

JUDGES, from page 4

detailed reports on each judge that include data on whether they treat parties equally regardless of race, sex or economic status; if they issue opinions in a timely manner; and a host of other pertinent criteria.

In the May primary and the November general election, Oregon voters have been asked to fill 65 judicial positions across the state, including nine in Multnomah County Circuit Court and three on the Oregon Supreme Court.

In all but five judicial races statewide, there is only one name on the ballot, and most voters know little, if anything, about the candidates and incumbents attached to those names.

If past elections predict the future, many voters will pass over them without making a mark.

Two years ago, of the more than 304,000 Multnomah County voters who returned their ballots, 47 percent did not vote in their county's lone judicial race. Judge Gregory Silver retained his position after running unopposed.

Those who do vote in judicial elections must do so relying on sparse information that's biased by nature. The Oregon Voters' Pamphlet contains a brief bio that's submitted by the candidate, and the Oregon Bar Association posts questionnaires on its website that were filled out by fewer than half the candidates this election cycle.

"An entry in a voters' pamphlet might reveal an impressive resume," said Michael O'Brien, Presiding Judge in Tigard Municipal Court, "but little additional information. A candidate can't, ethically speaking, reveal how she or he might be harsh on drug offenses or armed robberies or whatever."

No independent analysis of how Oregon's judges are performing at their jobs is made available to voters, and there is little, if any, public debate.

"The Oregon State Bar's judicial preference polls attempt to fill the gap by polling attorneys who, presumably, know the candidates and have a broader range of information about them than voters do," O'Brien said.

These polls, however, are not publicized and lack detail.

Multnomah County Circuit Court Judge Edward Jones remembers when The Oregonian used to survey the courts and publish judicial ratings, although he said the newspaper ended the practice more than a decade ago.

He thinks giving voters more information would be helpful but said figuring out how to rate a judge isn't easy. You can easily determine if they show up to work on time and sober, but measuring their love of the law and concern for the people that come before them would be difficult to determine, he said.

But elections are typically reserved for judges who have already secured a seat at the bench, because despite Oregon's judicial election system, the vast majority of Oregon's judges were not elected to their positions in the first place.

When a judge retires mid-term – and in Oregon, most do – it's the governor, not voters, who appoints their replacement.

"A big-picture drawback of that kind of system – and Oregon is not alone – is that in some states, it's a culture of judges to resign mid-term," Reddick said. "I think it tends to go against one of the values that many people see in contested elections for judges, and that

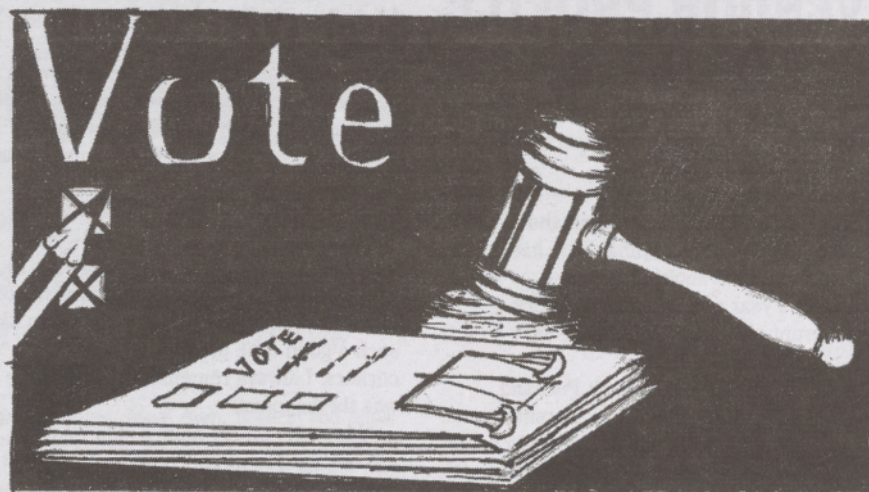


ILLUSTRATION BY APALA BARCLAY

THE O'CONNOR JUDICIAL SELECTION PLAN

Former U.S. Supreme Court Justice Sandra Day O'Connor's recommended model for selecting judges:



PHOTO BY DOUG GANSLER/WIKIMEDIA COMMONS

Sandra Day O'Connor

1. A judicial nominating commission selects candidates.
2. The governor appoints a judge.
3. Regular evaluations of the judge's performance are conducted.
4. Voters decide whether to retain the judge.

Source: Institute for the Advancement of the American Legal System

is accountability. But elections aren't providing accountability if voters don't have a choice."

Jones said most judges retire mid-term because it's a personal decision to retire, and lining that up with a six-year term isn't practical.

In recent years, about 85 percent of Oregon's state judges have been initially appointed rather than elected to their positions, according to the National Center for State Courts.

