The Merits of Judicial Selection

By Angela Johnson

The issue of judicial selection has been long-debated in American history. During the colonial era, judges were selected by the king. This proved to be an unsuccessful approach as the king quickly began abusing this power and essentially controlled how judges ruled. Our country's Founding Fathers sought to prevent this abuse of power when drafting the U.S. Constitution. They felt that a judge should still be appointed, but that judges should not be appointed by a single ruler; rather separation of powers must exist between the executive branch and the judicial branch. The U.S. Constitution required that federal judges be appointed for life, granted they exhibit "good behavior," and that Congress cannot cut a judge's pay. These provisions are designed to promote judicial independence by avoiding undue political influence over judicial decisions, while allowing for impeachment in cases of serious crimes. Today, the Supreme Court has nine judges appointed by the president with the approval of the senate. This check on our branches of government is designed to prevent one branch of government from having too much power over the judiciary.

This paper explores the judicial selection process in the United States, weighing the merits of popular election versus merit selection in our democracy. Judges were never meant to be politicians; they are to be non-partisan and free from bias. A person should only be able to predict a future ruling based on a judge's past ruling or legal precedent, not by public opinion poll results or the dollar value of campaign ads purchased by potential future plaintiffs. But if it is the judges making rulings which bind citizens to our laws, should the citizens be allowed choose the judges which make the rulings? Proponents of judicial selection by merit appointment contend that if citizens want impartial, unbiased judges who can make rulings by applying laws to the material facts of the case, and be free from political or campaign-contributor pressure, then we must have judges who are not concerned about pleasing "the popular vote." To achieve this, judges must be selected using a merit based system, and not by popularity contests. Proponents of merit selection note that judges are not to represent constituent interests; they are supposed to represent the law. Conversely, those who oppose merit appointment contend that in a democratic nation, judges should be selected by popular election, just like politicians. Opponents further argue that unaccountable judges force their own ideological bias on an unwilling populace.

The Merit Plan

Early concern over too much executive influence on the judiciary led many states to begin popularly electing their judges. However, this deviation from the traditional appointment system, which mirrored federal systems of appointing judges, were brief and many states returned to appointment systems to limit partisan politics and corruption in state judiciaries. Today, many of the states have followed the merit plan, though none of the states' plans are identical. Common features among the states include a permanent, non-partisan commission composed of lawyers and non-lawyers who provide a short-list to the state's executive, who must then make an appointment from the list. This of course very closely mirrors the way the justices of the United States Supreme Court are appointed. Where the state appointment process differs from the United States Supreme Court is that most states do not require their appointments to be confirmed by the senate and the judge first endures a one to two year probationary period, and at the end of the period the judge must run unopposed on a retention ballot. This ballot is very easy to understand and this is the most crucial element to maintaining the voice of the people in a merit appointment jurisdiction. The question on the ballot is plain and simple, "Shall [illegible]e ____ be retained in office?" A judge must win a majority of the vote in order to serve a full term. In other words, if fifty-one percent of the voters vote "Yes," the judge is retained. With the incorporation of the retention vote element, the voice of the people is still heard; there is democracy, and accountability, even if the judge was not initially chosen directly by the people. But perhaps even more important is the inability for the chief executive to abuse his or her power by appointing a particular judge for personal or strategic reasons. The executive's power is limited in that the executive's choice is limited to a selection among three to four candidates which have been provided in the form of a short list prepared by an unbiased commission comprised of highly regarded professionals in the field who have access to information about the candidates that voters do not. In this regard, the commission is actually able to investigate candidates more thoroughly than any voter could which ensures that the short list of candidates being provided to the chief executive contains only the candidates with the highest levels of legal knowledge, experience, and propriety.

Why Selection System Matters at all Levels

Ninety-seven percent of the cases heard in the United States every year are handled by state judges. According to the National Center for State Courts, approximately 100 million cases are heard in state and local trial courts each year. This also means that every year, millions of people appear in state courts (Institute for the Advancement of the American Legal System). Not all of them are defendants; some are called for jury duty, or to address a minor offense. Regardless of the role the citizen plays, it is clear that Americans' primary interaction with the courts is mostly in America's local trial-level courts. This underscores the importance that in addition to federal judges and state appellate judges, trial court judges must also remain impartial and of the utmost regard and dignity, for it is those judges who come into contact with the most citizens, thereby representing the judiciary as a whole. Yet, it is also the trial court judgeships that comprise the majority of those appointed by popular election.

