



# Judicial selection in the United States: a special report

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Historically there has been considerable controversy about how American judges should be chosen. During the colonial era, they were selected by the king, but his intolerably wide powers over them was one of the abuses that the colonists attacked in the Declaration of Independence. After the Revolution, the states continued to select judges by appointment, but the new processes prevented the chief executive from controlling the judiciary.<sup>1</sup>

Gradually, however, states began to adopt popular election as a means of choosing judges. For example, as early as 1812 Georgia amended its constitution to provide that judges of inferior courts be popularly elected. In 1816, Indiana entered the Union with a constitution that provided for the election of associate judges of the circuit court. Sixteen years later, Mississippi became the first state in which all judges were popularly elected. Michigan held elections for trial judges in 1836.

By that time the appointive system had come under serious attack. People resented the fact that property owners controlled the judiciary.<sup>2</sup> They were determined to end this privilege of the upper class and to ensure the popular sovereignty we describe as Jacksonian Democracy.

During the next decade, there was little opposition to those who advocated popular elections. For example, in the New York Constitutional Convention of 1846 there was not even a lengthy discussion of the subject. As one writer has stated:

The debates on an elective judiciary were brief; there was apparently little need to discuss the abuses of the appointive system, or its failures, or why election would be better. A few delegates argued cogently for the retention of the old system, and indeed

forecast the possible evils if the judiciary fell under political domination . . . . But the spirit of reform carried the day.<sup>3</sup>

New York's adoption of an electoral system signaled the beginning of this trend. By the time of the Civil War, 24 of 34 states had established an elected judiciary with seven states adopting the system in 1850 alone.<sup>4</sup> As new states were admitted to the Union, all of them adopted popular election of some or all judges until the admission of Alaska in 1959.

## No panacea

Within a short time, however, it became apparent that this new system was no panacea, and the need for reform again was recognized. For example, as early as 1853 delegates to the Massachusetts Constitutional Convention viewed the popular election of judges in New York as a failure and refused to adopt the system. One delegate claimed that it had "fallen hopelessly into the great cistern" and quoted an article in the *Evening Post* that illustrated that judges had become enmeshed in the "political mill."<sup>5</sup> By 1867, the subject was a matter of great debate in New York, and in 1873 a proposed amendment to return to the appointive system gained strong support at the general election.<sup>6</sup>

One of the main concerns during this period was that judges were almost invariably selected by political machines and controlled by them. Judges were often perceived as corrupt and incompetent. The notion of a judiciary uncontrolled by special interests had simply not been realized. It was in this context that the concept of nonpartisan elections began to emerge.

The idea of judicial candidates appearing on the ballot without party label was used as early as 1873 in Cook County [Chicago], Illinois. Interestingly, it was the judges themselves who decided to run on a nonpartisan ballot rather than doing so pursuant to a statute or some other authority. Elections in 1885 and 1893 were also nonpartisan (Cook County subsequently returned to partisan elections). By the turn of the century the idea of nonpartisan judicial elections had gained strength, and several states had adopted the idea. By 1927, 12 states employed the nonpartisan idea.<sup>7</sup>

Once again, criticism of nonpartisan elections arose almost as soon as such elections began. As early as 1908 members of the South Dakota Bar Association indicated dissatisfaction with how the idea was working in their state. By 1927, Iowa, Kansas, and Pennsylvania had already tried the plan and abandoned it.<sup>8</sup> The major objection was that there was still no real public choice. New candidates for judgeships were regularly selected by party leaders and thrust upon an unknowledgeable electorate, which, without the guidance of party labels, was not able to make reasoned choices.

### The rise of commission plans

While others attacked nonpartisan elections, a number of well-known scholars, judges and concerned citizens began assailing all elective systems as failures. One of the most outspoken critics, Roscoe Pound, delivered a now classic address to the American Bar Association in 1906 on “The Causes of Popular Dissatisfaction with the Administration of Justice.” He claimed that “putting courts into politics, and compelling judges to become politicians in many jurisdictions . . . [had] almost destroyed the traditional respect for the bench.”<sup>9</sup>

Several years later in a speech before the Cincinnati Bar Association, William Howard Taft claimed that it was “disgraceful” to see men campaigning for the state supreme court on the ground that their decisions would have a particular class flavor. It was “so shocking, and so out of keeping with the fixedness of moral principles,” he said, that it ought to be “condemned.”<sup>10</sup>

Reformers claimed that the worst features of partisan politics could be eliminated through what they called a “merit plan” for selecting judges. The plan would expand the pool of candidates to include persons other than friends of politicians. Selectors would not consider inappropriate partisan factors such as an individual’s party affiliation, party service, or friendship with an appointing executive so the most distinguished members of the bar, regardless of party, could be elevated to the bench.<sup>11</sup>

Origins of the plan are usually traced to Albert M. Kales, one of the founders of the American Judicature Society. Versions of his proposal were introduced in state legislatures throughout the 1930s. The American Bar Association endorsed a merit plan in 1937, and in 1940 Missouri became the first state to put one into effect. Today it is variously known as the Kales plan, Missouri

plan, merit plan, or commission plan.

Almost none of the state plans is identical, but they do share common features. Most include a permanent, nonpartisan commission composed of lawyers and non-lawyers (appointed by a variety of public and private officials) who actively recruit and screen prospective candidates. The commission then forwards a list of three to five qualified individuals to the executive, who must make an appointment from the list.

