

Justice at Stake



January 27, 2016

The Honorable Brent Steele
Chair
Senate Judiciary Committee
Indiana State Senate
200 W. Washington St.
Indianapolis, IN 46204

The Honorable R. Michael Young
Ranking Member
Senate Judiciary Committee
Indiana State Senate
200 W. Washington St.
Indianapolis, IN 46204

Dear Chairman Steele and Ranking Member Young:

On behalf of Justice at Stake, a national, nonpartisan organization that works to protect state courts from partisan politics and special-interest pressure, I write to urge you to replace Senate Bill (SB) 352 with a proposal that creates a well-designed merit selection system informed by Indiana's system of choosing its appellate judges, as well as by St. Joseph and Lake Counties' unique judicial selection systems. These models have helped promote those values most crucial to the fair and impartial operation of state courts: quality, transparency, diversity, and accountability.

All across the country, a new culture of judicial politics has emerged. State courts, the institutions whose legitimacy is most reliant on public confidence, have been undermined by record-shattering contributions to judicial candidates, unprecedented influence from outside organizations such as Super PACs and 501(c)(4) organizations, and alarming instances of political intimidation and politicization from the executive and legislative branches. State courts serve citizens best when judges are accountable to the Constitution, the Bill of Rights, and the law – not to politicians or politics. As Chief Justice John Roberts wrote last year in *Williams-Yulee v. The Florida Bar*,¹ judges are not politicians, and they must be insulated from political pressures that reduce their ability to be fair and impartial.

I am concerned that the judicial selection structure proposed by SB352 would endanger the fairness and impartiality of Marion County judges. Under the bill's

¹ 575 U.S. ____ (2015).

current design, Marion County judges would be selected by members of the Indiana legislature who represent the county. (Though legislators would make up only half of the nominating commission created under SB352, the bill designates legislators as Chair and Co-Chair of the commission, effectively putting the legislative branch in charge of the process.) This arrangement raises serious separation of powers issues, threatening to undermine the balance of power created by the Appointments Clause of the Indiana Constitution.

This is especially concerning given the jurisdiction of Marion County's courts. As these courts rule on statewide policy matters – be it insurance company liability or the Religious Freedom Restoration Act – their decisions affect Indiana's entire population. Granting this expansive power to a select few legislators would give those legislators disproportionate influence over statewide policy, and creates a function of the legislature that is without parallel in Indiana government.

A Well-Designed Merit Selection System Promotes Fairness and Impartiality

Some of the best appellate court systems in the country, including Indiana's, utilize merit selection systems. This is because they increase public confidence in courts, protect judicial independence, and promote diversity on the bench. Under a well-designed merit selection system, a nonpartisan nominating commission—typically made up of lawyers and non-lawyers—helps to select new judges. These commissions review judicial applicants for quality, including applicants' knowledge of the law, professional experience, integrity, and reputation in the community. The commission, importantly, does not consider whether the applicant has friends in high political places. After the commission has reviewed each applicant, it sends its top choices, typically three, to the governor, who looks over the three remaining candidates before choosing one to put on the bench.

A version of this system has been successful in St. Joseph County, where applicants for a vacancy are reviewed by a committee made up of three elected attorneys, three citizens, and a justice of the Indiana Supreme Court. The committee then sends the top candidates to the governor for appointment.

A Well-Designed Merit Selection System Promotes Public Confidence

When judges are appointed by specific legislators, the impartiality of their rulings may come under scrutiny. A well-designed merit selection system reduces the role of politics while promoting transparency and ensuring broad, nonpartisan participation. It is an established best practice that is designed to ensure a quality judiciary that enjoys the public's trust and confidence. A well-designed merit system would boost the people of Marion County's confidence in their courts, because it would remove the appearance of impropriety inherent in having judges beholden to the very

legislators who put them in office (or to political parties, as under the previous system).

A Well-Designed Merit Selection System Promotes Judicial Independence

A well-designed merit system helps ensure fair and impartial courts by allowing judges to make decisions based on the facts and the law, rather than public opinion. Moreover, a merit system that is informed by judicial performance evaluations—assessments that cover criteria such as judicial competence, knowledge of the law, integrity, and administrative efficiency—would add additional mechanisms for ensuring accountability. In St. Joseph County, for example, the St. Joseph County Bar Association surveys its members each year, who are asked to critique the judges on a variety of matters, and then makes the results available to the public.

A Well-Designed Merit Selection System Promotes Diversity

Provisions that support diversity on the bench, such as the diversity provisions used in Lake County regarding both commission members and applicants, support equal access to justice, enhance and enrich judicial decisionmaking, and build confidence in court systems. A well-designed merit selection system requires diversity among members of the commission who evaluate judicial applicants, and charges these commission members with recruiting a diverse pool of applicants. Some states using merit selection have included laws that require the makeup of these commissions to be reflective of a state's racial, gender, and geographic diversity. Other states require that the commission consider the racial, gender, and geographic diversity of the community when choosing the applicants they send on to the governor.

Altogether, courts exist to protect the rights of the people, and a judiciary free from political restraints is crucial to ensuring public confidence, judicial independence, and diversity on the bench. SB352, in its current form, will jeopardize the ability of Marion County's judges to remain fair and impartial. I urge you to instead consider a well-designed merit selection system informed by Indiana practices that promotes those values most crucial to state courts: quality, transparency, diversity, and accountability.

Respectfully,

Debra Erenberg
Director of State Affairs