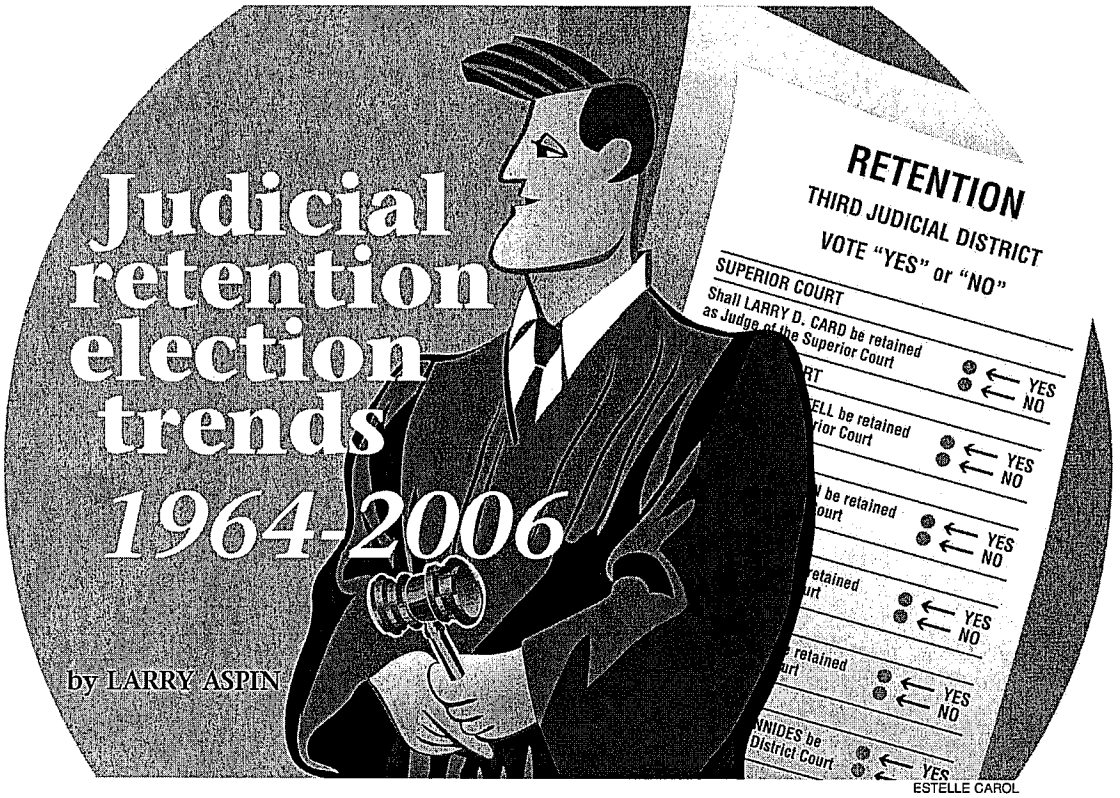

Judicial retention election trends 1964-2006

by LARRY ASPIN

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The Judicial Retention Project database[1] now contains results from 1964, when several states first adopted the merit-retention system, to 2006. Through the years the project has published several detailed analyses of retention election issues and then summarized and updated some of the findings in a series of reports.[2] This article provides a further update and reports developments on four elements of widespread interest: the affirmative vote, defeated judges, voter differentiation, and rolloff.

Updating and expanding information previously reported in "Trends in judicial retention elections, 1964-1998," *Judicature*, September-October 1999.

Affirmative vote

Both Figure 1 and Table 1 report the variability in the national mean affirmative vote across time. The national average dropped 9 points from 1968 to 1974 whereupon it remained relatively stable, if not drifting slightly upward, until 1990. Then the affirmative vote suffered a 7-point drop in a single election cycle, declining from 76.7 percent in 1988 to 69.4 percent in 1990. The average climbed back to the 75 percent level where it remained almost constant from 1998 to 2004 before decreasing slightly in 2006.

