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**Partisan Lobbying, Mass Incarceration, and Gerrymandering:
Should Judicial Elections be Abolished?**

Introduction

Around the world, the idea that a judge could be elected seems rather perplexing. Typically, most nations utilize an appointment system that is akin to the procedures used in selecting federal judges in the United States.¹ However, while the federal judges are appointed via the executive branch, the vast majority of states appoint some of their judges through an election process. A total of thirty-nine states hold some form of elections in appointing judges in their respective trial courts and intermediate appellate courts, while thirty-eight of those states hold judicial elections for their high courts (typically referred to as “Supreme Courts”).² In comparison, only two other nations, Switzerland and Japan, use any form of judicial election, and even they refrain from using it to such a degree.³ Former Supreme Court Justice Sandra Day O’Connor once opined, in reference to judicial elections, “No other nation in the world does that, because they realize you’re not going to get fair and impartial judges that way.”⁴

¹ Adam Liptik, U.S. voting for judges perplexes other nations, The New York Times, May 25, 2008. https://www.nytimes.com/2008/05/25/world/americas/25iht-judge.4.13194819.html?module=ArrowsNav&contentCollection=Americas&action=keypress®ion=FixedLeft&pg_type=article (last visited February 8, 2019).

² American Bar Association, Fact Sheet on Judicial Selection Methods in the States, https://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf (last visited February 3, 2019).

³ Liptik, supra note 1; “Smaller Swiss cantons elect judges, and appointed justices on the Japanese Supreme Court must sometimes face retention elections, though scholars there say those elections are a formality.”

⁴ Id.

Justice O'Connor's concerns have also held through in the general public as well. A 2013 poll of 600 registered voters found that 59% believed that campaign contributions made to a judge had a "great deal" of influence on the judge's decisions.⁵ Yet, in light of these strong feelings, judicial elections have becoming a booming enterprise with approximately \$211 million dollars being raised in state supreme court races from 2000 to 2009, "two and a half times more than in the previous decade."⁶ With concern coming from the highest court in the land to the very people that vote for these judges, the question remains, "why do we not abolish judicial elections?"

This paper looks to explore the history and circumstances surrounding the rather unique concept of judicial elections, from its inception to the issues that still arise from its perplexities. First, this paper will examine the initial rationale and viewpoints that shaped the use of judicial elections in states despite the use of the appointment system in the federal level. Second, the paper will examine issues that have been arisen in recent years from the use of the judicial election system, including concerns regarding gerrymandering, an increase in sentencing, and the influence of campaign financing. Finally, this paper will examine other potential systems or ideas that could be incorporated in order to overhaul the judicial election system. Ultimately, this paper aims to highlight the numerous problems with judicial elections but present an option that would not outright eliminate judicial elections.

A Brief Look at the History of Judicial Elections

⁵ Justice at Stake/Brennan Center National Poll, 10/22-10/24, 2013, https://www.brennancenter.org/sites/default/files/toplines337_B2D51323DC5D0.pdf (last visited February 2, 2019).

⁶ Billy Corriher, Partisan Judicial Elections and the Distorting Influence of Campaign Cash, Center for American Progress, October 25, 2012. <https://www.americanprogress.org/issues/courts/reports/2012/10/25/42895/partisan-judicial-elections-and-the-distorting-influence-of-campaign-cash/> (last visited February 8, 2019).

The late Roy A. Schotland, a former law professor at Georgetown University, once said that “more sweat and ink have been spent on getting rid of judicial elections than on any other single subject in the history of America law.”⁷ A great deal of this debate has always centered around concerns of judicial independence. Although much literature has been expended on defining and narrowing down what is “judicial independence”, Wisconsin’s Chief Justice Patience Drake Roggensack has described it as “impartial decision making, where the rule of law is applied even-handedly and the court does not respond to external pressures, such as court funding, special interest groups, political agendas, the press, campaign contributors, or an upcoming election or hoped-for appointment.”⁸

The questions surrounding maintaining this judicial independence and insulating judges from the rest of government has been raging on for centuries. For over three hundred years, the English monarchs fought with Parliament over who controlled appointment of the judiciary.⁹ These anxieties eventually made their way across the pond in the British Colonies. American colonists sought to gain some control over the judges that controlled their law, but to avail. The British monarchy controlled the appointment of colonial judges, and, alongside the British Parliament, began paying judicial salaries through taxes on American’s imported goods.¹⁰ These

⁷ Alex B. Long, “Stop Me Before I Vote for This Judge Again”: Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges, 106 W. Va. L. Rev. 1, 2 (2003).

