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STATE JUDICIAL SELECTION:

Reforms to Promote a Fair and Independent Judiciary

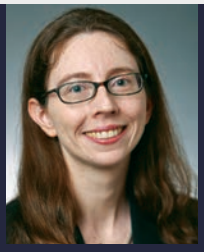
BY ALICIA BANNON

Less than a generation ago, state supreme court elections were subdued affairs. Candidates — to the extent they actively campaigned at all — primarily discussed their qualifications and backgrounds. Political and special interests paid little attention to these low-profile races.[1]

That era is over. Thirty-eight states use elections as part of their system for choosing supreme court justices,[2] and million-dollar campaigns are increasingly the norm.[3] Dark money — the sources of which remain anonymous — flows freely. National political groups regularly weigh in with heavy spending, as do plaintiffs' lawyers and business interests. As it now stands, one-third of all elected justices currently sitting on the bench have run in at least one one-million-dollar race, according to a 2017 analysis by the Brennan Center for Justice. Perhaps unsurprisingly, nearly 90 percent of voters believe that campaign cash affects judicial decisions.[4]

The implications for American justice are acute. If a judge hears a case involving a major donor, will she be thinking about how her ruling will affect her next campaign? If she angers a powerful political interest, will she face an avalanche of attack ads? These electoral pressures create a morass of conflicts of interest that threaten the appearance, and reality, of fair and impartial decision-making. They are also a roadblock for aspiring judges who can't tap million-dollar networks.

Over the past 20 years, numerous bar associations, academics, judges, advocates, and other experts have offered ideas about how to mitigate special-interest influence in judicial elections, including public financing for judicial races and stronger ethics rules for judges. Many have called for eliminating contested judicial elections. But states have been slow to act.



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Meanwhile, recent trends — including the increased prevalence of high-cost elections and the growing role of outside interest groups — create both heightened urgency and new policy challenges.

Recognizing these realities, the Brennan Center for Justice recently released a report, *Choosing State Judges: A Plan for Reform*, urging states to take on judicial selection reform.[5] This report was the culmination of a three-year project taking a fresh look at judicial selection, focused on state supreme courts, where the rise of politicized elections has been most pronounced. We studied how each state selects its justices, including via individual case studies and an in-depth examination of judicial nominating commissions. We spoke to dozens of experts and stakeholders, reviewed the extensive legal and social science literature on judicial selection, and considered reform proposals from bar associations, legislatures, and scholars.

We make two key recommendations. First, states should do away with state supreme court elections. Instead, justices should be appointed through a publicly-accountable process conducted by an independent nominating commission. Second, to genuinely preserve judicial independence, states should adopt a single, lengthy term for all high-court judges. No matter the mechanism by which they reach the bench, be it an election or an appointment by the governor or legislature, justices should be freed from wondering if their rulings will affect their job security.

THE URGENT NEED FOR REFORM

Too often, a judge's race for voters has become a race for money. Between 1999 and 2017, the number of state supreme courts with at least one member who has competed in a one-million-dollar-plus election nearly tripled (inflation-adjusted). One byproduct of this rise of big-money elections is the potential for conflicts of interest. During the 2015–16 election cycle, for example, more than half of all contributions to supreme court candidates came from business interests, lawyers, and lobbyists. In Louisiana, a 2016 race for an open seat had plaintiffs' lawyers who bring environmental litigation backing one candidate and the oil and gas companies they sue backing another.

Like other elections, supreme court races have also seen a proliferation of spending by political action committees, 501(c)(4) social welfare organizations, and other non-political party groups. Funneling money into such groups often can allow wealthy donors to avoid campaign contribution limits and disclosure requirements that apply to direct contributions to political campaigns. During the 2015–16 cycle, nonparty groups engaged in a record $27.8 million in outside spending, making up an unprecedented 40 percent of overall supreme court election spending. Only 18 percent of these expenditures could be easily traced to transparent donors, leaving voters in the dark about who is seeking to influence judicial races and obscuring potential conflicts of interest.

