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Who Is to Judge?

Charles Gardner Geyh

Elected v. Appointed: Who Wins?

Judicial Selection — Book Review/Q & A

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Who Is to Judge?
By Charles Gardner Geyh
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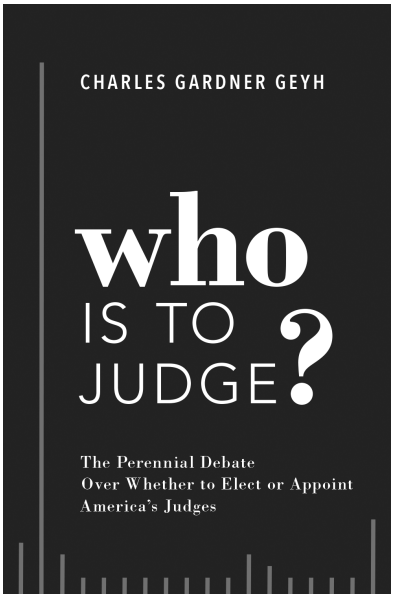
Imagine this scenario: A state trial judge is running for re-election in a mid-sized U.S. community. He/she receives campaign contributions from a local construction company. A case arises before the judge in which the construction company is accused of negligent safety practices causing worker injuries. A motion to dismiss is pending regarding whether the construction company has a duty to protect the workers on the job. Imagine another scenario: A lawyer applies for an appointed judge position. He/she gets the judgeship by being appointed by a Governor who is the same political party as the new judge. Subsequently, the State is sued for not increasing its budget for child welfare—something the Governor, and the new judge's political party, have always opposed. The new judge is faced with a motion for summary judgment from the State claiming the Governor has sole discretion to decide the budget.



Both of these examples show the unpleasant conflicts inherent in both elected and appointed judicial selection systems. Hopefully, our bench is lacking those who would allow such pressure to affect the merits of a case. But what if data show it does? And what if the public believes it does, regardless? Charles Gardner Geyh, of Indiana University Maurer School of Law, is a leading scholar and thinker about courts and judicial selection. His works include *What's Law Got To Do With It?: What Judges Do, Why They Do It, and What's at Stake* (Stanford University Press 2011), *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (University Of Michigan Press 2008), and *Why Judicial Elections Stink* (*Ohio State Law Journal* 2003). In his latest book published earlier this year, *Who Is to Judge?* (Oxford Publishing 2019), he looks at the age-old debate between advocates for elected judges and appointed judges, and anything in between. His discussion and conclusions will surprise you because he thinks both sides are right—sort of.

Professor Geyh's writing tone and style are a refreshing approach to this well-worn adversarial acrimony. The book reads easy and flows well as we delve into each side's strengths and weaknesses—and as Professor Geyh deftly demonstrates, each side has a *lot* of strengths and weaknesses. One bright spot shows up right away in the Introduction as the author puts us in spectator seats for a great figurative tennis match between the advocates for and against each side. As the pros and cons of each argument are described and evaluated, the score goes back and forth. Finally, the match is a never-ending tie and nobody wins. But we readers are treated to a succinct summary of each argument, and pointed to Professor Geyh's eventual conclusion—nobody wins, or as the book describes, no judicial selection model is optimal for all places at all times. It is quite possible that no one has made this case before, or at least as well.

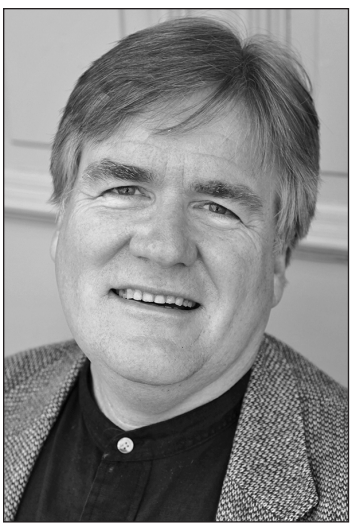
Judges and lawyers will not wonder why another book about this important topic, but this author justifies it anyway, and reaches for those beyond the legal profession: "We should care about how America picks its judges because we should care about who becomes judges and the decisions that those judges make." Judges make a difference because they interpret constitutions and statutes, make common law, and affect the everyday lives of people, he says.

