

## 2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say

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NOVEMBER 3, 2010—Election Day 2010 brought a new round of special interest money, nasty ads and wedge issue politics into America’s courtrooms, breaking several spending records and spreading costly, ideological hardball campaigns into new states. The roar of this year’s national politics—which favored populists and partisans, and tilted against incumbents and the establishment—played out in judicial elections and referenda in a number of states.

In Michigan, Supreme Court candidates were vastly outspent by political parties and an out-of-state group in a TV ad war whose cost was estimated at \$5 million to \$8 million. In Alabama, combined spending exceeded \$3.2 million. Election costs remained modest in North Carolina, which offers public financing to qualifying appellate court candidates.

In Iowa, three Supreme Court justices were ousted after out-of-state interest groups spent nearly \$700,000 to unseat them over their votes in a 2009 gay marriage case. But organized efforts to unseat high court justices failed in Illinois, Colorado, Alaska, Kansas and Florida. Non-candidate groups spent heavily on TV ads in Michigan and Ohio, while Iowa and Illinois set records for the most expensive retention elections ever in their states.

As they have done several times over the last decade, voters rejected efforts to change judicial selection systems. In Nevada, Question 1, which would have replaced competitive elections with judicial appointments and retention contests, was defeated. But in Kansas, voters in District 1 also defeated efforts to scrap a merit selection system and switch to competitive contests.

“Pressure on impartial justice is growing,” said Bert Brandenburg, executive director of the Justice at Stake Campaign. “Judges are facing more demands to be accountable to interest groups and political campaigns instead of the law and the constitution.”

Through Monday, Nov. 1, 2010, slightly more than \$12 million was spent nationally on TV air time this year in state supreme court elections. Of that, nearly \$5.1 million — 42% of total spending for the year — was spent in the week leading up to the election, between Oct. 26 and Nov. 1.

Including \$4.6 million spent on TV ads in 2009, the current total for the 2009-2010 election cycle is approximately \$16.6 million, about the same amount spent on judicial television advertising in the last non-presidential election cycle, 2005-2006.

“As in past years, judicial election campaigns featured substantial numbers of hard-hitting, mud-slinging attack ads – many of which were as nasty as those seen in any political campaigns,” said Adam Skaggs, Counsel at the Brennan Center for Justice at NYU School of Law.

Final estimates of TV ad spending, as recorded by TNS Media Intelligence/CMAG, are expected within a few days. Complete candidate fundraising data often are not fully available until weeks, and in some cases months, after the elections, meaning that total campaign cost totals tend to rise with time.

Three in four Americans believe that the special-interest money needed to finance such elections influences court decisions. From 2000 through 2009, fundraising by high-court candidates surged to \$206.9 million, more than double the \$83.3 million raised in the 1990s.

This year, heavy spending and angry TV ads spread to several states holding retention elections, which in 2000-2009 had accounted for barely 1 percent of spending in high court races. This year, high-court retention elections in Illinois, Iowa, Colorado and Alaska resulted in about \$4.6 million in total costs—more than twice the \$2.2 million raised for all retention elections nationally in 2000-2009.

In most of the 15 states where 37 justices stood in retention elections, however, campaign expenditures were far lower than in competitive election states.

Overall, 33 states held some type of election. In addition to the 15 states holding one-candidate retention elections, in which incumbents needed a “yes” vote to stay on the bench, 11 states held competitive elections for 18 seats. In seven other states, there were no challengers in elections that technically were competitive, granting automatic victory to the candidate on the ballot.

The following is a round-up of major trends in the 2009-10 judicial election campaign season, as identified by the Justice at Stake Campaign and the Brennan Center for Justice. Further information is available at the Judicial Elections 2010 web site.

### **TV Ad Data**

Television ads ran this year in fourteen states with elections for the state supreme court: Alabama, Alaska, Arkansas, Colorado, Idaho, Illinois, Iowa, Michigan, Montana, North Carolina, Ohio, Texas, Washington and West Virginia.

