



State or Federal Court?

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August 2016

Most people will find themselves in a courtroom at some time in their lives, perhaps for a traffic ticket, a lawsuit, or jury duty. While the trials and the courtrooms may look the same in state or federal courts, the two systems could not be more different.

How are judges chosen for state and federal courts?

Federal judges are nominated by the president and confirmed by the U.S. Senate. Justice Sonia Sotomayor, for example, was nominated by President Barack Obama to the U.S. Supreme Court—the highest federal court—on May 26, 2009, and she was confirmed by the U.S. Senate on August 6, 2009. The framers of the U.S. Constitution structured the federal judicial system so that judges, once they are on the bench, are generally insulated from political pressure. These judges never have to be elected or reappointed. They serve life terms.

President Obama has appointed the most diverse federal bench in U.S. history.¹ According to the Federal Judicial Center, as of August 2, 2016 of 778 current district, circuit, and Supreme Court judges and justices, 263—or 34 percent—are women, 107—or 14 percent—are black, 79—or 10 percent—are Hispanic, and 25—or 3 percent—identify as Asian American.² However, federal courts still suffer from a lack of racial, ethnic, gender, and experiential diversity.

A few states use a similar system for their state courts, but in 39 states, judges must be reelected to keep their jobs.³ In about half those states, justices are initially chosen by a governor from a list drafted in a merit selection process focused on their qualifications.⁴ In most merit selection states, the judges must run in retention elections, in which voters are asked whether to keep them on the bench.⁵ These retention elections have historically seen fewer campaign contributions, but some recent elections have seen millions in spending to unseat justices.⁶ The other states with elections require justices to run in contested races. Only a handful of states still use partisan ballots to choose judges, and those elections have traditionally seen the most expensive elections.⁷

What are the problems with each of these processes?

Our elected representatives nominate and confirm federal judges. Under the Senate's rules, the senators from the judges' home states play a key role in confirmations, and they can obstruct the process of filling empty seats on the bench.⁸ Additional steps established by

long-standing Senate traditions also allow for more partisan obstruction of the confirmation process. In 2016, for example, President Obama nominated Judge Merrick Garland to the Supreme Court after the death of Justice Antonin Scalia, only to have the Senate engage in record-breaking obstruction of his nomination. The result has been a prolonged vacancy that has affected millions of Americans, including 6.4 million individuals who were left to fear the deportation of a loved one after the court split 4-4 in the case of *U.S. v. Texas*.⁹

In state courts, where most judges are elected, candidates often require political connections or access to millions of dollars in campaign contributions to succeed. The state supreme court elections of 2014 saw nearly \$15 million in spending—more than half of which came from political parties and the type of independent spending groups unleashed by Citizens United.¹⁰ Last year, the Pennsylvania Supreme Court election alone saw even more money, a record for a single state supreme court election.¹¹

Candidates of color often lack the necessary connections to secure such sizable donations, which can lead to a loss of racial and ethnic diversity on the bench. A 2015 report from the Center for American Progress found that elected justices of color had a substantially lower reelection rate than white justices.¹² The report discussed two incumbent Texas Supreme Court justices who lost their seats to challengers who questioned whether voters would reelect a justice with a Latino name.

Most states have ethics rules that fail to keep judges from hearing cases involving campaign donors.¹³ In Wisconsin, the rule was written by two groups that have spent a lot of money to elect the justices, and not surprisingly, the rule says that campaign contributions cannot be the sole reason for a judge's recusal. The conservative majority on the Wisconsin Supreme Court cited this rule in refusing to sit out a case involving groups that had spent \$10 million to put them on the court.¹⁴

Does a case belong in federal or state court?

The vast majority of cases—more than 90 percent—are heard in state courts. These include criminal cases or lawsuits involving state laws, as well as family law issues like marriage or divorce. State courts also hear cases that involve important state constitutional rights. Almost every state constitution protects the right to an equal or adequate education, and several state supreme courts have battled state legislators over their obligation to honor this right by equally funding schools.¹⁵

The federal courts, by contrast, can only hear certain kinds of cases. These include cases involving federal crimes, lawsuits involving citizens of different states, and cases involving the U.S. Constitution. The federal courts interpret the U.S. Constitution, which limits government power and protects rights like free speech and Equal Protection of the laws. For example, marriage equality was established in 2015 after six district court rulings, which appealed to the Fourth, Sixth, Seventh, Ninth, and Tenth Circuit Courts, and ultimately

culminated in the Supreme Court case of *Obergefell v. Hodges*.¹⁶ In 2016, abortion rights were upheld by the Court in *Whole Woman's Health v. Hellerstedt*, after a district court decision invalidated a Targeted Regulation of Abortion Provider, or TRAP, law, only to be reversed by the Fifth Circuit Court.

Conclusion

Though they may seem complex, our state and federal courts make decisions that impact all of us. The judges on these courts interpret constitutions that protect our most cherished individual rights. But these courts face daunting problems: a lack of diversity, the influence of campaign contributions in state courts, and a backlog of cases from empty seats on our federal courts. Americans should demand judicial diversity and process reforms to allow Americans swift access to justice and to keep elected judges fair and impartial, so we may all benefit from and gain confidence in our state and federal courts.

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Endnotes

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- 2 Federal Judicial Center, "History of the Federal Judiciary – Research Categories," available at http://www.fjc.gov/history/home.nsf/page/research_categories.html (last accessed August 2016).
- 3 Brennan Center for Justice, "Judicial Selection: An Interactive Map, Supreme Courts," available at <http://judicialselection-map.brennancenter.org/?court=Supreme> (last accessed August 2016).
- 4 Ibid.
- 5 Ibid.
- 6 "Retention races have increasingly taken on the characteristics of contested elections, complete with special-interest spending, attack ads, and heavy candidate fundraising." See Scott Greytak and others, "Bankrolling the Bench: The New Politics of Judicial Elections 2013-14" (Washington, New York, and Helena, Montana, Justice at Stake, Brennan Center for Justice, and National Institute on Money in State Politics, 2015), available at <http://newpoliticsreport.org/>.
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- 8 Anisha Singh and Kulsum Ebrahim, "Just a Judge" (Washington: Center for American Progress, 2015), available at <https://www.americanprogress.org/issues/civil-liberties/news/2015/12/08/126705/just-a-judge/>.
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