Gubernatorial appointments are preferable to judicial reform advocates – but only when they occur in partnership with a nominating commission, a process also known as merit selection.

"Merit selection is certainly one of our ideals," said Norman Turrill, president of the League of Women Voters of Oregon. "The recognition is that judges are rarely opposed on the ballot, and we think an appointed process would be better than the way we do it now," he said.

In this process, multiple office holders appoint attorneys and non-attorneys representative of the judicial district's community. That commission nominates two or three people that the governor must choose from for judicial appointment.

Missouri was the first state to implement this system about 75 years ago.

In Oregon, however, the governor is free

to make appointments based on his or her own potentially partisan and personal preference, which opens the door to nepotism and cronyism.

O'Brien suggested the governor could use the bar's preference poll to make appointments, "though there's nothing binding about that process."

Once judges are seated, voters are unlikely to remove or replace them.

Gov. Kate Brown, to date, has based all her judicial appointments on the recommendations of her judicial selection panel, although the law does not require her to do so.

This panel is assembled by the governor's office and is composed of people from a range of different legal practice areas, said Bryan Hockaday, a spokesperson for Brown.

IAALS sent Brown a letter, penned by former U.S. Supreme Court Justice Sandra Day O'Connor, shortly after she was sworn in, asking her to consider using the nominating commission process, as there was an Oregon Supreme Court vacancy at that time.

Brown's office did not reply to the letter, Reddick said.

O'Connor has made changing the way America selects its state judges her legacy project since retiring from the U.S. Supreme Court, and she has been working with the Quality Judges Initiative at IAALS to promote her judicial selection plan.

In six states, including Colorado, Alaska and Utah, all four components of the O'Connor Plan are used in the selection and retention of trial through appellate court judges, Reddick said.

First, a nominating commission selects candidates for the governor's appointment.

Once a judge is appointed, regular evaluations of their performance are conducted.

Reddick explained this is typically done by conducting surveys of attorneys, litigants, judges and others familiar with the judge's work, such as probation officers, social workers and court staff.

The judge's impartiality, clarity of communications, command of the law and procedural rules, docket management and even temperament are all examined.

A judicial performance evaluation commission analyzes the results and then makes its findings public, along with a recommendation on whether the judge should be retained.

Having this information at their fingertips helps voters make informed choices when judges are periodically up for retention election.

In these elections, the sitting judge runs uncontested, and voters are asked if they would like to keep the judge on the bench or if they would like the judge to be removed. If they vote against retaining a judge, then a replacement is appointed.

O'Connor recommends the components of her plan be written into each state's constitution, which in Oregon would have to be introduced in the Legislature and approved by a majority in both the House and the Senate.

Jones said that before he was appointed to his position on the Multnomah County Circuit Court, he was screened by the Multnomah County Bar Association and went through four rounds of interviews.

He said he hasn't seen another process for appointing judges that would work better than the system Oregon already has in place, and he isn't a fan of retention elections.

He said Oregon's judicial fitness commission is in place to make recommendations to the Supreme Court when a problem judge needs to be removed.

"Nobody other than the governor can make you a judge, but lots of people have the power to prevent you from being a judge," he said of the selection process.

"The real problem with retention hearings is: Who are you running against?" he said.

He acknowledged that elections are susceptible to campaign finance influences but said he didn't think a different judicial selection process would prevent that.

Carolyn Tyler, IAALS spokesperson, said that in the six states that have implemented the O'Connor Plan, including judicial performance programs, "we've not seen high-dollar anti-retention campaigns."

"However," she said, "there are 13 additional states that also have retention elections – either in conjunction with a merit selection process or contested elections. Some of these states have seen isolated instances of high-dollar anti-retention campaigns based on particular decisions or overall perceived ideologies. ... But generally speaking, retention elections are less politicized than contested elections."

The Center for Public Integrity and Public Radio International gave Oregon a D grade for judicial accountability in 2012, but making changes to the state's judicial processes is not an issue any organization has championed in recent years.

"There have been occasional discussions about looking at our selection process, but it's been a long time since those discussions have picked up steam in Oregon," Oregon State Bar spokesperson Kateri Walsh said in an email. "If a serious proposal were to take shape, I'm certain the OSB would be involved in those discussions and would be evaluating the proposal on its merits."

She said the bar considers the existence of a fair and impartial judiciary independent of the political pressures of the other two branches to be foundational to a strong justice system. But, she said, Oregon has been fortunate in that its courts have been "widely regarded as healthy and functional."

O'Brien agreed. "My overall experience suggests Oregon's judges function in a nonpartisan way," he said. "I haven't seen much evidence of appointment based on cronyism or special interest, though I'm sure it exists to some degree."