The politicization of judicial selection also poses unique issues for *sitting* justices, who must hear cases with the knowledge that an unpopular decision — even if required by law — could cost them their job. Indeed, judicial decisions are frequently campaign fodder, with complex or nuanced legal and procedural issues often reduced to misleading and provocative attacks. More than one-third of television ads in the 2015–16 supreme court election cycle were negative — and a majority of them attacked judicial rulings.

There is good reason to be concerned that election pressures impact how judges decide cases. For example, a wide body of social science research suggests that electoral pressures make judges more punitive in criminal cases, to avoid appearing "soft on crime."[6] There is also evidence that the pressure to appeal to wealthy supporters can have an effect on cases. In a 2001 survey, state court judges were asked, "How much influence do you think campaign contributions made to judges have on their decisions?" Strikingly, nearly half — 46 percent — believed campaign contributions had at least some impact.[7]

And while precise causality is difficult to establish, numerous studies have found strong correlations between donor support and favorable rulings for those donors.[8] One such study found a relationship between contributions from business interests and business-friendly outcomes. However, when judges were serving their last term before mandatory retirement — and, therefore, were freed from having to curry favor with wealthy supporters to finance their next election — their favoring of business litigants essentially disappeared.[9] Another study found similar dynamics in election law cases. Judges who received more campaign money from political parties and allied groups were more likely to rule in favor of the party that supported them. However, the influence of campaign money largely disappeared when judges were no longer eligible for reelection.[10]

Notably, while elections are the most common mechanism for judicial reselection, similar pressures exist in systems where judges are reappointed by a governor or legislature. For exam-

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ple, in 2006, New York Gov. George Pataki declined to renew Judge George Smith's tenure for another term on New York's highest court, a decision that many observers attributed to Smith's opinion that struck down the state's death penalty law.[11] While the impact of reappointment processes is less frequently studied, one analysis found that judges are more likely to rule in favor of the government litigants responsible for reappointing them to the bench.[12]

REPLACE SUPREME COURT ELECTIONS WITH AN ACCOUNTABLE APPOINTMENT SYSTEM

Whether states should elect or appoint supreme court justices has been hotly debated for decades. But while the debate is not new, the number of big money state supreme court contests — and all the problems associated with them — has grown substantially this century.

As the Brennan Center's report lays out, we believe supreme court elections in today's super-charged political environment pose too great a threat to both the appearance and reality of evenhanded justice to be a desirable selection method. In many ways, the harder question is how to craft an alternative to elections that does not raise a host of its own problems. As legal historian Jed Shugerman has observed, "Appointments can be even more vulnerable to cronyism, patronage, and self-dealing than partisan elections."[13]

Judges — especially state supreme court justices — regularly hear cases involving powerful interests. If a selection system creates even the appearance that judges are beholden to benefactors responsible for their appointment, it can undermine public trust in the appointment process — and in the judiciary. Indeed, it was exactly these concerns that prompted many states to abandon appointment systems in favor of judicial elections in the 19th century.

The good news is that states' experiences show that appointment systems can be effective in insulating judges from political and special interest pressure and influence and can function as a preferable alternative to judicial elections. However, the mechanics and procedures underlying appointment systems are critical.

First, states should utilize judicial nominating commissions, independent bodies tasked with evaluating judicial candidates on nonpolitical criteria and producing a shortlist of names from which the governor can choose. Because the governor does not control the creation of a commission's shortlist, judicial nominating commissions can provide a layer of insulation from the normal operation of politics, while still empowering a politically accountable actor to make the final determination. Moreover, studies of judicial nomination commissions, which are already used in some form in many states, suggest that they have often been successful in setting aside political considerations and constraining governors' discretion.[14]

Yet our research on states' experiences also highlights that nominating commission design and processes can impact both their effectiveness and the public's confidence in the outcomes they produce. For example, as it now stands, in nearly half the states that use nominating commissions, governors appoint the majority of commission slots. In six states, governors appoint all members. Gubernatorial control can risk a dynamic where a commission functions to essentially ratify the governor's preferences, a concern that has been raised in several states and borne out in at least some.[15] Capture by partisan interests is another concern: less than half of all states with nominating commissions have any kind of bipartisanship requirement. A lack of diversity among commissioners also can undermine public trust in a commission's activities, while opaque processes can make public oversight impossible.

