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# Public Campaign Financing in North Carolina Judiciary

BALANCING THE SCALES

Sasha Horwitz

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CENTER *for* GOVERNMENTAL STUDIES

2008



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# Foreword

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This report examines public campaign financing in North Carolina. The Center for Governmental Studies (CGS) has studied public campaign financing in state and local elections for 25 years. The goal of this effort is to gauge how public campaign financing programs are working and determine whether changes are necessary.

CGS has published a comprehensive analysis of public financing in 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 Wisconsin, *Public Campaign Financing in Wisconsin: Showing its Age* (2008); New Jersey, *Public Campaign Financing in New Jersey—Governor: Weeding Out Big Money in the Garden State* (2008) and *Public Campaign Financing in New Jersey—Legislature: A Pilot Project Takes Off* (2008); Minnesota, *Public Campaign Financing in Minnesota: Damming Big Money in the Land of 10,000 Lakes* (2008); Michigan, *Public Campaign Financing in Michigan: Driving Towards Collapse?* (2008); Tucson, *Political Reform That Works: Public Campaign Financing Blooms in Tucson* (2003); New York City, *A Statute of Liberty: How New York City's Campaign Finance Law is Changing the Face of Local Elections* (2003); Suffolk County, NY, *Dead On Arrival? Breathing Life into Suffolk County's New Campaign Finance Reforms* (2003); San Francisco, *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 these and other CGS reports are available at [www.cgs.org](http://www.cgs.org).)

CGS thanks the public officials, administrators and advocates on both sides of the public financing debate who assisted in the preparation of this report by providing invaluable information, suggestions and stories about public financing in North Carolina.

Sasha Horwitz, formerly CGS California Governance Project Manager, authored this report. Horwitz received his Master of Public Policy from the Goldman School of Public Policy at UC Berkeley. CGS Chief Executive Officer Tracy Westen, President Bob Stern and Director of Political Reform Jessica A. Levinson provided editorial comments and invaluable oversight.

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. 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.

The Rockefeller Brothers Fund provided generous grants to make this report possible. However, the Fund is not responsible for the statements and views expressed in the report.

# Contents

.....

*Foreword*   iii

*List of Figures*   vii

## **EXECUTIVE SUMMARY   1**

### **I. INTRODUCTION   5**

A. Why Did North Carolina Enact Judicial Public Campaign Financing?   5

B. Judicial Elections in North Carolina   8

### **II. THE JUDICIAL CAMPAIGN REFORM ACT   9**

A. Sources of Funding   10

B. Candidate Qualification   13

C. Spending Limits and Matching Funds   14

D. Voter Guide   15

E. Legal Challenges   16

### **III. ANALYSIS OF NORTH CAROLINA'S JUDICIAL PUBLIC FINANCING PROGRAM   19**

A. Candidate Participation   19

B. Financial Impacts   20

C. Funding Sufficiency   21

1. Low Check-Off Participation   21

2. Legal Challenges to Attorney Contributions   22

3. Lack of Adjustments for Inflation   23

- D. Equity and Fairness 23
  - 1. Reduced Influence of Private Contributors 23
  - 2. Reduction in Excess Spending 25
- E. Implementation 25
  - 1. Plurality Elections 26
  - 2. Voter Guides 26
  - 3. Controlled 527 and Independent Expenditures 27
  - 4. Problems Addressed 28
- F. Next Steps 29
  - 1. Pilot Program for Statewide Elections 29
  - 2. Public Financing in Local Elections 29
  - 3. Joint Legislative Elections Oversight Committee 30

#### **IV. RECOMMENDATIONS 31**

- 1. Expand the Program to Fund the Primary Campaign 31
- 2. Improve the Tax Check-Off Provision 32
  - a. Change from Opt-In to Opt-Out 32
  - b. Allow Funding for Unmarked Check-Offs 33
  - c. Replace Check-Off with General Fund Appropriation 33
- 3. Adjust Income Sources for Inflation 34
- 4. Exclude Primary Spending from the Trigger for Matching Funds 34
- 5. Send Voter Guides to Households with at Least One Registered Voter 35

#### **V. CONCLUSION 37**

#### **VI. APPENDIXES 39**

- 1. Checklist of Proposed Reforms to North Carolina's Judicial Public Campaign Financing Law 39
- 2. List of Publications 41

#### **VII. BIBLIOGRAPHY 45**

# List of Figures

.....

- FIGURE 1** Amount of Funding, Fiscal Year 2003–2004 12
- FIGURE 2** Amount of Funding, Fiscal Year 2005–2006 13
- FIGURE 3** Qualifying Contributions 14
- FIGURE 4** Public Funds Distributed to Qualifying Candidates 15
- FIGURE 5** Percentage of Funds from Private Sources 24







## EXECUTIVE SUMMARY

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In 2002, the state of North Carolina enacted a landmark judicial campaign finance reform law, creating the North Carolina Public Campaign Fund (“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 two elections in 2004 and 2006, candidates and the reform community are overwhelmingly positive about the program. The program is widely considered a model for judicial campaign financing in other states. Nevertheless, some familiar with the program criticize aspects of the law, particularly its failure to fund candidates in primary elections.

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 basic premise of the Public Campaign Fund 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 sizable 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.

Participating candidates can raise up to \$10,000 in “seed money” before opting into the program and can raise approximately \$77,000 in qualifying contributions during the primary election. Candidates must collect qualifying contributions from North Carolina residents in amounts from \$10 to \$500. In the general election, participating Court of Appeals candidates may receive \$160,000 in public funding, and participating Supreme Court candidates may 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 who are opposed by independent expenditures may receive additional “rescue funds” to ensure that they remain competitive. 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 fund is also supported by a \$50 mandatory contribution by practicing attorneys.

In existence for only two election cycles, the Public Campaign Fund is a strong and effective way to finance judicial elections. Participation rates are high, and participating candidates have expressed their satisfaction with the program. The legislature and Elections Board have both worked to address problems quickly and effectively.

*Balancing the Scales* analyzes the Public Campaign Fund, 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. In general, North Carolina's Public Campaign Fund is working well, although the report suggests improvements to the program:

### ***1. Expand Public Funding to the Primary Election***

By funding only the general election, the Public Campaign Fund fails to insulate candidates from private contributors who may seek preferential treatment from judges through contributions in primary elections. The program should provide public funds in the primary elections as well. This would require the legislature to redesign the process of qualifying for public money; currently all primary funding comes from private qualifying contributions. This reform could increase the cost of the program by more than half a million dollars per election and require that several other aspects of the program be redesigned, including the funding mechanism. The reforms would help ensure that the Public Financing Fund can eliminate the perceived or actual influence of campaign contributors on judicial decisions.

