Policy Brief: Election of State Court Judges
April 14, 2023

Insights for What’s Ahead:

Recently, Janet Protasiewicz won a nonpartisan State Supreme Court race in Wisconsin, giving control of the Supreme Court there to liberals for the first time in 15 years. This was the most expensive judicial race ever, with more than $45 million spent. Highlighting the importance of judicial elections, in the coming year, the Court is expected to rule on issues including abortion rights, legislative maps, and the governor’s appointment powers. This Policy Brief discusses both the status of elections in state supreme court appointments at different stages of a judge’s tenure and some recent developments on the issue.

- **Most states use elections at some point in their judicial selection process:** Despite the expected nonpartisan role of a judge, most states use elections at some point in their judicial selection process. Further, in eight states, state supreme court judges are selected in contested partisan elections.

- **Independent commissions often propose a vetted list to fill vacant seats:** In 26 states and DC, an independent commission evaluates candidates and forwards a list of those deemed most qualified to the appointing authority, generally the governor.

- **Several states are considering legislation to alter their judicial selection processes.**

- **Public confidence in the independence of the judiciary is at risk with the election process for the selection of judges.** CED’s longstanding position has been to call for an appointment system for state level judges with non-partisan commissions selecting judges based on merit. The commission’s independence could be further strengthened by dispersing power to appoint members of the commission across a variety of offices, including the governor and legislators from both parties.

Most States Use Elections in their Judicial Selection Process

In the American judicial system, judges are expected to perform their role apart from the “political thicket,” free of political pressures and indifferent to public opinion. However, most states use elections in their judicial selection process, and 38 use elections to select judges to the state supreme court at some point in the judges’ tenure.

CED’s first wrote about electing state judges in a 2011 report and then again in a 2015 White Paper warning that judicial independence from the other branches of government and its credibility are at risk when judges hold or retain office by election, as elections can provide special interests with substantial opportunities to politicize judicial decisions and possibly influence judicial behavior and supporting fundamental reform of the state judicial selection process. In its seminal 2017 book, *Sustaining Capitalism*, CED called for an appointment system for state level judges with non-partisan commissions selecting judges based on merit. The commission’s independence could be further strengthened by dispersing power to appoint members of the commission across a variety of offices, including the

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governor and legislators from both parties. CED has called on state leaders to initiate these reforms before the public loses confidence in the impartiality of our courts.

**Initial Selection of State Court Judges**

Most states use elections at some point in their judicial selection process. Twelve states use gubernatorial or legislative appointment systems for the state supreme court. The 38 states that use elections to select judges to state supreme courts have used several distinct methods:

- in 16 states, judges are appointed by the governor and reselected (or not) in retention elections in which the judges run unopposed; a simple majority means continuation in office;
- in 14 states, judges are selected in contested nonpartisan elections;
- in 8 states, judges are selected in contested partisan elections;
- in New Mexico’s hybrid system, higher court judges are appointed by the governor from a list of candidates from a nominating commission. At the next general election, they compete in a partisan election; winning candidates are thereafter eligible for reelection in retention elections.

**After the First Term**

- Judges of general jurisdiction in three New England states never face reselection:
  - Rhode Island: Judges are appointed by the governor to a life term with no age limit.
  - Massachusetts and New Hampshire: the governor appoints judges to a single term (in conjunction with the Governor’s Council (Massachusetts) or Executive Council (New Hampshire) lasting up to mandatory retirement at 70 years.
- Retention elections are the most common reselection method to state high courts; in 20 states, high court judges who finish a term have the ability to stand for additional terms in uncontested yes/no retention elections.

**Interim Selection: What Happens When a State Supreme Court Seat Becomes Vacant?**

- In 45 states (and the District of Columbia), a judicial candidate is selected by the governor for appointment. Among those 45 states:
  - Binding Nominating Commission: In 26 states and DC, an independent commission evaluates candidates and forwards a list of those deemed most qualified to the appointing authority (generally the governor), which must select the only from among the list of candidates recommended by the independent commission.
  - Nonbinding Nominating Commission: In 6 states, an independent commission evaluates candidates and forwards a list of those deemed most qualified to the appointing authority, which is not compelled to choose amongst the suggested list.

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2 AK, AZ, CA, CO, FL, IL, IN, IA, KS, MD, MO, MT, NE, NM, OK, PA, SD, TN, UT, & WY
3 AK, AZ, CO, CT, DE, DC, FL, HI, ID, IN, IA, KS, KY, MO, NE, NV, NM, NY, OK, RI, SD, TN, UT, VT, WV, & WY
4 GA, ME, MD, MA, NH, & WI
Confirmation: In 17 states, including 15 with nominating commissions, the governor’s nominee must be confirmed by a governing body. This includes several states in which the Governor has selected only from recommendations by a commission.

Process for Selection of State Supreme Court Judges for the First Full Term:

<table>
<thead>
<tr>
<th>Process Type</th>
<th>States</th>
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<tbody>
<tr>
<td>Gubernatorial Appointment (1 state)</td>
<td>NJ*</td>
</tr>
<tr>
<td>Gubernatorial Appointment w/ Binding Nominating Commission (23 states)</td>
<td>AK, AZ, CO, CT*, DE*, DC*, FL, HI*, IN, IA, KS, MO, NE, NH*, NM, NY*, OK, RI*, SD, TN*, UT*, VT*, WY</td>
</tr>
<tr>
<td>Gubernatorial Appointment w/ Nonbinding Nominating Commission (3 states)</td>
<td>ME*, MD*, MA*</td>
</tr>
<tr>
<td>Nonpartisan Elections (14 states)</td>
<td>AR, GA, ID, KY, MI, MN, MS, MT, NV, ND, OR, WA, WV, WI</td>
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<tr>
<td>Partisan Elections (7 states)</td>
<td>AL, IL, LA, NC, OH, PA, TX</td>
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<tr>
<td>Legislative Appointment (2 states)</td>
<td>SC**, VA</td>
</tr>
<tr>
<td>Hybrid (1 state)</td>
<td>CA***</td>
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* The governor’s judicial nominee must be confirmed by a governmental body.

** An independent commission evaluates candidates and forwards a list of those deemed most qualified.

*** The governor selects a judicial candidate for appointment; the governor’s judicial nominee must be confirmed by a governmental body; and sitting judges seeking additional terms stand in uncontested yes/no elections.

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5 CT, RI, TN, DE, DC, HI, MD, MT, NJ, NY, PA, TX, UT, VT, ME, MA, & NH
New Developments in 2023

Utah Bill Would Change the Vetting Process for State Judges

The Utah House passed a bill to change the binding commission process for all state judges. In Utah, Commissioners no more than four can come from the same party. Additionally, the governor is required to appoint two attorneys recommended by the Utah State Bar, with an eighth non-voting member appointed by the Judicial Council. SB 129 would strike those requirements and instead require the governor to select two practicing or retired attorneys for the commission. The Utah State Bar opposes SB 129, noting that it would remove the required political balance against “established best practices.”

Failed Montana Senate Bill Would Have Required Supreme Court Candidates to Declare Party Affiliation

A recent Montana bill that would have required that candidates for judicial office run with a party affiliation following a nonpartisan primary died at the hand of a bipartisan coalition earlier this month. SB 302 had passed largely along party lines, with one Republican joining Democrats in voting against it. The Montana Bar Association, Montana Women Vote, and the Montana Magistrates Association, among several other organizations, oppose the legislation.

CED will continue to monitor legislation on this issue.
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