TO: SPECIAL COMMITTEE ON JUDICIARY

FROM: F. JAMES ROBINSON, JR.
KANSAS BAR ASSOCIATION

DATE: OCTOBER 1, 2019

RE: JUDICIAL SELECTION IN KANSAS

Chairperson Rucker, Chairperson Patton, members of the committee, we thank you for the opportunity to appear today and comment on your review of judicial selection process in Kansas. I am here today for the Kansas Bar Association.

If those who select judges for our highest courts are knowledgeable and insulated from partisan politics, focus on professional qualifications, and are guided by proper rules and procedures, they will choose good judges.

History of Judicial Selection

Before charting a course for the future, we must have a clear understanding of the past. Several times since the state's founding, Kansans have had to rethink how to select Kansas Supreme Court justices. Early in this nation's history, governors and legislators chose state court judges. Concerns that some judges received their judicial appointments as a reward for their previous work for political elites, party machines, and special interests led reformers around the time of Kansas' statehood to propose judicial elections.[1] The first Kansans preferred non-partisan judicial elections, while allowing the governor to appoint judges to fill vacancies. Early in the 20th century Kansans switched to partisan elections, but a few years later switched back to non-partisan elections. However, critics were not convinced that non-partisan elections cured the problems plaguing partisan elections. Political parties continued to play a role in selecting and supporting candidates.[2]

During the mid-part of the 20th century political scandals in some states prompted reformers to move to a system using independent non-partisan nominating commissions. First adopted in Missouri in 1940 after Missouri courts fell victim to the control of machine politics by notorious Democratic Party boss Tom Pendergast, merit selection was created as a means for selecting judges based on their professional qualifications and experience, not on their politics.[3]

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[1] Jeffrey D. Jackson, "The Selection of Judges in Kansas: A Comparison of Systems," *Journal of the Kansas Bar Association* 32, 33-34 (January 2000).
[2] *Id.*
[3] Rachel Paine Caufield, "Article and Response: What Makes Merit Selection Different?," *Roger William University Law Review* 765, 776-69 (Fall 2010).

Kansas was the second state to adopt the Missouri Plan. In 1956, the Republican party was deeply divided. Republican Governor Fred Hall lost the party nomination to Warren Shaw. Democratic candidate George Docking defeated Shaw in the general election. Chief Justice Bill Smith was Hall's political ally. Smith was ill and wanted to retire but could not countenance an appointee by a Democratic governor. Hall negotiated a scheme to retire Smith. Smith retired on December 31. Hall resigned on January 3. Lieutenant Governor John McCuish held office for eleven days before Docking's inauguration. McCuish's only official act was to appoint Hall as Chief Justice of the Kansas Supreme Court.[4]

That scandal prompted super-majorities in the House and the Senate to approve a constitutional amendment establishing merit selection based on the "Missouri Plan." Those who favored the move argued the Missouri Plan would lead to better qualified justices than in contested elections. Also, they believed the Plan would more effectively free judges from political pressure and influence. A Kansas Chamber of Commerce brochure[5] from the 1958 campaign for merit selection argued:

> **What's Wrong with Electing Judges?** First, the partisan elective process puts the judiciary into politics. Candidates for legislative or executive offices may run on the basis of advocacy of certain policies; a judge should have no policy other than to administer the law honestly and competently. Judges should not be influenced by political alliances or political debts.

Kansas voters in 1958 overwhelmingly amended the Constitution to provide for merit selection.[6]

Unlike the Kansas Supreme Court, which was created by the Kansas Constitution, the Kansas Court of Appeals was created by statute. The selection process for its judges was amended in 2013 to allow the Governor, with the consent of the Senate, to appoint a judge to fill a vacancy.

Today, 34 states and the District of Columbia use a commission as part of the selection process for at least some of their high court judges.[7]

A May 2019 study of nominating commissions by the Brennan Center for Justice at New York University School of Law finds that while "the work of commissioners varies only slightly from state to state," the composition and selection of commission

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[4] *Id.* at 772.

[5] *Id.* (quoting brochure).

[6] Jackson, note 1, 34.

[7] American Judicature Society, http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf.

members vary among the states.[8] See Appendix. Governors appoint a majority of commissioners in 15 of the 35 commission jurisdictions. In 16 commission states no single authority appoints a majority of commissioners. In 26 jurisdictions, lawyers comprise a majority of commissioners, even though only 15 states require lawyer majorities. Nonlawyer commissioners comprise a majority of commissioners in just 6 states, and half of the seats in 3 states. Nearly two-thirds of the nonlawyer commissioners come from either private industry or the legislative or executive branches of government.[9]

No state has *ever* moved away from a constitutionally based merit selection process. Indeed, in 2012, voters in Arizona, Florida, and Missouri, by wide margins, rejected efforts to move away from merit selection.[10]

The Kansas Supreme Court Nominating Commission and Retention Elections

Article 3, Section 5 of the Kansas Constitution, as amended in 1958, provides for the non-partisan Kansas Supreme Court Nominating Commission. The Commission has 9 members. The Chair is an attorney who is selected based on a vote of licensed Kansas attorneys. One member from each congressional district is an attorney who is elected by the licensed attorneys in that district. One non-attorney member from each congressional district is appointed by the Governor.

The Commission's composition ensures a balance between professional assessment of an applicant's legal ability and the voice of citizens. Lawyer members understand the work of courts, can critique the applicant's written materials, and are aware of the specialized knowledge and experience needed to serve as a judge. Citizen members appointed by the Governor provide public input, ensure accountability, and lend credibility and legitimacy to the process.

The rule governing the Commission's makeup that denies the Governor the right to select a majority of the Commission's members is designed to reduce political influence on the Commission. The Brennan Center's study of nominating commissions finds that governors are likely to appoint commissioners "whose judgment they trust and with whom they share values or political preferences."[11]

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[8] Douglas Keith, *Judicial Nominating Commissions: An analysis finds that despite varying methods of selecting them, state commissioners are almost uniformly professionally homogeneous* (Brennan Center May 29, 2019), https://www.brennancenter.org/publication/judicial-nominating-commissions.
[9] *Id.*
[10] https://ballotpedia.org/Arizona_Judicial_Selection_Amendment,_Proposition_115_(2012); https://ballotpedia.org/Florida_Supreme_Court,_Amendment_5_(2012); https://ballotpedia.org/Missouri_Judicial_Appointment_Amendment,_Amendment_3_(2012).
[11] Keith, note 8, at p. 4.

Recently, in Iowa and Florida, where the governor in each state appoints all the commissioners, the governors have "come under fire for appointing political allies and donors to their states' nominating commissions."[12] In Florida, the current governor is accused of interfering with the commission by insisting that one of the applicants be presented to him for consideration.[13] Also, editorials have criticized the Florida governor for elitism and playing politics with the commission.[14] In Iowa, the governor appointed her father to the commission.[15]

The Brennan Center study concludes, "power concentrated in the hands of one official makes it more likely that the commission will merely ratify that official's preferences. Conversely, a mix of appointing authorities reduces the chance that a single political agenda will drive the commission's work."[16]

Political scientist Greg Goelzhauser also has studied nominating commissions. His recent book, *Choosing State Supreme Court Justices: Merit Selection and the Consequences of Institutional Reform,* concludes, "[a]n analysis of the backgrounds of supreme court justices found that states using nominating commissions are less likely to have justices with ties to major political offices (such as former aides to the governor or state legislators) than states using an appointment system without nominating commissions, suggesting that nominating commissions do constrain the governor in appointing political allies."[17]

As for the Nominating Commission's work, its members screen and vet prospective justices based on qualifications, not party affiliation or connection. The commission presents a slate of three nominees to the Governor, who must choose one.

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[12] *Id.*

[13] Gary Fineout, "DeSantis admin strong-arms judicial pick — South Florida congresswoman wants impeachment inquiry — Florida timber owners rethink their future," *Politico* (June 24, 2019) https://www.politico.com/newsletters/florida-playbook/2019/06/24/desantis-admin-strong-arms-judicial-pick-south-florida-congresswoman-wants-impeachment-inquiry-florida-timber-owners-rethink-their-future-449855.

[14] Editorial, "Florida's sham: Governors are rigging courts through 'partisan litmus tests,'" *Orlando Sentinel* (July 3, 2019), https://www.orlandosentinel.com/opinion/guest-commentary/os-op-florida-governors-rigging-courts-desantis-20190703-ewczebk4zzeexgxieijcvxyqgq-story.html; Editorial, "Gov. Ron DeSantis stiffs Florida Bar to stack courts with hard-right judges," South Florida Sun-Sentinel (August 14, 2019), https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-desantis-judges-20190814-tfpq5h5cbfextaragehnlcpji4-story.html ("The news is not good for people who believe Florida's courts need to be something more than extensions of the governor's office.").

[15] Todd Magel, "Critics denounce Reynolds' decision to appoint farther to panel that vets judges," *KCCI Des Moines*, May 2, 2018, http://www.kcci.com/article/critics-denounce-reynolds-decision-to-appoint-father-to-panel-thatvets-judges/20128272.

[16] Keith, note 8, at p. 4

[17] Greg Goelzhauser, *Choosing State Supreme Court Justices: Merit Selection and the Consequences of Institutional Reform* (Temple University Press, 2016), 57-58.

Retention elections are an important part of merit selection. Unlike the federal process, Kansas does not grant lifetime judgeships. A Kansas Supreme Court justice serves a 6-year term. As the justice's term is nearing the end, the justice is on the ballot in an unopposed "yes-or-no" retention election.

Retention elections were intended to give the people a voice in whether a state court judge deserved another term without the bruising characteristics of political attacks, partisan tactics, and competitive contests.[18] These elections sought to evaluate a judge based on his judicial performance—has the judge committed a serious ethical indiscretion, or is the judge incompetent?—not the popularity of a single decision or whether the judge is too "conservative" or too "liberal."[19] Merit elections sought to remove partisan politics and special interests from the election process.[20] Most importantly, they sought to insulate judges from shifts in public opinion that can undermine the consistency and fairness in the law. Judicial retention elections, then, were never meant to serve as a tool for judicial intimidation or payback for an unpopular, but legally sound, decision.

Even so, Kansas' merit selection system cannot ensure the total elimination of politics from the process. However, having an independent non-partisan commission select nominees for the governor's consideration removes a threat to the fairness and impartiality of the judiciary. A justice, after all, should not owe his or her position to a governor who made the appointment as a reward for political accomplishments. And justices should not make promises the way politicians do. Their job is to remain impartial: to decide cases based on the law and the facts. Also, they must be free enough to make unpopular decisions while applying the law, doing justice, and respecting an individual's rights.

The greatest political vulnerability in the merit selection system is the retention election. Even so, those elections subject justices to less political pressure than either contested partisan elections or political appointments. If a justice is ousted in a retention election, the Nominating Commission starts the process of taking applications and vetting applicants.

Merit selection was originally championed by business interests and the legal profession. The U.S. Chamber of Commerce's Institute for Legal Reform issued a report in 2009, and a second edition in 2016, *Promoting Merit in Merit Selection: A Best Practices Guide to Commission-Based Judicial Selection,* advocating for merit selection systems with meaningful public participation.

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[18] Todd E. Pettys, "Judicial Retention Elections, The Rule of Law, and the Rhetorical Weaknesses of Consequentialism," 60 *Buffalo Law Review* 69, 74 (2012).

[19] *Id.*

[20] Traciel V. Reid, "The Politicization of Retention Elections: Lessons Learned from the Defeat of Justices Lamphier and White," 83 *Judicature* 68, 69 (1999).

A strong scholarly view supports merit selection.[21]

As for Kansas voters, in the most recent available poll in 2015 by 20/20 Insight LLC of likely Kansas voters, 46% of whom voted for Sam Brownback and 44% of whom voted for Paul Davis in the 2014 general election, 53% favored merit selection, 27% opposed merit selection, and 20% were undecided. 76% opposed changing the Constitution to allow selection by the Governor and confirmation by the Senate, 14% favored the change, and 10% were undecided.[22] See Appendix.

Answering the Critics

Some critics argue our merit process is undemocratic. But they fail to recognize that merit selection was approved by super-majorities in the legislature and an overwhelming popular vote on the heels of a major political scandal. Having a process for the Kansas Supreme Court that focuses on an applicant's fairness and impartiality, rather than politics or popularity, is an important consideration in selecting justices.

Some critics prefer the Washington model for selecting justices—one where the Governor appoints the justice (without the benefit of a nominating commission) and the Senate confirms the appointment. But the Washington model has its own set of problems.

The Washington model is not as transparent as the *current* Nominating Commission's processes. The Commission's application form is available to the public. When a vacancy occurs, the Commission advertises the application process. The Commission publishes the names of all applicants and it releases to the public

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[21] See for example, Nuono Garoupa and Tom Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence," 57 *American Journal of Comparative Law* 103, 104 (Winter 2009) (noting a "growing scholarly consensus in favor of 'merit selection"); Malia Reddick, "Merit Selection: A Review of the Social Scientific Literature," 106 *Dickerson Law Review* 729 (2002) (providing summary of empirical evidence); Malia Reddick, "Judging the Quality of Judicial Selection Methods: Merit Selection, elections, and Judicial Discipline," (American Judicature Society 2010), available at http://www.judicialselection.com/uploads/documents/Judging_the_Quality_of_Judicial_Sel_8EF0DC3806ED8.pdf; Joseph A. Colquitt, "Rethinking Judicial Nominating Commissions: Independence, Accountability and Public Support," 34 *Fordham Urban Law Journal* 78 (2007); Rachel Caufield, "Inside Merit Selection: A National Survey of Judicial Nominating Commissioners" (American Judicature Society 2012) available at http://www.judicialselection.us/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pdf.

[22] 20/20 Insight LLC, Kansas Likely Voters, Feb 26-Mar 1, 2015, available at https://www.brennancenter.org/sites/default/files/2015%202020%20Insight%20Kansas%20Poll.pdf

portions of the applicants' applications. The Commission conducts public interviews. It publishes guidelines for the interviews and uses a statutorily mandated yardstick by which to measure applicants. The Commission then publishes the names of the three nominees when it sends those names to the Governor.

By contrast, under the Washington model, the public learns who the Governor appointed, but the Governor is not required to say who were considered for the seat, what the appointee or the Governor discussed during the interview, or what yardstick the Governor used to measure the appointee. On this score, the Commission's process is far more transparent than the Washington model.

The Washington model that appoints judges for life does not provide the same accountability measures as the merit selection process. In Kansas, retention elections allow for the removal of justices who do not meet fixed standards for job performance or ethics and assure keeping justices who properly perform their duties.

Further, the Washington model opens the door to political appointments leading to the circus-like atmosphere of recent notable confirmation hearings. For those who think the states are immune from such antics, they need look no further than the recent 6 years-long battle in New Jersey to confirm Governor Chris Christie's appointments to the New Jersey Supreme Court. See Appendix for a more complete discussion. Connecticut has encountered a similar problem.[23] In Rhode Island, legislative confirmation has been used to extract concession on unrelated issues.[24] Political wrangling over nominees leading to long vacant judicial seats can result in excessive caseloads for those who are on the bench, causing excessive delays in deciding cases.

Some who oppose merit selection argue the Commission is an elite group controlled by lawyers favoring liberal appointees. But that charge is not based on any study assessing the structure, function, and operation of the current Nominating Commission.

Empirical evidence is hard to come by. The most comprehensive study is the *Inside Merit Selection* national survey that was published in 2012 by the American Judicature Society.[25] Professor Rachel Caufield, Ph.D. of Drake University led a team who surveyed 487 nominating commission members in 30 states, including Kansas. The study notes the non-lawyer members are "overwhelmingly" appointed by the governor while the lawyers are selected by some process involving other lawyers. The

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[23] Joseph De Avila, "Connecticut Supreme Court Nominee Is Blocked by State Republicans," *The Wall Street Journal*, March 27, 2018, https://www.wsj.com/articles/connecticut-supreme-court-nominee-is-blocked-by-state-republicans-1522186710.

[24] Scott Mackay, "Despite Reforms, Connections Can Still Lead to Judgeships," *Rhode Island Public Radio*, May 27, 2013, http://www.ripr.org/post/despite-reforms-connections-can-still-lead-judgeships#stream/0.

[25] Caufield, note 21.

study shows that lawyer and non-lawyer commission members reject political considerations as part of their deliberations. More than 73% say that party affiliation is not considered. A majority of commissioners report they are not aware of candidates' party affiliations. The survey finds, "[a]cross the board, we see consensus among survey participants that lawyer and non-lawyer members work well together and respect each other's contributions." The survey notes, "[l]awyers and non-lawyers tend to agree on the criteria for evaluation, the role of political influences, and the relationship between the governor and the Commission." The survey concludes, "[a]rguments that merit selection systems are dominated by members of the bar appear to be unfounded, based upon the evidence offered by the Commissioners themselves."[26]

For those critics who argue that only judicial elections provide democratic legitimacy, we note the framers of the U.S. Constitution set up a federal system that insulates judges, once on the bench, from political accountability. Judicial elections for state supreme courts were established many decades after the nation's founding.

A Fair and Impartial Judiciary is a Cherished Democratic Principle

By design, courts keep the government true to its Constitution. The Framers designed a democracy in which the legislative branch creates the law, which the executive branch enforces. The judicial branch's role is to interpret and apply the legislature's statutes, declare the common law, and preserve and protect the Constitution.

The Framers equipped courts to act impartially. Thomas Jefferson wrote, "[w]hen one undertakes to administer justice, it must be with an even hand, and by rule; what is done for one must be done for everyone in equal degree."[27] Retired U.S. Supreme Court Justice Sandra Day O'Connor observes the Framers founded the judiciary on the premise that "there has to be someplace where being right is more important than being popular or powerful, where fairness trumps strength. And in our country, that place is supposed to be the courtroom."[28]

Ensuring that democracy, liberty and the rule of law were not hollow promises, the Framers created a form of government aimed at avoiding the concentration of power in a single authority. They made the judiciary an institution "not under the thumb of the other branches of Government."[29] James Madison, while introducing in Congress the amendments that became the Bill of Rights, eloquently noted that the

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[26] *Id.*

[27] W. Cleon Skousen, *The Making of America*, 241 (Verity Publ.)

[28] NPR's All Things Considered, "Justice O'Connor Criticizes Campaign Finance Ruling," (January 26, 2010), https://www.npr.org/templates/story/story.php?storyId=122993740.

[29] Ruth Bader Ginsburg, "Judicial independence: The Situation of the U.S. Federal Judiciary," 85 Nebraska Law Review 1, 1 (2006).

judiciary "will be an impenetrable bulwark against every assumption of power in the Legislative and the Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[30]

Alexander Hamilton described the judiciary as the only institution that can ensure the legislature and the executive do not violate the Constitution. Hamilton argued that "there is no liberty, if the power of judging be not separated from the legislative and executive powers . . . The complete independence of the courts of justice is . . . essential . . ."[31] As Hamilton explained, if the legislature judged the validity of its own laws, then its members would substitute their will for the will of the people, noting "the courts were designed to be an intermediate body between the people and legislature, in or order, among other things, to keep the latter within the limits assigned to their authority."[32] Without judicial independence, Hamilton argued, "all the reservation of particular rights and privileges [as legal principles to the applied by courts] would amount to nothing."[33] Hamilton argued that citizens "of every description" should value judicial independence because "no man can be sure that he may not be tomorrow the victim of a spirit of injustice."[34]

The Framers thus plainly intended that judges should be free from political influence. As Hamilton noted, every care should be taken to ensure that the best qualified persons will be appointed, and that once seated the judge is expected to decide cases free from the effects of politics and the changing winds and passions of public opinion.[35]

It is also clear, then, that the Framers called on the judiciary to patrol the Constitution's legal boundaries and preserve the rule of law not because they believed judges to be wiser or smarter than those in the government's other branches; rather, the Framers believed that allowing the other branches to police themselves was too dangerous.[36]

Jurists, performing their basic role in American democracy, have throughout this country's history required the other branches to take unpopular actions such as desegregating schools or mandating certain minimum standards for prisons. Often politicians have enough respect for courts that they are circumspect in their statements about unpopular decisions. Most politicians understand the value to the democracy of accepting decisions from the highest courts, even those they think are wrong. Former U.S. Supreme Court Justice John Paul Stevens warns that,

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[30] James Madison, Speech to the House of Representatives (June 8, 1789), *in the Mind of the Founder*, 210, 224 (Marvin Meyers ed., 1973).
[31] The Federalist No. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] Stephen Breyer, *Making Our Democracy Work*, 6-8, 215 (2010).

"[d]isciplining judges for making an unpopular decision can only undermine their duty to apply the law impartially."[37] Preserving a high level of confidence in courts should be, as Justice Anthony Kennedy has noted, "a state interest of the highest order."[38]

Conclusion

Retired Justice O'Connor observes, "[l]ike democracy itself, merit selection relies on a wide-angle view of our nation's goals for its people and produces a systemic superiority that safeguards our most precious baseline values."[39]

No selection method is perfect. Even so, the Commission uses a balanced, rigorous, and transparent process, in which the qualifications of the applicants are the determinative factor. That process continues to select highly qualified, non-partisan, fair and impartial Supreme Court justices. There is no compelling reason for Kansans to rethink their constitutionally based merit selection process

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[37] John Paul Stevens, "Should We Have a New Constitutional Convention?," *New York Review of Books* (October 11, 2012), https://www.nybooks.com/articles/2012/10/11/should-we-have-new-constitutional-convention/?pagination=false

[38] *Republican Party of Minnesota v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

[39] Sandra Day O'Connor, "Reflections on Arizona's Judicial Selection Process," 50 *Arizona Law Review* 15, 24 (Spring 2008).

Appendix

- Biography of Forrest James Robinson, Jr.

- The Standoff Between New Jersey Governor Chris Christie and the New Jersey Senate Over Confirmation of Nominees to the Supreme Court of New Jersey

- 20/20 Insight LLC, Kansas Likely Voters, Feb 26-Mar 1, 2015, available at https://www.brennancenter.org/sites/default/files/2015%202020%20Insight%20Kansas%20Poll.pdf

- Brennan Center for Justice, *Rethinking Judicial Selection in State Courts*

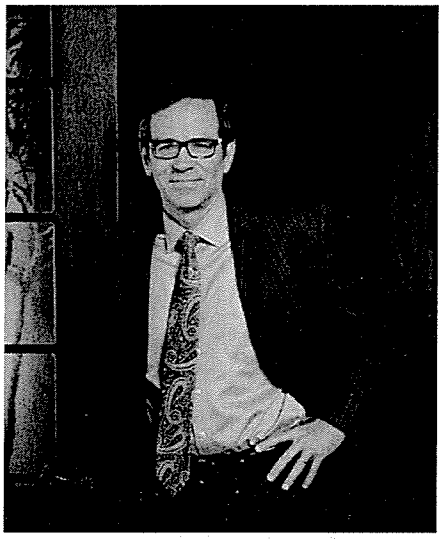
- Rachel Caufield, "Inside Merit Selection: A National Survey of Judicial Nominating Commissioners" (American Judicature Society 2012) available at http://www.judicialselection.us/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pdf.

- Brennan Center for Justice, *Choosing State Judges: A Plan for Reform*

- Douglas Keith, *Judicial Nominating Commissions: An analysis finds that despite varying methods of selecting them, state commissioners are almost uniformly professionally homogeneous* (Brennan Center May 29, 2019), https://www.brennancenter.org/publication/judicial-nominating-commissions

- *SYMPOSIUM: Merit Selection: A Review of the Social Scientific Literature*

Forrest James Robinson, Jr.



Forrest James "Jim" Robinson, Jr. is a business litigation partner in the law firm of Hite, Fanning & Honeyman, L.L.P., in Wichita, Kansas. He received degrees from Southwestern College (1980) and the University of Kansas School of Law (1983).

He is listed in *Best Lawyers in America* in the areas of "bet-the-company litigation," "commercial litigation" and litigation—banking and finance" and is recognized in 2019 as "Lawyer of the Year" in "bet-the-company litigation in Wichita." He is recognized by *Chambers, U.S.A.*, as a Tier One lawyer in Kansas commercial litigation, *Benchmark Litigation* as a "Litigation Star in Kansas" and is included in Missouri and Kansas *Super Lawyers* editions from 2008-2019.

He has held leadership positions in Wichita Bar Association (WBA) (Board of Governors, 2010-2012; Chair, Legislative Committee, 2008-2014; Past Chair, Professionalism Committee); Kansas Bar Association (KBA) (Chair, Legislative Committee, 2014-2018), Kansas Association of Defense Counsel (KADC) (President, 2011; Board of Directors, 2004-2015; Chair, Legislative Committee, 2006-2014); and Defense Research Institute (DRI) (Kansas State Representative, 2012-2015; DRI Center for Law and Public Policy's Judicial Task Force 2015-present, and Issues and Advocacy Committee 2015-present).

In 2018, he was appointed by the Kansas Supreme Court to serve as a member of the Kansas Judicial Council.

He serves as a member of the Executive Committee of the Lawyer's Committee of the National Center for State Courts in Washington D.C. and the National

Advisory Committee of the National Association of Women Judge's "Informed Voter's—Fair Judges" Project.

He has received a Champions of Justice Award from Kansas Appleseed (2018); Liberty Bell Award from the Thirteenth Judicial District Bar Association (2018); William H. Kahrs Lifetime Achievement Award from KADC (2017); Philip H. Lewis Medal of Distinction from KBA (2017); Howard C. Kline Distinguished Service Award from the WBA (2016); Kevin Driscoll Outstanding State Representative Award from DRI (2015); Distinguished Service Award from KBA (2014); Distinguished Service Award from Kansas Association for Justice, now known as the Kansas Trial Lawyers Association (2013); President's Award from WBA (2009, 2014); Distinguished Service Award from KADC (2007); and the F. James Robinson Silver Helmet Award for legislative work from KADC (2006, 2009, 2013).

In November 2018, he was inducted into the National Center for State Courts' Warren E. Burger Society. The Burger Society honors individuals who have demonstrated an exemplary commitment to improving the administration of justice.

In 2002, he received the National Award for Board Leadership from Child Welfare League of America.

He is a member of the Social Sciences Hall of Fame at Southwestern College (2009).

He has written or co-authored numerous articles, including Hon. Barbara J. Pariente & F. James Robinson, Jr., *A New Era for Judicial Retention Elections: The Rise of and Defense Against Unfair Political Attacks*, 68 FLA. L. REV. 1529 (2016).

Jim is married to Jennifer Robinson and they have three children.

The Standoff Between New Jersey Governor Chris Christie and the New Jersey Senate Over Confirmation of Nominees to the Supreme Court of New Jersey

New Jersey uses the Washington model to select justices to the Supreme Court of New Jersey. Justices are nominated by the Governor and confirmed by the Senate. By tradition, the 7-member court has 4 members of either the Democratic Party or Republican Party and 3 of the other. Usually the balance has been 3 Republicans and 3 Democrats, with the chief justice belonging to the party of the appointing governor. A justice serves a 7-year term, after which the Governor customarily re-nominates a justice in good standing, despite ideological differences, and once confirmed can serve until the mandatory retirement age of 70.[1]

From 2010 until 2016, New Jersey's Republican Governor Chris Christie was in a standoff with the Democrat controlled New Jersey Senate over confirmation of the governor's appointees to the Supreme Court of New Jersey.[2] This left longstanding vacancies with temporary judges filling in.[3]

On May 3, 2010, Christie broke with tradition by applying a political litmus test to justices and deciding not to re-nominate Justice John E Wallace, Jr., the only African-American member of the court and a Democrat. Wallace was the first justice to be denied tenure since the adoption of the 1947 State Constitution. Christie then nominated attorney Anne M. Patterson, a Republican.[4] Senate Majority Leader Stephen Sweeney refused to consider any nominee to Wallace's seat, insisting that by tradition the seat belonged to a Democrat.[5]

Because of the impasse' between Sweeney and Christie, in September 2010, the Chief Justice, exercising his constitutional power to make temporary assignments

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[1] *Judicial Selection in the States: New Jersey,* American Judicature Society, http://www.judicialselection.com/judicial_selection/index.cfm?state=NJ

[2] Maygar, "Christie's Judicial Shuffle Escalates Supreme Court Battle," *N.J. Spotlight*, August 13, 2013, https://www.njspotligh.com/2013/08/13-08-13-christie-s-judicial shuffle-escalates-supreme-court-battle/

[3] Aron, "Supreme Court Still On Standoff Over Appointments," *NJTV News* (December 26, 2013) https://www.njtvonline.org/news/video/supreme-court/; Rizzo, "Reacting to Christie, NJ lawyers call for constitutional amendment to protect judges," *The Star-Ledger* (April 11, 2014), https://www.nj.com/politics/2014/04/reacting_to_christie_nj_lawyers_call_for_constitutional_amendment_to_protect_judges.html#incart_flyout_politics.

[4] Editorial, "The Politicization of a Respected Court," *The New York Times* (December 16, 2010) https://www.nytimes.com/2010/12/16/opinion/16thurs3.html?ref=opinion; Love, "Ouster of a black judge is linked to Christie's Bridgegate," *The Grio.* (January 14, 2014), https://thegrio.com/2014/01/14/ouster-of-a-black-judge-is-linked-to-christies-bridgegate/

[5] "Justice John E. Wallace OUSTED: Anne M. Patterson Picked to Replace Only Black Justice On NJ Supreme Court By Chris Christie," *The Huffington Post* (July 5, 2010), https://www.huffpost.com/entry/justice-john-e-wallace-ou_n_562640?guccounter=1

when necessary, temporarily assigned judge Edwin H. Stern to the Court.[6] By December 2010, Justice Roberto Rivera-Soto, a Republican, was refusing to cast votes or write opinions as long as temporary judge Stern remained on the court. Rivera-Soto believed the Chief Justice lacked the power to make the temporary assignment. There were calls for Rivera-Soto's resignation.[7] In January 2011, Rivera-Soto told Christie he did not want to be re-nominated.[8]

In May 2011, Christie and Sweeney reached a deal.[9] Justice Roberto Rivera-Soto announced he would retire when his term expired in September 2011. Christie and Sweeney agreed that previously rejected nominee Patterson would replace Rivera-Soto. The Senate confirmed Patterson and she was sworn in on September 1, 2011.[10] Wallace's seat was still open.

In June 2011, the Chief Justice temporarily assigned judge Dorothea Wefing to fill the spot on the bench vacated by temporary judge Stern, who had reached the mandatory retirement age.[11]

On January 23, 2012, Christie nominated Bruce Harris and Philip Kwon.[12] In March 2012, Kwon's nomination was rejected by the Senate Judiciary Committee.[13] In May 2012, the Judiciary Committee rejected Harris' nomination.[14]

In October 2012, judge Mary Catherine Cuff was temporarily assigned to the Court to replace temporary judge Wefing, who had retired. Before the assignment the

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[6] Ackerman, "A political fight provides N.J. Supreme Court with apolitical legal mind," *The Star-Ledger* (October 24, 2010), https://www.nj.com/news/2010/10/a_political_fight_provides_nj.html.

[7] Editorial, "Time for Justice Rivera-Soto to resign," *The Star-Ledger* (December 14, 2010), https://www.nj.com/njv_editorial_page/2010/12/post_14.html.

[8] Magerian, "N.J. Supreme Court Justice Roberto Rivera-Soto tells Gov. Christie he doesn't want to be renominated," *The Star-Ledger* (January 3, 2011), https://www.nj.com/news/2011/01/nj_supreme_court_justice_rober.html

[9] "N.J. lawmakers strike deal to advance state Supreme Court nomination," *The Star-Ledger* (May 2, 2011), https://www.nj.com/news/2011/05/nj_lawmakers_strike_deal_to_ad.html

[10] Gibson, "N.J. Senate approves nomination of Anne Patterson to state Supreme Court," *The Star-Ledger* (June 27, 2011), https://www.nj.com/news/2011/06/nj_senate_approves_nomination.html; *Spotto,* "Anne Patterson sworn in to N.J. Supreme Court," *The Star-Ledger* (September 9, 2011), https://www.nj.com/news/2011/09/anne_patterson_sworn_in_as_new.html

[11] Spotto, "Appellate judge appointed temporary N.J. Supreme Court justice," *The Star-Ledger* (June 11, 2011), https://www.nj.com/news/2011/06/apellate_judge_dorothea_wefing.html.