### ***2. Improve the Voluntary Taxpayer Check-Off***

Most of the program funding comes from taxpayers who voluntarily use the check-off to designate \$3 from the state's tax revenues to the Public Campaign Fund. Alone, the check-off does not bring in enough money to cover the costs of the program; participation is too low and the check-off amount is not adjusted for inflation. North Carolina could remedy this weakness in a number of ways. The check-off could be changed from opt-in to opt-out, 50 cents could be designated to the program if a taxpayer neither agrees nor objects to the check-offs, or the program could be funded directly from the general fund.

### ***3. Adjust Program Funding Sources for Inflation***

Taxpayer check-offs and attorney contributions are not adjusted for inflation, but the money distributed to candidates is. In future elections, this could lead to funding shortages. If the legislature decides to keep the check-off program, it should be indexed for inflation or the Elections Board should be allowed to adjust the amounts annually. The same two alternatives should be applied to attorney contributions.

***4. 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.

***5. Send Voter Guides to Households with at Least One Registered Voter***

In order to save public funds, North Carolina should send voter guides only to those households where there is at least one registered voter.





## INTRODUCTION

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**N**orth 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 new 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's 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?

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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.”<sup>1</sup> 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 in two.

.....  
 Although political candidates are expected to serve and promote the interests of their constituents, judges must be impartial and remain independent from political pressures.  
 .....

Ten of those 28 states rely on retention elections, in which a previously appointed judge runs unopposed and must win a majority<sup>2</sup> of votes to continue on the bench for another term.<sup>3</sup>

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. Only nine 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.<sup>4</sup>

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

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<sup>1</sup> California Commission on Campaign Financing, “The Price of Justice: A Case Study in Judicial Public Financing,” *Center for Governmental Studies*, 1995.

<sup>2</sup> Illinois requires a 60 percent majority.

<sup>3</sup> 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.

<sup>4</sup> *New York State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 802 (2008) (Kennedy concurring).

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 judges, one such apparent conflict is campaign contributions from individuals or entities with an interest in the outcome of a case.<sup>5</sup> 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.<sup>6</sup> 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

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 Voters may doubt  
 whether judicial candidates can make fair  
 decisions involving  
 their campaign contributors once they  
 assume the bench.  
 .....

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") convened a committee to review the virtues of publicly financed judicial elections. The committee found that the best judicial selection systems utilize retention elections and recommended that states electing judges do so through publicly financed races. Public financing, the committee stated, is the best way to address the "perceived impropriety associated with judicial candidates accepting private contribu-

tions from individuals and organizations interested in the outcomes of cases those candidates may later decide as judges."<sup>7</sup>

Taking a cue from the ABA, the North Carolina Bar Association tried 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.<sup>8</sup>

<sup>5</sup> "Public Financing of Judicial Campaigns," *American Bar Association*, February 2002.

<sup>6</sup> Adam Liptak, "Looking Anew at Campaign Cash and Elected Judges," *New York Times*, January 29, 2008.

<sup>7</sup> "Public Financing of Judicial Campaigns," *American Bar Association Standing Committee on Judicial Independence*, February 2002.

<sup>8</sup> Telephone Interview with Allan Head, Executive Director, North Carolina Bar Association, January 4, 2008.

## B. JUDICIAL ELECTIONS IN NORTH CAROLINA

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Since 1868, the voters have directly elected North Carolina's appellate and trial court judges. Appellate court elections became non-partisan in 2004. 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 reviews successful petitions from the Court of Appeals and all non-unanimous Court of Appeals decisions. 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.





## THE JUDICIAL CAMPAIGN REFORM ACT

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The North Carolina legislature passed the Judicial Campaign Reform Act (“JCRA”) in 2002 after years of efforts by public interest groups and reform-minded legislators. Two events contributed to the drumbeat for reform: (1) the 2000 election, which saw North Carolina’s first Supreme Court campaign exceed \$1 million in spending; and (2) a 2001 scandal surrounding former Agriculture Commissioner Meg Scott Phipps’ use of campaign funds in her race for that office the year before.<sup>9</sup> Phipps served three years in federal prison.

The legislature made state Supreme Court and Court of Appeals races non-partisan and established the North Carolina Public Campaign Fund.<sup>10</sup> In addition to full public financing for qualified candidates in the general election, the Public Campaign Fund established a voter education arm 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.

.....  
The legislature made state Supreme Court and Court of Appeals races non-partisan and established the North Carolina Public Campaign Fund.  
.....

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. Candidates do not receive public money during the primary election period. 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. Certified candidates are prohibited from raising any private money except from certain family members. Independent entities may run ads on behalf of candidates.

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<sup>9</sup> Kristin Collins, “Phipps Trial Begins Today,” *News and Observer*, October 20, 2003.

<sup>10</sup> Formerly known as the North Carolina Candidates Financing Fund.

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”<sup>11</sup> 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 is nearly unanimous, with 11 of the 12 candidates in contested elections participating.

**A. SOURCES OF FUNDING**

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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. A sixth source, left-over funds, was a one-time transfer of money from a defunct program.<sup>12</sup>

***Taxpayers’ \$3 Check-Off*** Most of the funding for the Public Campaign Fund comes from opt-in taxpayer check-offs. Since 2003, 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  
 Most of the funding for person owes \$100 in state taxes and checks “Yes,” \$97 dollars will  
 the Public Campaign go to the state general fund and \$3 will go directly to the Public Cam-  
 Fund comes from paign Fund.  
 opt-in taxpayer  
 check-offs. Check-off participation has been low, even though supporters  
 ..... have made efforts to increase check-off awareness. The check-off,  
 which began after fiscal year 2003, brought in \$446,377 for the  
 2004 election. The 2006 election included check-offs from fiscal  
 years 2005 and 2006 and totaled \$2,244,485. Check-offs provided 38 and 71 per-  
 cent of total revenue, respectively.<sup>13</sup> The 2008 election included check-offs from  
 fiscal years 2007 and 2008 and totaled approximately \$2,495,016.

***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 2004, practicing attorneys were also asked to voluntarily donate \$50 to the Public Campaign Fund in addition to the annual North Carolina

<sup>11</sup> “Matching funds” were called “rescue funds” until 2007.

<sup>12</sup> North Carolina General Statute §163-278.63.

<sup>13</sup> State Board of Elections. Figures from North Carolina Department of Revenue differ from the Elections Board’s. They show \$973,046 in 2003 and \$1,125,296 in 2004 to the check-off. More recent figures were unavailable.

