# Public Campaign Financing:

## North Carolina Judiciary

balancing the scales

Center *for* Governmental Studies

CGS

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2009

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The Center for Governmental Studies (CGS), founded in 1983, creates innovative political and media solutions to help individuals participate more effectively in their communities and governments.

CGS uses research, advocacy, information technology and education to improve the fairness of governmental policies and processes, empower the underserved to participate more effectively in their communities, improve communication between voters and candidates for office, and help implement effective public policy reforms.

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# Foreword:

This report examines judicial public campaign financing in North Carolina. The Center for Governmental Studies (CGS) has studied public financing of elections in state and local jurisdictions for 25 years. The goal of these studies is to gauge whether public campaign financing laws are working and whether improvements are necessary.

CGS has published several general reports on public financing: a comprehensive analysis of state and local jurisdictions, *Keeping It Clean: Public Financing in American Elections* (2006); a primer, *Investing in Democracy: Creating Public Financing Elections in Your Community* (2003); and a report on innovative ways to fund public financing programs, *Public Financing of Elections: Where to Get the Money?* (2003).

CGS has also published detailed, jurisdiction-specific analyses of public financing programs in numerous state and local jurisdictions, including; *Public Campaign Financing in Florida: A Program Sours* (2008); *Public Campaign Financing in Wisconsin: Showing Its Age* (2008); *Public Campaign Financing in New Jersey—Governor: Weeding Out Big Money in the Garden State* (2008); *Public Campaign Financing in New Jersey—Legislature: A Pilot Project Takes Off* (2008); *Public Campaign Financing in Minnesota: Damming Big Money in the Land of 10,000 Lakes* (2008); *Public Campaign Financing in Michigan: Driving Towards Collapse?* (2008); *Political Reform That Works: Public Campaign Financing Blooms in Tucson* (2003); *A Statute of Liberty: How New York City's Campaign Finance Law is Changing the Face of Local Elections* (2003); NY, *Dead On Arrival? Breathing Life into Suffolk County's New Campaign Finance Reforms* (2003); *On the Brink of Clean: Launching San Francisco's New Campaign Finance Reforms* (2002); and Los Angeles: *Eleven Years of Reform: Many Successes, More to be Done* (2001) (copies of CGS reports are available at www.cgs.org and www.policyarchive.org).

CGS thanks the public officials, administrators and advocates on both sides of the public financing debate who provided CGS with invaluable information, suggestions, reports and observations about public financing in North Carolina. In particular, CGS thanks Bob Hall, Executive Director of Democracy North Carolina, for his invaluable and significant editorial comments and insights, and his generosity with his vast knowledge of public campaign financing in North Carolina. CGS additionally thanks Damon Circosta, Executive Director, North Carolina Center for Voter Education, Jesse Rutledge, Vice President of External Affairs at National Center for State Courts, Charles Hall, Justice at Stake, and Bob Phillips, Executive Director of Common Cause North Carolina, for

their immeasurable assistance. They each significantly contributed to the final product of this report, and CGS is extremely grateful for their help.

Tracy Westen, CGS Chief Executive Officer, Bob Stern, CGS President, Jessica Levinson, CGS Political Reform Project Director, and Sasha Horwitz, former CGS California Governance Project Manager, are responsible for the contents of this report.

CGS is a non-profit, national non-partisan organization that creates innovative political and media solutions to help individuals participate more effectively in their communities and governments.

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# Executive Summary :

In 2002, the state of North Carolina adopted a landmark judicial campaign finance reform law, enacting the North Carolina Judicial Campaign Reform Act ("the Act"),[1] which created the North Carolina Public Campaign Fund ("the Public Campaign Fund"). The program provides full public financing for the general election campaigns of Court of Appeals and Supreme Court candidates who meet certain qualifications. After three elections in 2004, 2006 and 2008, candidates and the public are overwhelmingly positive about the Act. The program is widely considered a model for judicial campaign financing in other states. This report suggests a few adjustments to the program, which should be implemented in order to ensure its long-term viability.

The Public Campaign Fund is a fund established to insulate Court of Appeals and Supreme Court judges from the influence of contributors who may have an interest in cases before the judge. The program is administered by the State Board of Elections ("the Elections Board").

The basic premise of the Act is straightforward. Candidates qualify by raising a set number of small contributions during the primary election, but they do not receive public funding for the primary (except to match high-spending opponents). Those who meet the program requirements and finish first or second in the primary receive a grant of public money in the general election. Through public financing, the candidates are freed from the pressures of fundraising and have more time to talk to voters about their qualifications and judicial philosophies. In addition, public financing programs play an important role in increasing the public's confidence in their elected officials, and decreasing the perception that officials are indebted to large donors.

Participating candidates can raise up to $10,000 in "seed money" before opting into the program. Candidates for the Court of Appeals must raise at least $38,400 and not more than $76,800 in qualifying contributions during the primary election. Similarly, candidates for the Supreme Court must raise at least $40,050 and not more than $80,100 in qualifying contributions during the primary election. Candidates may only collect qualifying contributions from North Carolina registered voters in amounts from $10 to $500. In the general election,

[1] The law made Court of Appeals and Supreme Court races nonpartisan, reduced the individual contribution limit to candidates running for those positions from $4,000 to $1,000, created a state voter guide, and created full public campaign financing for judicial elections. *North Carolina Public Campaign Fund* §163-278.62.

participating Court of Appeals candidates shall receive $160,000 in public funding, and participating Supreme Court candidates shall receive approximately $234,000. Participating candidates are prohibited from raising any additional money. The contribution limit for privately financed candidates is $1,000. Privately financed candidates must disclose their fundraising to the State Board of Elections, and once they raise 80 percent of the public funds grants, they are held to stricter reporting requirements.

Publicly financed candidates who are outspent by privately financed opponents or certain outside groups may receive additional "rescue funds" to ensure that they remain competitive.[2] Rescue funds are available during both the primary and general election phases, and they are limited to twice the expenditure limit of that race.

The Public Campaign Fund is supported by a $3 voluntary taxpayer check-off ($6 for couples), which does not increase an individual's tax liability. The Public Campaign Fund is also supported by a $50 mandatory surcharge on the annual fee paid by attorneys to the State Bar, a government agency.

In existence for only three election cycles, the Public Campaign Fund is a strong and effective way to finance judicial elections. Participation rates are high amongst candidates, and participating candidates have expressed their satisfaction with the program. The legislature and the Elections Board have both worked to address problems quickly and effectively. At the end of November 2008, the Public Campaign Fund had $2.8 million on hand after spending $1.2 million that year on two statewide voter guides and $1.9 million on grants to certified candidates. The Fund now collects about $4.6 million per election cycle from various sources.

*Balancing the Scales* analyzes the Act, the role of private money in judicial campaigns, the influence of outside groups, the ability of the Board to address problems as they arise and the effectiveness of the law itself in reducing conflicts of interest between contributors and judges. North Carolina's Public Campaign Fund is generally working very well. The suggested reforms detailed below are related to bolstering the system and making it viable for the long-term:

1. **Improve the Voluntary Taxpayer Check-Off**

   Most of the program's funding comes from taxpayers who voluntarily use the check-off to designate $3 from the state's tax revenues to the Public Campaign Fund. On its own the

[2] Matching funds are provided not only for "independent expenditures," which are defined as express advocacy, but also for "electioneering communications," which are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

check-off does not bring in enough money to cover the costs of the program both because participation is low and the check-off amount is not adjusted for inflation. Over the long-term, North Carolina could change the check-off from opt-in to opt-out, provide funding for unmarked check-offs, or fund the program directly from the general fund.

2. **Revise the Trigger for Matching Funds**

   Publicly financed candidates who run against privately financed candidates can potentially raise or spend more money than their opponents because of a loophole in the "trigger for matching funds." The legislature should revise this formula to eliminate the bias.

3. **Expand Public Funding to the Primary Election**

   Ideally, the program should provide public funds in the primary election as well as in the general election. By providing public funds only in the general election, the Public Campaign Fund does not completely insulate candidates from private contributors who may seek preferential treatment from judges through contributions in primary elections. This reform, however, could be costly and would require the legislature to redesign the process of qualifying for public money and would likely require that other aspects of the program be redesigned, including the funding mechanism. The reforms would help more qualified candidates without a network of contributors to run for office and help eliminate the perceived or actual influence of campaign contributors on judicial decisions.

4. **Adjust Program Funding Sources for Inflation**

   Taxpayer check-offs, the attorney surcharge and public funds grants to candidates should be adjusted for inflation. The money distributed to candidates is not adjusted for inflation, but is pegged to a surrogate for inflation, candidate filing fees, which are in turn pegged to the salaries of judges. Those salaries do not automatically adjust according to the cost of living, but rather they only change through legislative action.

PART : **01**

# 01 : **INTRODUCTION**

North Carolina passed a landmark judicial public financing law in 2002, becoming the first state to offer full public financing for judicial elections. This report takes a multi-dimensional approach to analyzing the law, relying on intensive research, data compilation and analysis, interviews with experts and interested persons and consultations with civic groups and public officials. Of primary concern is the quality of the judicial public financing law, how well it is administered and how it can be improved to serve candidates and the public interest more effectively.

