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The Effect of Selection Processes on Judicial Behavior

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Does the judicial selection process affect judicial behavior? In this paper I argue that the judicial selection process does affect the behavior and character of the judiciary. Specifically, I argue that judges that are selected by executives in systems where no accountability to the people is present will mirror the ideological views of the executive in making their judicial decisions. I also argue that the competitive nature of elections influences judges to be more responsive to public opinion than those held accountable on non-competitive retention ballots. Lastly, I argue that judges that are elected or retained on non-partisan ballots will be harsher in their decision making, especially in criminal cases, than those on partisan ballots.

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INTRODUCTION

In the selection of judges, a common debate emerges between those in favor of selecting judges which have the greatest expertise and those in favor of selecting judges that will be most accountable to the people. Differing states and jurisdictions throughout the country have instituted different methods whereby judges are selected in hopes that those with certain desired characteristics or behaviors will serve. The emergence of these different selection processes begs the question, does the judicial selection process affect judicial behavior?

In this paper I argue that the judicial selection process does affect the behavior and character of the judiciary. Specifically, I argue that judges that are selected by executives in systems where no accountability to the people is present will mirror the ideological views of the executive in making their judicial decisions. I also argue that the competitive nature of elections influences judges to be more responsive to public opinion than those held accountable on non-competitive retention ballots. Lastly, I argue that judges that

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are elected or retained on non-partisan ballots will be harsher in their decision making, especially in criminal cases, than those on partisan ballots.

EXECUTIVE SELECTION

Judges that are selected by executives in systems where no accountability to the people is required will make decisions that mirror the ideological views of the executive that selected them. Selection processes of this type are most commonly seen at the federal level, where judges are appointed by the president and serve life-long terms without the threat of losing office due to an unfavorable reelection. Although past presidents' rhetoric may suggest that ideology is not their most important factor when considering which judges to appoint, the presidents have been highly incentivized to appoint judges with similar ideologies to their own to ensure that policies they favor will survive the court system for years to come (Stidham et al. 1996). Because these judicial positions are held for life without any accountability checks, the judges will experience little to no incentive to adhere to public opinion when making decisions. The decisions made by these judges will spring from their personal ideologies, and executives will appoint judges with similar ideologies to their own.

When examining previous federal court decisions, district court judges appointed by liberal

presidents make more liberal decisions when compared to the decisions made by judges appointed by conservative presidents (Stidham et al. 1996). From 1992-1996, decisions made by judges appointed by Jimmy Carter were the most liberal, by Ronald Reagan the most conservative, and by Bush and Clinton were comparatively moderate (Stidham et al. 1996). This data shows a heavy correlation between the decisions made by the judges and the ideology of the executive that selected them. “It is clear that the president’s party makes a difference in the way decisions are made by the court” (Stidham et al. 1996). The process whereby these judges are selected allows the president to appoint those who will mirror his ideology, and because no accountability is required, the judges’ decisions will be based almost purely on ideology.

RETENTION ELECTIONS

Ideally, judges that are held accountable by retention reelections will exhibit behavior that shows a balance between their own expertise as well as alignment to public opinion. Many states throughout the country have adopted a judicial selection process called the Missouri Plan. Under the Missouri Plan, judges are appointed by the state’s executive based on merit and remain in office after their term is completed by decision of the voters in a non-partisan, non-competitive retention election (Aspin and Hall 1994). In theory, the Missouri Plan ensures that the most qualified judges will be appointed and will remain in office if their decisions are supported by public opinion. 86.5 percent of surveyed judges under the Missouri Plan favor being held accountable through these retention elections (Aspin and Hall 1994). Most judges believe that the public is ignorant about the quality of their work, but retention elections serve as a validation for their success (Baum 2009).

In practice, however, retention elections do not tie judges’ decisions to the public opinion as heavily as desired. Opponents of the Missouri Plan argue that the public is not knowledgeable enough to make informed voting decisions based

on judicial behavior in non-competitive and non-partisan elections, so the outcomes of the elections show no reflection of public approval of the judges’ decisions (Aspin and Hall 1994). The only time that public opinion is put into account by judges making decisions are in decisions made closer to election day and those made in highly visible criminal cases (Baum 2009). Resources put into retention reelection campaigns are often wasted due to reelection being extremely common. State Supreme Court justices whose selection is retained by retention elections only have a 2% defeat rate (Hall 2001). The commonality of reelection reassures judges that their judicial behavior will hardly ever cost them reelection. Judges will not cater to public opinion in exhibiting most of their judicial behavior under the Missouri Plan because the public is often so uninformed that their opinion will not matter in terms of being retained for another term. Public opinion will only be taken into account on salient campaign issues closer to reelection day.