As seen in Figure 1, the affirmative vote is strongly related to political trust. The correlation coefficient between the trust index and affirmative vote is .82 for the years 1964 through 2004.[3] The trust index is more sensitive to trust in national institutions/officials than to trust in state and local officials and this may explain an interesting disconnect evident in Figure 1. By the 2000 election both the trust index and the affirmative vote had returned to their mid-1980s highs. Then, after 9/11, the trust index spiked upward 10 points for a single election cycle.[4] This momentary surge in trust did not benefit judges; the affirmative vote remained constant in the 2000, 2002, and 2004 elections.

In addition to the yearly variation, the affirmative vote continues to vary from state to state and from district to district within states. This variation is yet to be completely explained and the inter-state differences are reported in Table 1. While the Missouri and Wyoming affirmative vote means are about 10 points apart in 2006, respectively 68.8 percent

1. The 6,306 retention elections in the data set are all major trial court, appellate court, and supreme court retention elections held in the states of Alaska, Arizona, Colorado, Illinois, Indiana, Iowa, Kansas, Missouri, Nebraska, and Wyoming from 1964 through 2006. These 10 states use pure retention elections for the major trial court and all higher courts, hold the elections at the even-numbered years' fall general elections (i.e., 1976, 1978, 1980, etc.), and began using retention elections at least by 1976. Eight other states also employ retention elections; however, they either began to do so after 1976 and/or do not use them for trial courts. Thus, their elections are not included here so as to maximize comparability across time.

2. For the earlier summaries see William Hall and Larry Aspin, *What twenty years of judicial retention elections have told us*, 70 JUDICATURE 340 (1987); Larry Aspin, William Hall, Jean Bax and Celeste Montoya, *Thirty years of judicial retention elections: an update*, 37 SOC. SCI. J. (2000); and Larry Aspin, *Trends in judicial retentions elections, 1964-1998*, 83 JUDICATURE 79 (1999).

3. The trust index cannot be calculated for 2006. The 2006 American National Election Study included only one of the four questions used to construct the trust index.

4. It has been suggested by many researchers, and empirically supported by others (e.g., See Gary Langer, *Trust in government...to do what?* 13 PUBLIC PERSPECTIVE 7 (July/August 2002) that this upward spike in trust was due to confidence in national officials to handle issues related to national security and terrorism, not confidence in national officials to handle social issues, which remained low. Also, state and local government did not also enjoy an upward spike in trust in 2002, but rather remained constant (See Richard Cole and John Kincaid, *Public opinion on U.S. federal and intergovernmental issues in 2006: continuity and change*, 36 PUBLIUS 443 (2006). Thus, it is very possible that trust in the judiciary did not also experience an upward spike after 9/11.