We therefore urge states not only to reject elections for supreme court justices, but also to adopt a *publicly accountable* appointment process, a variant of the so-called "merit ▸

selection" appointment process, with the following safeguards:

- States should use an independent, bipartisan judicial nominating commission with diverse appointing authorities and membership, including nonlawyers. The commission should vet candidates on qualifications, temperament, ethics, and other nonpolitical considerations, and then issue a *binding* shortlist of nominees to be considered for appointment.
- The application process should be clear and open, with transparent selection criteria, public interviews, and a public vote by the commissioners. Commissioners should be regulated by ethic rules, and public data should be collected about the diversity of judicial candidates at each stage of the process, from the initial pool of applicants to the final shortlist.
- The final appointment decision should rest with the governor, who should be required to select a justice from the nominating commission's shortlist.

These recommendations apply both to the 22 states that use contested elections for reaching the bench, as well as to states that already use some form of an appointment system, the overwhelming majority of which lack many of these safeguards.

ADOPT A SINGLE, LENGTHY JUDICIAL TERM

Judicial selection debates usually focus on how judges first reach the bench, but far less attention has been paid to judicial *retention.* As discussed previously, however, it is the process for retaining sitting judges that can have some of the most pernicious effects on judicial behavior.

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We urge a straight-forward solution to this problem. State supreme court justices should only serve a single, lengthy term on the bench — a "one and done" term of at least 14 years — so that they can decide cases without worrying that following the law could cost them their job. This recommendation applies to all states, including those that use retention elections as part of a merit selection system. Alternatively, states can allow supreme court justices to serve indefinitely, with or without a mandatory retirement age, subject to the same "good behavior" rules as federal judges. Three states — Massachusetts, Rhode Island, and New Hampshire — follow this model. Or states can follow the practice of Hawaii and the District of Columbia, and have an independent commission determine whether a sitting justice should be retained.

Adopting any of these changes at the state level would be transformative. While federal judges enjoy life tenure, nearly every state provides for multiple terms for supreme court justices, and uses a political process (most commonly elections) to determine whether a sitting justice should serve an additional term. Notably, in states where the complete elimination of supreme court elections lacks public support, focusing on eliminating the *reelection* of judges offers an alternative path, which would address many of the most harmful elements of electoral systems.

While any of the above methods for eliminating political reselection would be an improvement over the status quo, we favor the use of a lengthy single term, which is a common feature of many European constitutional courts.

Adopting either a lengthy single term or good behavior tenure has the advantage of providing judges time to develop expertise. Several U.S. Supreme Court justices have said it took them three to five years to fully learn the job.[16] Both approaches also provide long-term job security, which can help in attracting high-quality applicants.

A lengthy single term also has several advantages compared to life tenure, however. First, it avoids entrenching power for generations at a time, providing regular opportunities for new justices to populate the bench and lowering the stakes for any

given vacancy. It also allows a court's membership to evolve so that it can reflect changing community values and makes it easier to achieve a more diverse bench over time.

In fact, a lengthy single fixed term may actually result in more turnover on a court — creating more opportunities for diversity — than a retention system with unlimited shorter terms, given the advantages that usually attach to incumbents. In 39 states (a mix of election and appointive systems), at least one supreme court justice during the past decade served for 20 or more years. Eleven of those states had at least one justice who served for 30 years or more.[17]

Some have raised the concern that a lengthy single term could discourage mid-career lawyers from seeking supreme court seats, due to the prospect of finishing their term before retirement age. However, we believe it is unlikely that states will find it difficult to attract strong mid-career candidates, especially because many state supreme court justices move on to federal judgeships or political office or find lucrative employment in the private sector. Nevertheless, states can mitigate these concerns by allowing justices who have completed their terms to become a "senior judge" and preside over cases in the lower state courts. States may also need to amend their pension systems so justices' pensions can vest once they complete their term.

