



Written Testimony of

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**Before the House Judiciary, Rules and Administration Committee
on**

**House Bill No. 251, the Idaho Judicial Independence Act, and
House Joint Resolution No. 3, Providing for Selection of Judges and Justices**

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Madam Chair and members of the Committee:

Thank you for accepting this testimony on behalf of the Brennan Center for Justice at New York University School of Law. The Center's mission is to promote equality and human dignity through an innovative and nonpartisan program of scholarship, public education, and legal action that safeguards fundamental freedoms. The Center's Democracy Program works to promote full participation and fair representation in accountable government, including through public financing of judicial election campaigns.

1. The Idaho Judicial Independence Act

Through this Act, Idaho has an opportunity to join a growing community of States that have adopted partial or full public funding systems for judicial, executive, and/or legislative offices. The American Bar Association also endorses full public financing for States that elect judges. The Act will substantially reduce candidates' reliance on private contributions and enable them to respond

more readily to the sort of interest-group attack ads that Idahoans have unfortunately become familiar with in recent Supreme Court elections.

Judicial candidates' financial independence is critical to protecting every person's right to due process. Each litigant, rich or poor, politically connected or not, must know that his or her case will be heard by a judge whose loyalty is to the law. Citizens cannot have confidence in an impartial judiciary if they believe judges' decisions might be affected by the interests of campaign contributors—or of those who will be asked to fund the next campaign. Recent national polls show that 76% of respondents believe campaign contributions have “a great deal” or “some” influence on judges' decisions, and only 5% believe contributions have no influence at all. Shockingly, 46% of state judges agree that contributions have at least “a little” influence on decisions. If half of the judges think decisions may be affected by campaign contributions, what is the public to think? Even those who would not support public financing of legislative and executive campaigns can support the Act as a vital aspect of ensuring that every Idahoan has, and is seen to have, a fair day in court.

Under the Act, a commission will set an amount, based on amounts spent in previous campaigns, to be distributed from the Idaho Judicial Independence Act Trust Fund to Supreme Court and Court of Appeals candidates who choose to accept public funding. Candidates must raise a fixed number of \$5 contributions from individuals to ensure they have enough support to justify their receipt of public funds. Once candidates are certified as eligible, they must conduct their campaigns exclusively with Trust Fund money. Thus, all certified candidates for a seat will have the same amount to spend, ensuring a robust debate in which voters will have the opportunity to hear from all candidates. Candidates who choose not to accept Trust Fund money will not be subject to expenditure limits.

The Trust Fund will not require additional taxation. Like public funding systems in place in other States, the Act calls for a dedicated stream of income from specific sources, which are listed in

proposed § 34-2605 of the Idaho Code. It appears that most of the Trust Fund will come from a surcharge on fines for traffic and parking violations and infractions of fish and game statutes. The Arizona Supreme Court recently—and unanimously—upheld a nearly identical mechanism against a claim that the system violated the First Amendment rights of a person who parked illegally and had to pay the surcharge. *See May v. McNally*, 55 P.3d 768 (Ariz. 2002), *petition for cert. filed*, 71 U.S.L.W. 3489 (Jan. 9, 2003) (the Brennan Center is counsel to Arizonans for Clean Elections, an intervenor-defendant in the *May* case).

The Act also contains a provision crucial to any public financing system with voluntary expenditure limits. If a nonparticipating candidate raises or spends funds in excess of the limit voluntarily accepted by participating candidates, the Trust Fund will disburse “matching” funds to certified candidates equal to the amount by which the nonparticipating candidate has exceeded the limit. *See* § 34-2606(10). This assures candidates that by agreeing to limit expenditures, they are not “unilaterally disarming” and leaving themselves vulnerable to a high-spending opponent. To protect the Trust Fund from depletion, matching funds are capped at double the original expenditure limit. Thus, it is possible for a nonparticipating candidate to outspend participating candidates, although participating candidates should still have sufficient resources to get their message to voters. Courts routinely uphold “trigger” provisions that make additional funding available when nonparticipating candidates exceed voluntary spending limits. *See Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998).

We believe, however, that the matching-fund provision has an important gap that should be closed by the Committee. Though the Act, as drafted, protects participating candidates from high-spending opponents, it offers no protection to candidates attacked by individuals or interest groups unconnected to opposing candidates. As the Committee no doubt recalls from recent experience, independent attack ads can play a significant role in judicial campaigns. What it may not be aware of is the rapidly growing scope of this phenomenon. In the 2000 elections, for example, non-candidate

spending in only the four states with the most expensive campaigns reached approximately \$16 million.

