23 states, the governor appoints judges to the highest court with the assistance of a commission.[5] In contrast, while the governor appoints the judges in California, Maine, New Jersey and New Hampshire, he or she does so without the aid of any such commission.[6] The legislature chooses judges in both South Carolina and Virginia.[7]

INTERMEDIATE APPELLATE COURTS

Thirty-nine states have intermediate appellate courts.[8] Among those states, 5 choose intermediate appellate judges

Footnotes

1. Alabama, Illinois, Louisiana, Pennsylvania, Texas, and West Virginia. In Illinois and Pennsylvania, judges must first win their initial term through a contested partisan election. Thereafter, they run in uncontested retention elections for subsequent terms. A.B.A. Standing Committee on Judicial Independence, *Fact Sheet*, *available at* http://www.abanet.org/judind/jeopardy/fact/html (June 7, 2006) [hereinafter Fact Sheet].
2. Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, and Wisconsin. *Id.*
3. Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, New England, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming all have uncontested retention elections after an initial appointment. *Id.* New Mexico modifies the method by initially appointing judges who then face a contested partisan election for a full term, and then run in uncontested retention elections for subsequent terms. *Id.*
4. Connecticut, Delaware, Hawaii, Massachusetts, Maine, New Hampshire, New Jersey, New York, Rhode Island, Vermont, Virginia, and South Carolina.
5. *See* Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, AM. JUDICATURE SOC'Y (1999), *available at* http://www.ajs.org/js/berkson_2005.pdf, *at* 6 (last visited June 9, 2006). This method is also used by the District of Columbia, with the exception that in lieu of a governor, the President of the United States makes all appointments to the D.C. Court of Appeals (the highest court) and D.C. Superior Court (trial court). *See* Judicial Selection in the States: District of Columbia, *available at* http://www.ajs.org/js/DC_methods.htm (lasted visited June 9, 2006).
6. *See* Berkson, *supra* note 5, at 6-7.
7. *Id.* at 7.
8. *See* Fact Sheet, *supra* note 1. The states that do not have intermediate appellate courts are Delaware, Maine, Montana, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

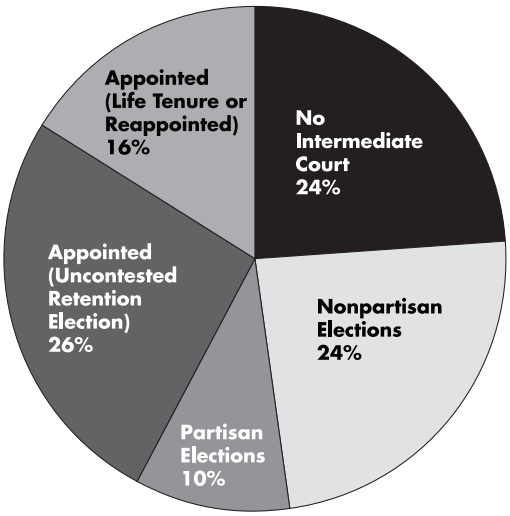

FIGURE 2: SELECTION METHODS FOR STATE INTERMEDIATE APPELLATE JUDGES

through partisan elections[9] and 12 hold nonpartisan elections.[10] Of the 22 states that initially appoint judges, 14 states require that incumbents run in uncontested retention elections,[11] while the remaining 8 states either grant life tenure or use a reappointment method.[12] As with state supreme court appointments, the legislature appoints judges in both South Carolina and Virginia, and the governor makes his or her appointments without the aid of a nominating commission in California and New Jersey.[13]

Such a commission assists the governors of the remaining eighteen states when they appoint intermediate appellate judges.[14]

