

# The *White* Decision in the Court of Opinion: Views of Judges and the General Public

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The U.S. Supreme Court's first decision on judicial elections—*Republican Party of Minnesota v. White*<sup>1</sup>—came on the heels of the first national opinion survey devoted entirely to judicial selection issues. In late 2001, 1,000 randomly selected members of the public and 2,500 state appellate and trial judges answered questions about their participation in judicial elections, opinions about current practices, and support for various reform proposals. Some questions were asked of judges and public alike, while other questions concentrated on their respective roles in the election process. The surveys were conducted on behalf of the Justice at Stake Campaign, a nationwide coalition of legal and citizen organizations concerned with preserving judicial independence.<sup>2</sup>

These surveys present a unique opportunity to evaluate empirically some of the explicit and implicit assertions made by respondents, lower courts, amici curiae, and the Supreme Court justices concerning what the public thinks and wants, and how judges experience campaigning and the canons. Indeed, the survey's findings are a part of the record in the *White* decision. One amicus brief (filed by the Brennan Center)<sup>3</sup> and Justice O'Connor's concurring opinion cited the survey. All references are to survey questions about the influence of judicial campaign fundraising. Justice O'Connor noted that:

Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary. See Greenberg Quinlan Rosner Research, Inc., and American Viewpoint, National Public Opinion Survey Frequency Questionnaire 4 (2001), available at <http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf> (describing survey results indicating that 76 percent of registered vot-

ers believe that campaign contributions influence judicial decisions); *id.*, at 7 (describing survey results indicating that two-thirds of registered voters believe individuals and groups who give money to judicial candidates often receive favorable treatment).<sup>4</sup>

The surveys have more to say on the topic of campaign fundraising by judges, and include questions that describe judicial and voter behavior at election time. Survey participants were also asked to indicate their support for various proposals for improving judicial elections.

Other questions sought more abstract impressions of what it means to be a judge. The status of the judge as a politician was a particular theme. Questions ask how judges *should* campaign and how judges compare to other public officials who run for office. The survey thus allows some exploration of fundamental concerns about judicial independence and accountability. The result is a complex image of judges. Both judges and the public hold equivocal views of where the judge as decision-maker intersects with the judge as fundraiser and campaigner.

## THE SURVEY

The firm of Greenberg Quinlan Rosner Research, Inc. designed and administered the telephone survey of 1,000 randomly selected sample of (self-identified) registered voters. American Viewpoint, a survey firm with a largely Republican client base, collaborated with Greenberg Quinlan, which has a largely Democratic client base, to ensure bipartisanship in the choice of questions and question wording. Four focus groups were used to fine-tune the questions. The survey was conducted October 30–November 7, 2001.<sup>5</sup>

The same collaboration carried out the separate, national survey of state judges by mail from November 5, 2001 to

## Footnotes

1. 122 S. Ct. 2528 (2002).
2. Justice at Stake is a nonpartisan national partnership working to keep courts fair and impartial. Partner organizations include the American Bar Association, the Constitution Project, the League of Women Voters, and the National Center for State Courts, as well as various state-specific organizations. For more information consult the Justice at Stake website at [www.justiceatstake.org](http://www.justiceatstake.org).
3. In addition to citing the two questions asked of the public used in Justice O'Connor's concurring opinion, the Brennan Center brief also reported on three questions from the judges' survey in support of the claim that "[m]any judges are acutely aware of the role of money in judicial elections." Brief for the Brennan Center for Justice at New York University School of Law as Amicus Curiae in Support of Respondents at 16, *Republican Party of Minn. v. White*, 122 S.Ct. 2528 (2002) (No. 01-1521).
4. 122 S. Ct. at 2543 (O'Connor, J., concurring). Justice O'Connor paired her survey-derived evidence with anecdotal evidence about the actual role of campaign contributions in influencing decisions.
5. Telephone numbers were generated by a random digit dial process, which allowed access to all listed and unlisted phones. The list was stratified by state. Quotas were assigned to reflect the percentage of households within these states. The data were weighted by gender, region, education, age, and race to ensure the sample is an accurate reflection of the population. Findings are subject to a margin of error of +/- 3.1 percent. To maximize the number of questions that could be asked, some questions are based on 500 respondents. This increases the margin of error to +/- 4.4 percent.

January 2, 2002. Survey questionnaires were completed and returned by 61 percent of the recipients, a strikingly high rate of participation.<sup>6</sup> The 2,428 participating judges included 188 state supreme court justices, 527 intermediate appellate court judges, and 1,713 trial court judges. Survey participants include about one judge in ten.

