United States of America

The United States has a wide range of judicial selection procedures. At the state level there are three main selection methods, by the legislature or executive, by an independent body, or through popular election procedures. Partisan election processes raise some concerns. A large percentage of funding for these campaigns comes from special interest groups or attorneys. These practices are not adequately safeguarded by appropriate disclosure or contribution limits. The American Bar Association has long been a supporter of merit selection by an independent body.

The United States of America (USA) is a federated union of states. The Constitution of the USA embodies the principle of the separation of powers and was ratified by the several states of the Union in 1788. In 1791 the first ten amendments to the Constitution, known as the Bill of Rights, were ratified, containing many fundamental civil rights. Since the formation of the Union the USA has had a long history of respect for the principles of parliamentary democracy.

Article I of the Constitution vests the legislative power in Congress which consists of a House of Representatives and a Senate. The members of the House of Representatives are elected every second year by popular election, and the members of the Senate every sixth year by popular election. The Congress has the power to legislate on the subjects enumerated in Article I, section 8 of the Constitution. Among these are the collection of taxes, the establishment and maintenance of armed forces and to define and punish offences against the law of nations. All citizens eighteen years or older of the United States of America are entitled to vote, but it is not compulsory. Article II of the Constitution vests the federal executive power in the President of the United States of America who is elected by a popular vote for a term of four years. The federal judicial power of the United States of America is vested by Article III of the Constitution in the Supreme Court and in such inferior courts as Congress may establish.

The states have a system of government similar to that of the federal government consisting of a legislature, executive and judiciary. The head of the executive at the state level is the Governor, who has varying levels of power depending on the state. State governments have the power to make laws with respect to any subject that has not been specifically granted to the federal government. In some instances however, states can also make laws in areas granted to the federal government.

The Judiciary

The Federal Judiciary

The federal judicial system is established and regulated by Article III of the Constitution and Title 28 of the United States Code. The federal court structure consists of the US Supreme Court, the 13 Circuit Court of Appeals and the 94 District Courts. Other specific subject matter courts, such as the US Court of International Trade, the US Court of Federal Claims and the Military Courts also form part of the federal judiciary.The federal courts have jurisdiction over all cases arising under the Constitution or federal laws and treaties, cases between states or individuals and states, and disputes involving the United States of America. The District Court is the court of first instance and the Circuit Court of Appeal is the court of first appeal, and these courts deal with the preliminary stages of federal disputes. The US

Supreme Court consists of a Chief Justice and 8 other justices and has final appellate jurisdiction in all federal matters. For almost all cases the Supreme Court decides for itself which cases it will accept for review.

Federal Judicial AppointmentsFederal judges are granted tenure for life and are guaranteed a compensation that cannot be reduced during their term in office by Article III of the Constitution. Judges in federal courts hold their offices during good behaviour and can only be removed through the impeachment mechanism in Article II, section 4 of the Constitution.Potential candidates for the federal courts are nominated by the President with the advice and consent of the Senate. The judiciary has no formal role to play in the nomination of new candidates, although members of the judiciary can be consulted in an ad hoc manner to determine appropriate candidates. Senators and the federal Attorney General can also recommend nominees for the District Court and the Circuit Court of Appeal. These candidates are then referred to the Senate Judiciary Committee which gathers information on the candidates, conducts hearings and presents a formal recommendation to the Senate. The recommendation must then be confirmed by the Senate.The scope of the Senate's role in providing advice and consent in the selection of judges is undefined, enabling procedures to be used, such as litmus tests, that are not consistent with judicial impartiality. A litmus test involves questioning a candidate as to how he or she would decide a particular case if appointed to the bench. Common questions include those on capital punishment or on the right to abortion. Such questioning indicates that a candidate's integrity, honesty or legal knowledge is not being evaluated, but rather how they would decide particular cases. However, candidates often refuse to answer such questions on the basis that the issues may come before them in court.Recently, deliberations by the Senate Judiciary Committee have been characterised by partisan politics, as the Republican Party controlled Judiciary Committee has attempted to slow down judicial appointments of judges with a perceived Democratic Party political ideology. As of 1 February 2000 there were 79 judicial vacancies in the federal courts with several positions remaining vacant for up to 6 years. The delays in the appointment of judges to fill vacancies, or the failure to create new judgeships reduces the ability of the court system to provide efficient justice. Further, the provision of adequate resources to the judiciary is a basic duty of the state to enable the effective functioning and to safeguard the independence of the judicial system.