TRIAL COURTS OF GENERAL JURISDICTION

Thirty-nine states hold elections of some kind for trial courts.[15] Eight states hold partisan elections for all trial court judges,[16] while 20 states have nonpartisan elections.[17] Seven states appoint trial judges,[18] but hold uncontested retention elections. Four states[19] use different selection systems for general jurisdiction trial courts depending on the county or judicial district. For example, in Indiana, the governor appoints trial court judges in Lake and St. Joseph counties from lists of names submitted by local nominating commissions, but the voting public elects trial judges in other counties.[20] Those elections are partisan except for Allen County, where judges run without party designation.[21] As with other judicial appointments, the legislature appoints trial judges in both South Carolina, and Virginia and the governor forgoes the aid of a nominating commission in Maine, New Hampshire, and New Jersey.[22]

EVALUATING THE DIFFERENT METHODS

A preliminary question is whether judges should be elected or appointed, but additional questions arise depending on that answer. If judges are elected, should the election be partisan or nonpartisan? If appointed, what benefits does commission input provide? Finally, once the initial selection has been

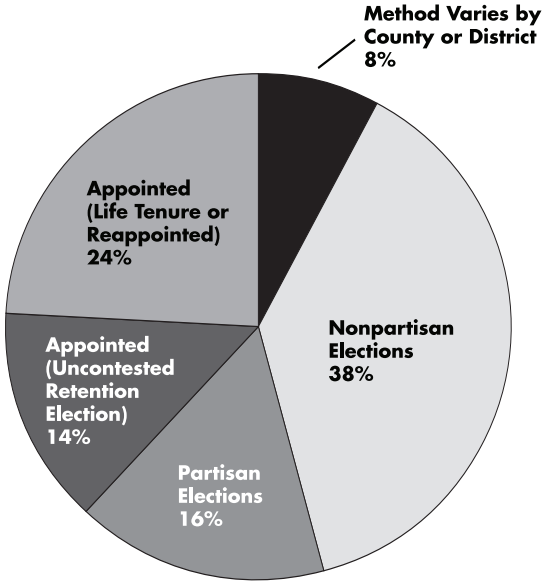

FIGURE 3: SELECTION METHODS FOR STATE GENERAL JURISDICTION TRIAL JUDGES

9. Alabama, Illinois, Louisiana, Pennsylvania, and Texas.
10. Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, North Carolina, Ohio, Oregon, Washington, and Wisconsin.
11. Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, New Mexico, Oklahoma, Tennessee, and Utah.
12. Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, New York, South Carolina, and Virginia.
13. *See* Berkson, *supra* note 5, at 7.
14. *Id.*
15. *See* Fact Sheet, *supra* note 1. Eleven states (Connecticut, Delaware, Hawaii, Massachusetts, Maine, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Virginia) either grant life tenure or use reappointment of some type for all general jurisdiction trial courts. *Id.*
16. Alabama, Illinois, Louisiana, New York, Pennsylvania, Tennessee, Texas, and West Virginia hold partisan elections. *Id.*
17. Arkansas, California, Florida, Georgia, Idaho, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Washington, and Wisconsin all hold nonpartisan elections. *Id.*
18. Alaska, Colorado, Iowa, Nebraska, New Mexico, Utah, and Wyoming use uncontested retention elections. *Id.*
19. The types of election vary by county or district in Arizona, Indiana, Kansas, and Missouri. *Id.*
20. *See* Judicial Selection in the States: Indiana, *available at* http://www.ajs.org/js/IN_methods.htm (last visited June 9, 2006).
21. *Id.* In Kansas, the method of selection varies by judicial district (17 districts select district court judges using a nominating commission, while 14 use partisan elections). *See* Berkson, *supra* note 5, at 7. The public elects most Missouri trial court judges in partisan contests, but four counties appoint the judges based on a commission's recommendation. *Id.*
22. *See* Berkson, *supra* note 5, at 7.

made, should the judge be subject to an uncontested retention election or reappointment, or enjoy a life tenure?