**ASSERTIONS ABOUT WHAT JUDGES EXPERIENCE AS CANDIDATES**

The judge’s survey inquired about experiences as a candidate, preferences in terms of reform, evaluation of their state’s canons, their view of the judicial role, and concerns about judicial elections. How judges respond is shown in tables and charts. Each table and chart repeats the exact wording of the question. The views of supreme court justices, intermediate appellate court judges, and trial judges tend to be similar. The text notes instances where the world looked differently depending on the level of court a judge occupied.

(1) *Judicial elections today are “nastier, nosier, and costlier.”*

“Nastier, nosier, and costlier” is a punchy description of how judicial elections have changed in recent years.<sup>7</sup> That change is evident in a number of states, especially for supreme court races. A survey question asked the judges if they believe the conduct and tone of judicial campaigns has changed over the past 5 years (see Table 1). The majority of judges (61%) perceive a decline in the conduct and tone of judicial campaigns over the past 5 years. Thirty percent of the judges saw no change. One judge in ten sensed an improvement.

Do you think the conduct and tone of judicial campaigns has gotten better or worse over the past 5 years?	
Much better	2 %
Somewhat better	7
Stayed the same	30
Somewhat worse	38
Much worse	23
<b>Total</b>	<b>100 %</b>

The responses suggest that concern over declining standards in judicial campaign conduct is widespread, certainly present in many states and at all court levels, but not universal.

The survey also asked judges if they were satisfied with the way judicial campaigns are conducted. Despite the sense of decline just noted, judges are evenly split between those satisfied and those dissatisfied with the conduct and tone of campaigns (see Table 2).

(2) *Judges are preoccupied with raising campaign funds.*

It is recognized that in some states a viable judicial candidate, especially for a supreme court seat, must raise very large sums of money. The survey asked the judges if they felt under

6. The total judges’ sample is subject to a margin of error (MOE) of +/- 2 percent, and each separate sample to a higher margin of error (supreme court sample, MOE = +/- 7.2 percent; appellate sample, MOE = +/- 4.3 percent; lower court sample, MOE = +/- 2.4 percent).

How satisfied are you with the conduct and tone of judicial campaigns?	
Very satisfied	14 %
Somewhat satisfied	39
Somewhat dissatisfied	31
Very dissatisfied	17
<b>Total</b>	<b>100 %</b>

pressure to raise campaign money (see Table 3). Of judges running for election, 59% describe themselves as being under pressure to raise money for their campaign during election years. Most report being under “a great deal of pressure” (57% of supreme court justices, 49% of intermediate appellate court judges, and 40% of trial judges). Few (only 10% for supreme court justices) describe the pressure as “just a little” or “none at all.” Thus, it appears that the demands of fundraising are being experienced throughout the judiciary.

If under pressure to raise money: How much pressure are you under to raise money for your campaign during election years?			
	Supreme Court	Intermediate Appellate	Trial
Great deal	57%	49 %	40%
Some	33	32	40
Just a little	3	6	7
None at all	7	14	13
	<b>100 %</b>	<b>100 %</b>	<b>100%</b>

The survey strongly suggests the pressure to raise campaign funds is pervasive, experienced by the majority of judges, both trial and appellate.

(3) *Judges face public criticism from within and outside their state.*

The majority of judges report having been publicly criticized in their role of judge. This was most often the case among supreme court justices (76%) but common among intermediate appellate court justices (54%) and trial judges (56%). The survey asked participants to identify the source of the criticism (see Table 4). The media and within-state special interest groups were the most frequent sources of criticism. Other officials ranked third as the most frequent critics. Public criticism from other judicial candidates was rare, even among supreme court justices. Nearly one-half of supreme court justices report receiving criticism from special interest groups within their state, as do about one-fourth of other judges. Criticism from national interest groups is less common but experienced by about one in five supreme court justices. Eighteen percent of

7. See David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 LOYOLA L.A. L. REV. 1369 (2001) (quoting Richard Woodbury, *Is Texas Justice for Sale?*, TIME, Jan. 11, 1998, at 74 (noting that recent changes in judicial elections had made them “noisier, nastier, and costlier”).

supreme court justices, 5% of intermediate appellate judges, and 3% of trial judges reported criticism from national special interest groups.

Have you ever been publicly criticized in your role as judge by any of the following individuals or groups?			
	Supreme Court	Intermediate Appellate	Trial
The media	56%	34%	38%
Special interest group in state	46	24	22
Other public official	38	18	20
Other judicial candidate	23	9	11
National special interest group	18	5	3

(4) *The canons restrict the ability of judicial candidates to counter speech with more speech.*

The overwhelming majority (89%) of judges who had been criticized felt that they “held back or felt restrained” in responding. The canons were the most frequently cited reason for restraint, mentioned by 73% of those reporting criticism.<sup>8</sup> The other commonly cited reasons were “a personal belief that judges should not respond” (cited by 43%) and “the criticism wasn’t worthy of a response” (34%).