Figure 1. Affirmative retention vote, rolloff, and political trust

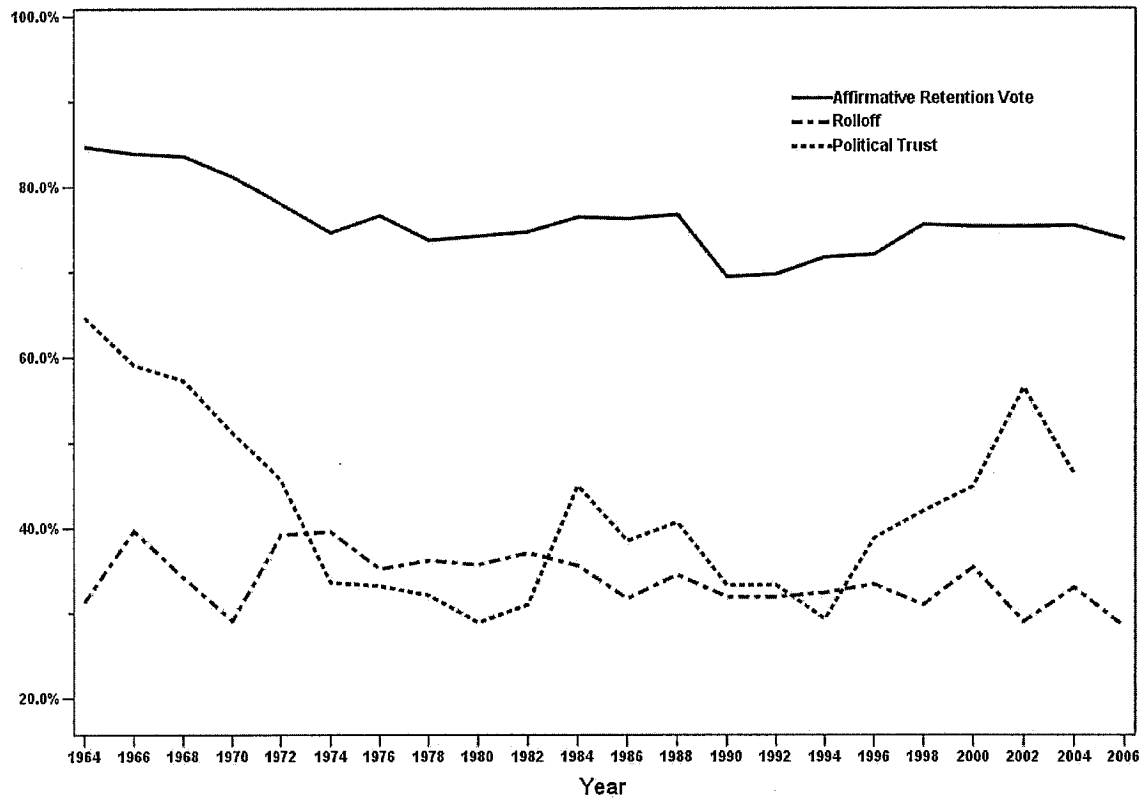


Table 1. Mean percentage affirmative vote for retention by state and year

Year	Alaska	Arizona	Colorado	Illinois	Indiana	Iowa	Kansas	Missouri	Nebraska	Wyoming	Yearly Average	Number of Elections
1964	71.7			85.5			71.6	82.0	87.2		84.7	127
1966	72.9			87.2				80.3	84.8		83.9	57
1968	74.6			86.4			78.8	80.6	85.8		83.6	47
1970	76.6		75.7	84.5			73.2	78.3	83.4		81.2	172
1972	74.9		74.0	79.5	68.1	84.4	78.8	79.0	82.6		78.0	246
1974	71.5		75.9	73.7	67.4	84.1	77.8	76.5	80.9	66.1	74.6	143
1976	69.0	77.2	74.0	76.7	66.0	80.5	80.9	76.9	77.6	80.5	76.6	215
1978	67.2	73.4	70.6	72.7	64.7	78.5	80.0	73.2	77.9	79.5	73.7	310
1980	63.9	81.6	71.7	73.4	66.9	78.2	77.1	71.1	77.2	76.0	74.2	271
1982	60.2	80.0	72.1	74.3	65.9	78.2	81.7	69.5	79.2	75.2	74.7	326
1984	68.4	81.0	74.2	77.2	71.2	77.4	82.6	72.8	73.6	75.6	76.4	324
1986	71.1	79.8	71.7	75.5	63.0	80.2	84.1	71.0	74.7	73.8	76.2	310
1988	68.9	78.7	75.0	76.7	66.1	79.1	79.5	69.5	78.7	78.2	76.7	320
1990	68.2	69.2	67.4	69.7	63.4	76.5	73.4	58.5	75.2	74.3	69.4	370
1992	64.3	66.8	68.8	72.8	63.3	74.2	72.1	63.0	70.3	58.2	69.7	329
1994	66.3	72.7	67.3	75.3	62.1	73.7	70.7	64.6	72.5	76.6	71.7	351
1996	69.0	72.4	66.5	75.0	68.8	74.1	76.0	67.6	67.1	77.5	72.0	387
1998	68.4	73.4	73.2	78.6	71.5	77.0	75.4	68.7	75.8	78.4	75.5	371
2000	64.3	76.1	72.7	78.9	73.1	77.0	75.9	69.0	74.4	76.5	75.3	402
2002	69.1	73.6	73.1	79.1	71.8	76.8	77.3	69.6	74.1	77.7	75.3	398
2004	69.5	75.4	73.1	78.9	67.7	76.4	75.3	67.0	73.9	80.0	75.4	428
2006	64.1	73.6	72.4	79.4	68.9	74.3	72.1	68.8	71.5	78.5	73.8	412

