

When a new country like Fredonia is structuring its judicial system, there is perhaps nothing more important than the judicial selection process for their Supreme Court. This process inevitably raises tension between three spheres: judicial accountability, judicial independence, and judicial competence. Judicial accountability is how well the people hold judges accountable for their choices. Judicial independence is the inverse of this—how well judges are kept away from the influences of public opinion, of other branches of government, and of potential voter or campaign donor response; it pushes the law and legal precedents as the only guide for decision-making. Judicial competence is how capable the judges are of providing justice.

There are four methods used to pick judges and justices: election, appointment, appointment-and-election, and legislative selection. The methods are looked at through the lenses of the three tensions mentioned above. There are both positive and negative aspects of all four methods and inherent trade-offs; nevertheless Fredonia will be amply informed and will make the right decision for their country.

The Methods

The first method is election. There are two types of elections: partisan and non-partisan. In a partisan election, the political affiliation of the judges is on the ballot, while in a non-partisan election this information is not given. There are positives and negatives associated with both of these types of elections. Because judges do not have the sort of mud-slinging, attention-drawing election campaigns candidates partake in in other branches of government, voters in a non-partisan election system rarely know enough about them to have an opinion, they are just names on a ballot. The result is constituents who have an uninformed vote or who do not vote for judges or justices altogether. This is called “roll-off.” Both of these are non-desirable. In a

partisan election, there is less roll-off because constituents have the ability to vote their party. In the American system, for example, a member of the conservative Republican Party will be willing to put their faith in a judge who identifies with the Republican Party even if they are not intimately aware of their decisions in the courtroom. Members of the liberal Democratic Party will behave likewise.

There are some fairly obvious drawbacks to the partisan election system. Judges are not supposed to be politically motivated; if their political affiliation is on the ballot, the race becomes not about who is the better judge, but about which party has the ability to drum up the most votes nationally. Because the judge will know that every decision they make can potentially be analyzed and used against them by the opposing party, judicial independence will be compromised. Rather than paying attention to only what is in the actual text of the law or Constitution, judges and justices may cater to public opinion or bend to the will of the loudest campaign backer.

Another negative aspect of the partisan election system is that without proper measures taken to protect against it, political party machines themselves can become corrupted. More than a political candidate playing dirty in campaigns, this is the corruption of those who are behind the scenes; the corruption of those who run everything. In what are known as *patronage operations*, voters are told that if they help a certain party in getting their candidate elected, the party would be able to help them get a job. These jobs range anywhere from a stable working-class job, to a career as a judge. In this case, there would be virtually no democratic accountability, because judges will be aware that the people are not voting based on any policy or decisions coming from the court. Neither will there be any judicial competence, because those

who are elevated to the position of a judge are not going to be educated in law and will be highly unqualified.

Judges do not function like the government officials of the other branches; therefore they should not be treated like the government officials of the other branches. Elections, while playing a vital role in any democracy by giving the public a voice, tend to turn the participants into competitors. Instead of focusing on and deciding what the law says, judges and justices will begin to act like men and women in Congress and will take their potential election or reelection into account when deciding a case. Polls show that judicial elections do not make judges and justices more accountable.

There are drawbacks to the election system as a whole, as well. One of these is the potential issue of conflict of interest. Whether or not their political affiliation is on the ballot, there is still an election, meaning judges need to campaign, and they need to get campaign money. If a person or company donates money for or against the judge's campaign, and they later bring a case to the Supreme Court, how can the said judge be truly impartial or objective? Though laws can be made requiring a judge to recuse themselves when the donation exceeds a certain amount or it becomes clear they cannot be impartial, who decides what that limit is, or when they are not able to decide impartially? If it is an attorney that donates money for the judge's campaign, or for the judge's opponent's campaign, is it plausible to expect a judge to remain objective when that attorney and their client end up in their courtroom?