[12] "Gov. Christie nominates two for state Supreme Court, including gay African-American mayor," *The Star-Ledger* (January 23, 2012), https://www.nj.com/news/2012/01/gov_christie_nominates_two_for.html

[13] Baxter, "In rejecting Supreme Court nominee Phillip Kwon, Dems send Gov. Christie a message," *The Star-Ledger* (March 25, 2012), https://www.nj.com/news/2012/03/in_rejecting_supreme_court_nom.html

[14] Celock , "Chris Christie, Stung By New Jersey Supreme Court Nominee Defeat, Attacks Democratic Lawmakers," *The Huffington Post* (May 31, 2012), https://www.huffpost.com/entry/chris-christie-new-jersey-supreme-court-nominee_n_1560938

7-member court had been operating with 6 justices, including Wefing.[15] Also, judge Ariel Rodriguez was temporarily assigned to the Court to fill the seat of Justice Virginia Long, who had retired on March 1, 2012.[16]

In December 2012, Christie nominated David F. Bauman and Robert Hanna.[17] Hanna received no confirmation hearing. In January 2014, Christie withdrew the nomination.[18] Also, Bauman received no confirmation hearing.[19]

In August 2013, Christie decided to not re-nominate Helen E. Hoens for lifetime tenure.[20] Hoens then stepped down creating a third vacancy on the Court. Christie nominated Faustino J. Fernandez-Vina on September 30, 2013 to replace Hoens. Fernandez-Vina was confirmed by the Senate and sworn on November 19, 2013.[21]

In May 2014, Christie struck a deal with Senate President Sweeney. Christie would re-nominate Chief Justice Stuart Rabner. Sweeney agreed to support the nomination of Lee Solomon, even though the Senate had previously twice rejected Solomon.[22] Both Rabner and Solomon were confirmed on June 19, 2014.[23] Solomon then replaced temporary judge Rodriguez, who retired.

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[15] Campisi, "N.J. Supreme Court appoints 2 temporary lower court judges," *northjersey.com* (September 4, 2012), http://www.northjersey.com/news/NJ_Supreme_Court_appoints_2_lower_court_judges.html.

[16] *Id.*

[17] Portney, "Christie introduces 2 new nominees for N.J. Supreme Court," *The Star-Ledger* (December 11, 2012), https://www.nj.com/politics/2012/12/christie_press_conference.html

[18] Rizzo, "Chris Christie, facing resistance, drops N.J. Supreme Court nominee," *The Star-Ledger* (January 3, 2014), https://www.nj.com/politics/2014/01/christie_facing_resistance_drops_nj_supreme_court_nominee.html

[19] Magyar "Christie's Judicial Shuffle Escalates Supreme Court Battle," *NJ Spotlight* (August 13, 2013), https://www.njspotlight.com/2013/08/13-08-13-christie-s-judicial-shuffle-escalates-supreme-court-battle/

[20] Rizzo, "Supreme stunner: Christie declines to nominate Justice Hoens for lifetime tenure," *The Star-Ledger,* (August 13, 2013), https://www.nj.com/politics/2013/08/supreme_stunner_christie_declines_to_nominate_justice_hoens_for_lifetime_tenure.html

[21] Sapone, "Fernandez-Vina takes the oath and dives into cases at N.J. Supreme Court," *The Star-Ledger (November 19, 2013)* https://www.nj.com/politics/2013/11/fernandez-vina_takes_the_oath_and_dives_into_cases_at_nj_supreme_court.html

[22] Friedman, "Christie brushes off criticism for re-nominating Rabner as NJ Supreme Court chief justice," *The Star-Ledger* (May 21, 2014), https://www.nj.com/politics/2014/05/christie_anounces_compromise_to_re-nominate_stuart_rabner_as_chief_justice_of_nj_supreme_court.html.

[23] Rizzo, "NJ Senate confirms Rabner, Solomon for state's highest court," *The Star-Ledger* (June 19, 2014), https://www.nj.com/politics/2014/06/nj_senate_confirms_rabner_solomon_for_states_highest_court.html

In February 2016, Christie again nominated Bauman, a Republican.[24] Responding to the nomination, Sweeney said, "I will not stand for Chris Christie's repeated attempts to pack the court" and Christie's attempts "to end the 70-year tradition of partisan balance and judicial independence."[25] Sweeney refused to allow Bauman a confirmation hearing.

Christie nominated Walter F. Timpone, a Democrat, in April 2016. He was later confirmed and sworn in.[26] Judge Cuff's temporary assignment then ended.

Since Christie's refusal in 2010 to re-nominate Wallace, Sweeney repeatedly led efforts to block the governor's nominees. Sweeney argued, "[a]s Senate president, I don't get to select the governor I am going to work with, but I do get to choose who and what I fight for."[27]

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[24] "Christie names N.J. Supreme Court nominee for a second time," *The Star-Ledger,* https://www.nj.com/politics/2016/02/christie_names_nj_supreme_court_nominee_wont_take.html#incart_2box_nj-homepage-featured.

[25] Johnson, "Sweeney slaps down Christie over N.J. Supreme Court nominee," *The Star-Ledger,* https://www.nj.com/politics/2016/03/sweeney_slaps_christie_over_nj_supreme_court_nomin.html#incart_most-commented_opinion_article.

[26] "*Christie praises 'good friend' Timpone as new Supreme Court justice is sworn in,*" *The Star-Ledger,* https://www.nj.com/politics/2016/06/christie_attends_walter_timpone_swearing-in_ceremo.html#incart_river_home

[27] Johnson, note 25.

20/20insightllc

Kansas Likely Voters, Feb 26-Mar 1, 2015
898 Likely Voters, Margin of Error: 3.3% at 95% Confidence Level

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Q1 Direction of things in Kansas

LV	
28	Right Direction
64	Wrong Track
8	Not Sure

Q2 Governor Vote in 2014

LV	
44	Paul Davis, the Democrat
46	Sam Brownback, the Republican
7	Voted for Some Other Candidate
2	Refused to Say
1	Did Not Vote

Q3 Now I am going to read the names of some people and things to you and ask you to rate them on a scale of 1 to 5 using the numbers on your phone, with 1 being the worst and 5 being the best. Think of it the same way restaurants or movies are rated in the newspaper - the more stars something gets the better it is. If you've heard a name but can't rate it, that's fine, and if you haven't heard a name before, that's fine too. [1-5 Scale converted to 0-100 Temperature scale and averaged for those who can rate - 50 implies a neutral balanced rating between negative and positive]

			1 (Worst)	2	3	4	5 (Best)	Can't Rate	Not Heard	Temperature	Total Rate	Total Heard
A	Barack Obama	**LV**	50	9	10	14	16	1	0	34	99	100
B	Sam Brownback	**LV**	45	11	16	11	15	1	0	35	99	100
C	Kansas Supreme Court	**LV**	10	13	27	18	11	16	5	52	79	95

Kansas Likely Voters, Feb 26-Mar 1, 2015
898 Likely Voters, Margin of Error: 3.3% at 95% Confidence Level

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Q4 Now, thinking for a moment about judges on the Kansas Supreme Court. As you may know, here in Kansas a panel made up of lawyers and non-lawyers interviews applicants for vacant Supreme Court seats. They identify several of the most qualified applicants, and send a list of finalists to the Governor at which point he selects one of the finalists to fill the vacancy. Once on the court, judges can keep their seat if they periodically win a retention election, where voters vote yes to keep them or no to remove them from the bench. This system is often referred to as "merit selection". Knowing this, do you favor or oppose merit selection, the current method used here in Kansas?

LV	
53	Favor Merit Selection
27	Oppose Merit Selection
20	Not Sure

Q5 Some people have proposed amending the state Constitution to increase the number of votes a judge would need to retain his or her seat on the Supreme Court. Under the proposal, judges would need 2/3s of voters, or 67% to vote Yes, an increase from the current simple 50% majority requirement. No other elected office in Kansas requires a candidate to get more than 50% of the vote. Would you favor or oppose amending the Constitution to increase the vote needed for justices to stay on the bench to 2/3 or 67%?

LV	
32	Favor Amending Constitution to Change
57	Oppose Amending the Constitution
11	Not Sure

Q6 Some people have proposed amending the state constitution to change the way supreme court judges are selected here in Kansas. Under the proposal, judges would be chosen by the Governor without first being recommended by the panel. They would then be confirmed by the state Senate. They would also still face periodic retention elections. If asked to vote on a constitutional amendment to switch from the current merit selection system to the proposed change, would you support or oppose changing the way judges are selected in Kansas?

LV	
14	Favor Amending Constitution to Change
76	Oppose Amending the Constitution
10	Not Sure

20/20insightllc

Kansas Likely Voters, Feb 26-Mar 1, 2015
898 Likely Voters, Margin of Error: 3.3% at 95% Confidence Level

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Q7 Some people have proposed amending the state Constitution to change the way judges are selected here in Kansas. Under the proposal, judges would be chosen in contested elections, just like we currently choose people to serve as Governor or in the state legislature. Would you favor or oppose amending the Constitution to switch from merit selection to the proposed new way of electing judges in contested elections?

LV	
31	Favor Amending Constitution to Change
55	Oppose Amending the Constitution
15	Not Sure

Q8 Age

LV	
5	18-29
17	30-44
45	45-64
31	65 & Older
2	Refused

Q9 Gender

LV	
51	Female
48	Male
1	Refused

Q10 Ethnicity/Race

LV	
3	Hispanic Total
95	Not Hispanic
0	Not Sure on Origin
2	Refused Hispanic Answer
89	White Total
4	Black Total
1	American Indian/Alaska Native
0	Asian
0	Native Hawaii/Pacific Islander
1	Other Race
1	More Than One Race
0	Not Sure on Race
4	Refused on Race

20/20insightllc

Kansas Likely Voters, Feb 26-Mar 1, 2015
898 Likely Voters, Margin of Error: 3.3% at 95% Confidence Level

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Q11 Party

LV	
25	Democrat
49	Republican
21	Independent
2	Third Party
3	Not Sure
34	Democratic Base = Democrats + Usually Choose Dem in two-way
56	Republican Base = Republicans + Usually Choose Rep in two-way

Q12 And now think about how often you vote in elections. As you know, the main elections are held every four years for President, but there are also elections for things like Governor, Congress, Mayor and School Board. And in addition to the November elections, the political parties hold primary elections that decide who their nominees will be in the summer. On a scale of 1 to 5, with 1 meaning hardly ever and 5 meaning you never miss an election, even a primary, how often would you say you vote?

LV	
2	1 (Almost Never)
3	2
10	3
29	4
54	5 (Always Even Primaries)
2	Not Sure

Q13 Ideology

LV	
16	Liberal
39	Moderate
38	Conservative
7	Not Sure

That concludes our survey today. Thank you for your time.

BRENNAN
CENTER
FOR JUSTICE
TWENTY
YEARS

RETHINKING JUDICIAL SELECTION IN STATE COURTS

Alicia Bannon

Brennan Center for Justice *at New York University School of Law*

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INTRODUCTION

When most people think of the courts — or talk about judicial selection — they focus on the federal courts, particularly the U.S. Supreme Court. But while federal courts get the most attention, Americans are far more likely to find themselves before state court judges. Ninety-five percent of all cases are filed in state court, with more than 100 million cases coming before nearly 30,000 state court judges each year.[1] In recent years, state supreme courts have struck down tort reform legislation,[2] ordered state legislatures to equalize funding for public schools,[3] and declared a state's death penalty unconstitutional.[4]

Because state courts have a profound impact on the country's legal and policy landscape, choosing state court judges is a consequential decision. And, in recent decades, judicial selection has become increasingly politicized, polarized, and dominated by special interests — particularly but not exclusively in the 39 states that use elections to choose at least some of their judges. Growing evidence suggests that these dynamics impact who is reaching the bench and how judges are deciding cases.

Pennsylvania's 2015 supreme court election for three open seats exemplifies many of the problems with judicial selection today. The election, which set a new spending record for state supreme courts, was largely funded by business interests, labor unions, and plaintiffs' lawyers — all groups that are regularly involved in cases before the court.[5] Millions of dollars went into negative ads that characterized candidates as issuing "lenient sentences" and "failing to protect women and children"[6] — amid growing evidence that such attacks make judges more likely to rule against criminal defendants.[7] And, in a state where people of color make up more than 20 percent of the population,[8] none of the 2015 candidates in the general election was a racial or ethnic minority, and the Pennsylvania Supreme Court remains all-white.[9]

Having monitored judicial elections and other state court issues for almost two decades, the Brennan Center has chronicled numerous threats to the fairness and integrity of state courts that are closely tied to how states choose their judges:

- ***Outsized role of money in judicial elections:*** A flood of special interest spending in judicial elections is undermining the fairness of state courts. Judges regularly hear cases involving campaign supporters, and, in one survey of state court judges, nearly half said they thought campaign contributions affected judges' decision-making.

- ***Politicization of campaigns:*** Judicial campaigns have also become more overtly political, regularly including partisan language and statements on contested political issues such as gun rights or religious liberty. For neutral arbiters, this heightened political temperature risks exacerbating pressures to decide cases based on political loyalty or expediency, rather than on their understanding of the law.

- ***Lack of judicial diversity:*** Neither elective *nor* appointive systems of choosing judges have led to a bench that represents the diversity of the legal profession or of the communities that courts serve. Research suggests that diverse candidates face numerous challenges in reaching the bench, from fundraising difficulties, to inadequate pipelines for recruitment, to bias, both explicit and implicit. The resulting lack of diversity undermines public confidence in the courts and creates a jurisprudence uninformed by a broad range of experience.

- ***Job security concerns affect outcomes:*** A growing empirical literature suggests that in both elective and appointive systems, concerns about job security are affecting how judges rule in certain high-salience cases, putting judicial impartiality at risk. Numerous studies have found, for example, that when judges come closer to reelection, they impose longer sentences on criminal defendants and are more likely to affirm death sentences. "Reselection" pressures impact judges across the country: In 47 states, judges must be elected or reappointed in order to hold onto their seats.

Recent efforts at reform have focused on either mitigating the role of money in elections through public financing and stronger recusal rules (which govern when judges must step aside from cases), or moving away from contested elections altogether, typically to a "merit selection" system in which a nominating commission vets potential candidates, who are then appointed by the governor and later stand for periodic yes-or-no retention elections. But these reforms have failed to either gain traction or to adequately address the challenges facing courts today.

In the face of growing threats to state courts' legitimacy and to the promise of equal justice for all, we need to rethink how we choose state court judges.

Identifying the problems facing state courts is only the first step. Any alternative system of choosing judges will have its own advantages and disadvantages, and may advance or impede important values related to the selection of judges — including judicial independence, accountability and democratic legitimacy, judicial quality, public confidence in the courts, and diversity on the bench. Rethinking judicial selection therefore raises important empirical questions about the likely impact of different systems on these values. It also raises normative questions about how to balance these values when they come into tension. To make these judgments, we need to understand how different selection systems actually operate today and what tradeoffs are posed by potential alternatives.

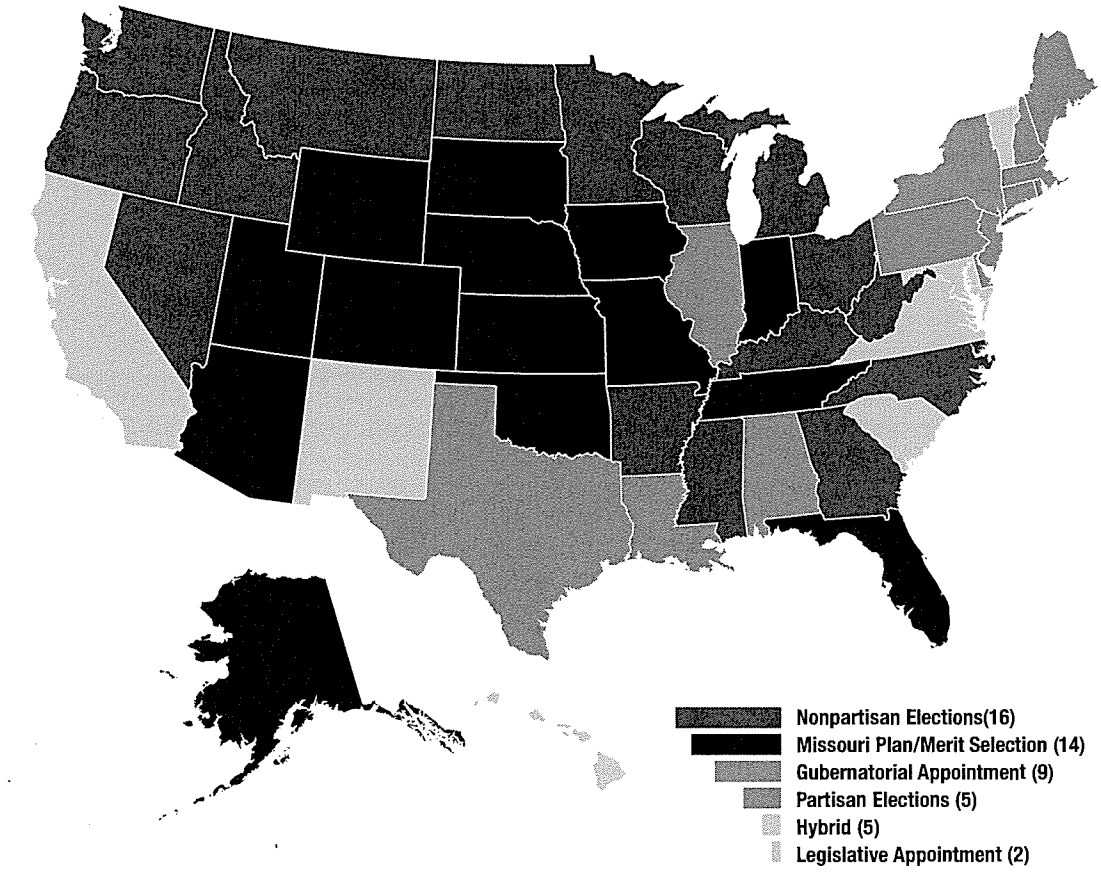
This paper offers a framework for considering these important questions. Part I of the paper looks more closely at some of the problems plaguing our state court systems today, many of which are closely linked to states' systems for choosing judges. Part II discusses the basic values that judicial selection should promote and describes what we know from existing research about how different selection systems impact these values. Part III suggests a series of unanswered questions and other considerations that should inform inquiries into potential reforms.

Learning More About Judicial Selection

Despite state courts' importance, relatively little is known about how judicial selection operates in the states. Accompanying the release of this paper, the Brennan Center is introducing new resources to make it easier to study state courts.

- **Interactive map on state judicial selection:** Available at *judicialselectionmap.brennancenter.org*, this data visualization tool provides comprehensive information about judicial selection in all 50 states and the District of Columbia, as well as summary statistics and statutory references.
- **A hub for research, scholarship, and data:** Available at *www.brennancenter.org/rethinking-judicial-selection*, this site collects research, scholarship, and data related to judicial selection.[10]

JUDICIAL SELECTION TODAY: A BACKGROUNDER



How are judges selected in the states? The vast majority of states use one of four basic models for choosing judges.

- **Contested elections:** In contested elections, multiple candidates vie for a single seat — similar to how candidates run for executive and legislative offices. In partisan elections, party labels appear on the ballot next to candidate names. In nonpartisan elections, party labels do not appear on the ballot. At the supreme court level, 5 states utilize partisan elections and 16 states utilize non-partisan elections. Contested elections are even more common in lower courts. At the trial court level, 21 states utilize nonpartisan elections and 8 states utilize partisan elections.

- **Merit selection, also known as the "Missouri Plan":** In merit selection systems, a nominating commission screens and vets prospective judges and then presents a slate to the governor, who must choose from that group. An appointed judge may stand for additional terms in periodic, unopposed "yes-or-no" retention elections. At the supreme court level, 14 states utilize this system. At the trial court level, only nine states do.

  While nominating commissions are a central feature of merit selection systems, their structure varies substantially. Some states vest the governor with exclusive authority to appoint nominating commissioners, while in others the state's bar association or lawyers within the state select a portion of the commission. The state legislature or the judiciary may also have the power to appoint commissioners.

- **Gubernatorial appointment:** Gubernatorial appointment systems have no elective element. Judges are appointed by the governor, and, in those states where judges serve multiple terms, they are subject to reappointment by the governor. At the supreme court level, nine states utilize this model. Each of these states provides for some kind of "confirmation" of the governor's nomination by the legislature or other elected body, such as a "governor's council." Each also provides for input by a nominating commission, similar to how Missouri Plan systems operate, although in three states the commission's recommendations are non-binding.

- **Legislative appointment:** In legislative appointment systems, judges are selected by the legislature. Two states, South Carolina and Virginia, utilize this system (at the supreme court, intermediate appellate, and trial court levels). One state, South Carolina, utilizes a nominating commission as part of its process.

  Many states also use **hybrids or other variations** of these four main systems. In Hawaii, for example, the governor makes judicial appointments after vetting by a judicial selection commission, with confirmation by the state senate. But for the judge's reappointment, it is the judicial selection commission itself that makes the decision, without the involvement of the governor or legislature.

  States also vary in the **length of judges' terms.** At New York's highest court, for example, judges serve 14-year terms, while in Texas their terms are only six years. Three states provide life tenure for judges, either with or without an age limit. Each of these three states (Massachusetts, Rhode Island, and New Hampshire) provides for the appointment of judges by the governor, with confirmation. No state that uses elections provides for life tenure or a single term for judges.

For more information on judicial selection in the states, see the Brennan Center's interactive map at judicialselectionmap.brennancenter.org.

I. THE PROBLEM: BROKEN JUDICIAL SELECTION SYSTEMS THREATEN THE FAIRNESS OF STATE COURTS

State courts are facing challenges to their basic fairness and legitimacy, many of which are tied to states' systems for choosing judges. Several of the most serious threats to equal justice stem from the growing politicization of judicial elections — including evidence that campaign spending impacts judges' decisions on the bench. Yet other problems cut across selection methods, including a lack of diversity on the bench and evidence that concerns about job security impact judges' decisions in controversial cases.

A. Politicized Judicial Elections Undermine Judicial Integrity

Judicial elections increasingly look similar to the rough and tumble of political campaigns — from attack ads, to super PACs, to million-dollar elections — bringing politics to the courtroom and undermining the integrity of courts. For many years, judicial elections were generally low-cost and staid affairs.[11] But over the past few decades, and particularly in the last 16 years, judicial races, at least at the state supreme court level, have become, in the words of one observer, "nastier, noisier, and costlier."[12] Less is known about how lower-court races operate, although there is anecdotal evidence that at least some jurisdictions have seen similar patterns.[13]

1. "Buying a Vote": Special Interest Election Spending Shapes Courts and Judicial Rulings

Since 2000, special interests have increasingly turned their attention — and wallets — toward supreme court races. Money should not be able to buy justice, but there is evidence that big spending is affecting outcomes on the bench in at least two ways: First, judges face pressure to decide cases in a way that will please donors and avoid politicized attacks, rather than based on their understanding of the facts and the law. And second, wealthy interests are able to shape the ideological direction of the courts by spending large amounts of money on judicial candidates who share their worldview.

The rise of high-cost supreme court elections

In the past 15 years, high-cost supreme court races have become commonplace. In the 2000-09 decade, 20 of the 22 states that use contested elections to select judges set spending records,[14] and new records for contested elections have already been set in five states since 2010.[15] More recently, retention elections, where a judge runs unopposed and faces a yes-or-no vote, have seen similar patterns. Average spending per seat in retention elections nationwide has increased tenfold from 2001-08 to 2009-14 (from an average of $17,000 per seat to $178,000 per seat, respectively).[16] In Florida, a 2012 retention election for three supreme court justices saw nearly $5 million in spending and was the second most expensive judicial election in the country that year. During the entire previous decade, Florida Supreme Court retention elections had seen a paltry $7,500 in spending (all in 2000).[17]

These spending trends have occurred against the backdrop of a series of U.S. Supreme Court decisions that weaken states' capacity to regulate campaign finance. Most notably, after *Citizens*

United v. FEC,[18] which barred restrictions on independent spending by corporations and unions, spending by outside groups has surged. In 2013-14, outside spending as a portion of total spending in state supreme court elections set a new record — much of it coming from groups that do not disclose their donors.[19] In 2009-10, outside spending was 16 percent of total spending; in 2013-14, it was 29 percent.[20]

These trends also reflect new attention by interest groups in judicial elections, most often rooted in battles over tort reform and the perceived business-friendliness of state courts.[21] Nearly two-thirds of contributions to supreme court candidates in 2013-14 came from business interests, lawyers, and lobbyists — all interests that regularly appear in state court. While outside spending is harder to track due to weak disclosure laws, many of the recent high spenders, such as the Republican State Leadership Committee (which spent $3.4 million in total on judicial races in five states in 2014) and Pennsylvanians for Judicial Reform (which spent $3.4 million on Pennsylvania's 2015 supreme court election), are funded either by business interests or the plaintiffs' bar.[22] (Although both sides have participated in the spending arms race, in the aggregate, groups supporting conservative justices have far outspent the other side.[23])

Why does a tobacco company care about monitoring bracelets for convicted sex offenders?

One way that special interests shape state courts is through campaign ads. Notably, the content of these ads often has little to do with groups' actual interest. For instance, business-oriented groups regularly run ads praising candidates as tough on crime, or criticizing them for being soft on crime, because they know crime resonates with voters.

From 2011-14, 18 organizations ran criminal justice-themed ads in state supreme court elections. Only three described criminal justice as an issue of concern on their websites.[24] One of the nastiest ads in 2014 was in North Carolina, which characterized a sitting justice as someone who "sides with child predators" because of a decision

Justice for All NC PAC, *Power Ad* (copyright Karpe Media/ GMAC 2014)

that monitoring bracelets could not be imposed after a defendant had already been sentenced.[25] The ad was sponsored by a group funded by the Republican State Leadership Committee, which is in turn largely funded by corporate donors. Two of its major North Carolina donors are Reynolds American and Lorillard Tobacco, frequent litigants in North Carolina courts over consumer issues — but not companies with any apparent interest in criminal justice.[26]

Impact on the courts

Does money buy outcomes? Ohio Supreme Court Justice Paul Pfeifer observed that in his experience, "Everyone interested in contributing has very specific interests....They mean to be buying a vote."[27] While Justice Pfeifer argued that "it's hard to say" whether these interests have been successful,[28] research suggests that money impacts outcomes in at least two ways.

First, the importance of campaign dollars puts pressure on judges to favor campaign supporters when they appear before them in court. Ninety-five percent of the public believes that campaign spending impacts judges' rulings.[29] Remarkably, nearly half of state court judges agree. In a 2001 survey of state supreme court, appellate, and trial judges, 46 percent said they believed campaign contributions had at least some impact on judges' decisions.[30] As Richard Neely, a retired chief justice of the West Virginia Supreme Court of Appeals, observed, "It's pretty hard in big-money races not to take care of your friends. It's very hard not to dance with the one who brung you."[31] While not establishing a causal relationship, studies have also shown a strong correlation between campaign contributions and favorable rulings. A 2006 study by *The New York Times*, for example, found that on the Ohio Supreme Court, justices voted in favor of contributors 70 percent of the time.[32]

Indeed, judges regularly hear cases involving campaign supporters — including lawyers and litigants with cases pending at the very time they are spending on a judge's campaign.[33] In 2014, for example, Ohio Supreme Court Justice Judith French received almost $60,000 in contributions to her reelection campaign from parties, lawyers, and groups that filed amicus briefs in a case involving the regulation of fracking that was before the Court. Three months after the election the Court ruled in favor of the fracking interests in a 4-3 decision. Justice French authored the opinion.[34] A study of the Nevada Supreme Court found that in 60 percent of the civil cases decided in 2008-09, at least one of the litigants, attorneys, or firms involved in the case had contributed to the campaign of at least one justice.[35]

The importance of campaign cash also shapes outcomes in a second way: It gives deep-pocketed interests disproportionate influence in shaping the composition of courts. This is particularly so because judicial elections are low-information races; in the words of one Texas Supreme Court justice, "voters know far more about their *American Idol* judges than their Supreme Court judges."[36]

In 2013-14, over 90 percent of contested supreme court seats were won by the candidate who raised the most money.[37] While this relationship almost certainly has many causes, research suggests that in judicial elections, spending does make a difference in the outcome of races, improving the odds for challengers and for incumbents who were initially appointed. (Incumbents who were previously elected, and who are therefore likely to be better known and have an established track record, do not benefit in the same way from additional spending.)[38]

Indeed, an influx of spending has corresponded with shifts in the ideological composition of at least eight state supreme courts since 2000.[39] Spending is also frequently highest in states with closely-divided courts.[40]

The concern that money may buy outcomes is exacerbated by inadequate safeguards against special interest influence. Weak recusal rules, which govern when judges have to step aside from cases, mean that judges face few barriers in hearing cases involving major financial supporters, particularly when that support takes the form of independent expenditures, which are less regulated. At the same time, only two states currently offer public financing for appellate court elections. In many states, judges facing the reality of a high-cost election may therefore have little choice but to fundraise from interests likely to appear before them. With big-spending races showing no signs of abating, special interest influence poses a fundamental threat to equal justice.

Caperton v. Massey: From the Ballot Box to the U.S. Supreme Court

Big spenders in supreme court races are often repeat litigants — but sometimes their interest in a judicial race is more immediate. West Virginia mining company Massey Energy stood to lose $50 million in damages after a jury found the company liable for fraudulent misrepresentation and other harms, in a case brought by Harman Mining Corp. In 2004, Massey readied itself for an appeal to the West Virginia Supreme Court — at the same time an election for a seat on the Court began to heat up.[41]

Massey's CEO, Don Blankenship, set his sights on the election, spending $3 million to defeat incumbent Justice Warren McGraw and elect attorney Brent Benjamin to the high court. The funds included a $2.5 million contribution to a PAC called "And for the Sake of the Kids,"[42] which put out a series of nasty attack ads targeting McGraw. One ad alleged that McGraw voted "to release a child rapist" and "agreed to let this convicted child rapist work as a janitor in a West Virginia school,"[43] while another

And For the Sake of the Kids, McGraw Too Dangerous
(copyright Karpe Media/CMAG 2004)

described him as "too soft on drugs, too dangerous for our families."[44] More than 60 percent of total spending in support of Benjamin's campaign came from Blankenship.[45]

When the West Virginia Supreme Court finally heard the Massey case, Benjamin refused to step aside from hearing the appeal — and ultimately cast the deciding vote in overturning the $50 million verdict.[46] Harman's owner, Hugh Caperton, sought review by the U.S. Supreme Court, which ruled that Benjamin should have stepped aside as a matter of due process. The Court explained that under the circumstances, Blankenship's election spending created "serious, objective risk of actual bias."[47]

B. Judges as Partisan "Backstops": Judicial Campaigns Have Become More Overtly Political and Partisan

At the same time judicial election spending has grown, judicial races have also become increasingly political and partisan. Justice requires that judges put aside their political preferences and loyalties when deciding cases, and rule based on their understanding of the law and the facts at issue. But when judges look no different than other politicians during the election season, it creates the appearance — and perhaps also the reality — that they will not be able to avoid political biases when they sit in the courtroom.

Judicial campaigns were once typically staid affairs, focusing on judges' backgrounds and experience, and avoiding references to partisanship or hot political issues.[48] But as spending in these races has ratcheted up in this century, so has the rhetoric.