and 78.5 percent, all state means are well above the thresholds required for retention. Thus, any decline in the overall affirmative vote (e.g., that stemming from some sudden drop in political trust) is unlikely to sweep judges from office. Even when specific judges are targeted for removal by voters, a traditionally high affirmative vote in the district provides a cushion to survive dissatisfied voters.[5] Retention voters, however, can overcome this cushion. Wyoming has one of the highest average affirmative votes, 75.9 percent, yet it also has the highest percentage of elections where judges have been defeated, 3.9 percent.[6]

Defeated judges

In only 56 of the 6,306 judicial retention elections were judges not retained. The type of court is of no relevance to being defeated, but the required threshold remains important. Of the 6,306 elections 86.7 percent were major trial court elections and, similarly, 91.1 percent of the defeated judges were major trial court judges. In contrast, while 31.3 percent of the elections were in Illinois, which alone among the 10 states requires a 60 percent affirmative vote for retention, 51.8 percent of the defeated judges were in Illinois. Interestingly, of the 29 defeated judges in Illinois only 1 had an affirmative vote below 50 percent.

As seen in Table 2, after the 1990 peak when 10 Illinois judges were defeated, there has been a steady decline in the number of defeated judges.[7] In the last five election cycles only four judges have not been retained. While the recent low frequency of defeated judges coincides with a consistently high national affirmative retention vote, there is little relationship between them. The most significant factors in a typical retention election are very different than those in elections where judges are not retained. In the typical retention election, non-judge specific factors (e.g., political trust) play large roles, whereas judge specific variables (e.g., a judge's controversial act, organized campaign against retention, negative recommendation from a judicial performance commission) play large roles when judges are defeated.

While a general decline in the affirmative retention vote moves judges closer to the retention threshold making them more vulnerable, judges are rarely defeated simply because of a general decline in the affirmative vote.[8] Defeat comes when voters withdraw support from very specific judges, often in a single election cycle, with few negative consequences for the other judges on the ballot. For example, 30 of the 56 defeated judges won at least their first retention election. These 30 were later defeated when their affirmative vote plunged on average 22 percentage points from their previous successful retention election.

Voter removal efforts are clearly focused on specific judges and they are not indiscriminately throwing all the rascals out. The 30 at least once retained judges had an average affirmative vote 14.7 percent below their respective district-year means in their unsuccessful retention elections. Similarly, the judges defeated in their first retention election had an average affirmative vote 15.9 percent below their respective district-year means.[9] Also, illustrating this specific targeting and lack of significant negative consequences for other judges on the ballot is the defeat of Judge Landry in 2006. Judge Landry received an affirmative vote of 47.4 percent while the affirmative votes for the other nine judges in the 3rd district varied from 61.1 percent to 63.8 percent. Judge Landry was the only judge the Alaska Judicial Council recommended not be retained in 2006.

While retention election voters have removed only 56 judges from the bench, as will be seen below, they have tried and failed to remove judges in at least twice that many elections.[10]

In only 56 of the 6,306 judicial retention election were judges not retained

5. As expected, when the analysis is limited to judges who voters supported less than the other judges in the district (e.g., an affirmative vote 5% or more below that of the other judges in the district), the lower the traditional affirmative vote in the district the more likely the judge was defeated. Obviously, the closer a judge's support level is to the retention threshold, the more vulnerable the judge is to smaller shifts in the affirmative vote.