Another drawback to the election system as a whole is the flagrant incumbency advantage that all judges are privy to. This is not a result of the perks they may receive from being an incumbent, such as more money to fund their campaign, amongst other benefits the Congressional incumbents are entitled to in the American system. Rather, this advantage stems

solely from the ignorance of the people. Again, because the judges do not engage in the type of vicious campaigning that appears on television and radio ads and draws the attention of the people—as do competitors from the other branches of government—people know nothing about the judges running for the bench. The result is that when a name appears on the ballot, and it is signified that he or she is a current judge, the people tend to blindly vote them back into office. In the American system, this happens nine times out of ten and it never matters whether or not the contender might be a good replacement.

The roll-off is more pronounced in non-partisan elections, because voters are not able to see the political affiliation a judge may have. This means that, again taking the American system as an example, a more conservative Republican voter may vote back onto the bench a more liberal democratic judge even if the opposing judge may be highly conservative. The voters simply have no idea what values certain judges hold, or how they decide their cases. Voters trust judges to be fair and make the right decision, and as a result they vote in again and again anyone on the ballot who has “judge” preceding their names.

The benefit of the election method of appointing judges as a whole is that all judges, especially those on the Supreme Court, render influential and highly important decisions. These decisions will directly affect the lives of the citizens of Fredonia and will play a major role in the way Fredonia develops as a country. With the election system, citizens will be able to hold judges and justices directly accountable for their decisions. Rather than sitting idly by while judges and justices make important decisions for them, the citizens will be able to directly rein in any judge or justice they feel is overstepping their authority or is otherwise unfit.

The second method is appointment. In this method, the executive of Fredonia appoints the judge to the Supreme Court, and the upper house of the Fredonian legislature must approve

the choice with a two-thirds vote. There are two avenues that could be taken regarding the length of time a Supreme Court judge serves under the appointment method. One avenue is the judge could serve for a certain period of years, and at the end of their term the executive could reappoint the judge or they could choose to appoint someone else. The second avenue is for the judge or justice's term length be for life. In this case, the judge or justice would serve for as long as they showed good behavior, a term which is purposefully vague. Fredonia has the freedom to decide what they want to consider behavior bad enough to warrant a judge's impeachment.

Some positives that come from the appointment process are that there is none of the problems that arose from the election process. The appointment process does not turn the courtroom into a political battleground, like the election process does, because the judges cannot sway the executive with campaign ads. There are also no conflict of interest issues because, since there are no campaigns, there are no campaign funds or opposing sides that political players like attorneys or potential clients could take. Studies show that appointments result in more diversity in the court, meaning there are more women less-dominant ethnicities and races. This would be a necessary function in equally representing the multiple races and ethnicities in Fredonia.

There are safety valves in place so the president cannot appoint recklessly, or purely for their own benefit. The president can either be required, or have the option to, pick a judge from a list of qualified candidates put together by a judicial nominating commission in a method called the *merit selection*. Judicial nominating commissions help to step away from the popular vote fraught with potential corruption. A judicial nominating commission would focus more on judicial competence rather than judicial accountability. Though this might cause worry that the judges and justices will not be held as accountable as they would be in the election process,

traces of judicial accountability are still present because the president is democratically elected—if the public does not like what he or she is doing, they vote them out.

However, there are some negatives associated with the appointment method, as well. The people do not get enough input; even though they elect the president in a national election, they do not directly elect him. Electoral colleges keep a barrier between the people and the president, and this indirect relationship between the two may not be sufficient enough to maintain the proper amount of judicial accountability necessary for a justice in the highest court in the country.

The third method is appointment-and-election, commonly called the merit plan. As it sounds, this is a combination of the election method and the appointment method. Like the appointment process, the appointment-and-election method uses a judicial nominating commission, which screens applicants for the potential vacancies on the Supreme Court. The president chooses a judge from the list that the judicial nominating committee compiles. In this method, the appointed judge serves for one to two years and then, like in the election method, they face the voters in what is called a “retention election.” In a retention election, there are no opponents running against the judge; the constituents simply vote “yes” or “no.” If the judge or justice is retained, they serve for another term and then again face the voters in a retention election.