Judges now regularly describe themselves in overtly political terms. For example, in the Ohio Supreme Court's 2014 election, an ostensibly non-partisan race, sitting Justice Judith French described herself as a "backstop" for the Republican governor and legislature, announcing on the campaign trail:

> I am a Republican and you should vote for me. . . . Let me tell you something: the Ohio Supreme Court is the backstop for all those other votes you are going to cast. Whatever the governor does, whatever your state representative, your state senator does, whatever they do, we are the ones that will decide whether it is constitutional; we decide whether it's lawful. . . . So forget all those other votes if you don't keep the Ohio Supreme Court conservative.[49]

Kansas: Battle Brews Between Courts and Political Branches

Politicized rhetoric has infiltrated state courts in other ways as well. In 2014, Kansas Gov. Sam Brownback criticized the state supreme court during his reelection campaign as too "liberal," and the governor and legislature have sparred with the courts over a series of rulings finding that the state's public school funding system violates the state constitution.[50] Since then, the court system, particularly the state supreme court, has been targeted by a series of legislative efforts to weaken its power, including a law (successfully challenged in court by the Brennan Center and co-counsel[51]) that weakened the budgetary and administrative power of the supreme court,[52] and a second law (also challenged in court by the Brennan Center and co-counsel[53] and later eliminated by the legislature) that tied the court's entire judicial budget to the outcome of the earlier litigation.[54] Other recent legislative efforts include an attempt to give the governor and legislature more control over judicial selection by eliminating judicial nominating commissions, and an attempt to expand the basis for impeaching supreme court justices to include decisions that "usurp" the power of other branches.[55]

Television ads, which have become commonplace in supreme court elections, also routinely use political signals, such as touting a judge's "conservative" values. In 2012, for example, Texas Supreme Court Justice Don Willet put out an ad that quoted the state's then-attorney general (now governor), Greg Abbott, describing Willet as "the judicial remedy to Obamacare."[56] In 2011, a Wisconsin justice was described in an attack ad as a "rubber stamp" for Gov. Scott Walker.[57] In 2016, an Arkansas Supreme Court candidate emphasized an NRA endorsement.[58]

One cause of this shift in rhetoric is a 2002 U.S. Supreme Court decision, *Republican Party of Minnesota v. White*, in which the Court ruled that a state's code of judicial conduct, which establishes standards of ethical behavior for judges and judicial candidates, could not bar candidates from announcing their views on disputed legal or political issues.[59] Along with the flood of new money, *White* opened the door to a new kind of campaigning — with judges increasingly willing to signal partisan and ideological alliances.[60]

The rise of outside spending has also contributed to this change in tone, because outside groups are more likely than candidates to air negative advertisements. In supreme court races during the 2013-14 cycle, more than 90 percent of "traditional" television ads, which focused on a candidate's background and experience, came from candidates themselves. In contrast, more than 85 percent of negative ads were sponsored by outside groups, including ads describing justices as supporting higher taxes or helping advance Obamacare.[61]

As a retired Wisconsin justice argued, when judicial campaigns look more like other elections, "I think people lose faith that the court is anything but a political machine."[62] Even more worrying is that judges themselves may believe their own rhetoric — and consider cases on the basis of political loyalty or expediency, rather than what is required by law.

Do Similar Dynamics Exist in States That Use Judicial Appointments?

The rise of high-cost and politicized judicial elections has been well-documented — and scrutinized — in recent years. What is less understood are dynamics in states that use various appointment-based methods. This will be an important research question in developing effective reforms.

For instance, the current Senate standoff over President Barack Obama's nomination of Merrick Garland to the U.S. Supreme Court is a powerful example of how partisanship can undermine the judicial appointment process. Are state appointment processes similarly politicized? There are some indications they may be becoming more so. In New Jersey, a dispute between the governor and state senate over whether a Democrat or Republican should fill a supreme court seat kept a vacancy open for six years.[63] In other states, political leaders describe judicial appointments in overtly partisan terms. In Tennessee, when a justice appointed by a Democrat announced he was stepping down, giving the Republican governor an opportunity to shift the court's majority, the state's Lieutenant Governor announced it was "our turn" to put judges "capable of rendering conservative decisions" on the bench.[64]

Likewise, while special interest influence in supreme court elections is well-documented, some critics of judicial nominating commissions, which are often used to vet judicial candidates for appointment,[65] have argued that these commissions are themselves frequently "captured" by interest groups, such as the state bar.[66] Others have argued that in some states, nominating commissions are too closely aligned with elected officials.[67] There has been little research to-date testing the veracity of these critiques, or exploring how such dynamics may impact judges' work.

C. "The Crocodile in Your Bathtub": Threats of Political Retaliation Put Pressure on Judges in Deciding Cases

Another threat to the fairness of courts is rooted in pressures around the *reselection* of judges currently on the bench. Judges often hear cases relating to high-profile issues, such as reproductive rights or the death penalty. While judicial rulings have always been — and should be — fair game for criticism, judges must nevertheless follow their understanding of what the law requires, even if it is unpopular.

Yet there is a growing body of evidence that concerns about job security — in both elective and appointive systems — impact how judges decide cases. In the words of the late California Supreme Court Justice Otto Kaus, deciding controversial cases when you know you will be facing an election is like "finding a crocodile in your bathtub when you go in to shave in the morning.

You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."[68] Only three states provide for life tenure for judges (with or without age limits). In every other state, regardless of how a judge initially came to the bench, judges must seek additional terms through an election or reappointment. Social science research supports the concern that in these states, judges may avoid making unpopular rulings in order to hold onto their jobs.

For example, research suggests that criminal defendants may not be accorded fair and impartial treatment in states where voters decide judges' fates. Numerous studies have found that when judges come closer to reelection, they impose longer sentences on criminal defendants and are more likely to affirm death sentences.[69] Indeed, criminal justice rhetoric is routinely part of judicial campaigns. In one recent Kentucky election, a judge lost after being the subject of a racially-charged attack ad about a ruling she participated in, which reversed the convictions of two African-American defendants who were described as having "ruthlessly murder[ed] pregnant women."[70] In Tennessee, three supreme court justices were attacked as soft on crime, and narrowly held onto their seats after touting their record of upholding "nearly 90% of all death sentences."[71] Nor are election pressures limited to criminal justice issues. Research suggests that, more generally, elected judges tend to decide cases according to the political preferences of voters — and that when voters' preferences change, judges' behavior follows.[72]

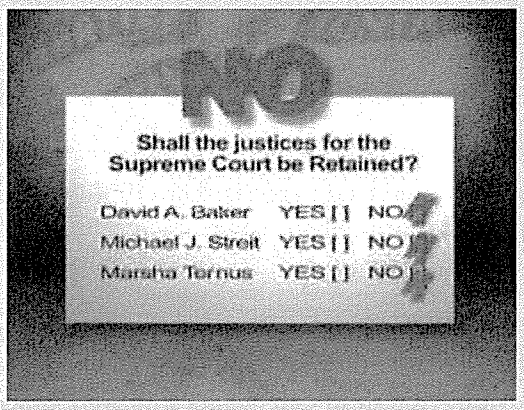
Appointment pressures are often less transparent, but as one legal historian has observed, "the politics of reappointment . . . can be just as unseemly and corrupt as modern judicial elections."[73] In New Jersey, reselection pressures moved into public debate when Gov. Chris Christie declined to reappoint the state's only African-American Supreme Court justice in 2010, asserting that the justice had contributed to "out of control" activism on a court known for ruling against the state in cases involving school funding and housing segregation.[74] It was the first time since the ratification of New Jersey's constitution in 1947 that a sitting justice was not reappointed by the governor.[75] Yet even when selection pressures are less public, evidence suggests that judges still worry about their job security. For example, in appointment states, judges are more likely to support government litigants who are responsible for their reappointment.[76]

Taken together, the evidence we have so far suggests that reselection pressures pose unique and serious threats to the fairness of courts.

Marriage Equality and Iowa's Long Shadow

Iowa never had a single dollar spent on a retention election for its supreme court until 2010, when a million-dollar anti-retention campaign was launched against three justices who joined a unanimous decision extending the right to marry to same-sex couples.[77] Ads described the justices as "liberal, out of control judges," and asked "what will they do to other long established Iowa traditions and rights?"[78] The justices lost their seats, and Iowa's experience has served as a warning to other judges hearing high-profile cases in the years since.[79]

In 2014-15, for example, members of the Arkansas Supreme Court, who are chosen via elections, used procedural mechanisms to avoid ruling in a marriage equality suit for two years, ultimately waiting for the U.S. Supreme Court to resolve the issue first. Two justices openly criticized the other members of the Court for the delay. One member wrote a public letter stating that the Court had "created out of whole cloth an issue to delay the disposition" of the marriage equality lawsuit.[80] Another recused himself from the case over the delays, saying that he could not ethically be "complicit in ... depriving justice to any party before this court."[81] The apparent lack of justification for the delay — coupled with the public criticism by two justices — strongly suggests that the Court had deliberately sought to avoid issuing a controversial ruling.



Iowa for Freedom, *Send Them a Message* (copyright Kantar Media/CMAG 2010)

D. Courts Do Not Reflect the Diversity of the Communities They Serve, or the Diversity of the Legal Community

Courts are also undermined by a lack of diversity on the bench, which harms public confidence in the courts and creates a jurisprudence uninformed by a broad range of experiences.

In 2010, only 8.4 percent of state court judges were people of color, compared with 27.6 percent of the national population. Women made up 26.4 percent of the bench, compared with 50.8 percent of the national population.[82] A 2009-10 survey found that 26 state supreme courts were all white and three were all male.[83] The state court bench also fails to represent the diversity of the legal profession: Those with prosecutorial and corporate backgrounds dominate state (and federal) courts.[84]

Importantly, inadequate diversity is an issue in both appointive and elective systems. Indeed, research suggests that many of the barriers to achieving a diverse bench "operate across both types of systems, appointive or elective,"[85] and that "both elective and appointive systems are producing similarly poor outcomes in terms of the diversity of judges."[86] Money, old-boys networks, biases — both explicit and implicit — and inadequate pipelines for diverse candidates are all contributing factors.

For example, in the 36 states that use judicial nominating commissions to vet judicial candidates in at least some circumstances, commissioners serve as both the gatekeepers and recruiters for judicial candidates. But while there is evidence that diverse nominating commissions are more likely to suggest a diverse slate of judicial candidates,[87] in practice, many nominating commissions continue to be dominated by white men.[88]

Florida, for instance, has 27 separate judicial nominating commissions to fill vacancies at different levels of the state courts.[89] A 2014 survey by the state bar association found that nominating commissioners were 80 percent white,[90] in a state where only 56 percent of the population identifies as white (non-Hispanic).[91] Although research consistently shows that recruitment is essential to promoting judicial diversity,[92] half of the commissioners surveyed in Florida stated that they did not think that greater outreach would help them garner more applications from African-American or Hispanic lawyers.[93] One commissioner observed, "We don't want judges who can't even figure out how to apply on their own."[94]

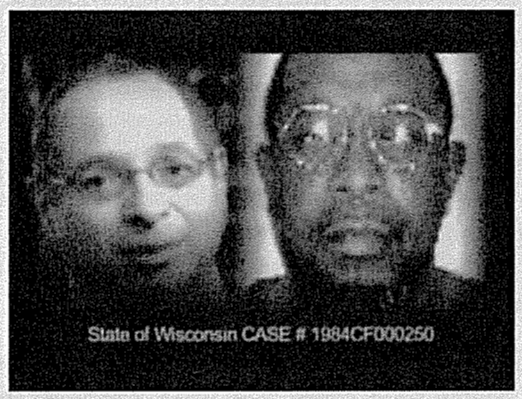
In judicial elections, fundraising is another barrier to a more diverse bench.[95] As election costs have soared, there is evidence that minority candidates face obstacles to accumulating sufficient war chests.[96] The pressure to fundraise may also dissuade candidates from entering races in the first place.[97]

Racial and gender biases among voters are another hurdle for judicial candidates from diverse backgrounds. Scholarship suggests that when voters face low-information elections — as judicial elections typically are — they may, consciously or unconsciously, rely on racial and gender stereotypes as "shortcuts" in determining their choice.[98] For instance, Justice Steven González, who had been appointed to the Washington Supreme Court and was its first Mexican-American justice,[99] faced a surprisingly close election campaign in 2012. His opponent, lawyer Bruce Danielson, did not campaign or spend any money on his election,[100] and was either unrated or rated "inadequate" by bar and lawyers associations vetting judicial candidates.[101] While González held onto his seat, Danielson garnered 75 percent of the vote in some of the (predominantly white) eastern and central parts of the state.

Was González's Hispanic last name a factor in these regions? A study by a University of Washington professor found substantial racial block voting in these areas, where voters also lacked access to voter guides or other information about the candidates and where the non-partisan ballot left voters without any clues about the candidates' ideologies. The results held even when controlling for voters' ideological preferences, leading the study's author to conclude that "racial voting bias distorted the González-Danielson race in certain Washington counties."[102] Justice González observed: "Frankly[,] I want voters to know the candidate they're voting for and vote because of that candidate's qualifications[,] not because of their reaction to a last name."[103]

Wisconsin: Racially Charged Television Ad Targets Justice

Some ads speak more directly to racial bias. In Wisconsin, Justice Louis Butler lost his seat on the Wisconsin Supreme Court in 2008 after his opponent ran a racially-charged attack ad. The ad falsely suggested that Butler used loopholes to allow a child rapist to go free, resulting in an assault on another child. The ad juxtaposed a photograph of Butler with a photograph of the defendant, both of whom were black. The ad was incredibly deceptive: Butler did not decide the case as a judge — he provided representation as a public defender before joining the court. Furthermore, the defendant in the case did not "go free." He served his full term before committing his subsequent crime.[104]



Michael Gableman, *Shadowy Special Interests* (copyright Kantar Media/CMAG 2008)

E. Recent Reform Efforts Do Not Solve the Problem

In the face of mounting evidence that courts' capacity to provide basic fairness is at risk in many states, numerous bar associations, scholars, task forces, and legislators have suggested reforms.[105] Many groups, including the Brennan Center, have urged action. Yet these proposals have both struggled to gain traction and fail to address many of the most troubling aspects of how judicial selection is currently functioning.

Most proposals fall into two categories. One set of reforms focuses on mitigating the impact of money and special interests in judicial elections, typically through public financing systems and stronger recusal rules, which govern when judges have to step aside from cases.

These reforms are vital to promoting the integrity of the courts in states that hold elections. However, they address only part of a broader problem, at least given how elections are currently structured in states around the country. For example, when an outside group spends six- or seven-figure dollar amounts attacking a judge as soft on crime, neither public financing nor recusal can remedy the pressure this places on a judge in hearing other cases, knowing that he or she may face similar attacks during the next election.

Additionally, states have lagged in adopting either reform. Only six states have recusal rules addressing when judges must step aside from cases in the face of independent expenditures, for example.[106] Public financing has faced even greater hurdles. Only two states — West Virginia and New Mexico — offer public financing for judicial elections. Two other states — Wisconsin and North Carolina — had programs that were recently eliminated.

The second set of proposals has focused on judicial selection reform, most commonly to replace contested elections with a merit selection system, which generally utilizes nominating commissions, appointment by the governor, and periodic retention elections. Merit selection went through a period of broad adoption, with 14 states currently opting to use the system for supreme court elections, and several others utilizing hybrid systems.[107] But no state has moved from contested elections to a merit selection system in more than 30 years.[108] Nor has any other judicial selection reform gained traction. While a handful of states moved from partisan to nonpartisan contested elections over the past decade, few states have adopted major changes in how they choose judges since the 1980s, and recent changes have not reflected any consistent trends.[109]

Even more importantly, merit selection raises its own problems. Merit selection proposals typically call for the use of retention elections, which have become increasingly high-cost and politicized and put troubling pressures on judges deciding controversial cases. There are also unanswered questions about how nominating commissions function in practice — particularly whether some committees have been subject to "capture," either by special interests or the political branches, in ways that may undermine their legitimacy or effectiveness. Nor have states that use merit selection had success in ensuring a diverse bench, raising questions about their processes for recruiting and vetting judicial candidates.

To be sure, these are not the full universe of proposals for addressing the problems facing state courts today. A wide range of alternative reforms have been suggested in recent years, including:

- Continuing to elect judges, but to a single, lengthy term, thus eliminating reelections and the pressures of job security. In Wisconsin, a state bar committee in 2013 proposed continuing the state's system of nonpartisan elections, but limiting judges to a single, 16-year term;[110]

- Modifying merit selection to eliminate retention elections. In one proposal, a judicial nominating commission would be responsible for not only initially vetting judicial candidates but also reappointing judges.[111] This is the system currently utilized in Hawaii;[112]

- Modifying how judicial nominating commissions are constituted. Among other ideas, one proposal suggests popularly electing a portion of the nominating commission.[113]

But little work has been done to understand how such proposals are likely to function in practice, including the extent to which they are likely to respond to existing problems, or create new ones.

Judicial Selection Systems Reflect History of Reform

There is a long history of judicial selection reform in the states, with each movement responding to the perceived threats to the fairness of the courts that animated the day. The diverse selection methods that exist today reflect this series of reform movements over the past two centuries.[114]

In the Founding era, all states chose their judges through gubernatorial or legislative appointments.[115] The first major change to state judicial selection came in the middle of the 19th century with the adoption of partisan judicial elections. Interestingly — and perhaps surprisingly for modern readers — proponents of judicial elections justified them as enhancing judges' independence, arguing that appointed judges had been captured by corrupt legislatures and governors, and that elected judges were more likely to enforce limits against legislative overreach.[116] In the words of one election supporter, "unless your judges are elected by the sovereign body, by the constituent, you will look in vain for judges [who] can stand by the constitution of the State against the encroachments of power."[117]

Mississippi was the first state to adopt partisan elections in 1832, but the reform accelerated in the mid-1840s, spurred by an economic crisis that many blamed on profligate state legislatures — and judges that were insufficiently independent from the political branches.[118] By 1909, 35 states chose their judges through partisan elections.[119] And, in fact, a study of 19th century rulings found that the first generation of elected judges blocked substantially more legislation than judges from prior eras.[120]

In the early 20th century, during the Progressive era, there was another wave of state constitutional conventions, and this time nonpartisan judicial elections gained favor. Concerned that party-affiliated judges were instruments of party machines and special interests, and frustrated that state courts were striking down progressive legislation, reformers sought to minimize party influence by removing party labels from the ballot.[121] In the words of one proponent, courts were "composed of lawyers who owe their position, not so much to legal attainment and professional learning, as they do to political services rendered."[122] Nineteen states adopted nonpartisan elections in the 1910s and 1920s.[123]

Merit selection, which includes the vetting of judicial candidates by nominating commissions, followed by gubernatorial appointment and periodic retention elections, has been the most recent reform movement, taking hold in the latter half of the 20th century. The move toward merit selection was led by the American Bar Association, the American Judicature Society, and state bar associations, and was supported by progressive reformers who wanted a more professional bench. Proponents argued, among other things, that merit selection's elite-driven system would lead to better qualified jurists than in contested elections, and that it would more effectively insulate judges from politics. At the same time, they argued that its use of retention elections would preserve democratic accountability.[124]

The first state to adopt merit selection was Missouri in 1940 (although California adopted a similar hybrid in 1934),[125] and merit selection became known as the "Missouri Plan." Other states followed, with reform accelerating in the 1960s and 1970s.[126] In many states, calls for a more "professional" judiciary were prompted by scandals. Florida, for example, introduced merit selection for its appellate courts after a series of corruption scandals in the early 1970s led to the resignation of three supreme court justices. Among other things, a lawyer representing the public utilities industry before the court ghost-wrote a decision, while a dog track with a case pending before the court paid for a Las Vegas gambling junket for one justice.[127] Beginning in 1940, 14 states adopted a version of the Missouri Plan for their supreme courts, and still others adopted aspects of the plan, such as retention elections or the vetting of candidates by nominating commissions.[128] The last state to move from contested elections to merit selection was South Dakota in 1980.[129]

II. JUDGING JUDICIAL SELECTION: WHAT VALUES SHOULD BE FORWARDED IN JUDICIAL SELECTION AND HOW SHOULD REFORMS BE ASSESSED?

Choices about judicial selection frequently require tradeoffs among values, each important to a functioning judiciary. In different eras particular problems have had greater salience, and values have been balanced differently. In order to assess potential reforms, it is therefore vital to be thoughtful, and transparent, about the values against which they are being measured.

Judicial selection debates are most often framed as a struggle between judicial independence and accountability. But these terms raise more questions than they answer: Independent from what? Accountable to whom? Moreover, what other important values are implicated by the choice of judicial selection method, such as the quality of the bench, public confidence in the courts, and judicial diversity? Thinking through what matters in judicial selection is central to assessing existing models and options for reform.

A. Judicial Independence

At its core, judicial independence means, in the words of legal scholar Charles Geyh, "the capacity of individual judges to decide cases without threats or intimidation that could interfere with their ability to uphold the rule of law."[130]

Pressure on judges can manifest in many ways — a powerful governor angry that her signature law was struck down as unconstitutional; a media campaign funded by a deep-pocketed interest group concerned about the outcome of a high-stakes lawsuit; public anger about an unpopular ruling in a hot-button case. While all of these actors may have a legitimate interest in how a court rules, it is fundamental to the rule of law that judges decide cases based on their understanding of what the law requires — and not out of fear of political consequences.

One form of independence concerns the amount of insulation a judge has from negative consequences for his or her decisions. When the U.S. Supreme Court ordered the desegregation of Kansas's schools in *Brown v. Board of Education*, "impeach Earl Warren" signs cropped up across the South. But Justice Warren and his colleagues were protected from political retaliation by the Constitution's grant of life tenure, along with prohibitions against reducing judicial salaries and high standards for impeachment that make political retribution difficult.

On this measure, state courts generally enjoy less independence than the federal system. In all but three states, judges are periodically reconsidered for their jobs, whether through elections or reappointment. State constitutions are also generally easier to amend than the federal constitution, opening the door to changing a state court's structure and powers if powerful interests are dissatisfied with unpopular rulings. These dynamics can put pressure on judges, which, in the words of the U.S. Supreme Court, "might lead [them] not to hold the balance nice, clear and true."[131] Evidence that reselection pressures impact judicial decision-making highlights the seriousness of this concern.[132]

Judicial independence also has a relative component. As legal historian Jed Shugerman has observed, "In the switch from one form of selection to another, judges become more independent from one set of powers but more accountable to another."[133] The switch in many states from appointments to elections, for example, gave judges more independence from the governor and state legislatures, but less independence from majoritarian politics and party bosses. In assessing today's threats to the courts, then, the question is

not only how to best insulate judges from political forces, but also *which* political forces — including the political branches, special interests, political parties, and majority rule — pose the gravest threat to judicial independence.

B. Judicial Accountability and Democratic Legitimacy

In debates over judicial selection, the value of "independence" is most often contrasted with "accountability." Accountability is important to ensure that judges do not simply impose their own personal or political preferences under the guise of law. As discussed below, it is also closely connected to the concept of democratic legitimacy — that because judges with different philosophies and values may decide hard cases differently, judges should be selected in a manner that gives voice to citizens' views about the role and appropriate conduct of the courts.

Accountability is most often framed as the need for a majoritarian check on judges, and cited as an argument for judicial elections. In the words of political scientist Melissa Gann Hall, because "judges often have significant discretion and rely on their own political preferences to make decisions," we should reject the premise that "any form of constituency pressure is negative." Why, asks Hall, are "a judge's unconstrained preferences . . . any less dangerous (or consistent with the rule of law) than the threat of majority tyranny"?[134]

Hall and other proponents of electoral accountability raise important questions about the nature of courts in a constitutional democracy. Indeed, Hall is plainly correct that "judges are not mere technocrats" [135] — one need only look at the ongoing debates over when and how to select Justice Antonin Scalia's replacement on the U.S. Supreme Court to appreciate the political and policy significance of who sits on the bench.

At the same time, judges are also not simply politicians in robes. In a democracy, judges act within the constraints of law, "anchored," in the words of Bruce Fein and Burt Neuborne, "to one of a number of theories that the American people have come to accept as a legitimate part of judging."[136] It is undeniable that judges' decisions are shaped by their experiences, presuppositions, judicial philosophies, and even political instincts. Yet a belief in the rule of law means a belief that judging is — or should be — constrained by legal principles and interpretative norms in a way that makes it different than the exercise of raw political power. This is particularly important because judges are often a counter-majoritarian force protecting the rights of minorities and pushing back against illegal actions by the government's political branches.

The challenge, then, is to identify a judicial selection method that fits comfortably within our democratic system without transforming judges into ordinary politicians. One part of the answer is that there are numerous accountability mechanisms that do not depend on judicial selection. For example, appellate review of lower court judges allows for the correction of legal errors, while disciplinary rules police unethical conduct.[137] Judges are also constrained by the expectation that they will give reasons for their decisions, frequently through written opinions. But accountability requires more than discipline and error correction. Another aspect of accountability is democratic legitimacy.

Courts make high-stakes decisions, and as a result, the choice of who sits as a judge has high stakes as well. It is both inevitable and appropriate that the public — including advocates, interest groups, and ordinary citizens — care about who becomes a judge, and that they prefer judges who share their values. To meet the value of democratic legitimacy, judicial selection must be capable of channeling citizens' legitimate preferences about the operation of our courts.

While accountability is often equated with elections, other selection systems can, and do, provide for democratic legitimacy. Federal judges, for example, are unelected but are nevertheless tethered to our democratic institutions because they are nominated and confirmed by democratically-elected bodies.

Yet, other forms of judicial selection are less closely linked to democratic institutions. In Germany, for example, judges take written and oral exams and must complete a probationary period, with promotions determined by more senior judges.[138] Closer to home, 27 states provide for the appointment of judges by governors whose discretion is circumscribed by judicial nominating commissions, who vet potential nominees and identify a short-list of qualified candidates.[139] Similar nominating commissions are also used by some U.S. senators in recommending judicial nominees to the president (itself a practice not part of the formal federal appointment process but done as a matter of tradition).[140] In some states, membership in judicial nominating commissions includes individuals without a connection to a democratically-elected body, such as lawyers selected by the state bar.

While constraining the governor's discretion through the use of nominating commissions has salutary benefits — including promoting judicial independence by helping insulate judges from the political branches — it raises hard questions from the democratic legitimacy perspective. Many states mitigate these concerns through retention elections, which provide for public input at the back end of the process. But as retention elections themselves grow increasingly costly and politicized, the question of how to insulate judicial selection from the negative aspects of political pressure while ensuring democratic legitimacy becomes even more difficult.

C. Quality Judges

Judicial quality is another value to be advanced by a state's choice of selection system. Given the importance of judges' work, it is vital that they have the appropriate temperament, show integrity and a lack of bias, bring diverse perspectives and experiences to their work, and have the competence and expertise to interpret and apply the law.

A state's choice of judicial selection system will create particular pathways for would-be judges — paths that may reward, or even incentivize, certain backgrounds and character traits. Research into whether particular selection systems tend to yield higher "quality" judges, however, has been inconclusive.[141] One reason for the lack of clear data is a measurement issue — common proxies such as citation counts or the number of opinions issued are extremely rough measures of quality. Other potential measures, such as misconduct allegations, are often not publicly available. Moreover, a host of state-specific factors impact such measures, making cross-state comparisons difficult. While differences in quality may well exist, they are hard to identify. Similarly, little is known about whether a state's choice of judicial selection method impacts substantive outcomes, such as whether judges are more likely to rule on the side of corporations.[142]

Given the lack of clear evidence, supporters of fair and impartial courts should think broadly and creatively about how to select quality judges, including options for promoting judicial diversity, strengthening ethical rules and professional standards, developing robust judicial performance evaluations, and strengthening judicial discipline. That said, it is also plainly the case that choices about judicial selection methods will advantage, or disadvantage, different candidates based on their particular backgrounds or temperaments. In assessing existing systems and considering new reforms, it is important to think critically about what kind of judges each route to selection will attract and benefit.

D. Public Confidence

The public's confidence in the fairness and impartiality of the judiciary is another important value in assessing judicial selection. As Sherrilyn Ifill, president and director-counsel of the NAACP Legal Defense and Educational Fund, has observed: "The importance of public confidence to the legitimacy of our courts cannot be overstated. Judges possess neither armies nor battalions. What courts rely on is the public's acquiescence, the public's sense that when a court issues a decision that decision is to be obeyed."[143] When the public has confidence in the courts, it can discourage retaliatory assaults on judicial independence by political actors because such efforts are more likely to be viewed as illegitimate by voters. It also legitimizes court decisions, even to litigants on the losing side. For these reasons, it is important that judicial selection operates to promote confidence in judicial institutions.

While the courts tend to be seen more favorably by the public than the political branches,[144] polling data by the National Center for State Courts suggests that today's public nevertheless has serious concerns about the fundamental fairness of state courts. Nearly 70 percent of voters think that the courts give preference to large corporations and the wealthy.[145] Moreover, less than one-third of African Americans believe state courts provide equal justice, compared with 57 percent of all Americans.[146]

There are many reasons for these perceptions — not least that there is in fact a vast justice gap in America, and one which disproportionately harms minorities. Moreover, courts — and judges — have been complicit in everything from penalizing the poor through the imposition of onerous criminal justice fees and fines to failing to vigorously police prosecutorial misconduct.[147] Inadequate diversity on the bench, including a lack of racial diversity and the underrepresentation of public defenders and other lawyers with criminal justice or civil rights backgrounds, has doubtlessly contributed to these dynamics.

There is also evidence that the growing cost and politicization of judicial elections is increasing public concerns that justice is for sale. A 2004 survey found that 71 percent of voters believe that campaign contributions from interest groups have at least some influence on judges' decisions in the courtroom.[148] By 2013, the number had risen to 87 percent.[149]

Research by political scientist James Gibson similarly suggests that spiraling judicial election spending diminishes the legitimacy of courts in the eyes of the public.[150] At the same time, however, Gibson argues that judicial elections, all else being equal, *enhance* judicial legitimacy in the view of the public, "most likely by reminding citizens that their courts are accountable to their constituents, the people."[151] Gibson also found that many judicial campaign activities, such as making policy promises, do not damage the public's opinion of courts' legitimacy.[152]

Together, this evidence suggests that courts, and judges, have a reservoir of public support that enhances their legitimacy, particularly when compared to the other branches of government, but also that this reservoir is under strain. In assessing options for choosing judges, it is important to consider the legitimacy-enhancing role that elections can play, but also how campaign spending by special interests, along with a lack of diversity on the bench, can undermine public confidence.

E. Judicial Diversity

Finally, diversity is a key value to be promoted by judicial selection. Diversity is closely linked to other important values. Diversity — including racial, gender, socio-economic, and professional diversity — is vital to a well-functioning court system, one that draws from as broad a pool of talented lawyers as possible, fosters robust deliberation that reflects different life perspectives, and engenders confidence within the communities it serves. As Ifill has observed, "the public's confidence in the judiciary must be earned."[153]

The importance of a diverse bench to decision-making is frequently emphasized by judges themselves. Retired U.S. Supreme Court Justice Sandra Day O'Connor noted in a tribute to Justice Thurgood Marshall that his life experiences as an African American and a civil rights lawyer impacted not just his perspective on the bench, but also her own: "Occasionally, at Conference meetings, I still catch myself looking expectantly for his raised brow and twinkling eye," she recalled after his death, "hoping to hear, just once more, another story that would, by and by, perhaps change the way I see the world."[154] And, as Judge Harry T. Edwards of the Court of Appeals for the D.C. Circuit observed, "[I]t is inevitable that judges' different professional and life experiences have some bearing on how they confront various problems that come before them. And in a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better informed discussion."[155]

Existing research has not shown any clear relationship between the method of judicial selection and diversity outcomes, leaving more questions than answers about how judicial selection can be structured to best foster diversity.[156] For example, it seems likely that local circumstances — such as the extent to which there is racially polarized voting, or the commitment of a state's governor to ensuring a diverse bench — may advance or hinder diversity.[157] Selecting judges from local districts, as opposed to statewide, may also have an impact on diversity. Likewise, members of different underrepresented groups may face different challenges in reaching the bench.

These considerations suggest that those interested in potential reform must look beyond aggregate studies, including considering how individual jurisdictions have (or have not) created meaningful pathways for diverse candidates. It also suggests that judicial selection reform must be coupled with other measures to promote such pathways, be it a public financing system for elections or an outreach mandate for judicial nominating commissions.

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All of these values are important — and no judicial selection system can meet them all in equal measure. In rethinking judicial selection, we must consider the magnitude of the likely tradeoffs, evaluate whether other reforms can compensate for any deficiencies, and ultimately, make judgments about which tradeoffs are most acceptable.

III. RETHINKING JUDICIAL SELECTION

While it is clear that many of the current systems for judicial selection fall short on important values, this is only a partial answer to the question of whether reform is warranted. The other — and more difficult — question is whether another option would better advance these values. As described in this paper, there are numerous important considerations and unanswered questions about judicial selection that should frame future reform efforts.