6. In the other states employing retention elections that are not included in the analysis reported here, judges also have varying degrees of cushion from the retention threshold. California, Florida, Maryland, Oklahoma, South Dakota, and Tennessee employ retention elections only for higher courts, whereas New Mexico and Utah use retention elections for major trial courts, but began to do so more recently. Of these states all use the 50% criteria for retention except New Mexico, which increased it to 57%. The average affirmative votes in 2006 were California (72.9%), Florida (69.5%), Maryland (87.3%), New Mexico (77.1%), Oklahoma (67.0%), South Dakota (83.7%), Tennessee (75.3%), and Utah (79.3%). Utah's vote increases to 81.2% when the one defeated trial court judge is removed from the calculation.

7. Note that the sharp 1990 decline in the affirmative vote occurred in 9 of 10 states, but the only judges defeated in 1990 were in Illinois. Conversely, the defeat of 10 judges in 1990 was not the reason for the decline in the national affirmative vote that year. There are so few defeated judges that removing them from the analysis produces no effect on the national average affirmative vote.

8. There are rare cases when judges have not been retained in part because of a general decline in the affirmative vote for an entire district. In 1972 Judge William A. Ginos, Jr, (Illinois 4th district trial judge) received an affirmative vote of 61.4%, just above the 60% retention threshold and 7.0% below the district-year mean of 68.4%. In 1978 the district-year mean dropped 3.1% to 65.3% and the judge's vote also dropped 3.1% to 58.3%, which again was 7.0% below this district-year mean. Judge Ginos maintained his relative position in the district, but was removed from the bench by a small decline in the general affirmative vote.

9. The district-year mean is calculated in 18 of the 30 elections where judges won at least one prior retention election and 11 of the 26 elections where judges were defeated in their first retention election.

10. As a final note on defeated judges, defeat does not always end judicial careers. There are rare cases where judges have lost retention elections and subsequently returned to the bench. For example, Judge John DeLaurenti (Illinois 3rd district trial court) lost in 1980, was returned to the bench in 1982, and subsequently retained in 1988 and 1994.

Table 2. Defeated judges: number and mean percentage vote for retention by year and retention threshold*

	1964	1972	1974	1976	1978	1980	1982	1984	1986	1988
50% Required	46.7	39.2	44.2	0	42.7	25.3	42.7	34.6	36.5	48.8
	1	1	1	0	5	1	3	2	1	1
60% Required	0	0	59.8	58.8	57.0	52.1	56.3	0	56.4	55.4
	0	0	1	1	4	3	1	0	3	1
Total	46.7	39.2	52.0	58.8	49.0	45.4	46.1	34.6	51.4	52.1
	1	1	2	1	9	4	4	2	4	2

	1990	1992	1994	1996	1998	2000	2002	2004	2006	Total
50% Required	0	42.3	43.5	40.6	0	0	48.4	0	47.4	41.9%
	0	4	2	2	0	0	2	0	1	27
60% Required	55.3	55.3	57.8	0	0	0	0	55.2	0	55.8%
	10	2	2	0	0	0	0	1	0	29
Total	55.3	46.6	50.6	40.6	0	0	48.4	55.2	47.4	49.2%
	10	6	4	2	0	0	2	1	1	56

* Illinois requires a 60% affirmative vote for retention, all other states require a 50% affirmative vote for retention.

Voter differentiation

Voter differentiation among judges, as reflected in different retention votes, has settled to a low steady state. In most elections voters are consistently painting almost all judges on the ballot with the same brush. One way to express the typical lack of voter differentiation among judges is with a judge's absolute deviation from the district-year mean. This district-year mean, which controls for the inter-state and inter-district variation in the affirmative vote, is the average affirmative vote for all judges on the same ballot—when there are at least four judges on the ballot.[11] The absolute difference between a judge's affirmative vote and the district-year mean indicates the degree to which the judge has been treated differently—for whatever reason— than his or her fellow judges in the same district. For the 3,575 elections where four or more judges were on the ballot, the average absolute deviation was 1.9 percent. Thus, while the affirmative vote varies considerably from state to state and district to district, within a district the typical judge's affirmative vote differs very little from that of the other judges in the district.

As seen in Figure 2, the mean absolute difference from the district-year mean peaked in 1978 at a high of 3.7 percent. From 1980 to 1990 the average absolute difference was 2.2 percent. Since the 1992 election the average has varied between 1.5 and 1.7 percent, except for 2002 when after 9/11 it dipped to 1.2 percent.

