

CASELOAD HIGHLIGHTS

EXAMINING THE WORK OF
THE STATE COURTS

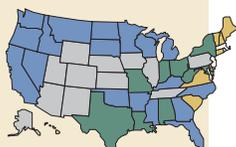
VOLUME 13, NUMBER 2
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Methods of Selection inside on
pages 4 and 5.

Appellate Courts



Trial Courts



Judicial Selection 101: What Varies and What Matters

Introduction

This Caseload Highlights offers a primer on the complex world of state judicial elections at a time in which longstanding misgivings about judges running for office are being brought into sharp focus by trends making those elections “noisier, nastier, and costlier.”

Thirty-nine states elect some or all of their judges (the total grows to 43 if elections for probate court judges in Connecticut, Maine, South Carolina, and Vermont are included). The pervasiveness of elections in the selection of state judges is one of the more enduring features of state judicial branches and a frequent target of judicial reformers. Even though in 1906 Roscoe Pound warned that “putting courts into politics, and compelling judges to become politicians in many jurisdictions...almost destroyed the traditional respect for the bench,” the percentage of the state judiciary facing elections today is essentially the same as the percentage in the early 20th century (89 versus 87 percent). The 2006 judicial elections for state courts of last resort offer a look into the current world of judicial selection.

The 2006 Judicial Elections

As of July 31, 2006, elections will be held to fill 86 seats on the courts of last resort in 30 states. Three types of elections will be used. Thirty-five justices will run in a *retention election* against his or her own record, facing a “Yes” or “No” vote on whether they should be retained in office (the method to be used in 17 states). Contested elections will decide the remaining 51 races, 17 through *partisan elections* (to be used in eight states) and 34 through *non-partisan elections* (to be used in 13 states). Twelve states exclusively use *appointments* to fill their courts of last resort.

Most but not all contested elections involve an incumbent. Nine of the justices up for re-election in 2006 did not seek another term, resulting in open seats to be filled by contested election. Eight of the incumbents facing non-partisan elections will not have an opponent. In two states—Alabama and Texas—candidates will run for the specific office of Chief Justice (also applicable in Arkansas, Montana, North Carolina, and Ohio although that position is not on the 2006 ballot in these states).

The Art of Classifying Judicial Selection Methods

There is no way to classify states into a single type of judicial selection system because judges in different or the same levels of courts within one state may be selected through different methods. The common practice of referring to four main methods for selecting judges—appointment, partisan election, non-partisan election, and retention election—simplifies but does not always clarify the main points of difference. What follows is a description of the basic elements that define a state’s method for selecting judges.

Stages in the Selection Process

The previous description of court of last resort races in 2006 is based on methods for selection to a subsequent or “full-term.” Consideration of both the method of *initial* and *subsequent selection* offers a more refined basis for classifying states. The raw material for such categorizations is shown in the adjacent table, Judicial Selection Methods by State. The table highlights the current lack of dominance of any one method.

The strong regional concentration of selection methods becomes apparent when the information from the table is displayed on separate maps for appellate and general jurisdiction trial courts, (see pages 4 and 5). The northern border from Washington State to Michigan uses non-partisan elections at both initial and subsequent selection. Northeastern states from Maine to New Jersey use appointment followed

Judicial Selection Methods by State

	Appellate Courts								General Jurisdiction Trial Courts							
	Initial Term				Subsequent-Term				Initial Term				Subsequent-Term			
	Partisan Election	Non-Partisan Election	Appointment	Retention Election	Partisan Election	Non-Partisan Election	Appointment	Retention Election	Partisan Election	Non-Partisan Election	Appointment	Retention Election	Partisan Election	Non-Partisan Election	Appointment	Retention Election
Alabama	•				•					•						
Alaska																•
Arizona																•
Arkansas		•				•										
California																•
Colorado																•
Connecticut																•
Delaware																•
Florida																•
Georgia		•				•										
Hawaii																•
Idaho																•
Illinois	•															•
Indiana																•
Iowa																•
Kansas																•
Kentucky		•				•										
Louisiana	•				•											
Maine																•
Maryland ¹																•
Massachusetts																•
Michigan ²		•				•										
Minnesota		•				•										
Mississippi		•				•										
Missouri																•
Montana		•				•										
Nebraska																•
Nevada		•				•										
New Hampshire																•
New Jersey																•
New Mexico	•															•
New York ³	•				•											
North Carolina		•				•										
North Dakota		•				•										
Ohio	•				•											
Oklahoma																•
Oregon		•				•										
Pennsylvania	•															•
Rhode Island																•
South Carolina																•
South Dakota																•
Tennessee																•
Texas	•				•											
Utah																•
Vermont																•
Virginia																•
Washington		•				•										
West Virginia	•				•											
Wisconsin		•				•										
Wyoming																•