Beyond Merit Selection vs. Elections

Most debates over judicial selection reform have centered on the advantages and disadvantages of merit selection systems. Supporters of merit selection typically argue that it leads to higher quality judges, and insulates judicial selection from partisanship and the operation of political machines. The American Bar Association Coalition for Justice argued in a 2008 report, for example, that merit selection "encourages community involvement in judicial selection, limits the role of political favoritism, and ensures that judges are well qualified to occupy positions of public trust."[158] Conversely, supporters of contested elections frequently argue that merit selection systems simply transfer political influence behind the scenes, while weakening mechanisms for holding judges accountable for overreach,[159] or that adopting merit selection would harm diversity on the bench, at least in some jurisdictions.[160]

Advocates should consider reframing this traditional debate.

First, while elective and appointive systems are often described in opposition to each other, the majority of states have elements of both systems. States generally design their judicial selection systems to address three distinct phases:

1. filling a seat when a judge steps down at the end of his or her term;
2. filling a seat when a sitting judge finishes a term and wishes to stand for a new one; and
3. filling an interim vacancy, when a seat becomes vacant before the end of a judge's term.

At the supreme court level, 38 states use some kind of election in at least one of these phases, including 22 states that use elections to fill an open seat on the bench, and 38 states that use elections in connection with subsequent terms.[161] At the same time, almost every state gives the governor the power to make appointments for interim vacancies when a seat opens before the end of a judge's term. Notably, in some states that provide for elections, judges routinely step down before the end of their terms so as to provide the governor with an appointment. In Minnesota, North Dakota, and Georgia, for example, *all* current supreme court justices were initially appointed to the bench.[162] It is therefore important to understand how judicial selection operates — and the incentives it creates — at each of these phases, which frequently include both elective and appointive elements.

Importantly, some of the strongest empirical evidence on how selection impacts judicial independence suggests that *reselection* pressures — whether through elections or appointments — pose severe challenges to fair courts.[163] Yet, this is an area where the safeguards are almost uniformly weak. Only three states — Massachusetts, New Hampshire, and Rhode Island — have life tenure (with or without a mandatory retirement age) for judges. More attention needs be paid to protecting judges from the "crocodile in the bathtub" — the effect job security can have on decision-making in high-salience cases. Surprisingly, relatively little attention has been paid to *reselection* as such, and how these unique pressures might be mitigated, regardless of how a judge initially made it onto the bench.

On the question of the initial or interim selection of judges to fill vacant seats, here too those considering reform should look at a wide range of options. This might include alternative ways of structuring appointment systems. For example, can nominating commissions be more effective at promoting democratic legitimacy and diversity? Does the federal system provide any lessons? While problems associated with judicial elections have been well-documented, far less is known about how judicial appointment systems in the states function in practice. Those considering reform options might also take a hard look at the extent to which changes in the structure of judicial elections — such as the adoption of a robust public financing system — would alleviate concerns about how these contests are working today.

Considering Differences

State conditions also vary widely, including population size, concentration, demographics, polarization, and political party dominance. Simply put, a judicial selection system that may be suitable for a small, homogenous state controlled by a single party may not be appropriate for a large, diverse, and politically polarized one. In considering reforms, it is therefore important to consider how to take account of the differences among states yet, at the same time, let states achieve goals such as diversity, independence, and accountability.

Another consideration is that different levels of courts may benefit from different selection systems. Most of the existing research on judicial selection has examined state supreme or appellate courts. It is plausible that judicial selection problems may present differently at lower levels. Moreover, lower court judges perform different tasks than their counterparts on high courts. While lower courts may hear trials and sentence defendants, their decisions are non-precedential and do not play the same "policy" role as state supreme courts. And, there is evidence that in certain jurisdictions, diverse candidates may do better in local elections than they would in an appointive system, but fare less well in statewide races such as for the supreme court.[164] Each level of court plays an important, but different, role in the judiciary, and reformers must look at how their actions will affect the courts at every level.

Looking Forward

The way we select judges has a profound impact on the kind of courts, judges, and ultimately, justice that we have in our country. In many states today, judicial selection is not working. While there is growing recognition of the problems facing state courts, many of the proposed solutions have not been fully responsive to these challenges. With the release of this paper and other resources, we hope to spur an important conversation — and innovation — regarding how states choose their judges.

ENDNOTES

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What judicial quality means will also depend on the nature of the court; for example, the experience, skills, and temperament that would make someone good at presiding over trials may be different than what would make them a good choice for a state supreme court justice, where much of the work involves writing precedential opinions.

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150 James L. Gibson, Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy 68 (2012).

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152 *Id.*

153 Ifill, *supra* note 143, at 48.

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155 Harry T. Edwards, *Race and the Judiciary*, 20 Yale L. & Pol'y Rev. 325, 329 (2002); *see also* Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 10 Asian Am. L.J. 127, 140 (2003).

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157 Lawyers Comm. for Civil Rights Under Law, *supra* note 88, at 11-12, 16-18.

158 ABA Coal. for Justice, Am. Bar Ass'n., *supra* note 105, at 7.

159 *See* Ware, *supra* note 66, at 764-66.

160 Lawyers Comm. for Civil Rights Under Law, *supra* note 88, at 11-12.

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★ ★ ★ ★ ★ BY RACHEL PAINE CAUFIELD, PH.D

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★ ★ ★

Executive Summary

During the summer of 2011, The American Judicature Society conducted a nationwide survey of Judicial Nominating Commissioners. Nominating Commissions exist in 36 states and the District of Columbia to recruit, screen, evaluate, and recommend individuals for appointment to the state courts. The survey was designed to gather information about the membership, rules, procedures, practices, and effectiveness of Judicial Nominating Commissions from those who know it best – the Commissioners. This information can be used to better understand how current systems operate and to evaluate proposals that would alter existing merit selection systems or institute new ones.

With 487 respondents hailing from 30 states and the District of Columbia, this is the largest survey of its kind. Taken as a whole, the data indicates that Judicial Nominating Commissions are highly functional decision-making bodies that operate in a way that is consistent with the goals that guided their creation. Specifically, the results show that:

- When compared to past studies, Commissions appear to have become more systematic in their work, with more formalized written rules of procedures, greater levels of transparency and public access, more diversity in membership, and more intentional efforts to minimize or eliminate the influence of political factors in their evaluation and recommendation of individuals to serve on the bench.
- A large majority of lawyer members work in private practice, with both the plaintiff and defense bars well-represented among survey participants. Non-lawyer Commissioners are well-distributed across a large range of professional pursuits, though a substantial number are retired or self-employed.
- Approximately one third of Commissioners who responded have held public office and just over twenty percent have held a party office. It is more common for non-lawyer Commissioners to report that they have served as a party officer or public official.
- More survey respondents identified as Democrats than Republicans. Those Commissioners appointed by the governor are both more likely to be strong Democrats and more likely to be strong or moderate Republicans than are those selected through other means.
- Seventy-eight percent of survey respondents report that their Commission uses written operating procedures; specific evaluative criteria are the most common. Nearly 75% of Commissioners report that they are subject to provisions regarding ethics, most commonly rules governing conflicts of interest.

- Bar association publications and public websites are regarded as the most common recruitment tools, although word of mouth and recommendations from other Commissioners are considered to be important as well.
- In evaluating judicial applicants, Commissioners are uniform in their assessments of which information is most useful, with no significant differences between lawyer, non-lawyer, and judge members. In-person interviews were most commonly recognized as "absolutely essential" in the process, followed by review of disciplinary records, criminal history, and tax documents, as well as applicant questionnaires.
- Commissioners report that mental health is the most important criteria that they use to assess applicants, followed closely by professional reputation and the ability to communicate effectively. In contrast, political experience or affiliations receive the lowest ratings, alongside personal and demographic characteristics of applicants. Overwhelmingly, Commission members affirm that criteria are widely shared, and that the applicants who are recommended receive very broad support.
- Nearly all Commissioners report that their Commission uses formal in-person interviews, and a majority say that they interview all applicants for the judicial position, without pre-screening; formal interviews are conducted by the full Commission, but in some states applicants also meet separately with individual Commissioners. Nearly three quarters of Commissioners who answered the survey report that Commission interviews last for thirty minutes or less.
- A majority of survey participants say that their Commission uses standard voting procedures to determine which judicial applicants will be recommended to the appointing authority. The most common voting procedures are secret ballot or voice vote.
- Most Commissioners note that their procedures are made public, and that the names of applicants are publicly available.
- Regarding Commissioners' assessments of the process, there is wide agreement that the merit selection process is fair, that it works to promote highly-qualified individuals for service on the bench, that it appropriately constrains the power of the governor, and that it helps to minimize the role of partisan politics. Overwhelmingly, Commissioners believe that their service is worthwhile, and there is broad support for the proposition that merit selection is preferable to contestable judicial elections.
- Of those who responded to the survey, there is widespread agreement that party affiliation and other political considerations are generally not important in the process of selecting individuals for recommendation to the governor (or other appointing authority).
- Commissioners agree that lawyer members and non-lawyer members have very positive working relationships, and that members work together and respect input from their peers.
- Diversity is generally recognized as a goal of the Judicial Nominating Commissions, although respondents also say that race, gender, and sexual orientation are generally not important considerations in the decision-making of their Commission.

★ ★ ★

Introduction

> No matter how excellent the laws and administrative methods of a civilized people may be, they cannot yield satisfactory results save as they are administered by skilled and competent judicial officers. It may be that in the savage or pioneer stage of life robust common sense in a judge was an entirely satisfactory substitute for professional training, but to the world as we know it that day will never return; and if it did we should still be forced to consider some method of assuring in our judges that kind of common sense. In a word, tolerable results may be produced by rather poor governmental machinery when handled by experts; but the best administrative machinery, if somewhat complicated, cannot be well managed by the incompetent. So, unless we assure the selection of proper men [and women] as judges, we cannot hope to escape from a large measure of just dissatisfaction with the work of our courts.[1]

For over two centuries, the American states have been engaged in a process of finding the best ways to select their judges. The debate over judicial selection, which began before the founding of the nation, is an ongoing conversation about the judicial function in a democratic society.[2] The act of judging, like all human endeavors, depends upon the individual capacities of those entrusted to exercise the authority inherent in the job. Thus, methods of judicial selection and retention implicate a wide range of foundational questions: the nature of individual rights and liberties and how they will be safeguarded, the sources and limitations of government power, and the competing interests of citizen and state (to mention but a few). As states have struggled to ensure highly-qualified, knowledgeable, accessible, adaptable, and accountable judiciaries, the methods used to staff the bench have frequently engendered fervent debate.

Beginning in the early 20th Century, judicial reformers took up the cause of judicial selection, with particular concern about the detrimental effects of judicial elections, including control by party factions and dependence upon the "wisdom" of ill-informed voters who lacked information about the candidates.[3] Among those most concerned with the problem at the time, elections were perceived to undermine the impartiality of the judiciary, promote individuals who were motivated by partisan politics and potentially unqualified for the job, deter qualified individuals from attempting to attain a judgeship, and, ultimately, significantly erode the integrity of the judicial process. The most prominent call for reform came in Roscoe Pound's speech to the American Bar Association in 1906, in which he posited that "putting courts into politics, and compelling judges to become politicians in many jurisdictions [had] almost destroyed the traditional respect for the bench."[4] Over the next few decades, in an effort led by the first Director of Research at

The American Judicature Society Albert Kales and prominent political scientist Harold Laski, a new system of selection was proposed that came to be known as judicial merit selection.[5]

After a particularly contentious period in its own history,[6] Missouri became the first state to adopt "merit selection" in 1940.[7] Since its adoption, the merit selection system has become increasingly common (See Appendix A for a timeline of state adoption of merit selection). Though no two states use an identical system (See Appendix B for summary characteristics of all merit selection systems), there are a few common characteristics that define "merit selection" plans. First, all use a committee to evaluate candidates for judicial office. These committees, frequently named "Judicial Nominating Commissions" or "JNCs"[8] are made up of lawyers and non-lawyers. As a general rule, attorney members are elected by the state or local Bar Association, while non-attorney Commissioners are selected by the governor, sometimes subject to legislative confirmation.[9] Second, merit selection systems generally restrict the governor's authority by requiring that a gubernatorial appointment be made from a list of individuals recommended by the Judicial Nominating Commission. Some states require legislative confirmation of judicial appointments, while others only require gubernatorial appointment to the bench. Finally, most states that have implemented Commission-based appointment of judges include retention elections, whereby sitting judges will appear on the ballot in uncontested elections, and voters will simply vote "Yes" or "No" to determine whether a judge will remain in office for another term.

Judicial Nominating Commissions have been called the "key" to judicial merit selection.[10] Put simply, the work of the Commission – soliciting applications, reviewing application materials, interviewing judicial applicants, and determining which individuals are best suited to a judicial position – is essential to filling vacant judgeships. Not only are Nominating Commissioners taking on the responsibility of vetting would-be judges (a function usually reserved for the governor and her staff in pure appointive systems), but the Commission-based system is expressly designed to ensure that staffing of the judiciary is not determined by unfettered political control by the governor.[11] Similarly, retention elections effectively allow the public to exercise "veto" authority by removing judges from office. But the public does not, in turn, have the power to replace that judge.[12] Should a sitting judge fail to win retention, the job of reviewing potential replacements and winnowing the field for gubernatorial appointment falls to the Judicial Nominating Commission.

Because these Commissions have such a central role in the process of selecting judges, they are frequently the topic of derision and praise. For those who support merit selection systems, Judicial Nominating Commissions are often characterized as a way to minimize political influence in the choice of judges, with representation from among those who best know the judicial system (lawyer members) balanced by citizen (non-lawyer) input.[13] Among those who oppose merit selection, Judicial Nominating Commissions have been characterized as secret elite cabals controlled by the trial Bar, without public accountability and favoring "liberal" applicants.[14] These characterizations, however, are frequently based on weak or anecdotal evidence and thus serve more as points of

argument than strong empirical assessments of the structure, function, procedures, and membership of Judicial Nominating Commissions as they currently operate.

Previous studies of Judicial Nominating Commissions are limited. The earliest study was conducted by Watson and Downing (1969) as a means to evaluate the extent to which political influences were present in Missouri's Non-Partisan Court Plan.[15] They find a remarkable degree of partisan and ideological manipulation in populating the Commission as well as in Commission decision-making. Most notably, their interview of lawyers and court-watchers in Missouri finds highly polarized bar elections for membership on the Commission, with intense competition between the plaintiffs and defense bars. At the same time, the interviewees noted a high degree of control by the governor through appointment of non-lawyer members and the use of "panel-wiring" whereby the governor would indicate a preferred judicial applicant and the Commission would recommend the preferred applicant alongside others who might as well be chosen at random. As one prominent reviewer wrote at the time "In short, the [Non-Partisan Court] Plan does not elevate the selection process above the politically polluted atmosphere. It merely shifts political arenas – out of the issueless and pedestrian considerations of ward and county politics into the only slightly less base perspective of gubernatorial cronyism and bar factionalism."[16]

Watson and Downing did not survey Nominating Commissioners systematically, and their report is overwhelmingly based upon outsiders' perspectives. Information about how Commissioners – those inside the system – assess the work of the Commission is noticeably absent. Despite the perceptions of political manipulation, the lawyers and court-watchers who were interviewed by Watson and Downing did evaluate judges appointed under the Non-Partisan Court Plan higher on a wide array of judicial attributes, indicating that perhaps the initial goals of adoption were being realized, even amid these perceptions of political influence.[17]

The first full treatment of Nominating Commissions that relied on evidence collected directly from Commissioners was published by Ashman and Alfini in 1974.[18] Based on a systematic field research design supplemented with a national survey of Commissioners, Ashman and Alfini produced a comprehensive study of membership, rules, procedures, and practices. In many important respects, their findings contradict the geographically-limited and outsider-focused Watson and Downing study. For example, they find wide acceptance among Commissioners that political considerations play an extremely limited role in the Commission's deliberations and decisions, that lawyers and non-lawyers work well together, that the governor's preferences are given virtually no weight in the final voting, and that Commissioners consciously repudiate partisan influences.[19] They do, however, find noteworthy differences between lawyer members and their non-lawyer peers in the relative weight given to various evaluative criteria and they sum up their assessment of outside influences by saying "it would be naïve to think that partisan politics and bar associations do not influence the composition and deliberations of some

Judicial Nominating Commissions... we simply wish to emphasize the futility of thinking of Nominating Commissions as hermetically sealed, self-contained entities."[20]

Consistent with this sentiment, Henschen et. al. conducted a national survey of Nominating Commissioners in 1989 to better understand the political, economic, and social characteristics they bring to the process.[21] Demographically, they find significant improvements in the gender diversity of Commissioners since Ashman and Alfini's 1974 survey, although Commissions still demonstrated a remarkable lack of diversity when it came to race and religion. They also find high levels of political activism among Commissioners, and raise questions about the degree to which Commissioners' political ties may "damage the system's legitimacy."[22] Without looking further into the deliberative processes that are used, however, they are unable to draw inferences about the degree to which the political activity of Commissioners may influence the Commissions' decision-making.

Most recently, Joanne Martin conducted a comprehensive national survey of the Chairs of Judicial Nominating Commissions in 1994 that, like the Ashman and Alfini study, included a series of questions about the policies and operating procedures of the Commissions as well as individual assessments of Commission decision-making.[23] Two and a half decades after the initial Watson and Downing study, Martin finds a very different picture of Commission deliberation. Commission Chairs reported that political considerations rarely, if ever, entered into their deliberative processes and a full 89% indicated that they were satisfied with the quality of the candidates they recommended to the appointing authority. At the same time, Commission Chairs did indicate a desire for more highly-qualified applicants and perceived that judicial compensation was the single most important factor in recruiting highly-qualified candidates.

Taken as a whole, these prior research efforts portray a multi-faceted picture of how merit selection systems function in practice. Certainly, all have indicated some degree of political influence in the process, whether through bar politics (Watson and Downing), gubernatorial appointment of judges (Watson and Downing, Martin), the selection of individuals to serve on Nominating Commissions (Henschen et. al, Watson and Downing), the criteria that are used to evaluate applicants (Ashman and Alfini, Watson and Downing), or the relationship between lawyer and non-lawyer members (Ashman and Alfini, Watson and Downing, Martin). *In significant ways, the research also presents a picture of Commissions becoming more systematic in their work, with more codified rules governing their decision-making processes, more transparency, more diversity, and more self-conscious and intentional efforts to remove political influences from the deliberations.* Thus, while no judicial selection process will ever eradicate all traces of politics, the existing literature appears to indicate a significant trend toward reduction in arbitrary or politically-motivated decision-making.

Since 1994, no study of Judicial Nominating Commissioners has been undertaken. To remedy the dearth of empirical information regarding Judicial Nominating Commissions around the country and the individuals who serve on these Commissions, The American Judicature Society conducted a survey of Commissioners during the summer of 2011. The survey included questions about the personal and professional characteristics of sitting Commissioners, the policies and procedures of the Commissions, the evaluative criteria that are used, the relationship between lawyer and non-lawyer members, the Commissioners' relationship with the governor, the role of political and partisan influences, the importance of diversity in Commission decision-making, and the Commissioners' overall assessments of the process.

With 487 respondents, the survey is the largest of its kind.[24]

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Methodology

The online survey instrument was developed over the summer of 2011 and the full battery of questions is included as Appendix D. Judicial Nominating Commissions have been established in 36 states and the District of Columbia. During the spring of 2011, staff members identified all publicly available information about the individuals currently serving on Judicial Nominating Commissions. In those states where Commissioners are not identified on a public website or in a state publication, Commission chairs and/or judicial administrative staff members who work with the Commission(s) were identified. In every state that currently uses a Nominating Commission, communication with the Commission Chair and/or staff member was initiated, and each was given two options for how they would like to distribute the survey to Commissioners:

1. The Judicial Nominating Commission Chair and/or administrative staff members would distribute the invitation to participate in the survey (see Appendix C) to members of the Nominating Commission(s) for which they had authority.
2. The Judicial Nominating Commission Chair and/or administrative staff members could provide AJS staff with contact information for the Commissioners and AJS staff would communicate directly with Commissioners by sending an invitation to participate in the survey.

The first invitation to participate in the survey was distributed on July 25, 2011 with a follow-up invitation/reminder distributed on August 10. A second follow-up postcard reminder was sent out on August 15.

The respondents do not represent a random sample of Judicial Nominating Commissioners. Instead, responses were gathered from those Commissioners who voluntarily visited the online survey. For those Commissioners who did not have access to the internet or had trouble accessing the survey, an option to have a hard copy mailed to them was provided; fourteen Commissioners received and returned a hard copy of the survey.

Given the sensitive nature of their work, all commissioners were guaranteed full anonymity and confidentiality in their survey responses. Therefore, when specific quotes are used, all identifying characteristics have been removed. This confidentiality allows confidence in the results, by permitting commissioners to be honest and candid in their responses. It also contributes to confidence in the generalizability of the results reported here.

The survey responses allow a full assessment of the merit selection process as it is practiced in states across the country. The questions allow us to better understand the makeup of Nominating Commissions, the rules and procedures that govern Commission decision-making, the relationships between Commissioners, the role of political considerations in the process, and the extent of public involvement in the Commission's deliberations. Furthermore, questions pertaining to the work of the Commission permit a better understanding of the system by those who know it best, the Commissioners who serve.

★ ★ ★

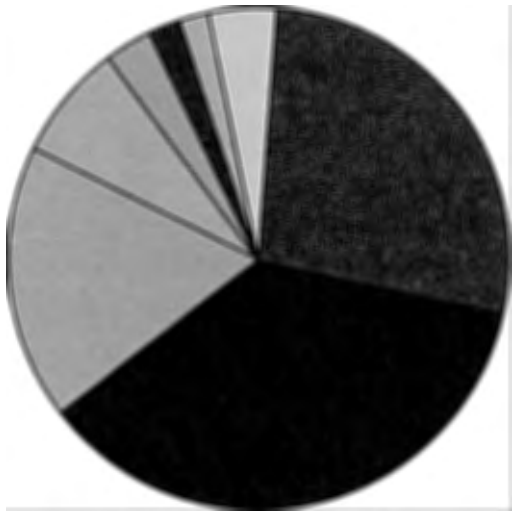
Who serves?

Although not a random sample of Commissioners, the 487 respondents hail from thirty states and the District of Columbia. As Table I reports, large numbers of Commissioners from Nebraska, Iowa, and Colorado responded to the survey. In each of these states, Judicial Nominating Commissions in each judicial district screen individuals for the courts of general jurisdiction, so there are exceptionally large numbers of Commissioners in these three states, accounting for the large number of respondents. For example, Nebraska has a Judicial Nominating Commission for the chief justiceship, one for each district of the Supreme Court, Court of Appeals, and District Court, and one for the courts of limited jurisdiction, with thirty three Nominating Commissions in total. Each Nominating Commission consists of nine people, four lawyers elected by the state Bar Association, four non-lawyers appointed by the governor, and a Supreme Court justice who serves as *ex officio* chair. In Iowa, one statewide Judicial Nominating Commission composed of 15 members reviews applicants for the Supreme Court and Court of Appeals. Fourteen similar Commissions are used to select members of the District Courts, each of which has 11 members. An additional 99 Commissions of 6 members each screen applicants for positions as District Associate Judge and Magistrate Judge. In total, there are over 750 Nominating Commissioners in the state. In contrast, Georgia has one Nominating Commission, established by Executive Order, with 20 members.

The majority of survey respondents were new to their Commission, with 16% having served less than one year; the vast majority have participated in the review process fewer than four times (27.2% report that they have not yet participated in the review of applicants for a judicial vacancy, and 38% report that they have done so for 3 or fewer vacancies). Judge members appear to have slightly more experience in terms of the number of vacancies for which they have reviewed applicants than lawyer or non-lawyer members, but this difference is not statistically significant.

In most states, members of the Judicial Nominating Commission(s) serve a relatively short term of office, generally between 2 years and 6 years (see Appendix B). A few states, including Wisconsin, Minnesota, Massachusetts, and Georgia, allow Commissioners to serve at the governor's discretion, which may mean longer terms of office.[26] Given short terms for Nominating Commissioners, which are typically implemented to ensure turnover in Commission membership

Since joining your current judicial nominating commission, how many times have you participated in the review of applicants to fill a judical vacancy?



and avoid entrenched strategic alliances among Commissioners, it is unsurprising that so many Commission members are new to the process.[27] In addition, turnover frequently occurs in the summer, when the survey was administered.

Finally, 82.8% of Commissioners who responded to the survey report that this is their first experience serving on a Judicial Nominating Commission, while only 17.2% indicated that they have served on other Judicial Nominating Commissions in addition

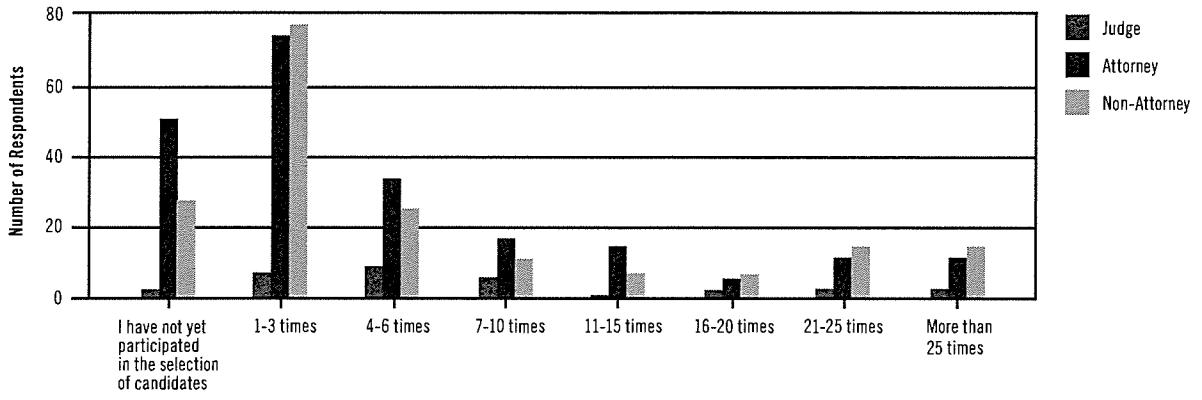
TABLE 1: Geographic Representation of Respondents

In which state does your commission operate?

Answer Options	Percentage	Count
Alabama	0.0%	0
Alaska	1.0%	4
Arizona	6.3%	24
Arkansas	Does not use Nominating Commissions	0
California	Does not use Nominating Commissions	0
Colorado	12.3%	47
Connecticut	0.8%	3
Delaware	1.3%	5
District of Columbia	1.0%	4
Florida	2.1%	8
Georgia	0.8%	3
Hawaii	1.3%	5
Idaho	1.0%	4
Illinois	Does not use Nominating Commissions	0
Indiana	0.5%	2
Iowa	13.1%	50
Kansas	3.4%	13
Kentucky	0.0%	0
Louisiana	Does not use Nominating Commissions	0
Maine	0.3%	1
Maryland	8.6%	33
Massachusetts	0.0%	0
Michigan	Does not use Nominating Commissions	0
Minnesota	4.4%	17
Mississippi	Does not use Nominating Commissions	0
Missouri	3.7%	14
Montana	0.3%	1
Nebraska	27.7%	106
Nevada	0.3%	1
New Hampshire	0.5%	2
New Jersey	0.0%	0
New Mexico	1.0%	4
New York	0.8%	3
North Carolina	Does not use Nominating Commissions	0
North Dakota	0.5%	2
Ohio	Does not use Nominating Commissions	0
Oklahoma	0.8%	3
Oregon	Does not use Nominating Commissions	0
Pennsylvania	Does not use Nominating Commissions	0
Rhode Island	0.8%	3
South Carolina	Does not use Nominating Commissions	0
South Dakota	1.6%	6
Tennessee	1.8%	7
Texas	Does not use Nominating Commissions	0
Utah	0.0%	0
Vermont	0.5%	2
Virginia	Does not use Nominating Commissions	0
Washington	Does not use Nominating Commissions	0
West Virginia	Does not use Nominating Commissions[25]	0
Wisconsin	0.3%	1
Wyoming	1.3%	5

answered question 383 | skipped question 104

Since joining your current judicial nominating commission, how many times have you participated in the review of applicants to fill a judcial vacancy?



Are you currently a member of multiple judicial nominating commissions?

Answer Options	Percentage	Count
Yes	5.2%	25
No	94.8%	452

answered question 477 | skipped question 10

Have you ever been a member of another judicial nominating commission?

