

DEMOCRACY REFORM PRIMER SERIES

Elected Vs. Appointed Judges

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Summary

In the United States, the federal judiciary is composed of judges who were nominated by the President, confirmed by the Senate, and serve life terms. In contrast, judges in state courts come to occupy their positions through a vast array of different procedures, and once in office, generally require additional procedures to stay there. The debate over whether judges should be elected or appointed hinges on a conflict between two competing ideals of judicial independence and accountability. Judicial independence is the belief that judges should be insulated from undue or improper influence by other political institutions, interests, and/or the general public. Independence is closely related to the idea of the rule of law: legal structures should be applied in a consistent and unbiased manner irrespective of the identity of litigants or judges. Pulling against judicial independence is the demand for accountability, the belief that public officials should answer to someone for their decisions in office. In a judicial hierarchy, lower court judges are internally accountable to higher ones. But another form of accountability at stake in discussions of judicial elections is accountability to the broader citizenry – that is, democratic accountability. If a judge faces the voters in frequent elections, they may have an incentive to pander swaying decisions they otherwise may not make to cater to popular positions. Reformers suggest judicial elections prioritize voters who may be largely uninformed about the qualifications of judicial candidates, and instead select officials based on narrow partisan interests. Proponents of judicial elections view appointments as a risk that an unelected official, out of step with the electorate; could forgo the citizenry's interests entirely.

Data shows that elected state judiciaries are associated with lower rates of litigation and lower-quality judicial opinions. Broadly speaking, scholars have documented numerous

case studies of elected judges refusing to dissent out of fear of adverse electoral consequences. One study found a strong relationship between the probability a state supreme court justice votes to uphold the imposition of the death penalty and the conservatism of state public opinion. In states with elected supreme courts, this relationship became significantly more pronounced. Studies show that elected judges demonstrate an 'electoral proximity effect'; or a shift in the severity of their sentencing depending on their proximity to an election. Further inquiry demonstrates that the burden of increased punishment associated with the electoral proximity effect is borne entirely by black defendants.

The tradeoffs entailed in the choice of how to select judges are complex, and there is no reason to believe that a "one-size-fits-all" approach is appropriate for all cases. A distinction that is frequently neglected in discussions of reforms is that between state lower courts and appellate (and especially supreme) courts. Lower court activity is extremely routinized, especially in criminal cases due to the prevalence of plea bargaining and the popularity of sentencing guidelines. There is less opportunity for a lower court judge to impose unjust authority on the average citizen; save for the significant cause for concern that lower courts engage in racially discriminatory practices. By contrast, state supreme courts have a much broader scope of impact on the average citizen. There is significant disagreement about the values justices in higher courts should bring to the exercise of discretion, ambiguity is high, and the externalities are potentially enormous. This suggests that the defense of judicial elections on grounds of democratic accountability would seem to be most compelling for state supreme courts.