ELECTION OR APPOINTMENT

During the colonial era, the king chose all judges. That pattern survived the Revolution as governors of the newly formed states continued to appoint state judges in the early years of the Union.[23] Popular election, however, is the essence of a democracy and in 1832, Mississippi became the first state to constitutionally decree the election of judges. Every state that entered the Union between 1846 and 1912 similarly provided for judicial elections. Supporters of popular election believe that accountability is of paramount importance and contend that as policymakers, judges resemble legislators: if judges make policy decisions, the absence of direct electoral accountability is contrary to democratic principles. Further, some believe that elections increase representation of women and minorities on the bench.[24] Despite these benefits, some critics perceive the election of judges as potentially problematic, charging that such selection compromises judicial independence.[25] Beyond the obvious problem that campaigning judges might take positions on issues they will later face on the bench,[26] concerns also exist regarding attorneys who contribute financially to campaigning judges and then subsequently appear before them in court. Such a relationship threatens the judge's required impartiality. Additionally, voters in some judicial elections—forced to choose from a seemingly indiscernible pool of candidates without the benefit of traditional campaign rhetoric—may not be sufficiently informed to make intelligent voting decisions and may simply decide to not vote.

Supporters of judicial appointment argue that the method mitigates the problems that come with elections and results in the selection of judges based on professional qualifications rather than political success. Advocates believe this approach de-politicizes the process, but critics contend that the process is still inherently political and that an appointment process, often undertaken by a nominating committee or commission, merely "substitutes committee politics for electoral politics."[27] Interest groups will inevitably promote their interests to the best of their ability, regardless of the judicial selection mechanism, and so the appointment method succumbs to the same politicization as an election, but without the accompanying accountability.

PARTISAN OR NONPARTISAN ELECTIONS

On one hand, partisan elections embody the very sort of political divisiveness cited by critics of judicial elections. Critics of partisan elections, alleging that such selection affects the behavior of judges on the bench, cite to the fact that the average tort award varies dramatically between partisan and nonpartisan states. According to one study, this is particularly true for out-of-state defendants, against whom the average tort award is $276,320 in nonpartisan states compared to an eyebrow-raising $652,720 in partisan states.[28] On the other hand, partisan elections provide the voter a quick and generally accurate way of distinguishing candidates who may be otherwise fungible to the average, nonlawyer voter.

Returning to the theme of accountability to voters, supporters of partisan elections argue that "[a]ccountability requires institutional arrangements that strengthen voters' ability to select officials who will . . . govern consistently with the majority's policy preferences."[29] While voters may not be able to readily evaluate different judges' judicial philosophies and qualifications, they are able to choose between a Republican or Democrat and the corresponding policy stances.

THE BENEFIT OF COMMISSION INPUT

The vast majority of state governors who appoint judges do so with the assistance of a commission. Under this method, a commission actively locates, recruits, investigates, and evaluates potential judges. At the conclusion of this process, that commission advances a list of names to the governor, who makes a final selection. This process, favored by the American Bar Association, the American Judicature Society, and others, endeavors to choose applicants on the basis of their qualifications rather than political or social connections. Furthermore, this approach recognizes that a single governor, acting alone, often lacks the time, resources, or possibly even knowledge to parse out the best qualified potential judges from a crowded legal field.

UNCONTESTED RETENTION ELECTIONS, REAPPOINTMENT OR LIFE TENURE

States first implemented retention elections to provide for public participation in the selection process while still excluding partisan politics, believing that the elimination of party labels and campaigns would help voters focus on the record and professional qualifications of sitting judges.[30] Unless

23. *See id.* at 1.
24. Tanya L. Green, *The American Judiciary: Understanding Federal and State Courts*, *available at* http://www.cwfa.org/articledisplay.asp?id=7296&department=LEGAL&categoryid=legalother (last visited June 12, 2006).
25. *See e.g.,* American Bar Association, Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary, available at http://www.abanet.org/judind/jeopardy/pdf/report.pdf (last visited June 11, 2006).
26. *See* Republican Party of Minnesota v. White, 536 US 765 (2002) (finding that First Amendment speech provisions prohibit states limiting judicial candidates' speech).
27. Michael DeBow, *Judicial Selection White Papers: The Case for Partisan Elections*, Federalist Society for Law and Public Policy Studies, *available at* http://www.fed-soc.org/Publications/White%20Papers/judicialelection.htm (last visited June 12, 2006) [hereinafter DeBow].
28. Alexander Tabarrok and Erik A. Helland, *Partisan Judicial Elections and Home Court Advantage*, Corporate Legal Times, *available at* http://www.independent.org/newsroom/article.asp?id=225 (last visited June 12, 2006).
29. DeBow, *supra* note 27, at 7-8.
30. Kevin M. Esterline, *Judicial Accountability the Right Way*, 82 Judicature 206 (1999); William K. Hall & Larry T. Aspin, *The Roll-off Effect in Judicial Retention Elections*, 24 Soc. Sci. J. 415, 418 (1987).