Answer Options	Percentage	Count
Yes	17.2%	82
No	82.8%	396

answered question 478 | skipped question 9

to their current service. Twenty five (5.2%) Commissioners who responded say that they serve on multiple Commissions. Of these 25 respondents, four (16%) are judges, eleven (44%) are lawyers, seven (28%) are non-lawyers, and three (12%) did not indicate their role. Membership on multiple Commissions occurs in those states where subsets of Commissioners in one geographic area are also responsible for reviewing applicants for smaller geographic subdivisions that fall within their Commission's jurisdiction. Seventy-two percent report that they fill vacancies for one or more counties, and 84% indicate that they are charged with screening applicants for trial courts. For purposes of analysis, the 25 Commissioners who serve on multiple Commissions are excluded from discussion of survey results regarding questions about specific Commission practices, as their service on multiple Commissions makes it unclear which Commission they are referencing in their responses. ★

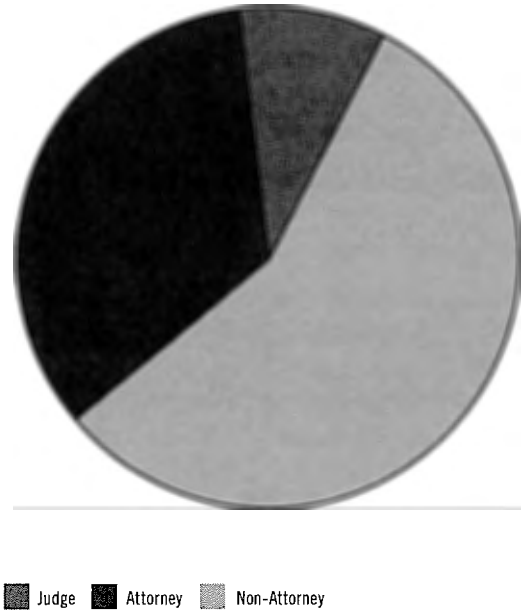
MEMBERSHIP & ROLES

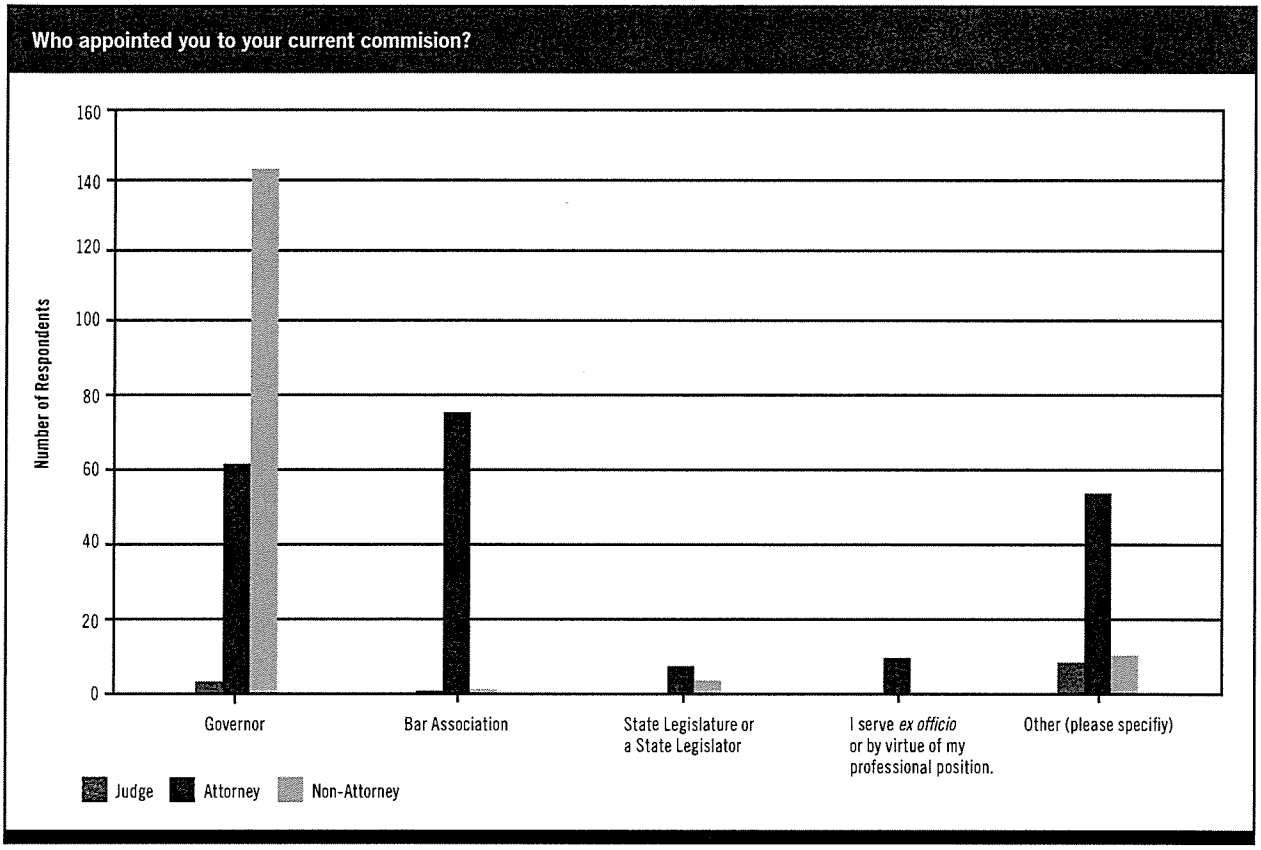
Merit selection systems are generally designed to include both lawyers and non-lawyer citizen Commission members, with the goal of balancing the expertise of the legal community with the sentiments of the citizenry. Often a judge will serve as *ex officio* chair, lending their reputation and experience to the process. Lawyers possess a unique ability to understand the work of the courts, to evaluate applicants' written materials including legal decisions or case briefs, and to assess the specialized knowledge and experience of potential judges. Citizen members, in turn, provide a voice for the public at large, ensure accountability in decision-making processes, and provide representation of the community in which they live. As noted in The American Judicature Society's *Model Judicial Selection Provisions*:

> In a democratic society it is important that public bodies such as Judicial Nominating Commissions are broadly representative of the communities they serve. Care should be taken to ensure that the composition of the Commission is reflective of the geographic and demographic makeup of the state or district and that neither political party has more than a simple majority of Commission members. A balanced Commission will include attorneys who can advise on the needs of the court and the professional qualifications of applicants. Lay members represent the public and have useful links to the community when screening and investigating applicants, and their non-legal perspective lends the process credibility and legitimacy in the eyes of the public. For these reasons, some jurisdictions have opted for a majority of lay members on the Commission. If a judge is a Commission member, s/he should have limited power so as to avoid exercising undue influence over other Commission members. [28]

The pool of survey respondents includes healthy subsamples of judge, lawyer, and non-lawyer members of Judicial Nominating Commissions, with 23 (4.7%) identifying as judges, 202 (41.5%) identifying as attorneys, and 159 (32.6%) identifying as non-attorneys. Of these subsets, it is worth noting that Commissioners are chosen for Commission service in predictable ways: non-lawyers are overwhelmingly selected by the governor,[29] lawyers are elected by the state or local Bar Association and judges report that they either serve *ex officio* as a result of their office or are chosen for the Commission in some other way (usually by seniority or by appointment by the Chief Judge). What is perhaps most notable, however, is the very large number of lawyers who are appointed by the governor. The common characterization of lawyer members of Judicial Nominating Commissioners is that of bar-elected representatives of the legal community. The data, however, indicate that of the 199 attorneys responding to the question, 63 (31.7%) were selected by the governor, while 76 (38.2%) were selected by the Bar Association. Some states allow the governor to make all appointments to the Nominating Commission and others practice merit selection by virtue of an Executive Order that guarantees the governor control over the makeup of the Commission. But the lawyers reporting that they were selected by the governor are not limited to states where the governor has extensive power over Commission membership. ⋆

Which of the following best describes your status as a member of your judicial nominating commission?




Who appointed you to your current commision?
Number of Respondents
160
140
120
100
80
60
40
20
0
Governor
Bar Association
State Legislature or a State Legislator
I serve ex officio or by virtue of my professional position.
Other (please specifiy)
Judge
Attorney
Non-Attorney

PROFESSIONAL BACKGROUND OF COMMISSIONERS

A series of survey questions was designed to assess the professional background of Nominating Commissioners. Among the 23 judge members who participated in the survey, 14 (63.6%) served on a general jurisdiction trial court, 5 (22.7%) served on an intermediate appellate court, and 3 (13.6%) were members of the state's high court.

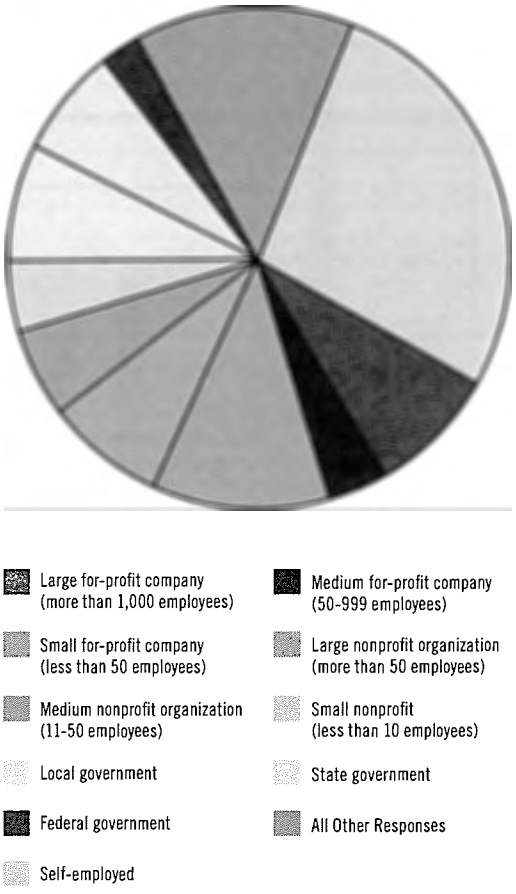
Any assumption that lawyer members hail from only one segment of the bar is mistaken – in fact, the plaintiffs and defense bars are both well-represented.

Among lawyer Commissioners, those in private practice vastly outnumbered those in other professional settings. 82% of the 202 attorneys who responded said that they worked at a private firm, with an additional 9% saying that they work in state or local government.

Of those at private firms (a total of 164 respondents), 99 (60.7%) say that they are a partner or shareholder at a firm with associates, 33 (20.2%) say that they are a solo practitioner, 15 (9.2%) say that they are a partner or shareholder at a firm without associates, and 11 (6.7%) say that they are an associate with a law firm. The very high percentage of partners or shareholders indicates that attorney Commissioners represent the elite of the legal community. Regarding the type of work that these practitioners do, 21.9% indicate that their firm represents primarily plaintiffs, while 26% report that they tend to represent defendants (47.9% say that they represent an approximately equal mix of plaintiffs and defendants).[30] Any assumption that lawyer members hail from only one segment of the bar is mistaken – in fact, the plaintiffs and defense bars are both well-represented.

Among non-lawyer lay Commissioners, there are few clear trends regarding the kind of individuals selected to serve in the nominating process. A large number are retired (included among all "other" responses, 15% of non-attorneys volunteered that they were retired), and the self-employed are over-represented.

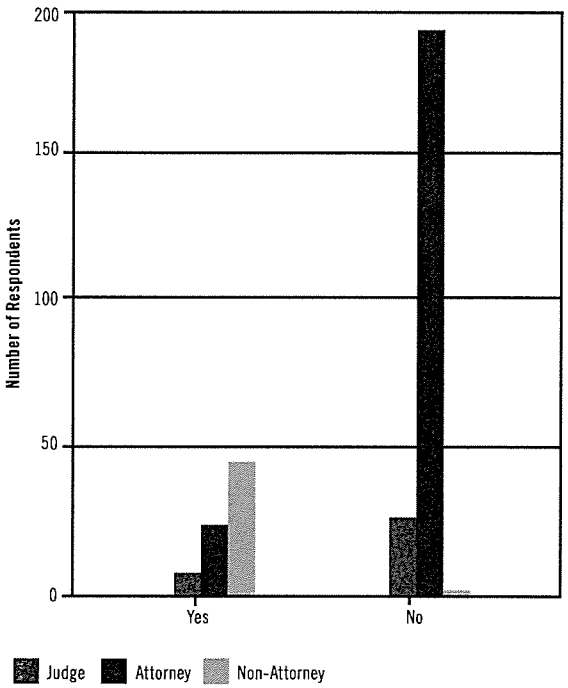
Which of the following describes your place of employment? (non-lawyer Commissioners)



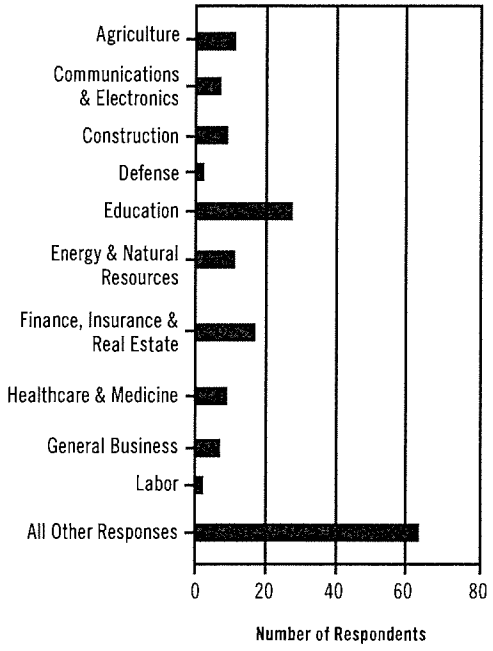
When asked about the industry in which they are employed, education tops the list with 18.1% of non-lawyer Commissioners indicating work in the educational sector, followed by finance, insurance and real estate (10.1%), agriculture (6.7%), and healthcare/medicine (5.4%). Among the large number of non-lawyer Commissioners who volunteered a response not offered, a fairly large number (23 in total) listed work in criminal justice, corrections, and social services, including victim advocacy and work as a volunteer guardian *ad litem*.

Most states do not require legislative confirmation of Judicial Nominating Commission appointments, but Commissioners appointed by the governor, whether lawyers or non-lawyers, are the most likely to be subject to legislative confirmation. By large majorities, Commissioners in all three categories report that they were not confirmed by the state legislature. Of the 52 Commissioners who indicate that they were confirmed, 35 (67.3%) were non-attorneys. Put differently, 85.7% of judges report that they were not confirmed by the state legislature prior to beginning their Commission service,[31] 93% of attorneys report that they were not confirmed, and 77.0% of non-attorney members report that they were not subject to legislative confirmation. ⋆

Were you confirmed by the state legislature before you began serving on your current commision?



Which of the following best describes the industry in which you are employed?

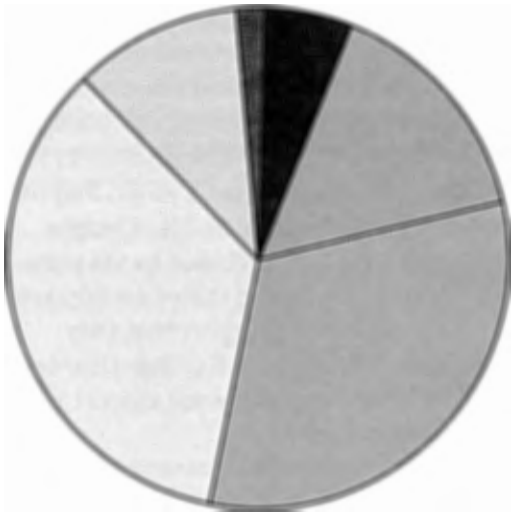


DEMOGRAPHIC INFORMATION AND DIVERSITY

Prior studies of Commissioners have found that they are overwhelmingly white and male, with the average lawyer Commissioner older than the legal community at large "presumably because [younger lawyers] have not been in practice long enough to have come into contact with a substantial number of fellow attorneys through bar association activities and other professional work."[32] In terms of age, the average Commissioner responding to our survey was 57.8 years old, with a range from 27 to 91. Comparing these survey results against those collected by Ashman and Alfini in 1973, it appears that Commissions have grown significantly older in their makeup over the past 38 years. At the same time, we see a distinct trend toward greater representation in terms of gender and race. Over time, more women have been appointed as Commissioners: 32% of all respondents were women, up from 10% in 1973 and 25% in 1989. The numbers of African American and Hispanic Commissioners are also growing, though the change appears to be happening very slowly. The percentage of White commissioners has gradually declined, from 98% in 1973 to 93% in 1989 to 88.9% in 2011, as the percent of Commissioners who identify as African American (4.2%), Asian or Pacific Islander (1.6%) and American Indian (.5%) seem to be inching upward. The percentage of Commissioners who identify as being of Hispanic, Latino, or Spanish origin appears to have leveled off at their 1989 levels.[33]

No study of Nominating Commissioners has ever included questions of gender identity or sexual orientation. With increasing focus on diversity on the bench, and the growing recognition that diverse voices on the Nominating Commission may help advance the cause of judicial diversity, sexual orientation among Nominating Commissioners may have a significant effect upon the likelihood for growing numbers of openly LGBT judges in the states. Of the 376 Commissioners responding to the question, only 9 (2.3%) identified themselves as gay or lesbian, with an additional 2 (.5%) identifying as bisexual; 93.1% responded that they were heterosexual or "straight."

Age of Commissioners



	Asthman and Alfini (1973)	Henschen at al (1990)	2011 AJS Survey
AGE	41 or younger (15%)	40 or younger (17%)	41 or younger (8.5%)
	42-47 (20%)	41-50 (32%)	42-47 (9.9%)
	48-53 (23%)	51-60 (24%)	48-53 (12.4%)
	54-59 (19%)		54-59 (22.3%)
	60 or older (23%)	61-70 (20%)	60 or older (46.9%)
RACE	White (98%)	White (93%)	White (88.9%)
	Black (2%)	Black (3%)	Black (4.2%)
	Hispanic (.2%)	Hispanic (2%)	Hispanic (1.7%)
	Other (.2%)	Other (2%)	Asian or Pacific Islander (1.6%)
			American Indian (.5%)
			Prefer not to answer (3.2%)
GENDER	Male (90%)	Male (75%)	Male (65.1%)
	Female (10%)	Female (25%)	Female (32.0%)
			Prefer not to answer (2.9%)

★ ★ ★

Procedures and Rules

To say that no two merit selection systems work in exactly the same way is an understatement. In fact, Judicial Nominating Commissions across the country operate with widely divergent rules and procedures, due in part to the large variation in the statutory and constitutional provisions that govern these entities, and in part because of the discretion that has been granted to Nominating Commissions to design and implement their own Commission practices.

While statutory or constitutional language may provide guidance to the Commission, it may also leave the Commissioners substantial leeway to develop working rules that will guide the process of screening applicants and making recommendations. For example, authorizing provisions may outline the evaluative criteria for the Commission to use, without guidance on voting procedures, recruitment of applicants, or the degree to which Commission deliberations will be open to the public. As a result, some Commissions function with sophisticated written rules and procedures that govern every step of the process while others operate with only an informal understanding of how they will exercise their responsibilities. It is frequently difficult to track the extent to which rules and procedures, including formal ethics provisions, are utilized because so many Commissions operate at different levels and with differing degrees of organization. In any given state, it is possible that a statewide Supreme Court Nominating Commission may use extensive written rules to guide their work, while District Court Nominating Commissions deviate from the written rules that statewide Commission has established, and county Nominating Commissions may (or may not) independently develop written rules. Thus, understanding Commissioners' reliance on formalized rules and procedures is essential to understanding how these Commissions go about their job of recruiting, screening, and interviewing applicants, deliberating to determine who is best qualified, and voting on a list of names that will be submitted to the governor or other appointing authority.

The American Judicature Society recommends formalized written procedures for all Judicial Nominating Commissions:

> If the Commission does not have written procedural rules, including selection criteria, Commissioners should develop and adopt them. The use of uniform rules reassures members of the public and potential applicants that the process is designed to treat all applicants in an even-handed and fair manner, and to identify the best-qualified persons to nominate for the judgeship. AJS recommends that a copy of the rules be included with the questionnaire sent to applicants, and that the rules also be made available to the public – either upon request, through the media, by posting them on a court website, or in a manner best suited to the jurisdiction.[35]

Commentary in the *AJS Model Judicial Selection Provisions* similarly states that:

> The benefits of standard, written procedures are many. Written rules guide Commissioners and applicants. They help ensure that all applications are handled similarly, and reassure the public that the process is fair and will withstand scrutiny.[36]

Of our survey respondents, 78% report that their Commission operates with written operating procedures, while just 7.1% report that their Commission does not have written operating procedures (14.9% indicate that they do not know whether their Commission has written operating procedures or not).[37] This is a remarkable change since Ashman and Alfini's 1973 study of

Nominating Commissions, where they write that

> It appears... that most of the Commissions either have not exercised their authority to adopt procedural rules or, if they have adopted rules, have neglected to commit them to written form. Sixty percent of the Commissioners who responded to our questionnaire indicated that the operating procedures of their Commission were not written or codified in any manner.[38]

Furthermore, most Commissioners indicated that the rules of the Commission were a matter of public record, with 65.9% responding that their Commission makes an effort to publicize the rules governing Commission procedures. Just as previous studies of Nominating Commissions have found some disagreement among Commissioners about what constitutes "written rules of procedure" and whether their Commission has adopted formal rules,[39] a breakdown by state indicates disparities in whether procedures have been formalized. This is likely attributable to two factors. First, new Commissioners are often unaware of the extent to which Commission procedures have been codified. Perhaps more importantly, the discretionary nature of the Commission's work in many states has led some Commissions to adopt formal written procedures while other Commissions operating in the same state may fail to do so.

Among the most common provisions included in written rules of procedure were statements that outline the evaluative criteria that will be used by the Commission in its consideration of applicants, with nearly 7 in 10 Commissioners recognizing this as a part of their written operating procedures. Over half also indicated that their Commission had written rules prohibiting discrimination and just over 40% cited provisions that require partisan balance among members of the Commission. Approximately 30% also reported provisions that encourage Commission recruitment of applicants, rules governing the demographic and geographic diversity of Nominating Commissioners, and written guidelines or requirements regarding diversity among those recommended to the governor as nominees to the bench.

Just as formalized rules appear to be far more common today than they were in 1973, Commissioners overwhelmingly report that they are bound by written ethics provisions, with three-fourths of all Commissioners responding that these rules are used for their Commission. Of those reporting that members are required to adhere to codified ethical guidelines, approximately 75% cite rules

Which of the following are included in your commission's written operating procedures? (Indicate all that apply).

Answer Options	Percentage	Count
A provision recommending that commissioners recruit applicants	30.7%	102
A provision regarding demographic diversity among commissioners	30.1%	100
A provision regarding partisan balance among commissioners	42.5%	141
A provision regarding geographical diversity among commissioners	32.2%	107
A provision regarding discrimination	55.1%	183
A provision providing the criteria the commission should use when evaluating applicants	69.0%	229
Not Applicable	1.8%	6
Don't know	17.8%	59
Other (please specify)	3.0%	10

answered question 332 | skipped question 120

governing recusal in cases of conflict of interest and requirements of confidentiality. By contrast, other ethics provisions, including prohibition on political activity by members of the Nominating Commission, restrictions on communications with the governor or other appointing authority, and disclosure of any communication about the process with the governor or other appointing authority appear to be far less common. While it is possible that Commissioners are simply unaware of these rules, it appears as though these guidelines have yet to become the norm. ⋆

Which of the following are included in your commission's ethics provisions?

Answer Options	Percentage	Count
A provision requiring you to disqualify yourself in the event of a conflict of interest	75.3%	250
A provision requiring commissioners to disclose communication with the governor (or other appointing authority)	10.2%	34
A provision prohibiting communication with the governor (or other appointing authority)	10.8%	36
A requirement that commissioners keep committee deliberations confidential	74.4%	247
A prohibition on political activity by commissioners	15.1%	50
Not Applicable	1.5%	5
Don't know	10.8%	36
Other (please specify)	4.5%	15

answered question 332 | skipped question 120

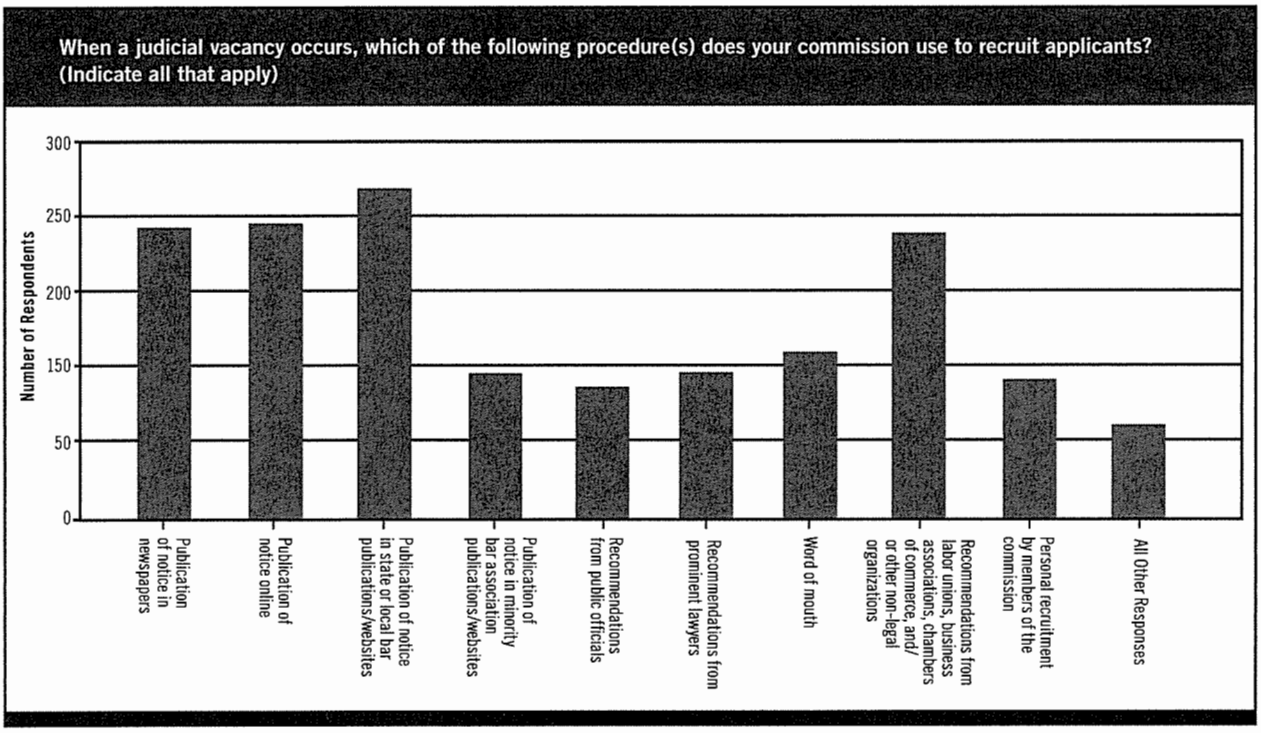
RECRUITMENT OF APPLICANTS

Judicial Nominating Commissioners are charged with the task of screening judicial applicants, assessing qualifications, and making recommendations regarding which individuals are best suited to the bench. Before they can begin the screening process, however, they must solicit applications. When a judicial vacancy occurs, Commissions are often given the responsibility to advertise the position and provide information about the timeline and process for consideration of judicial applicants.[40] How they do so is often left to the Commissioners to decide, and the call for applications can be distributed in a wide variety of ways. *Commissioners report that the most common means of soliciting applications is through publication in newspapers and Bar Association journals, as well as online postings.*

Interestingly, specialized and minority bar publications are far less likely to be used by the Commissions, and recommendations from public officials and prominent attorneys are generally utilized about the same amount as specialized bar publications. For those interested in advancing demographic and professional diversity on the bench, this is particularly important, as women and minorities as well as attorneys in certain practice areas may be ill-served by a Commission that looks to existing political and legal elites as a means of identifying applicants rather than utilizing smaller publications that reach targeted populations in under-represented demographic or professional groups. *Also significant is the reliance on word of mouth as a tool to solicit applications, cited by 49.6% of respondents, indicating that Commissioners rely on a close-knit legal community to function as a means to notify qualified individuals of the vacancy and the procedures for application.*

Similarly, the practice of personally recruiting applicants can be problematic,[41] in that it may be perceived as a conflict of interest to have Commissioners inviting applications from their network of personal and professional connections, and it may lead those who are recruited to believe that they have an advantage in the review process. Nonetheless, *nearly a quarter (23.9%) of Commissioners who responded to the survey report that the Commission relies on personal recruitment by Commission members.*

Also noteworthy is the number of applications Commissioners report receiving for vacancies. The modal category, 6-10 applications, was selected



by 37.3% of all respondents. This is the modal category for Commissions reviewing applicants on all levels of state courts, with only slightly higher numbers reported for appellate level courts. While high workloads may undermine the careful screening of applicants, as the time commitment would be simply impossible to manage for unpaid Commissioners operating with little staff assistance, a small number of applications can have the effect of promoting those applicants who take the time to apply, regardless of their relative merits when compared with other qualified individuals in the state. For example, the Commission that selects nominees to the Utah appellate courts has 45 days to screen applicants and submit a list of 5-7 qualified candidates to the governor. If only 6-10 applications are submitted, then any individual who commits the time to submitting an application has a remarkable chance of having their name forwarded to the governor for appointment. *Low numbers of applications also has the unintended consequence that the Nominating Commission may be serving in the capacity of weeding out unqualified applicants rather than truly having an opportunity to identify the best qualified applicants.* For those who are concerned about the power of a Nominating Commission to substantially restrict the governor's choices, however, the small number of applications may be a reassuring finding. ⋆

"We accept all applications, and some of the applicants may be recruited by all of the above methods. We would not do personal recruiting based on recommendations from public officials, for example, but surely some applicants have applied due to encouragement from public officials."

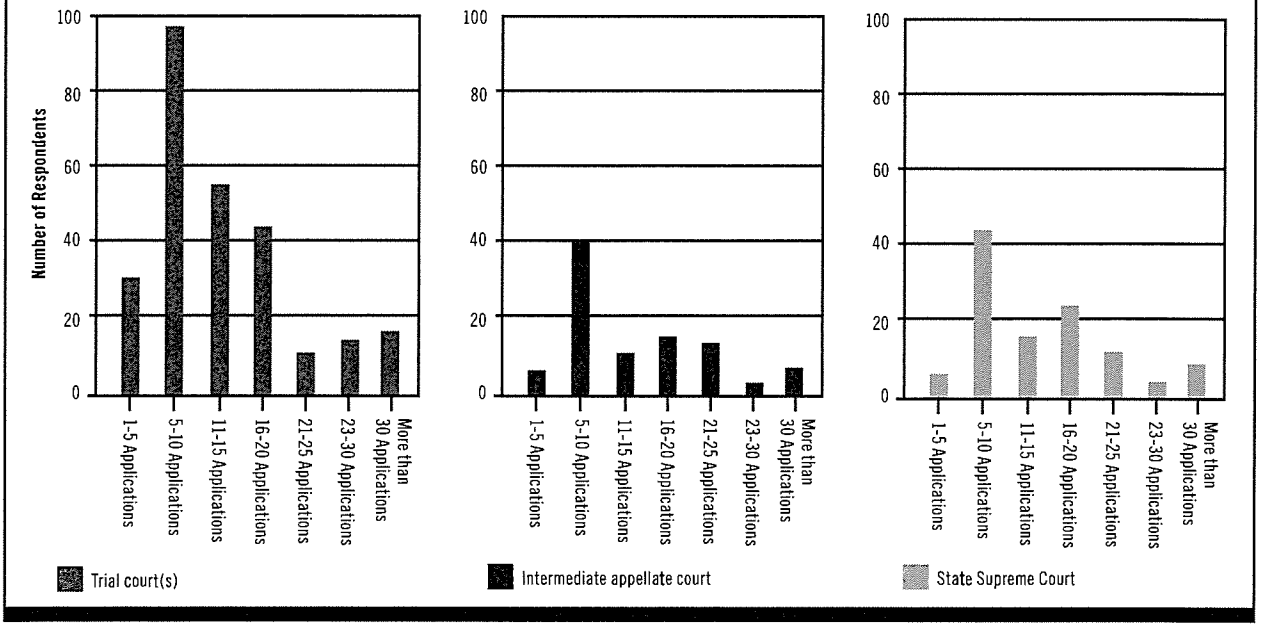
-survey comment by commissioner

For a typical vacancy, how many applications does your commission receive?

Answer Options	Percentage	Count
1-5 Applications	11.9%	46
6-10 Applications	37.3%	144
11-15 Applications	17.9%	69
16-20 Applications	16.8%	65
21-25 Applications	6.7%	26
25-30 Applications	4.1%	16
More than 30 Applications	5.2%	20

answered question 386 | skipped question 101

For a typical vacancy, how many applications does your commission receive?



SCREENING APPLICANTS

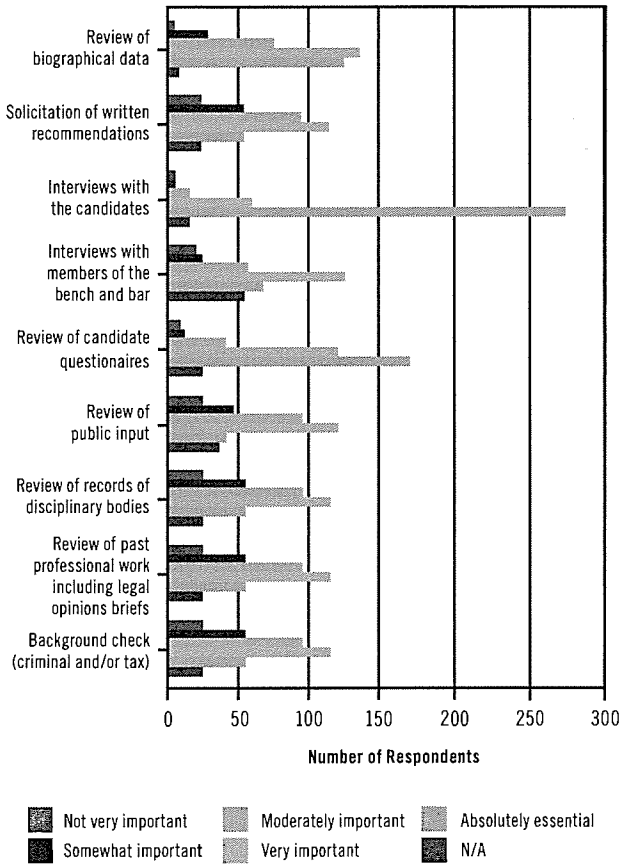
"In my experience, [recruitment] was not part of our responsibility. The recruitment and notification was not done by the members of the Judicial Commission."

