

MERIT SELECTION FOR JUDGES

As a part of our Democracy Lens tools, for each state in our region, we report a data snapshot and case studies (called Bright Spots) about philanthropy's role in democracy. You can access all these data and Bright Spots on the [Democracy Northwest webpage](#).

A fair and impartial judiciary provides a check on the other branches of government and is necessary to ensure equality under the law. However, the process of judicial selection has a tremendous impact on judges' ability to function independent of political influence. In the Northwest, most states directly elect judges,¹ a practice consistent with other Progressive Era reforms like the ballot initiative and referendum processes. From 1940 to 1994, 23 states eliminated judicial elections and implemented an appointment or merit selection process. As more recent reforms efforts have faltered, the amount of money in judicial campaigns has exploded. From 2000 to 2009, state supreme court candidates raised \$206.9 million nationally, more than double the \$83.3 million spent in the prior decade. This does not even include independent expenditures, which can be extremely difficult to track.²



How should judges be selected to ensure they are highly qualified and independent from political pressure? Though there is no perfect system, the history of reform in Wyoming illustrates the role of advocacy in ensuring fair courts.

Merit Selection in Wyoming

At the beginning of Wyoming's statehood in 1890, voters directly elected state judges to either six- or eight-year terms. If there was a vacancy before a term expired, the governor made an appointment. In 1971, the American Judicature Society launched a reform campaign in the Equality State. Then-State Representative Alan Simpson introduced a constitutional amendment to replace the popular election of judges with a merit selection system. The



legislature approved the resolution on February 28, 1971, and voters ratified the amendment the following year.³

Wyoming’s form of merit selection, commonly known as the “Missouri Plan,” named after the first state to adopt the model,⁴ has several components. First, there is the Judicial Nominating Commission, made up of three attorneys elected by the Wyoming State Bar and three nonattorneys appointed by the governor. The chief justice presides but votes only when agreement cannot be reached. To be considered for appointment, attorneys must submit a letter of interest, a detailed application, a writing sample and references to the commission. Political affiliation is not requested. The commission offers the governor three candidates from which to choose. If the governor should refuse all three, the chief justice then makes the selection.⁵

The second component is the retention election. After a judge serves one year of their term, they must stand for an election in which voters decide if the judge should be retained to serve the remainder of their term. This is a significant contrast to a contested election with two or more candidates. At the end of the term, if a judge wishes to continue their service, they will again face a retention election.⁶ In order to provide meaningful information to voters, all members of the Wyoming State Bar are polled about each judge’s performance and whether they should be retained. The results of the poll are then published.⁷

The Impact

The most obvious impact of the merit selection reform is the lack of money in judicial retention elections. Between 2008 and 2016, there were eight retention elections for state supreme court justice in Wyoming; not a single dollar was reported as raised in any of the races. In contrast, in the neighboring states of Idaho and Montana, which do not have retention elections, judicial campaign contributions over the same period of time were approximately one and two million dollars, respectively.⁸

State Judicial Campaign Contributions by Election Cycle, 2008-2016⁹

	Idaho	Montana	Wyoming
2008	\$243,190	\$334,446	\$0
2010	\$162,148	\$160,174	\$0
2012	\$0	\$329,384	\$0
2014	\$163,371	\$376,361	\$0
2016	\$431,258	\$789,282	\$0
Total Cycle Contributions 2008 - 2016	\$999,967	\$1,989,647	\$0

Average Cycle Contributions 2008 - 2016	\$199,993	\$397,929	\$0
State Population (2016)	1,683,140	1,042,520	585,501

The presence of money in judicial campaigns is one important, but limited method of assessing the independence of the judicial branch. Another way is to look at its willingness to keep the other branches in check, given one-party dominance in the state. From the mid-1990s to the early 2000s, the Wyoming Supreme Court issued a series of rulings that the legislature was not meeting its constitutional requirement of funding public education. Frustrated by these decisions, the majority of legislators voted in favor of a constitutional amendment to weaken the merit selection system, giving more control to the governor and the legislature. Lacking the supermajority required for a referral to the ballot, the resolution ultimately failed.¹⁰

