

### **Background**

Currently, there are six methods of selecting judges, each a variation on three basic models—appointment, election, and merit selection. Debates rage in many states regarding how best to balance calls for accountability with the need for independence. Such debates translate into calls for reforming the selection process.

Arguments for the two most common methods, election and merit, are outlined below. Review the benefits and costs of each method.

- Which method would support your definition of a good judge?
- How do you think each selection method shapes the administration of justice and impartiality of judicial decision-making?
- Does the process result in more judicial independence? More judicial accountability?

### **Method #1: Election**

In nine states, judges run as members of a political party, and in 12 other states, the elections are nonpartisan, meaning the judges do not reveal their political affiliation. A recent Supreme Court decision, *Republican Party v. Minnesota*, affirmed the right of judges to tell voters about their positions on specific political and legal issues that might come before them. Proponents of elections are not necessarily in agreement about how elections of judges are similar to and different from elections in other branches of government.

#### **Benefits**

- Many Americans believe the political preferences of judges are an important consideration.
- The Federalist Society argues that judicial elections, while not flawless, are better than the alternatives.
- Elections provide accountability in the form of an additional, significant measure of self-government to voters.
- As the legal system comes under increasing and aggressive legal suits such as the recent tobacco and on-going gun lawsuits, the public in states which elect judges will be better able to rein in the judiciary and block the continued deterioration of the civil justice system.

Those favoring election suggest certain checks on the powers of judges

- Prohibit judges from appointing a lawyer to perform services for the court if the judge knows or learns that the lawyer contributed more than a threshold amount to the judge's election campaign.
- Prohibit judicial candidates from accepting donations exceeding specified limits.
- Require judicial campaign committees to file disclosure statements showing the name, address, occupation and employer of each person contributing more than an established amount to the campaign.

#### **Costs**

- In states with elections, controversial races create pressure to raise more money.
- Spending by candidates, special interest groups, and political parties on judicial elections is at an all-time high. As a result, candidates are forced to solicit campaign contributions from lawyers and possible litigants.
- Candidates, often the largest contributors to the campaigns, may end up in debt.
- In large statewide races, candidates may lack sufficient money to inform the voters of their merits.
- Given the nature of the judicial elections, voters often lack clues they need to gauge the merits of individual candidates, such as party affiliations, committee assignments, voting records, press releases, or policy positions.
- Critics say judges should spend their time reducing the backlog of cases rather than campaigning for office.

### **Method 2: Merit**

Merit selection was proposed as a means of separating judges from the election process that shapes the selection of legislators and executive officers. As it has evolved, a nominating committee that is comprised of both lawyers and non-lawyers present the governor with a list of nominees from which the governor selects an appointee. After a stated term, the judge then stands for an election with no party affiliation and no opponent. The judge will be retained if he or she receives a certain percentage of the vote. Twenty-five states and the District of Columbia use some type of merit plan for selecting some or all of their judges. (In five other states, the governor or legislature appoints judges without a nominating commission.)

### **Benefits**

- Advocates of the merit system concede that politics can never be completely eliminated from the judicial selection process under a merit plan, or any plan.
- However, they point to the benefits of selection by a nominating committee that include lawyers who bring expertise to the selection process.
- They feel that is an improvement over elections in which voters do not vote because they are uninformed about judges or feel they are not in a position to evaluate judicial performance.
- Elections also discourage many well-qualified attorneys from seeking judicial office.
- Proponents feel that judges selected through this process will have more time to spend on the matters before them than judges who stand for election.
- In some states, the merit selection process results in a higher number of appointments of minority and female candidates.

### **Costs**

- The arguments against merit selection are based on the importance of the right of citizens to vote and the role of elections as a means of educating the public, which critics say is less likely to happen with merit selection.
- Opponents of merit selection also point out that politics are still present in the nominating process—but difficult for the public to monitor. Nominating commissioners may represent special interests and may not be drawn from all segments of society.
- They also point out that judges are rarely removed when they stand for retention, and as a result merit selection often results in life tenure for judges.