-survey comment by commissioner

The process of reviewing applications is the signature of the merit selection process. Statutory, constitutional or Executive Order language typically restricts the time in which the Commission must work, with virtually all Commissions required to submit names to the governor (or other appointing authority) within an established timeline generally ranging between 30 and 90 days.[42] The first step in this process is to collect information about the applicants, usually including a detailed uniform application that is submitted by each individual wishing to submit their name for the position. Commissions, however, generally seek to independently solicit additional information, and some Commissions have detailed procedures providing for personal reference checks, review of criminal tax and disciplinary records, and submission of public comments in addition to Commission interviews with all or some of the applicants.[43]

In evaluating the significance of various sources of information, by far the most widely appreciated among Commissioners were interviews with the applicants. Interviews will be addressed in more detail in later sections. For now, it is worth noting that *nearly 3 in 4 respondents (72.9%) rated the interviews as "absolutely essential" information sources in the review process. A majority of respondents also identified reviews of disciplinary records and reviews of criminal history and tax documents as "absolutely essential" in the process of assessing applicants. Review of candidate questionnaires also received significant attention from Commissioners, with a near majority (46.8%) citing it as "absolutely essential."* All other information sources included in the survey were generally regarded as "very important" (the modal category), although public input seems to have less significance in the work of the Commissions. One fifth (20.5%) of all Commissioners who responded to the survey rated "review of public input" as "not very important" or "somewhat important" and only 11.1% evaluated it as "absolutely essential"; "review of public input" received the lowest average rating of all information sources. *Interestingly, there are few differences between lawyer members, non-lawyer members, and judge members when evaluating the importance of informational sources.*

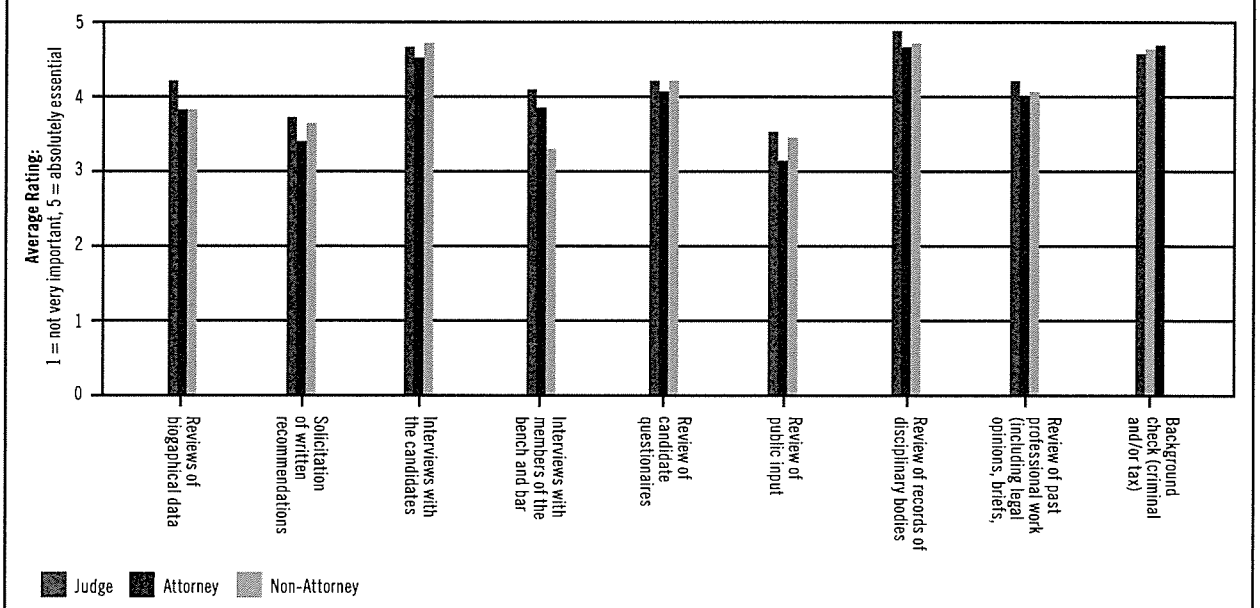
Indicate how important each of the following sources of information are in your commission's review of an applicant. If your commission does not utilize a particular source of information, indicate N/A.



Judges who serve on Judicial Nominating Commissions appear to value solicited written recommendations less than lawyer and non-lawyer members. They appear to put more emphasis on interviews with judges and lawyers familiar with the applicants' work as well as personal review of past legal briefs, judicial opinions, and/or published articles.

Lawyer and non-lawyer members demonstrate remarkable agreement on the value of all information sources, sharing the modal response in all but two; "solicitation of written recommendations" is slightly more valued by non-lawyers than by lawyers and "review of biographical data" is slightly more valued by lawyers than non-lawyers on the Commissions. The differences are not statistically significant. *

Indicate how important each of the following sources of information are in your commission's review of an applicant. If your commission does not utilize a particular source of information, indicate N/A.



INTERVIEWS

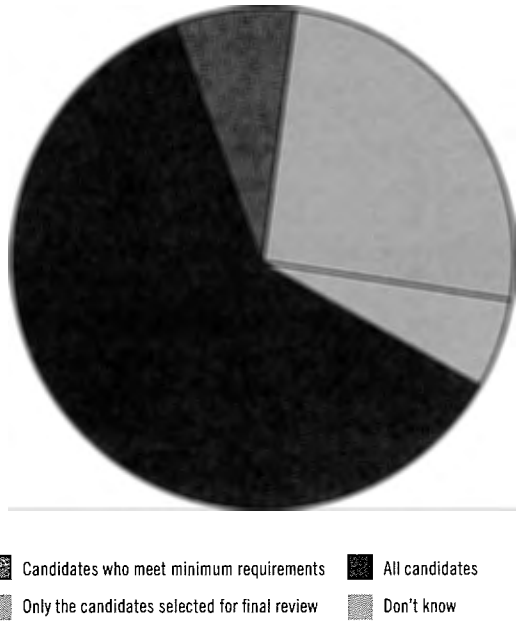
As reported, Commissioners overwhelmingly report that interviews are an important source of information as they evaluate the strengths and weaknesses of a potential judge. Interviews offer the Commission an opportunity to hear from the applicant directly, to ask questions and clarify inconsistencies or concerns about the applicant's record. In some cases, Commissions will conduct an initial screening to determine a set of finalists who will be interviewed in person.[45] Other Commissions regularly interview all applicants, regardless of whether the application materials indicate that they will be a viable candidate for recommendation to the appointing authority. In either scenario, Commissioners generally can use an interview with an applicant as a way to assess personal presentation, verbal communication abilities, temperament, and to request additional information about application materials:

> The interview is a critical step in the selection process. Up to this point, from the applicant questionnaire and investigation results, the Commission has been collecting information about the applicant. Now the Commission can gather additional information from the applicant. The interview thus provides an opportunity to meet the person behind the application, allowing each Commissioner to assess the applicant's demeanor, attitudes, oral communication abilities, maturity and candor... Effective interviews provide an additional basis for comparing candidates, supplementing information gleaned from the applicant questionnaire and investigation.[46]

Personal interviews may also permit non-lawyer members with an opportunity to meet the applicant, granting them knowledge that lawyer members may already possess as a result of their knowledge of and relationships within the legal community.[47]

Survey respondents overwhelmingly indicate that their Commission conducts personal interviews with all applicants. *More than 9 in 10 (91.9%) report that their Commission holds formal candidate interviews, while a mere 2.3% say that they do not do so. Of those who do interview applicants, 60.9% say that their Commission interviews all applicants, 25.5% say that they screen individuals before determining who will get an interview with the Commission, 7.8% say that their Commission interviews only those who meet minimum requirements (age, experience, etc), and 5.8% say that they are unfamiliar with the Commission's practices regarding interviews.*

Thinking about the formal candidate interviews your commission conducts, does the commission interview:



There are two noteworthy qualifications regarding interviews. First, a number of Commissioners report that members of their Commission meet with applicants individually outside of formal interviews. Second, although interviews are widespread, they do not appear to be particularly in-depth.

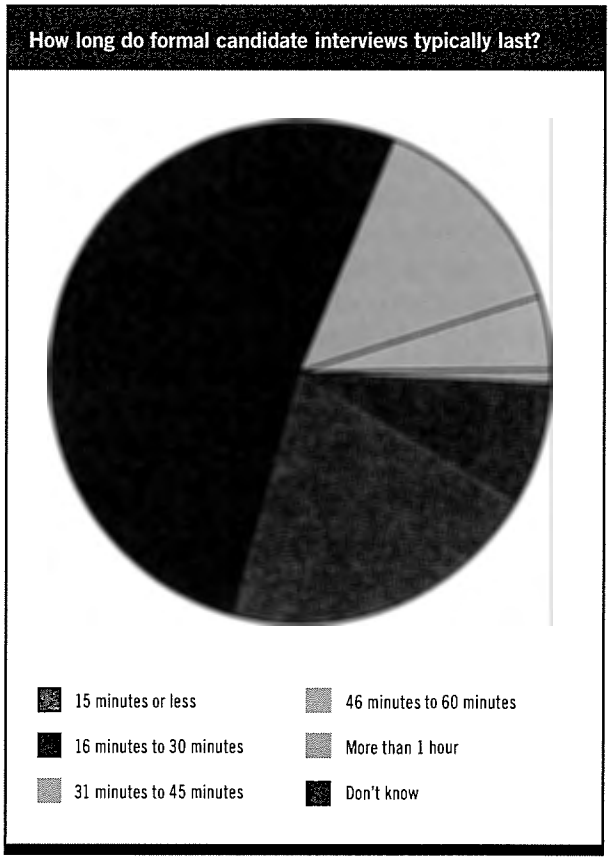
The American Judicature Society's *Handbook for Judicial Nominating Commissioners* recommends full Commission interviews of at least 30 minutes, with uniform questions, perhaps supplemented by unique questions that may be necessary to address specific concerns in an applicant's file.[48] Interviews with the full Commission guarantee that all Commissioners have the same information and experience with an applicant, ensure that all applicants appear before the Commission under the same conditions, and help to mitigate against the possibility of improper questioning by any

one Commissioner who may wish to undermine the process by focusing on personal or political characteristics of the applicant. Similarly, good interviews will allow the applicant sufficient time to answer questions fully and thoughtfully and will give Commissioners ample time to follow up and really gain a familiarity with the individual, and "most Commissioners agree that interviews should rarely be less than 30 minutes."[49] Nonetheless, *Commissioners who participated in the survey indicate that although formal interviews are conducted by the entire Commission (93.2% say that this is the case), meetings and interviews between individual Commissioners and applicants are not uncommon. In fact, fully a quarter (24.6%) of respondents indicate that these meetings happen outside of the formal interview process.*[50] These individual meetings are extremely common in Iowa, where applicants are expected to make arrangements to meet with each Commissioner in addition to their formal Commission interview, pursuant to operating procedures that state:

> Members of the Commission may personally interview candidates to determine their qualifications. Each candidate has the right to contact Commission members to ascertain if the Commission member desires to interview the candidate privately in advance of the Commission meeting. Such contacts, however, are not mandatory. In addition, the entire Commission may arrange interviews with all or any candidates the Commission believes to be qualified for the judicial vacancy to be filled.[51]

Unsurprisingly, 27.1% of all Commissioners who report meetings with applicants outside of formal interviews hail from Iowa, followed closely by 21.2% who serve in Nebraska, and 20% who serve in Maryland.[52]

Similarly, the vast majority of Commissioners who answered the survey report that their Commission interviews are fairly short, with 21.1% responding that interviews are typically 15 minutes or less and an additional 51.6% responding that interviews are typically 16-30 minutes long. Given the apparent trend toward interviewing all applicants, and the volunteer nature of Commission service, the increased workloads may be responsible for these short interviews. Although 16-30 minutes is the modal category regardless of the presence or lack of screening process (i.e. whether or not all applicants are interviewed in person, or only those who have been screened and selected as viable candidates), it does appear that those Commissions that interview all applicants generally have shorter interviews. ⋆



"I myself hold true to how the person will best serve the needs of the public in a fair and impartial manner. Communication is a very important part of my decision process as much teaching and explanation must occur in court."

-survey comment by commissioner

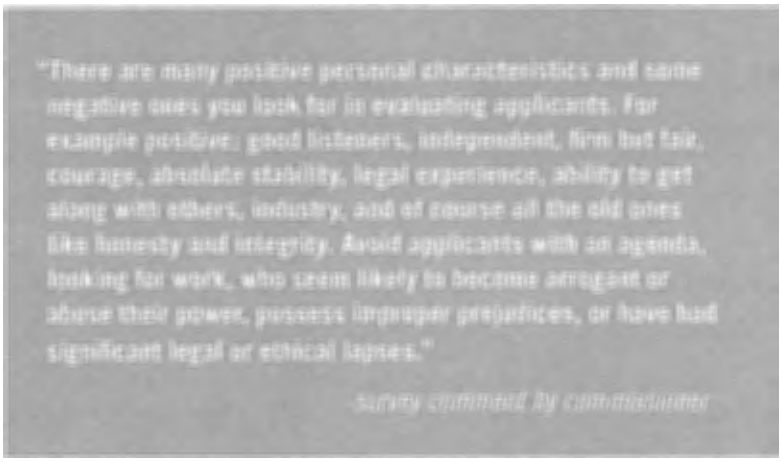
EVALUATIVE CRITERIA

Every Commissioner is charged with a responsibility to evaluate applicants for the bench and determine which individuals are best suited to judicial service. To do so, they must weigh evidence submitted by the applicant, review the record, and evaluate outside input. Judging, however, is never an exact science, and determining who is most qualified can be an extremely difficult task. Certainly, professional reputation, experience, legal knowledge, communication skills, work ethic, temperament, fairness, and integrity are all essential components of a good judge. At the same time, different courts require different skill sets – the exemplary trial judge and the exceptional appellate judge likely have some similar characteristics, but may have vastly different strengths and styles. While one may excel at written communication, decisiveness, and caseload management, the other may rely on collegiality and expansive legal knowledge. In some jurisdictions, trial court judges must travel and quickly adapt to changing professional circumstances. In appellate courts, judges must have a capacity to balance competing legal principles while maintaining relationships with dissenting colleagues. How these qualities are best assessed, however, is something that Commissioners must consistently ask, and must attempt to answer in order to perform their job effectively. One scholar, assessing judicial selection methods, writes:

> Initially, there is the problem of reaching agreement on what attributes make someone a qualified judge. While it might be possible to agree on some general attributes, it is difficult to quantify them in any one individual, and just as difficult to determine ways to design an imperfect tool such as a judicial selection system to promote these attributes. Further, even assuming that these difficulties can be overcome, there is the problem of garnering public support for such a system. Unfortunately, judicial candidates, unlike eggs, do not come with a generally-recognized quality grade stamped on their forehead, visible to all.[53]

Most famously, Maurice Rosenberg has written that "a black robe and gavel do not by themselves make an able judge of an able lawyer."[54]

Commissioners evaluate information based upon their perceptions of those qualities that are most likely to predict success in the position, but specific criteria individually appear to have very little independent impact. To determine those evaluative criteria that carry the most weight in Commission assessments, we asked the Commissioners about a variety of factors and the importance they have in the Commissioners' review process. For each criteria, we asked Commissioners to "evaluate how important [it] is to *you* when reviewing an applicant." As such, the responses are based on individual decision-making processes rather than the Commissioners' assessments of their collective decision-making processes. Answers ranged from "not very important" (1) to "absolutely essential" (5).



The only criteria that was widely rated as "absolutely essential" by the Commissioners completing the survey was "applicant's mental health," with 46.3% of all respondents categorizing it as such. The only single criteria that received a comparable average rating among Commissioners was "applicant's professional reputation," with an average score of 4.26 (the modal category for professional reputation was "very important," while the modal category for mental health was "absolutely essential"). *Those criteria that received scant attention from Commissioners include personal and demographic characteristics and past political experience and/or affiliations.* The ten lowest average ratings, for which "not very important" was

the modal category in every case, were: applicant's race/ethnicity, applicant's gender, applicant's sexual orientation or gender identity, applicant's prior service as a public defender, applicant's prior experience as an elected or appointed public official, applicant's experience holding office in a political party, applicant's party affiliation, recommendations or ratings from labor unions, recommendations or ratings from civil rights groups, and recommendations or ratings from law enforcement. *The ten highest rated criteria, following applicants' mental health and professional reputation, were written communication skills, oral communication skills, number of years of legal practice, amount of trial experience, honors and professional distinctions, recommendations and ratings from other Commissioners, participation in civic or community affairs, and prior service as a judge or magistrate.*

While Commissioners consistently note that political affiliation and prior political experience are not important in their evaluation of an applicant, it is worthwhile to contrast this with the importance allotted to recommendations or ratings by fellow Commissioners. Certainly, this is not the most important consideration reported, but given earlier indications that recommendations by other Commissioners are considered important for recruiting efforts, and that they also play a role in the evaluation process, the collegiality of Commission interactions could potentially pose a problem should it result in favoritism. For those who are particularly interested in practices that could increase diversity on the bench, the lack of attention paid to race or ethnicity, gender, and sexual orientation combined with the lack of recruiting among minority bar associations

Answer Options	Not very Important (1)	Somewhat Important (2)	Moderately Important (3)	Very Important (4)	Absolutely Essential (5)	Rating Average	Count
Applicant's age	11 (30.87%)	119 (32.51%)	108 (29.51%)	25 (6.83%)	1 (0.27%)	2.13	366
Applicant's physical health	33 (8.99%)	65 (17.71%)	125 (34.06%)	117 (31.88%)	27 (7.36%)	3.11	367
Applicant's mental health	5 (1.39%)	9 (2.49%)	42 (11.63%)	138 (38.23%)	167 (46.26%)	4.25	361
Applicant's gender	247 (66.94%)	60 (16.26%)	50 (13.55%)	12 (3.25%)	0 (0.00%)	1.53	369
Applicant's race or ethnicity	231 (63.11%)	57 (15.57%)	65 (17.76%)	13 (3.55%)	0 (0.00%)	1.62	368
Applicant's sexual orientation or gender identity	311 (84.28%)	43 (11.65%)	13 (3.52%)	1 (0.27%)	1 (0.27%)	1.21	370
Applicant's law school record (including their academic performance and the prestige of the law school)	76 (20.65%)	94 (25.54%)	115 (31.25%)	75 (20.38%)	8 (2.17%)	2.58	369
Number of years applicant has practiced law	6 (1.62%)	33 (8.92%)	124 (33.51%)	171 (46.22%)	36 (9.73%)	3.54	370
Amount of trial experience	3 (0.81%)	23 (6.23%)	93 (25.20%)	198 (53.66%)	52 (14.09%)	3.74	369
Amount of appellate experience	55 (15.11%)	87 (23.90%)	113 (31.04%)	92 (25.27%)	17 (4.67%)	2.80	364
Amount of academic or teaching experience	103 (28.07%)	106 (28.88%)	119 (32.43%)	36 (9.81%)	3 (0.82%)	2.26	367
Honors and distinctions applicant has received as an attorney, judge, and/or magistrate	12 (3.25%)	56 (15.18%)	136 (36.86%)	144 (39.02%)	21 (5.69%)	3.29	369
Applicant's prior service as a judge or magistrate	29 (7.92%)	62 (16.94%)	118 (32.24%)	135 (36.89%)	22 (6.01%)	3.16	366
Applicant's prior service as a prosecutor	104 (28.57%)	112 (30.77%)	99 (27.20%)	44 (12.09%)	5 (1.37%)	2.27	364
Applicant's prior service as a public defender	119 (32.69%)	116 (31.87%)	96 (26.37%)	30 (8.24%)	3 (0.82%)	2.13	364
Applicant's pro bono legal service	61 (16.76%)	111 (30.49%)	135 (37.09%)	50 (13.74%)	7 (1.92%)	2.54	364
Applicant's prior experience as an elected or appointed public official	154 (41.96%)	98 (26.70%)	68 (18.53%)	41 (11.17%)	6 (1.63%)	2.04	367

Shaded cells represent the modal category.

Answer Options	Not very Important (1)	Somewhat Important (2)	Moderately Important (3)	Very Important (4)	Absolutely Essential (5)	Rating Average	Count
Applicant's prior experience holding office in a political party	299 (81.25%)	48 (13.04%)	12 (3.26%)	8 (2.17%)	1 (0.27%)	1.27	368
Applicant's professional reputation	2 (.55%)	8 (2.19%)	30 (8.20%)	178 (48.63%)	148 (40.44%)	4.26	366
Applicant's written communication skills	0 (0.00%)	9 (2.46%)	57 (15.57%)	198 (54.10%)	102 (27.87%)	4.07	366
Applicant's oral communication skills	0 (0.00%)	11 (2.98%)	56 (15.18%)	191 (51.76%)	111 (30.08%)	4.09	369
Applicant's party affiliation	319 (86.68%)	26 (7.07%)	15 (4.08%)	4 (1.09%)	4 (1.09%)	1.23	368
Applicant's participation in civic or community affairs	17 (4.66%)	49 (13.42%)	164 (44.93%)	117 (32.05%)	18 (4.93%)	3.19	365
Recommendations or ratings from bar groups	49 (13.24%)	59 (15.95%)	139 (37.57%)	105 (28.38%)	18 (4.86%)	2.96	370
Recommendations or ratings from public officials	107 (29.16%)	101 (27.52%)	116 (31.61%)	37 (10.08%)	6 (1.63%)	2.28	367
Recommendations or ratings from other commission members	21 (5.72%)	40 (10.90%)	146 (39.78%)	142 (38.69%)	18 (4.90%)	3.26	367
Recommendations or ratings from labor unions	277 (75.68%)	57 (15.57%0	23 (6.28%)	8 (2.19%)	1 (0.27%)	1.86	366
Recommendations or ratings from civil rights groups	151 (41.48%)	90 (24.73%)	93 (25.55%)	26 (7.14%)	4 (1.10%)	2.02	364
Recommendations or ratings from law enforcement	120 (33.06%)	111 (30.58%)	89 (24.52%)	39 (10.74%)	4 (1.10%)	2.16	363
Recommendations or ratings from non-legal professional and business associations	96 (26.09%)	116 (31.52%)	109 (29.62%)	40 (10.87%)	7 (1.90%)	2.31	368
Other (please specify)							
					answered question 370 | skipped question 117		

Shaded cells represent the modal category.

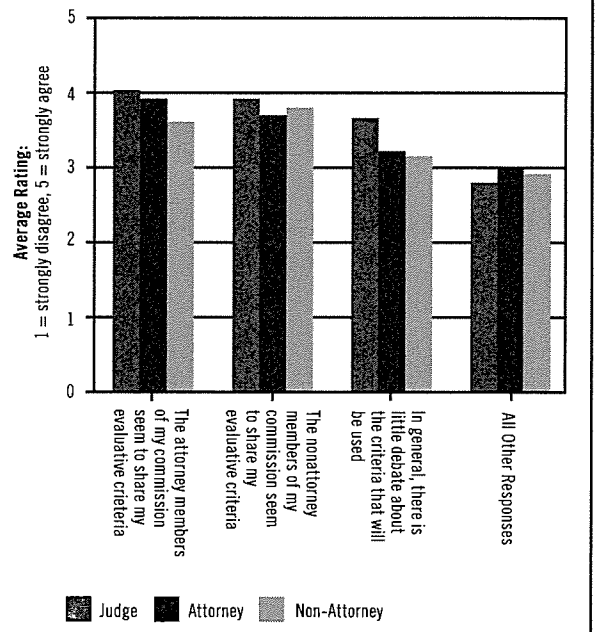
could suggest that Commissions not only do not reach out to women and minority attorneys to seek applications for judicial vacancies, but they are unlikely to actively consider these personal characteristics during the process of review.

Given frequent concerns about the degree to which lawyers and non-lawyers participate in the process differently, it is particularly important to assess whether they deviate in terms of assessments of specific evaluative criteria. *The survey responses indicate remarkable agreement among judges, lawyers, and non-lawyers who serve on Judicial Nominating Commissions. Despite a few minor inconsistencies in ratings, those factors considered most important are universally valued by all Commissioners.* To directly assess the Commissioners' sense of common purpose in the use of evaluative criteria, we asked Commissioners whether they felt that their criteria were generally shared by non-lawyer members, by lawyer members, and the Commission as a whole. *At very high rates, Commissioners report that there is little debate about the criteria that the Commission will use, and members overwhelmingly report that the lawyer members and non-lawyer members share their standards for reviewing applicants. Most importantly, lawyers feel that both non-lawyer and lawyer members share their criteria, and non-lawyers concur in this assessment. Thus, the survey respondents offer striking evidence that lawyers and non-lawyers do not have substantial disagreements about the relevant characteristics that will be used to evaluate potential judges.*

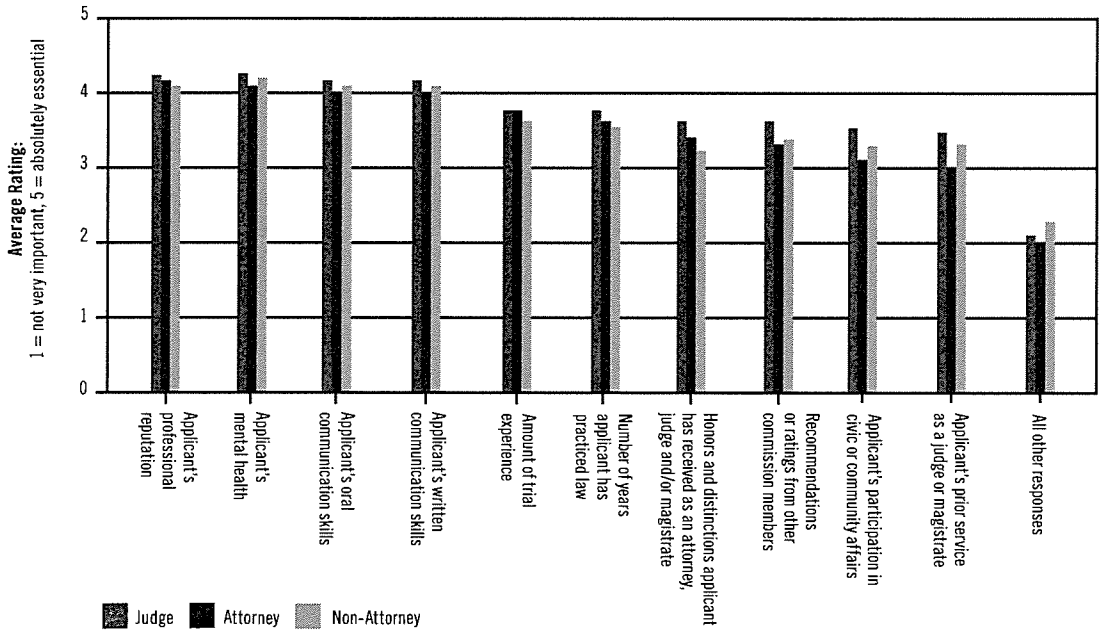
Similarly, and perhaps more surprising, there appears to be remarkable similarity among Commissioners regardless of the level of court they are staffing. *Commissioners report nearly uniform*

agreement on the most important criteria, with very minor differences between Commissions working to screen applicants for trial courts, and those working to evaluate applicants for appellate courts, including state high courts. Despite common assumptions that Judicial Nominating Commissioners are uniquely tailored in their review processes to assess those skill sets most relevant for *specific* judicial functions, the findings indicate that, with very minor deviations, this is not the case. *The only possible exception is the role of written communication skills, which appear to be more highly valued by Commissioners that review applications to fill vacancies on appellate courts.* ★

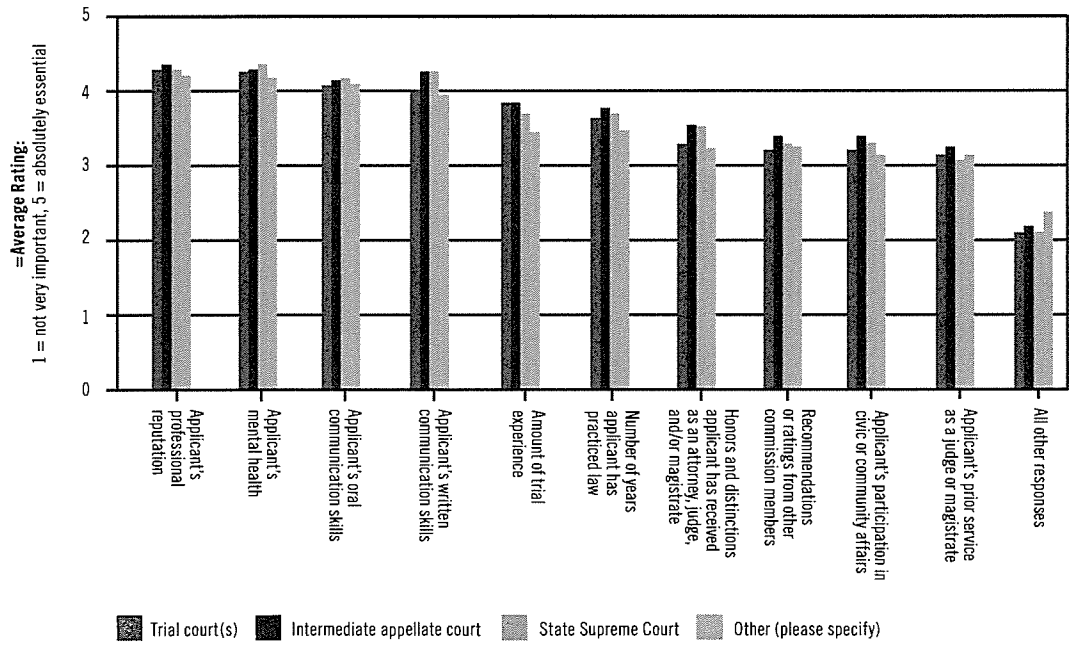
Thinking about the criteria your commission uses to evaluate applicants, please indicate your agreement with the following statements.



Next, we would like to hear from you about the criteria you use to evaluate applicants. Please indicate how important each of the following factors is to you when reviewing an applicant:



Next, we would like to hear from you about the criteria you use to evaluate applicants.
Please indicate how important each of the following factors is to you when reviewing an applicant:



DELIBERATIONS & VOTING PROCEDURES

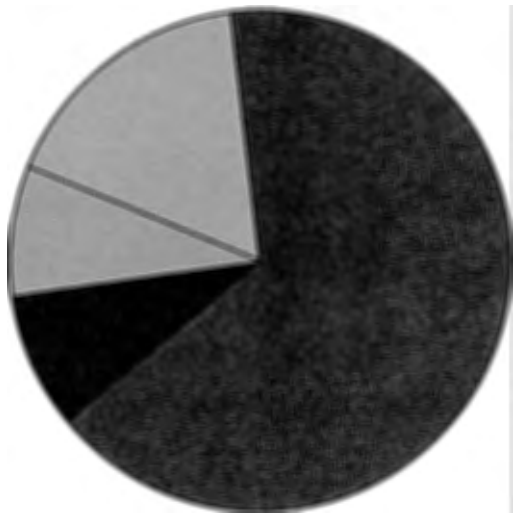
Once Commissioners have evaluated the candidates, they must deliberate and vote to determine which individuals are best suited to fill the vacancy. These steps are the culmination of a long assessment of applicant qualifications, and ultimately determine which individuals will be recommended to the governor or other appointing authority. As previous studies have documented, voting procedures vary considerably, and a single Commission may, in fact, use multiple balloting methods to determine which applicants will get the nod.[55] Although written voting procedures can significantly enhance the legitimacy and fairness of the process, a number of Commissions have been known to operate on the basis of consensus or other *ad hoc* decision-making procedures. As recommended by the *Handbook for Judicial Nominating Commissioners*, a codified procedure that specifically lays out the threshold for Commission recommendation will avoid manipulation and confusion.[56] In so doing, it will also serve to enhance the integrity of the process, avoid the appearance of favoritism or "panel-stacking,"[57] and help ensure that the public, the applicants, and the governor can feel secure in the knowledge that the process functions to staff the courts with the best qualified judges.

"We have very open and frank deliberations."
-survey comment by commissioner

Specific voting procedures can take many forms[58] and Commissioners are often permitted authority to determine their own decision-making rules.[59] The survey therefore asked Commissioners to share information about the methods of voting that are used by their Commission. *A majority of Commissioners (56.3%) report that their Commission has standard voting procedures that are used for all vacancies, with minorities saying that established voting procedures are usually used, but deviations do sometimes occur (10.4%) or that their Commission has no established standard set of voting rules (13.3%), with 20% reporting that they do not know about the body's voting procedures. When asked about the form of voting, 45% report that a secret ballot is used, while 33% say that the Commission uses voice vote to make decisions.*

"I believe the deliberative process we follow is a good one. All aspects of a qualified applicant are considered as it is vitally important that our judges reflect their community. However we consider all aspects in our voting decisions. It is vitally important for a judge to not just have good skills but [to be] a part of the community they serve."
-survey comment by commissioner

Which statement best describes your commission's voting procedures?