Usually the judge serves a one- or two-year probationary period, after which he must run unopposed on a retention ballot. The sole question on which the electorate votes is: “Shall Judge \_\_\_\_ be retained in office?” A judge must win a majority of the vote in order to serve a full term.

### Judicial Selection Today

Today the combination of schemes used to select judges is almost endless. Almost no two states are alike, and many states employ different methods of selection depending upon the different levels of the judiciary, creating “hybrid” systems of selection. It is possible, however, to classify selection methods in the states. The most frequently used classification differentiates between states that appoint their judges and states that elect their judges. The two groups turn out to be fairly equal in number.

**Appointment:** Thirty-three states and the District of Columbia use nominating commissions to help the governor select state judges.<sup>12</sup> Twenty-three states and the District of Columbia use the commission plan to make initial appointments to most or all of their courts and ten others use panels only for interim appointments.

Five states use gubernatorial or legislative appointment without the aid of a nominating commission. In three (California, Maine, and New Jersey), the governor appoints judges (subject to senatorial confirmation in Maine and New Jersey, confirmation by a 3-member commission on judicial appointments in California). In Virginia and South Carolina, the legislature appoints judges (in South Carolina, the legislature does so with the aid of a 10-member judicial merit selection commission that screens candidates and reports to legislators).

**Elections:** Eight states elect all of their judges in partisan elections, and seven states use partisan elections to elect some of their judges. Thirteen states use nonpartisan elections to select all of their judges. An additional eight states use nonpartisan elections to select some of their judges. In total, 32 states choose some, most, or all of their judges using some form of contestable popular election.

Given the “hybrid” systems that appear in many states, it is also helpful to examine how states choose their judges at each level of the judicial system. Again, the states are fairly evenly divided between those that elect and those that appoint their judges.

**Courts of Last Resort:** Twenty-two states hold elections for judges serving on courts of last resort: 9 use partisan

elections, 13 use nonpartisan elections. In 23 states and the District of Columbia, judges are appointed to the highest court by the governor with the assistance of a judicial nominating commission. In California, Maine, and New Jersey, the governor appoints these judges without the aid of a nominating commission. In South Carolina and Virginia, Supreme Court judges are chosen by the legislature.

**Intermediate Appellate Courts:** Of the forty states that have intermediate appellate courts, 18 elect appellate judges: 7 states use partisan elections and 11 states use nonpartisan elections. Five states use appointment without a nominating commission (2 allow the legislature to select judges; 2 allow the supreme court to designate judges; and 1 allows the governor to appoint judges). Seventeen states use a judicial nominating commission to help the governor appoint judges to intermediate appellate courts.

**Trial Courts:** Ten states use partisan elections to select all judges for their general jurisdiction courts and 18 states use nonpartisan elections to do so. Fourteen states and the District of Columbia use a judicial nominating commission to help the governor appoint all judges for these courts. Maine and New Jersey allow the governor to appoint without the aid of a judicial nominating commission, and South Carolina and Virginia rely on the legislature to appoint these judges. Four states (Arizona, Indiana, Kansas, and Missouri) use multiple methods to select judges for general jurisdiction trial courts. In Arizona, the method of selection varies according to county population, with judges in larger counties appointed by the governor with a nominating commission and judges in smaller counties elected in partisan races. In Indiana,

the method of selection for superior court and circuit court judges varies by county and type of court. In Kansas, it varies by judicial district (17 districts select district court judges using a nominating commission, while 14 use partisan elections). In Missouri, most circuit court judges are elected in partisan contests, but five counties have adopted the commission plan.

## Notes

This article originally appeared in Volume 64, Number 4, October 1980, pages 176-193, and was last updated in April 2010. It is condensed from a larger study, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* (Chicago: American Judicature Society, 1980).

1. Eight of the original 13 states vested the appointment power in one or both houses of legislature. Two allowed appointment by the governor and his council, and three vested appointment authority in the governor but required him to obtain consent of the council. Escovitz, *JUDICIAL SELECTION AND TENURE* 4 (Chicago: American Judicature Society, 1975).

2. Niles, *The Popular Election of Judges in Historical Perspective*, *THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK* 523 (November, 1966).

3. *Id.* at 526.

4. Escovitz, *supra* n. 1, at 6.

5. Niles, *supra* n. 2, at 528.

6. *Id.* at 535, n. 46.

7. Aumann, *Selection, Tenure, Retirement and Compensation of Judges in Ohio*, 5 *U. CIN. L. REV.* 412, n. 11 (1931).

8. *Id.*

9. Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 20 *J. AM. JUD. SOC'Y* 178 (February, 1937).

10. Taft, *The Selection and Tenure of Judges*, 38 *A.B.A. REP.* 418 (1913).

11. Kales, *UNPOPULAR GOVERNMENT IN THE UNITED STATES* Chap. 17 (Chicago: University of Chicago Press, 1914). See also Harley, *Taking Judges Out of Politics*, in *PUBLIC ADMINISTRATION AND POLITICS* (Philadelphia: The American Academy of Political and Social Science, 1916); and Winters, *Judicial Selection and Tenure*, in Winters (ed.), *SELECTED READINGS: JUDICIAL SELECTION AND TENURE* (Chicago: American Judicature Society, 1973).

12. These are states that have formal merit selection processes established by constitution, statute, or executive order. In some elective states, individual governors establish advisory bodies to assist them in filling mid-term vacancies. These states are not included in this figure.