This is CGS' second publication concerning judicial campaign financing. In 1995, CGS published a report of the California Commission on Campaign Financing, which examined judicial elections in Los Angeles and issued comprehensive recommendations regarding contributions and private spending in those elections.

Under North Carolina's program, candidates who collect a minimum number of qualifying contributions and agree to limit their campaign spending can receive full public financing for the general election. Although the program is too new to draw solid conclusions about its success or predictions about its future, high participation rates and positive evaluations by former candidates suggest it is well designed.  This report discusses the program and its successes and failures, and it issues several recommendations to fix remaining problems. It also discusses the efforts North Carolina has taken to expand public financing to other statewide races and local elections.

### A : WHY DID NORTH CAROLINA ENACT JUDICIAL PUBLIC CAMPAIGN FINANCING?

The responsibility of judges to issue impartial decisions is a fundamental tenet of American jurisprudence. Throughout American history, states have undertaken various efforts to create impartial judicial selection procedures. "Judicial selection procedures fall along a spectrum of two policy choices: some reflect a preference for judicial independence, some for public accountability, and others strike a balance between the two."[3] To promote judicial independence by insulating judges from popular pressure, judges are appointed by governors or the legislature in 28 states; governors appoint judges in 26 states; and legislatures appoint them

[3] California Commission on Campaign Financing, "The Price of Justice: A Case Study in Judicial Public Financing," *Center for Governmental Studies*, 1995.

in two. Ten of those 28 states rely on retention elections, in which a previously appointed judge runs unopposed and must win a majority[4] of votes to continue on the bench for another term.[5]

The remaining 22 states directly elect their judges. This exposes judicial candidates to political pressure and requires that they actively campaign for votes. At the same time, direct elections insulate judges from a partisan appointment process. Few states with judicial elections include party affiliation on the ballot. In all, 39 states elect some or all of their judges. Judges, unlike political officers (e.g. governors and legislators), do not serve in representative capacities, which could cause conflicts of interest in judicial elections. Although political candidates are expected to serve and promote the interests of their constituents, judges must be impartial and remain independent from political pressures. However, the pressure of campaigning forces judges to seek donations from entities who may be interested in particular judicial outcomes.

United States Supreme Court Justice Anthony Kennedy recently noted:

> *When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence. The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.*[6]

Privately financed judicial elections may threaten the effectiveness of the judicial system, either by electing judges who issue opinions that favor their contributors or by creating a public perception that the judicial process favors contributors. Judges who make campaign promises to espouse certain positions, may in some instances, violate the judiciary's fundamental deference to the rule of law. Although most judges take their responsibilities seriously, the judicial process might be jeopardized if the public begins to doubt judges' impartiality.

Independence in any judicial selection system is a noble but unreachable goal. A genuine merit-based system likely cannot exist. What can be done, therefore, is to remove the actual or apparent conflicts of interest that bring judicial independence into question. For elected

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4 Illinois requires 60 percent majority.

5 Less than one percent of judges have been removed from office as a result of losing a retention election; see also Larry Aspin, "Judicial Retention Election Trends 1964–2006," *Judicature Magazine,* Vol. 90 No. 5, March–April 2005.

6 *New York State Bd. of Elections v. Lopez Torres,* 128 S. Ct. 791, 802 (2008) (Kennedy concurring).

judges, one such apparent conflict is campaign contributions from individuals or entities with an interest in the outcome of a case.[7] The two most pressing and visible examples are: (1) contributions from attorneys who may try a case before a judge they supported; and (2) contributions from individuals with a case that may come before that judge. In some states, such as Louisiana and Ohio, these contributions appear to have had real consequences on judicial rulings.[8] Other worrisome conflicts include contributions from organizations such as police, district attorneys and trial lawyer organizations, because they may appear to promote the causes of their members regardless of the facts of a particular case.

Another major concern among voters is that judges should remain above politics, and be free from the pressures of campaign fundraising. Voters may doubt whether judicial candidates can make fair decisions involving their campaign contributors once they assume the bench. Because judges are not politicians, campaigns without public financing hurt judicial candidates who may not know how, or do not like, to raise money.

In 2002, the American Bar Association ("ABA") approved the recommendations of a committee established to review the virtues of publicly financed judicial elections. The central statement of the resolution said, "the American Bar Association while reaffirming its long-standing support of selection of judges by merit selection urges states and territories that select judges in contested elections to finance judicial campaigns with public funds." Public financing, the committee stated, is the best way to address the "perceived impropriety associated with judicial candidates accepting private contributions from individuals and organizations interested in the outcomes of cases those candidates may later decide as judges."[9]

Taking a cue from the ABA, the North Carolina Bar Association tried again to establish a merit selection system for judges, but faced significant obstacles, because the "legislature doesn't want to take away the right of the people to vote," even for judges.[10]

### B : JUDICIAL ELECTIONS IN NORTH CAROLINA

Since 1868, the voters have directly elected North Carolina's appellate and trial court judges. The Court of Appeals is composed of 15 members who sit in rotating three member panels. Court of Appeals judges hear appeals from the Superior and District courts, except cases involving the death penalty, which are appealed directly to the Supreme Court. The Supreme Court comprises six associate justices and one chief justice. The full seven-member panel

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7 "Public Financing of Judicial Campaigns," *American Bar Association*, February 2002.

8 Adam Liptak, "Looking Anew at Campaign Cash and Elected Judges," *New York Times*, January 29, 2008.

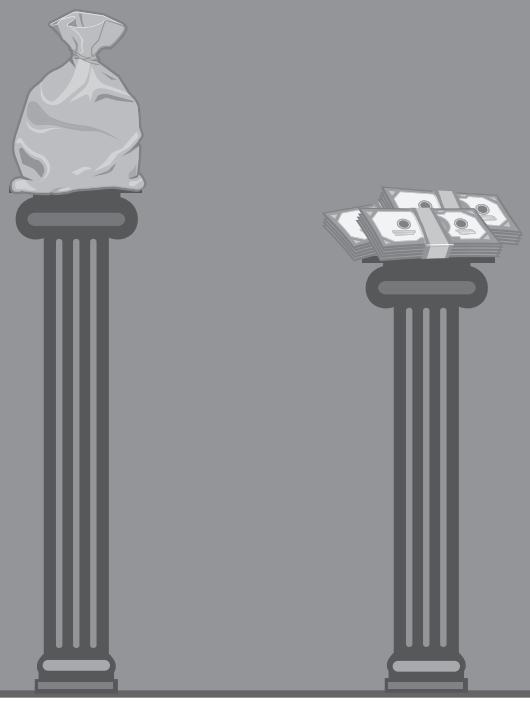
9 "Public Financing of Judicial Campaigns," *American Bar Association Standing Committee on Judicial Independence*, February 2002.

10 Telephone Interview with Allan Head, Executive Director, North Carolina Bar Association, January 4, 2008.

reviews successful petitions from the Court of Appeals and non-unanimous Court of Appeals decisions upon request. Judges of both appellate courts have eight-year terms.

Elections for seats on the Court of Appeals and Supreme Court are held in even-numbered years. Candidates run for non-partisan, statewide seats. The top two vote getters in the primary election proceed to the general election regardless of party affiliation. If only two candidates vie for a single seat, they only compete in the general election and do not appear on the primary election ballot.

PART : **02**



## 02 : **THE JUDICIAL CAMPAIGN REFORM ACT**

The North Carolina legislature passed the Judicial Campaign Reform Act in 2002 after years of efforts by public interest groups and reform-minded legislators and after the 2000 election saw North Carolina's first Supreme Court campaign exceed $1 million in spending.

The legislature made state Supreme Court and Court of Appeals races non-partisan and established the North Carolina Public Campaign Fund.[11] In addition to full public financing for qualified candidates in the general election, the Act established a voter education program responsible for sending nearly four million judicial voter guides to every North Carolina residential address, whether or not there are any registered voters at the address.

Candidates interested in receiving public funds can raise and spend up to $10,000 in "seed money" to test the waters before deciding whether to participate in the program. Those who choose to participate must then collect at least 350 qualifying contributions of $10 to $500. These monies are the only private funds that certified candidates can use, other than a limited amount from themselves or their families. Candidates do not receive public money during the primary election period, except for possible matching or rescue funds to offset high-spending opposition. The top two primary finishers, or the only two candidates if the primary is uncontested, continue onto the general election. At that time publicly financed candidates receive a lump sum of public funds. Independent entities may run ads on behalf of or in opposition to candidates; however, their spending is subject to disclosure requirements and may trigger the release of "matching funds" to a certified candidate.

Privately financed candidates are free to raise as much money as they wish in contributions of $1,000 or less. In the event that a privately financed candidate outraises or outspends a publicly financed candidate, the publicly financed candidate will receive an equal amount of "matching funds"[12] to stay competitive, up to twice the certified candidate's expenditure limit. In the 2004 election, three-quarters (12 of 16) of candidates participated in the Public Campaign Fund. That rate fell to two-thirds (eight of 12) in 2006. In 2008, participation was nearly unanimous, with 11 of the 12 candidates in contested elections participating.

11 Initially known as the North Carolina Public Campaign Financing Fund.

12 "Matching funds" were called "rescue funds" until 2007.

