Judicial Selection Methods, Qualifications, and Proposed Additions

Jacob C. Rickard

Louisiana State University of Alexandria

Judicial Selection Methods, Qualifications, and Proposed Additions

Introduction

Every method currently used for the purpose of filling a vacant judgeship at any level in the United States (inferior, state to highest, federal courts) contains within it a significant inherent risk of political influence compromising the vision of judicial independence. Compounding this issue, the constitutional minimum qualifications to become a judge are alarmingly vague or altogether nonexistent in some cases. Both federal and state legislatures perpetuate the resulting issues by failing to ensure that judges have the appropriate, prerequisite knowledge to perform as finders of fact. This is especially true in cases without juries where a judge should have a deeper, more thorough understanding of the law in order to make an informed opinion backed with precedents. Furthermore, no value has been placed by legislatures on proper foundations and experience a judge needs to possess in furtherance of their role as an arbiter. This paper seeks to enlighten readers to these basics. It will explain the negatives to both judicial appointments and elections in the hope that progress toward a non-politicized method of judicial selection can be reached in the future.

There are either two or three tiers of courts at the state level. The lowest and most common type of courts have many names: district, circuit, inferior, etc. These are sometimes followed by a middle tier which are usually named appellate or appeals courts. Lastly, there are the highest authority, or Supreme, courts. The federal judiciary uses three tiers of courts that follow the same nomenclature as state courts.

The Current State of Judicial Selection

Currently, in the broadest of terms, every state either appoints or elects their judges. Elections are either partisan, non-partisan, or, in a couple of states, legislative elections. Appointments are either strictly gubernatorial (meaning there is no nominating committee) or those based on the Missouri Plan (also known as merit selection). Connecticut and New Hampshire use appointments with nominating commissions, so these states can be allocated to the Missouri Plan subcategory. However, it is interesting to note that these two states are the only ones that use authorities other than the governor to appoint their judges (legislative and executive council appointments respectively). The District of Columbia's (D.C.) judges as well as the entirety of the federal judiciary are presidential appointments (American Judicature Society, 2019).

According to the American Judicature Society (2019), 11 of the 50 states use two or more methods to select their judges (different methods for different tiers of courts). In total, there are 26 states that use appointments in at least one tier of their courts. There are 32 states that use elections for their judiciary seats in at least one tier. Furthermore, 23 states and D.C. use some type of nominating commission as the first step in their judicial selection process. In the same vein, 13 states and D.C. use a secondary organization outside of the appointing authority to confirm judiciary nominees as the last step in their process. Finally, nine states and D.C. use both nominating commissions and confirmations (American Judicature Society, 2019).

Lack of Standards

The documented minimum qualifications to be eligible for a judge seat have not kept up with the passage of time. At best, there are states like Massachusetts where not only do they

employ both nominating committees and confirmations in their process, but they also require at least 10 years of "legal experience and training" for their lowest level of court judges (Executive Order No. 558, 2015). Unfortunately, there are a non-negligible number of states that do not take as quality of an approach. In fact, 21 states do not specify a requirement for a minimum number of years of experience. As an example, Illinois' only experience-related requirement for their judges is that they will be, "a licensed attorney-at-law of this State" (I.L. Const. Art. VI, § 11).

However, that is still better than the state of Minnesota's sole requirement that a judge at any level (including their supreme court justices), "shall be learned in the law" (M.N. Const. Art. VI, § 5). Then there are the worst cases where experience-based requirements are completely absent such as New Hampshire where the literal only requirement is that a nominee cannot be over the age of 70 (N.H. Const. Pt. II, Art. 78). As a comparison to the 21 states that lack an experience-based requirement, 31 states have a publicly documented maximum age requirement similar to New Hampshire's (American Judicature Society, 2019). This is entirely justifiable since we do not want our judges to become senile while actively serving. If over half of the states in our country show concerns for a judge's mental faculties close to their exits (retirements), why do we not set higher standards for their entrances into office?

Issues Arising from Current Methods

The question then arises: what is the consequence of such negligence and broad requirements? According to O'Brien (2016), the ramifications are so crippling that the legitimacy of our courts is compromised, and judicial independence is endangered. Judicial independence has two parts to it. The first is the goal that our country's judicial branch, to include all federal and state judiciaries, should be separate from the other branches of

government. This is one of the most imperative, founding principles of our government's structure. Second, judicial independence can also be interpreted as the ideal that our judges' decisions should be far removed from any undue influence. A judge's rulings should be made solely on the interests of justice and not on the deep pockets of partisan entities or special interest groups (O'Brien, 2016).

Flaws in using elections.

Geyh (2018) makes one comment on a shortcoming of election methods that expounds on these ideas by emphasizing the dichotomy between one of the main sources of a judge's regulations on conduct, the American Bar Association's (ABA) Model Code of Judicial Conduct, and the reality of judicial practice. The Code mandates that judges "shall not be swayed" by the fear of public perceptions (Rule 2.4, 2014), let any non-juristic "interests or relationships" (e.g., political, financial, family, etc.) influence their "conduct or judgement" (Rule 2.4, 2014), or "make pledges, promises, or commitments" (Rule 2.10, 2013) that put their impartiality in jeopardy. Those are the ideals, but Geyh notes that winning elections requires each of those rules be broken. Elections, partisan or not, are nothing if not convoluted popularity contests.