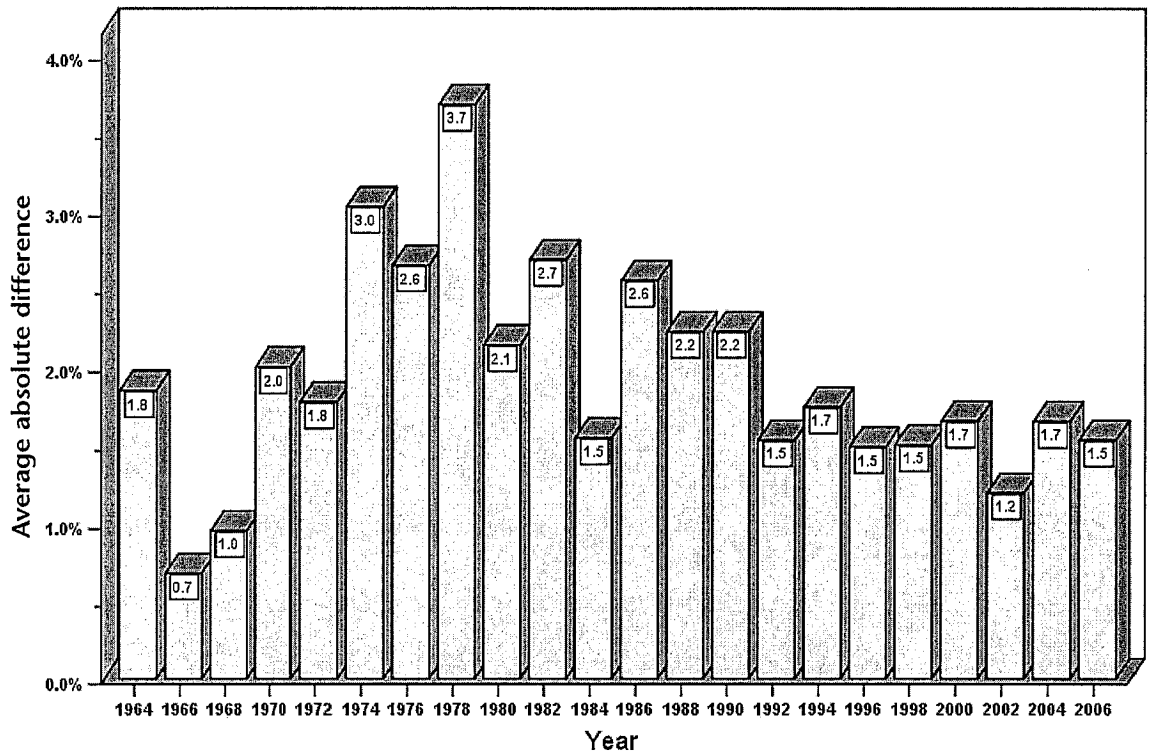
The obverse side of voters consistently treating most judges the same is that voters are also consistent in the number of judges singled out for special attention. Judges, however, may not desire this special attention, for it is almost always negative. The best way to identify when voters are treating a judge differently is distance of a judge's affirmative vote from the district-year mean.[12] In 83 of the 3,575 elections the judges' affirmative vote was 10 or more percentage points from the district mean, or a relatively steady 4 per election year.

In contrast to Figure 2, Figure 3 reports the distribution of elections both above and below the district-year mean. As is evident in Figure 3, when voters do treat a judge significantly different than the rest of the judges in the district, the treatment is almost always negative. Of the 83 elections where the judges' affirmative vote was 10 or more points from the district-year mean, almost all, 81 to be exact, were below the district-year mean. Yet while a significant portion of usually supportive retention voters were expressing their dissatisfaction with the judges in these 81 elections, judges were defeated only one-third of the time—24 of the 81 elections. In the other 57 elections

11. The district-year mean is calculated using all judges on the ballot. Only very minor differences occur when the district-year mean is calculated individually for each judge (i.e., the district-year mean is for all other judges on the ballot).

