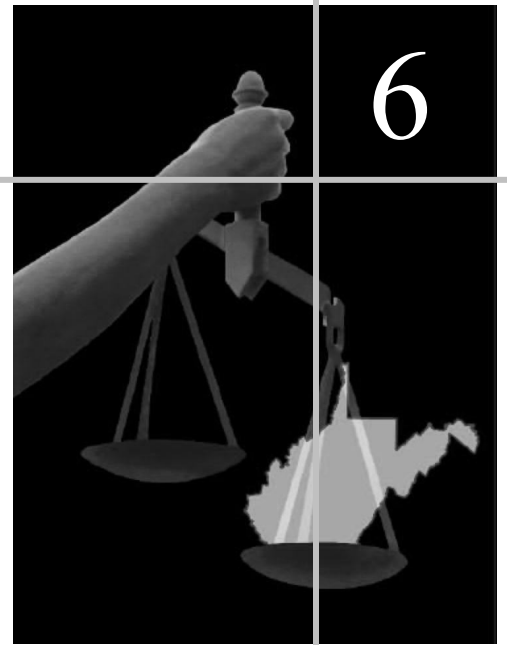


CHAPTER 6



JUDICIAL ELECTIONS: FACTS VS. MYTHS

by Chris W. Bonneau

The Rule of Law

6

JUDICIAL ELECTIONS: FACTS VS MYTHS

Chris W. Bonneau

Judicial elections, a uniquely American institution, have come under intense scrutiny in recent years. There have been several calls for the eradication of these elections by both the media and legal academics alike. However, as I will argue below, many of these claims are made on the basis of unsubstantiated empirical claims about the nature of these elections. In this essay, I am going to discuss the current state of the literature of judicial elections, focusing on elections to the state supreme court. A more detailed exploration of this topic can be found in my (with Melinda Gann Hall) recent book, *In Defense of Judicial Elections*.

MYTHS AND FACTS

Myth #1: Incumbents are subject to the whims of voters and routinely lose their reelection campaigns.

Facts: While it is true that there are some cases of incumbents losing somewhat randomly, the fact is the incumbent reelection rate for state supreme court justices is quite high. From 1990-2004, 85.7 percent of justices were reelected compared to 90.0 percent of Senators, 94.9 percent of House members, and 81.7 percent of governors. Moreover, many of those justices that lost did so for predictable reasons (scandal, out-of-touch with the preferences of the electorate, etc.). Thus, state supreme court elections are much like elections to other offices in this regard. It is true that, occasionally, an incumbent is defeated for no apparent reason. But this is true for legislative and executive races as well. Judicial elections should not be singled out for scorn just because the results of them are occasionally idiosyncratic.

Myth #2: Voters do not participate in these elections, and, when they do, they do not know enough information to make meaningful choices.

Facts: In a series of articles in the *American Journal of Political Science* (2006, 2008), Melinda Gann Hall and I show that these claims are patently false. In terms of participation, voters participate when they are more informed (either because they are more educated or because of the amount of campaign spending) and when the election is competitive. This is not surprising news. In terms of knowledge, voters are able to distinguish between more and

less qualified candidates. Thus, candidates with prior judicial experience perform better with voters than do candidates without such experience. Other things being equal, we find that a quality challenger can reduce the incumbent's percentage of the vote by over 4.5 percent. Why is this the case? We argue it is because voters view lower court judges as more qualified to serve on the state supreme court than they do attorneys with no judicial experience. Not only do voters participate when they have information, they also have enough information to make informed choices in the election.

Additionally, voters overwhelmingly support the election of judges. A 2002 survey of North Carolina voters showed that 77 percent of voters claimed they were interested in the last election and 81 percent of the voters felt that judges should be elected. A 2008 survey in Minnesota indicated that 73 percent of the respondents say they "sometimes" or "almost always" vote in judicial elections and a whopping 92 percent of voters agreed (or strongly agreed) that it is important for judges to be elected by the public. At the same time, majorities of voters also said they would like more information about the candidates in these elections. However, the numbers are clear: voters like electing judges. Moreover, these two states are not anomalies: in just about every state where judges are elected and voters are surveyed, the numbers are about the same.

Myth #3: Campaign spending in judicial elections is a bad thing.

Facts: I already mentioned above how campaign spending can affect voter participation—the more spending, the higher the levels of participation. Additionally, campaign spending can make the election more competitive. In a recent article (Bonneau 2007a), I found that while spending by the incumbent was not able to raise his or her percentage of the vote, campaign spending by the challenger was able to do so. Specifically, for every 1 percent increase in challenger spending, the incumbent's level of electoral support decreases by 1.8 percentage points. This is a significant figure. Simply spending money can make the race more competitive, likely by providing voters with more information on which to base their decision. Whether you look at voter participation or electoral competition, spending in state supreme court elections enhances democracy.