Flaws in using appointments.

Appointive systems are not without flaws either. To illustrate these issues, this paper will criticize the Missouri Plan as it is the more "apolitical" selection method versus strictly gubernatorial appointments. As stated earlier in the paper, the Missouri Plan is a subcategory of appointments. The goal of merit selection was to create a politics-free alternative to the only other two options at the time. Geyh (2018) points out that instead of ridding judicial selection of political influence it has only placed it in the shadows away from the public eye. There are cases

of log-rolling, committees that have removed all power from the governor by presenting only one viable option as a candidate, and vote-trading (Geyh, 2018). This is only the tip of the iceberg as a mainly partisan discussion without even touching the special interest group or business-owner aspects.

One need not look further for an example of everything wrong with the current state of judicial selection than our nation's federal congressmen. After the death of Supreme Court Justice Antonin Scalia in February 2016, a group of senators led a coordinated mass-denial of President Obama's appointments. Consequently, 59 nominees, 30 of whom had cleared the Senate Judiciary Committee, were prevented from being confirmed to the federal bench between February and the end of 2016. By the time President Trump came into office, he had the ability to nominate judges for over 100 lower court seats (Gerhardt & Painter, 2017). Then, after stunts like this, is there any wonder why there is such a massive backlog of cases throughout our nation's judiciary? While it is possible one could make the argument that state judiciaries are more elected positions, which could negate the above anecdote, the reality of our judicial branch is that it is incredibly helpless against the actions of the executive and legislative branches. The reasons for blatant manipulations like the example above are categorically not in the interests of justice, nor do they stem from the principles of either judicial independence or judicial accountability.

Recommendations and Future Research

Emphasis in selection methods should be placed on a separation of political influences including non-partisan entities (special interest groups). Instilling more experience-based minimum qualifications could ameliorate this and is capable of manifesting in a variety of ways. Litigation (oral argumentation) experience should become mandatory. Is it acceptable for

attorneys that have never stepped into a courtroom before to become judges? This kind of experience leads an attorney to come in contact with aspects that a judge would on a frequent basis. One example is interactions with grand and petit juries. An attorney that has picked a jury and argued before a jury will become a judge that can expedite the voir dire process in its entirety.

What do we, as a country, say to the presumed innocent defendant whose trial is in February with a judge that just came to the bench in January with only family law experience (i.e., divorces, child custody, etc.)? Such a judge would almost assuredly have no knowledge of criminal law or procedure. In that vein, it would be practical and efficient if legislatures and/or governors amended their laws/policies to require that nominees must have practiced the specific branch of law that their judgeship will be seated in. Using the same field of law as above, a criminal court judge would be required to have a certain minimum number of years' experience as either a prosecutor or criminal defense attorney.

This paper briefly overviewed the existing judicial selection methods used across the nation. Second, the case that there is a fundamental lack of minimum qualifications in our laws, executive orders, and constitutions was presented. Third, the potential consequences of the present state of judiciary selection were highlighted. Finally, a short, provisional list of additional minimum qualifications was proposed. Ultimately, the process of depoliticizing our judiciary is far too beyond what could be considered a reasonable amount of time from now. Future research should develop upon the original goals of the Missouri Plan and seek innovative, novel policies and methodologies for judicial selection. The main conclusion is that implementing more stringent judicial candidate qualifications would accomplish a two-fold

purpose of lessening the degree of political influence associated with current selection methods and produce a higher quality of incumbent judicial prospects with a certainty.

References

American Judicature Society. (2019). Methods of Judicial Selection. Retrieved from http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=

Gerhardt, M., & Painter, R. (2017). Majority Rule and the Future of Judicial Selection. *Wisconsin Law Review*, 2017(2), 263-284.

Geyh, C. (2018). Judicial Selection and the Search for Middle Ground. *DePaul Law Review*, 67(2), 333-368.

I.L. Const. art. VI, § 11. Retrieved from http://www.ilga.gov/commission/lrb/con6.htm

Mass. Exec. Order No. 558 (Feb. 05, 2015). Retrieved from https://www.mass.gov/executive-orders/no-558-reconstituting-the-judicial-nominating-commission-and-establishing-a-code

M.N. Const. Art. VI, § 5. Retrieved from https://www.revisor.mn.gov/constitution/#article_6

N.H. Const. Pt. II, Art. 78. Retrieved from https://www.nh.gov/glance/judicial.htm

O'Brien, D. (2016). State Court Elections and Judicial Independence. *Journal Of Law & Politics*, 31(4), 417-428.

Rule 2.4, External Influences on Judicial Conduct. (2014). In American Bar Association, Center for Professional Responsibility, *Model Code of Judicial Conduct.* Retrieved from https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_4externalinfluencesonjudicialconduct/

Rule 2.10, Judicial Statements on Pending and Impending Cases. (2013). In American Bar Association, Center for Professional Responsibility, *Model Code of Judicial Conduct.* Retrieved from https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_10judicialstatementsonpendingandimpendingcases/