State Bar membership fees. The number of contributions was smaller than anticipated. In fiscal years 2003 and 2004, attorneys contributed a total of only \$58,433.<sup>14</sup>

The North Carolina State Bar, a state-run organization that handles receipts, initially objected to mandatory attorney contributions, but eventually agreed to encourage its members to contribute.<sup>15</sup> In light of the dearth of contributions in 2004, the legislature replaced the voluntary contribution with a mandatory \$50 surcharge in 2005.<sup>16</sup> Contributions increased to \$567,546, nearly ten-fold, in fiscal years 2005 and 2006.<sup>17</sup>

Opposition to the attorney contributions has been strong. The North Carolina Bar Association (an unaffiliated, private organization) opposed the fee because it “felt that it was wrong to tax one profession for the good of the whole.”<sup>18</sup> A recently filed lawsuit in state court, *El-Khoury 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.<sup>19</sup> This case is pending.

In another case, a federal district court dismissed a challenge to the legality of the attorney contributions requirement.<sup>20</sup> 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.<sup>21</sup>

**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** Penalties assessed for violations of the campaign financing law are paid to the Public Campaign Fund. The Elections Board can issue penalties of up to \$10,000 per violation or “three times the amount of any financial transaction in the violation whichever is larger.”<sup>22</sup> The Board has levied no fines. Fines are not expected to be a major source of funding.

<sup>14</sup> State Board of Elections. Figures from the North Carolina Department of Revenue show \$49,746 from attorney contributions in 2002 and \$36,281 in 2003.

<sup>15</sup> Telephone Interview with Bob Hall, Executive Director, Democracy North Carolina, August 21, 2007.

<sup>16</sup> North Carolina General Statute §84-34.

<sup>17</sup> State Board of Elections.

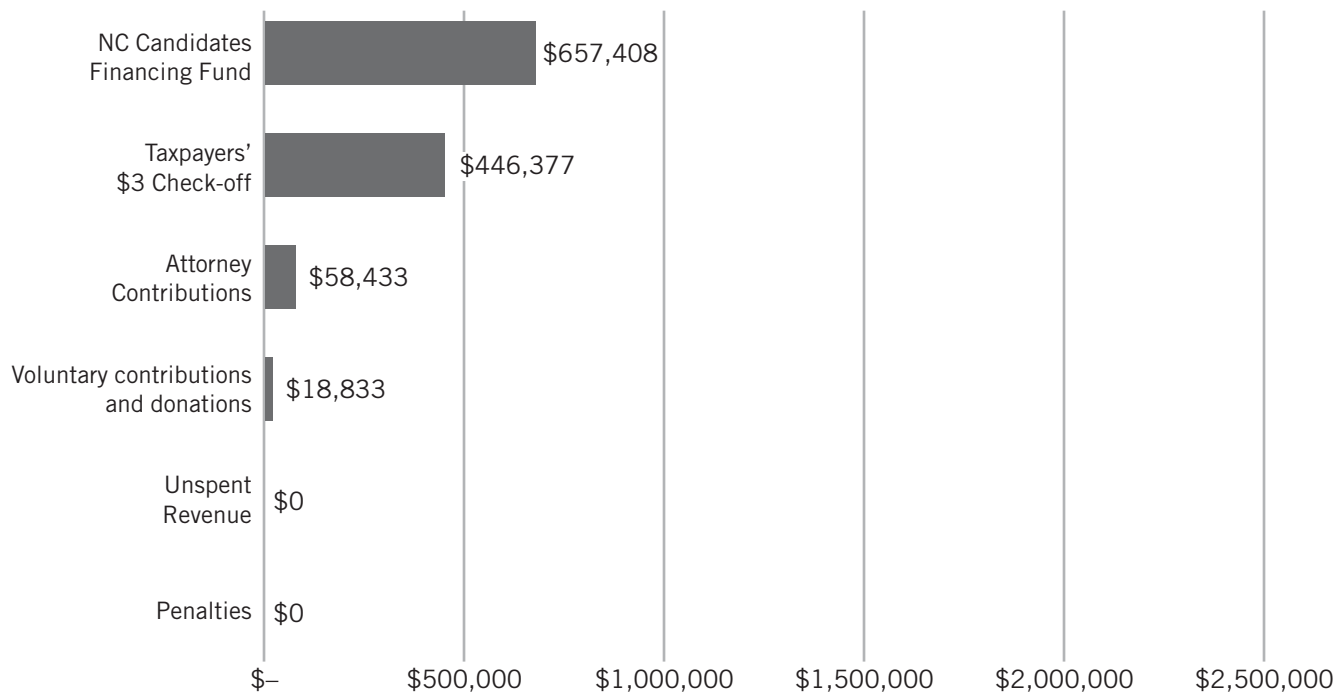
<sup>18</sup> Telephone Interview with Allan Head, January 4, 2008.

<sup>19</sup> *El-Khoury, v. State of North Carolina*, No. 07 CVS 16422.

<sup>20</sup> *Jackson v. Leake*, 476 F.Supp.2d 515 (2007).

<sup>21</sup> Associated Press, *Group Sues in Over Lawyers’ Fees for Public Campaign Financing*, October 10, 2007.

<sup>22</sup> “A Candidate’s Guide to the North Carolina Judicial Campaign Reform Public Financing Program,” *North Carolina State Board of Elections*, 2004–2008.