Another question sought an evaluation of the impact of the canons on judicial behavior. The response varied by type of court: 51% of supreme court justices, 60% of intermediate appellate judges, and 71% of trial judges agreed with the statement (see Table 5). It appears that supreme court justices are subject to more criticism than judges at other levels but are less concerned with restrictions imposed by the canons.

Do you feel that your state’s Code of Judicial Conduct prevents judges from adequately responding to unfair or misleading criticism of decisions?			
	Supreme Court	Intermediate Appellate	Trial
Yes	51%	60%	71%
No	49	40	29
Total	100%	100%	100%

The sense of being restrained does not necessarily indicate a desire to weaken or even change the canons. Most judges at all levels felt that their state’s code contained the right amount and type of restrictions (see Table 6).

Judges who feel their state’s canons are too restrictive greatly outnumber those who perceive too few restrictions. Yet most

judges—nearly two-thirds—view the canons as being of the right amount and type.

Do you feel that your state’s Code of Judicial Conduct contains too many restrictions on judicial campaign speech, too few restrictions, or the right amount and type of restrictions on judicial campaign speech?	
The right amount and type	64 %
Too many restrictions?	30
Too few restrictions.	6
	100 %

(5) *Judges place boundaries on their own campaign behavior.*

The survey identifies some areas in which nearly all judges believe a judicial candidate cannot stray. One question dealt with the “pledge or promise” provision in many canons, unaffected by the *White* decision. Judges were asked how strongly they support or oppose the following statement: “Judicial candidates should never make promises during elections about how they will rule in cases that may come before them.” Strong support was offered by 97% of the judges. Only a handful (out of nearly 2,500 judge participants) strongly opposed the statement.

Another area was examined in a question that sought the degree of support for the proposition, “Judicial candidates should commit to not making misleading or unfair accusations about opponents during elections.” Strong support came from 93% of the judges surveyed.

For the most part, supreme court, intermediate appellate judges, and trial judges reported similar experiences and expressed similar opinions. A striking finding is the pervasiveness of pressure to raise funds and public criticism. The relatively small number of high-profile supreme court races tells only a part of the story of how judicial elections are being conducted.

## WHAT THE PUBLIC THINKS AND WANTS

The telephone survey of the public included more questions than the postal survey completed by judges. A wide range of topics was covered. These include the record of voting for judicial candidates, evaluations of judges, courts, and other organizations, concerns over judicial selection and decision making, and preferences among various reform proposals. Most topics were approached through several types of questions, enriching what the survey findings can tell us. The benefit of such a multifaceted approach comes in what we can learn about core issues like whether being elected makes a judge a politician in the same sense as legislators and governors.

(1) *Judges are politicians . . . .*

One survey question took a direct approach to the issue of whether judges are politicians. The survey participants were read a series of words and phrases that people use to describe

8. The question read, “If yes, what are the two most important reasons that you held back or felt restrained in responding to criticism?”

judges and then asked to say how well each describes judges (the choices were “very well,” “well,” “not too well,” and “not well at all”). “Political” was included in the list. Most survey participants felt that “political” describes judges “very well” (34%) or “well” (44%). Only 4% felt “political” describes judges “not well at all.” The identification of judge with “political” is striking because of the 12 words and phrases (including “impartial,” “committed to the public interest,” and “qualified”) that were tested, “political” attracted the largest proportion of describes “very well” responses.<sup>9</sup>

(2) *But judges are a special kind of politician.*

Although judges are seen as “political,” it may be that the public attaches some caveats that distinguish judges from executive and legislative branch officials. Other questions pursued the meaning of political in the judicial context through an abstract approach, addressing concerns such as judicial independence. One question of that kind involved a statement:

Judges should be treated differently than other public officials since they must make independent decisions about what the law says. Judges should not have to raise money like politicians, make campaign promises like politicians, or answer to special interests. We must take concrete steps to ensure that judges can make unpopular decisions based only on the facts and the law.<sup>10</sup>

Respondents were asked if they found the statement very convincing, somewhat convincing, a little convincing, or not at all convincing. Eighty-two percent found the statement either very convincing (52%) or somewhat convincing (30%).<sup>11</sup>

A less wordy, but again somewhat abstract approach to public sentiment on the uniqueness of the judiciary was taken by asking survey participants to choose between a pair of statements. One statement describes courts as institutions that should be free of political and public pressure and the other posits that courts are just like other institutions and thus should *not* be free of those pressures (see Table 7). Survey participants were asked to say which statement is closer to their own view.

The responses suggest the public sees the judiciary as unique, rather than similar to other institutions. Eighty-one percent opt for the statement that courts are unique.