State legislators are critical actors in preserving the fairness, impartiality, and integrity of state courts; they play a vital role in that they have the ability to improve the state judiciary. They can enact laws which prescribe for merit appointment selection, retention methods, or improve current election methods. If legislatures are still unwilling to make a move from election to merit appointment, they should at a minimum enact laws which require—rather than encourage—judges to recues themselves if they have received a campaign contribution from a party to a case. Special interest groups or donors would be less inclined to invest in judicial elections if they knew the recipients would be barred from participating in their cases. Redress for violating such a law is equally important.

Bowing to Winds of Opinion

Imagine for a moment that the justices sitting on the Supreme Court of the United States of America in 1954 were elected candidates and every one of them was up for reelection the following year. Assuming each one of the justices wanted to keep their jobs, they must make decisions and issue opinions that would be looked favorably upon by their constituents. It has been argued that the landmark decision in Brown v. Board of Education (1954) was the most controversial and hotly contested decision of our time. The Supreme Court's ruling in Brown had a profound impact on racial segregation and overturned a fifty-eight year precedent. Because the justices were not concerned with making citizens happy, they were able to interpret and apply the law impartially, albeit against popular desire. So why would we ask any different of our state courts?

Unsurprisingly, it is against the law for any candidate—executive, legislative, or judicial—to give constituents money in return for a vote. It is illegal because it would undermine democracy as well as the fundamental principal that votes cannot be purchased. However, a

2006 survey examining the Louisiana Supreme Court over a fourteen-year period indicates on average, justices voted in favor of their contributors sixty-five percent of the time, and two of the justices voted in favor of their contributors eighty percent of the time. At a glance, one could object to these statistics and possibly say the favorable rulings could be circumstantial, or perhaps most of the contributors are attorneys or law firms which would have a high number of cases in the court and thus it would be inherently likely that a higher percentage of their cases would be ruled favorably when compared to an attorney or a pro se litigant who rarely appears in the same court. But the researcher debunks this argument by comparing voting behavior on cases in which no contribution was made. For instance, "Justice John L. Weimer was slightly pro-defendant in cases where neither side had given him contributions, voting for plaintiffs 47% of the time. But in cases where he received money from the defense side, or more money from the defense when both sides gave money, he voted for plaintiffs only 25% of the time. In cases where the money from the plaintiffs' side dominated, on the other hand, he voted for plaintiffs 90% of the time" (Palmer). Additionally, the study results show that the larger the contribution, the greater the impact. Justice Catherine D. Kimball was 30% more likely to vote for a defendant with each additional $1,000 donation; and the effect was even more profound for Justice Weimer, who was 300% more likely to vote in favor of a defendant who had contributed money to his campaign.

A large issue with contested judicial elections is that few people can come up with enough money to truly be competitive enough to qualify as a viable candidate. This means many qualified candidates will never even try. Just how much does a contested judicial election cost? The most expensive judicial election in American history was in 2004, that race cost Illinois Supreme Court Justice Lloyd Karmeier $9.3 Million, a sum greater than what was spent in more than half of the U.S. Senate races that year (O'Connor). Between 2000 and 2004, judicial candidates raised over $123 million, used mostly on television ads which commonly consist of fifteen to thirty second snarky comments, badgering and cutting down the opposing candidates. In various 2008 state supreme court elections, special interest groups spent $3.75 million on television advertisements (Pappas). Between 2000 and 2009, state supreme court candidates raised $205.8 Million, according to the Justice at Stake Campaign, a watchdog group that monitors money in court races. This figure represents more than double the $8.4 million raised the previous decade (Samuels). When looking at 2006 alone, judicial candidates raised more than $34 Million. This demonstrates that in order for a judicial candidate to be competitive at any level but primarily the state supreme court level, they must raise close to $1 Million (Peck). Considering the average salary of trial court judges is in the low one hundred thousand dollar range, it seems like a large price to pay out-of-pocket for a potential job (National Center for State Courts). But the truth is, the candidates do not pay even a fraction of the campaign costs, this is where their contributors come in, and how better to repay the debt than to rule in favor of the contributor? I have already demonstrated that this is exactly the case. Additionally, many states allow judges to serve multiple terms and thus incumbent judges running for re-election will likely rely on the same contributors; repaying accordingly.