**FIGURE 1** Amount of Funding, Fiscal Year 2003–2004

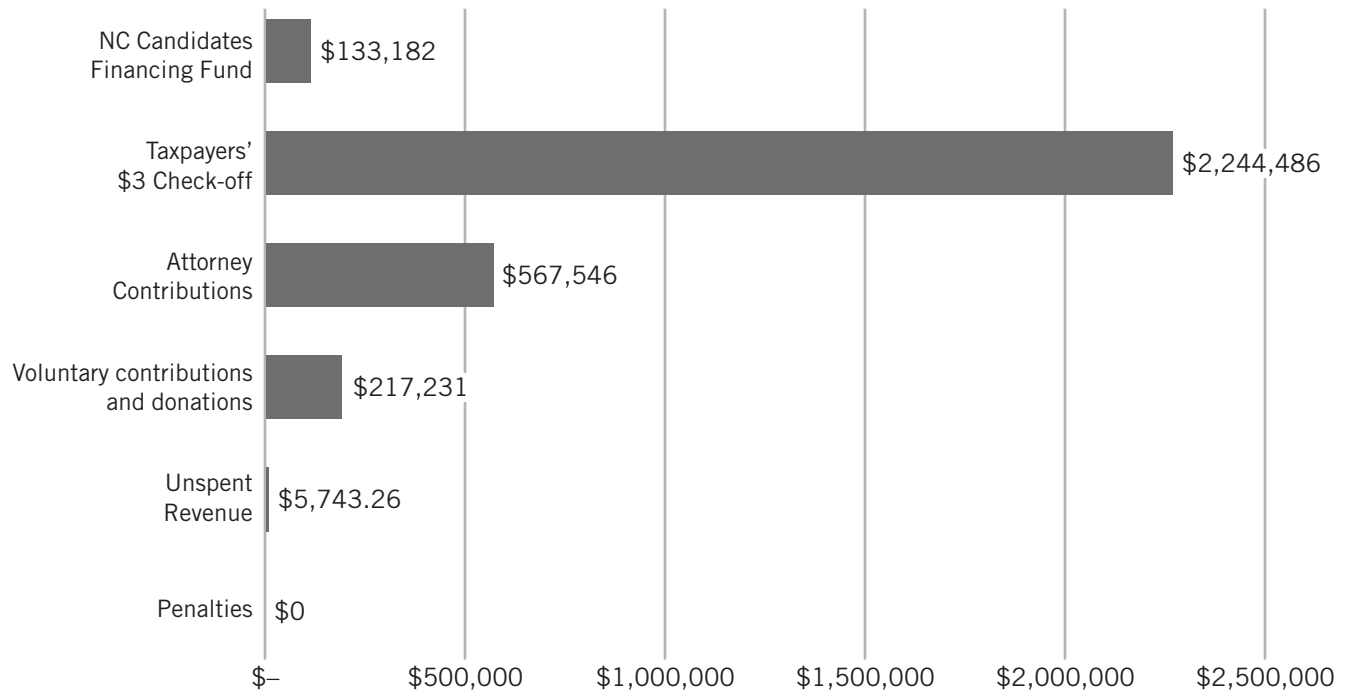
*Voluntary Contributions and Donations* Contributions to the Public Campaign Fund can be made directly in any amount by individuals, corporations, other business entities, labor unions and professional associations.<sup>23</sup> Voluntary contributions have been small but significant. The federal government also contributed \$148,530 by way of the Help America Vote Act (“HAVA”). North Carolina used these contributions, which totaled over \$236,000 for the two elections, 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 JCRA 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.”<sup>24</sup> 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.

<sup>23</sup> *Id.*

<sup>24</sup> “Judicial Public Financing Success, By the Numbers,” *Democracy North Carolina*, available at: <http://www.democracy-nc.org/nc/judicialcampaignreform/JCRAsuccess.pdf>

**FIGURE 2** Amount of Funding, Fiscal Year 2005–2006

## 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.<sup>25</sup>

Upon filing the Declaration, candidates must “demonstrate public support and voluntarily accept strict fund-raising and spending limits”<sup>26</sup> 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.<sup>27</sup>

<sup>25</sup> *Id.*

<sup>26</sup> North Carolina General Statute §163-278.61.

<sup>27</sup> North Carolina State Board of Elections *supra* note 22.

**FIGURE 3** Qualifying Contributions

Office	2004		2006		2008	
	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 contributors and up to \$2,000 from immediate family members.<sup>28</sup>

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.<sup>29</sup> Candidates do not receive any public money during the primary phase. 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 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 independent 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.

<sup>28</sup> North Carolina General Statute §163-278.64.

<sup>29</sup> The Elections Board increases filing fees biennially and in 2008 set them at \$1,335 for the Supreme Court and \$1,280 for the Court of Appeals.

**FIGURE 4** 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.” 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.<sup>30</sup>

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, certified candidates may receive twice the amount of the maximum qualifying threshold: approximately \$154,000 for Court of Appeals and \$160,000 for Supreme Court. During the general election, participating candidates can receive up to twice the amount of the initial public disbursement in matching funds: approximately \$320,000 for Court of Appeals and \$467,000 for Supreme Court races. No further matching funds are available.

## D. VOTER GUIDE

The Public Campaign Fund provides voter guides 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. Approximately four million guides are printed for each election. The guides cost the Public Campaign Fund \$498,450 in 2004 and \$584,350 in 2006.<sup>31</sup>

<sup>30</sup> North Carolina General Statute §163-278.66.

<sup>31</sup> State Board of Elections.

E. LEGAL CHALLENGES

Since the inception of public financing systems, people have waged legal challenges to their validity. In *Buckley v. Valeo*,<sup>32</sup> 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 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-Khoury v. State of North Carolina*.<sup>33</sup> The former challenged the program on numerous grounds and was decided in May 2008. The latter addresses the legality of one aspect of the program's funding.

In 2005, two privately financed candidates, Barbara Jackson and Wilton "Rusty" Duke,<sup>34</sup> 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.<sup>35</sup>

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';"<sup>36</sup> (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.

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 In May 2008, the  
 U.S. Court of Appeals  
 upheld the constitu-  
 tionality of the Public  
 Campaign Fund.  
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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

<sup>32</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>33</sup> *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008); *El-Khoury et al. v. State of North Carolina et al.*, No. 07 CVS 16422.

<sup>34</sup> At the time the plaintiffs filed the complaint, 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 the North Carolina Supreme Court in the 2006 election. Despite his fundraising advantages, Duke lost to incumbent Supreme Court Justice Sarah Parker.

<sup>35</sup> *Jackson v. Leake*, 476 F.Supp.2d 515 (E.D.N.C. 2006); *Jackson*, 476 F.Supp.2d at 515 (2007).

<sup>36</sup> North Carolina General Statute §163-278.13.



thereof) in judicial elections.”<sup>37</sup> 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.”<sup>38</sup> 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.<sup>39</sup>

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.”<sup>40</sup> Moreover, the court found the reporting requirements necessary to fulfill the matching funds provisions.

With regard to 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.”<sup>41</sup> 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-Khoury v. State of North Carolina*, is pending in state court and challenged only the legality of the mandatory \$50 attorney contribution surcharge.<sup>42</sup> 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.

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<sup>37</sup> *North Carolina Right to Life v. Leake*, 525 F.3d at 19.

<sup>38</sup> *Id.*

<sup>39</sup> 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.

<sup>40</sup> *North Carolina Right to Life v. Leake*, 525 F.3d at 18, quoting *McConnell v. FEC*, 540 U.S. at 196.

<sup>41</sup> *Id.*

<sup>42</sup> *El-Khoury et al. v. State of North Carolina et al.*, No. 07 CVS 16422.





# 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 44 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.

.....  
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.....

Democrats and Republicans, incumbents and challengers, men and women and African-Americans and whites all participated at high rates.<sup>43</sup>

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.<sup>44</sup> 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 candidate is not eligible for the program because he has no general election opposition. The other non-participating simply opted not to participate.