⁸ John F. Kowal, Judicial Selection For the 21st Century, Brennan Center For Justice Twenty Years at New York University School of Law (2016).
https://www.brennancenter.org/sites/default/files/publications/Judicial_Selection_21st_Century.pdf (last visited February 8, 2019).

⁹ Paul J. De Muniz, Politicizing State Judicial Elections: A Threat to Judicial Independence, 38 Willamette L. Rev. 367, 369 (2002) (citing ack M. Sosin, The Aristocracy of the Long Robe: The Origins of Judicial Review in America 32 (1989)).

¹⁰ Id.

worries manifested themselves in the Declaration of Independence, in which the Founding Fathers accused King George III of “[making] Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”¹¹

Ultimately, following the victory in the American Revolutionary War, the Founder Fathers were presented an opportunity to shape the judicial selection process in their own way. Thus, on May 14, 1787, the delegates at the Constitutional Convention attempted to, amongst other things, decide the selection of judges on the federal level.¹² A compromise was ultimately reached in which the executive branch would appoint federal judges, “with the advice and consent” of Congress.¹³ While there was unity in the federal government on how appointment would occur, the states were divided into two camps on how they would select their own judges. Five of the original thirteen states, allowed judicial appointment by the governor or the governor’s council.¹⁴ While the eight remaining states placed the power of judicial appointment in the hands of the state legislatures.¹⁵ Yet, despite the overall democratic movement within the newly formed nation, direct elections for judges would still remain a foreign concept for many years. In fact, from 1776 to 1830, the eleven newly added states placed their judicial selection in the hands of either the governor or the legislature.¹⁶

¹¹ The United States Declaration of Independence, paragraph 11 (1776).

¹² Matthew Schneider, Why Merit Selection of State Court Judges Lacks Merit, 56 Wayne L. Rev. 609, 610–11 (2010).

¹³ Id. at 611, (citing James Madison, Notes of Debates in the Federal Convention of 1787, Reported by James Madison (Chicago: Ohio Univ. 1966) 23 (recording the first arrival of delegates to the Constitutional Convention on May 14, 1787)).

¹⁴ Thomas R. Phillips, The Merits of Merit Selection, 32 Harv. J.L. & Pub. Policy 67, 71 (2009).

¹⁵ Id.

¹⁶ Rachel Paine Caufield, Ph.D., How the Pickers Pick: Finding A Set of Best Practices for Judicial Nominating Commissions, 34 Fordham Urb. L.J. 163, 166 (2007)

In the early nineteenth century, as the suffrage movement continued to grow, the general populace began to push back against the antiquated system of executive and legislative appointments of judges in the states. The scorn directed at the crown for denying the colonists the right to allow their legislatures to choose judges, had now crept up once again. However, this time, the scorn and accusations of tyranny were now being hurled by the American people at those same legislatures.¹⁷ In 1812, Georgia became the first state to implement judicial elections.¹⁸ The rise of populism under Andrew Jackson and his slogan “Let the People Rule” also led to a dramatic increase in states abandoning appointments in favor of direct judicial elections.¹⁹ By 1861, the majority of states had shifted to a judicial election based system, and²⁰ “[b]etween 1865 and 1959, every state that was admitted to the Union adopted popular election of state judges.”²¹

In examining the adoption of judicial elections, it seems that such an occurrence was simply a natural progression of suffrage in the United States. The colonists began their campaign in taking away judicial appointment from the British crown and, after decades of fighting, were able to bring that power to the people themselves. However, a deeper examination of judicial elections brings to light issues that those early Americans could not have accounted for. These issues (discussed in the preceding paragraph) are the result of the unique conditions surrounding judges and the judiciary.

¹⁷ Id.

¹⁸ Republican Party of Minnesota v. White, 536 U.S. 765, 785 (2002).

¹⁹ Phillips, supra note 14, at 72.

²⁰ Republican Party of Minnesota v. White, 536 U.S., at 785.