9. Other proportions of “very well” responses include “independent” (13%), “honest and trustworthy” (14%), and “qualified” (24%). It is possible that the context provided by earlier survey questions heightened sensitivity to the role of judge as political candidate.

10. The information contained in the statement might be seen as making the case for treating judges as different. Other questions, however, use wording that might be seen as arguing in the opposite direction.

11. That statement was read to one half of the survey participants. The other half was read a statement that ended with, “We must take concrete steps to ensure that judges are shielded from excessive partisan political pressure that other public officials face.” The majority of respondents found that a convincing argument, but to a lesser degree than for the notion of judges as free to make

**TABLE 7**

Courts are unique institutions of government that should be free of political and public pressure.	
Courts are just like other institutions of government and should not be free of political and public pressure.	
First statement much more convincing	62 %
First statement somewhat more convincing	19
Second statement somewhat more convincing	10
Second statement much more convincing	9
	<hr/> 100 %

The survey finds that the public image of the courts and judges contains a strong political component. The image also contains a strong sense that the judicial branch is unique. Such ambiguities and complexities are characteristic of public opinion on the courts and generally. Consistency is not the most prominent feature of public opinion.

(3) *Judicial elections damage the public standing of the judiciary.*

As Justice O’Connor noted, a considerable majority of Americans express concern over judges as campaign fundraisers. Does that concern translate into lower levels of trust in courts and judges? The survey evidence suggests that it might. Survey participants were asked, “How much trust and confidence do you have in courts and judges in your state?” The response choices offered to survey participants were “a great deal” (25%), “some” (53%), “just a little” (16%), or “none at all” (5%).

Whether people believe campaign fundraising influences judges is related to their trust in the courts (see Chart 1). “A great deal” of trust in the courts is expressed by 16% of participants who perceive “a great deal” of influence from campaign fundraising and by 40% of those who see no influence from campaign contributions.<sup>12</sup>

There is a statistically significant relationship between concern over fundraising and trust in the courts. The relationship is negative because the greater the concern over contributions, the lower the trust. Statistical significance gives us confidence that even if we asked the same questions of another group of 1,000 randomly selected adults, the relationship of perceived influence with trust would be about the same.

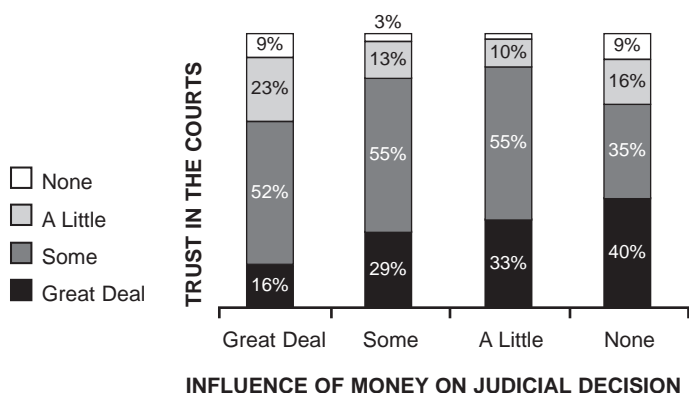
The strength of the relationship between perceived influence

unpopular decisions. Overall, 73% of respondents found the statement on partisanship convincing (split evenly between very and somewhat so).

12. Other recent surveys confirm the public’s unease with judges as campaign fundraisers and the association between that unease and levels of trust in the courts. Relevant surveys include AMERICAN BAR ASSOCIATION, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM (1999) and NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY (1999). Reports on both surveys have appeared in previous issues of *Court Review*. See *An Interview with Phil Anderson and Marilyn Goldman*, COURT REVIEW, Winter 1998, at 8; and David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, COURT REVIEW, Fall 1999, at 24.

**CHART 1**

**Level of Trust in the Courts by Perceived Influence of Money on Judicial Decisions**



and trust is measured separately. That relationship is weak. Here, we measured how well knowing a person's views about campaign fundraising correlates with their evaluation of the judiciary. A score of 1.0 indicates a perfect relationship—if you know how a person feels about campaign fundraising, you can exactly predict their trust in the courts. A score of zero means knowing a person's view on fundraising tells us nothing about their level of trust. The correlation between the influence and trust is on the low side:  $-.21$ .<sup>13</sup>

While those who disapprove of fundraising by judges are less likely to trust the courts, that is only a small part of a much larger story. There is no reason to single out campaign fundraising as looming larger in importance to the public than other issues related to the role and performance of the judiciary.

(4) *Voters fail to participate in judicial elections because they lack adequate information to choose among the candidates.*

The survey offers some support for the belief that a lack of information on the candidates is a factor underlying the reluctance to participate in judicial elections. First, the survey confirms the relatively low amount of information potential voters have on judicial candidates (see Table 8).