In light of the recent Supreme Court ruling Citizens United v. FEC, 530 F. Supp. 2d 274, Justice John Paul Stevens noted in dissent, these states which hold judicial elections "may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems" (Samuels). The ruling overturned legal precedent and wiped away decades of restrictions on how corporations and other interest groups are able to spend their general treasuries on candidates. The author of the article and an expert on judicial selection methods, Dorothy Samuels proposes that "to protect the integrity of their court systems, states need to enact basic reforms: switching from judicial elections, for instance, to the selection of judges on merit, or adopting strict rules that bar judges from ruling in cases involving major financial supporters" (Samuels). In a forum at Georgetown Law Center this past January, Sandra Day O'Connor spoke about the Citizens United v. FEC ruling and explained, "in invalidating some of the existing checks on campaign spending, the majority in Citizens United has signaled that the problem of campaign contributions in judicial elections might get considerably worse and quite soon" (Georgetown Law Center).

Even more concerning is the judicial candidate that collects hundreds of thousands of dollars in contributions from litigants, as was the case in a survey of Nevada judges. The report noted that donations were "frequently" dated "within days of when a judge took action in the contributor's case." One would suspect it is lawyers that are lining the pockets of easily swayed judges, but according to the National Institute on Money in State Politics, nationwide in 2006, business donors contributed twice as much to state supreme court candidates as attorneys, who by nature of the job, appear more frequently in court (Sample). In some regard it is not how much money is being spent, or what the money is spent on, but who the money comes from and when the contribution is made. A contribution coming from a party to a pending lawsuit in that judge's court may have greater impact than a contribution by someone not anticipating involvement with that judge's court.

A scientifically-administered national poll revealed 81 percent of Americans surveyed believe judges are influenced by campaign contributions. Additionally, 83 percent of voters, 79 percent of lawyers, and 48 percent of judges surveyed feel campaign contributions have a "significant influence" on case outcome (McCall). It seems obvious that if we eliminated the campaigning contribution issue, or better yet, campaigning all together, we would eliminate much of the distrust felt by attorneys appearing before the judges and layperson voters. We want to be able to trust our judicial branch; we charge judges with the task of ruling fairly and impartially, but it is difficult for a judge to remain impartial if money and job security are on the line. Just as political scientist David Mayhew has persuasively argued that members of Congress vote in ways to maximize their chances of reelection, so too elected judges may believe that a single errant ruling is less important than securing their future on the bench (Mayhew).

One of the most authoritative and outspoken proponents of merit appointment and retention of judges is former Associate Justice of the United States Supreme Court, Sandra Day O'Connor, who is also a former Arizona state senator and prior to mounting the highest bench in the land, served in the Arizona Court of Appeals—an elected position. In her interview with Barbara Peck, writing for the Moritz College of Law, she explains, "I am concerned that competent and qualified candidates will opt not to become judges because they lack the political skills or desire to go through the knock-down drag-out fight that judicial elections are becoming" (Peck). As previously discussed, with the increasing financial constraints in campaigning for a judicial seat, more and more candidates are either unable or refuse to raise money. I say refuse only because many would-be attorneys believe it is a clear conflict-of-interest and unethical approach to accept campaign contributions, and then later rule on cases in which contributors are parties. Thoughtful judicial candidates known to look at the law on a case-by-case basis, as they should, will be at a distinct disadvantage in light of the accelerated money war; more moderate candidates are unlikely to be considered a bankable vote by any special interest group investing heavily in judicial campaigns (Samuels).

Diversity of the Bench

Aside from the financial hurdle of running for judgeship, evidence suggests women and minorities have an even larger hurdle, regardless if their experience or campaign dollars double or triple that of their contenders. One of the most important findings of this research is that when comparing Cook County, Chicago's adoption of the merit plan, it was discovered that from 1992 and 1996, 113 judges were appointed, thirty were African American, seven were Hispanics, and thirty-eight were women (State of Wisconsin Committee on Judicial Selection). A study published in "The Judges' Journal" shows that merit selection plans provide the highest percentage of ethnic and racial minority appointments and the highest percentage of women to the bench (Reddick, Nelson and Caufield). This plainly exhibits the benefits of merit appointment when looking at racial and gender diversity in the judiciary. Diversity on the bench is important because it satisfies an underlying principle of equal justice for all by having judges who are not only wise and impartial, but are peers who bring their own life experiences and understandings to the bench. Further, it is believed a diverse judiciary increases public confidence in the courts and provides decision-making power to formerly disenfranchised groups. It is also interesting to note, with regard to merit appointment by chief executives in state courts, that Democratic governors are responsible for appointing more racial and ethnic minorities and women (Reddick, Nelson and Caufield).

