



Choosing Justice? The Need for Judicial Selection Reform

How judges are selected and placed on the bench is central to the impartial administration of the law and ultimately to the quality of justice in our legal system. The procedures for selecting those who hold judicial office should be designed to safeguard the integrity of the courts and insulate those who are chosen from political pressures or other influences that may undermine unbiased and impartial decisions in administering justice. However, throughout much of the nation, the procedures currently in place fail to uphold this fundamental requisite of an independent judiciary.

Almost 90 percent of state appellate court judges are initially placed in office or remain in office as a result of decisions made by voters. Only 12 states select judges to their highest state court through appointment processes that do not require judges to appear on the ballot. In 38 states, state supreme court judges are either elected to office in the first instance and then face regular re-election to remain in office or are initially appointed to office and then retain their positions after the completion of a specified term by standing for election. The Committee for Economic Development of The Conference Board (CED) believes that these systems of selection by election are antithetical to the notion of an independent judiciary. Elections encourage candidates to raise campaign contributions and appeal to voters, which exposes judges to partisan political pressures and interest group politicking aimed at influencing their behavior.

The damaging consequences of judicial elections have become increasingly evident and acute in recent elections due to the significant changes that have taken place in these contests. Many of these elections are becoming costly and divisive battlegrounds in which competing interests vie to elect candidates whom they perceive to favor their views—or defeat those whom they do not. As a result, the amount of money involved in judicial campaigns has risen dramatically in the past decade, with most of the campaign contributions coming from attorneys and other

donors with a stake in the outcome of court decisions. In addition, interest groups are responsible for a growing share of the spending that takes place in these races. Interest groups have greater incentives than ever before to participate in these elections in hopes of influencing judicial outcomes. Their involvement has heightened the prospect of state judicial elections becoming entangled in the political thicket of national partisan and special interest politics. Examples from recent elections indicate that interest groups are responsible for a growing share of the money poured into these contests and are outspending the candidates in the most important races.

BUSINESS COMMUNITY CONCERNS

The business community is deeply concerned about the damaging effects of elections on the independence and integrity of our state courts. The risks posed by the influence of donor interests and political pressures are too great to guarantee unbiased outcomes or to maintain public confidence in the courts. Survey research commissioned by CED revealed that the vast majority of business leaders worry that campaign contributions have a major effect on the decisions rendered by judges, and found near universal concern that the demands of campaigning will make judges accountable to politicians and special interest groups rather than the law. These views are widely shared by the public.

Our concerns are reflected in the U.S. Chamber of Commerce's annual assessment of business perspectives on the litigation environment in the states. A growing majority of businesses now report that a state's litigation environment is likely to impact important business decisions at their company. And it is not surprising that most of the states ranked as having the worst litigation environments are states that elect their judges.

Recent research supports these views. The most comprehensive empirical analyses conducted to date

indicate that the growing demands of campaigning have a significant influence on the behavior and decisions of state judges. Selection by election thus entails inherent risks that pose a threat to the impartiality and integrity of the courts, and to the independence of the judiciary.

KEY RECOMMENDATIONS

We have concluded that fundamental reform of the judicial selection process is urgently needed and that appointment should be the basic principle applied to the selection of all judges. In reaching this conclusion, we have been mindful of the principle of judicial accountability and the need to hold judges accountable for their behavior and decisions. These are essential elements of an independent judiciary and effective rule of law.

- We believe a commission-based appointment process with appropriate mechanisms for holding judges accountable, similar to the commission used to identify and nominate judicial candidates in Arizona, would be the best means of selecting judges. Each state should establish a nonpartisan, independent judicial nominating commission that would be responsible for recruiting, reviewing, and recommending eligible nominees for judicial office. A nominating commission should be selected by multiple appointing authorities with provisions to guarantee diverse membership and transparent procedures. The commission would be responsible for preparing a list of nominees that would be the basis for judicial appointments to be made by a state's governor.
- To facilitate periodic review and evaluation of judges for purposes of reappointment, we support the establishment of independent and nonpartisan judicial performance evaluation commissions, similar to those now used in Arizona and other states. Such commissions would be responsible for preparing a recommendation as to whether a judge should be retained in office that would be made available to the public and the relevant appointing authority.
- Commission-based appointment systems work best when a substantial number of highly qualified candidates agree to be considered by nominating commissions. Levels of salary and compensation must be appropriate to encourage such individuals

to serve in judicial office. We encourage state officials to review current salaries to ensure that appropriate levels of compensation are provided to judges at all levels, and support the use of judicial compensation committees as a means of providing objective assessment of judicial salaries.

We acknowledge that most states will find it politically impracticable to move to a commission-based appointment system in the near future, even though the case for reform is compelling. We therefore support measures that will not resolve the core problems of judicial elections, but will make a major contribution in addressing their most deleterious effects.

- Recusal can resolve the problem of conflict of interest or bias that can result from campaign activities, and is a remedy widely supported by the business community. We support stricter recusal procedures and standards than those currently in place in many states.
- We also continue to support changes in current election practices, including the use of merit-based selection rather than contested elections, the elimination of partisan elections, longer terms of office to reduce the frequency of elections, and the use of judicial performance evaluation commissions, similar to those recommended for appointment-based selection, as a means of providing information to voters.

CONCLUSION

Selection by election does not benefit the role of a judge. With highly politicized judicial races spreading to more and more states, the risk to the impartiality and integrity of state judiciaries has become more severe. A bad system is becoming worse, and the risk of political influence on judicial behavior is escalating.

We urge public officials, members of the business community, judges, members of the legal profession, and community leaders in the states to join in our efforts to increase public understanding of the importance of an independent judiciary and the consequences of judicial elections. We call upon these leaders to work together to initiate needed reforms before the rule of law is further eroded and the public loses confidence in the impartiality of our courts.