- My commission always uses the same set of voting procedures for each vacancy
- My commission has a set of voting procedures that are usually used, but the commission sometimes uses alternative voting rules.
- My commission does not have a standard set of voting procedures.
- Don't Know

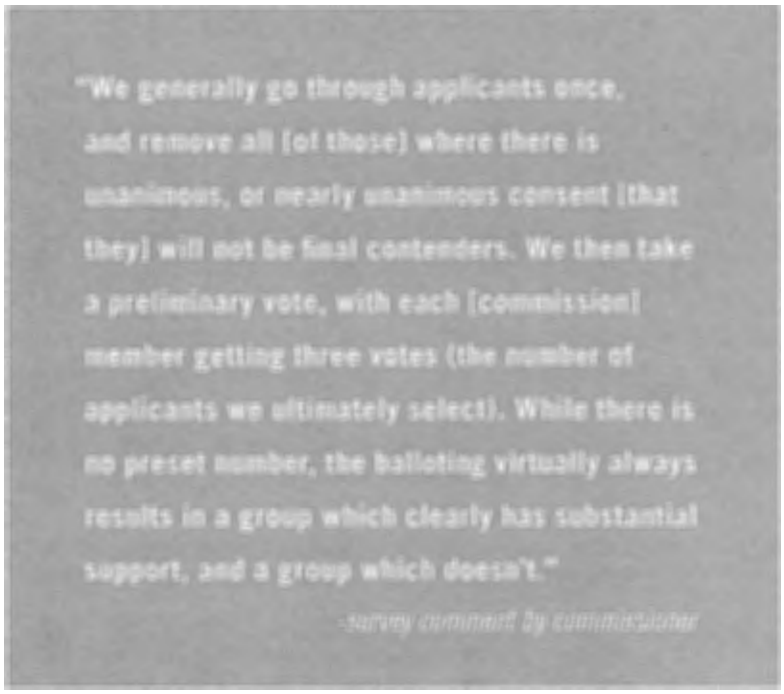
How does your commission usually vote?

Answer Options	Percentage	Count
Secret ballot	45.0%	185
Voice vote	30.4%	125
Don't know	16.3%	67
Other (please specify)	8.3%	34

answered question 411 | skipped question 76

Certainly, outcomes are heavily dependent on the voting threshold that is utilized to make decisions. In a majority of cases, respondents say that decisions about which applicants will be recommended for appointment are made by a majority vote, though approximately one in four report that a supermajority is necessary and nearly one in ten say that unanimous or near-unanimous support is necessary.

Taken as a whole, the survey findings indicate that Commissions have vastly more sophisticated rules and procedures than they did in 1974, when Ashman and Alfini surveyed Nominating Commissioners about their practices. Although codification of rules and procedures is still uneven, Commissioners report remarkable progress in creating consistent decision-making processes with significant agreement on the standards that will be used to assess judicial applicants. ⋆



Thinking about your commission's voting procedures, how much support is needed for a candidate to be nominated?

Answer Options	Percentage	Count
Majority Support	57.5%	231
Support of more than a majority of commissioners, but less that unanimous support	23.9%	96
Unanimous (or near-unanimous) support	9.7%	39
Other (please specify)	9.0%	36

answered question 402 | skipped question 85

TRANSPARENCY

Discussions of how merit selection systems function often question the degree to which Judicial Nominating Commissions include the public, and the extent to which the work of the Commissions is open to public scrutiny. In their discussion of Missouri's Non-Partisan Court Plan, Watson and Downing embarked on a detailed observation of the Commission's work, finding that the political nature of judicial selection was still present, but simply moved behind closed doors. Today, their findings continue to be cited as evidence that judicial merit selection serves as a means to allow elites to dominate the process, without transparency or accountability.[60]

Supporters of merit selection counter that the inclusion of non-lawyer Commissioners institutionalizes public input, while Commission practices may dictate public participation in other ways (through public hearings, etc). In his assessments of the Missouri Non-Partisan Court Plan, Elmo B. Hunter wrote:

> The laymen keep the entire selection process objective. They help remind the other Commission members that the courts are not just to serve lawyers and their interests, but truly and ultimately belong to the people who are entitled to the best.[61]

Every Commission must balance the goal of accountability against confidentiality of applicants' professional and personal information. While accountability can help improve the process by ensuring fair and even-handed consideration of applicants, keeping information confidential can ensure a high-quality pool of candidates by guaranteeing that an applicant will not suffer professional ramifications such as loss of business to their law practice or a perception that they are less committed to their current position by virtue of their interest in obtaining a judgeship. Furthermore, review of tax records and financial transactions as well as interviews with past employers or colleagues can pose ethical dilemmas when a Commission makes all information public, particularly in areas with small and inter-connected legal communities.

Statutory and constitutional authorizing language may dictate the degree to which the Commission can be accessible to the public. In Missouri, formal language demands confidentiality in virtually all Commission proceedings.[62] In Hawaii, confidentiality interests restrict knowledge of who has applied for a judicial vacancy, potentially impairing the Commission's ability to even request professional references for information about an applicant during the screening process.[63] In sharp contrast, Arizona's merit selection system is generally considered a model of transparency, as the Commission is included in the state's open meetings law and all aspects of the decision-making process are open to citizens and the media.[64] Over the past decade, there has been a decided trend toward transparency in Judicial Nominating Commission proceedings. In 2011, Commissions in at least three states opened all applicant interviews to the public for the first time (Iowa, Nebraska, and Missouri), including live-streaming the interviews via web, for easy access by interested citizens.

Survey respondents were asked about the degree of public disclosure of all aspects of Commission decision-making. Overall, the responses indicate that *Commissions make their procedures available as a matter of public record (66.6% of Commissioners report that the procedures are publicly available), and names of applicants are generally made public (71.3% of Commissioners report that a list of applicants is made available).* The review process itself, however, including applicant files, interviews, Commission deliberations, and voting remains largely removed from the public.

Commissioners are divided on whether interviews are open to the public, with 39.0% reporting that all interviews are open and 45.5% saying that all interviews are private. *Sixty-six percent of Commissioners indicate that all deliberations are conducted outside of public view, and sixty-four percent say that votes remain confidential. Notably, all Commissioners who said that deliberations were open to the public and all commissioners who reported that votes were made public served in Arizona.* In other words, Commission discussion about applicants and Commissioners' votes on who will be recommended to the governor is kept confidential in every state except Arizona.

Are your commission's procedures a matter of public record?

Answer Options	Percentage	Count
Yes	66.6%	233
No	10.3%	36
Don't know	0.3%	1

answered question 416 | skipped question 71

Are the names of applicants available to the public?

Answer Options	Percentage	Count
Yes	71.3%	298
No	16.7%	70
Don't know	12.0%	50

answered question 419 | skipped question 68

Are applicant files (or portions of applications) available to the public?

Answer Options	Percentage	Count
Yes	22.9%	96
No	48.2%	202
Don't know	29.9%	121

answered question 419 | skipped question 68

Are applicant interviews open to the public?

Answer Options	Percentage	Count
All interviews are open to the public	39.0%	151
Some applicant interviews are open to the public	6.5%	25
All applicant interviews are private	45.5%	176
Don't know	9.0%	35

answered question 387 | skipped question 100

Are commission deliberations open to the public?

Answer Options	Percentage	Count
Yes, deliberations are open to the public	11.7%	49
No, deliberations are not open to the public, but a record of the deliberations is available to the public	8.1%	34
No, deliberations are not open to the public	66.5%	278
Don't know	13.6%	57

answered question 418 | skipped question 69

Are commission votes a matter of public record?

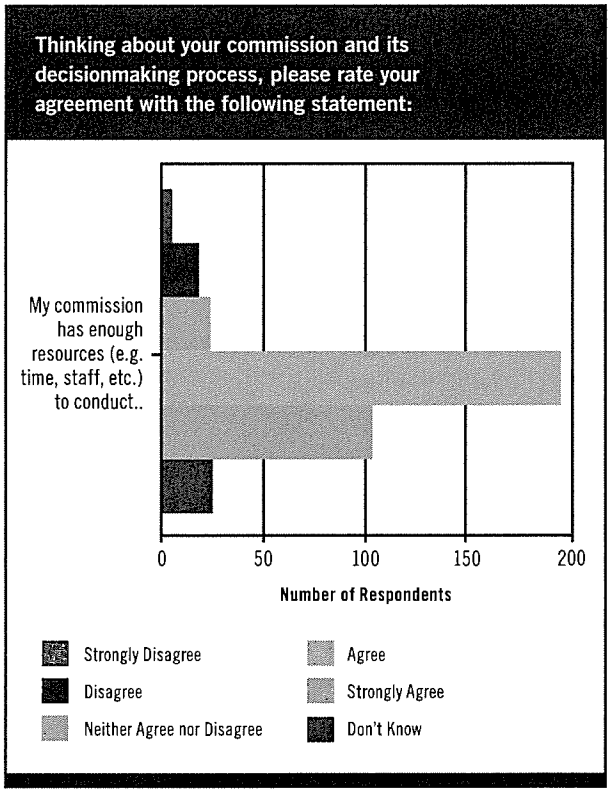
Answer Options	Percentage	Count
Yes	13.5%	56
No	63.9%	266
Don't know	22.6%	94

answered question 416 | skipped question 71

★ ★ ★

RESOURCES

Judicial Nominating Commissions perform vitally important tasks, but they generally do so with little staff support and very limited resources.[74] Commissioners volunteer their time, and although expenses (usually only including travel costs to attend Commission meetings) are generally covered by the judicial branch budget, there are rarely staff or administrative resources available. Nonetheless, *79.1% of Commissioners who participated in the survey agreed or strongly agreed that their Commission had sufficient resources to conduct its work effectively.*



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Commissioners' Assessments of the Process

Those who serve on Nominating Commissions have a unique perspective on how judicial merit selection systems function in practice. Despite observers' attempts to characterize Commissions, few have extensive first-hand experience with Commission work upon which they can base their evaluations, and it is rare for Commissioners to speak extensively about their perceptions of the process beyond formal announcements or press releases. The survey, therefore, provides a unique opportunity to find out how Commissioners assess the policies, procedures, and practices of their Commissions and how the system appears to be functioning from their vantage point.

Overall, Commissioners are exceptionally satisfied with the work of their Commissions, and feel that participation on the Commission is worthwhile.[65] While participation in the survey is voluntary, the confidentiality of the survey would suggest that those who are dissatisfied with the process would have a rare opportunity to express these sentiments. Nonetheless, 64.9% of Commissioners strongly agree that their work on the Commission is "worthwhile," with an additional 30.3% agreeing with the statement. *A combined 91% indicate that their Commission's decision-making process is fair* (55.8% of commissioners who took the survey strongly agree while 35.5% agree). *Similarly, 92% agree or strongly agree that their work on the Commission helps to ensure that highly-qualified judges are appointed to the bench and 85% agree or strongly agree that the Commission helps to insulate the process from partisan politics.*

Commissioners also indicated strong confidence that judicial merit selection is better than competitive elections to select judges. Commission members have an extraordinary role to play in selecting judges and therefore are far more satisfied with the merit selection process than they would be with competitive elections where they would not have the opportunity to exercise this power. If, however, Judicial Nominating Commissions are driven by ideology and politics hidden behind closed doors, then we should expect some general discontent with the process, particularly among Commissioners who feel as though their peers are rigging the system.

Generally speaking, survey respondents agreed that their Commission chose individuals who were more qualified than those who would likely be selected through popular elections, that merit selection was better at promoting diversity than judicial elections, and that merit selection was, overall, a better system of choosing judges. There was far more hesitation, however, when Commissioners were asked about whether the Commission chose individuals who were unlikely to reach the bench through popular election; Commissioners are generally uncertain whether this is the case. Also notable is that *the degree of support for merit selection as opposed to popular elections was very strong among judge members, moderately strong among lawyer members, and weaker for non-lawyer citizen Commissioners.*

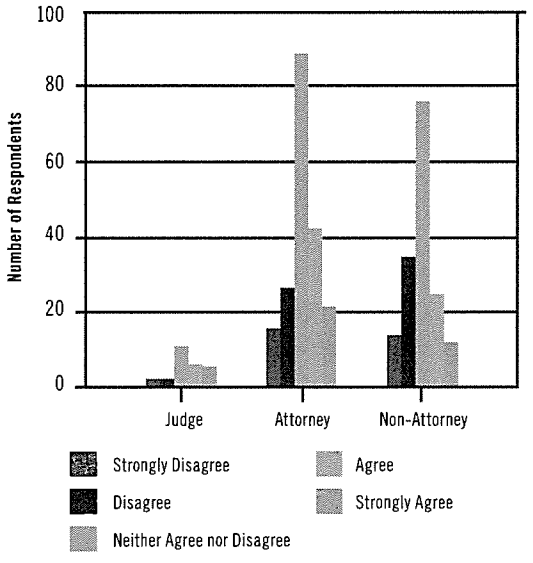
Regarding the Commission's power to constrain the choices of the governor, Commissioners are fairly confident that the Commission does not simply nominate individuals who share the views of the governor and indicate that the system provides an appropriate check on the power of the governor. Given some concerns that governors may exert undue influence on members of the Commission[66] (most notably through appointing the non-lawyer members to their positions on the Judicial Nominating Commission), and, on the other hand, opposing concerns that the system empowers the Nominating Commission at the expense of the governor, the findings indicate that Commissioners feel as though they occupy a middle ground, neither succumbing to the political and ideological preferences of the governor nor seizing power that

Answer Options	Strongly disagree (1)	Disagree (2)	Neither Agree Nor Disagree (3)	Agree (4)	Strongly Agree (5)	Average
"Judicial nominating commissions are a better way to select judges than popular elections"	1.3%	0.8%	9.9%	19.8%	68.2%	4.53
"The individuals that my commission recommends are more qualified than those who would be chosen through popular elections."	1.3%	2.1%	20.5%	31.3%	44.9%	4.16
"My commission's work promotes diversity on the bench better than popular elections."	1.3%	2.3%	34.9%	32.8%	28.7%	3.85
"My commission nominates individuals who would be unlikely to reach the bench through popular elections."	7.4%	15.9%	48.3%	19.2%	9.2%	3.07

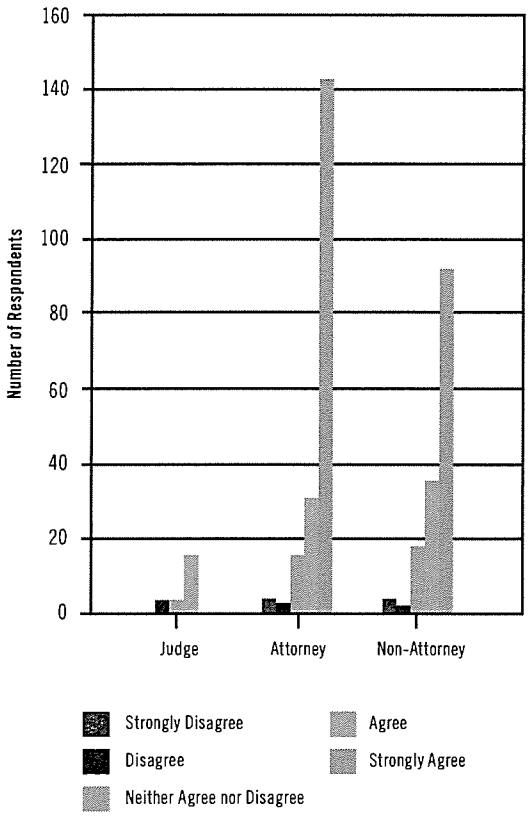
Shaded cells represent the modal category.

rightfully belongs to the executive. *More than 7 in 10 respondents said that the Commission provides an "appropriate" check on the governor's (or other appointing authority's) ability to select judges.*[67] *At the same time, 39.7% of Commissioners responding to the survey said that they "neither agreed nor disagreed" with the statement that "my Commission nominates judges that represent the governor's (or other appointing authority's) views," 29.8% disagreed and 24.2% strongly disagreed.* While non-lawyer members of the Commission have a slightly less enthusiastic response regarding the Commission's authority to check the role of the governor in judicial appointments, they similarly have a slightly more enthusiastic response regarding the Commission's alignment with the views of the governor. Most non-lawyer members are gubernatorial appointments, and therefore these assessments are likely the result of their allegiance to the governor. Lawyer members, who are usually elected to their position by the Bar Association and therefore serve independently from the governor, have more confidence in the Commission's role restricting gubernatorial authority and, as expected, a lesser perception that Commission recommendations generally reflect the views of the governor. ⋆

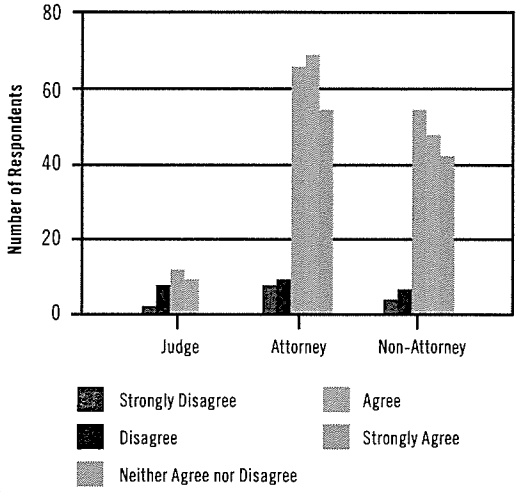
My commission nominates individuals who would be unlikely to reach the bench through popular elections.



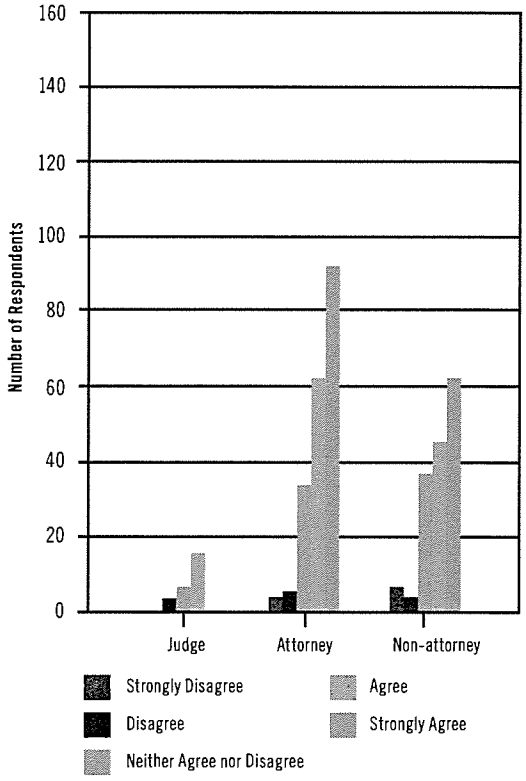
Judicial nominating commissions are a better way to select judges than popular elections.



My commission's work promotes diversity on the bench better than popular elections.

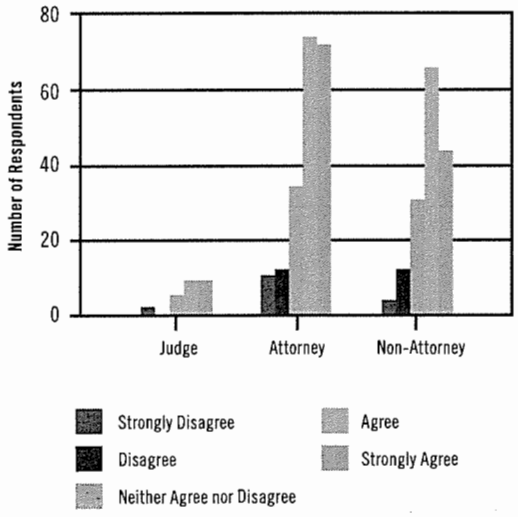


The individuals that my commission recommends are more qualified than those who would be chosen through popular election.

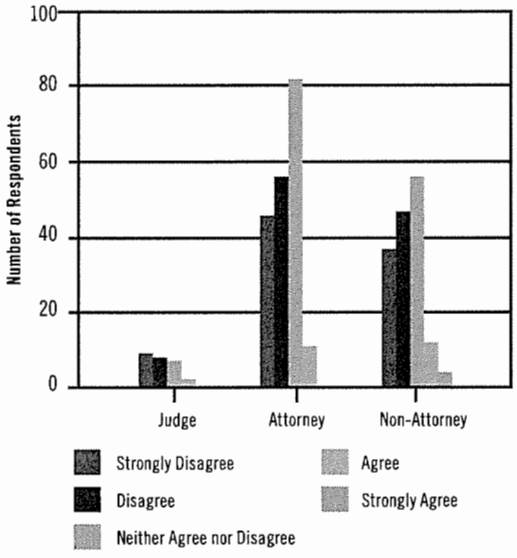


Most non-lawyer members are gubernatorial appointments, and therefore these assessments are likely the result of their allegiance to the governor.

My commission provides an appropriate check on the governor's (or other appointing authority's) ability to select judges.



My commission nominates judges that represent the governor's (or other appointing authority's) views.



POLITICAL CONSIDERATIONS

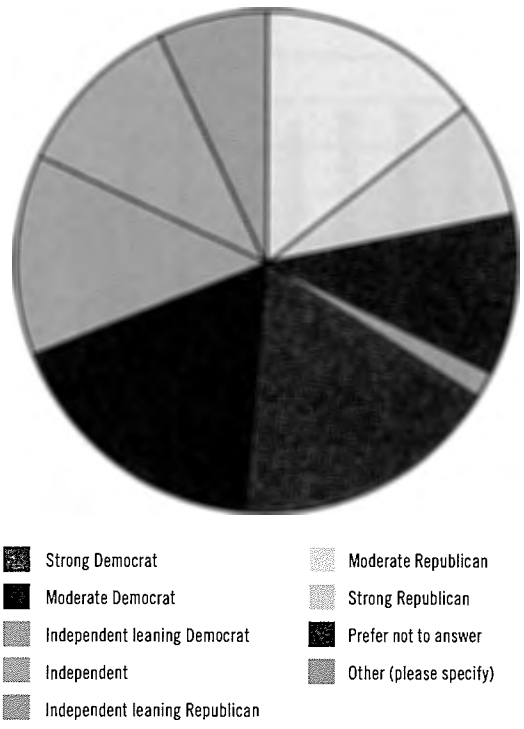
Ideally, the screening process that is at the core of the Commission's work is one that prioritizes the qualifications of individual applicants and eliminates, to every extent possible, political, ideological, and partisan influences in the selection of judges. At a practical level, it may be virtually impossible to achieve this goal. Nonetheless, the ideal merit selection system is structured in a way that is intended to insulate the process from politically motivated decisions regarding who will occupy positions on the bench. To evaluate the extent to which Commissioners rely on political considerations, or perceive that their fellow Commissioners rely on political considerations, a series of questions were included specifically addressing a wide array of potential political influences on Commission decision-making.

First, and most important, are the political affiliations and loyalties of the Commissioners themselves. When asked about their party affiliations, respondents generally indicated a widely diverging range of ideological positions. While the distribution skews toward Democrats, it does not do so as dramatically as some observers might expect. A combined 35.7% of respondents self-identify as strong or moderate Democrats, while a combined 21.8% say that they are strong or moderate Republicans.

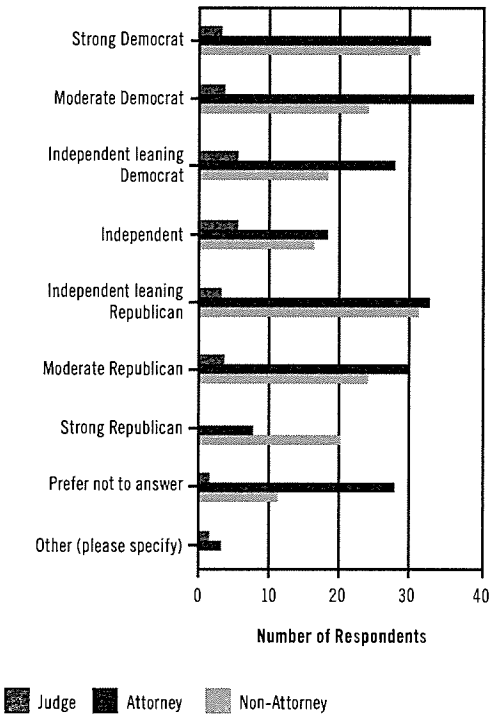
"I try to select the best applicants for the position at hand, without regard to politics. I have served on our commission for several years and find that the lawyer members tend to influence and sometimes sway the laymembers who defer to us for guidance. I sometimes experience frustration over what I perceive as "nitpicking" over some of the female applicants, when that same process does not often apply to the male applicants. It seems to me that women are evaluated much more for temperament than the male applicants."

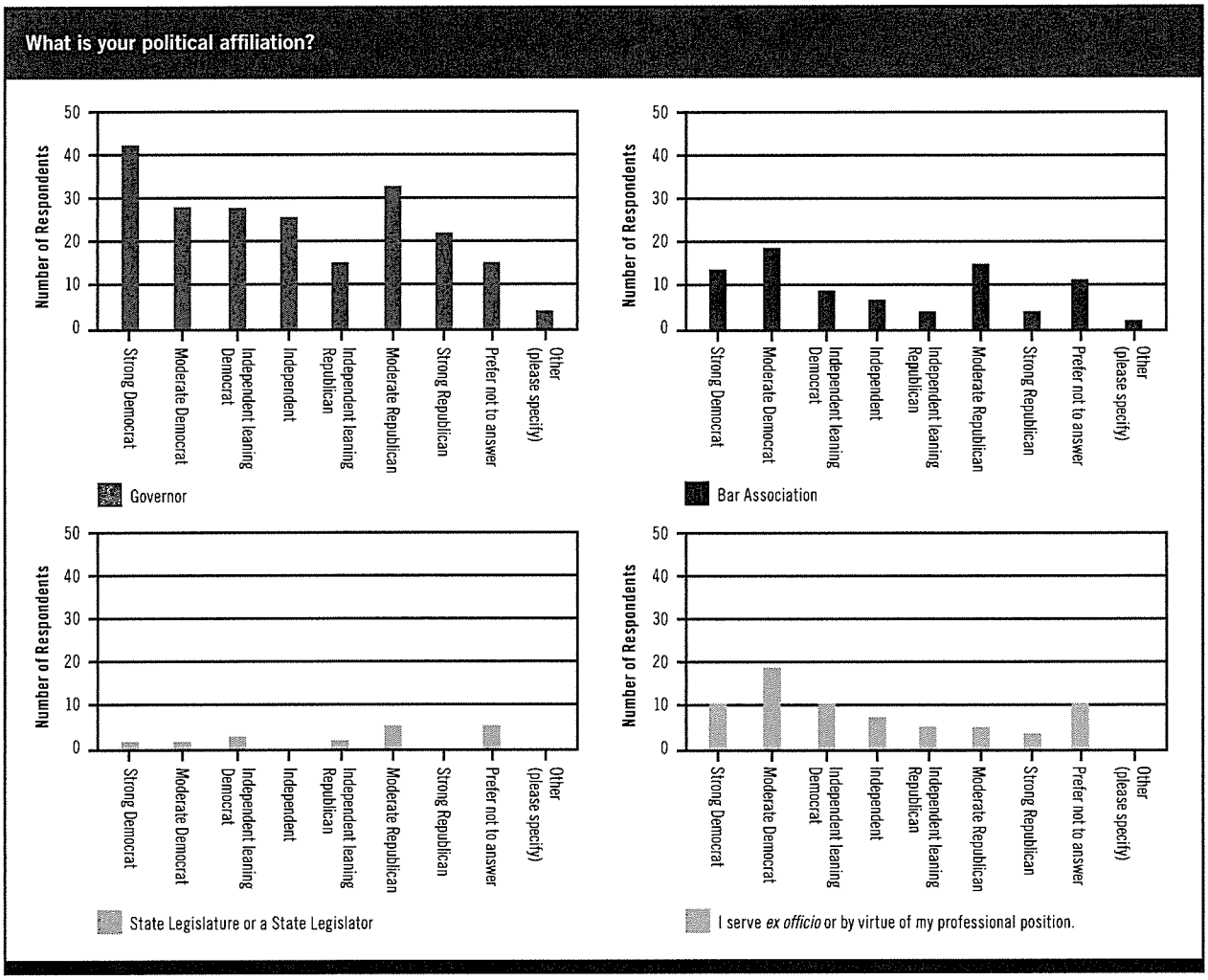
-survey comment by commissioner

What is your political affiliation?



What is your political affiliation?





When broken down by the selection method by which the Commissioner came to serve and their role on the Commission, there are few significant differences to note. *Those Commissioners appointed by the governor are both more likely to be strong Democrats and more likely to be strong or moderate Republicans than are those elected by the Bar Association. Lawyer members chosen by their respective bars are more polarized than any other group, with high numbers of strong Democrats and strong Republicans. Among those who serve ex officio, the proportion who identify as independent-leaning Republicans is higher than among any other group.*

Regarding political activity of Commissioners, Henschen et. al. found that:

> in addition to reflecting high levels of educational attainment and occupational status, Judicial Nominating Commissioners also evidence high levels of political and civic involvement. Two thirds (67 per cent) of the Commissioners are members of civic organizations, over one-fourth (26 per cent) have held party office and nearly one third (31 per cent) have held public office. It is even more striking that 33 per cent of the law Commissioners have served in a party office, while 24 per cent have held some public post. Given that only 3 per cent of the population nationwide have even been candidates for public office, Commissioners can certainly be considered politically active.[68]

Respondents to this survey indicate similar levels of political involvement. *Approximately 31% of Commissioners report that they have held public office and just over one in five has held a party office. Unlike previous findings, however, rates of public service are higher for non-lawyer Commissioners,*

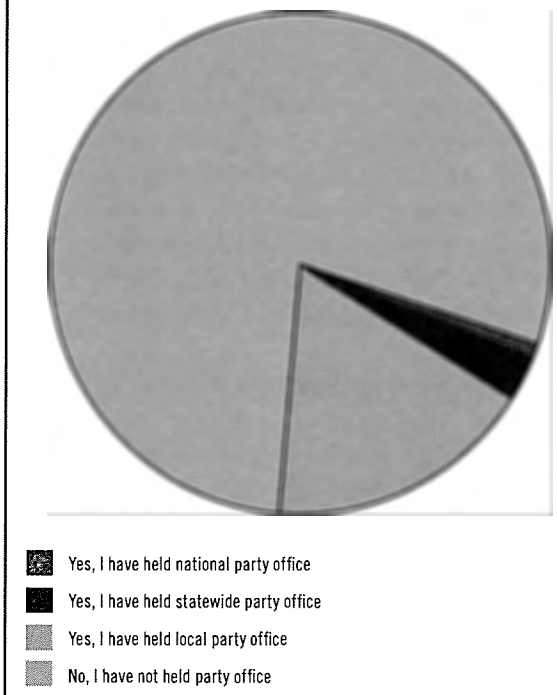
with 24.5% of non-lawyers reporting that they have served as an officer in their political party, and 34.4% indicating that they have occupied a position as a public official.

The relationship between the appointing authority and the Commission conducting a screening process can be complicated. The Commission is explicitly charged with making recommendations to the governor or other appointing authority. At the same time, some members of the Commission are often selected by the governor. That the membership is determined, in part, by the governor and yet intended to operate independently has the potential to create a significant conflict.

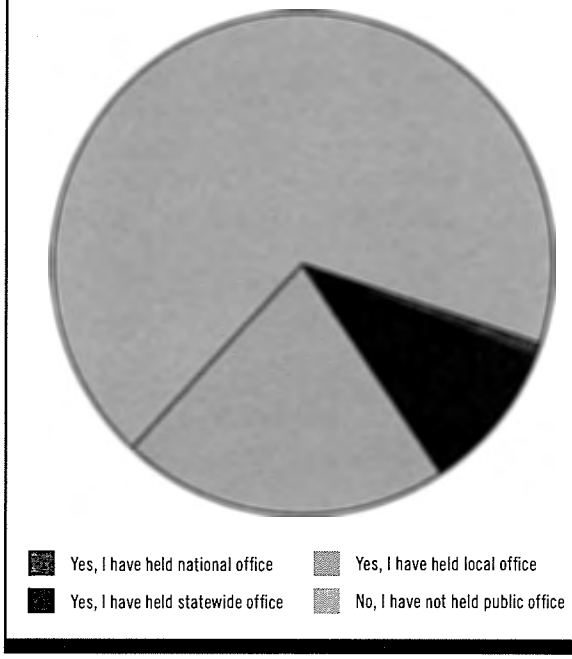
When asked about the role of the governor, however, respondents indicate that while they may know what attributes the governor or other appointing authority desires, their decision-making is not dramatically affected by this knowledge. Just under 3 in 10 commissioners say that the Commission knows what qualities the governor desires in a judicial appointment, with approximately 1 in 4 indicating neither agreement nor disagreement with the statement. When asked whether the Commissioners translate this to indicate that the governor favors individual applicants, it appears that they do not: 61% indicated that the Commission does not typically know which applicants the governor would prefer.