To further exhibit the gender and minority disadvantage of judicial elections, during the 2006 California superior court election, Judge Dzintra Janavs, a highly respected twenty-year veteran of the court, was defeated by Lynn Diane Olson, who only practiced law for four years, a decade ago. Ms. Olson had been running a bagel shop prior to filing her candidacy and did not reactivate her bar membership until days before her campaign began (Curtis). It is believed Judge Janavs lost the election despite her impeccable record and high regarded ethics and judicial conduct because Ms. Olson's name sounded more familiar or American (Meropolitan News-Enterprise).

Recent research reveals that while incumbent male candidates enjoy greater campaign funding, women incumbents receive no similar benefit; in fact, women candidates raise substantially more and spend more money than men candidates but despite the superior effort only matched men's mean shares of the vote by only 1.4%. When studying incumbent judicial elections from 1998-2006, the overall retention rate for judicial incumbents who face reelection reveal that women must work harder to keep their jobs under judicial elections than men. Additionally, "campaign spending (beyond a certain level) has less impact on women's vote shares than on men's" (Reid). To highlight the uphill battle women face in judicial elections, among states that elect judges using nonpartisan elections "voters were inclined to draw upon sex stereotypes or gender generalizations as the basis for selecting between judicial candidates" (Reid). Partisan elections are no better; "over a 10-year period between 1996 and 2006, women competing in partisan supreme court races received less money (just 11% of their total receipts) for their general election campaigns from party leaders and party organizations that did their male counterparts (22% of their total receipts)" (Reid). In other words, party affiliation serves only to further disadvantage women candidates.

Judicial Selection Affects Taxpayer Dollars and Fairness of Criminal Sentences

Because voters are uninformed about judicial behavior and find it difficult to locate information about the qualifications of the candidates, voters often turn to the media to inform them whether an incumbent judge is doing a good job. The outcome of just one publicized case can be the deciding factor driving their vote. Voters are more likely to remember instances of underpunishment than over-punishment. In a study by Gregory A. Huber of Yale University and Sanford C. Gordon of New York University using sentencing data from over twenty-two thousand Pennsylvania criminal cases, they found that judges up for reelection severely strengthen sentences and take more punitive approaches as their race for reelection approaches. The extensive study revealed that pre-election sentences grew by 2,705 additional years (or 5.9%) additional incarceration time just in one state. The study found that all judges, even the most punitive, increase their sentences as reelection nears, and the most dramatic increase occurs with the most lenient judges (Gordon). Judges up for reelection, like all incumbent politicians, are concerned about criticism from their opponents and in the case of a judicial election, opponents will mostly look to recent sentences imposed by judges and use those sentences to scare voters into thinking a particular judge is "soft on crime" or too "lenient" in their punishments. Further, women judicial candidates are represented to be inherently "too soft" and "too lenient" and are challenged to prove otherwise (Reid). This pressures both male and female incumbent candidates to order overly harsh punishments that do not follow precedent, with a purpose of boosting a "tough on crime" image, at taxpayer expense.

Democracy and Power

At a glance, choosing judges by election seems to be the most democratic option, after all it's the "American way," and appears to be the best way to give the voice to the people. "But at the same time, electing trial judges compromises other aspects of judicial integrity. Foremost, elections may tie judges too closely to the whims of public opinion" (Croley). The election of trial judges differs from the election of legislators in that so little information is available to voters. Nonpartisan elections sans a party label give voters even less information and increase the risk of gendered stereotypes (Reid).