There are many positives associated with the appointment-and-election method. The appointment-and-election method represents the best qualities of both the election method and the appointment method. Because there is no election in which the judge or justice must run against other judges and justices, they are not political competitors and so will not let their potential election or reelection affect their decisions on cases. There is also a higher degree of democratic accountability than there is in the appointment method, because the people can vote

the judge or justice out of office in an election if they do not approve of them. Judicial accountability is also present in the voter's democratically electing the president, as it is in the appointment method. The list made by the judicial nominating commission would stress judicial competence because people who are unbiased and are educated in law draft the list, so they know what to look for in potential members of the Supreme Court. In this way, judicial competence and judicial accountability would be nicely balanced.

The negatives of the appointment-and-election method are two-fold. On one hand, it could be argued that the people do not get enough of a voice in the electing the justices of the highest court in their country; in other words, there is not enough democratic accountability. There are two layers between the people's election of the president and the appointment of a judge: the Electoral College, and the president appointing the judge himself rather than the people. Also, though the people get to vote on the judge in a retention election, they do not get to choose which judge they would like to sit on the bench; they only have the opportunity to choose whether or not they get to retain the one already there. If they choose to eject the judge from the bench, the president gets to make the executive decision on who the new judge is going to be, though it does have to be approved by the Senate.

Of course, it could be argued that there is too much democratic accountability. Those that believe that judges who sit on the bench in the highest court in the country need to be kept as removed from the public opinion as possible would see this method as not closed off enough from the voters. Again, voters are not in tune with what the judges are doing, and are therefore in no place to render an informed verdict in the form of a ballot on who should be hearing the most important cases in the country. Also, those who believe judges on the Supreme Court should be kept isolated from public opinion are also going to believe that Supreme Court judges should

serve life terms, as in the appointment process. If the public can vote the judges out of office at a retention election, the Supreme Court loses its legitimacy.

The fourth method is legislative selection in which the legislature is the entity appointing Supreme Court justices. There is a judicial nominating commission that drafts a list of potential appointees. The list is given to the president, who in turn gives it to the legislature. The appointee the legislature picks serves for eight years, and the reelection power lies with the legislature. There are some positive and negative attributes associated with this method, as well.

Some positives of the legislative selection method is that the judge has a freedom that they are not afforded in other systems because the public is, for the most part, cut out of the process of their appointment. The legislature does not have complete freedom, however, because the legislators are only in power by the consent of the governed—in other words, there is still a sense of democratic accountability, because if the legislators veer too far away from what their constituents want, they run the risk of getting voted out of office.

Despite the perks this freedom may offer, there is a negative aspect of this system. There may be less emphasis on judicial competence because there is the possibility legislators will potentially appoint either retired or defeated colleagues versus lawyers or judges trained in the law. While there is judicial accountability in the form of people voting for legislators, it is not as strong as it could and possibly should be. Though democratic accountability is present in the sense that the masses vote for the legislature, they are fairly removed from the appointment of Supreme Court judge.

Comparisons

When looking at the four methods—election, appointment, appointment-and-election, and legislative selection—through the three tensions—judicial competency, judicial accountability, and judicial independence—it is easy to see some stark trade-offs. The election system has almost no respect for judicial independence. Judges, if constantly worrying about how their decisions are going to come across to voters and how that will in turn affect how they do in elections, are not being properly kept a step away from public opinion and voter response. Judges will also be preoccupied by how a certain decision will affect a potential campaign backer. The judges are not viewing the law and legal precedents as the only guide to decision-making; they are too wrapped up in the public response and the potential backlash on their careers.

Though the election method typically has high democratic accountability, because voters get a direct say in whom they want to sit on the bench, there is the potential for low democratic accountability and low judicial competence as well. If the election process gets corrupted and patronage operations are put in place, the appointed judges are not going to be well versed in the law and will not be wary of the people's ability to vote them off of the bench if they fail to render verdicts to the people's standards or if they behave in ways that are unconstitutional.

Appointment, on the other hand, has none of the campaigning pitfalls of the election method and therefore has a higher degree of judicial independence. Because what the voters think has no impact on what the judges' political future holds, they are not forced to bend to the will of the people because they fear for their spot on the bench at the next election. There is also no conflict of interest issues, because if there are no campaigns, there can be no campaign money and campaign donators, so the judge would not be compromised by anyone whose case came before him or her in court like they would in the election method.