12. One problem with measuring voter special attention with just distance from the district-year mean is that 2,731 elections occur in districts with less than four judges on the retention ballot. An additional way to identify judges who are receiving special attention, changes in a judge's retention vote across time, is not reported because of its limitations. First, it is insensitive to a judge's first retention election. Recall that 26 of the 56 losses occurred the first time judges stood before voters and first time retention elections represent 48% of all elections in the database. Second, yearly variation in the affirmative vote is substantial in a few years and in a few districts (e.g., in 1992 the affirmative vote declined over 15 percentages points for most judges in Maricopa County, Arizona).

Figure 2. Average absolute difference from the district-year mean affirmative vote



District-year mean is the average affirmative vote of all judges in a judicial district who stood for retention in the same election. Distance from the mean is calculated in the 3,575 elections with 4 or more judges on the ballot.

the usually high affirmative vote allowed the judges to survive the election challenge. Thus, in addition to the 56 elections where judges were defeated, there were an additional 110 elections where judges survived the negative attention of voters—the documented 57 where judges were10 or more points below the district-year and an estimated 54 elections from the 2,731 elections where district-year mean is not calculated.[13]

Finally, the distribution of retention votes around the district-year mean reported in Figure 3 further supports the conclusion that while the usually supportive retention election voters can, and do, withdraw support from specific judges at the ballot box, seldom do voters heap praise on specific judges in the form of higher affirmative votes. In contrast to the large number of affirmative votes more than 10 percentage points below the district-year mean, note the paucity of affirmative votes even five points above the district-year average.