## A : SOURCES OF FUNDING

Steady and sufficient funding is integral to the long term success of the Public Campaign Fund, as is the case with any public financing program. Programs with unreliable funding mechanisms are liable to outgrow their usefulness in the face of inflation or political pressure that diverts resources away from the program. The Public Campaign Fund is collectively financed by five sources, which now generate $4 million to $5 million per two-year election cycle. A sixth source, leftover funds, was a one-time transfer of money from a defunct program. At the end of the 2008 election, the Fund had $2.8 million in its account.[13]

### Taxpayers' $3 Check-Off

A little over half of the funding for the Public Campaign Fund now comes from opt-in taxpayer check-offs. Since 2004, taxpayers have had the option of checking "Yes" on a box on their state income tax forms that would designate $3 ($6 for couples) of their income tax payment to the Public Campaign Fund. The contribution does not increase an individual's tax liability. Hence, if a person owes $100 in state taxes and checks "Yes," $97 dollars will go to the state general fund and $3 will go directly to the Public Campaign Fund.

Check-off participation has been low, even though supporters have made significant efforts to increase check-off awareness, such as airing public service announcements. In its initial year, the check-off brought in $1.03 million from January through October, 2004, for use in the 2004 election. The 2006 election included check-offs from a two-year period, November 2004 through October 2006, which totaled $2.2 million. Check-offs have provided 37 and 67 percent of total revenue, respectively, reflecting the difference between one year and two years of check-off receipts. For the 2008 election, the check-off produced $2.5 million or 51 percent of the Public Campaign Fund's total receipts from November 2006 through October 2008.

### Attorney Contributions

The second largest source of regular revenue for the Public Campaign Fund is attorney contributions. All practicing attorneys in North Carolina must pay an annual Privilege License Tax or risk the suspension of their license to practice law. In 2003, practicing attorneys were also asked to voluntarily donate $50 to the Public Campaign Fund in addition to the annual Privilege License Tax. The number of contributions was smaller than anticipated. For the two years through October 2004, attorneys contributed a total of just over $59,000.[14]

The North Carolina Bar Association, a private organization, initially objected to mandatory attorney contributions, but eventually agreed to encourage its members to contribute. In light of the dearth of contributions in 2003 and 2004, the legislature replaced the voluntary

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13 North Carolina General Statute §163-278.63. Democracy North Carolina.

14 State Board of Elections. Telephone interview with Bob Hall, Executive Director, Democracy North Carolina. August 21, 2007.

contribution in 2005 with a mandatory $50 surcharge on an annual fee paid by all attorneys to the NC State Bar, a public agency.[15] In its first year, the surcharge provided $1 million to the Public Campaign Fund, through October 2006, and a total of $2.2 million from November 2006 through October 2008, nearly as much as the $3 check-off.[16]

Opposition to the attorney surcharge has been strong. The North Carolina Bar Association (the private organization) opposed the fee because it "felt that it was wrong to tax one profession for the good of the whole."[17] A recently filed lawsuit in state court, *El-Khouri v. State of North Carolina*, alleges that this fee amounts to an illegal tax because it arbitrarily targets the legal profession while benefiting all North Carolinians.[18] This case is pending.

In another case, a federal district court dismissed a challenge to the legality of the attorney contributions requirement.[19] Without issuing a formal decision, the court implied that lawyers do meet the standard of a beneficiary group and left the mandatory attorney contribution surcharge intact. The court held that the issue should be left to the state courts.[20]

**Unspent Revenues**

Certified candidates must return unspent or uncommitted monies to the Public Campaign Fund once the election is over or if at any time they withdraw from the election. This includes both unspent money at the end of an election and money remaining in the account of decertified candidates. For accounting purposes, privately raised money is considered spent before public funds. Unspent revenues are only a small source of funding. As of the 2006 election, less than $6,000 had been returned in this way.

**Penalties**

The Elections Board can order a candidate to return money to the Public Campaign Fund as part of the penalty for violating the program's legal requirements. Fines can also be levied, but they do not go the Public Campaign Fund.[21]

**Voluntary Contributions and Donations**

Contributions to the Public Campaign Fund can be made directly in any amount by individuals, corporations, other business entities, labor unions and professional associations.[22] Voluntary contributions have been small but significant. The federal government also contributed

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15 North Carolina General Statute §84-34.

16 State Board of Elections.

17 Telephone Interview with Allan Head, January 4, 2008.

18 *El-Khouri, v. State of North Carolina,* No. 07 CVS 16422.

19 *Jackson v. Leake*, 476 F.Supp.2d 515 (2007).

20 Associated Press, *Group Sues in Over Lawyers' Fees for Public Campaign Financing*, October 10, 2007.

21 North Carolina General Statute §163-278.63.

22 *Id.*

$148,530 by way of the Help America Vote Act ("HAVA"). North Carolina used these contributions, which totaled over $278,000 for the 2004 election, to cover the cost of the voter guide.

**North Carolina Candidates Financing Fund**

North Carolina once had a program known as the Candidates Financing Fund to finance gubernatorial races. It was funded by taxpayers who willingly added on a contribution to their tax burden. The Act eliminated the Candidate Financing Fund and transferred the balance into the new North Carolina Public Campaign Fund.

In 2004, the legislature also provided a one-time contribution of $863,468 to be used specifically for "matching funds."[23] The money was not used in either election. Later, in 2007, the legislature appropriated $25,000 to meet the costs of implementing several revisions to the law.

## B : CANDIDATE QUALIFICATION

In order to receive public funds, candidates must first file a "Declaration of Intent to Participate" in the Public Campaign Fund with the Elections Board between September 1 of the year preceding the election and the date of the primary election in early May. Certified candidates may not raise qualifying contributions before filing the Declaration. Candidates that have spent or received in excess of $10,000 in seed money prior to filing the Declaration are ineligible to participate.[24]

Upon filing the Declaration, candidates must "demonstrate public support and voluntarily accept strict fund-raising and spending limits"[25] in order to receive public money. This process keeps program costs down and prevents nonviable candidates from receiving public funds. Declared candidates must collect a minimum of 350 non-cash contributions from registered North Carolina voters in amounts ranging between $10 and $500. The aggregate sum of those contributions must fall within a range of 30 and 60 times the filing fee for the office, or approximately $38,000 to $77,000 for Court of Appeals candidates; and $40,000 to $80,000 for Supreme Court candidates.[26]

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23 "Judicial Public Financing Success, By the Numbers," *Democracy North Carolina*, available at: http://www.democ racy-nc.org/nc/judicialcampaignreform/JCRAsuccess.pdf

24 *Id.*

25 North Carolina General Statute §163-278.61.

26 North Carolina State Board of Elections *passim*.

FIGURE 1. **QUALIFYING CONTRIBUTIONS**

| | 2004 | | 2006 | | 2008 | |
|---|---|---|---|---|---|---|
| **Office** | **Min.** | **Max.** | **Min.** | **Max.** | **Min.** | **Max.** |
| Supreme Court (Chief Justice) | N/A | N/A | $37,100 | $74,300 | N/A | N/A |
| Supreme Court (Associate Justice) | $34,590 | $69,180 | $36,200 | $72,400 | $40,050 | $80,100 |
| Court of Appeals | $33,150 | $66,300 | $34,700 | $69,400 | $38,400 | $76,800 |

## C : SPENDING LIMITS AND MATCHING FUNDS

Before the primary election, publicly financed candidates may only spend their seed money and qualifying contributions. Participating candidates are prohibited from raising private money after the date of the primary election. However, the candidate and the candidate's immediate family may make $1,000 contributions during the qualifying period that do not count toward the qualifying limit. Privately financed candidates can accept contributions up to $1,000 from non-family contributors, unlimited funds from themselves or their spouse, and up to $2,000 from a parent, child, brother, or sister.[27]

Publicly financed candidates are bound by expenditure limits, but their privately financed opponents are not held to such restrictions. To enable publicly funded candidates to be competitive against excessive spending by their opponents or outside groups, the Public Campaign Fund guarantees matching funds, up to twice the spending limit. Non-participating candidates and independent expenditure committees must disclose their spending so that the Elections Board can calculate the matching fund disbursement in a timely fashion.

In the general election, public funds are distributed to participating candidates in block grants of 125 times the filing fee for Court of Appeals and 175 times the filing fee for Supreme Court candidates.[28] Candidates do not receive any public money during the primary phase, except for possible matching funds. During the general election, participants may not raise any additional funds and may only spend the money remaining from the primary election plus the public funds.

Rescue funds are available in two situations. First, if at any time a privately financed

27 North Carolina General Statute §163-278.64, North Carolina General Statute §163-278.13(e2(2).

28 The filing fees are set by law at one percent of the salary paid to the person in that position. In 2008, they were set at $1,335 for the Supreme Court and $1,280 for the Court of Appeals.

opponent spends more than the amount of the public grant, the publicly financed opponent receives so-called "rescue funds" in amounts equal to the excess spending. Second, rescue funds are also available when certain outside groups make expenditures in support of a privately financed candidate or in opposition to a publicly financed candidate. In the 2008 general election, Supreme Court Justice Bob Edmunds received almost $13,000 in rescue funds based on independent expenditures made by the state Democratic Party in favor of Edmunds' opponent, Suzanne Reynolds. Rescue funds are available for both the primary and general elections. Total available money is capped at twice the spending limit in that election phase.