There appears to be a wholesale acceptance of the Public Campaign Fund by candidates of different races, genders and partisanship.<sup>45</sup> All five of the African-American candidates who ran in 2004, 2006, and 2008 participated in the Public

<sup>43</sup> Calculated by the author.

<sup>44</sup> Calculated by the author.

<sup>45</sup> Calculated by the author.

Campaign Fund. Twenty-six of the 36 whites who ran opted into the Public Campaign Fund. Seven of the 22 men and 15 of the 19 women participated. Four Democrats and six Republicans did not join the program; however one of those Democrats ran in both 2004 and 2006. Incumbents were more likely to participate than challengers; in only one case an incumbent did not opt in. Nine of 11 open-seat candidates participated. Both of the two winners in the open-seat contests participated in the Public Campaign Fund in 2004 and 2006.

**B. FINANCIAL IMPACTS**

Spending in North Carolina's judicial election campaigns nearly doubled between 1996 and 2002, the years preceding the establishment of the Public Campaign Fund. In 2000, one candidate spent over \$900,000 in a losing bid for Chief Justice of the Supreme Court.<sup>46</sup> The race made headlines as the first judicial campaign in the state to reach \$1 million in combined spending.

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 In the 24 races held  
 in the four elections  
 before the Public  
 Campaign Fund  
 existed, the higher  
 spending candidate  
 won 79 percent of the  
 time. That rate has  
 fallen to 46 percent  
 since the establish-  
 ment of the Public  
 Campaign Fund.  
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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 79 percent of the time. That rate has fallen to 46 percent since the establishment of the Public Campaign Fund.<sup>47</sup>

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 made 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 11 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 only spent \$51,490. Martin won and achieved the dubious distinction of spending

<sup>46</sup> Chief Justice Henry Frye lost to Associate Justice I. Beverly Lake.

<sup>47</sup> In a perfect system in which campaign spending has no influence, the higher spending candidate would be expected to win 50 percent of the time.

more money than any other race in 2004 or 2006. Hunter, by contrast, had the sixth lowest spending total.

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, 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.<sup>48</sup> In two races where both candidates were publicly financed, final spending totals were within 1 percent of each other.<sup>49</sup>

## C. FUNDING SUFFICIENCY

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Funding for the Public Campaign Fund has been sufficient, but less than expected. Most program funding comes from taxpayer check-offs, which accounted for 38 percent of total funding in 2004 and 71 percent in 2006.<sup>50</sup> 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 a plurality election.<sup>51</sup> In that race, the incumbent retired from the bench after winning 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 contribution; and
- Lack of inflation adjustments for Campaign Fund revenues.

### I. Low Check-Off Participation

The taxpayer check-off is the primary source of revenue for the Public Campaign Fund, and brings in slightly more money than is now needed to run the program.

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<sup>48</sup> Parker–Tyson, Bryant–Stubbs, Timmons–Goodson–Levinson, and Hudson–Calabria.

<sup>49</sup> Timmons–Goodson–Levinson, and Hudson–Calabria.

<sup>50</sup> State Board of Elections.

<sup>51</sup> 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.

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.<sup>52</sup> 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 not translate into heavy use of the taxpayer check-off.<sup>53</sup>

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 \$450,000 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).<sup>54</sup> Based on cost estimates by Democracy North Carolina, the Public Campaign Fund requires at least 11 percent participation in the check-off to be solvent.<sup>55</sup>

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.”<sup>56</sup> 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 Attorney Contributions

The North Carolina State Bar initially opposed the legislature’s effort to make attorney contributions mandatory, and only agreed to a public education effort to en-

<sup>52</sup> “Who’s Funding Judicial Elections, Past and Future?” *Democracy North Carolina*, available at: <http://www.democracy-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.

<sup>53</sup> 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.

<sup>54</sup> 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.

<sup>55</sup> “Judicial Reform Becomes Law,” *Democracy North Carolina*, available at: <http://www.democracy-nc.org/nc/judicialcampaignreform/govsigns.html>.

<sup>56</sup> 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.”

courage attorney compliance. After an abysmal participation rate in 2004, the State Bar decided to support mandatory contributions.

Attorney contributions have been challenged in state court and their continued legality is not settled. A ruling against mandatory contributions would strike a major blow to the Public Campaign Fund's revenue stream.

..... **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 contributions adjust with inflation.

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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 contributions adjust with inflation. Grants to certified candidates, however, increase annually. 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

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The stated purpose of the Public Campaign Fund 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.<sup>57</sup>

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.

### I. Reduced Influence of Private Contributors

How well has the Public Campaign Fund reduced conflicts of interest and the influence of campaign contributions that could impugn a judge's impartiality? Has 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.

<sup>57</sup> North Carolina General Statute §163-278.61.

**FIGURE 5** 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%	36%

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 potential conflicts of interest.

.....  
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 .....

According to research by Democracy North Carolina, attorneys or attorney committees contributed 54.6 percent of money raised in 2002.<sup>58</sup> While the Public Campaign Fund 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 36 percent of total dollars raised for participating candidates.

For certified candidates, private funds make up anywhere from 14 to 36 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.

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.

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.”<sup>59</sup> To put it in perspective, if the state provided primary election funds, it would have cost North Carolina an additional \$557,880 in 2006,

<sup>58</sup> “Funds Raised by Appellate Court Candidates in 2002 That Would be Restricted in 2004,” *Democracy North Carolina*, available at: <http://www.democracy-nc.org/nc/judicialcampaignreform/funds%20restricted.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.

<sup>59</sup> Telephone Interview with Bob Phillips, Executive Director Common Cause North Carolina, October 29, 2007.



assuming all eight certified candidates received public money equal to the maximum they could raise as qualifying contributions.<sup>60</sup>

## 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 once 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, 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.<sup>61</sup>

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.<sup>62</sup>

Duke's complaint was rejected by the U.S. Court of Appeals in *North Carolina Right to Life v. Leake*.

## E. IMPLEMENTATION

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This final section of the analysis considers the effectiveness of the Public Campaign Fund's implementation. It considers how well the Public Campaign Fund has handled the unexpected events and realities of judicial campaigns, as well as the response of the legislature and Elections Board in addressing these problems.

<sup>60</sup> 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.

<sup>61</sup> "A Profile of the Judicial Financing Program, 2004-06," *Democracy North Carolina*, <http://www.democracy-nc.org/nc/judicialcampaignreform/impact06-06.pdf>

<sup>62</sup> Telephone Interview with Judge Rusty Duke, Senior Resident Superior Court Judge, January 8, 2008.

## I. 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.

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 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.  
 .....

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"<sup>63</sup> process and be held on the same day as the general election.<sup>64</sup> Public financing is not available in these races.

