

# Trends: Close Up

October 2016

## Election 2016 and the Courts

With so much attention being paid to the 2016 presidential election, down-ballot items tend to be forgotten. However, ballot items in four states this November will have a direct impact on state courts. These proposals represent not just questions for voters in a particular year, but also broader discussions about how state courts operate, ranging from judicial age and capacity to the role of independently elected clerks of court.

### Mandatory Retirement Ages for Judges

Voters in Pennsylvania and Oregon will be voting on changes to their states' mandatory judicial retirement ages. Thirty-two states require some or all of their judges to retire once they hit a particular age. Pennsylvania voters will decide whether judges, who currently must retire at the end of the year in which they reach 70, can retire at the end of the year in which they reach 75. Oregon voters will decide on whether to simply repeal their mandatory judicial retirement age outright.

Many early state constitutions called for lengthy terms for judges, if not outright life appointments. The question arose of what to do with judges who had reached the point, as Alexander Hamilton put it in Federalist No. 79, of "inability." Articles of impeachment in most states could only be tendered against a judge for some misdemeanor or malfeasance in office.

## About the Series



These special reports are part of the National Center for State Courts' "Trends in the State Courts" series and serve as informative and timely updates for state court leaders. Any opinions expressed herein are those of the authors, not necessarily of the National Center for State Courts.

Simply being physically or mentally unable to continue in office fell into neither category.

The solution was to set specific ages for retirement in the state's constitution. Later, when judicial retirement systems began to be more developed, an alternative was offered to judges: retire by a set date or forfeit some or all of your pensions. In 1992 the U.S. Supreme Court held in *Gregory v. Ashcroft* that the continued practice in states of imposing such ages did not violate the Age Discrimination in Employment Act; moreover, state and federal courts have found these provisions do not violate either state or federal constitutional provisions. Therefore, any efforts to remove these provisions would have to come from the legislature; in states where the age is set in the constitution, changing these provisions would require voter approval.

In the last decade, as Baby Boomer judges have moved closer to these mandatory retirement ages, there has been a marked uptick in efforts in state legislatures to remove these provisions, with mixed



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## **“There has been even less success at the ballot box in changing judicial retirement ages.”**

success. Legislators in Indiana eliminated the mandatory retirement age for trial judges but balked at eliminating it for appellate judges. Virginia’s legislature, which not only sets the judicial retirement age but also selects all judges in the state, debated an increase for almost a decade before finally settling on a compromise that would raise the age for appellate judges but require trial judges to be reelected by the legislature itself before receiving the increase.

There has been even less success at the ballot box in changing judicial retirement ages. Eleven constitutional amendments to increase or eliminate the mandatory retirement ages for judges have been sent to voters since 1995, with only four being approved. Moreover, three of these four were minor changes, allowing judges to merely serve out the remainder of the year (Pennsylvania 2001) or the remainder of the term (Louisiana 2003,

Texas 2007) in which they reach the retirement age. Most of the other seven efforts were rejected handily, often with less than a 33% yes vote.

### **Legislatures Taking Control of Judicial Qualifications/Disciplinary Commissions**

Georgia voters will decide whether to recreate that state’s Judicial Qualifications Commission (JQC) and allow for the legislature to take control. Such commissions offer a means to discipline and even remove judges other than via impeachment. They can be traced back, in part, to the existence of mandatory retirement ages and offer a mechanism to remove judges without using arbitrary dates.

Developed in the 1960s, such commissions were designed to be an alternative to legislative activity in this arena. As such, they are typically made up of judges and lawyers, not legislators, to ensure judicial independence.

Hamilton’s warning in Federalist No. 79 that should the legislature have both the power to impeach judges and the power to remove judges for lesser reasons, “such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose.”

The current Georgia constitution sets the JQC membership as two judges selected by the supreme court, three attorneys selected by the state bar, and two non-attorneys appointed by the governor. The amendment up for a vote this fall would eliminate the membership criteria and allow the legislature to set its own criteria. Georgia has already enacted legislation that would go into effect if the amendment is approved, with legislative leaders appointing four of the seven members of the new JQC.