Professor Geyh first takes readers on an adventurous journey through the history of the judicial selection debate focusing on state courts. He navigates waters running through five different selection methods, and how perceived shortfalls of each led to the next: colonial governors appointing (too much power to the King) to state legislatures appointing (too much political cronyism) to partisan elections (too much power to party bosses) to nonpartisan elections (still partisan) to "merit" selection. Why the never-ending debate? Election advocates seek accountability, and the public seems to trust a system more in which they have some control. Appointment advocates seek independence from outside influence and what the electorate may find popular. As the book unfolds, it shows the current judicial selection landscape as a "seismic shift" with more money and more special interest litigation laying a complicated confluence that has not always bode well for either side of the debate. The jewel of the book is halfway through where a whole chapter takes each side—election and appointed—not to decide which is better or weigh the merits or each, but to fully inform and explain. That chapter alone is an excellent primer on this whole field and worth the price of the book. It all depends on how one views judges and what core values one believes are at stake. Election advocates see all judges as politicians who should have to answer to the electorate. Appointment advocates see all judges as unbiased umpires who should be left alone from the pressures of outside influence.

"Whose cause is righteous?" Professor Geyh asks. "Both and neither." A unique value of the book is the well-chronicled data supporting and refuting claims of each side. For example, those against elected judges can cite research of 470 judges and 28,000 cases to show a "statistically significant relationship" between contributions from special interest groups and results for litigants favored by special interest groups. On the other hand, those against appointed judges can cite studies from distinguished academics finding no difference between the quality of elected and appointed judges, and one that even finds elected judges write more opinions and are more independent. And while the author settles on the appointed system as his preference by "default," this is a "soft and rebuttable presumption: appointed systems must yield to elective systems when the judiciary's legitimacy depends on supplying the people a greater measure of control over the judges who serve them."

Professor Geyh's book provides a plethora of provocative information and discussion. Those on either side of the debate will find it challenging and compelling. Most of all, it is thoughtful at a time when we need to be more reflective about whether this is a binary choice, or has room for the book's suggestions for incremental reform. Readers will have to decide if they agree with the authors' conclusion that the longstanding judicial selection debate is "a condition to be managed rather than a disease to be cured."

Q & A WITH THE AUTHOR



Charles Gardner Geyh is the John F. Kimberling Professor at the Indiana University Maurer School of Law. His work on judicial independence, accountability, selection, administration, procedure, and ethics has appeared in over eighty books, articles, book chapters, reports, and other publications. Before entering the academy in 1991, he clerked for Thomas A. Clark on the United States Court of Appeals for the Eleventh Circuit, worked as an associate at the Washington, D.C. firm of Covington & Burling, and served as counsel to the House Judiciary Committee. He joined the Indiana University faculty in 1998, where he has served as the law school's associate dean for research, and has received three faculty fellowships, three Trustees teaching awards, the Wallace teaching award, and a Carnegie Fellowship.

"[J]udges alter their decision making when elections are impending . . ."

Q: The book often cites data claiming to show elected judges' decisions are affected by public approval, upcoming elections, etc. Are there any studies about the shortcomings of appointed judges' performances as well?

A: The issue has less to do with whether judges are appointed or elected, than whether they are subject to reselection processes. Studies show that judges who are subject to reselection—be it reappointment or reelection—tend to make decisions with an eye toward those who control their future. Judges who are not subject to reselection—most notably judges on the U.S. Supreme Court and circuit courts—are less dependent on the preferences of others but can be more influenced by their own ideological preferences, especially in close cases.

Q: Some states have a mixed set of selection systems (elected in some counties, appointed in others, partisan, non-partisan, etc.). Is this prudent and will it last?

A: Local rule has its virtues, but from the perspective of a unified judiciary, having county-by-county variation is chaotic. We have such as situation here in Indiana, which our Chief Justices have proposed to rectify, but old traditions die hard.

Q: You seem to consistently posit the terms "independent" (for appointed) and "accountability" (for elected) as separate descriptions for the sake of analysis. Is that oversimplified?