Michigan saw the highest overall spending on supreme court TV ads, with about \$5.1 million spent on airtime, according to TNS Media Intelligence/CMAG; Ohio is second

with more than \$1.9 million in airtime spending. In both of these states, four candidates competed for two Supreme Court seats. (An additional Ohio Justice, Paul Pfeifer, ran unopposed in a vote in which no TV advertising has aired.)

The highest level of spending in a single-candidate retention race was in Illinois, where incumbent Justice Thomas Kilbride spent more than \$1.6 million on TV airtime through Nov. 1.

For the year, spending on television advertising in supreme court races was evenly split between judicial candidates and non-candidate groups. Through Nov. 1, candidates spent more than \$6.1 million on television advertising, while non-candidate groups — including political parties and special interests — accounted for 49% of all television airtime, spending more than \$5.9 million.

Four of the top five spenders on TV airtime in supreme court elections are non-candidate groups. The Michigan Republican Party ranked first overall in TV spending (just over \$2 million). Kilbride ranked second (\$1.6 million); the Michigan State Democratic Party ranked third (\$1.4 million); the Partnership for Ohio's Future ranked fourth (about \$846,000); and the Law Enforcement Alliance of America, which spent more than \$780,000 in support of two Republican candidates for the Michigan Supreme Court, ranked fifth.

“Many of the harshest ads were aired by political parties and special interest groups, which accounted for about 49% of all spending on television ads in state supreme court elections,” Skaggs said.

Through Nov. 1, spending on TV airtime in states holding single-candidate retention elections has totaled approximately \$2.1 million — approximately 17.5% of all TV spending during that time. This level of spending in retention contests is the greatest since the Brennan Center for Justice began compiling judicial TV ad data in 2000.

## **Major states**

### **Iowa**

All three state Supreme Court justices appearing on a retention ballot were voted out, following a withering attack on a unanimous 2009 ruling that overturned a state law banning gay marriage. The margin of defeat was similar in each case, with about 55 percent voting “no” on another term. Robert Hanson, the Polk County trial judge who initially ruled in favor of gay marriage, won his retention vote.

Out-of-state groups attacking the high-court justices included the National Organization for Marriage, the American Families Association, the Family Research Council, the Campaign for Working Families and Citizens United. Along with in-state groups, reported spending to oust the three justices was about \$800,000. Fair Courts for US, a group headed by former governor Robert Ray, reported spending nearly \$400,000 in

support of retaining the justices, raising total Iowa election costs to \$1.2 million. More than half, about \$700,000, came from out of state.

Iowa's supreme court had not seen a contentious retention election before this year. The election raised concerns that wedge issues could make it more difficult for courts, in Iowa and elsewhere, to rule in hot-button legal disputes.

"Under our constitutional system, courts are designed to be different from the other branches of government," Brandenburg said. "If judges in any state begin basing their decisions on political pressure and campaign spending, instead of the facts and the law, everyone loses."

## **Nevada**

Question 1 was put on the ballot after spending on Nevada high court elections rose, and after a 2006 Los Angeles Times report unearthed questionable fundraising practices by Las Vegas trial judges. But voters, by a margin of about 58 to 42 percent, chose to keep their current system of nonpartisan competitive elections.

The election continued a trend of states preserving their existing judicial selection system, whether elective or appointive.

"The politics of 2010 made it a difficult climate to ask voters to change how they picked judges," said Bert Brandenburg, executive director of the Justice at Stake Campaign. "And yet many voters remain concerned about campaign cash in the courthouse."

Candidates for Nevada high court raised \$9.8 million in 2000-2009, ranking the state eighth nationally.

## **Illinois**

In one of the year's most extraordinary races, Justice Thomas L. Kilbride reported raising more than \$2.5 million, while the Illinois Civil Justice League reported raising \$648,000 to defeat him. Kilbride retained his seat with 68 percent of voters favoring another term.

Although the campaign was prompted by a business ruling, in which the Illinois court overturned legislative limits on medical malpractice awards, the league focused on Kilbride's record in crime cases, memorably running an ad in which actors playing felons savor their violent crimes and say Kilbride took their side in court.