given a strong reason to do otherwise, voters generally have supported the judges in such elections: from 1964 to 1998—only 52 of 4,588 judges running in retention elections lost.[31] In this regard, the system has proven effective as a means for the voting public to hold judges accountable. Implicit in this accountability, however, some critics have found the potential for abuse by interest groups. Any judge who strikes down a popular law, renders an arguably lenient sentence, or otherwise makes an unpopular decision may, in doing so, imperil his or her reelection. For example, after the Florida Supreme Court in 1990 struck down a state law requiring minor girls to obtain parental consent before obtaining abortions, the Florida Right to Life Committee unsuccessfully sought to defeat Chief Justice Leander Shaw.[32] The result of such action is awareness on the part of judges that while they are ostensibly independent, an unpopular decision might prove fatal to their return to the bench. Such an awareness, some may argue, inevitably politicizes the judges' decision making. While reappointments and life tenures may cure this problem of politicized decision making, such approaches also deprive the public of accountability on the part of the judiciary.

ABA MODEL CODE OF JUDICIAL CONDUCT

Since 1924 the American Bar Association has produced ethics guidelines for judges. Originally called "Canons," subsequent revisions in 1972 and 1990 have renamed the document the Model Code of Judicial Conduct ("Model Code").[33] Each state judiciary and the federal judiciary (except the Supreme Court of the United States) uses the Model Code as a starting point for its own ethics rules. Since 2003, a joint commission of the ABA has reviewed the current Model Code in an effort to update and improve the guidance to judges.[34] While the joint commission intended to conclude its work by the summer of 2006, it was unable to do so. Among the key reasons for its inability to finish in the allotted time was the increasing difficulty in applying the current Canon 5 of the current Model Code, which pertains to conduct by judges and candidates in the course of election campaigns and judicial selection processes.

Canon 5 seeks to regulate the behavior of judicial candidates. This is both a practical and constitutional challenge. In light of the variety of election/selection processes noted above, it is difficult to draft the Model Code to adapt to all such variations. It is therefore not surprising that Canon 5 is the canon most revised by state jurisdictions when they form their own ethics code. Canon 5 in general mandates that "[a] judge or judicial candidate shall refrain from inappropriate political activity."[35] The tricky part is determining what constitutes "inappropriate activity." In general, for example, judges and candidates are warned not to act as leaders or officeholders in political organizations, publicly endorse or oppose candidates for public office, attend political gatherings, or solicit campaign contributions.

Regardless of whether a state adopts any of the specific proscriptions, there is increasing uncertainty about the constitutionality of some of the provisions. The uncertainty began with the 2002 decision of the Supreme Court of the United States in *Republican Party of Minnesota v. White*.[36] The *White* decision struck down a provision of Minnesota's then version of Canon 5. The clause prohibited judicial candidates from announcing their views "on disputed legal or political issues." This "announce clause" appeared in the 1972 version of the Model Code but had been removed from the current 1990 version. The Supreme Court held that the announce clause violated the First Amendment rights of candidates, and remanded the case to the court of appeals for further consideration of other Minnesota provisions. Subsequently, the United States Court of Appeals for the Eight Circuit held that other Canon 5 clauses, like the announce clause, also were unconstitutional.[37] Specifically, the Eighth Circuit struck down provisions that prohibited candidates from identifying themselves as members of a political organization, attending political gatherings, using endorsements from political organizations, and personally soliciting contributions. The Supreme Court, notwithstanding an amicus brief from the ABA begging for review,[38] denied a petition for certiorari.[39]