A: If you are asking whether I think that your summary of my analysis is oversimplified, then yes. Judges are independent and accountable to varying degrees in each of the five systems of selection in use across the states. The primary reason that elected judges are generally regarded as less independent and more accountable than their appointed counterparts, is because most (though not all) states with elective systems require incumbents to run for reelection in contested elections. Studies show that judges alter their decision making when elections are impending, and more so in contested elections than retention elections, because the threat to tenure is more meaningful. That said, appointed judges in the handful of states who are subject to reappointment show signs of being as if not more dependent than their elected counterparts.

Q: What do you think of Presidential candidate Pete Buttigieg's proposal to "depoliticize" the U.S. Supreme Court by having 10 justices chosen as now, and an additional 5 chosen by unanimous vote of the 10 sitting justices?

"No one system works best for all state and all times . . ."

A: I'm a traditionalist. I take constitutional conventions seriously—including conventions against playing partisan games with Supreme Court size. We are slowly internalizing the reality that the U.S. Supreme Court is a different kind of court—a more political court that may warrant a different system of selection. But we are not there yet. And I worry that what his proposal might gain by diminishing external political pressure on the composition of the Court, it could lose by exacerbating internal political pressures within the Court, to the detriment of Court cohesiveness and collegiality.

Q: The history that you trace seems to show shortcomings in both elected and appointed selection systems ever since the early 1800s or before. Why does this debate always persist?

A: Ultimately, the issue of whether you want judges to be independent from or accountable to the preferences of the majority implicates competing priorities that have remained in perpetual—and perhaps constructive—tension.

Q: Shouldn't judges be both independent and accountable to ensure public confidence?

A: Of course—and I suspect that almost every thoughtful person would agree. Too much independence and the rule of law suffers because we are helpless to prevent rogue judges from going their own way and disregarding the law. Too much accountability, and the rule of law suffers because judges can be intimidated into disregarding the law and doing what they are told by those who control their future.

Q: In 1913, the American Judicature Society proposed a "council of judges" to create a pool of prospective qualified judges. What do you think about judges choosing judges?

A: Judges do select judges in limited contexts: federal judges, for example, choose federal magistrate judges. Such a practice has the benefit of ensuring that judges will be capable and qualified, because judges know what it takes to be a good judge, and because hiring friends who are incompetent slackers would make life miserable for the judges who selected them. But the risk is that judges so selected could become further and further removed from the people they serve—and that concerns me. In an anti-elitist age when public confidence in government generally is at low ebb, a system in which government officials choose their successors is unlikely to inspire public confidence.

Q: A large conclusion you draw is that any given selection model cannot be optimal for all states at all times. But shouldn't we be moving toward one system?

A: No one system works best for all states and all times, because different systems emphasize different priorities, and those priorities can change with the times and the circumstances. In my view, a system in which judges make decisions unencumbered by the concern that they might lose their jobs if they reach an unpopular result, better serves the rule of law and is a preferable default. But in jurisdictions where public confidence in the judiciary depends on judges being answerable to the people they serve in periodic elections, an elective model may be essential to preserving court legitimacy.

Q: When judges are not reelected, or not retained, because of public disapproval over one case, doesn't that mitigate the argument that elected judges are compromised and won't be true to the law? And aren't there just as many or more examples of appointed judges who appear compromised in favor of their personal ideology?

A: There are examples of judicial courage, featuring judges who follow the law knowing that it will anger the electorate and put their tenure at risk, just as there are other examples of judges who lost their jobs because of backlash to an unpopular decision that they never saw coming. Ultimately, however, we need to set anecdotes aside and look at the data. And there is no getting past data showing that, on average, judges decide cases differently in the shadow of impending cases, to mollify voters and stay in office. For example, studies in multiple states show that judges impose harsher sentences on defendants during election season than otherwise. Ideological influence is well documented at the Supreme and circuit court levels of the federal system, but less so at the trial level, where appellate oversight, applicable precedent, and and the relative absence of ideologically charged issues limit ideology's impact.