FIGURE 2. **PUBLIC FUNDS DISTRIBUTED TO QUALIFYING CANDIDATES**

| Office | Calculation | 2004 | 2006 | 2008 |
|---|---|---|---|---|
| Supreme Court (Chief Justice) | 175x filing fee | No Election | $216,700 | No Election |
| Supreme Court (Associate Justice) | 175x filing fee | $201,800 | $211,100 | $233,625 |
| Court of Appeals | 125x filing fee | $138,100 | $144,500 | $160,000 |

Non-certified candidates must notify the Elections Board once they have raised or spent 80 percent of the "trigger for matching funds." For the primary, the trigger equals the maximum amount of qualifying contributions a participating candidate may collect. For the general election, the trigger equals the amount of the public disbursement. This gives the Elections Board time to disburse matching funds once the trigger is reached.

Any entity that makes or raises money with the intention of making an independent expenditure of at least $5,000 in support of, or in opposition to, a certified candidate or in support of a candidate opposing a certified candidate, must notify the Elections Board within 24 hours. The $5,000 reporting threshold applies to aggregate spending by the entity. Every subsequent $1,000 raised or spent by such an entity must also be reported to the Elections Board.[29]

The Elections Board distributes matching funds in an amount equal to the reported excess immediately after aggregate spending by a non-certified opponent and/or an independent expenditure entity exceeds the trigger amount. During the primary, matching funds to a certified candidate are limited to two times the maximum qualifying contributions. During the general election, matching funds to a certified candidate are limited to two times the



[29] North Carolina General Statute §163-278.66.

public funds disbursements: approximately $320,000 for Court of Appeals and $467,000 for Supreme Court races. No further matching funds are available.

**D : VOTER GUIDE**

The Act provides a judicial voter guide to every North Carolina household (whether or not anyone at that household is registered to vote) several weeks before the election. The guides increase the likelihood that voters will vote in down-ballot races. Low levels of voter information often cause voters to skip judicial races, a trend called "voter drop-off."

The guides contain photographs of the candidates, short biographies detailing their qualifications and experience and brief personal statements (maximum 150 words) written by the candidates. While the guide makes no mention of party affiliation, the personal statements sometimes contain suggestions of affiliation or mention party endorsements. By law, the guide also describes the functions of the appellate courts, the purpose of the Public Campaign Fund, and the regulations for how to register to vote. In addition, it contains information about a voter's rights and responsibilities, the voting machines used in counties, accessibility to polling locations, and methods for voting, including provisional ballots and the state's relatively new law for same-day registration and voting. Approximately four million guides are printed for each general election; the Elections Board also produced and distributed an edition for the 2008 primary. The guides cost the Public Campaign Fund $498,450 in 2004 and $584,350 in 2006.[30]

**E : LEGAL CHALLENGES**

Since the inception of public financing systems, people have waged legal challenges. In *Buckley v. Valeo*,[31] the United States Supreme Court upheld the constitutionality of public campaign financing programs. The Court allowed limitations on contributions, finding that there is a public interest in reducing corruption or the appearance of corruption by limiting the amount that one supporter can give to a candidate. With respect to expenditures, the Court held that it would be an undue burden on candidates' First Amendment rights to limit their campaign spending. As such, only voluntary spending limits are valid.

Two court cases have reviewed the North Carolina Public Campaign Fund: *North Carolina Right to Life v. Leake and El-Khouri v. State of North Carolina*.[32] The former challenged the

30 State Board of Elections.

31 *Buckley v. Valeo*, 424 U.S 1 (1976).

32 *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake,* 524 F.3d 427 (4th Cir. 2008), *cert. denied,* 129 S.Ct. 490 (2008); *El-Khouri et al. v. State of North Carolina et al.*, No. 07 CVS 16422.

program on numerous grounds and was decided in May 2008; the U.S. Supreme Court refused to review the decision. The latter addressed the legality of one aspect of the program's funding.

In 2005, two privately financed candidates, Barbara Jackson and Wilton "Rusty" Duke,[33] joined the North Carolina Right to Life Independent Expenditures Committee ("IEPAC") and State Political Action Committee ("SPAC") in a federal district court lawsuit against several state officials. The plaintiffs argued that the Public Campaign Fund violated the First and Fourteenth Amendments speech rights.[34]

The parties alleged three provisions of the Public Campaign Fund violated the First and Fourteenth Amendments: (1) the "21-day provision" that "prohibits contributions to the campaign of any candidate during the period beginning 21 days before the general election and ending the day after the general election if that contribution causes the candidate to exceed the 'trigger for rescue funds'";[35] (2) the reporting requirements that compel non-certified candidates and independent expenditure groups to report campaign contributions or expenditures that exceed certain triggers to the Elections Board; and (3) the matching funds provision.

The U.S. District Court for the Eastern District of North Carolina dismissed plaintiffs' claims. In May 2008, the U.S. Court of Appeals upheld the constitutionality of the Public Campaign Fund and rejected the plaintiffs' three claims.

The court found that the 21-day provision "advances the state's interest in avoiding the danger of corruption (or the appearance thereof) in judicial elections."[36] It noted, in particular, that since the ban only applies to a few situations, "the narrowness of its application confirms that the ban is closely drawn to the asserted state interests."[37] Proponents of the Public Campaign Fund were concerned that the provision might be invalidated by the U.S. Supreme Court and opted to repeal the provision from the Public Campaign Fund law. They viewed the 21-day provision as a liability to the program as a whole.[38]

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33 Barbara Jackson declared her intent to participate in the program in the 2004 election but failed to qualify for public funds. Jackson still won election to the Court of Appeals. Rusty Duke ran for the North Carolina Supreme Court in the 2006 election. Despite his fundraising advantages, Duke lost to incumbent Supreme Court Justice Sarah Parker.

34 *Jackson v. Leake,* 476 F.Supp.2d 515 (E.D.N.C. 2006); Jackson, 476 F.Supp.2d at 515 (2007).

35 North Carolina General Statute §163-278.13.

36 *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake,* 524 F.3d 427 (4th Cir. 2008), *cert. denied,* 129 S.Ct. 490 (2008) at 19.

37 *Id.*

38 North Carolina Session Law 2008-150; The decision to remove the 21-day provision may also be due to the Supreme Court opinion in *Davis v. FEC,* 128 S.Ct. 2759 (2008), which struck down the federal campaign finance law's Millionaire's Amendment. *Davis* also makes suspect any campaign finance provision that holds publicly financed and privately financed candidates to different standards.

As to the reporting provision, the Court of Appeals noted that courts generally uphold disclosure rules particularly when disclosure is necessary to administer public financing programs. In this instance, the Court of Appeals rejected the plaintiffs' argument that the reporting requirements were overly burdensome. It held that the requirements further the state's interest in disclosing information to the public, deterring actual or apparent corruption and "gathering the data necessary to enforce more substantive electioneering restrictions."[39] Moreover, the court found the reporting requirements necessary to fulfill the matching funds provisions.

With regard to the matching funds provision, the plaintiffs alleged that the law compelled speech in violation of the First Amendment because it required them to "fund activities of an ideological nature" and spend money to support candidates with whom they ideologically disagreed, specifically their publicly financed opponents. The plaintiffs also argued that the matching funds requirement effectively limited speech because it discouraged privately financed candidates and independent expenditure groups from making contributions that would cause a publicly financed opponent to receive additional public money. The Court of Appeals, however, found that "North Carolina's provision of matching funds is likely to result in more, not less, speech" and does "not burden a nonparticipating candidate's First Amendment rights."[40] Appellants petitioned the United States Supreme Court for writ of certiorari in 2008. The Supreme Court denied certiorari on November 3, 2008.

The other Public Campaign Fund case, *El-Khouri v. State of North Carolina*, is pending in state court and challenged only the legality of the mandatory $50 attorney surcharge.[41] Three practicing attorneys claimed that the surcharge was a de facto tax that illegally targets attorneys because they are not the sole beneficiaries of the tax. The three attorneys refused to pay the surcharge and were notified by the North Carolina State Bar that continued refusal to pay would force the bar to suspend their licenses to practice law. The plaintiffs eventually paid the $50 surcharge under pressure from the State Bar.

39 *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake,* 524 F.3d 427 (4th Cir. 2008), *cert. denied,* 129 S.Ct. 490 (2008) at 18.

40 *Id.*

41 *El-Khouri et al. v. State of North Carolina et al.*, No. 07 CVS 16422.

PART : **03**

# 03 : ANALYSIS OF NORTH CAROLINA'S JUDICIAL PUBLIC FINANCING PROGRAM

## A : CANDIDATE PARTICIPATION

North Carolina's system is successful in two key ways that are vital to the success of any public financing program: judicial candidates participate at high rates, and participants have made strong showings against privately financed opponents. In all, 31 of the 41 candidates who ran for the Supreme Court or Court of Appeals in 2004, 2006, and 2008 participated in the Public Campaign Fund. Three other candidates declared their intention to participate but failed to qualify. Democrats and Republicans, incumbents and challengers, men and women and African-Americans and whites all participated at high rates.

In 2004, the first publicly financed election, 12 of 16 candidates for the North Carolina Supreme Court and North Carolina Court of Appeals (four of the five winners) opted for public funds. In total, public funds made up 65 percent of the money raised in those races. Participation declined slightly in 2006, when eight of 12 candidates accepted public campaign financing, but nothing indicates that that decline was caused by a weakness in the public financing program or law. That year, five of six winners accepted public financing. In 2008, 11 of 13 judicial candidates participated in the program. One of the 13 candidates was not eligible for the program because he ran unopposed. The other non-participating candidate simply opted not to participate.