In addition to the Minnesota decisions, federal courts also have been asked to enjoin another provision of Canon 5, specifically the so-called commit clause. This provision provides that judges and candidates shall not "with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." [40] District courts in Kentucky,[41] North

31. Larry T. Aspin, *Trends in Judicial Retention Elections*, 1964-1998, 83 JUDICATURE 79 (1999).
32. G. Alan Tarr, *State Judicial Selection and Independence*, *in* JUSTICE IN JEOPARDY, *supra* note 25, at appendix D-8.
33. MODEL CODE OF JUDICIAL CONDUCT Preface (2004), *available at* http://www.abanet.org/cpr/mcjc/toc.html [hereinafter MODEL CODE].
34. *See ABA Joint Commission to Evaluate the Model Code of Judicial Conduct*, http://www.abanet.org/judicialethics/home.html (last visited June 21, 2006).
35. MODEL CODE Canon 5 (2004)
36. Republican Party of Minnesota v. White, 536 US 765 (2002). *See also* Jan Witold Baran, *Judicial Candidate Speech After Republican Party of Minnesota v. White*, COURT REVIEW, Spring 2002, at 12; Roy A. Schotland, *Should Judges Be More Like Politicians?*, COURT REVIEW, Spring 2002, at 8.
37. Republican Party of Minnesota v. White, 416 F.3d 738 (8th Cir. 2005).
38. *See* Brief for American Bar Association, as Amici Curiae, Dimick v. Republican Party, No. 05-566, *available at* http://www.abanet.org/amicus/briefs/holton06.pdf
39. Dimick v. Republican Party, 126 S. Ct. 1165 (2006).
40. MODEL CODE Canon 5(A)(3)(d)(i)(2004).
41. Ackerson v. Ky. Judicial Ret. and Removal Comm'n, 776 F. Supp. 309 (W.D. Ky. 1991) (as applied to administrative matters, "pledge" and "commit" clauses fail strict scrutiny).

Dakota,[42] and Kansas[43] have enjoined this clause in the respective state judicial codes on the grounds that it is too vague and impinges on First Amendment rights. Moreover, lawsuits have been filed in various states, including Alabama,[44] Kentucky,[45] and Pennsylvania,[46] challenging provisions that bar judicial candidates from answering questionnaires from organizations.

Finally, recent controversies have arisen regarding the interpretation of the clause[47] that prohibits judges from endorsing candidates. In Texas the judicial disciplinary committee has proposed to sanction a state supreme court justice who made public statements in support of his former colleague, Harriet Miers, who in the fall of 2005 was nominated by President George Bush for the United States Supreme Court.[48] The statements were interpreted as improper "endorsements" under Canon 5. The Texas justice has vowed to challenge the sanction as a violation of his First Amendment speech rights. In addition, several judges on the United States Court of Appeals for the Third Circuit appeared as witnesses before the Senate Judiciary Committee in support of the nomination of their then-colleague, Judge Samuel Alito, who also was then a nominee to the Supreme Court of the United States.[49] While to date there is no indication of disciplinary proceedings against the judges, public reports quoted ethics experts on the issue of whether the judges' statements were improper endorsements under the Code of Conduct for United States Judges, which warns judges not to "publicly endorse or oppose a candidate for public office."[50]

In short, multiple provisions of Canon 5 are under both practical and legal challenges. This makes campaigning for judicial office more complicated and makes the job of the ABA in rewriting the Model Code a daunting task.