Q: How do you reconcile the traditional arguments for appointed judge selection (independence from donors and from public approval, etc.) with the spending from special interest groups for/against Justice Kavanaugh and airing public ads to call senators?

A: When the success of a candidate's campaign to become a judge turns on the support of an individual or organization with an interest in the outcome of the cases that the judge will decide, it can call the judge's impartiality into question. That is so regardless of whether the support takes the form of financial contributions to an election campaign, financial contributions to an appointment campaign, or nonfinancial support. And so, I find the spectacle of the Kavanaugh campaign quite troubling. As a policy matter, however, it troubles me less than the role that money plays in judicial election campaigns for two reasons. First, in the context of judicial elections, a judge's need to keep his campaign supporters happy is ongoing, because the judge will need to stand for reelection. One study shows, for example, that in their last term of office, when there is no further need to mollify their supporters, judges do not align their votes with the views of their principal supporters as closely. For a federal judge, in contrast, once appointed, his dependence on interest group support is at an end. Second, the problem of interest groups attempting to buy influence in federal judicial appointments is not systemic, but is focused

largely on the nine judges who staff a single Court—a Court that is sui generis. The perception of money buying influence in judicial election campaigns, in contrast, is far more pervasive, and cuts across states and tiers of court.

Q: Have state judgeships become more political regardless of how they are selected?

A: Yes, I think so. First, after the Warren Court was dismantled and the Supreme Court's support for civil rights and liberties weakened, Justice Brennan and others encouraged groups to move their ideologically charged litigation campaigns to state systems, where state constitutions were often more protective of individual rights than their federal corollary. Second, the movement toward establishing intermediate courts of appeals across the states that began in earnest in the 1950s was typically paired with reducing supreme court caseloads by making their jurisdiction discretionary. As a consequence, supreme courts have tended to leave cases of simple error correction to the intermediate appellate courts and focus on a smaller number of more difficult and often politically charged cases that require them to make new—and controversial—law. Third, the public is increasingly unwilling to accept the premise of the traditional rule-of-law paradigm, that judges set their personal views aside and impartially uphold the law, and is more inclined to suspect that ideology, race, gender, and other extralegal factors play a role in decision making.

Q: How has social media affected judicial selection?

A: The potential impact is at least threefold. First, judicial rulings made in the hinterlands that would never have come to public attention before the age of the Internet can reach a worldwide audience in a matter of hours—rulings that can become fodder for judicial election campaigns. Second, "citizen journalists" who disseminate information via social media, are unencumbered by fact-checking norms that regulate the mainstream media, which increases the extent to which junk news can pollute judicial election campaigns. Third, social media allows the public to mobilize quickly, which can be problematic in states with retention elections, where late-breaking opposition campaigns can leave incumbents helpless to defend themselves.

Q: The book seems to analyze the disputants in the judicial selections debates more than judges' behavior itself. Why is that important?

A: This is a book about the judicial selection debate, and why that debate is never-ending, which lends a natural focus to the arguments on both sides of the debate and who is making them. My last book, *Courting Peril: The Political Transformation of the American Judiciary* focused more on judicial behavior and public perception of that behavior, to the end of explaining why and how the judiciary has become a more political place. That said, the arguments that drive the judicial selection debate, which is the focus of this book, *do* focus on judicial behavior—most notably, studies showing the impact of impending elections on judicial decision making; and studies showing how judges selected via different systems apply the law differently.

"[J]udges selected via different systems apply the law differently."

Q: You write that the data shows elected judges' rulings are affected by upcoming elections—how does that affect the balance of the arguments between elected and appointed systems?

A: It may be the strongest argument against elective systems—or, more precisely, against systems that use elections to re-select judges. Some political scientists disagree. They argue that when, for example, judges impose harsher sentences in the shadow of impending elections it channels their discretion away from imposing their own ideological preferences and toward the preferences of the public they serve. I agree that judges do have discretion to exercise, but that discretion is informed by a lifetime of experience and learning that the public lacks. We want judges to give us their best assessment of what the law and facts are—a result that can best be achieved if judges are not under pressure to contort their rulings to appease "constituents."