The State Judiciary

Each of the 50 states of America has its own Constitution which establish the legislative, executive and judicial branches. All states have a court system similar to the federal system consisting of a final court of appeal and several levels of subordinate courts at appeal or trial level. The procedures for the appointment of judges and the characteristics of their tenure vary considerably between states. Generally, judges at the state level are selected for a limited time period after which their tenure is subject to renewal through a variety of mechanisms, such as executive or legislative re-appointment, retention elections or by running for re-election.

State Judicial Selection Methods

The initial selection mechanism for judges can be divided into three broad categories: selection by the legislature or executive, merit selection, and popular election. Each state may have a different selection method for the various levels of state judiciary. The selection method may also vary within a judicial office, for example appointment by the executive

followed by public retention elections at the end of each term. Due to the complexity and variety of procedures amongst the states and within their judiciaries, reference in this section is only to the initial selection process for final appellate court judges.

Selection by the Legislature or Executive

In some states judicial selection is undertaken by the executive or the legislature. Where selection is undertaken by the executive, the Governor, as head of the executive, will determine which candidates will be selected for official nomination. The actual candidate evaluation process is usually carried out by a delegate, with the Governor responsible for the final selection. A list is prepared based on certain criteria, usually including the judges' qualifications or experience, evidence of good character and, potentially, the candidate's political alignment, and then a selection is made. Other bodies may be consulted, such as bar associations, but there is no legal requirement to do so and no obligation to follow their recommendations. Nominations by the executive for judicial office are then appointed by the Governor or may be subject to further approval by the legislature. Alternatively, the entire selection process can be carried out by the legislature.

In the states of Maine, New Jersey, and Delaware members of the judiciary are selected and appointed by the Governor with the consent of the Senate. In New Hampshire candidates are selected and appointed by the Governor with the consent of the executive council. In Virginia candidates are selected by a Senate committee and then approved in a vote by the majority of members elected to each house of the General Assembly. Initial appointment may be followed by a re-appointment by the legislature or a re-election or retention procedure at the end of the judicial term, or next general election.

The state of California utilises a method of judicial selection that combines selection by the executive with evaluation by an independent body. Article VI, section 16 of the Constitution provides for the election of judges. A candidate is nominated by the Governor who submits the name to the Judicial Nominees Evaluation Commission. This commission evaluates the candidate and then reports its findings to the Governor. The Governor will then officially nominate the candidate, and that nomination will be reviewed by the Commission on Judicial Appointments created by Article VI, section 7 of the Constitution. This commission, consisting of the Chief Justice of the Supreme Court, the Attorney General and the presiding justice of the Courts of Appeal must confirm or reject the nomination. If the Commission confirms the nomination the candidate is sworn into office and is subjected to voter approval at the next gubernatorial election. After the expiration of the judge's term in 12 years the judge will then be subject to a retention election. California is classified under this selection method as the determination as to which candidates are to be submitted for evaluation is made exclusively by the executive.Selection entirely by the executive or the legislature may not adequately provide enough objective safeguards to protect against judicial appointments for improper motives.

Merit Selection

Merit selection currently takes place in 21 states. Merit selection involves potential candidates being selected and evaluated by an independent, non-partisan nominations body established by law, and then appointed by the Governor or state assembly. The executive or legislature is bound to appoint judges from those candidates provided by the nominations body. This body can consist of members of the judiciary, members of the state assembly,

citizens and representatives of the state bar association. The members of the body are usually appointed by various persons, for example bar associations or the Governor, to promote independent decision making. In many states, for example Connecticut, Tennessee, Missouri and Colorado, persons holding state offices or political party offices are excluded from being members of the commission, providing extra safeguards that the commission will act in an non-partisan manner. Alternatively, there may be requirements that an equal balance of political affiliation amongst the members of the body be maintained.

The nominations body evaluates candidates' qualifications based on their qualifications and experience, integrity, legal knowledge and other criteria, and provides a list of acceptable candidates to the state governor or state assembly, who will then decide whom to appoint. Generally, the selection criteria will be enumerated in law. This system is similar to selection by the executive or legislature, but it has the advantage of separating initial evaluation and nomination from the political process. At the end of their term the judges' performance is evaluated and a determination is made whether they are to be retained, either by an independent commission, the executive or legislature, or by the public in retention elections. In retention elections judges are subject to a yes/no vote by a non-partisan ballot. These elections are intended to increase judicial accountability by allowing the public to evaluate a candidate's performance during their tenure in office.