The public divides evenly between those who have at least "some" information and those who have "just a little" or less information.

**TABLE 8**

Thinking back to the last time there was an election for judges in your state, how much information would you say you had about the candidates in those election?

A great deal of information	13 %
Some information	38
Just a little information	35
No information at all	14
	<u>100 %</u>

Second, the survey measures the relatively low rate of voter participation in judicial elections (see Table 9).

**TABLE 9**

Thinking specifically about judicial elections, how frequently do you vote in elections for judges?

Almost always	59 %
Sometimes	17
Not often	6
Almost never	16
	<u>100 %</u>

The survey provides two benchmarks to compare voting in judicial elections to the rates in other types of elections. Eighty-seven percent of participants said they had voted in the 2000 presidential election. When asked to look ahead to the 2002 congressional elections, 72% said they were "almost certain" to vote, 18% said they would probably vote, and 8% gave the probability as 50-50. Three percent said they did not think they would vote. The survey findings are consistent with actual voting percentages.<sup>14</sup> There is a voter "roll-off" in which voters who cast ballots for "top-of-the-ticket" races like those for governor, but fail to vote in any judicial election.<sup>15</sup>

The most commonly offered reason survey participants give for not voting is that they "don't know enough about the candidates" (cited by 18% of the survey participants). "Don't have time" was the second most common answer (cited by 11% of participants).

Third, those who claim possession of a great deal of information are more likely to vote in judicial elections (see Chart 2). Those claiming possession of "a great deal" of candidate infor-

13. The statistic is Spearman's rho, a measure of the strength of the relationship between two variables appropriate for ordinal data (where responses to a question go from high to low but at intervals that are not fixed). For example, we do not know if in a response to a question asking about support for, say, merit selection, the distance between strongly support and somewhat support is the same as the distance between somewhat support and somewhat oppose.

14. It is likely that there is some exaggeration of frequency with which participants actually vote in judicial elections. Survey responses can be affected by what people think they should do. An indirect measure of voting can be obtained from the survey. About one in four (38%) survey respondents said they "always vote" in response to the question of why they did not vote in judicial elections. This compares with the 59% who stated that they

"almost always vote" in judicial races. According to the U.S. Census, 86% of registered voters cast their ballot for President in 2000. Press Release, Bureau of the Census, Registered Voter Turnout Improved in 2000 Presidential Election, Census Bureau Reports (Feb. 27, 2002), available at <http://www.census.gov/Press-Release/www/2002/cb02-31.html>.

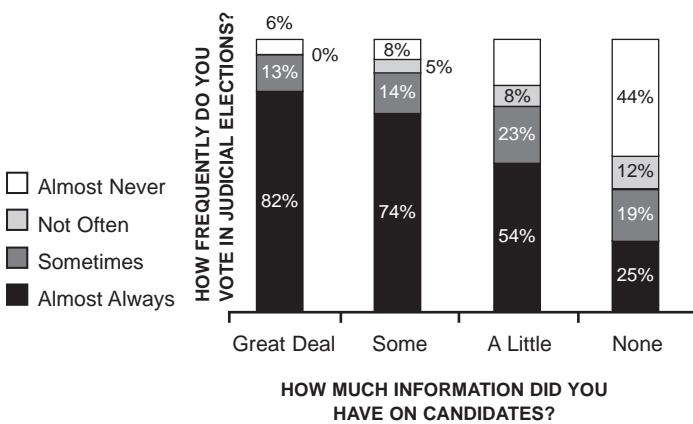
15. Roll-off rates during the 1990s ranged from 15% to 25% in retention elections (Florida), 33% to 42% in nonpartisan elections (Washington state), and 8% to 14% in partisan elections (Texas). Straight-party votes are more responsible for the low roll-offs found in partisan elections than the excitement generated by contested, hard-fought campaigns. Charles H. Sheldon & Linda S. Maule, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 63, 83, 143 (1999).

mation claim that they almost always vote in judicial elections. Among potential voters with no candidate information, only one in four report being “almost always” likely to vote.

Having information on judicial candidates is related to the extent to which people take an active interest in political life generally. Survey participants were asked if contributed money to political parties or candidates. About 40% were contributing and they claimed greater knowledge about judicial candidates and about how the courts work. Being a campaign contributor is related to a person’s education. Concern over influence of campaign contributions, however, was the same among political contributors and noncontributors.

**CHART 2**

**Likelihood of Voting in Judicial Elections by Information About Candidate**



(5) *The public is unwilling to give up the right to vote in the judicial selection process.*

The public prefers to elect judges despite a lack of information about the candidates, concern about campaign fundraising by judges, and low rates of voter participation in judicial elections. The preference to vote emerges clearly from the responses survey participants gave when offered a direct choice (see Table 10). The question offered two statements about how judges should be selected and asked which they found the most convincing.