Q: There is some discussion in the book that, on one hand, judicial elections provide accountability—but on the other hand, political party labels can actually inhibit democratic accountability. Can you explain?

A: In nonpartisan elections, where voters are foreclosed from voting with reference to party labels, studies show that voters are more likely to base their votes on the decisions that an incumbent has made (or at least as those decisions are described in campaign advertising)—because that is what the voters have to work with. In partisan elections, voters are more likely to vote for judges of their preferred political party, with less regard for the particular decisions that the judges have made. Some political scientists have argued that in this way, partisan elections diminish democratic accountability by making judges in partisan elections less accountable for their decisions. I don't really buy this argument for two reasons. First, I don't think that the rate at which voters throw judges out of office because of their decisions is a good measure of democratic accountability. Second, partisan and nonpartisan systems promote democratic accountability in different ways: Partisan elections focus on voter choice in greater relation to the candidates' party affiliations and the philosophical differences those affiliations connote. Nonpartisan elections focus on voter choice in greater relation to the high-profile cases those judges decide.

Q: What do you mean when you write that judges are neither independent "umpires" nor elected "politicians in robes," but both?

A: In the book, I say that they are neither and both. I'm really making the common-sense point that judges are acculturated to take the law seriously and uphold the law as they think it is

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written, in a manner akin to umpires. But in close cases, when judges have discretion and judgment to exercise, they must bring their background, education, experience, and policy perspectives to bear in deciding what outcome is right or best—which can bring ideological, aka "political," influences to bear. I see nothing wrong with that: It is part of the art of judging. And to that extent judges are neither umpires nor politicians but something else.

Q: How do reconcile your general support for appointed judicial selection with the data that shows judicial appointments are less transparent and can adversely affect public confidence?

A: The data do indeed show that, on average, judicial elections are legitimacy enhancing. All else being equal, the public prefers to have a say-so over the public officials who serve them—including judges. Elections, however, are not the only way in which judicial systems protect and preserve their legitimacy. In jurisdictions that do not select their judges in contested elections, legitimacy is promoted by judges' perceived expertise, impartiality, independence, and integrity. As a consequence, public confidence levels in unelected federal courts and elected state courts are essentially the same. Insofar as elected and unelected judiciaries are both perceived as legitimate, my default is to appointive systems, for two reasons: 1) appointive systems (unencumbered by meaningful reselection processes) avoid judicial dependence on voter preferences when elections are impending, and 2) appointive systems avoid the risk of ugly, expensive, no-holds-barred election campaigns, where the data show that elections can, in extreme cases, diminish the judiciary's perceived legitimacy.

Q: Some of the sociological analysis in the book includes why people on both sides of this debate are not open-minded. You even include yourself. What changed you?

A: It's largely a matter of whom I talked to. When my information bubble was limited to organizations like the American Bar Association, the American Judicature Society, and merit selection reformers, my perspective was influenced largely by groups whose antipathy to judicial elections was entrenched. When I began to explore competing views—not for the purpose of countering them but for the purpose of understanding them—particularly the views of leading political scientists and the data that informed their conclusions—I came to the common-sense conclusion that the reason that this debate is endless is because it is complicated, and not just because one side is being stupid. Interesting side note: My innumerable conversations with judges over the years have not played as much of a role in this process, because with only a handful of exceptions, judges tend to think that whichever system selected them is pretty good.

Q: Some trial court judges may dispute the notion that attitudinal influences, and other sociological factors, are less pronounced in lower courts. What would you say to them?