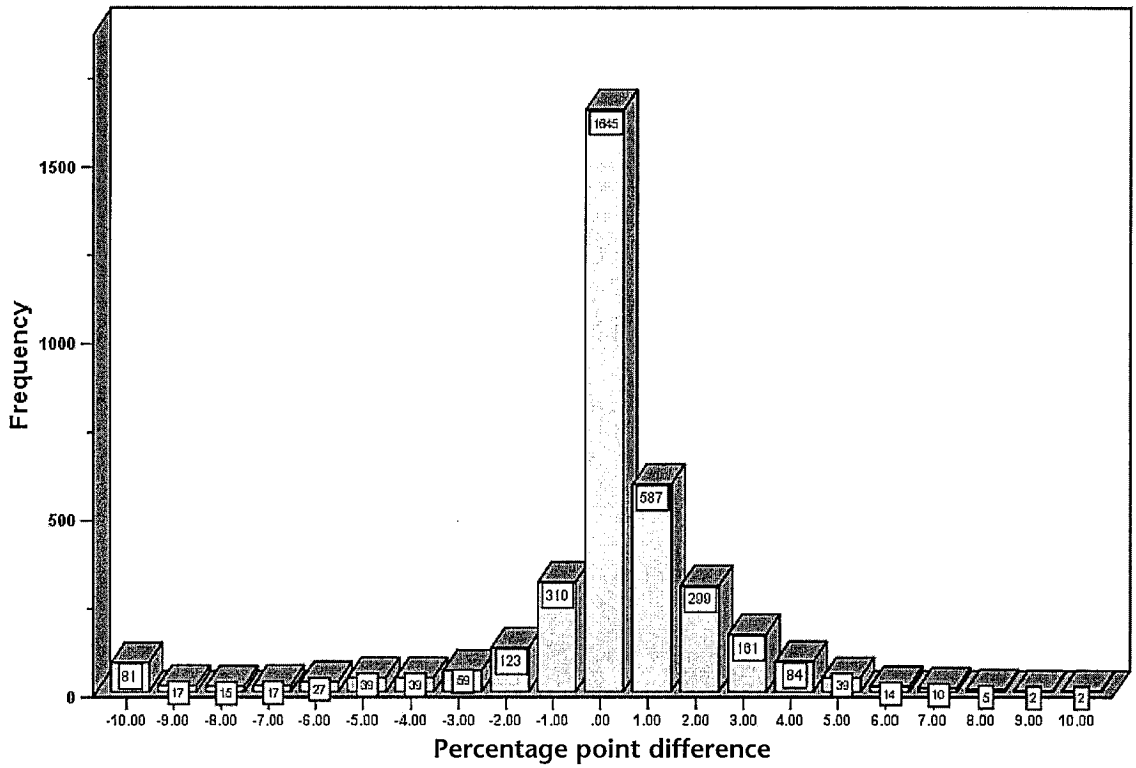
Rolloff

Over the decades rolloff has declined, but the decline has not been universal and a cyclical pattern is emerging. Rolloff is the percentage of the balloting voters who do not vote in the retention election. As illustrated in Figure 1, rolloff declined across the decades until it reached its lowest point in 2006. States with very little rolloff (e.g., Alaska, Wyoming) have remained relatively constant, but most other states have witnessed a decline in rolloff. The significant exception is Arizona where rolloff has increased substantially.[14]

Careful study of Figure 1 also reveals an emerging oscillation in rolloff where it is clearly higher in presidential elections than in off-year elections. For the 1976-1994 period there was an insignificant .7 percent difference between rolloff in presidential election years (34.5 percent) and rolloff in nonpresidential election years (33.8 percent). For the 1996-2006 period the difference in rolloff increased to 3.9 percent, 33.5 percent in presidential election years and 29.4 percent in nonpresi-

13. Distance from the district-year mean is not calculated for 2,731 of the 6,306 elections, those with three or fewer judges on the ballot. Since 27 of the 56 elections where judges were defeated come from these 2,731 elections, clearly in some of these 2,731 elections the usually supportive retention voters tried, but failed, to remove judges. Given the pattern reported above of judges being defeated in only one-third of the elections where voters single them out for negative attention, it is not unreasonable to estimate that in 54 of these 2,731 elections judges were retained even in the face of lower support by a significant proportion of usually supportive voters.

Figure 3. Distance from the district-year mean affirmative vote



For the 3,575 elections with 4 or more judges on the ballot the district-year mean is subtracted from each judge's affirmative vote. Values less than -10 are coded as -10, values greater than 10 are coded as 10.

dential election years. As with the general decline, the emerging oscillation in rolloff is observed in almost every state.[15]

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Reviewing recent retention elections reveals continuities, subtle changes, and significant variability, especially at the district level. Voters still routinely retain almost all judges, which is what existing judicial performance evaluation systems usually recommend (e.g., Alaska, Arizona, and Colorado). Judges are seldom awarded higher affirmative retention votes than their colleagues, but voters occasionally withdraw support and in some cases they are successful in removing the judge from the bench. While the differences are small, there are interesting patterns emerging with regard to whether the retention election occurs with a presidential election or is in an off-year. Far greater differences are still observed by moving down from the aggregate national values to inter-state and inter-district differences. Some of the inter-state variability in the affirmative vote is reported in Table 1. Inter-district variability on affirmative vote is similar to the inter-state variability observed in Table 1; however, inter-district variability on rolloff is larger. For example, within a state a 10 point difference between districts on the mean affirmative vote does occur, but it is not the norm. In contrast, 10 point inter-district differences on rolloff is the rule in most states.

14. For the 1976-1994 period rolloff in Arizona was 33.2%, whereas it increased to 43.1% for the 1996-2006 period. The increase is primarily in Maricopa County where rolloff has increased substantially from an average 35.3% in the 1976-1994 period to an average 48.8% in the 1996-2006 period, peaking at 54.5% in 2004. In contrast, Cook County, Illinois, another large urban county, saw rolloff drop from an average 52.4% in the 1976-1994 period to an average 46.1% in the 1996-2006 period, with a low of 38.8% in 2006.

15. In contrast to rolloff, while shifting ever so slightly the affirmative vote shows no clear signs of oscillating with the election year. In the 1976-1994 period the affirmative vote was higher in presidential election years, 75.9%, than in non-presidential election years, 74.1%. However, for the 1996-2006 period this has changed to 74.3% in presidential election years and 74.8% in non-presidential election years.

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