**TABLE 10**

Judges in my state should be elected to office.	
Judges in my state should be appointed to office.	
First statement much more convincing	63 %
First statement somewhat more convincing	18
Second statement somewhat more convincing	8
Second statement much more convincing	12
Total	100 %

16. The balance weighed less in favor of elections when it was paired against “Judges in my state should be initially appointed to office, then voters should have a chance to decide whether the judge

Elected judges were preferred to appointed judges. The first statement was closer to the views of 80% of respondents.

(6) *The public values judicial accountability.*

Two questions, one on public criticism and the other on free speech, provide insight into the public’s thinking about the appropriate balance between judicial independence and accountability. The question on public criticism took the form of paired statements. Participants indicate which statement is the more convincing (see Table 11).

**TABLE 11**

Public criticism of judges makes judges more accountable and leads to better decisions.	
Public criticism of judges often intimidates them and leads to worse decisions.	
First statement much more convincing	39 %
First statement somewhat more convincing	31
Second statement somewhat more convincing	19
Second statement much more convincing	12
Total	100 %

Two-thirds of the public survey respondents were convinced by the notion that criticism is conducive to accountability. Few saw criticism as intimidation.

Another survey question used a more abstract form of words to investigate the importance placed on judicial accountability relative to other considerations. A statement was read and the participants were asked to say how convincing they found it to be (see Table 12).

**TABLE 12**

Our courts and judges must be accountable to the people.	
So-called reforms that limit the ability of citizens to educate others about the decisions of judges are a fundamental assault on the Constitution. People who say they’re out to reform the system are really just trying to take away your right to vote.	
Very convincing	26 %
Somewhat convincing	36
A little convincing	19
Not at all convincing	19
Total	100 %

The response to the statement is mixed. The statement convinces the majority of respondents. The balance was tipped toward the side of “somewhat” rather than “very” convincing.

Overall, the public is equivocal in how it views the judiciary. On the one hand, it appears to see judges as political and to desire that judges be held accountable through the electoral process. On the other hand, it regards judges as different from other elected officials. Somehow campaign funding by a judicial candidate is qualitatively different that fundraising by a leg-

stays in office.” Fifty-four percent favored the first statement and 42% the second.

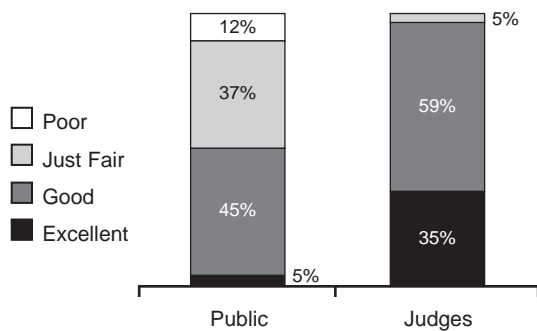
islative or executive candidate. Perhaps the public image of the judiciary contains the elements that many groups and individuals concerned with the *White* case sought to reconcile.

(7) *The public and the judges disagree on how judges should be selected.*

The surveys identify some points of agreement and disagreement in the priorities of judges and the public for improving judicial elections. That difference may be related to a fundamental divergence in the opinions of judges and public. Judges give themselves high marks, while the public gives far lower marks to the quality of the job being done by the courts in their state (see Chart 3). A judge is seven times more likely than members of the public to rate courts and judges as doing an excellent job (35% versus 5%). The public is evenly split between those holding positive and negative views of the judiciary, while 96% of judges describe the courts as doing an excellent or good job.

**CHART 3**

**How would you rate the job being done by courts and judges in your state?**



Such a fundamental difference is likely to color how each group approaches the topic of judicial selection.

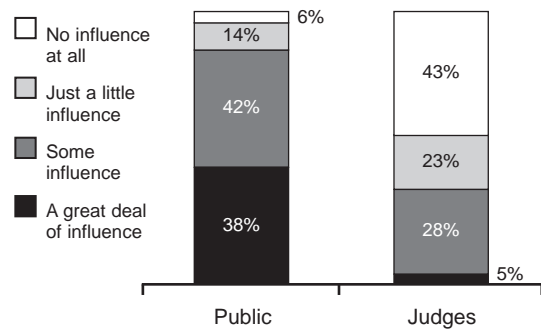
The gap between what the public and judges think is also found in the question of whether campaign contributions influence judges' decisions. The public's assessment of the impact campaign contributions made to judges have on their decisions is at odds with the judiciary's view (see Chart 4). Thirty-eight percent of the public and 5% of the judges surveyed attribute "a great deal of influence" to campaign contributions.