There is also a high degree of judicial competence, not only because the executive who appoints the judge is more knowledgeable than the masses in the intricacies of the potential judges capabilities, but also because he or she picks from a list compiled by the judicial nominating commission. This commission is made up of those who are highly educated in the law and who can select the best candidates without a bias. While there is some degree of democratic accountability because the people elect the president, the inherent layer between the president and the people put in place by the Electoral College makes it not as prevalent as in the election method.

Appointment-and-election also has a high degree of judicial independence. The appointment-and-election method keeps away from the negativity of campaigning like appointment method does. The judges are not appointed to the bench based on public opinion or the popularity of their verdicts, because—like the appointment method—the executive familiar with the judges and their past case decisions is making his or her choice based of a list compiled by the judicial nominating commission. This means that the system will have a healthy amount of judicial competence. Democratic accountability is present too, and in a more concentrated dose than in the appointment method, though it is not as strong as in the election method. The retention election serves to give the public a voice, but at the same time it limits their power. The people are only allowed to vote after the judge has been on the bench for his or her term, and they are only allowed to vote on whether or not they should stay on the bench. The people are never able to pick the judge; that immense power lies with someone who is more equipped to deal with it.

The legislative selection method has a certain amount of judicial independence. Because the people do not vote on the judge, the judge does not have to cater his decision to, or worry

about, the public will. The judge is free to decide a case based solely on the written words of the constitution, or the certain proposition the case involves, as in the appointment method. Also like the appointment method, there are no ugly campaign or conflict of interest issues to deal with. The judicial independence is not all-encompassing, however. The legislature is the entity that picks and reappoints the judge to the bench, putting the judge in the same position with the legislature as they were with the public in the election method.

Depending on the corruption level of the Fredonian society, the amount of judicial competence in Fredonia under this system can waver. On one hand, because there is a judicial nominating commission like in the appointment and appointment-and-election methods, there is some level of judicial competency; the commission's list is dependable and only contains judges who pass muster. On the other hand, if any sort of corruption takes place, legislators will appoint either retired or defeated colleagues, probably because they owe them a favor or two. Potentially better-suited and more educated lawyers and judges will get passed over because the legislators are not required to pick from the judicial nominating commission's list. Even if a law were passed requiring a judge be picked from a commission's list, corruption is still possible—perhaps easier—because instead of having the entire legislative body need to vote to put an unfit judge on the bench, only the few on the commission need to be corrupted. There is some judicial accountability, as the public votes on the legislators, like in the appointment method; however, judicial accountability is not highly recognized because the people's vote for the legislators is only a step away from the legislature's vote for a judge.

The Best Choice for Fredonia

The method best for Fredonia depends on which of the three tensions are the most important when choosing a judge for the Supreme Court. The answer is judicial independence and judicial competence. The basis of the constitution is separation of powers, and since the people have a direct voice in two out of three branches of government, it is necessary to the balance of the system that they are somewhat restrained in the third branch. The judicial system is the entity keeping Congress in check when making laws, because congressmen know they will not be able to get away with passing outlandish ones, and the people trust that they will have a fair day in court. The courts make decisions that affect the country and lives of the people directly, and if they are not competent enough to do their job to the caliber it needs to be done, then they should not be adjudicating at the highest court in the country.

The best choice for Fredonia is the appointment method. It places the highest value in judicial competency and judicial independence. The appointment method is what is currently in place in the United States of America, and has proven to work better than any of the other methods. Since the system works the best if Supreme Court justices serve life terms, the election method as well as the appointment-and-election method is flawed in that they inherently require the people to be able to vote a judge out of office. The legislative selection method also requires that the legislators are able to decide on reelection, though there could potentially be a way judges could serve for life. However, there is simply too much potential for corruption; both judicial competency as well as judicial independence is compromised. The appointment method is the method Fredonia should use to select their Supreme Court judges.