



March 8, 2011

Repairing NY's Toxic Judicial Election System

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With the nation's judiciary coming under fire for perceived bias and favoritism, New York Chief Judge Jonathan Lippman took a welcome step to shielding New York's judges from conflicts with his recently announced ban on judges hearing cases in which lawyers have contributed \$2,500 or more to the judge's campaign. Lippman's plan could be the start of a reform for the state's unpleasant judicial election system.

Long a low-key battlefield, judicial elections in other states have lately garnered a flood of attention and money. A 2009 Supreme Court decision showed just how critical judicial elections are becoming, when it ruled that a West Virginia Supreme Court justice had to recuse himself from a case after a coal executive spent over \$3 million to benefit the justice's successful campaign. That was the most prominent, but by no means only, recent judicial battle with national import — in November, Iowa voters kicked out three judges who voted to overturn the Defense of Marriage Act.

New York's judicial elections haven't garnered the same attention, thanks to the fact that the members of the Court of Appeals, the state's highest court and the one that ultimately rules on big cases that affect policy, are selected by the governor from a list provided by the Commission on Judicial Nomination and then confirmed by the Senate. These judges don't have to worry about raising money. This has worked well for the state — the Court of Appeals is usually ranked highly in judicial surveys.

New York's elections are in the lower levels of the courts — which may not ultimately decide the big legal and policy questions for the state, but do play a critical role in any average citizen's interaction with the law. New York's judicial-political fights stand out precisely because they are not about serious policy questions. They are simply about getting what can be a plum position.

New York's judicial elections are a pure age-old battle over patronage, political power and money. In fact, the judiciary is one of the last vestiges of power left to the once mighty local political leaders.

While the laws of New York state give the voters the right to choose these judges, in practice, this power is tightly held by politicians. The Democratic and Republican parties hold primaries in each Assembly district to choose delegates to a judicial nominating convention, one in each of the 12 judicial districts, held two weeks after the primary.

The leaders select candidates at these tightly controlled nominating conventions. This extra step solves any concerns about voters mucking up the process. Since one-party domination, be it Democrat throughout New York City or Republican in parts of upstate is the rule in the vast majority of New York's electoral races, receiving the party's nomination is tantamount to winning the race.

This system was upheld by a Supreme Court vote in 2008 — though the justices were critical of the system. In his concurrence, Justice John Paul Stevens noted that “the constitution does not prohibit the legislatures from enacting stupid laws.”

The problem with this selection method is not just the quality of judges, it is that it turns the position into a cash cow for political leaders. For example, the now-convicted Clarence Norman, the former chair of Brooklyn’s Democratic party, allegedly required judicial candidates to pony up as much \$100,000 for the race. The money was allegedly given to Norman’s choice of campaign consultants, though a number of candidates complained that the money was not spent on their campaign, but rather taken effectively as a payoff.

To get the money for these expensive races, the judges have to raise it. And the people who donate are lawyers. Donors claim they don’t get a benefit out of the donations, but New Yorkers have seen enough cases of political leaders taking advantage of legal appointments to be justifiably wary of such pronouncements.

There have been numerous reports of top political leaders financially benefiting from lucrative judicial assignment, especially in the Surrogate’s Court. In 2005, Brooklyn Surrogate Court Judge Michael Feinberg was thrown out of office by the Court of Appeals for a host of financial shenanigans, including at least \$2 million in excessive fees that proved to be ruinous to unsuspecting citizens who had the misfortune of having relatives die in Kings County.

New York’s system for electing judges is in need of reform. Chief Judge Lippman’s proposal, which cleans up a big appearance of bias problem, is a great place to start.