Eight specific reform proposals were presented to judges and the general public (see Table 13). The reaction to five of the proposals was roughly similar among judges and the public. Most proposals were either strongly or somewhat supported by judges and the public alike.

There were two main points of difference. First, the public is more supportive than judges of proposals that would bring more information or more public participation into the judicial election process. This is particularly true of voters' guides that would provide a standard source of information on candidates (51% of judges and 72% of the public strongly agreed with that proposal). There is also greater public support for establishing independent citizen boards to inform the public about misleading advertising in judicial campaigns. These are differences in degree. Both proposals receive support ("strong" or "some-

**CHART 4**

**How much influence do you think campaign contributions made to judges have on their decisions?**



**TABLE 13**

**EIGHT REFORM PROPOSALS: SUPPORT BY JUDGES AND PUBLIC**

A series of proposals have been made to help improve the way we elect judges. For each one, please mark whether you strongly support, somewhat support, somewhat oppose, or strongly oppose the proposal.

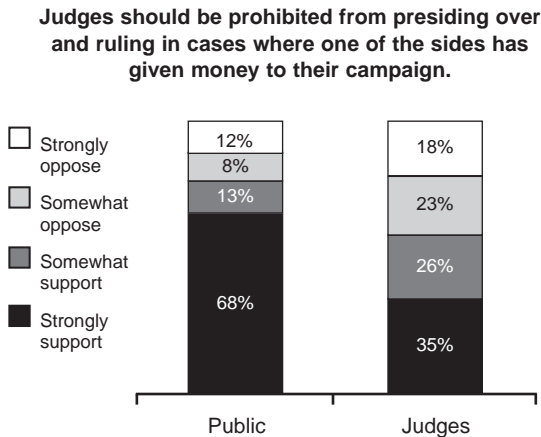
	Proportion Giving Strong Support	
	Public	Judges
States should provide voter guides prior to judicial elections to help inform voters about the candidates in each race	72 %	51 %
States should require that all judicial candidates disclose the individuals, parties, or organizations who donate money to their campaigns	72	80
States should require that all political advertisements in judicial elections clearly state who is paying for the ad	74	87
Independent citizen boards should be established to inform the public about misleading or inaccurate advertising in judicial campaigns	56	45
States should limit campaign contributions to judicial candidates	55	45
Judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign	68	35
Judicial candidates should condemn negative or misleading advertising done on their behalf	60	83
Judicial candidates should commit to not making misleading or unfair accusations about opponents during elections	72	93

what”) from a sizable majority of judges and members of the public.

The second point of difference is in the behavior of judges in relation to or in response to campaigning. Judges are stronger supporters of a proposal that judicial candidates should condemn negative or misleading advertising done on their 83% percent of judges and 60% of the public gave “strong support” to that proposal.

The sharpest difference between judges and the public is about a prohibition on presiding over cases in which one of the sides contributed to their election campaign. The public was more supportive than judges of the proposal that “Judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign” (see Chart 5). Two-thirds of the public but only one-third of judges strongly support a prohibition on presiding over cases when one side has given money to a judge’s campaign. Even so, a majority of judges (61%) gave either some or strong support to that proposal. The public was also more supportive of establishing independent citizen boards to inform the public about misleading or inaccurate advertising in judicial campaigns.

**CHART 5**



A majority of both judges and the public agreed that “[j]udicial candidates should commit to not making misleading or unfair accusations about opponents during elections.”

(8) *The judicial selection reform agenda is divisive.*

Although the public and judges responded similarly to some specific proposals for improving judicial elections, their views diverged when it came to assessing merit selection. Both judge and public survey respondents were given a summary of a proposal based on the merit selection model: a nonpartisan citizen panel evaluates and then recommends a slate of potential judges to the governor, who selects a nominee for confirmation by the state legislature. If confirmed, subsequent terms are secured through retention elections. The proposal receives substantial support from the public but a less positive reaction from intermediate appellate and trial court judges, who are evenly split on the supporting and opposing positions. Supreme court justices have a distinctive reaction to the proposal: one-third strongly support and one-third strongly oppose merit selection, with an overall majority (59%) in support (see Chart 6). This is one of the instances in which the

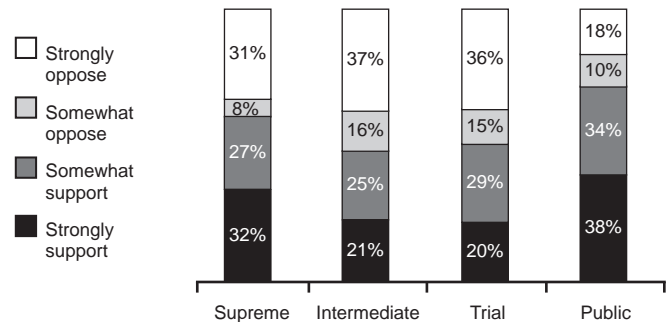
level of court is related to a judge’s opinions about judicial selection.