There appears to be a wholesale acceptance of the Act by candidates of different races, genders and partisanship. All five of the African-American candidates who ran in 2004, 2006, and 2008 participated in the Public Campaign Fund. Twenty-six of the 36 whites who ran opted into the Public Campaign Fund. Sixteen of the 22 men and 15 of the 19 women participated. Four Democrats and six Republicans did not join the program; one of those Democrats ran in both 2004 and 2006, and another ran unopposed in 2008. Incumbents were more likely to participate than challengers; in only one case did an incumbent with an opponent decide not to opt in to the program. Nine of 12 open-seat candidates participated. All three of the winners in the three open-seat contests participated in the Public Campaign Fund in 2004, 2006 and 2008.

## B : FINANCIAL IMPACTS

Spending in North Carolina's judicial election campaigns was climbing higher in the years preceding the establishment of the Act. In 2000, one candidate spent over $900,000 in a losing bid for Chief Justice of the Supreme Court.[42] The race made headlines as the first judicial campaign in the state to reach $1 million in combined spending, more than twice the previous record.

Voters often decry the role of money in politics, especially when high-spending candidates appear to buy their way into elected office. The Public Campaign Fund has reduced the influence of money for judicial candidates and come close to equalizing spending. In the 24 races held in the four elections before the Public Campaign Fund existed, the higher spending candidate won 71 percent of the time. That rate has fallen to 46 percent since the establishment of the Public Campaign Fund. Spending caps and matching funds reduce the likelihood that privately financed candidates will greatly outspend their publicly financed opponents. In the four elections before public financing became available, one candidate more than doubled his or her opponent's spending 75 percent of the time.

Public grants and matching funds make it much more difficult for a publicly financed candidate to be overwhelmed by an avalanche of spending by a privately financed opponent. In terms of spending, the tightest races in the 2004 and 2006 elections occurred between two publicly financed candidates. In those races, the only variation in financing resulted from differences in the amount of money collected as seed money, qualifying contributions or contributions from family members. Two privately financed candidates facing one another are not bound by spending limits and therefore are likely to have the most expensive races. Only once in the 17 contested judicial races in 2004, 2006, and 2008 have both candidates rejected public money. In that race, incumbent Associate Justice Mark Martin spent $471,557; challenger Rachel Lea Hunter spent $145,781. Martin won and achieved the dubious distinction of spending more money than any other candidate in 2004 or 2006.

One of the most visible effects of the Public Campaign Fund is that spending levels are relatively equal when at least one candidate is publicly financed. In 6 of the 11 races in 2004 and 2006, the losing candidate outspent the winning candidate by less than 10 percent. As expected, the greatest disparity in spending occurred in the Martin-Hunter race, where both candidates opted out of the program. In four races, candidate spending totals were nearly identical.[43] In two races where both candidates were publicly financed, final spending totals were within 1 percent of each other.[44]

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42 Chief Justice Henry Frye lost to Associate Justice I. Beverly Lake.

43 Parker v. Tyson, Bryant v. Stubbs, Timmons-Goodson v. Levinson, and Hudson v. Calabria.

44 Timmons-Goodson v. Levinson, and Hudson v. Calabria.

## C : FUNDING SUFFICIENCY

Funding for the Public Campaign Fund has been sufficient, but the program's original funding design was changed after the $3 check-off and the voluntary attorney contribution produced less than expected revenues. As of November 2008, the Public Campaign Fund had $2.8 million on hand, after spending $3.2 million in that year's election for grants to certified candidates and voter guides in both the primary and general election. The Fund now receives about $2.3 million a year, or $4.6 million per election cycle, with the taxpayer check-off bringing in a little more than the attorney surcharge. With taxpayer participation below 10 percent, however, North Carolina should consider changing the sources for the Public Campaign Fund. The check-off, for instance, could be converted from opt-in to opt-out, or the Elections Board could increase advertising to promote its merits.

The two most significant funding problems in the 2004 election were handled in advance of the 2006 election. First, in 2005, the legislature made attorney contributions mandatory (see II. A. Sources of Funding). Second, the Elections Board had to prorate public funding across more candidates than anticipated due to an unusual plurality election in 2004.[45] In that race, a Supreme Court justice retired from the bench after the primary election, but before the general. Eight candidates ran and five received public money, but the Elections Board prorated public funds among the five.

Three future issues might potentially threaten the Public Campaign Fund's financial sustainability if they are not resolved soon. They are:

- Low taxpayer participation in the voluntary $3 check-off;
- Legal challenges to the $50 attorney surcharge; and
- Lack of inflation adjustments for Public Campaign Fund revenues.

### 1. **Low Check-Off Participation**

The taxpayer check-off is the largest source of revenue for the Public Campaign Fund. North Carolina asks taxpayers to voluntarily designate $3 from their income tax payments to the Public Campaign Fund. This does not increase their tax liability. Only seven percent of voters used the check-off in 2004, a figure much lower than supporters predicted.[46] Public opinion research conducted by the nonpartisan North Carolina Center for Voter Education indicated strong voter support for the Public Campaign Fund, but for unknown reasons this support did

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45 In plurality elections the top vote getter wins even if he or she does not receive more than 50 percent of the vote. Usually these involve more than two candidates running for the same seat.

46 "Who's Funding Judicial Elections, Past and Future?" *Democracy North Carolina,* available at: http://www.democ racy-nc.org/nc/judicialcampaignreform/whosfunding.shtml. One Democracy North Carolina study said 10 percent was needed to fund the program and 15 percent was needed to fund the voter guide.

not translate into heavy use of the taxpayer check-off.[47]

Numerous civic organizations contributed to a massive public education effort to raise awareness about the check-off, including television advertising by former governors Jim Hunt (D) and Jim Holshouser (R). Nevertheless, few taxpayers participate in the check-off. The check-off brought in approximately $1 million for the 2004 election. Contributions rose to about $2.2 million for the 2006 election, as this number included two years of check-offs (2005 and 2006).[48] Based on cost estimates by Democracy North Carolina, the Public Campaign Fund would have required at least 11 percent participation in the check-off to be solvent if the only other major source was voluntary contributions from attorneys.[49]

More taxpayers may be willing to utilize the check-off than actually do so. It is likely that low participation is a result of confusion about how the check-off works. Many taxpayers may choose "No," believing that a "Yes" will cost them more money. The legislature, concerned that the check-off wording suppressed participation, amended the language appearing on tax return to read: "Mark 'Yes' if you want to designate $3 of taxes to this special Fund for voter education materials and for candidates who accept spending limits. Marking 'Yes' does not change your tax or refund."[50] The change first went into effect on 2007 tax returns, and early figures seem to show an increase in participation. In 2007, approximately 425,400 people marked "yes" on their tax returns, and in 2008, approximately 406,272 people did so. This means contributions rose to about $2.5 million for the 2008 election, including check-offs from 2007 and 2008.

2. **Legal Challenges to the Attorney Surcharge**

The North Carolina Bar Association initially opposed the legislature's effort to make attorney contributions mandatory, and only agreed to a public education effort to encourage attorney compliance. After an abysmal participation rate in 2003 and 2004, the state legislature decided to require mandatory payments from attorneys.

Attorneys have challenged the surcharges in state court. A ruling against mandatory contributions would strike a major blow to the Public Campaign Fund's revenue stream.

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47 Scott Crosson, "Impact of the 2004 North Carolina Judicial Voter Guide: Exit Poll Study Report," *North Carolina Center for Voter Education and Justice at Stake Campaign*, 2005.

48 State Board of Elections; Figures for the 2004 election refer to data from FY 2003 and 2004, figures for the 2006 election refer to date from FY 2005 and 2006.

49 "Judicial Reform Becomes Law," *Democracy North Carolina*, available at: http://www.democ racync.org/nc/judicialcampaignreform/govsigns.html.

50 Previous tax returns used the following language: "The fund pays for a nonpartisan voter guide and helps fund judicial candidates who accept strict fund-raising and spending limits. Do you agree that $3 should go to this fund? Filing in a circle below will not increase your tax or reduce your refund."

3. **Lack of Adjustments for Inflation**

In the long run, there are problems with both major funding sources—taxpayer check-offs and attorney fees—because neither the $3 check-off nor the attorney fees adjust with inflation. Grants to certified candidates, however, are pegged to the candidate's filing fee that typically increase with each new election. Unless North Carolina's population continues to grow, an ever increasing number of taxpayers check "Yes" on the earmark and/or the number of practicing attorneys increases every year, the Public Campaign Fund will be unable to keep pace with rising campaign costs.

If the legislature or the Elections Board automatically adjusted taxpayer check-offs and attorney fees for inflation, the Public Campaign Fund would likely be able to perpetually deal with rising campaign costs.

## D : EQUITY AND FAIRNESS

The stated purpose of the Act is:

> *to ensure the fairness of democratic elections in North Carolina and to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, those effects being especially problematic in elections for the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts.*[51]

This section analyzes whether the program serves both publicly and privately financed candidates equitably and whether they are able to competitively compete against one another.