Note: Several states use more than one method to select judges for either their trial or their appellate benches. There is no “correct” criterion to use in deciding which method to use for classification purposes. The selection method cited in such situations is the one used for the largest proportion of judges at that level. For trial courts, selection methods for judges differ either across districts of a single trial court or among trial courts that share the same subject matter in Arizona, Indiana, Kansas, and Missouri. For appellate courts, the selection method for courts of last resort is different for the intermediate appellate court in Michigan (as treated in this report) and New York.

- 1 Only registered Democrats and Republicans may vote in the circuit court primary.
- 2 Candidates for the supreme court must be nominated at party conventions or through nominating petitions.
- 3 Justices of New York’s appellate division are chosen from all judges elected to the supreme court.

by reappointment (Pennsylvania being the exception). The Midwestern and Southwestern states tend to use merit selection with appointment to an initial term followed by retention elections. Partisan elections are used for both initial and subsequent terms in two small clusters of states: Alabama, Louisiana, and Texas in the Deep South, and the neighboring states of Ohio and West Virginia. This regional clustering of selection systems complicates attempts to attribute patterns of judicial behavior or of public opinion to the formal methods by which states select their judges.

Multiple Selection Methods

In 39 states all appellate and general jurisdiction court judges are selected by a single method.

- Appointment: 11 states
- Partisan election: 5 states
- Non-partisan elections: 13 states
- Appointment followed by retention elections: 7 states
- Partisan selection followed by retention elections: 3 states

The remaining 11 states fall into three main groups. First, several states use different selection methods for their appellate and trial judges, as with appointment followed by retention elections for appellate judges and either non-partisan elections (California, Florida, Oklahoma, and South Dakota) or partisan elections (Maryland) for trial judges. Second, Michigan and New York select their court of last resort judges differently than they do their intermediate appellate and trial court judges. Third, more than one method is used to select general jurisdiction court judges in Arizona, Indiana, Kansas, and Missouri based on districts of a single trial court or across multiple courts sharing the same subject matter jurisdiction.

Selection Type and Judicial Term for Courts of Last Resort (in years)

Retention 16 States		Partisan 9 States		Non-Partisan 13 States		Appointment 12 States	
	Term		Term		Term		Term
Alaska	10	Alabama	6	Arkansas	8	Connecticut	8
Arizona	6	Illinois	10	Georgia	6	Delaware	12
California	12	Louisiana	10	Idaho	6	Hawaii	10
Colorado	10	Michigan	8	Kentucky	8	Maine	7
Florida	6	New Mexico	8	Minnesota	6	Massachusetts	Until Age 70
Indiana	10	Ohio	6	Mississippi	8	New Hampshire	5
Iowa	8	Pennsylvania	10	Montana	8	New Jersey	Until Age 70
Kansas	6	Texas	6	Nevada	6	New York	14
Maryland	10	West Virginia	12	North Carolina	8	Rhode Island	Life
Missouri	12			North Dakota	10	South Carolina	10
Nebraska	6			Oregon	6	Vermont	6
Oklahoma	6			Washington	6	Virginia	12
South Dakota	8			Wisconsin	10		
Tennessee	8						
Utah	10						
Wyoming	8						

Selection in Courts of Last Resort

Court of last resort elections are by district rather than statewide in eight states: Illinois, Kentucky, Louisiana, Maryland, Mississippi, Nebraska (except the Chief Justice), Oklahoma, and in South Dakota (only for initial selection).