**CHART 6**

Here is a summary of a proposal that deals with the way judges are selected.

*Under this proposal, a nonpartisan panel of citizens, legal professionals, and civic leaders evaluates and recommends potential judges to the governor. The governor then chooses a nominee from the list who must then be confirmed by the state legislature. After each term, the public then votes on whether a judge should keep the seat or be removed from office. If a judge is rejected, the selection process starts again.*

Based on this statement, would you strongly support, somewhat support, somewhat oppose, or strongly oppose such a proposal?



**CONCLUSION**

The survey data challenge some assertions made in connection with the *White* case and support other assertions. Both challenges and support often come with clarification or modification.

There is support for the depiction of judicial election campaigns as “nastier, nosier, and costlier” than before. The striking finding from the judges’ survey is the extent to which concern over elections and campaign fundraising activity is so pervasive. Concern is not limited to the small number of states that have made the news. It is also not limited to supreme court races. Still, public criticism by other candidates or by national interest groups is infrequent.

The data also support the claim that the canons restrict responses to criticism. However, there is no consensus among judges that such restrictions need to be loosened. The majority of judges believe that the existing canons in their state are just right.

The survey also suggests that there is a commitment on the part of virtually all judges to keep judicial elections different. Pledges or promises are viewed as improper, as is a commitment to make misleading or unfair accusations against potential opponents.



Other assertions attracted mixed or limited support. Judges are viewed as political, but generally the public comes down on the side of respecting the unique responsibilities of the judicial branch. If judges are politicians, they are a very special kind of politician. The public wants judges to be subject to criticism but generally supports provisions that modify the election process to be appropriate for judicial office. The survey provides grounds for viewing with caution the desire expressed in this and other surveys to elect, not appoint judges. The public has an equivocal view of judges. The various pieces forming that view do not fit into a coherent whole.

Voters in judicial elections are poorly informed; voters acknowledge the limited information that they possess. Voters do not believe, however, that they are bereft of any information. About one-half of registered voters report knowing at least something about the judicial candidates in the last election.

The public is more supportive than the judiciary of reforms that will bring more information into judicial elections. The public is more persuaded than judges of the merits of efforts like voters' guides and campaign oversight committees. At the same time, the public is less convinced of the need for judicial candidates to condemn misleading advertising done on their behalf. It is notable, however, that a reform agenda for judicial elections attracts very substantial support among judges and the public.

Both of the surveys were professionally done and should meet accepted tests for acceptance by the courts. Under Rule 703 of the Federal Rule of Evidence, survey findings are allowed as a basis for expert opinion when they "are of a type reasonably relied upon by experts in the particular field in forming opinions." For survey results, the specific standard may be stated this way: "Was the poll or survey constructed in accordance with generally accepted principles, and were the results used in a statistically correct way."<sup>17</sup>

Here, both surveys meet that standard. The judges' survey is

unique in its authoritativeness. Nearly one of every ten serving American state judges participated. The high rate of participation by judges is strong testimony on the topicality of judicial selection.<sup>18</sup>

The public survey is unique in being devoted to the topic of judicial selection. The breadth and depth of its coverage gives it considerable value.

Perhaps the most striking finding from the public opinion survey is the equivocal view people hold of judges and the judiciary. In some ways, this is to be expected. Public thinking about the judiciary is inchoate. It is full of inconsistencies and not well grounded in knowledge or experience. That does not mean, however, that public opinion is without substance or importance. The American public is shaky on the details but gets the gist of our system. They acknowledge that judges are political, but consider them a unique sort of politician, ones who play within a different set of rules than legislative or executive branch elected officials when campaigning.



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17. See Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229, 233-34 (2d ed. 2000).  
 18. The response rate is on the high end of what is typical in postal surveys administered to judges. The rate is notable in that the surveys were mailed in the immediate aftermath of September 11, 2001. Other surveys have produced response rates ranging from 14% (Randall D. Lloyd, et al., *An Exploration of State and Local Judge Mobility*, 22 JUST. SYS. J. 19, 26-27 (2001) (on contests to

judicial authority)), 33% (Rita James Simon, *Judges' Translations of Burdens of Proof into Statements of Probability*, 13 TRIAL LAW GUIDE 103 (1969) (on defining reasonable doubt)); and 41% (Gordon Bazemore & Leslie Leip, *Victim Participation in the New Juvenile Court: Tracking Judicial Attitudes Toward Restorative Justice Reforms*, 21 JUST. SYS. J. 199, 205 (2000) (on juvenile court judges)). The importance of the topic to the judges surveyed is an important factor in determining the response rate.

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