## 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.<sup>65</sup>

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

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<sup>63</sup> 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 50 percent or greater of the first choice votes. Otherwise, the lowest vote getter is removed from the running. If a voter's first choice was removed, his or her second choice vote is added to the tabulation. This process continues until a candidate reaches 50 percent.

<sup>64</sup> North Carolina General Statute § 163-329.

<sup>65</sup> Crosson, *supra* note 54.

from the check-off would not cover the cost of production and mailing of the voter guides.<sup>66</sup> 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.<sup>67</sup> Funding for the voter guide does not appear to be in any danger in future elections.

### 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.”<sup>68</sup> 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 again for every additional \$1,000 raised or spent. Also, after the 2006 election, the Elections Board changed the definition of “express advocacy” to allow issue ads by 527 groups to count towards trigger amounts for matching funds. Candidates opposed by issue ads may now receive matching funds, even if the ad does not contain the “magic words” of express advocacy.

.....  
 Candidates opposed  
 by issue ads may now  
 receive matching  
 funds, even if the ad  
 does not contain the  
 “magic words” of  
 express advocacy.  
 .....

One 527 group, FairJudges.net, spent \$200,000 running a television ad in the final week of the 2006 campaign.<sup>69</sup> 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 the names of four Supreme Court candidates.<sup>70</sup> Three of the four candidates were Democrats. The fourth, Republican Mark Martin, was opposed by Rachel Lea Hunter, a Democrat that many, including those in her own party, considered unqualified for office.

<sup>66</sup> “Judicial Public Financing Success, By the Numbers,” *Democracy North Carolina*, available at: <http://www.democracy-nc.org/nc/judicialcampaignreform/JCRAsuccess.pdf>

<sup>67</sup> Telephone Interview with Bob Hall, August 21, 2007.

<sup>68</sup> *Buckley v. Valeo*, 424 U.S. 1 at 44, n.52 (1976).

<sup>69</sup> “Letter to Larry Leake Regarding FairJudges.net,” *Democracy North Carolina*, available at: <http://www.democracy-nc.org/nc/judicialcampaignreform/FJcomplaint.pdf>.

<sup>70</sup> *Id.*

The two publicly financed candidates with opponents endorsed by the FairJudges.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 occurred late in the campaign when groups are prohibited from running independent expenditures and 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.<sup>71</sup>

.....  
 Except for the FairJudges ad, independent expenditures have not played a role in North Carolina's judicial elections.  
 .....

Because of constitutional concerns, there are no limits on how much independent expenditure committees or issue ad groups can raise or spend. Except for the FairJudges ad, independent expenditures have not played a role in North Carolina's judicial elections. 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 privilege license surcharge for attorneys.

***Fixed 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 issue ads 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

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<sup>71</sup> Steve Hartsoe, "Hudson to Take Seat on High Court," *News and Observer*, December 21, 2006.

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.<sup>72</sup>

.....  
 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.  
 .....

**F. NEXT STEPS**

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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, several races, both statewide and local, were publicly financed for the first time. Moreover, the legislature created a new joint legislative committee to oversee campaign finance regulations and recommend future changes to the laws.

**I. 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.<sup>73</sup> 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.<sup>74</sup> Because funding relies on annual allocations by the legislature, it is subject to political pressures.

The Voter-Owned Elections Act also improves 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

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<sup>72</sup> State Board of Elections

<sup>73</sup> North Carolina Session Law 2007-540.

<sup>74</sup> "NC lawmakers approve expanding public campaign financing," *Associated Press*, August 2, 2007.

to enact and enforce local laws.<sup>75</sup> 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, but the Elections Board ruled that the program violated a state law prohibiting corporate contributions over \$4,000.<sup>76</sup> 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.<sup>77</sup> The bill authorized a pilot program for city elections in 2009 and 2011.<sup>78</sup> 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. Publicly financed candidates may not spend any private money on their campaigns.<sup>79</sup>

### 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.”<sup>80</sup> 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 statutes 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.

<sup>75</sup> “Investing in Democracy: Creating Public Financing of Elections in Your Community,” *Center for Governmental Studies* 2003, p. 31.

<sup>76</sup> Steven M. Levin, “Keeping it Clean: Public Financing in American Elections,” *Center for Governmental Studies*, 2006.

<sup>77</sup> North Carolina Session Law 2007-222.

<sup>78</sup> “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](http://www.ncvce.org/index.php?page=Chapel%20Hill_Release).

<sup>79</sup> 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>.

<sup>80</sup> North Carolina Session Law 2008-150.



## RECOMMENDATIONS

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**N**orth Carolina’s Public Campaign Fund has existed for only a few full election cycles. Despite its short lifespan, it is already clear that there are a few problems that the state should fix.

### I. EXPAND THE PROGRAM TO FUND THE PRIMARY CAMPAIGN

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The primary problem facing the North Carolina Public Financing Fund is that it fails to insulate judges from outside contributions, because candidates must solicit and receive private funds for the primary election phase. Participating candidates have the patina of receiving public financing, but in reality also must rely on private financing. By only financing the general election, the Public Campaign Fund allows individuals to contribute to publicly financed candidates almost as freely as they

.....  
By only financing the general election, the Public Campaign Fund allows individuals to contribute to publicly financed candidates almost as freely as they can contribute to privately financed ones.  
.....

can contribute to privately financed ones. There are no incentives to keep an individual or group from contributing to a campaign merely because those contributions must be made during the early months of the campaign.

North Carolina should therefore restructure its program to provide public funds for the primary elections.

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.

Without a new revenue source, the Public Campaign Fund cannot absorb the additional costs of providing public financing in the primary election. The most reliable way of instituting public financing for the primary election is through a systematic general fund appropriation, rather than relying on voluntary taxpayer contributions or attorney contributions, which do not guarantee the program will raise sufficient funds to meet its costs. Experience from other states shows that funding shortages can undermine campaign finance programs.

## 2. IMPROVE THE TAX CHECK-OFF PROVISION

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The Public Campaign Fund's greatest long-term vulnerability comes from potential funding shortfalls. Advocates hoped that the voluntary tax check-off would prove more lucrative. However, only 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, but participation remains below ten percent. The following three recommendations address problems with the check-off. Implementation would require legislative action.

Any concerns that the 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 JCRA, the legislature considered an opt-out check-off, which it eventually replaced with an opt-in check-off.<sup>81</sup> 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, with some legislators voicing concern that too much money would flow into the Public Campaign Fund and in effect divert money from the general fund.

An opt-out check-off, in theory, would 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.

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<sup>81</sup> 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.