"In Illinois, special-interest money bought one of the most tasteless TV ads ever appeared in a court election, while a sitting justice raised millions of dollars from plaintiffs' lawyers and other parties who will appear in court," Brandenburg said. "In 2004, Justice Lloyd Karmeier called Illinois election spending 'obscene,' and it's hard to see how this year did anything to restore public trust in that state's courts."

As in 2004, unions and plaintiffs' firms backed the Democrat. National business groups, including the U.S. Chamber of Commerce, American Justice Partnership, and the American Tort Reform Association, backed the opposition campaign.

## **Michigan**

Including TV, Michigan was the nation's most expensive judicial election state in 2010.

Non-candidate groups, led by the state Republican and Democratic parties and the Virginia-based Law Enforcement Alliance of America, accounted for more than 80 percent of all TV spending.

The Brennan Center for Justice, which tracks satellite captures of major TV markets, has recorded \$5.1 million in TV ads, as of Nov. 1. The Michigan Campaign Finance Network, which checks TV station ad records, placed the total at more than \$8 million.

"Political parties and independent groups hijacked this election, heavily outspending the candidates, and ads on both sides were riddled with questionable claims," Brandenburg said. "Michigan remains a ground zero for negative, costly court elections."

The two incumbents reported the highest campaign fundraising. About two weeks before the election, Republican Robert Young, who won in a landslide, reported raising \$776,000, while Democrat Alton Davis, who lost, raised \$691,000. According to the most recent fundraising reports, total fundraising among four candidates was just over \$1.8 million.

## **Ohio, Alabama**

Ohio and Alabama, the two most expensive states for the 2000-2009 decade, showed that high court campaigns can generate big numbers in even relatively quiet years.

Of the \$3.2 million reportedly raised by Alabama candidates through Oct. 19, Republicans outraised Democrats four to one.

In Ohio, the most recent reports showed that candidates had raised \$2.7 million, with the Republicans outraising the Democrats. In addition, the Chamber-related Partnership for Ohio's Future spent more than \$840,000, according to Brennan Center data.

## **Colorado, Alaska, Kansas, Florida**

In Colorado and Alaska, campaigns opposing the retention of sitting justices made substantial efforts but were unable to win. Alaska Justice Dana Fabe got a 53 percent yes vote, despite a campaign by social conservatives. Three Colorado justices survived a challenge by Clear the Bench Colorado that focused on tax and spending issues.

“As in Iowa, ‘Vote No’ campaigns showed that judges in many states must look with more concern than at the impact of single-interest protest groups,” said Skaggs. “More than ever, a single vote in a single legal dispute might haunt judges at election time, and that will make it harder for many to focus on facts and the law, instead of political agendas.”

Attempts by social conservatives in Kansas, and by Tea Party activists in Florida, failed to gain significant traction on announced efforts to unseat justices in their states.

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The Justice at Stake Campaign is a nonpartisan national partnership working to keep our courts fair, impartial and free from special-interest and partisan agendas. In states across America, Campaign partners work to protect our courts through public education, grassroots organizing and reform. The Campaign provides strategic coordination and brings organizational, communications and research resources to the work of its partners and allies at the national, state and local levels. For information, visit [www.justiceatstake.org](http://www.justiceatstake.org).

The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Center works on issues including judicial independence, voting rights, campaign finance reform, racial justice in criminal law and presidential power in the fight against terrorism. Part think tank, part public interest law firm, part advocacy group, the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector. For more information, visit [www.brennancenter.org](http://www.brennancenter.org).

### **TV Methodology**

All data on ad airings and spending on ads are calculated and prepared by TNS Media Intelligence/CMAG, which captures satellite data in that nation’s largest media markets. CMAG’s calculations do not reflect ad agency commissions or the costs of producing advertisements. The costs reported here therefore understate actual expenditures; the estimates are useful principally for purposes of comparison of relative spending levels across states.