A: I'm not an ivory tower academic, in the sense that I create opportunities to learn from the judges I write about. In the past year or so, I have taught a weeklong class on judges and social science to forty Indiana trial judges, addressed over four hundred federal trial judges at events on the east and west coasts, participated in a mid-career workshop for thirty federal magistrate judges, and addressed 150 state appellate judges at a national conference. In the past ten years I have spoken to around 3,000 state trial judges at judicial conferences around the country. What they have told me is that ideology plays less of a role in their decision making for at least three reasons: 1) They don't tend to deal with hot-button issues like abortion, gun control, same-sex marriage, prayer in public schools, and so on, where ideology is front and center; 2) their dockets are top heavy with "easy" cases, where the law tends to be pretty simple and clear and their focus is on the facts; and 3) their discretion is sharply curtailed by appellate court precedent—they simply don't have the latitude to make legal policy. Many trial judges have bemoaned the fact that the public hears about judicial politics on the Supreme Court and incorrectly assumes that it describes courts everywhere, including theirs. Their views are corroborated by studies showing that the evidence of attitudinal influences diminishes as we go from courts of final resort, to intermediate appellate courts, to courts of original jurisdiction. When teaching my class to Indiana trial judges, which I have done several times now, my struggle has been to convince them that ideology matters at all. Two examples I use to make my point (which they tend to buy, albeit grudgingly) are the discretion they exercise when imposing sentence, and when awarding child custody in light of the "best interests of the child." The consensus among trial judges, with whom I have spoken, is that the extralegal factors that influence their decision making are less attitudinal than strategic: Judges are alert to the impact of their decisions on their communities, and will sometimes temper their rulings accordingly.

Q: When the book uses the term "dueling publics" to explain another point about why disputants are not open-minded, it seems to compare with what many commentators say today about the public divide on all public issues, that is, that we only hear and seek the information for our side and never listen to, or reconsider, anything else. What distinguishes the judicial selection debate?

A: My reference to "dueling publics" does not concern inevitable differences of opinion in garden-variety public surveys. It has to do with the fact that when it comes to public attitudes toward courts and judicial selection there are two different "publics." One "public" is the general public, comprised of rank and file voters, for whom a good judge is one who engenders public trust by making decisions they regard as politically acceptable. Surveys show that the general public favors judicial elections, and sees no problem with judges who take positions on issues that may come before them, or make promises to decide future cases in specified ways. The other

"public" is the litigating public. It is comprised of litigants for whom a good judge is one who will give them a fair shake in court. The litigating public is likelier to be skeptical of elected judges who could lose their jobs if they make an unpopular decision in the litigant's favor, or whose latest election campaign was financed by the other party, the other party's lawyer, or an interest group that wants to see the other side win. And the litigating public will be averse to judges who lock themselves in to a public position on the litigant's issue before the litigant has had an opportunity to be heard. The net effect is that disputants in the judicial selection debate each think that they have the "public" on their side. They are both right. They are both wrong.

Q: One of your main points is that the judicial selection debate needs to involve "deep inter-disciplinarity." What is that?

A: In the Indian folk tale of the blind men and the elephant, each of three blind men mis-describes an elephant with reference to the part he is holding, and the same is true with judicial selection. The legal profession appreciates the importance of law in judicial decision making, but has been reluctant to acknowledge the ways in which ideology, race, gender, and other extralegal influences can affect decision making. Political scientists have studied the role that ideology and other non-legal influences can exert on judicial decision making, but are often dismissive of the role that law plays. And neither lawyers nor political scientists pay adequate heed to the roles that psychology, history, and anthropology can play in understanding why judges do what they do. By bringing these different disciplines to the table via deep inter-disciplinarity, we stand a better chance of accurately describing the whole elephant, in all its complexity. And that is the first step toward regulating judicial selection with the nuance it requires. If judges are all about law, as the legal profession often posits, then elections are anathema, because they turn law into a popularity contest. If judges are all about politics, as political scientists often claim, then appointive systems liberate judges to go rogue and satiate their ideological impulses. Bring the two of them together, however, educate them both on what psychology, history, and anthropology add, and the judicial selection choices we make—which are premised on the ways those choices affect judicial decision making—are likely to be better informed.

Q: An interesting feature you propose to counter the effects of personal bias among elected judges is deeper disqualification procedures, such as stricter enforcement and having a third party, like another judge, determine whether to disqualify. Is there any data to support whether this may work?

A: Survey data from West Virginia, amid the Caperton affair, showed that 80% of respondents thought that judges should not decide their own disqualification requests. More rigorous disqualification procedures strike me as a small if useful part of a larger package of proposals that can remediate some of the corrosive effects of judicial elections in states that have them. For example, if judges know that they are subject to disqualification when they take positions on issues that could come before them (notwithstanding their right to take such positions after *Republican Party of Minnesota v. White)*, it will make it easier to avoid problems by telling voters that if judges shared their views they would have to disqualify themselves later.