States under this system often limit the initial appointment periods of those judges selected. In these states judges face retention elections at the next general election after the expiry of a certain time period. If they are retained in those elections they then serve the full appointment period. In the states of Iowa, Kansas, Maryland, Florida, Missouri and Wyoming judges face retention elections after the expiration of a minimum of one year; in Colorado, Indiana and Arizona after two years; and in Alaska, Nebraska, South Dakota and Utah after three years. In the states of New Mexico, Oklahoma and Tennessee judges appointed to fill vacancies are evaluated at the next general election. In Oklahoma and Tennessee this is by a retention election and in New Mexico this is by a partisan election. After re-appointment, in these states, the judges hold office for the unexpired tenure of the office to which they were appointed before again contesting a retention election to be able to serve a full term.

There is a concern that the shortness of initial appointment, which may amount to a probationary period, will subject judges to elections based on the quality and popularity of their judgements over a short time frame. This leaves the judiciary particularly susceptible to campaigns by political groups focusing on a particular decision or a single issue, rather than a history of judicial practice.

Judicial Elections

Judicial elections for final appellate court judges take place in 22 states. This process involves candidates for judicial positions being directly elected by the public in popular elections. The election procedure can involve an evaluation of unopposed judges purely on their judicial record or may require members of the judiciary to compete against each other for available vacancies. In 13 states members of the judiciary are elected by a non-partisan ballot, but in the states of Alabama, Arkansas, Illinois, Louisiana, North Carolina, Pennsylvania, Texas and West Virginia, candidates are elected by a partisan ballot. In New Mexico candidates are elected by a partisan ballot after initial appointment by an Appellate Judges Nominating Commission.

Studies into campaign financing in states that conduct partisan elections show that the majority of funding comes from attorneys, with other funding coming from special interest or single issue groups. Funding from law firms that may appear in court before the candidate, or from special interest groups, increases the potential that members of the judiciary will be subject to pressure, mental and physical, from those that appear before them in court. It also diminishes the judiciary's appearance of impartiality and the public's confidence that justice is being performed.

Most of the states in which partisan elections are conducted have reporting requirements for all contributions and a further requirement that contributions over a certain level, usually around $50, be itemised. This requires candidates or their fund-raising committees to state, inter alia, the contributor's name, address and the amount of funds contributed. Limitations can be placed on the length of time before an election that money may be contributed or solicited, on those that may contribute, or on direct solicitation or contribution to the judicial candidate. In the latter situation fund-raising and receipt of contributions is carried out by a committee established for that purpose. A state may also limit, or prohibit entirely, the amount that may be contributed in a particular form, such as in cash or anonymously. The states of Arkansas, North Carolina, Texas and West Virginia limit the amount that can be contributed. In Arkansas contributions of more than $100 per individual and $2500 per political party or political action committee are prohibited. In North Carolina contributions from individuals or political committees to a candidate or their committee are limited to $4000 and in Texas the limit is $5000 for state-wide judicial offices. In West Virginia contributions are limited to $1000 per statewide election. However, in Texas compliance with the contribution limits established under the Judicial Campaign Fairness Act is voluntary.

Texas is the only state, out of those that conduct partisan elections, that has provisions limiting contributions from lawyers and law firms; no more than $50 from an individual lawyer and up to $30,000 in aggregate from a law firm for a state-wide election. None of the states which conduct partisan elections have a mandatory recusal requirement for a judge where they have received excessive contributions from a party that is appearing before them. Only Alabama provides that a party to a case can request that the presiding judge be removed when the other party has donated more than $4000 to the judge's campaign.

Popular election procedures, whilst they are consistent with the principles of judicial independence, must safeguard against improper motives and methods. Partisan elections are particularly a concern as they expose judicial candidates to improper influences that can threaten their decisional independence once they are in office. The need to raise funds also increases the appearance of dependence on those that contribute. Principle 10 of the UN Basic Principles on the Independence of the Judiciary states that in the selection of judges there shall be no discrimination against a candidate on the basis of a political or other opinion. Therefore, a judge's political belief should not be a criterion relevant to their election to judicial office.