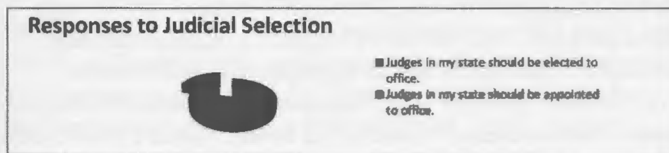
Due to the high number of judicial elections that are uncontested—for example, "Minnesota Lawyer" notes that the 2008 State of Minnesota judicial elections consisted of 117 uncontested judicial seats—citizens using election instead of an appointment and retention system actually have less democracy and less choice, especially in the case of uncontested elections. This creates two obvious issues: first, voters lack the power to replace an incumbent or at least choose among candidates; and second, if there is no other candidate to challenge or reveal information about the opponent, voters are less likely to obtain candidate information; whereas in an appointment and retention system, the appointed judge is thoroughly investigated and up for a retention vote every few years. If the voters want a retained judge out, they simply select "No" on the retention ballot and if the majority of voters agree, the judge is automatically replaced. So when comparing the highly common uncontested elections to merit appointments with retention ballots, it is apparent that voters actually have more power overall to remove a judge in the case of the merit appointment on a retention ballot than in a popular election.

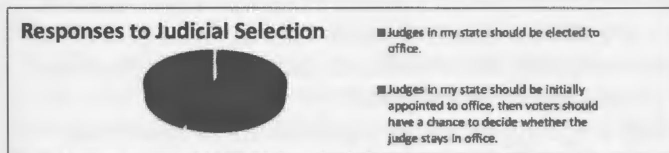
Additionally, as is the case with any judge serving in the American judiciary bar associations and judiciary commissions oversee judicial behavior and give people the opportunity to seek intervention and if applicable, reprimand. That cloak of protection which protects citizens from unethical judges or rulings is a protection afforded to all citizens regardless whether the judge is selected by popular election or if the judge is appointed by merit. But the distinction lies within the confidential accessibility afforded to voters who simply vote "no" in the privacy of a voting booth. Few citizens are willing to take the time or learn how to file a reprimand against a judge, and even less attorneys—especially ones who frequently argue in the judge's court—would ever be willing to seek action against a judge. Lastly, more is known about judges when they are up for retention than when an elected judge is campaigning. What we really care

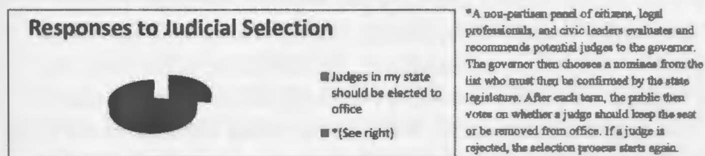
about or look for in our judges is their professional demeanor, ethical behavior, legal knowledge, adherence to the law, and fair and impartial administration of justice—retention ballots allow voters to make decisions based on proven behavior. Thirty-second judicial campaign ads, especially ads surrounding partisan elections, cannot adequately inform the public about these qualities. Citizens are better off, and the legal system is better preserved, when we leave the selection of judges to a well-qualified board or panel who can uncover and analyze much more relevant information than any citizen or single attorney ever could.

What the People Really Want

The rallying cry of those supporting selection by election is that the populace must not be thwarted by unaccountable judges. However, a national scientific survey administered by reputable research firm, Greenberg Quinlan Rosner, commissioned by Justice at Stake makes it clear that when citizens really know and understand merit selection, they prefer it to popular elections. The survey posed three differing set of questions to 1,000 random respondents. Of each set, the first question was always the same: "Judges in my state should be elected to office." The other option to each set of question asked about merit selection, but each question increased the level of explanation of merit selection (Justice at Stake 2001). To best demonstrate this, I will duplicate the findings visually:







Only the third survey explains merit selection in detail. By their wording, the first two surveys are biased in favor of popular elections. None of these surveys inform the public that with popular elections, judges are more likely to accept campaign contributions which impact their rulings whereas campaign contribution incentives diminish in merit-appointed judges. People like the idea of electing judges because people like the abstract notion of democracy and popular sovereignty. However, once citizens understand the actual process employed in merit appointment and retention systems, they recognize the value of merit appointment. Polling the public using the simplistic terms of "elected" versus "appointed" makes as much sense as electing judges to rule in an unbiased fashion.

Conclusion

In conclusion, my research shows that in order to have an independent and unbiased judiciary, which best serves the public and follows the vision of an independent judiciary envisioned by the Founding Fathers, we must select judges using merit-based appointments of thoroughly-researched appointees with periodic democratic retention ballots. This is the best way to ensure that both impartiality and accountability are maintained while opening up judgeships to a diverse pool of well-qualified candidates. However, educating the public, and legislatures, is key in popularly implementing judicial selection by merit-appointment.

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