Term Lengths for Courts of Last Resort

The length of subsequent (or “full”) terms for Court of Last Resort justices ranges from five to 14 years (as shown in the Selection Types and Judicial Term Length table above) for courts of last resort (except for the three states that do not mandate terms of specific length). In 29 states subsequent terms are for eight years or less, with terms of more than eight years specified in 18 states. The shortest terms tend to be in states with competitive elections, with six of these 22 states providing terms of 10 years or more. Term lengths associated with retention elections tend to be somewhat longer, but still in one-half of those states (9 of 16) terms are for six or eight years. The consequences of any particular method of selection

will vary depending on whether the term length is five, eight, or 14 years.¹

When is Non-Partisan Actually Partisan?

The traditional standard for non-partisan judicial selection is that candidates appear on the ballot without a party label. Yet appellate court races in Idaho, Michigan (high court) and Ohio—all nominally non-partisan—often look very similar to those in partisan election states. Michigan and Ohio are especially distinctive in that candidates are selected at party conventions and receive party endorsements. Many

¹A recent study noted that “intraplan differences” (especially the terms of office) may be as great as the differences between selection methods [partisan, non-partisan, appointment, merit]. Lee Epstein, Jack Knight, and Olga Shvetsova, “Selecting Selection Systems,” Chapter 9 in S. Brubank and B. Friedman (eds.), *Judicial Independence at the Crossroads: An Interdisciplinary Approach*. Sage Publications, 2002, p. 194.

NCSC Resource



National Center for State Courts
Judicial Selection and
Retention: Resource Guide

What Varies?

observers now place Ohio in the partisan election column while leaving Idaho and Michigan, (except for its Supreme Court, where candidates are often selected at party conventions) as non-partisan. The choice can be consequential to those concerned about the correlates of particular methods of judicial selection with patterns of judicial decision-making in areas like sentencing.²

Interim or Vacancy Selection

In all states with judicial elections, including states with partisan elections, many judges first reach the bench through an appointment to fill a vacancy that arises during a term of office. Interim appointments typically last until the next year in which judicial elections are held. In some states, if the vacancy occurs mid-term, the new appointee must run in the next judicial election, and then again in the election that occurs at the end of the original term.

The importance of interim appointments in shaping the composition of the bench can be considerable: during the years 1964-2004, 52% of judges in partisan election states joined the bench through an interim appointment, with the state-specific percentages ranging from a low of 18 percent to a high of 92 percent.³

Re-selection in Appointive States

Of the appointive states, only Rhode Island provides terms of office equivalent to the federal judiciary—lifetime subject to good behavior. Massachusetts and New Jersey appoint judges to terms until age 70, but in New Jersey an initial seven-year term must be served before a judge can be granted what is in effect tenure. In the other appointive states, terms run from 5 to 14 years in length, with continued service on the bench subject to a legislative or other review process at that interval.

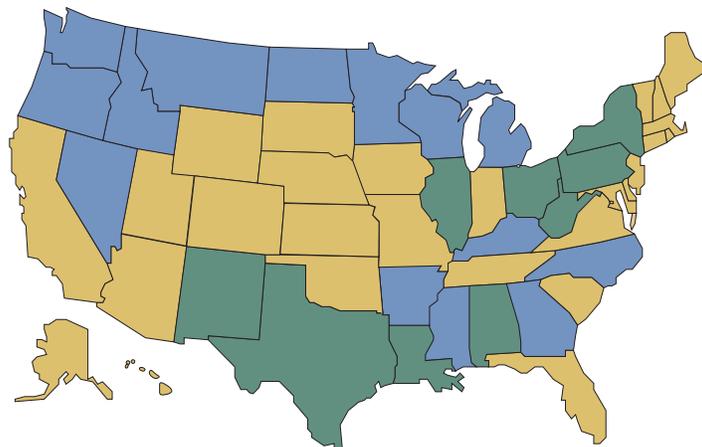
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Contestable vs. Contested Elections