²¹ Rachel Paine Caufield, In the Wake of White: How States Are Responding to Republican Party of Minnesota v. White and How Judicial Elections Are Changing, 38 Akron L. Rev. 625, 627 (2005)

Former Pennsylvania Governor Tom Ridge once stated that, “The restraint, temperament and detachment that we rightly demand from our judges is fundamentally incongruous with partisan, statewide political campaigns. In my opinion, campaigning is precisely the wrong thing to ask our judges to do!”²² The role of judges is vastly different from other elected officials. Those in the legislative and executive branches serve as representatives of the will of the people. A representative is meant to be “popular” as “issues of policy are properly decided by majority vote.”²³ In contrast, judges face a vastly different job than their constituents in the other branches of government, they must serve as a legal presence that provides apolitical rulings void of personal bias.²⁴

Over the years legal scholars and citizens alike have argued that judges should embrace a role of promoters of social change and that they should reflect the ideals of society.^{25 26} However, Supreme Court Justice Ruth Bader Ginsburg has argued that those roles are reserved for political actors.²⁷ In her Dissenting Opinion in Republican Party of Minnesota v. White, Justice Ginsburg

²² Mark A. Behrens; & Cary Silverman, The Case for Adopting Appointive Judicial Selection Systems for State Court Judges, 11 Cornell J.L. & Pub. Policy 273, 277–78 (2002) (quoting Governor Tom Ridge, Address, American Bar Association's John Marshall Award (Aug. 5, 2001), at <http://www.pmconline.org> (last visited Feb. 15, 2002)).

²³ Shira J. Goodman et. al., What's More Important: Electing Judges or Judicial Independence? It's Time for Pennsylvania to Choose Judicial Independence, 48 Duq. L. Rev. 859, 862 (2010)

²⁴ Brendan J. Doherty, Stifled Speech and Judicial Campaigns: An Analysis of A Conflicted Legal Culture in Republican Party of Minnesota v. White, 32 N. Ky. L. Rev. 305, 307 (2005)

²⁵ Bruce A. Green & Rebecca Roiphe, Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence, 64 N.Y.U. Ann. Surv. Am. L. 497, 507 (2009) (citing Morton Horwitz, The Transformation of American Law, 1780-1860 (1977)).

²⁶ Doherty, supra note 24, at 308.

²⁷ Republican Party of Minnesota v. White, 536 U.S., at 785; see also Anca Cornis-Pop, Republican Party of Minnesota v. White and the Announce Clause in Light of Theories of Judge and Voter Decisionmaking: With Strategic Judges and Rational Voters, the Supreme Court Was Right to Strike Down the Clause, 40 Willamette L. Rev. 123, 140-43 (2004).

argues that unlike other publicly elected officials, judges are not meant to serve a “faction or constituency.”²⁸ Instead, judges are to disregard popular opinion and “must strive to do what is legally right, all the more so when the result is not the one ‘the home crowd’ wants.”²⁹

Thus, although judicial elections appear on the surface to be grounded in the very democratic values the nation was founded on, they may not necessarily be appropriate in this case. Aside from the hypothetical and moral debate on the role of the judiciary, there numerous real-world examples that illustrate not only illustrate Justice Ginsburg’s concerns, but also bring to light new problems.

Problems Arising from Judicial Elections

In June 2017, the League of Women Voters of Pennsylvania, joined by eighteen Democratic Pennsylvanians, filed suit against Commonwealth of Pennsylvania (and numerous political officials) challenging the constitutionality of Pennsylvania’s 2011 congressional redistricting.³⁰ The Pennsylvania Supreme Court ultimately held that the 2011 redistricting was unconstitutional and, after the Pennsylvania General Assembly and Governor failed to timely agree on a new redistricting, the Court created its own congressional map for the 2018 elections.³¹

On the surface, the Court’s decision in League of Women Voters v. Commonwealth of Pennsylvania, appears to be a standard argument of constitutionality and separation of power.

²⁸ Id., at 806.

²⁹ Id.

³⁰ Brennan Center For Justice, League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania, October 29, 2018. <https://www.brennancenter.org/legal-work/league-women-voters-v-pennsylvania> (last visited February 8, 2019).

³¹ Id.

However, numerous Pennsylvania lawmakers have strongly criticized the decisions as a result of the partisan make-up of the Pennsylvania Supreme Court. Out of the seven Supreme Court justices, five are Democrats from the Philadelphia and Pittsburgh area and the remaining two are Republican.³²

The makeup of the Supreme Court of Pennsylvania makes clear the issue arising from League of Women Voters v. Commonwealth of Pennsylvania; as long as there are judicial elections, there will always be concerns about the impartiality of judges. In response to this ruling, Pennsylvania Republican lawmakers have called for the impeachment of the state's Supreme Court justices³³ and to reform the judiciary.^{34 35} Nonetheless, despite the potential positive impacts of the reform proposals, this political bickering has stemmed from Pennsylvania's partisan judicial elections. Politicians on both sides have dug into their party-line trenches as the Justices' opinions are being criticized and praised due to their party affiliation.