1. **Reduced Influence of Private Contributors**

The report analyzes how well the Act has reduced conflicts of interest and the influence of campaign contributions that could impugn a judge's impartiality, and whether the Public Campaign Fund eliminated private contributions or merely shifted them from the general election to the primary election. The primary purpose of judicial public financing programs is to eliminate any favorable treatment that parties in litigation may receive from a judge to whom they contributed campaign funds.

Some candidates who participated in the Public Campaign Fund relied heavily on contributions from lawyers to meet the qualifying threshold. Attorneys are the most likely contributors to judicial elections, because they are likely to be familiar with the candidates in what are otherwise low-profile races. Unfortunately, attorney contributors also pose the biggest risk for

[51] North Carolina General Statute §163-278.61.

potential conflicts of interest.

According to research by Democracy North Carolina, attorneys or attorney committees contributed 54.6 percent of money raised in 2002.[52] An additional 18.4 percent came from political parties and political action committees. While the Act did not eliminate the influence of outside entities, it significantly reduced the share of campaign money contributed by these sources. Because of the limits on private fundraising, it is impossible for private contributions to provide more than 35 percent of total dollars raised for participating candidates.

For certified candidates, private funds make up anywhere from 14 to 35 percent of total dollars raised, depending on the office sought. The chart displays the percent of funds that can be raised from private sources, excluding matching funds and contributions made by the candidate or the candidate's immediate family.

FIGURE 3. **PERCENTAGE OF FUNDS FROM PRIVATE SOURCES**

| Office | Minimum | Maximum |
|---|---|---|
| Supreme Court (Chief Justice) | 14% | 28% |
| Supreme Court (Associate Justice) | 15% | 28% |
| Court of Appeals | 19% | 35% |

Public funding programs that provide funds for the primary and general elections are more costly than those that fund the general election alone. In those jurisdictions, the public subsidizes the cost of the primary election, which usually includes more candidates than a general election. Programs of this type usually require candidates to raise a set number of contributions in symbolically low amounts—$5 to $100—to indicate broad public support for their candidacy.

To put it in perspective, if the state provided primary election funds, it would have cost North Carolina an additional $557,880 in 2006, assuming all eight certified candidates received public money equal to the maximum they could raise as qualifying contributions and assum-

52 "Funds Raised by Appellate Court Candidates in 2002 That Would be Restricted in 2004," *Democracy North Carolina*, available at: http://www.democ racy-nc.org/nc/judicialcampaignreform/funds%20 restricted.pdf; Democracy North Carolina excludes small contributions for which contributors do not have to disclose their occupations, and contributions by the candidate and candidate's committee.

ing they faced no other qualifying candidates in their primaries.[53] North Carolina decided to fund only the general election based partially on financial considerations and partially on a desire to give publicly funded candidates "authority from the voters."[54]

2. **Reduction in Excess Spending**

The Public Campaign Fund's matching funds provision is a widely used and accepted tool in many campaign financing systems because it allows certified candidates to be competitive with non-participating opponents. Certified candidates abide by spending limits even as their opponents or outside groups can make unlimited expenditures. Matching funds enable certified candidates to keep pace.

North Carolina has only distributed matching funds twice over the life of the program. In her 2006 run for Chief Justice, Supreme Court Justice Sarah Parker raised $74,215 in qualifying contributions from 685 donors—almost all of them attorneys and their spouses. She also received over $370,000 in public funds. Parker's opponent, Superior Court Judge Rusty Duke, who opposed public financing, spent $155,000 more than the $216,650 spending cap for publicly-funded candidates, triggering a dollar-for-dollar disbursement of $155,000 in matching funds to Parker. In the end, Parker won the election 67 to 33 percent.[55]

Judge Duke described how matching funds deterred his continued fundraising, saying:

> *The process created by the campaign financing law made it so that I did not want to raise more money for my campaign. I reached the point where my campaign contributed indirectly, through the rescue funds law, approximately $100,000 [sic] to my opponent's campaign, by raising that amount of money over the limit. And when I saw that, we quit raising money. It's just a very frustrating, very counterproductive, process when you're raising money for your opponent and your opponent doesn't have to go through the expense of raising it.*[56]

Duke's complaint was rejected by the U.S. Court of Appeals in *North Carolina Right to Life v. Leake.* The second example of matching funds being awarded occurred in 2008, in the Supreme Court race of Robert Edmunds Jr. against Suzanne Reynolds.

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53 The seven certified Court of Appeals candidates would have cost the program $69,360 each and the one certified Chief Justice of the Supreme Court candidate would have cost an additional $72,360.

54 Telephone Interview with Bob Phillips, Executive Director Common Cause North Carolina, October 29, 2007.

55 "A Profile of the Judicial Financing Program, 2004-06," *Democracy North Carolina*, http://www.democracy- nc.org/nc/judicialcampaignreform/impact06-06.pdf

56 Telephone Interview with Judge Rusty Duke, Senior Resident Superior Court Judge, January 8, 2008.

## E : IMPLEMENTATION AND CHANGES

This section considers the effectiveness of the Act's implementation and how well the Act has handled the unexpected events and realities of judicial campaigns. The section concludes by analyzing the response of the legislature and Elections Board in addressing these problems.

### 1. **Plurality Elections**

In North Carolina's first publicly financed judicial election, Supreme Court Justice Bob Orr vacated his seat between the primary and general elections. The race to fill his vacancy was held at the same time as the general election in a "winner-take-all" plurality election. Eight candidates entered the race, five accepting public funding. A sixth candidate failed to qualify. The winner, publicly financed candidate Paul Newby, was elected directly to the Supreme Court, with fewer than 25 percent of the votes cast in the race.

Because the Public Campaign Fund is designed to provide public funds for only two candidates at a time, it is not adequately prepared to fund multi-candidate runoff elections. The cost required to fund a pool of five candidates strained the Elections Board and the Board had to prorate the public grant. Each received $80,710, less than half of the $201,775 they would have been entitled to in a non-vacancy contest.

The legislature addressed this situation in 2006, amending the law governing vacancies that occur after the primary filing period by eliminating the possibility of plurality elections. If the vacancy occurs more than 63 days before the scheduled general election, all candidates compete in a primary election and the top two finishers face off in the general election. However, when a vacancy occurs fewer than 64 days before the general election, the election must utilize the "instant runoff voting"[57] process and be held on the same day as the general election.[58] Public financing is available in these races.[59]

### 2. **Voter Guides**

Voter guides serve a needed role by increasing voter information. During the first publicly funded election, the North Carolina Center for Voter Education and the Justice at Stake Campaign, a non-profit organization that promotes fair and impartial courts, conducted an exit poll to measure the influence of the voter guide. According to the findings, 38 percent of people who received the voter guide called it their primary source of information for judicial races, a figure greater than TV news, newspapers and advertising combined.[60]

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57 Instant runoff voting systems require voters to rank all their choices for a given office in order of preference. A candidate wins if he or she receives more than 50 percent of the first choice votes.

58 North Carolina General Statute §163-329.

59 North Carolina General Statute §183-278.64A.

60 Crosson, *supra* note 47.

Non-partisan voter guides are an excellent and necessary component of judicial elections. The only criticism they have received is that distributions were delayed in 2004 because of funding concerns. That year the state legislature provided additional money to the Public Campaign Fund when it appeared that the income from the check-off would not cover the cost of production and mailing of the voter guides.[61] In the end, the Elections Board mailed the guides in time for the general election, but voters in some localities did not receive them before early voting began.[62] Funding for the voter guide does not appear to be in any danger in future elections, and the law was changed to require the Election Board to mail the guide earlier.

3. **Controlled 527 and Independent Expenditures**

While traditional independent expenditure committees have reporting and disclosure requirements, the legislature exempted certain groups organized under Section 527 of the Internal Revenue Code from these requirements as long as the ads did not use the language of "express advocacy." Express advocacy is usually defined by the presence of so-called "magic words" identified in *Buckley v. Valeo.* Specific examples include the terms "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat" and "reject."[63] Ads run by 527 groups often do not explicitly advocate the election or defeat of a candidate, and for that reason they are often labeled "issue ads."

Only once have outside groups played a significant role in a North Carolina judicial campaign. The failure of the Public Campaign Fund to deal with unregulated outside spending became apparent in 2006, when a group with a clear partisan bias ran ads promoting several Supreme Court candidates. The Elections Board was slow to intervene, but the legislature subsequently changed the law to expedite future responses. Now groups have to report spending within 24 hours of raising or spending $5,000, and must follow an expedited reporting schedule set by the Elections Board to reveal additional funds raised or spent. Also, after the 2006 election, the law was changed so that, in addition to independent expenditures, certain "electioneering communications" by 527 or other groups will count towards trigger amounts for matching funds if the Election Board "ascertains that the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Candidates opposed by electioneering communications may now receive matching funds, even if the ad does not contain the "magic words" of express advocacy.

61 "Judicial Public Financing Success, By the Numbers," *Democracy North Carolina,* available at: http://www.democracy-nc.org/nc/judicialcampaignreform/JCRAsuccess.pdf

62 Telephone Interview with Bob Hall, August 21, 2007.

63 *Buckley v. Valeo,* 424 U.S. 1 at 44, n.52 (1976).