The Role of Philanthropy

Judicial selection reform is one of the most intentional ways of strengthening democracy, yet foundations have played a limited role. The now-defunct American Judicature Society (AJS), a bipartisan advocate for effective judicial practices, had over its more than 100-year history relied primarily on membership contributions from judges, lawyers and individuals concerned about judicial fairness. AJS also attempted to ask judges for cy pres funds, or monies in class action lawsuits where not all injured parties can be identified.¹¹ In 2011 and 2012, the Foundation to Promote Open Society contributed \$350,000 to the organization.¹² However, with a declining membership base and no other foundation support, AJS closed down in 2014.¹³ A sister organization, Justice at Stake, whose campaign received a two-million-dollar grant from the Gates Foundation in 2012,¹⁴ also closed recently due to lack of funding.¹⁵

The primary movement in philanthropy to support an independent judiciary is the Piper Fund. This funder collaborative housed at the Proteus Fund makes grants to state-based groups, with a very small portion coming to the Northwest region.¹⁶

Key Takeaways

- Merit selection in state judicial elections can improve the judicial system’s independence, which is necessary to a strong democracy.
- Not enough philanthropies have responded to the need for proactive reforms in judicial elections.

Endnotes

1. Alicia Bannon, Rethinking Judicial Selection in State Courts (New York City: Brennan Center for Justice, 2016), 1-2, 4, https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf
2. John F. Kowal, Judicial Selection for the 21st Century (New York City: Brennan Center for Justice, 2016), 1-7, 14, https://www.scribd.com/document/314725870/Judicial-Selection-For-The-21st-Century#fullscreen&from_embed.
3. Marilyn S. Kite, "Wyoming's Judicial Selection Process: Is It Getting the Job Done?" Fordham Urban Law Journal, Volume 34, no. 1 (2007): 205-206, 210, <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1948&context=ulj>.
4. Kowal, "Judicial Selection," 2.
5. Kite, "Wyoming's Judicial Selection," 206-210.
6. Kite, "Wyoming's Judicial Selection," 210
7. See Judicial Advisory Polls, "Resource Page," Wyoming State Bar, accessed September 17, 2018, <http://www.wyomingbar.org/about-us/resource-page/>.
8. See "Election Overview," FollowTheMoney.org, accessed July 17, 2018, <https://www.followthemoney.org/tools/election-overview> for Idaho, Montana and Wyoming state judicial contributions by year for 2008, 2010, 2012, 2014 and 2016; see also "Explore Census Data," United States Census Bureau, accessed September 18, 2018, <https://data.census.gov/> for population data.
9. See FollowTheMoney.org, "Election Overview," for Idaho, Montana and Wyoming state judicial contributions by year for 2008, 2010, 2012, 2014 and 2016; see also United States Census Bureau, "Explore Census Data," for population data.
10. Kite, "Wyoming's Judicial Selection," 224-225
11. "Q&A: After 100 Years, American Judicature Society Still Advocating for Courts," United States Courts, June 21, 2013, <http://www.uscourts.gov/news/2013/06/21/qa-after-100-years-american-judicature-society-still-advocating-courts>; Mark Chenoweth, "The Ethical Demise of The American Judicature Society," October 14, 2014, <https://www.forbes.com/sites/wlf/2014/10/14/a-blow-to-legal-ethics-from-an-unlikely-source/#790c85691eac>.
12. See "Foundation Funding U.S. Democracy," Candid, accessed September 17, 2018, <http://democracy.foundationcenter.org/> for a search feature that lists contributions to grantees including the American Judicature Society.
13. Chenoweth, "The Ethical Demise.
14. See "Foundation Funding U.S. Democracy," Candid, accessed September 17, 2018, <http://democracy.foundationcenter.org/> for a search feature that lists contributions to grantees including the Justice at Stake Campaign.
15. Debra Cassens Weiss, "Justice at Stake, a group dedicated to impartial courts, closes amid funding woes," ABA Journal, June 27, 2017, http://www.abajournal.com/news/article/justice_at_stake_a_group_dedicated_to_impartial_courts_closes_amid_funding/.
16. See "PIPER FUND: Judicial Independence," Proteus Fund, accessed September 18, 2018, <https://www.proteusfund.org/piper/judicial-independence/>; "2017 Grants," Piper Fund, accessed July 17, 2018, https://docs.wixstatic.com/ugd/69f444_05cc0cf828e34a37bead003e6a0bfb4d.pdf; and Piper Fund: Judicial Independence grants, "Grant Index," Proteus Fund, accessed September 18, 2018, <https://www.proteusfund.org/grant-index/?issues=348> for more information about the Piper Fund's priorities.