Moreover, the public quarreling and challenges of the Supreme Court of Pennsylvania's impartiality may further damage citizen's faith in the judiciary. In a 2001 poll conducted by the request of the Pennsylvania Supreme Court found that ninety percent (90%) of Pennsylvanian voters "believed that judicial decisions were influenced by large campaign contributions."³⁶ It is

³² Id.

³³ Editorial Board, Pennsylvania lawmakers threaten to impeach judges. It's a dangerous trend. The Washington Post March 27, 2018. https://www.washingtonpost.com/opinions/pennsylvania-lawmakers-threatened-to-impeach-state-judges-its-a-dangerous-trend/2018/03/27/be83cd78-312f-11e8-94fa-32d48460b955_story.html?utm_term=.de22d100f4e0 (last visited February 8, 2019).

³⁴ Regular Session 2017-2018, Pennsylvania House Bill 11.

³⁵ Regular Session 2017-2018, Pennsylvania Senate Bill 22.

³⁶ Charles Gardner Geyh, Publicly Financed Judicial Elections: An Overview, 34 Loy. L.A. L. Rev. 1467, 1470 (2001) (citing Dennis Chaptman, Process of Electing Judges Debated; Officials From 17 States Study Campaign Finance, Threats to Independence, Milwaukee J. Sentinel, Dec. 10, 2000, at 2B.)

clear that political debates about the partisan bias of Pennsylvania judges are unlikely to rectify the distrust of the judiciary.

The recent statistics surrounding judicial elections in Pennsylvania have probably substantiated the concerns that those nine in ten Pennsylvanians had. Out of the Pennsylvania Supreme Court justices who served in 2008 and 2009, the six who won their positions through election raised a total of nearly \$ 8 million in campaign contributions.³⁷ The number becomes more concerning when acknowledging that approximately thirty percent (30%) of these contributions were made by “attorneys, law firms, and legal PACs.”³⁸ These lobbyist did more than just get their day in court, they reveled in it. Out of the 112 civil cases decided upon by the Pennsylvania Supreme Court in 2008 and 2009, seventy-five (75) of them involved at least one “litigant, attorney, or law firm” that contributed to one of the six justices’ election campaigns.³⁹

Not only are legislatures and citizens aware of the potential biases related to judicial elections, but judges appear to be cognizant of the issue as well. A 1998 study sponsored by the Texas Supreme Court found that forty-eight (48%) of Texas judges believed that campaign contributions affected judicial decisions.⁴⁰ Judges also behave differently as elections approach.

A Pennsylvania study, found that “all judges, even the most punitive, increase their sentences as re-election nears, resulting in some 2,700 years of additional prison time, or 6 percent of total prison time, in aggravated assault, rape and robbery sentences over a 10-year

³⁷ Malia Reddick & James R. DeBuse, Campaign Contributors and the Pennsylvania Supreme Court, 93 *Judicature* 164 (2010). The author notes that the seventh justice was appointed to fill a court vacancy.

³⁸ Id.

³⁹ Id. at 165.

⁴⁰ Behren and Silverman, supra note 22, at 283.

period.”⁴¹ The researchers conclude that “media accounts of courtroom proceedings tend to result in voters believing judges are too lenient,” and “voters are inclined to believe the criminal justice system as a whole is too lenient.”⁴² Therefore, judges often run on campaigns that are “heavily anti-defendant or pro-death penalty.”⁴³ Moreover, these are not mere campaign slogans nor do these sentiments end when a judge wins reelection. In fact, appointed judges are far more likely to reverse a death penalty conviction (26% of the time) as compared to a judge facing retention elections (15%) or judges facing competitive elections (11%).⁴⁴

Ultimately, the statistical findings show that the concerns arising from judicial elections causing impartiality are not unfounded. Judicial elections are shown to raise concerns over impartiality and partisanship, while also significantly changing the way that judges actually rule. Perhaps some of these trends help explain why or contribute to the fact that only twenty-nine percent (29%) of Americans have a “great deal” of confidence in the criminal justice system and ninety-two percent (92%) want to see change in the civil justice system.⁴⁵ These findings lead to another question, what can we do to change the judicial system?