All judges are potentially vulnerable to interest-group attacks, whether their decisions can be characterized as “liberal” or “conservative,” “pro-business” or “pro-consumer.” A judge who writes an opinion expanding tort liability might be targeted by the insurance industry; but if the opinion had gone the other way, the judge might be attacked by trial lawyers’ organizations. Candidates participating in the public finance system should be able to respond to such attacks. To close this gap, the Act should require individuals or groups underwriting independent expenditures aimed at electing or defeating a particular candidate to disclose promptly the amounts they are raising and spending, so that matching funds can be made available quickly. There is recent authority for the constitutionality of matching independent expenditures. *See Daggett v. Comm’n on Gov’tal Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (noting that those who attack a candidate “have no right to speak free from response—the purpose of the First Amendment is to secure the widest possible dissemination of information from diverse and antagonistic sources”).

2. House Joint Resolution No. 3

This resolution would amend the Idaho Constitution to eliminate contested elections for Supreme Court, Court of Appeals, and District Court judgeships. Instead, a nonpartisan council would recommend between two and four candidates for each vacancy, and the Governor would appoint one of the council’s nominees. At the end of a judge’s term, the judge would face a “retention” election, in which voters would decide whether the judge should serve another term or be removed from the bench. There would be no opposing candidate; if voters removed the judge, the Governor would appoint a replacement. Fifteen states have adopted similar systems.

We are cautiously supportive of the concept of appointing judges, but we hesitate to support the Resolution. The value of an appointive judiciary was apparent to the Framers of the federal

Constitution, who of course provided not only for Presidential appointment but also for lifetime tenure as a means of guaranteeing judicial independence. Nonetheless, the appointive process should not be viewed, as it sometimes is, as “taking politics out of judicial selection.” The process by which a Governor or other appointing authority chooses judges is clearly political, at least in part, which is why the federal system checks the President’s power by requiring the advice and consent of the Senate. What an appointive system removes from the system is the particular *kind* of politics that comes with contested elections. In an campaign, candidates (including sitting judges) can come under considerable pressure to commit to decide particular kinds of cases in a way that is popular with a majority of voters, rather than according to the law. That kind of pressure is not absent from the appointive process, but it is generally not as stark and arises in contexts in which it is easier for candidates to survive the process without bringing their future impartiality into question. A lifetime appointment, as in the federal system, also protects sitting judges from considering whether potential contributors’ interests could be affected by the judges’ decisions. It should be emphasized, however, that a system that includes retention elections does not fully insulate the judiciary from this pressure.

Our caution in supporting the Resolution comes from two sources. First, we believe the power of the Governor and the nominating council should be subject to the Legislature’s advice and consent. It is important that judges be independent, but citizens should have some say in who gets onto the bench. In an appointive system, they can best do so through legislators who collectively represent every part of the State and reflect the concerns of a variety of constituencies.

Second, while the data are limited and there is some controversy on the subject, many judges and other observers believe that women and racial minorities are less likely to become judges in appointive systems than in elective systems. We would not support a move to an appointive system unless there were assurances that procedures were in place to preserve, if not enhance, whatever diversity has been achieved under the existing system. For example, Governor Mitt Romney (R.,

Mass.), recently promulgated an executive order that will require his judicial nominating commission to include members from all geographical regions of the state, from a variety of professional backgrounds, and of both sexes and diverse racial and ethnic groups, and he has instructed the commission to seek out a similarly diverse pool of qualified judicial applicants. Such procedures could assure Idahoans of a high-quality bench reflecting all segments of the State's legal profession under an appointive system.

If the Legislature should be inclined to put the proposed amendment on the ballot, we have two recommendations regarding campaign financing. First, the Idaho Judicial Independence Act should still be enacted in this session. The voters may naturally be disinclined to give up their power to elect judges directly, and the proposed amendment may fail. Even if it eventually passes, public financing would still be desirable for judicial elections that take place before the new appointive system is implemented. In either event, it is important to put the Act into law as soon as possible so the Trust Fund can accumulate sufficient funds in time for the 2004 election. Second, if Idaho does switch to appointing judges, experience from other States suggests that public funding should be available if needed in the retention elections. Appointed judges tend not to spend time seeking contributions for their retention campaigns (indeed, this is a great advantage of eliminating contested elections), which leaves them especially vulnerable to unfair and well-funded attacks shortly before retention elections. We believe that the State would be best served by making a small amount available to all judges up for retention and having matching funds standing by if needed to respond to campaigns seeking to defeat particular judges.

Once more, we thank the Committee for the opportunity to provide this information, and we would be happy to discuss the bills further with Committee staff by telephone.