The issue of undue influence is particularly a concern in states where the death penalty can be imposed. Of the states which conduct partisan elections, all except West Virginia can impose the death penalty. Final appellate court judges in these states must remain free from any external influence in deciding whether a death sentence was legally imposed in any individual circumstance. Judges in these cases are frequently targeted by pro-death penalty organisations, threatening a campaign to remove the judge from office at the next election unless the death sentence is supported. As voting in the United States of America is

voluntary, and the percentage of qualified voters voting is often low, judicial elections can be distorted by well organised, single issue committees who do not represent the general public's opinion of a judge's performance. This is not to say that a member of the judiciary would place the preservation of their career over the life of the appellant. However, these influences threaten the independence and impartiality of the judiciary, and distract the judge concerned from a proper determination in the case.

American Bar Association

The American Bar Association (ABA) has various programs focusing on judicial independence, and it established a Standing Committee on Judicial Independence in 1997. In June 1999 the Standing Committee established a Commission on Judicial Selection Standards to investigate judicial selection methods and to develop appropriate standards for selection processes. The Commission conducted hearings in late 1999, and will make final recommendations to the ABA House of Delegates in July 2000.

The policy of support for the merit selection of judges was reaffirmed by the ABA House of Delegates at the ABA Annual Meeting in 1999. At this meeting the report of the Ad Hoc Committee on Judicial Campaign Finance was also submitted. This committee was formed in 1998 to review the recommendations contained in Part II of the Task Force on Lawyers' Political Contributions formed in 1997. The Ad Hoc Committee's report issued the following recommendations:

* that the ABA re-emphasise, as a first order of priority, the merit selection of judges;
* the organised Bar should support efforts to educate the public about the desirability of merit selection procedures, and to inform the public generally about the nature of judicial responsibilities and the critical importance of judicial independence;
* amendments to the ABA Mode Code of Judicial Conduct, including limiting judges' appointments of lawyers who have contributed over a certain amount to their campaigns; a requirement for judges to disqualify themselves in a proceeding in which the judges' impartiality might reasonably be questioned; the limitation of campaign contributions and increased disclosure of the source of campaign contributions.

The recommended amendments to the ABA Mode Code of Judicial Conduct were adopted by the ABA House of Delegates. The Ad Hoc Committee also recommended that the issue of public funding for judicial campaigns be further evaluated.

Report of the ABA Commission on Separation of Powers and Judicial Independence

In July 1997 the Commission on Separation of Powers and Judicial Independence of the American Bar Association issued its report "An Independent Judiciary." The Commission was assigned the task of examining the state of the independence of the federal judiciary in light of recent events which had threatened that independence. During its inquiries it also gathered evidence on judicial independence concerns in various states and developed a model program of response for state and local associations to unjust criticism of judges.

The Commission gathered evidence from US senators and representatives who chair committees that have jurisdiction over the courts, from federal and state judges, bar leaders and academics. The Commission concluded:

Maintaining the appropriate balance between independence and accountability of the federal judiciary is of critical importance to our democracy. Current mechanisms for promoting accountability and preserving independence are essentially sound; and efforts to modify them are subjects of concern.

The report recognised that, although at the time of publication there had been recent extensive criticism of judges, this was no worse than at any other time in the nation's history. However, the report made the important distinction between criticism of the judicial decision and a threat that the judge will be removed if the case is not decided favourably. Criticism of the latter type must be condemned as it threatens the independence of the judiciary and is effectively an attempt to improperly influence the judicial process. Judges should be subject to criticism for decisions made contrary to law, as they are not fulfilling their judicial function, and that form of criticism is protected by the first amendment to the Constitution. Criticism that amounts to personal attacks diminishes public confidence in the judiciary and is an attempt to breach the separation of powers.

Included in the report is a model program for state and local bar associations to respond to judicial criticism. This is a welcome recommendation, as the independence of the judicial office requires that members of the judiciary do not respond directly to criticism of their actions. It is necessary that independent groups associated with the judicial system take an active role in defending the decisional independence of the judiciary as this will maintain public confidence in the system as a whole. Also welcome in this area would be a response by the state or federal Attorney General as a display of political support for the independence of the judiciary. Unfortunately, there has not been a substantial response by state and local bar associations to the model program. Few have set up official processes to respond quickly to criticism, and most only respond on an ad hoc basis or not at all.