⁴¹ Adam Liptak, Rendering Justice, With One Eye on Re-election, New York Times May 25, 2008. https://www.nytimes.com/2008/05/25/us/25exception.html?_r=3&hp=&adxnlnx=1211666537-vbcSV1I8LyrHme86GFnA9g&pagewanted=all (last visited February 8, 2019).

⁴² Keith Swisher, Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification, 52 Ariz. L. Rev. 317, 366 (2010) (quoting Gregory A. Huber & Sanford C. Gordon, Accountability and Coercion: Is Justice Blind When It Runs for Office?, 48 Am. J. Pol. Sci. 247, 262 (2004)).

⁴³ Joanna Cohn Weiss, Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights, 81 N.Y.U.L. Rev. 1101, 1109 (2006).

⁴⁴ Kate Berry, How Judicial Elections Impact Criminal Cases, Brennan Center for Justice at New York University School of Law (2015), at page 2. https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf (last visited February 8, 2019).

⁴⁵ Ron Faucheux, By the Numbers: Americans Lack Confidence in the Legal System, The Atlantic (July 6, 2012). <https://www.theatlantic.com/national/archive/2012/07/by-the-numbers-americans-lack-confidence-in-the-legal-system/259458/> (last visited February 8, 2019).

Ideas for Change in Judicial Selections

Although it is beneficial to view the problems associated with a judicial election system, criticisms also benefit from suggestions. Analyzing the history of judicial selection in the United States presents many answers to the questions that have plagued researchers and scholars, but it can also cause some misunderstanding. The judicial election systems adopted by the majority of states in the nineteenth century served the purpose of furthering stripping power from a dominating elite and getting individuals involved in the legal system.

Nonetheless, American society has changed dramatically, and new issues arose from judicial elections that those early suffrage proponents could not have accounted for. In the early-nineteenth century, voters only had to choose from a handful of candidates who relied on their reputation rather than any sort of organized campaigning.⁴⁶ However, urbanization eliminated the natural “grass-root” campaigns as political parties began to endorse and select candidates.⁴⁷ Even in the late-eighteenth century, due to the overbearing party machines choosing judges, the public began to lose confidence in the judiciary.⁴⁸ By the early-twentieth century, numerous states (including Pennsylvania) adopted nonpartisan elections.

Ultimately, Pennsylvania rejected the nonpartisan elections due to voters being “unable to make informed decisions.”⁴⁹ The history of judicial elections has always had one underlying problem, “is the judiciary independent?” Yet, the target of these attacks has shifted throughout the

⁴⁶ Phillips, supra note 14 at 73-4.

⁴⁷ Id. at 74.

⁴⁸ Caufield, supra note 16, at 168.

⁴⁹ Id., at 169.

years. The public no longer fears that a king or the legislative elite control the judges, but rather they are concerned that wealthy donors and political parties now influence judicial decisions.

Nevertheless, no judicial selection system can be perfect. On one hand, executive appointment systems allow for judges to escape direct scrutiny from the public. On the other hand, judicial elections encourage and often force judges to change their decision-making. Therefore, states, and Pennsylvania in particular, should look to incorporate a system that balances both judicial independence and accountability to the public. The most appropriate system would be a merit-based judicial appointment system. A merit-based selection is comprised of three parts;

(1) selection of a nonpartisan judicial nominating commission; (2) a list of judicial nominees compiled by the commission and presented to the appointing authority, who is usually the governor;⁵⁰ and (3) the selection and appointment of a nominee.⁵⁰

States adopting such a system can also incorporate retention elections, in which the appointed judge serves a shorter initial term and then voters cast ballots on whether or not renew the judge for a new term.⁵¹ This provides a step in the right direction while retaining a role for active voters.

Conclusion

In conclusion, judicial election systems no longer serve the purpose that they were originally intended for. Judicial elections were once important for providing judicial independence and promoting public faith in the judiciary. The statistics show that neither of these principles still apply, especially in the state of Pennsylvania where judicial partisanship issues are still making

⁵⁰ Behren and Silverman, supra note 22, at 302.

⁵¹ Id. at 301.

headlines in the news. Judicial election states should seek to incorporate a merit-based system that restore the balance the Founding Fathers fought for.