

## **Politics Will Inevitably Be a Part of Judicial Selection**

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Editorial by Sally J. Kenney

The Pioneer Press is right to worry about judicial independence and the effect of recent decisions (editorial, Dec. 16). No state in recent history, however, when given the choice to give up electing judges to merely vote whether to retain appointed judges (the Missouri Plan) has done so. Nonetheless, we should still consider which system of selecting judges is best and why.

Two often-overlooked concepts are fundamental. First, the United States is a constitutional democracy. We restrict a democratically elected government from violating fundamental rights. We have charged the judiciary with checking governmental power. Judges must therefore be independent, threatened neither with job loss nor violence.

Second, no bright line separates law from politics. While judges must uphold the constitution and are not free to enact their policy preferences, constitutional interpretation is not a deductive enterprise. Judges do not simply apply rules. They reason from precedent and principle. Because we disagree about what constitutes cruel and unusual punishment, when speech becomes conduct, and what the equal protection of the laws entails, judges' life experiences and philosophy matter.

What is this politics that must be kept out of judicial selection? Politics is the system for determining who gets what how. Plato, however, saw politics as about answering the question, what is the good life? Politics is also the process of interpreting what things mean, from whether the death penalty deters murder to what liberty requires.

Judicial independence requires that judges cannot be obliged to donors, constituents or parties. They cannot permit a governor or mob boss to tell them how to rule. We expect them to listen, consider arguments and deliberate, but we cannot expect them to be a blank slate, free from ideology and experience.

It is a mistake to base proposals for judicial reform on the lie that law is not political and that we are simply after the best person for the job, without defining what merit entails.

By promoting the myth of a bright line between law and politics, we merely shift the politics from masses to elites and move it behind closed doors. The political preferences of the governor's judicial appointments commission or the bar association prevail instead of the voters.' Minnesota elites have long been edgy about voters' abilities to make sound choices among judicial candidates for good reason.

Judicial elections now suffer from the pathologies of presidential and legislative elections dominated by money. Judges compromise their integrity when they must raise vast sums. The quality of debate is impoverished when groups can hide their spending and negative

television ads simplify and distort the issues. The Chamber of Commerce seeks to unseat judges who are pro-plaintiff in tort actions; others target judges who overturned capital convictions or term limits.

Disturbing as such trends are, it does not follow that citizens should never participate in choosing judges. In England, neither citizens nor legislators participate in choosing judges; women, minority men and those educated at state schools are largely excluded from service, and most of the citizenry regards the judiciary as out of touch.

Maybe we need more public education about tort reform or sentencing policy to counter smear campaigns. Perhaps the League of Women Voters or the bar associations could explain whom they have endorsed and why judicial independence is important.

Whether it is Germany, France, Hungary or South Africa, politics are transferring more decision-making authority to courts. How have they avoided the judicial appointment gridlock that paralyzes Congress?

Like Germany, we could appoint judges for a single, nonrenewable term, ensuring their independence but also some opportunity for change over time. Judges would not have to give up retirement or serve while ill in order to hold on for a president of their party to take office.

Alternatively, we could make multiple appointments at the same time, eliminating the fight to the death of the zero-sum game of a single seat. This would likely enhance judicial deliberation by making sure all points of view garnered a hearing.

Neither system of elections or appointments is without its dangers. But we are not well served by pretending we can remove the politics of judicial selection by merely placing it in the hands of elites. We are better served by a public debate about the role of the judiciary and deserve a bench that represents us in all our diversity.

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