One 527 group, FairJudges.net, spent $200,000 running a television ad in the final week of the 2006 campaign.[64] The Democratic Party was FairJudges.net's primary funder, and the group was staffed by a consultant to the party. The ad broadcast the message, "Fair, unbiased judges—that's what we need in our North Carolina courts," followed by the names of four Supreme Court candidates.[65] Three of the four candidates were Democrats. The fourth, Republican Mark Martin, was opposed by Rachel Lea Hunter, a Democrat that many, including her own party's leaders, considered unqualified for office.

The two publicly financed candidates with opponents endorsed by the Fair-Judges.net ad alleged that the ads violated restrictions on coordinated expenditures and that they should be entitled to matching funds. The ad occupied a gray area between independent expenditures and issue ads, as it did not expressly advocate the election or defeat of any candidate. The Elections Board refused to grant the matching funds but authorized an investigation into whether the group illegally coordinated its expenditures with the Democratic Party.

Soon after the election, unsuccessful candidate Ann Marie Calabria argued that the ads were responsible for her 20,000 vote loss and demanded that the Elections Board refuse to certify Robin Hudson, who was mentioned in the ad, as the winner. The Board considered the claims but unanimously decided there was no basis to call a new election.[66]

Because of constitutional concerns, there are no limits on how much independent expenditure committees or issue ad groups can raise or spend. After the FairJudges ad, independent expenditures have not played a role in North Carolina's judicial elections, except for the matching funds provided to certified candidates as a result of a modest amount of independent expenditures by the state Democratic Party in 2008. However, evidence from other jurisdictions suggests that independent spending may in time become more prevalent.

4. **Problems Addressed**

A number of unanticipated difficulties in the 2004 election warranted legislative or administrative response. The legislature and Elections Board handled the following difficulties with alacrity:

***Improved Attorney Contributions*** : After two years of dismal voluntary $50 contributions by attorneys, the legislature increased program revenue by adopting a mandatory $50 surcharge on the annual dues attorneys must pay to the State Bar.

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64 "Letter to Larry Leake Regarding FairJudges.net," *Democracy North Carolina,* available at: http://www.democracy-nc.org/nc/judicialcampaignreform/FJcomplaint.pdf.

65 *Id.*

66 Steve Hartsoe, "Hudson to Take Seat on High Court," *News and Observer*, December 21, 2006.

***Improved 527 Loophole*** : The experience of FairJudges.net revealed a loophole in the matching funds provision that in some cases prevented candidates from receiving matching funds. The legislature revised the formula for determining whether matching funds are necessary. The program is now able to deal with ads that are clearly electioneering, if they appear in future elections.

***Plurality Elections*** : The Public Campaign Fund was not prepared to deal with plurality elections in 2004, which led to under-funded races for a Supreme Court seat. The legislature revised the law to prevent this from happening in time for the 2006 election.

***Revised Taxpayer Check-off Language*** : Taxpayers who wished to support judicial public financing may have been uncertain about whether participating in the check-off would increase their tax liability. The legislature revised the language that appears on North Carolina tax returns to clarify the check-off. The 2007 returns were the first to display the new language, and early indications are that contributions have gone up.[67]

## F : NEXT STEPS

Reformers, judges and legislators, bolstered by the perceived successes of judicial public financing, have made efforts to expand public financing in North Carolina into other arenas. In 2008, three additional statewide offices were publicly financed for the first time and a city began developing the rules for offering candidates public financing in its local elections. Moreover, the legislature created a new joint legislative committee to oversee campaign finance regulations and recommend future changes to the laws.

### 1. Pilot Program for Statewide Elections

In August 2007, North Carolina lawmakers passed the Voter-Owned Elections Act to expand public financing to three low-visibility statewide races.[68] The law applies to candidates for Commissioner of Insurance, State Auditor and Superintendent of Public Instruction. All three races appeared on the November 2008 ballot. The Voter-Owned Elections Act creates a voluntary public financing system, similar to the judicial program, although both the number of qualifying contributions and the size of the public grants are larger. The law also sets aside $4.6 million from the state's general fund to finance the program. This is an improvement over the funding mechanism in the judicial financing program, which relies on a more unreliable source, taxpayer check-offs. Although the program does not expire, the funding allotment does not fund the program beyond the 2008 election.[69] Because funding relies on

67 State Board of Elections.

68 North Carolina Session Law 2007-540.

69 "NC lawmakers approve expanding public campaign financing," *Associated Press,* August 2, 2007.

annual allocations by the legislature, it is subject to political pressures.

The Voter-Owned Elections Act also improves on the model of the judicial program by limiting individual qualifying contributions to $200 for the three statewide offices. These small contributions make it less likely that supporters will be able to "buy" access to office holders.

2. **Public Financing in Local Elections**

Because North Carolina is not a "home rule" state, cities and towns in North Carolina cannot adopt public financing for local races without express authorization from the legislature. "Home rule" refers to the legal authority of local governments to enact and enforce local laws.[70] The continued survival of a local government public financing program depends on the degree to which the local jurisdiction may adopt laws that supplement, or in some instances conflict with, the state campaign finance laws.

In 2000, the Town of Cary established a public financing program without legislative authorization, and the Elections Board eventually ruled that the program violated a state law prohibiting corporate contributions over $4,000.[71] The Elections Board determined that because the Town of Cary is incorporated, the state law restricting the amount of money corporations could give to candidates applied to the town itself when, as part of its public financing program, it distributed more than $4,000 in public money to candidates.

In July 2007, the North Carolina legislature approved public financing for the Town of Chapel Hill.[72] The bill authorized a pilot program for city elections in 2009 and 2011.[73] In June 2008, the town created a public financing program for Mayoral and Town Council elections. Under the plan, candidates may raise small amounts of seed money before deciding to accept public financing: $750 for Town Council and $1,500 for Mayor. To qualify for public financing, candidates for Town Council must collect between $750 and $2,250 in small contributions to receive $3,000 in public funds. Candidates for Mayor must collect between $1,500 and $4,500 in small contributions to qualify for $9,000 in public funding.[74]

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70 "Investing in Democracy: Creating Public Financing of Elections in Your Community," *Center for Governmental Studies* 2003, p. 31.

71 Steven M. Levin, "Keeping it Clean: Public Financing in American Elections," *Center for Governmental Studies,* 2006.

72 North Carolina Session Law 2007-222.

73 "Chapel Hill Public Financing Bill Clears Both Chambers," *North Carolina Center for Voter Education,* available at: http://www.ncvce.org/index.php?page=Chapel%20Hill_Release.

74 An Ordinance Establishing the Town of Chapel Hill Voter Owned Elections Program (2008-06- 09/O-10) available at: http://www.indyweek.com/pdf/061108/CHOrdinance.pdf.

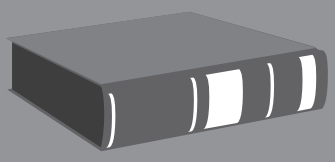
3. **Joint Legislative Elections Oversight Committee**

In 2008, the legislature created the Joint Legislative Elections Oversight Committee to "examine, on a continuing basis, election administration and campaign finance regulation in North Carolina."[75] This new committee has nine Senators and nine House members, and its partisan composition must reflect that of the respective chamber. Members are appointed to two-year terms beginning in odd-numbered years.

The committee's responsibilities include studying the budgets and activities of the Elections Board, tracking election administration and campaign financing court cases and statues in North Carolina and elsewhere and recommending legislative changes to the General Assembly. As a dedicated overseer, the committee should help guarantee that North Carolina's campaign financing programs do not become obsolete.

75 North Carolina Session Law 2008-150.

PART : **04**



# 04 : **RECOMMENDATIONS**

North Carolina's Public Campaign Fund has existed for only a few full election cycles, but is already working well. This report suggests a few reforms to help ensure that the program is a long-term success.

## 1 : IMPROVE THE TAX CHECK-OFF PROVISION

In order to ensure the long-term viability of the program, North Carolina should consider altering the taxpayer check-off system. As it stands, a small number of voters have utilized it. Numerous public interest organizations, judges and former political figures from both parties have made efforts to increase public awareness of the Public Campaign Fund and the simplicity of the check-off.

Any concerns that the three recommendations below would over-fund the program could be allayed with a provision that provides that if at any time the Public Campaign Fund contains money over a certain threshold, the excess must revert to the general fund. This threshold would need to be adjusted for inflation.

### a. Change from Opt-In to Opt-Out

During the crafting of the Act, the legislature considered an opt-out check-off, which it eventually replaced with an opt-in check-off.[76] Currently, North Carolina's state income tax forms ask taxpayers to check "Yes" if they would like to earmark part of their taxes to the Public Campaign Fund. By contrast, an opt-out check-off would automatically designate money to the Public Campaign Fund unless the taxpayer indicates he or she does not want to contribute to the Public Campaign Fund. During the legislative debates, this provision met with strong opposition.

An opt-out check-off would probably increase Public Campaign Fund income because voters who are ambivalent about the check-off may be unlikely to change the default designation. Additionally, many taxpayers skip the check-off question altogether, automatically designating money to the Public Campaign Fund.

76 Doug Bend, "North Carolina's Public Financing of Judicial Campaigns: A Preliminary Analysis," *Georgetown Journal of Legal Ethics,* Summer 2005.