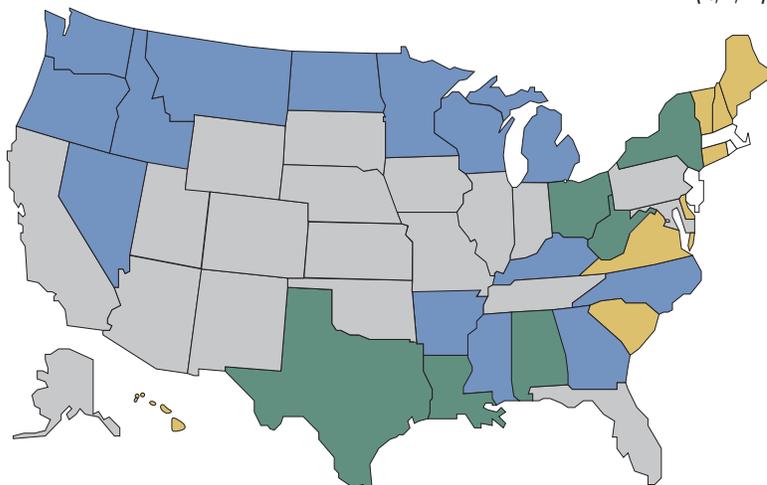
Of all judges subject at some point to a popular election, 78 percent potentially face an opponent in a partisan or non-partisan race (60 percent of the elected appellate bench and 80 percent of the elected trial bench). Historically and currently, however, most judges are unopposed when facing selection for a subsequent term. The actual competitiveness among states using the same selection method varies.

Method of Selection for Appellate Court Justices

Initial Term: ■ Non-Partisan Election ■ Partisan Election ■ Appointment



Subsequent Term: ■ Non-Partisan Election ■ Partisan Election ■ Re-appointment ■ Retention Election □ Lifetime or until age 70 (NJ, RI, MA)



² John Blume and Theodore Eisenberg, "Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study," *Southern California Law Review*, Vol. 72 (1999). The authors concluded that there is no statistically significant relationship between a state's method of judicial selection and the rate that the death penalty is reversed on appeal. However, as the authors note, had Ohio been treated as a partisan state, the relationship would have been sustained.

³ Lisa Holmes and Jolly Emrey "Court diversification: staffing the states courts of last resort through interim appointments," *Justice System Journal*, Vol. 27, No. 1, 2006.

What Matters?

From 1988 to 1995, 28 percent of incumbents in high court partisan elections did not face a challenger, nor did over one-half (55 percent) of those in non-partisan races. Contested elections for seats in courts of last resort are most common when the race is for an open seat on the court.⁴

Low Voter Participation

Judicial elections are “low information” races, especially if the candi-

date’s party affiliation or incumbency status is not listed on the ballot. In the absence of useful information, many voters skip over judicial races. Roll-off is the difference between the number of voters who make a choice for national or the senior statewide office (usually the governor) and the number who cast a vote for the highest statewide judicial race. Generally, roll-off is lowest in partisan elections and highest in retention elections, with non-partisan elections

falling somewhere in between. A major stride in providing voters with relevant information is through judicial performance evaluation commissions, found in seven retention election states (Alaska, Arizona, Colorado, Kansas, New Mexico, Tennessee, and Utah). These commissions publicize aggregated survey responses provided by litigants, jurors, and attorneys who appeared in a judge’s courtroom.