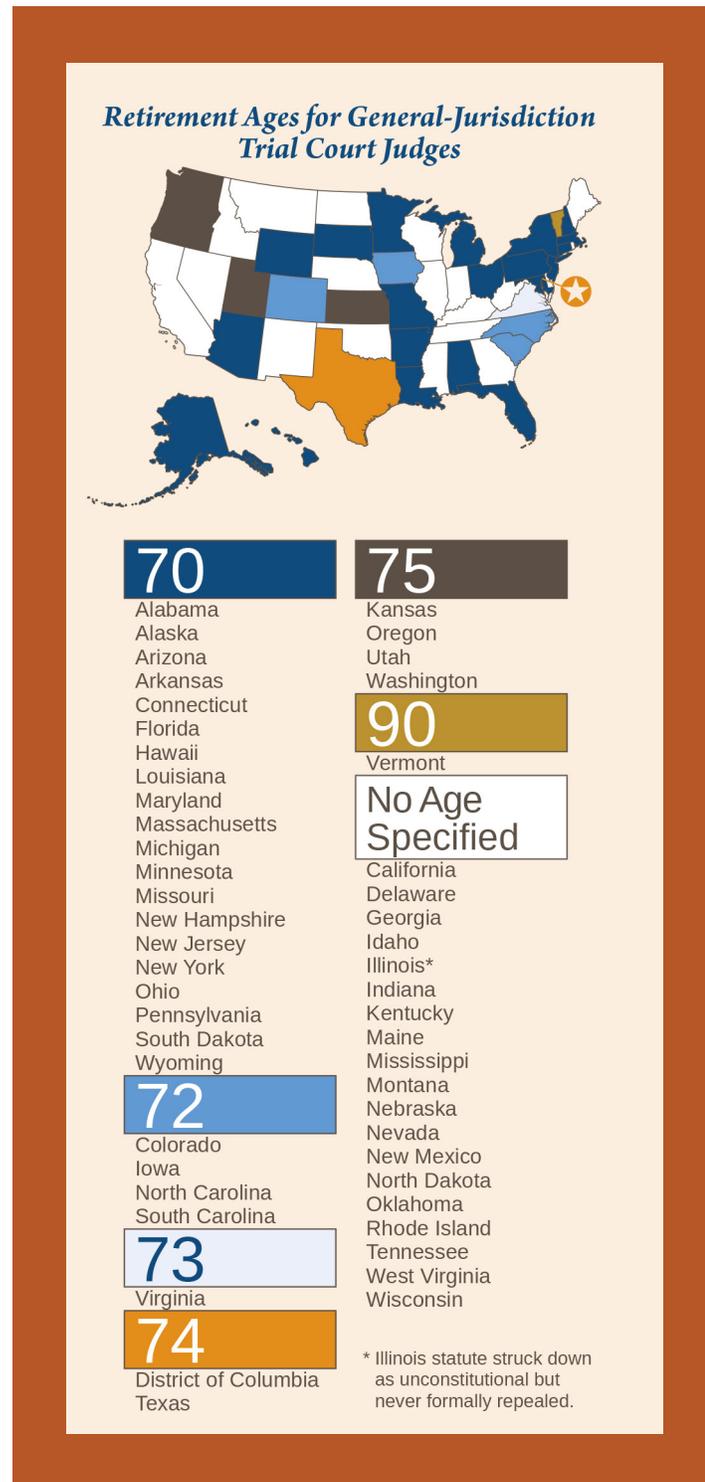
### Elected Clerks of Court in Arkansas

In Arkansas, and in the majority of states, the clerk of court is an elected official. Twenty-seven states allow voters to elect the clerks of every general jurisdiction court. In five additional states, some to most of the general jurisdiction courts have clerks who are elected. Arkansas is unique because its clerks serve only a two-year term. Whereas all other clerks (except some counties in North Dakota) have four- to six-year terms, Arkansas clerks of court must run in a general election every two years. The item on Arkansas’s ballot this fall would extend the term for clerks of court, as well as other county officials, to four years.

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