PUBLIC FINANCING OF JUDICIAL CAMPAIGNS

Amid all the challenges and uncertainties surrounding judicial campaigns, there is a faint glimmer of positive change. North Carolina, subsequent to a proposal by the ABA and its Commission on Public Financing of Judicial Campaigns,[51] adopted a public funding system for appellate candidates.[52] One of the most nettlesome ethics issues in judicial campaigns is the manner in which they are funded. Like all other political campaigns, those of judges are increasingly expensive. Unlike other major statewide campaigns, campaigns for offices like a state supreme court do not have a large or diverse potential private fundraising base. Contributions to judicial candidates unsurprisingly most often come from members of the bar or private parties with interests before the courts. Not only is this source of funding a potential special interest, it usually is not large enough to provide sufficient resources for expensive campaigns. For these reasons, the ABA has encouraged states to consider providing public funding to provide financial resources and dilute the dependence on private funding.

Public funding of judicial campaigns had been adopted in Wisconsin in the 1970s. However, it has never been sufficiently funded. North Carolina, in contrast, adopted and funded a public financing system. The program provides for threshold eligibility requirements and potential maximum public funding of slightly over $200,000. Additional public funds are available under certain conditions.

In 2004, 12 out of 16 eligible candidates qualified for public funding. Out of five seats up for election, two of which were for the state supreme court, four seats were won by candidates who participated in the public financing program. Almost $1.5 million was distributed to the 12 participating candidates, and the public subsidy accounted for 64% of all money received by Supreme Court candidates.[53]

These are encouraging statistics. They reflect widespread candidate participation. Apparently the combination of public and private funding was sufficient to undertake statewide campaigns. Most important, private funding was a minority source of funding for the Supreme Court candidates. The challenge for North Carolina will be to continue providing sufficient public funds and to maintain a system that provides enough

42. N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d. 1021 (D.N.D. 2005) ("pledge" and "commit" clauses fail strict scrutiny).
43. Kansas Judicial Watch v. Stout, ___ F. Supp. 2d ____, 2006 WL 2038045, 2006 U.S. Dist. Lexis 50765 (D. Kan. July 19, 2006) (granting preliminary injunction against enforcement of "pledge" and "commit" clauses as well as prohibition on solicitation of support).
44. Pittman v. Cole, 117 F. Supp. 2d 1285 (S.D. Ala. 2000) (enjoining ban on answering voter guide), *vacated and remanded*, 267 F.3d 1269 (11th Cir. 2001) (reversing for want of ripeness).
45. Family Trust Foundation of Ky. v. Wolnitzek, 345 F. Supp. 2d 672 (E.D. Ky. 2004) ("pledge" and "commit" clauses are overbroad because they cover more than promises to rule in a particular way on an issue likely to come before court), *stay denied sub nom.* Family Trust Foundation of Ky. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224 (6th Cir. 2004).
46. Pa. Family Inst. v. Black, 2005 U.S. Dist. Lexis 29735 (M.D. Pa. 2005) (dismissing for lack of ripeness).
47. Model Code Canon 5(B).
48. *See* Pete Slover, *Panel Rebukes Justice*, Dallas Morning News, May 24, 2006, *available at* http://www.dallasnews.com/haredcontent/dws/news/texassouthwest/stories/052406dntexhecht.15a0c2da.html (last visited June 21, 2006).
49. *See* U.S. Senate Committee on the Judiciary, "Supreme Court Witness List for Thursday, January 12, 2006 at 9:30 a.m.," *available at* http://judiciary.senate.gov/hearing.cfm?id=1725 (noting the scheduled appearances of Judges Becker, Scirica, Barry, Aldisert, and Garth).
50. Judiciary Policies and Procedures: Code of Conduct for United States Judges Canon 7(A)(2).
51. ABA Standing Committee on Judicial Independence, Report of the Commission on Public Financing of Judicial Campaigns 30-57 (2002), *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/judcampaigns_20020201/commissionreport.pdf (last visited June 22, 2006).
52. *See* North Carolina Judicial Campaign Reform Act, S.B. 1054 (2002), *available at* http://www.ncjudges.org/citizens/education/about_jcra/full_text.php (last visited June 22, 2006).
53. Justice at Stake, The New Politics of Judicial Elections 38-39 (2004), *available at* http://www.justiceatstake.org/iles/NewPoliticsReport2004.pdf (last visited June 22, 2006).