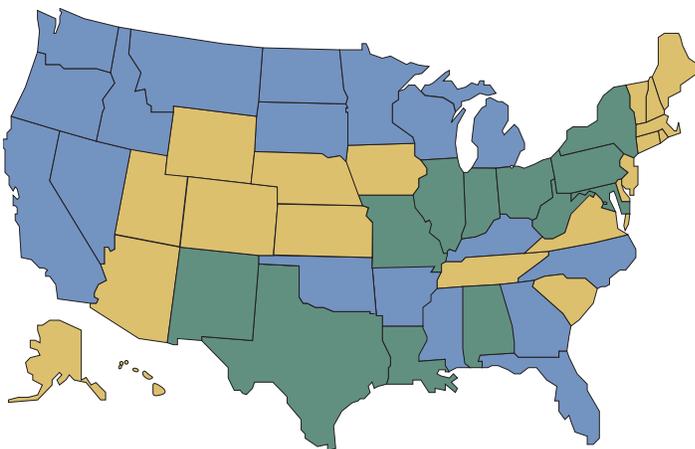
On the Web



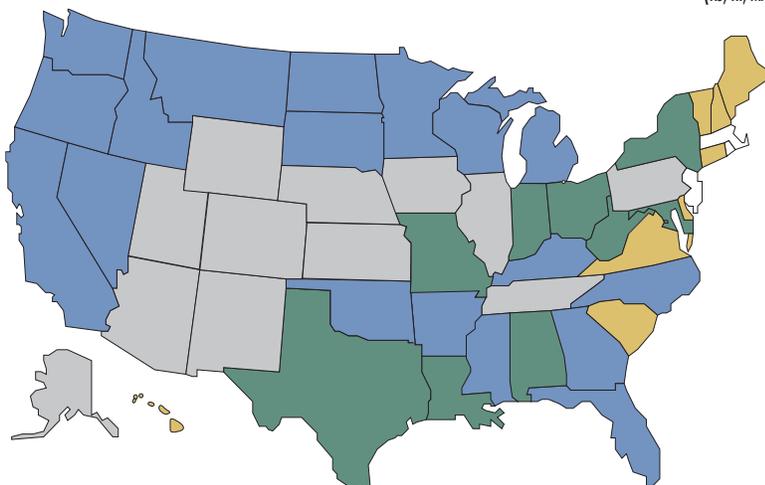
American Judicature Society
Judicial Selection in the States

Method of Selection for General Jurisdiction Trial Court Judges

Initial Term: ■ Non-Partisan Election ■ Partisan Election ■ Appointment



Subsequent Term: ■ Non-Partisan Election ■ Partisan Election ■ Re-appointment ■ Retention Election □ Lifetime or until age 70 (NJ, RI, MA)



The Role of Nominating Commissions

Some states that rely upon contested elections for initial and subsequent selection turn to merit selection for interim or vacancy appointments. Merit selection in this way is inserted into judicial selection in the partisan election state of Alabama and the non-partisan election states of Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, North Dakota, and Wisconsin. Nominating commissions vary in how commission members are themselves selected, the review process used, and the extent to which the appointing authority is constrained to select from among the commission’s nominees. “Merit” implies that nominating commissions are disengaged from party politics but the extent to which this is achieved depends in large measure on who selects the commissioners and the appointing authority’s discretion in acting upon the nominations submitted.

⁴ Chris W. Bousseau, “Vacancies on the Bench: Open-Seat Elections for State Supreme Courts,” *Justice System Journal*, Vol. 27, No. 2, 2006.

Trends in Judicial Selection

NCS Resource



National Center for State Courts

Call To Action:
Statement of the National
Summit on Improving
Judicial Selection

Since 1980 the proportion of appellate judges selected through each method shifted as four states—Arkansas, Georgia, Mississippi, and North Carolina—abandoned partisan elections in favor of non-partisan elections. Utah dropped non-partisan elections in favor of merit selection. The chart below shows the changes in selection method for all states. The major change since 1980 relates to the increased proportion of trial court

judges facing non-partisan elections. That growth is partly attributable to trial court consolidation in a number of states where judges of limited jurisdiction (e.g., municipal, and justice of the peace courts) were consolidated into general jurisdiction. As a result, the number of general jurisdiction court judges grew from 607 in 2000 to 1,498 in 2004, with much of this increase due to trial court unification in California.

Major Changes in Judicial Selection Methods 1980-2006

(for all courts unless specifically noted)

	State	Change
1980's	1980 South Dakota	Non-partisan elections to merit selection for the supreme court
	1983 Georgia	Partisan elections to non-partisan elections
	1985 Utah	Non-partisan elections to merit selection
	1987 Oklahoma	Non-partisan elections to merit selection for the court of civil appeals
	1988 New Mexico	Partisan elections to "hybrid system:" merit selection for interim vacancies, contested partisan election in the next general election; retention elections thereafter
1990's	1994 Mississippi	Partisan elections to non-partisan elections
	1994 Rhode Island	Legislative elections to merit selection for the supreme court, appointment to merit selection for lower courts
	1994 Tennessee	Partisan elections to merit selection for supreme court
	1998 North Carolina	Partisan elections to non-partisan elections for superior courts
2000's	2000 Arkansas	Partisan elections to non-partisan elections
	2002 North Carolina	Partisan elections to non-partisan elections for district courts
	2004 North Carolina	Partisan elections to non-partisan elections for the supreme court and court of appeals
	2004 Maryland	Non-partisan elections to partisan elections for circuit courts based on a court of appeals ruling