Myth #4: Judges' votes are "for sale" with contributors being able to buy judges' votes.

Facts: While several studies have found a correlation between campaign contributions and votes (Banner 1988; Ware 1999; McCall 2001, 2003; Cann 2002), evidence for contributions *causing* judges' to vote a certain way is scarce (but see Cann 2007). In a recent study, Damon Cann and I (2008) examined this relationship in 3 states and found some evidence of a link in Michigan but not in Nevada or Texas. The only conclusion one can make at this point is that there is certainly a relationship between contributions and votes, but there is no systematic empirical evidence to suggest judges are voting the way they do because one of the litigants was a contributor. This area is one where more research is definitely needed and is ongoing.

Myth #5: Elections erode the independence of judges and turn them into politicians.

Facts: Judges are political. They are political beings and make political decisions. The notion that judges decide cases solely on the law and facts of the case has been widely dismissed by scholars. Further, no amount of “independence” can change this. The U.S. Supreme Court has judges appointed for life. They are as structurally “independent” as a judge can be. However, every time there is a vacancy, there is a battle between the Democrats and the Republicans over who should be confirmed. Why? Because we know that Democratic judges interpret the law and the facts differently from Republican judges. If this were not true, then it would not matter who sits on the Court. The fact that politicians, the media, and the public are all concerned about seats on the U.S. Supreme Court is *prima facie* evidence that judging is not the neutral, impartial enterprise some would have us believe.

Elections allow the electorate to hold judges accountable for their decisions on the bench. And this is a good thing. Recently, the Chief Justice in West Virginia (Elliott Maynard) lost his bid for reelection after photographs surfaced of him vacationing with someone (Don Massey) while that person had a case pending before the court. West Virginians decided that they did not want someone on the court that they thought was not going to be fair and impartial. If West Virginia had an appointive system, there would have been no way to get rid of Justice Maynard. (Judges are rarely impeached and removed.) But, the presence of an election allowed the voters to hold him accountable for his behavior.

Let me give another example. The U.S. Supreme Court has upheld the use of capital punishment for certain types of cases. Take a state like Texas, which has decided to use the death penalty. If I am a judge in Texas who opposes capital punishment, what is to stop me from continually voting my personal preferences and overturning death sentences—regardless of the facts of the case—if the voters are not able to hold me accountable? Without accountability, I am free to *disregard* the law with impunity. Elections can help ensure that judges comply with the duly-enacted laws of the state.

A WORD ABOUT WEST VIRGINIA

State supreme court elections in West Virginia are interesting for a couple of institutional reasons. First, there are only 5 justices on the bench. No state has a smaller supreme court. Second, justices serve for 12-year terms of office. This is the longest of any elected state. Thus, each seat becomes extremely valuable since there are so few seats and the time between vacancies can be quite lengthy. This makes every election much more important and valuable than, say, if there were a 9-member court with 6-year terms of office. More than anything else, this institutional structure contributes to the high contestation rate in West Virginia and may lead to ever-increasing campaign spending in these races.

In a recent book chapter, I looked at average spending by state and spending per capita by state from 1990-2004 (Bonneau 2007b). Of the 22 courts that elect judges in partisan or nonpartisan races, West Virginia is the 8th most expensive overall and the 5th most expensive per capita. It is important to note that the aberrationally high spending election of 2004 makes West Virginia seem to be a higher campaign spending state than one would think based on prior elections. Yet, I would argue this is not evidence of any kind of problem. Since campaign spending leads to more informed voters, the amount of campaign spending can be a

positive characteristic of these elections. Voters in West Virginia might be *better off* because of the amount of spending in these elections.

CONCLUSION

In sum, contrary to the rhetoric of some, judicial elections are much like elections to other branches of government. Moreover, ending elections will not remove the “politics” from the judicial selection process; it will simply shift the politics from the voters to another group (governor, legislature, etc). Judging is political and the people involved in selecting judges know this. There is just no practical way to remove politics from the process. Thus, in an inherently political process, who should be trusted to select judges? Clearly, the public thinks it should be them. Additionally, the empirical evidence suggests that voters do a pretty good job at selecting judges. There is no evidence that you get a “better” bench by appointing judges rather than having them elected. In fact, Choi, Gulati, and Posner (2007) find that while “appointed judges write higher quality opinions than elected judges do, ... elected judges write many more opinions, and the evidence suggests that the large quantity difference makes up for the small quality difference.” That is, the evidence suggests that elected judges may in fact actually be *better* than appointed judges. If true, this would seem to argue not only that states with elections should keep them, but that more states should institute elections for judges.

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