COMPETITIVE ELECTIONS

Research suggests that incumbent judges are more responsive to public demands when the potential for electoral competition is higher (Gordon and Huber 2007). The state of Kansas hosts districts that retain judges based on non-competitive retention elections as well as districts that elect judges on competitive ballots. Gordon and Huber (2007) were interested to discover whether the behavior among Kansas’ judges differed between the two selection types. They noted that the judges that faced reelection in a competitive environment were motivated differently than judges in non-competitive retention reelections. The introduction to a viable challenger in an election alters the relationship between the officials and the voters. Because a potential challenger may bring an incumbent’s malfeasance to the attention of the public, incumbents in competitive election systems are much less likely to act irresponsibly (Gordon and Huber 2007). Incumbents will act with much more regard to the opinion of the public knowing that a potential competitor will challenge their actions at

the end of their term. State supreme court judges facing partisan elections have a 19% defeat rate, making them much more likely to lose their office when their term is up compared to those facing retention reelection (Hall 2001). The competitive nature of these elections forces judges to act in accordance with public will – more so than judges facing non-competitive retention elections – so that they can ensure their reelection for another term.

Additionally, competitive election systems will encourage lawyers who feel an attachment to the public good to run for judicial office. The election system will attract lawyers who are interested in what the public thinks of them and deter those with no such interest from running (Baum 2009). Because judges in these systems are selected by the people, and not by an executive, aspiring judges will need to be involved with the community and in tune with public opinion before seeking judicial office. In a comparison between judges in the urban centers of Pittsburgh – where competitive elections select judges – and Minneapolis, the judges in Pittsburgh were more strongly aligned with the public than those in Minneapolis, because their pre-judicial public involvement was much higher (Levin 1977). If lawyers that are strongly oriented to the public are attracted to run for judicial offices, the judges produced from competitive election systems will also be strongly oriented to the public.

Many legal elites and organizations argue against the close ties to the public that competitive elections provide. Surveyed judges under the Missouri Plan declared the lift from partisan politics to be the chief benefit of retention elections (Aspin and Hall 1994). On top of that, the American Bar Association (ABA) declared, “we need judges who will tell us what the law is and how it applies in individual cases without regard to what the results of the latest public opinion polls are” (ABA 2003). These elites worry that competitive elections sway the judicial actions to be too far aligned to public opinion and threaten the fundamental idea of an independent judiciary (Canes-Wrone et al. 2014). However, behavior of judges in these competitive systems often counter

the elites’ claims. Justices elected in partisan elections are often willing to vote across party lines and “have no more incentive to refrain from acting independently than appointed judges do” (Choi et al. 2010). This empirical evidence concludes that although judges selected in competitive elections will often act in alignment to public opinion, they will not give up the fundamental principle of judicial independence.

Judges that are elected on non-partisan ballots have more incentives to be harsher in their decision making, especially in criminal cases, than those on partisan ballots. If party labels are present, the inkling for a voter to choose the judge representing the party they identify with will overpower any negative information about that candidate received through the campaign process. Because on non-partisan ballots the voters lack the shortcuts provided to them by a partisan label, they will rely on information given to them from the campaigns when making their vote choice (Canes-Wrone et al. 2014). Due to this reasoning, “judges who face nonpartisan . . . elections should be more likely to issue popular decisions than judges who face partisan elections” because they will have to work to overcome the lack of shortcuts provided by party labels (Canes-Wrone et al. 2014). The popularity of giving harsh punishments to proven guilty criminals among the public incentivizes judges to make punitive decisions when sentencing criminals.

Recent observational research works to support these theories by providing empirical evidence that shows judges in non-partisan systems are harsher (Gordon and Huber 2007; Canes-Wrone et al. 2014). Canes-Wrone et al. (2014) collected data over 12,000 capital punishment decisions between 1980 and 2006 and compared their outcomes to the selection process present among the judges that made the decisions. They concluded that, “judges face the greatest pressure to uphold capital sentences in systems with non-partisan ballots”. This pressure came from a widespread agreement in public opinion for providing harsh punishments to criminals found guilty. Fear that a potential competitor could create a negative campaign message suggesting that

the incumbent is “soft” on crime will motivate the incumbent to make harsh decisions in criminal cases. Additionally, Gordon and Huber (2007) noticed that judges make more punitive decisions as the threat of losing an election grows larger. The incentives placed on a judge to ensure reelection are large enough to also incentivize him or her to provide harsher sentences, especially on salient issues or high-profile criminal cases.

CONCLUSION

The conclusions drawn in this paper can serve as a guide for policymakers when considering which selection process they wish to implement. The judicial selection process does in fact have an effect on the behavior and character of the judiciary. Those judges chosen by executives with no accountability checks will act independent of public opinion and based on ideology. The ideologies of these judges and their decisions are highly correlated with the ideology of the executive that appoints them. Additionally, judges that are selected and retained on systems determined by competitive elections will act with a closer alignment to public opinion than those selected and retained without competitive elections. The competitive nature of elections will also incentivize judges to administer more punitive sentences, especially in high-profile criminal cases and in situations where the threat of losing reelection is high. Policy makers can use these observed trends when creating institutions or revising selection processes to ensure that their desired outcome of judicial behavior and character will be present in their jurisdictions.

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