"[J]udges should not decide their own disqualification request."

Q: Please describe your ideal of what you call "qualified elections." Is that what you prefer, or is it a consensus model that you have settled on?

A: The qualified election model I develop here is not my "ideal." Rather, it is a compromise proposal for state high courts that seeks to combine some of the best features of elective and appointive systems, while avoiding the worst.

Here is how a "qualified election" model might work: When a vacancy occurs, a screening commission of judges, lawyers and non-lawyers would solicit applications from prospective judicial candidates. Like nominating commissions in many merit selection states, the commission would be charged with soliciting a diverse array of applicants. Unlike nominating commissions, which winnow the applicant pool to the best of the best, the screening commission's role would be limited to ensuring that all prospective candidates are capable and qualified—a role similar to that played by the American Bar Association in vetting federal judicial nominees. Nominees precleared by the screening commission would become eligible to run for office in a contested partisan or nonpartisan election. Campaigns would be subject to contribution limits and disclosure requirements, and candidates would be subject to code of judicial conduct restrictions, consistent with current practice in states that elect their judges. Judges who win election would then serve a single, fifteen-year term, or until a specified age. If a judge retires, resigns, dies, or is removed before the end of her term, the governor would appoint a judge to fill the vacancy until an election can be held. The interim appointment would be chosen from a stable of former supreme or intermediate appellate court judges who choose to remain eligible for judicial service, but judges so appointed would be ineligible to run for election to fill the vacancy. Judges selected via a qualified election model would be subject to disqualification if the campaign support they received or the campaign statements they made calls their impartiality into question in future cases that come before the judge's court. The same pool of former judges that would be available to fill vacancies on an interim basis would also be on call to replace disqualified judges.

The advantages of a qualified election model are 1) it offers the legitimacy-enhancing benefits of contested elections; 2) it provides a safety net to ensure that unqualified candidates are excluded from the pool; 3) eliminating re-selection processes will diminish ongoing judicial dependence on voters and campaign supporters; 4) limiting judicial office to a single term of years or until a specified age seeks to end reselection, while creating an endpoint for judicial service after which the legitimizing benefits of judicial elections can be renewed with a

"I have reluctantly [concluded] that a term limit [for U.S. Supreme Court] is appropriate."

new generation of candidates; 5) contribution limits, disclosure requirements, and disqualification regimes address perceived partiality problems that judicial campaigns create; and 6) the qualified election model creates a bullpen of capable, qualified, and experienced part-time judges who serve two important purposes.

Q: At one point, you write "America's ambivalence over judicial selection is ultimately a condition to be managed rather than a disease to be cured." Isn't America already there, that is, a middle ground of various systems according to each state's preference? How should we manage it?

A: We do indeed have multiple systems of selection in play across the states. But for those who participate in the selection debate, virtually all take the position that the reasons we have multiple systems is because the states that have not opted for the disputant's preferred model got it wrong. The solution, for them, is to cure the misguided of their affliction. My point is not just that we have multiple systems of selection in play, but that that's OK, and that the discussion should focus on which system is best for a given jurisdiction at a given time.

Q: At another point, you write that, "being a good politician is in tension with being a good judge." Doesn't that presuppose an inflexible assumption of politicians as always negative or suspect? Aren't there political skills that benefit a judge, whether elected or appointed?

A: As someone who served as counsel to the House Judiciary Committee I do not regard being a politician as a negative. Being a good politician is in tension with being a good judge in one sense only: Good politicians are majoritarian decision makers. Good judges are not. Being a good majoritarian decision maker means representing your "constituency" and being partial to their preferences, making promises to that constituency, and making good on those promises. Good judges do none of those things. Being a good politician can mean other things too: having good people skills, an aptitude for sensible compromise, a sense for the big picture, etc., and there is no tension between those skills and good judging.

Q: The U.S. is just about the only country on Earth, the book indicates, that has a significant number of elected judges. Doesn't that support an argument that the U.S. logically elects judges as a government of the people?