The original legislation anticipated higher revenues from an opt-out check-off. It selected a $1 amount per taxpayer instead of the $3 amount currently used. If the current check-off was suddenly transformed into an opt-out program, too much traditional tax revenue could flow into the Public Campaign Fund. To remedy this, North Carolina could reduce the check-off from $3 to 50 cents or have the excess transferred to the general fund.

**b. Allow Funding for Unmarked Check-Offs**

Another possible solution is to allocate money to the fund if the taxpayer skips the check-off question. From a funding standpoint, an unmarked check-off is functionally equivalent to selecting "No." A taxpayer who selects "No" makes a statement opposing the program's funding, whereas a taxpayer who leaves the question unmarked may have inadvertently skipped the question. An unmarked check-off means the taxpayer did not express any opposition to funding the program.

According to an early analysis of the Public Campaign Fund, the legislature introduced a bill in 2004 that would have required "the North Carolina Department of Revenue to allocate fifty cents per taxpayer to the fund if they neither agreed nor opposed the $3 check-off, but left it unmarked. A fiscal analysis of the bill found . . . that the fifty cent allocation would supply approximately $600,000 for the fund per year or $1.2 million per election cycle."[77]

North Carolina could designate $0.50 to the Public Campaign Fund for every unmarked check-off.

**c. Replace Check-Off with General Fund Appropriation**

Successfully meeting Public Campaign Fund costs likely requires approximately $2 million each two-year election cycle. Voter guides cost about $500,000 to produce and mail; public money disbursements amount to about $1.5 million[78] (more if matching funds are distributed); and the Elections Board has modest administrative costs associated with the program.

Often, the best way to ensure that funding levels are steady and sufficient is to replace the taxpayer check-off with a direct general fund appropriation. This would have little discernable impact on the amount of revenue going to the state. An appropriation could include automatic inflationary adjustments. If attorney contributions are found unconstitutional at some point in the future, the appropriation could be adjusted to supplant the funding shortage.

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77 *Id.*

78 Assuming 75 percent of general election candidates participate.

## 2 : EXCLUDE PRIMARY SPENDING FROM THE TRIGGER FOR MATCHING FUNDS

Currently, for privately financed candidates, money raised or spent in the primary election is counted toward the general election trigger for releasing matching funds to their opponents. As a result, even without the aid of matching funds, publicly financed candidates may raise and/or spend more than their privately financed counterparts.

In the primary, publicly financed candidates may raise a total of $87,000 ($10,000 in seed money and $77,000 in private contributions).[79] Privately financed candidates can raise more than $77,000, but once they pass this mark they trigger matching funds for their opponents. Privately financed candidates may spend up to a total of $160,000 in the general election before triggering matching funds, but this includes money spent on the primary, too. (The $160,000 figure is equal to the public grant that participating candidates receive in the general election.) For instance, a privately financed candidate could raise $77,000 in the primary without triggering matching funds; however, he or she could raise only $83,000 more in the general before triggering matching funds. In essence, a publicly financed candidate can raise and spend $247,000 ($87,000 in the primary and $160,000 in the general), but a privately financed one can only spend $160,000, before triggering matching funds.

A publicly financed candidate receives $1 in matching funds for every $1 raised by the privately financed candidate. In this way, the publicly financed candidate will always be able to raise and spend more than the privately financed candidate, regardless of matching funds.

The problem lies in the method of calculating when a candidate reaches the trigger for matching funds. For reasons of fairness, the legislature intended the trigger for matching funds to be equal to the expenditure limit on publicly financed candidates. But in practice it is not.

To fix this provision, North Carolina should assess only general election spending by privately financed candidates when calculating the general election trigger for matching funds. Revising the formula in this way would ensure that publicly financed candidates will not unduly benefit from the program.

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79 This amount varies for every publicly financed candidate based on what they are able to raise as seed money and qualifying contributions. A publicly financed candidate who raises no seed money and only the minimum amount needed to qualify for the program will only have a $38,000 advantage. For simplicity, all values discussed in this section refer to Court of Appeals candidates, but the information applies to Supreme Court candidates, as well.

### 3 : EXPAND THE PROGRAM TO FUND THE PRIMARY CAMPAIGN

Ideally, North Carolina should expand the program to provide funding for the primary election, to protect candidates from the potential dangers of private contributions during both the primary and general elections.[80] Currently, participating candidates must still rely on private financing during the primary election.[81]

North Carolina could restructure its program to provide public funds on a matching basis or as a block grant. Under a matching formula system, campaigns may only collect small contributions. The state agrees to provide funds according to a predetermined matching ratio. For instance, a program with a 4:1 match would provide any candidate that collects $100 from a private contributor with an additional $400 in public funds. Matching formulas award public money to candidates according to the amount they are able to raise privately.

Block grant systems, by contrast, require the candidate to collect a symbolic number of small contributions to prove their commitment to the campaign and show public appeal. For example, candidates may be required to collect 1,000 contributions of $5 each. A candidate who reaches this threshold receives a block grant of funds to spend on the primary election.

North Carolina should consider a new revenue source to cover the additional cost of expanding the program to primary elections. Often, the most reliable way of instituting public financing for the primary election is through a systematic general fund appropriation, which may be preferable to relying on voluntary taxpayer contributions or attorney surcharges.

### 4 : ADJUST INCOME SOURCES FOR INFLATION

Taxpayer checkoffs and the attorney surcharge are not adjusted for inflation. The amounts awarded to candidates are not adjusted for inflation, but are pegged to a surrogate for inflation, namely candidate filing fees which are in turned pegged to the salaries of judges; those salaries change through legislative action, not by an automatic cost-of-living adjustment. As time goes on, it is likely that fewer dollars will flow into the Public Campaign Fund than will flow out to candidates.[82] Public financing programs in jurisdictions sometimes fail

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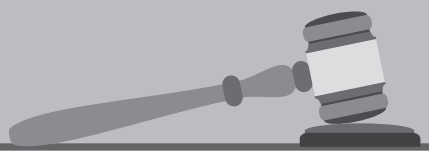
80 This report recognizes that in order to pass the program, a compromise was made to include funding for the general election only, and that according to many involved in the implementation of the program, most big contributors donated during the general election.

81 It should be noted, however, that the way the program is currently structured, candidates are prohibited from raising more than $87,000 in private funds ($10,000 in "seed money" and $77,000 in qualifying contributions) during the primary elections.

82 Inflationary adjustments would not be needed if simultaneously population growth matched the rate of inflation and the number of taxpayers contributing to the fund remained constant.

because they are outpaced by inflation. North Carolina should index the amounts awarded to candidates, the check-off amount and attorney surcharge for inflation. Ideally, this would be done automatically or by the Elections Board without involving the legislature.

PART : **05**



# 05 : **CONCLUSION**

North Carolina's Public Campaign Fund is widely recognized as an effective tool to preserve judicial impartiality. With one of the first judicial public financing programs in the country, North Carolina can and should serve as a model for other states. Public financing has reduced the influence of private contributors and helps insulate judges from politics. Many of the other states that directly elect some or all of their judges could benefit from North Carolina's experience with judicial public financing.

By implementing the recommendations in this report, North Carolina will go a long way toward building a judicial public financing system that will continue to insulate judges from outside influences. All signs indicate that judicial participation will remain strong, as long as participants remain competitive against non-participants. With successful funding, there is little doubt that the program will remain effective for a long time.

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# Appendixes :

**APPENDIX 1 :** CHECKLIST OF PROPOSED REFORMS TO NORTH CAROLINA'S JUDICIAL PUBLIC CAMPAIGN FINANCING LAW

Below is a summary of recommendations to improve North Carolina's public campaign financing law for judicial elections.

1. ***Improve the Voluntary Taxpayer Check-Off***
   North Carolina should change the check-off from opt-in to opt-out, provide funding for unmarked check-offs, or fund the program directly from the general fund.

2. ***Revise the Trigger for Matching Funds***
   North Carolina should use only general election spending by privately financed candidates when calculating the general election trigger for matching funds.

3. ***Expand Public Funding to the Primary Election***
   North Carolina should provide public funds in the primary election as well as in the general election.

4. ***Adjust Program Funding Sources for Inflation***
   North Carolina should index the taxpayer check-offs, the attorney surcharge and public funds grants to candidates for inflation.

**APPENDIX 2 :** LIST OF PUBLICATIONS

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Mixed Sources

# Public Campaign Financing:

## North Carolina Judiciary

## balancing the scales

North Carolina established the nation's first functioning judicial public campaign financing program for judicial elections in 2004. The program is widely considered a model of reform and is potentially applicable to other states. North Carolina provides full public financing for general election campaigns of candidates running for the Court of Appeals or Supreme Court. The program is designed to increase public confidence in the courts by eliminating private contributions to judicial candidates.

Now, two elections after its implementation, support for North Carolina's program is widespread among judicial candidates, the courts, the legislature and the public. Nonetheless, recent elections have revealed a few shortcomings that must be remedied before they become substantial weaknesses.

*Balancing the Scales* recommends a number of reforms to reduce potential conflicts of interest that for too long have plagued North Carolina's judicial elections:

- Expand public campaign financing to fund primary elections.
- Improve funding mechanisms to add more money to the program.
- Automatically adjust funding sources for inflation without the need for legislation.
- Eliminate a loophole that, in some cases, enables publicly financed candidates to spend more money than their privately financed opponents.

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