Finally, if a state chooses to use a commission-based reappointment system, the same cautions and recommendations about judicial nominating commissions apply. The main advantage of a commission-based system, as compared with a lengthy single term or life tenure, is that it provides an additional avenue for removing low-performing justices. However, absent a strong political will to create a depoliticized commission process that is independent from the governor, a commission-based retention scheme may not be sufficient to insulate judges from political pressure.

States that continue to elect justices should also embrace other safeguards, such as public financing for judicial campaigns and robust recusal rules governing when a justice should step aside from hearing a case involving a major donor. These policies can help curb the harmful effects of high-cost and politicized judicial elections.

As powerful interests increasingly look to state courts as a vehicle for forwarding their political, ideological, and financial agendas, it is imperative to revisit how state supreme court justices are selected. The good news is that there is much to learn from states' experiences — and much that can be done to better achieve fair, independent, and diverse state supreme courts.

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1 Jed Handelsman Shugerman, The People's Courts 247–48 (2012).

2 The phrase "supreme court justice" is used here to refer to any judge on a state's highest appellate court.

3 Alicia Bannon et al., *Who Pays for Judicial Races? The Politics of Judicial Elections, 2015–16,* 2017 Brennan Ctr. for Just. at N.Y.U. School of Law (hereinafter, "Brennan Ctr."), https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf. Unless otherwise noted, all judicial election data is from this source.

4 20/20 Insight LLC, *Justice at Stake/Brennan Center National Poll, 10/22–10/24, 2013*, http://www.brennancenter.org/sites/default/files/press-releases/JAS%20Brennan%20NPJE%20Poll%20Topline.pdf.

5 Alicia Bannon, *Choosing State Judges: A Plan for Reform*, 2018 Brennan Ctr., https://www.brennancenter.org/sites/default/files/publications/2018_09_JudicialSelection.pdf.

6 *See* Kate Berry, *How Judicial Elections Impact Criminal Cases*, Brennan Center for Justice, 2015 Brennan Ctr., https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf (describing studies).

7 Greenberg Quinlan Rosner Research Inc. & American Viewpoint, *Justice at Stake — State Judges Frequency Questionnaire*, 2002 Brennan Ctr., https://www.brennancenter.org/sites/default/files/2001%20National%20Bipartisan%20Survey%20of%20Almost%202%2C500%20Judges.pdf.

8 *See* Thomas E. McClure, *Do Contributions to Judicial Campaigns Create the Appearance of Corruption?*, in Corruption, Accountability and Discretion 88 (Nancy S. Lind & Cara E. Rabe-Hemp eds., 2017) (reviewing social science literature and concluding that "[a]lthough some studies fail to establish a connection between donations and judicial outcomes . . . most scholars have found a correlation between campaign contributions and high court rulings").

9 Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U L. Rev. 69, 104 (2011).

10 Joanna Shepherd & Michael S. Kang, *Partisan Justice: How Campaign Money Politicizes Judicial Decisionmaking in Election Cases*, 2016 Am. Const. Soc'y for Law & Pol'y, https://www.acslaw.org/analysis/reports/partisan-justice/.

11 Michael Cooper, *Pataki Appoints Fifth Republican to Highest Court*, N.Y. Times (Aug. 19, 2006), https://www.nytimes.com/2006/08/19/nyregion/19judge.html.

12 Joanna M. Shepherd, Symposium, *Are Appointed Judges Strategic Too?* 58 Duke L.J. 1589, 1617–21 (2009).

13 Shugerman, *supra* note 1, at 259.

14 *See* Bannon, *supra* note 5, at 6–7 (describing research).

15 *See, e.g.*, Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 Fordham Urb. L.J. 73, 87 (2007) (discussing safeguards to combat "commission capture"); Rebecca Mae Salokar, D. Jason Berggren & Kathryn A. DePalo, *The New Politics of Judicial Selection in Florida: Merit Selection Redefined*, 27 Just. Sys. J. 13–38 (2006) (discussing how, after a legislative change gave the governor more control over nominating commission membership, the state's Republican governor appointed more Republicans to appellate court seats).

16 Clare Cushman, *Rookie on the Bench: The Role of the Junior Justice*, 32 J. of Sup. Ct. Hist. 282, 293 (2007).

17 *Judicial Term Length*, analysis on file at the Brennan Center.