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

Another solution to the check-off funding shortages 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.”<sup>82</sup>

North Carolina should designate \$0.50 to the Public Campaign Fund for every unmarked check-off.<sup>83</sup>

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

Successfully meeting Public Campaign Fund costs requires at least \$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<sup>84</sup> (more if matching funds are distributed); and the Elections Board has modest administrative costs associated with the program.

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 The best way to ensure  
 that funding levels are  
 steady and sufficient  
 is to replace the tax-  
 payer check-off with  
 a direct general fund  
 appropriation.  
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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 easily include automatic inflationary adjustments. If attorney contributions are found unconstitutional at some point in the future, the appropriation easily could be adjusted to supplant the funding shortage.

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<sup>82</sup> *Id.*  
<sup>83</sup> This recommendation was also included in HB 1764 from the 2003 session.  
<sup>84</sup> Assuming 75 percent of general election candidates participate.

**3. ADJUST INCOME SOURCES FOR INFLATION**

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Contributions to the Public Campaign Fund are not automatically adjusted for inflation, whereas outlays to candidates are. As time goes on, it is likely that fewer dollars will flow into the Public Campaign Fund than will flow out to candidates.<sup>85</sup> Public financing programs in many jurisdictions fail because they are outpaced by inflation. North Carolina should index the check-off amount and attorney contributions for inflation. Ideally, this would be done automatically or by the Elections Board without involving the legislature.

**4. EXCLUDE PRIMARY SPENDING FROM THE TRIGGER FOR MATCHING FUNDS**

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The flaw in the current model is that 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).<sup>86</sup> 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.

.....  
 Even without the aid of matching funds, publicly financed candidates may raise and spend more than their privately financed counterparts.  
 .....

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.

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<sup>85</sup> 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.

<sup>86</sup> 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.

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.

## **5. SEND VOTER GUIDES TO HOUSEHOLDS WITH AT LEAST ONE REGISTERED VOTER**

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As a way to save public funds, North Carolina should send voter guides only to those households where there is at least one registered voter. Currently, North Carolina sends voter guides to all households, regardless of whether anyone living in that household is registered to vote.





## CONCLUSION

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**N**orth 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 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 38 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 (most importantly concerning funding issues), 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.





## APPENDIXES

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

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

#### **I. Expand the Program to Fund the Primary Campaign**

- North Carolina should expand its system of public campaign financing to include candidates in the primary elections. By only financing general elections, North Carolina's public financing program fails to insulate judges from the early influence of private contributions.

#### **2. Improve the Tax Check-Off**

- North Carolina should change its check-off program from an opt-in program to one that requires candidates to opt-out. This would likely increase the public funds available for use in the program.
- North Carolina could also allocate money for the program whenever a taxpayer leaves the check-off question blank.
- North Carolina could, in the alternative, replace its check-off with a direct general fund appropriation.
- North Carolina should index the check-off amount and attorney contributions for inflation. Without this change, North Carolina could face funding shortages.

#### **3. Exclude Primary Spending from the Matching Funds Trigger**

- North Carolina should assess only general election spending by privately financed candidates when calculating the general election trigger for match-

ing funds. Otherwise, publicly financed candidates could unduly benefit from the program if money raised or spent in the primary and general elections is counted toward the general election trigger for releasing matching funds for publicly-financed opponents.

**4. Send Voter Guides to Households with At Least One Registered Voter**

- North Carolina should send voter guides to those households where at least one person in the household is a registered voter.



## APPENDIX 2: LIST OF PUBLICATIONS

- Public Campaign Financing in Michigan: Driving Towards Collapse*** (2008)
- Public Campaign Financing in Minnesota: Damming Big Money in the Land of 10,000 Lakes*** (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 Flight*** (2008)
- Public Campaign Financing in Wisconsin: Showing Its Age*** (2008)
- Democracy By Initiative: Shaping California's Fourth Branch of Government, 2nd Edition*** (2008)
- Overview of California's Redistricting Reform Proposals*** (2008)
- Local Public Financing Charts*** (2007)
- State Public Financing Charts*** (2007)
- Termed Out: Reforming California's Legislative Term Limits*** (2007)
- Mapping Public Financing in American Elections*** (2007)
- In The Dead of the Night: How Midnight Legislation Weakened California's Campaign Finance Laws, And How to Strengthen Them*** (2007)
- Overview of California's Redistricting Reform Proposals*** (2007)
- Re-Drawing Lines: A Public Interest Analysis of California's 2006 Redistricting Reform Proposals*** (2006)
- Keeping it Clean: Public Financing in American Elections*** (2006)
- Government Regulation of Food Marketing To Children: The Federal Trade Commission and the Kid-Vid Controversy*** (2006)
- Digital Citizens' Bill of Rights*** (2006)
- State Public Financing Laws*** (2005)
- Public Financing Laws in Local Jurisdictions*** (2005)
- California Fair Redistricting Act: A Model Law*** (2005)
- PolicyArchive.Net: Assessing the Quality and Availability of Policy Research in the Internet World*** (2005)
- Drawing Lines: A Public Interest Guide to Real Redistricting Reform*** (2005)
- State Public Campaign Finance Laws—Summary Charts*** (2005)
- Video Voter: How to Produce Election Coverage in Your Community*** (2004)
- Campaign Finance Disclosure Model Law***  
CGS/Campaign Disclosure Project (2004)
- Electronic Filing and Disclosure Survey Results*** (2004)
- Video Voter: Producing Election Coverage for Your Community*** (2004)
- Losing Ground: How Taxpayer Subsidies & Balkanized Governance Prop Up Home Building in Wildfire and Flood Zones*** (2004)
- A New Sacramento Policy Center: A CGS Feasibility Study*** (2004)
- Summary of CGS Media Projects and Positions For The Oxford Internet Institute Conference*** (2004)
- Political Reform That Works: Public Campaign Financing Blooms in Tucson*** (2003)
- Investing in Democracy: Creating Public Financing of Elections In Your Community*** (2003)
- Public Financing of Elections: Where To Get The Money?*** (2003)

***CGS Amicus Curiae Brief In McConnell v FEC—United States Supreme Court*** (2003)

***Beyond BCRA: Cutting-Edge Campaign Finance Reform at The Local Government Level*** (2003)

***Video Voter Information: How Combinations of New and Old Media Can Educate Voters (And Save American Elections at the Same Time!)*** (2003)

***Video Voter Information: How Community Media Can Educate Voters (And Save American Elections at the Same Time!)*** (2002–2003)