A: Point taken, if the U.S. stood alone in the world as a "government of the people." As a matter of democratic theory, there is a "majoritarian difficulty" associated with assigning judges elected by the majority to protect minority rights that we the people have enshrined in our constitutions to protect from majority control. It is a difficulty that every other democracy in the world but Argentina has resolved by insulating judges from popular election. I acknowledge and respect the inevitability and sometimes the desirability of judicial elections given their unique place in our history, but I'm unprepared to say that the rest of the free world is wrong.

Q: Incremental reforms, such as public financing and donor limits for elected judges, or more stringent judicial discipline and performance evaluations for appointed judges, can narrow the divide in the judicial selection debate, you claim. How optimistic are you?

A: These are proposals at the margins that must be evaluated in the aggregate. I harbor no delusions that any of these reforms, taken in isolation, are potential game changers. But taken together (with the exception of public financing, which leaves me cold), I think that they could move the public confidence needle, particularly if they were marketed to the public as a package aimed at promoting an impartial, independent, and accountable judiciary.

Q: Do you have any preference for proposals to change U.S. Supreme Court selection, term limits, etc.

A: I have reluctantly reached the point of concluding that a term limit is appropriate. When the framers adopted tenure during good behavior, life spans and hence life tenure were shorter. The one linkage that the Constitution creates between federal judges and the people those judges served, is through the Presidents and Senators whom the voters selected to appoint the judges in question. And as judges serve into their nineties, that linkage becomes ever more attenuated—not only because the Presidents, Senators, and voters responsible for appointing those judges are often long dead—but because the ideological orientation of the judges themselves often drifts over time to the point where the judge whom the President and Senate appointed bears little relation to that judge three decades later.

Q: Do you think the U.S. Supreme Court should be selected as other appointed judges are selected, that is, by public application to a commission that nominates to the President?

A: I do not favor commission-based appointment of Supreme Court justices for two reasons. First, for positions so politicized and powerful, having an unelected commission constrain the president to, say, three choices of its choosing would be problematic. Second, one of the primary arguments in favor of a commission-based system is that it weeds out unqualified candidates better than governors apt to appoint cronies, or voters who are ill-equipped to assess candidate qualifications (and the data show that while elective and commission-based appointment systems produce comparably credentialed judges overall, there is some evidence that commission-based systems do a better job of weeding out the least qualified). Given how thoroughly and publicly Supreme Court nominees are vetted, I do not think a commission is needed to screen out unqualified candidates. The last president to nominate an under-qualified candidate was George W. Bush, whose nomination of Harriet

Miers was withdrawn only days after it was announced, following widespread criticism. I confess to making this point with slightly less confidence now than several years ago, given recent experience with the president nominating and Senate confirming some federal judges with limited experience, whom the ABA deemed unqualified.

Q: Today, is the U.S. Supreme Court politicized to the detriment of public confidence?

A: Yes and no. Public support for the Court has rallied a little after decades of decline, but remains strong relative to the other branches. Still, I worry about the nature of that support. What judicial systems want and need is diffuse support—support for the Court even when the public disagrees with its decisions. Increasingly, however, the support the Supreme Court enjoys is contingent, or "what have you done for me lately" support. Support for the Court is superficially stable over time, but that stability masks sizable shifts back and forth between conservatives and liberals, who support the Court or not depending on who the president is, and the Supreme Court's latest decisions.

Q: You indicate that there is a "peace" now in the judge selection debate? Why do you think that?

A: There are two things going on here. First, the "new politics" of judicial elections, which began in the 1980s and made judicial races "noisier, nastier, and costlier," is tapering off. Nationwide, expenditures in judicial races are flattening out after spiraling upward for many years. The best explanation for this development is that the drivers of the new politics—business interests intent on peopling state supreme courts with more business-friendly officeholders—have succeeded. Mission accomplished. Second, the history of judicial selection reform has come in waves, with each wave dominated by a new system of selection capturing the imaginations of state policy makers for a period of time. Now, we are between waves: Many states are debating judicial selection reform, but the new flavor of the month has yet to hit the stores.

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