

JUSTICE FOR HIRE

Improving Judicial Selection



EXECUTIVE SUMMARY

An independent and impartial judiciary is the cornerstone of the American system of governance. Judges sustain the vitality and legitimacy of the rule of law by giving it practical application, and we rely on their judgment and discretion to give shape to what is at times an indeterminate body of law. This judicial role is best fulfilled by individuals who are responsible only to the law and whose decisions are freed from the influence of public opinion and political pressures.

Justice for Hire: Improving Judicial Selection argues that the system of elections that dominates judicial selection at the state level undermines the independence of the judiciary. CED believes that states must move to a commission-based appointment system for the selection of judges.

FINDINGS

■ **A vast majority of judges at the state level are selected or retained by judicial elections.** Of the more than 30,000 judges at the state level, over 87 percent face either contested or retention elections. More than half of all appellate judges and over three-quarters of trial judges are selected directly by the voters. Taken together, the number of elected judges vastly exceeds the number of elected state legislators and executive officers throughout the country.

- **The nature of judicial election undermines the impartiality of the judiciary.** The desire to be elected or reelected may lead a judge to consider public attitudes or the electoral consequences of a decision in rendering a judgment. This is inconsistent with the concept of the judiciary as independent of any particular constituency.
- **The solicitation of campaign contributions poses an even greater threat to the independence of the judiciary.** By soliciting and accepting campaign contributions, judges are participating in an activity that does not befit the decorum of the office or build public trust in the judicial system. Even the appearance of obligation to campaign donors severely damages the professed impartiality of the judge.
- **The role of special interests has changed the nature of judicial elections dramatically.** Previously seen as low-cost and low-interest elections, judicial elections have emerged into a battleground for political parties and special interests to place “their” candidates on the bench. Issue ads and little regulation regarding the disclosure and participation of special interest groups in judicial elections have elevated campaign expenditures into the millions and changed the tone of judicial elections into one similar to legislative or gubernatorial campaigns.
- **There has been a dramatic rise in campaigns expenditures.** As the elections have become more competitive, the amount of money spent by campaigns has increased dramatically. The median expenditure by candidates for state supreme courts doubled between the 1996 and 2000 cycles. In all, spending in supreme court elections rose 61 percent from 1998 to 2000, to \$45 million, or more than double the amount spent in 1994.

RECOMMENDATIONS

CED urges public officials, business leaders, judges, members of the legal profession, and community leaders in the states to join together to help educate the public on the importance of an independent judiciary and the problems inherent in a system of judicial election. We call upon these leaders to take action to initiate reforms that would eliminate judicial selection by election, whether in the first instance or through retention elections, and put in place a system of commission-based appointment. Because we recognize that such a

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fundamental transformation of the judicial selection process is not likely to occur quickly, we also recommend a number of reforms that can be adopted in the interim to improve judicial elections. While these reforms will not resolve the perverse influences of elections on the judiciary, they will mitigate their most dangerous effects.

Appointment-based selection

- **States should adopt a commission-based appointment system. In this approach, each state would establish a nonpartisan, independent judicial nominating commission that would be responsible for recruiting, reviewing, and recommending eligible nominees for judicial office. All appointments to judicial positions would be made from the lists of candidates prepared by the commission.**

We believe that this approach will allow for a dispassionate and thorough review of the qualifications and abilities of judicial aspirants, and minimize the influence of political considerations in the selection of judges.

- **States should create judicial performance evaluation commissions.**

Any system of judicial selection must include appropriate mechanisms for holding judges accountable for their performance in office. An independent judicial performance evaluation commission would conduct a comprehensive, objective review of a judge's performance in office and prepare an evaluation report and a recommendation as to reappointment. This information would be provided to the governor or other appointing authority in a state for use in making a decision on reappointment. This system should also be utilized to perform mid-term judicial evaluations.

- **States should increase judicial salaries in order to increase the pool of available candidates for selection.** This would encourage qualified candidates to accept nominations to judicial positions and improve the quality of judges throughout the system.

Improving Judicial Elections

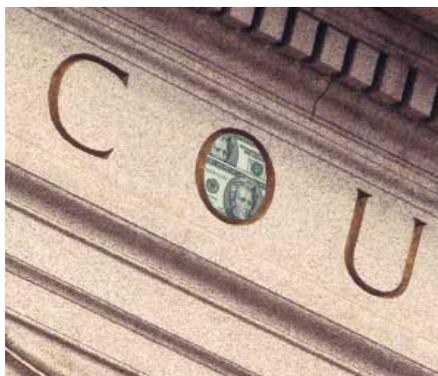
- **Judicial elections should be nonpartisan.** Partisan elections encourage the electorate to view judges as advocates and often feature substantial campaigning on the part of party organizations or their interest group supporters on behalf of a party nominee.
- **States should lengthen the term of office for all judges.** CED recommends that trial and appellate judges should have terms no shorter than 6 years and

the minimum term length for justices on the highest court be no less than 10 years. Longer terms of office represent another structural change that can help to reduce the political pressures on the judiciary.

- **Judicial election campaigns should be fully publicly-funded, as in Maine and Arizona.** Qualified candidates would receive a full subsidy equal to the amount of a set spending limit applicable to a given level of judicial office. Under this approach, candidates would be able to choose to fund their campaigns solely with public subsidies. Those candidates who accept this funding would be required to forego additional private fundraising and abide by campaign expenditure limits.

- **States should strengthen laws that require financial transparency in judicial elections and press for full disclosure by donors and other organized interests. States should set forth criteria for determining which third party communications would be subject to such a requirement.** In many instances, interest groups or party committees have relied on issue advocacy campaigns to avoid meaningful disclosure. These expenditures should be subject to full disclosure and set forth criteria for determining those communications that would be subject to such a requirement.

- **States that hold retention elections should adopt judicial performance evaluation commissions, similar to those we recommend for appointed judges, as a means of improving the information available to voters. The content of this report and the commission recommendation would then be widely disseminated to the public through voter guides and other means of communications.**



CONCLUSION

CED believes that the implementation of these recommendations would move us significantly closer to a judicial system in which public trust has been restored and its integrity and impartiality has been maintained.

But making CED's vision a reality will require fundamental changes in the way that judges are selected to the bench. These changes will be difficult to make and will face stiff opposition. CED believes that we must face up to these challenges. Without reform, the impartiality of state judicial systems is at risk. All stakeholders — state officials, voters, members of the legal profession, judges, and others — should organize their efforts in order to reform the judicial selection system.