***Beyond BCRA: Cutting-Edge Campaign Finance Reform at The Local Government Level*** (2003)

***Electronic Filing and Disclosure Update*** (2002)

***A Statute of Liberty: How New York City's Campaign Finance Law Is Changing the Face of Local Elections*** (2002)

***Alluvial Amnesia: How Government Plays Down Flood Risks in the Push for Development*** (2002)

***Dead on Arrival? Breathing Life Into Suffolk County's New Campaign Finance Reforms*** (2002)

***On the Brink of Clean: Launching San Francisco's New Campaign Finance Reform*** (2002)

***Electronic Filing and Disclosure Survey Results*** (2002)

***Eleven Years of Reform: Many Successes, More to Be Done: Campaign Finance Reform in the City of Los Angeles*** (2001)

***Electronic Filing and Disclosure Survey Results*** (2001)

***Access Delayed Is Access Denied: Electronic Reporting of Campaign Finance Activities*** (2000)

***Online Fundraising: Campaign Finance Solution or Gasoline on the Flames?*** (2000)

***Electronic Democracy (Ready or Not, Here It Comes)*** (2000)

***Campaign Money on the Information Superhighway: Electronic Filing and Disclosure of***

***Campaign Finance Reports***, CGS/National Resource Center for State and Local Campaign Finance Reform (1996–1999)

***Affordable Health Care for Low Income Californians: Report and Recommendations of the California Citizens Budget Commission*** (2000)

***Toward a State of Learning: California Higher Education for the Twenty-First Century***, Recommendations of the California Citizens Commission on Higher Education (1999)

***A 21st Century Budget Process for California: Recommendations of the California Citizens Budget Commission*** (1999)

***A State of Learning: California and the Dream of Higher Education in the Twenty-First Century***, California Citizens Commission on Higher Education (1998)

***Opportunity Through Technology: Conference Report on New Communication Technology and Low-Income Communities*** (CGS/ConnectLA 1997)

***Promises to Keep and Miles to Go: A Summary of the Joint Meeting of the California Citizens Commission on Higher Education and the California Education Roundtable*** (1997)

***A Shared Vision: A Practical Guide to the Design and Implementation of a Performance-Based Budget Model for California State Health Services***, California Citizens Budget Commission (1997)

***The Price of Justice: A Los Angeles Area Case Study in Judicial Campaign Financing***, California Commission on Campaign Financing (1995)

***Reforming California's Budget Process: Preliminary Report and Recommendations***, California Citizens Budget Commission (1995)

***California at the Crossroads: Choices for Health Care Reform***, Lucien Wulsin, Jr. (1994)

***Democracy by Initiative: Shaping California's Fourth Branch of Government***, California Commission on Campaign Financing (1992)

***To Govern Ourselves: Ballot Initiatives in the Los Angeles Area***, California Commission on Campaign Financing (1992)

***Money and Politics in the Golden State: Financing California's Local Elections***, California Commission on Campaign Financing (1989)

***Money and Politics in Local Elections: The Los Angeles Area***, California Commission on Campaign Financing (1989)

***The California Channel: A New Public Affairs Television Network for the State***, Tracy Westen and Beth Givens (1989)

***Update to the New Gold Rush***, California Commission on Campaign Financing (1987)

***The New Gold Rush: Financing California's Legislative Campaigns***, California Commission on Campaign Financing (1985)

CGS has published dozens of major books and reports on campaign finance, political and media reform. Most of the reports can be downloaded from the CGS website, [www.cgs.org](http://www.cgs.org) or ordered by calling the Center for Governmental Studies, (310) 470-6590.





## BIBLIOGRAPHY

---

### STATUTES

---

North Carolina General Statute §84-34.

North Carolina General Statute §163 *et seq.*

North Carolina House Bill 1764, 2003 Session.

North Carolina Session Law 2007-222.

North Carolina Session Law 2007-323.

North Carolina Session Law 2007-540.

North Carolina Session Law 2008-150.

“Ordinance Establishing the Town of Chapel Hill Voter Owned Elections Program (2008-06-09/0-10)” available at: <http://www.indyweek.com/pdf/061108/CHOrdinance.pdf>

### LEGAL OPINIONS

---

Brief of Amicus Curiae, Edwin Chemerinsky et al. at 20 *W. Russell (“Rusty”) Duke v. Larry Leake, et al.*, No. 07-1454 (E.D. N.C August 15, 2007).

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

*Davis v. FEC*, 128 S.Ct. 2759 (2008).

*Duke v. Leake*, No. 07-1454 (4th Cir. 2007).

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

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

*Jackson v. Leake* Amended Verified Complaint for Declaratory and Injunctive Relief-Class Action.

*Keller v. State Bar of California* 496 U.S. 1 (1990).

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

*North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008).

### NEWS ARTICLES

---

Aspin, Larry, “Judicial Retention Election Trends 1964–2006,” *Judicature Magazine*, Vol. 90 No. 5, March–April 2005.

Collins, Kristin, “Phipps Trial Begins Today,” *News and Observer*, October 20, 2003.

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

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

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

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

## POLLS, REPORTS AND BOOKS

---

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

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

Crosson, Scott, "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.

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

"A Candidate's Guide to the North Carolina Judicial Campaign Reform Public Financing Program," *North Carolina State Board of Elections*, 2004–2008.

"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](http://www.ncvce.org/index.php?page=Chapel%20Hill_Release)

"Funds Raised by Appellate Court Candidates in 2002 That Would be Restricted in 2004," *Democracy North Carolina*, available at: <http://www.democracy-nc.org/nc/judicialcampaignreform/funds%20restricted.pdf>.

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

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

"Judicial Reform Becomes Law," *Democracy North Carolina*, available at: <http://www.democracy-nc.org/nc/judicialcampaignreform/govsigns.shtml>.

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

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

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

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

"Who's Funding Judicial Elections, Past and Future?" *Democracy North Carolina*, available at: <http://www.democracy-nc.org/nc/judicialcampaignreform/whosfunding.shtml>

## INTERVIEWS

---

Telephone interview with Judge Wanda Bryant, Associate Justice, North Carolina Appeals Court, October 20, 2007.

Telephone interview with Damon Circosta, Acting Executive Director, North Carolina Center for Voter Education, Former Appeals Court Campaign Manager, October 31, 2008.

Telephone interview with Judge Rusty Duke, Senior Resident Superior Court Judge, January 8, 2008

Telephone interview with Bob Hall, Executive Director, Democracy North Carolina, August 21, 2007.

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

Telephone interview with Judge Barbara Jackson, Associate Justice, North Carolina Appeals Court, January 23, 2008.

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

Telephone interview with Jesse Rutledge, Deputy Executive Director, Justice at Stake Campaign, August 29, 2007

Telephone interview with Kim Westbrook Strach, Deputy Director-Campaign Reporting, North Carolina State Board of Elections, November 16, 2007.