1980 vs. 2004: Judicial Selection Methods Used

Appellate Courts				Trial Courts			
Initial Term		1980	2004	Initial Term		1980	2004
	Appointment	44%	47%	Appointment		26%	21%
	Non-partisan Election	22%	19%	Non-partisan Election		29%	44%
	Partisan Election	34%	33%	Partisan Election		45%	35%
Subsequent Terms				Subsequent Terms			
	Appointment	13%	11%	Appointment		11%	10%
	Non-partisan Election	26%	20%	Non-partisan Election		26%	44%
	Partisan Election	23%	26%	Partisan Election		30%	27%
	Retention Election	38%	43%	Retention Election		34%	19%

Glossary

Appointment A judge is appointed to the bench by either the governor or the legislature, and in some states is subject to periodic reviews. States differ in the degree to which the governor or legislature is restricted to names submitted by a nominating commission.

Initial Appointment Appointment to the first full-term of office. Most initial appointments are for a fixed number of years although in some states the initial appointment is for the new judge's lifetime or until a set retirement age.

Interim Appointments An appointment to fill a vacancy that arises during a term of office, usually as a result of retirement, removal from the bench, or death of a sitting judge. Interim appointments typically last until the next year in which judicial elections are held but in some states if the vacancy occurs during a term of office that extends beyond that initial election, the incumbent must again face the voters at the end of that full-term. In some states, the person selected through an interim appointment is precluded from running to retain their office.

Judicial Performance Evaluation Commissions Official commissions that gather information on the performance of judges subject to retention, generally through surveys of court users. That information is made public, in some states with a recommendation on whether a judge should be retained.

Merit Selection Selection via a non-partisan nominating commission that submits a list of candidates to the governor (or in South Carolina, the legislature) who appoints one candidate as judge. This type of judicial selection is also known as the Missouri Plan.

Nominating Commissions Commissions that solicit and screen nominees for judgeships, usually selecting several nominees for the governor or (in South Carolina the legislature) to choose from. States differ in the degree to which the governor or legislature is restricted to the names the nominating commission puts forward, and in how commission members are selected.

Non-partisan Elections Elections in which judicial candidates run on the ballot in a contested election but without a political party label. In some systems, however, candidates are chosen in party primaries and backed, financially and organizationally, by that party, (see **Partisan Elections**).

Partisan Elections Elections in which judicial candidates, including incumbents, run in party primaries and are listed on the ballot as a candidate of a political party. However, in Ohio for all judges and in Michigan for the courts of last resort, elections are entirely partisan except that the general election ballot does not include party labels.

Retention Elections Elections that occur after a fixed period of time on the bench. Voters say "Yes" or "No" on whether a judge should continue in office. A simple majority suffices except in Illinois (60 percent) and in New Mexico (57 percent).

Roll-off Roll-off in judicial races is the difference between the number of voters who vote for national or the senior statewide office (usually the governor) and the number who cast a vote for the highest statewide judicial race.

Subsequent Selection This selection occurs at the end of a term, and is usually for another term the same length as the initial one. In elective states this may involve partisan, non-partisan, or retention elections and in appointive states a selection at fixed intervals by the legislative branch or a commission.

The State of Judicial Selection

In practice, no classification of states by selection method can be regarded as correct or optimal. Some nuances to the selection process have necessarily been omitted, including the mechanism states provide for removal from office. Generalizations that a particular method of judicial selection best promotes judicial independence (or accountability) or produces particular patterns of judicial decision-making are therefore problematic.

The current momentum in debates in state legislatures on judicial selection reform focuses on a return to or switch to partisan elections, even in the face of “nastier, noisier, and costlier” elections. Efforts to politicize the judiciary further challenge the relevance of formal methods of selection as a basis for differentiating among states, and thwart the careful work of the framers of state constitutions to create a balance in which the judiciary is both accountable and independent.

On the Web



Justice at Stake Campaign
National Partnerships Working
for Fair and Impartial Courts

The Court Statistics Project (CSP)

Since 1975 the Court Statistics Project (CSP) has provided a comprehensive analysis of the work of state courts by gathering caseload data and creating meaningful comparisons for identifying trends, comparing caseloads, and highlighting policy issues. The CSP is supported by the Bureau of Justice Statistics and obtains policy direction from the Conference of State Court Administrators. A complete annual analysis of the work of the state trial and appellate courts will be found in *Examining the Work of State Courts, 2005*.



CASELOAD HIGHLIGHTS

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