To address Watson and Downing's finding of "panel-wiring" whereby the Commission purposefully includes the governor's preferred applicant on a list of recommendations, alongside other choices who are either decidedly not favored by the governor or who are essentially randomly chosen by the Commission with the knowledge that they will not be selected for judicial service, questions about whether the Commission engages in this kind of manipulation of the recommendations were included. The findings clearly indicate that these are not common practices. *A majority of those who responded said that the Commission did not try to recommend individuals who meet the governor's preferred criteria (just 16.8% said that it did), and an overwhelming majority indicated disagreement with the suggestion that the Commission would purposefully nominate individuals who clearly did*

Have you ever held office in a political party? (Indicate all that apply)



Have you ever been elected or appointed to public office? (Indicate all that apply)



not meet the governor's preferred criteria (72.6% disagreed or strongly disagreed, while just 3.6% agreed that this happened).

In fact, most Commissioners who answered the survey reported that members of the Commission usually did not know which of the recommended individuals would ultimately be chosen by the governor (just 6.7% agreed that the Commission would "often know" which candidate would be selected). Nearly 3 in 4 respondents said that the political preferences of the governor did not have an effect on the Judicial Nominating Commission's decision-making process.

With regard to party affiliation, approximately 25% agree that the Commission usually knows the party affiliation of applicants, with just over 50% indicating that this is generally not the case. *Commissioners agree, however, that party affiliation and other political considerations are generally not important in the process of selecting individuals for recommendation to the governor. In fact, just over 10% of those who responded agreed that political considerations played a role, while 73% disagreed, and 82% agree that recommendations are based on professional qualifications rather than political calculations (60.8% strongly agree with this overall assessment of Commission decision-making).*

Although the political appointment of Commissioners may raise concerns about the degree to which elected officials influence the process through these appointments, there appear to be only minor differences among Commissioners who were selected by the Bar Association, those who were appointed by the governor or state legislature, and those who serve by virtue of their position (*ex officio* judge members). In short, *the survey finds no statistically significant differences between those individuals selected by the Bar and those chosen by the governor (and possibly confirmed by the legislature) or state legislature in their perceptions about the role of political considerations in the process.* ★

Answer Options	Strongly disagree (1)	Disagree (2)	Neither Agree Nor Disagree (3)	Agree (4)	Strongly Agree (5)	Average
"Members of my commission typically know what attributes the governor (or other appointing authority) desires in a judge"	15.4%	18.3%	24.9%	29.1%	3.9%	2.45
"Upon initial review of applications, members of my commission typially know which applicant(s) the governor (or other appointing authorities) would prefer to select"	27.5%	33.5%	21.0%	9.4%	0.3%	2.14
"My commission tries to nominate candidates who meet the governor's (or other appointing authority's) desired criteria"	20.9%	30.1%	24.6%	12.6%	4.2%	2.87
"My commission purposely nominates some candidates who do not meet the governor's (or other appointing authority's) desired criteria"	36.8%	35.8%	16.4%	2.6%	1.0%	1.87
"When compiling the list of nominees, members of my commission often know which candidate the governor (or other appointing authority) will select from the list of nominees"	31.7%	33.5%	20.8%	6.2%	0.5%	2.03
"The political preferences of the governor (or other appointing authority) have no effect on the decisions my commission makes"	2.1%	4.9%	11.2%	33.5%	38.7%	4.13
"Members of my commission usually know applicant's party affiliations"	19.2%	30.9%	16.6%	16.9%	7.3%	2.58
"Political considerations, such as applicant's party affiliations, play a role in my commission's nomination process"	37.2%	35.9%	11.3%	5.5%	4.7%	1.99
"My commission chooses its nominees based on their professional qualifications rather than based on political calculations"	0.8%	0.5%	3.4%	21.4%	60.8%	4.62

Shaded cells represent the modal category.

Thinking about your commission and its decision-making process, please rate your agreement with the following statements:							
Answer Options	**Governor**	**Bar Association**	**State Legislature or a State Legislator**	**I serve *ex officio* or by virtue of my professional position**	**Other (please specifiy)**	**Rating Average**	**Count**
Upon initial review of applicants, members of my commission typically know which applicant(s) the governor (or other appointing authority) would prefer to select.							
Strongly Disagree (1)	68	15	2	4	17		
Disagree (2)	74	25	5	3	21		
Neither Agree nor Disagree (3)	41	18	4	2	16		
Agree (4)	13	13	0	0	10		
Strongly Agree (5)	0	0	1	0	0		
Don't Know	16	7	0	1	8		
	1.99	2.41	2.42	1.78	2.30	2.14	384
When compiling the list of nominees, members of any commission often know which candidate the governor (or other appointing authority) will select from the list of nominees.							
Strongly Disagree (1)	71	21	3	5	22		
Disagree (2)	76	21	3	3	25		
Neither Agree nor Disagree (3)	37	22	5	1	15		
Agree (4)	13	7	1	0	3		
Strongly Agree (5)	2	0	0	0	0		
Don't Know	13	7	0	1	7		
	1.99	2.21	2.33	1.56	1.98	2.03	384
Members of my commission typically know what attributes the governor (or other appointing authority) desires in a judge.							
Strongly Disagree (1)	32	13	1	2	11		
Disagree (2)	39	14	2	3	11		
Neither Agree nor Disagree (3)	52	19	6	2	16		
Agree (4)	63	23	1	2	22		
Strongly Agree (5)	9	2	1	0	3		
Don't Know	14	7	1	1	9		
	2.89	2.82	2.91	2.44	2.92	2.87	381
Members of my commission usually know applicants' party affiliations.							
Strongly Disagree (1)	44	11	2	3	14		
Disagree (2)	64	20	4	3	27		
Neither Agree nor Disagree (3)	35	18	1	0	10		
Agree (4)	27	19	4	2	13		
Strongly Agree (5)	23	4	1	0	0		
Don't Know	19	6	0	2	8		
	2.59	2.79	2.83	2.13	2.34	2.58	384

Thinking about your commission and its decision-making process, please rate your agreement with the following statements:							
Answer Options	**Governor**	**Bar Association**	**State Legislature or a State Legislator**	**I serve *ex officio* or by virtue of my professional position**	**Other (please specifiy)**	**Rating Average**	**Count**
Political considerations, such as applicants' party affiliations, play a role in my commission's nominating proces.							
Strongly Disagree (1)	76	29	3	5	29		
Disagree (2)	73	27	5	4	27		
Neither Agree nor Disagree (3)	24	10	2	0	7		
Agree (4)	12	5	1	0	3		
Strongly Agree (5)	15	1	1	0	1		
Don't Know	10	5	0	1	5		
	2.09	1.92	2.33	1.44	1.81	1.99	381
My commission tries to nominate candidates who meet the governor's (or other appointing authority's) desired criteria.							
Strongly Disagree (1)	39	18	2	4	17		
Disagree (2)	62	28	4	2	18		
Neither Agree nor Disagree (3)	53	18	6	1	16		
Agree (4)	33	5	0	1	9		
Strongly Agree (5)	12	0	0	1	3		
Don't Know	12	8	0	1	8		
	2.58	2.14	2.33	2.22	2.41	2.45	381
My commission purposely nominates some candidates who do not meet the governor's (or other appointing authority's) desired criteria							
Strongly Disagree (1)	79	21	5	7	29		
Disagree (2)	75	28	7	1	25		
Neither Agree nor Disagree (3)	39	14	0	1	9		
Agree (4)	4	4	0	0	2		
Strongly Agree (5)	2	2	0	0	0		
Don't Know	12	9	0	1	6		
	1.87	2.10	1.58	1.33	1.75	1.87	382
My commission chooses its nominees based on their professional qualifications rather than based on political calculations.							
Strongly Disagree (1)	3	0	0	0	0		
Disagree (2)	2	0	0	0	0		
Neither Agree nor Disagree (3)	9	2	1	0	1		
Agree (4)	45	18	3	1	15		
Strongly Agree (5)	129	45	7	6	45		
Don't Know	24	12	0	3	11		
	4.57	4.66	4.55	4.86	4.72	4.62	382

LAWYER/NON-LAWYER RELATIONSHIPS

One of the most frequent complaints raised by opponents of merit selection is the inclusion of members of the bar on the Judicial Nominating Commission. While the original proposals were designed to balance the input of non-lawyers who are representative of the public with specialized legal practitioners who have knowledge and expertise germane to the selection of judges, recent criticisms have pointed to the bar's role as essentially undemocratic, institutionalizing the preferences of the organized bar and therefore undermining the interests of the citizenry at large.[69] This complaint has formed the basis for three unsuccessful lawsuits challenging the makeup of the Nominating Commission in Alaska, Iowa, and Kansas.[70]

Similarly, claims are often made about the working relationships that develop within Nominating Commissions, including an oft-repeated claim that attorney members dominate the deliberations of the Commission, and that non-attorney "citizen" Commissioners are expected to follow the preferences of those representing the bar. Our survey results show that among Commissioners, these concerns are simply not justified. As discussed earlier, there is a remarkable level of agreement on the evaluative criteria that Commissioners use to assess applicants, with no discernible differences emerging between lawyers and non-lawyers.

When asked explicitly about the interaction of attorney and non-attorney members, those who responded to the survey report positive working relationships, consistent with the findings of Ashman and Alfini's early survey results.[71] Specifically, all groups report high levels of agreement with the statement "members of my Commission participate equally in deliberations," with slightly lower numbers of attorney members expressing strong agreement (38.1% of judge members strongly agree, another 38.1% of judge members agree; 48.3% of non-lawyers strongly agree while 33.6% agree; 29.8% of lawyers strongly agree, and 48.7% agree). Interestingly, *non-attorney Commissioners are more likely to express strong disagreement with the statement that "Commission meetings and deliberations are dominated by a few Commissioners," although the findings indicate significant disagreement with the statement among all Commissioners.*

When asked about the degree to which Commissioners seem to respect and value the contributions of their fellow Commissioners, the results are similarly striking. In fact, *there is no evidence to suggest a divide between*

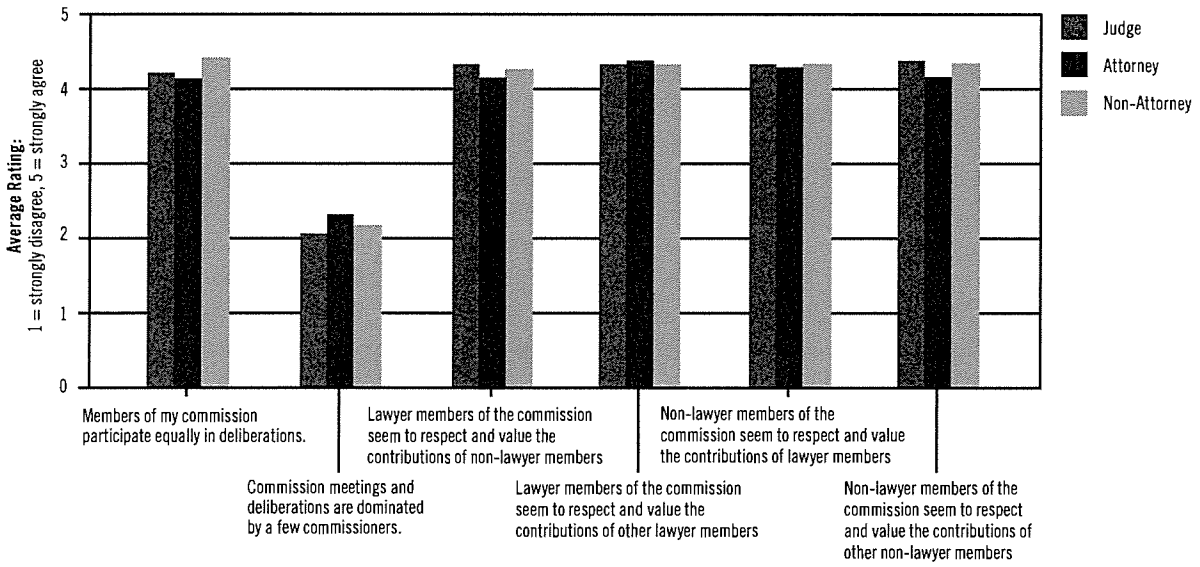
Thinking about your commission and its decision-making process, please rate your agreement with the following statements:

Answer Options	Governor	Bar Association	State Legislature or a State Legislator	I serve *ex officio* or by virtue of my professional position	Other (please specifiy)	Rating Average	Count
The political preferences of a governor (or other appointing authority) have no effect on the decisions my commission makes.							
Strongly Disagree (1)	4	1	1	2	0		
Disagree (2)	13	3	0	0	3		
Neither Agree nor Disagree (3)	25	8	4	0	6		
Agree (4)	72	24	4	3	26		
Strongly Agree (5)	81	33	3	4	27		
Don't Know	18	9	0	1	9		
	4.09	4.23	3.67	3.78	4.24	4.12	384

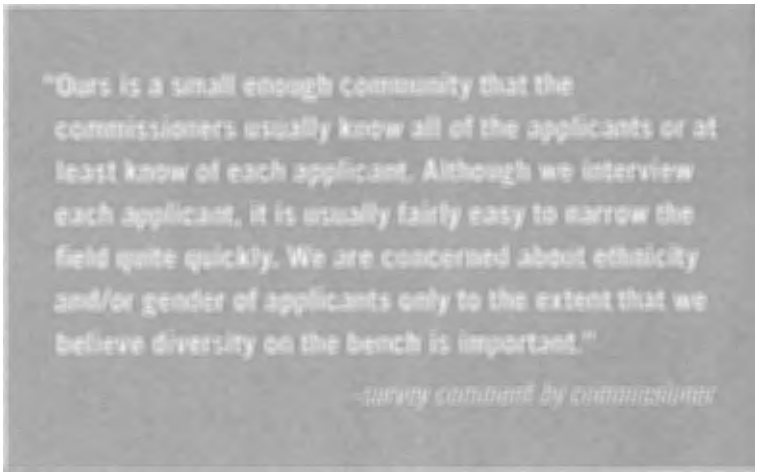
answered question 385 | skipped question 92

attorney members and non-attorney members. At exceptionally high levels, and with very few exceptions, Commissioners agree that lawyers respect the contributions of both other lawyer members and non-lawyer members, just as they agree that non-lawyers respect the contributions of other non-lawyer members and lawyer members. Any claim that Commissions are dominated by those elected by the Bar is simply not supported by the survey data. ★

Thinking about your commission and its decision making process, please rate your agreement with the following statements:



DIVERSITY



In the past decade, a number of scholars interested in questions of diversity have sought to understand how Commission processes affect the number of women and minorities currently serving in our state judiciaries. In general, there is support for the idea that diversity among Commission members can promote a more diverse group of appointees. For example, the Brennan Center for Justice at New York University School of Law has promoted a set of "best practices" that can be used by Commissions to enhance the prospects for women and minorities in the process based upon a set of interviews with Nominating Commissioners. They write that:

> Today, white males are overrepresented on state appellate benches by a margin of nearly two-to-one. Almost every other demographic group is underrepresented when compared to their share of the nation's population. There is also evidence that the number of black male judges is actually decreasing. (One study found that there were proportionately fewer black male state appellate judges in 1999 than there were in 1985.) There are still fewer female judges than male, despite the fact that the majority of today's law students are female, as are approximately half of all recent law degree recipients. This pattern is most prevalent in states' highest courts, where women have historically been almost completely absent.[72]

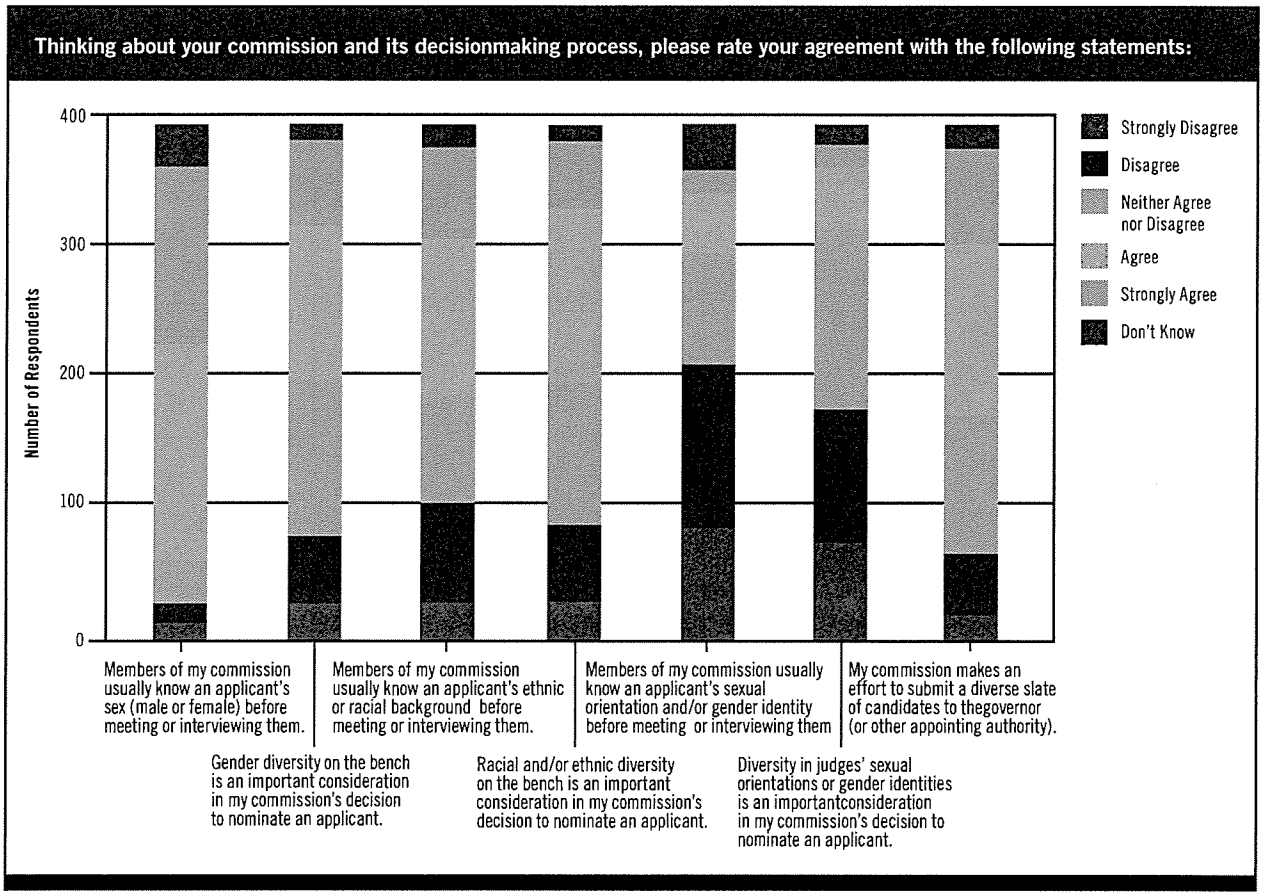
In discussing the role of diversity in Commission deliberations, the report finds that many Commission members lack a vision of how individual race or gender characteristics might be incorporated into their decision-making.

> Few Commissioners we talked to could or would articulate exactly how the race or gender of applicants is weighed or considered during the nominating process. A few viewed a candidate's minority status or gender as a "tie-breaker" between similarly qualified candidates. Others simply looked at it as a "plus" for a candidate that might keep a candidate in the pool for longer. Still other Commissioners described diversity as a factor that they examined after the deliberations. If the "short list" of nominees for presentation to the governor was not diverse, then the Commission would reconsider candidates to see whether they could produce a more diverse short list.[73]

The Brennan Center report concludes by advocating strategic and active recruitment of applicants from under-represented populations. As discussed above, Commissioners who responded to the survey indicate that this recruitment generally does not occur. There are two additional considerations that must be addressed, however. First, it is unclear the extent to which Commissioners want to incorporate diversity into their consideration of judicial applicants. Second, to the degree that they do desire to advance the cause of judicial diversity, they need to be aware of an applicant's race and gender in order to do so. Given the nature of the screening process, this information may not be easy to obtain in all cases.

Of the 393 respondents who answered questions about the role of diversity, 35.5% agreed that the Commission makes an effort to submit a diverse slate of candidates to the governor, with another 17.6% indicating strong agreement. While Commissioners may perceive an intention to recommend diverse candidates, they simultaneously seem significantly less committed to the idea that diversity of race or gender are important considerations in the Commission's decision-making processes. Furthermore, respondents indicate that

Commissioners are not always aware of an applicant's race or gender prior to the in-person interview. Initial screening processes, therefore, occur largely without this information. Commissioners are far more confident that they can identify the gender of an applicant before meeting them than they are able to identify the applicant's race. Of all diversity considerations, *commissioners are decidedly less enthusiastic about the importance of gender identity or sexual orientation than they are about race or gender. They are similarly less confident in their ability to know the sexual orientation or gender identity of the applicants.* ★



"While our Commission does seek to promote diversity on the bench, diversity in and of itself is not a controlling factor. The controlling factors are a person's reputation in the community, recommendations from the community the person will serve and the person's legal skills and life experiences. It is interesting to note that the use of these criteria results in diversity on the bench given that a great number of applicants we see are highly qualified and come from diverse parts of our community."

—survey comment by commissioner

Thinking about your commission and its decision-making process, please rate your agreement with the following statements:								
Answer Options	Strongly Disagree (1)	Disagree (2)	Neither Agree Nor Disagree (3)	Agree (4)	Strongly Agree (5)	Don't Know	Rating Average	Count
Members of my commission usually know an applicant's sex (male or female) before meeting or interviewing them.	12	12	30	175	124	39	4.10	392
Gender diversity on the bench is an important consideration in my commission's decision to nominate an applicant.	26	49	122	119	56	18	3.35	390
Members of my commission usually know an applicant's ethnic or racial background before meeting or interviewing them.	26	74	83	117	64	28	3.33	392
Racial and/or ethnic diversity on the bench is an important consideration in my commission's decision to nominate an applicant.	29	51	116	128	48	21	3.31	393
Members of my commission usually know an applicant's sexual orientation and/or gender identity before meeting or interviewing them.	76	127	84	51	18	35	2.46	391
Diversity in judges' sexual orientations or gender identities is an important consideration in my commission's decision to nominate an applicant.	66	100	149	37	18	23	2.57	393
My commission makes an effort to submit a diverse slate of candidates to the governor (or other appointing authority).	18	39	102	139	69	25	3.55	392
							answered question 394 | skipped question 93	

Shaded cells represent the modal category.

★ ★ ★

Conclusion

Taken as a whole, the survey results indicate that Judicial Nominating Commissions are highly functional decision-making units that engage in a fair and independent assessment of judicial applicants. With few exceptions, Commissioners report that they are satisfied with the system, and there is remarkable agreement that the processes remain insulated from partisan politics or gubernatorial influence. Although Commissioners remain largely White and male, there is increasing evidence of gender diversity in Commission membership, although racial diversity is increasing at a far slower pace. Professionally, Commissioners represent a wide range of backgrounds, including representation of a broad swath of the legal practice as lawyer Commissioners.

Procedurally, the findings, consistent with prior research, suggest a continued trend toward more formal written operating rules and ethics provisions. Very large majorities of Commissioners report formalized procedures in reviewing applications, interviewing applicants, conducting commission deliberations, and voting. While this is clearly indicative of a significant improvement over the past few decades, there does appear to be room for improvement. *Most notably, many Commissioners report that they are unfamiliar with the rules and procedures of their Commission, raising the question of how this information can be more systematically and effectively distributed and communicated to members. Recruitment efforts could more purposefully target underrepresented populations and rising talent.* Regarding interviews, the survey results suggest that Commissions are tending to interview more applicants, but spending less time with applicants in the interview. Screening processes, which allow the Commission to narrow the field before meeting for in-person interviews, might allow for greater attention to each individual interview, resulting in more useful and in-depth information. This may be particularly important for applicants who lack extensive connections in the legal community, a group of individuals who are rarely targeted in recruitment efforts. *By addressing and improving recruitment efforts and interviewing techniques, the ambiguous role of diversity might also be more clearly delineated by Judicial Nominating Commissions.* At the very least, conscious attention to the subject may be helpful to Commissioners who sense an abstract desire to attract and recommend individuals who represent the community but have less firm ideas about how the Commission might do this.

Across the board, we see consensus among survey participants that lawyer and non-lawyer members work well together and respect each other's contributions. Lawyers and non-lawyers tend to agree on the criteria for evaluation, the role of political influences, and the relationship between the governor and the Commission. Arguments that merit selection systems are dominated by members of the bar appear to be unfounded, based upon the evidence offered by the Commissioners themselves. Ideologically, lawyer members and non-lawyer members span the political spectrum, although members are slightly more likely to be Democrats than Republicans (a likely result of gubernatorial appointment of non-attorneys during a period in which Democratic governors outnumbered Republican governors).

The survey results reveal a picture of Judicial Nominating Commissions that provides reason to believe that the merit selection system is working well in states across the country. Though no system of selection is perfect, there is ample evidence to suggest that Judicial Nominating Commissions are operating in a way that is consistent with the original goals of those who fought to enact merit selection and, by doing so, help to promote and maintain a fair and impartial justice system for the generations to follow.

★ ★ ★

Endnotes

[1] James Parker Hall, *The Selection, Tenure, and Retirement of Judges (address before Ohio State Bar Association at Cincinnati, December 29, 1915)*, 3 J. Am. Jud. Soc. 37.

[2] These debates are not unique to democratic societies, although the present study is focused exclusively on an American context.

[3] As discussed elsewhere, partisan popular elections to choose judges had long attracted attention and concern. Proposals to switch to nonpartisan elections were very popular during the early 20th Century. See Larry C. Berkson, updated by Rachel Caufield and Malia Reddick, *Judicial Selection in the United States: A Special Report. Available at http://judicialselection.com/uploads/documents/Berkson_1196091951709.pdf.*

[4] Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 29 ANNU. REP. A.B.A. (1906).

[5] As discussed by Epstein, Knight, and Shvetsova, the reform impulse was not a "natural" or "nonpolitical" result of popular frustration. Rather, it was coordinated by a group of legal elites, particularly bar leaders, whose "preferences over judicial selection and retention mechanisms will vary depending on their beliefs about present and future political conditions." Nonetheless, the proposition that the reform movement was based *entirely* on political considerations, without attention to systemic concerns about the quality and dignity of the judicial branch is similarly over-simplified. See Lee Epstein, Jack Knight, and Olga Shvetsova, *Selecting Selection Systems*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank and Barry Friedman, Ed., Sage Publications 2002).

[6] Several important political developments gave rise to the movement to adopt merit selection in Missouri. First, judicial elections were squarely controlled by party machines, and political leaders would ensure that judges who failed to reinforce the party's goals would be removed from the bench in the next election. Between 1918 and 1941, only two Supreme Court justices were successfully reelected. Second, Democratic party boss Tom Pendergast was so displeased by a ruling that he joined forces with another party faction to unsuccessfully oppose the 1938 reelection of a very popular and well-respected supreme court justice. His involvement in the race, however, brought to light the extraordinary power that party factions expected to exercise in the selection and retention of judges, based purely on partisan political motivations. This influence caused a good deal of concern among lawyers and a number of well-respected citizens around the state. Finally, Judge Padberg was elected to the St. Louis Circuit Court despite the fact that he was not a practicing lawyer, but had been a pharmacist for the preceding eight years. During his tenure, a grand jury with extensive political connections failed to return indictments for election fraud (a decision that was later reversed). The *St. Louis Post Dispatch* said that "Padberg's six years on the bench have been a humiliation to the law and to the city." Missouri Bar Report By Commission on Judicial Independence, *History of Merit Selection. Available at http://www.mobar.org/nonpartisancourtplan/history.htm.* In discussing adoption of the Missouri Non-Partisan Court Plan, Laurance Hyde describes the impetus by saying:

> most important was the situation in our two large cities, St. Louis and Kansas City, where selection and tenure of judges was mainly controlled by politicians, and political machines, very apparently not working in the public interest. Conditions were continuously getting worse so that it was rather generally felt that something had to be done about it. Then, too, it was realized that under the party primary and election system, in statewide and large city elections, selection and tenure of judges depended upon issues wholly irrelevant to any judge's ability, record, or qualifications. This was illustrated by the experience in Missouri, where, in twenty years between the first and second world wars (1919 to 1939) only twice (1922 and 1936) was a judge of the Supreme Court of Missouri, who had served a full term, re-elected to another term. This result was due to the fact that the ten elections during this period turned on national political issues and the judges got only the party vote regardless of individual merit.

Laurance M. Hyde, *The Missouri Non-Partisan Court Plan*, in JUDICIAL SELECTION AND TENURE: SELECTED READINGS (Glenn R. Winters, Ed., The American Judicature Society 1973), at 91.

[7] Because Missouri was the first state to adopt the proposed "merit selection," the system is often referred to as "The Missouri Plan." In Missouri, however, the judicial selection system is known as the Nonpartisan Court Plan. Although Missouri's Nonpartisan Court Plan remains the longest merit selection system in operation, two important caveats should be made. First, it is a misnomer, as there are many variants of "merit selection," some of which differ dramatically from Missouri's system. Second, not all judges in Missouri are appointed through the Missouri Nonpartisan Court Plan. Under the state's Constitution, circuit court judges in St. Louis and Jackson County (Kansas City) are also appointed through merit selection. The Constitution also permits other counties to adopt merit selection through a majority vote of citizens living in the circuit, and the plan has been adopted by Clay, Platte, St. Louis, and Greene Counties in this manner. American Judicature Society, JUDICIAL SELECTION IN THE STATES: SELECTION OF JUDGES, *available at*: http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=MO

[8] There are many different names for these commissions. For example, in Vermont, they're called the Judicial Nominating Board, in Alaska and Idaho, they're called Judicial Councils, in Connecticut and Hawaii, they're called the Judicial Selection Commissions, and in Montana, they're labeled Judicial Nomination Commissions. "Judicial Nominating Commission" is common, and is frequently used as the generic term to refer to these bodies.

[9] See Appendix B for rules regarding the composition of nominating commissions and the selection process in each state.

[10] Ashman and Alfini, in delineating the characteristics that define merit selection, write that "the nonpartisan merit selection plan is defined for our purposes as a judicial selection system which employs: A **permanent nonpartisan commission of lawyers and nonlawyers that initially and independently generates, screens, and submits a list of judicial nominees to an official who is legally or voluntarily bound to make a final selection from the list**" (emphasis in original). Allan Ashman and James J. Alfini, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS (Chicago: The American Judicature Society 1974), at 12.

[11] Russell D. Niles, *The Changing Politics of Judicial Selection: A Merit Plan for New York*, in JUDICIAL SELECTION AND TENURE: SELECTED READINGS (Glenn R. Winters, Ed., The American Judicature Society 1973) at 145. In proposing a merit selection plan for New York, based on interviews with commissioners in four states, he says:

> The evidence is very strong that the commission plan has taken the nominating process out of the [political] reward system. A commissioner may favor a member of his own party and the governor certainly often does, but there is a universal denial of being influenced by the candidate's past service to a party of by his financial contributions to political campaigns.... *The commission has insulated the executive from certain political pressures* [emphasis added].

[12] In a few jurisdictions, incumbent judges run in a "retention election" only after initially winning a contested election. In New Mexico, for example, a judicial vacancy is filled through a merit selection process, whereby the appropriate commission recommends individuals and the governor chooses one from the list. Once appointed, the judge must compete in a contested partisan election. Provided that they win that election, they compete in retention elections thereafter and must receive 57% "Yes" votes to retain their seat on the bench. See American Judicature Society, JUDICIAL SELECTION IN THE STATES: NEW MEXICO, *available at* http://www.judicialselection.us/judicial_selection/index.cfm?state=NM.

[13] See, for example, Glenn R. Winters, who wrote:

> I think the lawyer viewpoint is important, just as is the judicial viewpoint, and lawyers and judges are useful commission members for those reasons. An all-lawyer commission, however, would tend to exaggerate the purely technical skills of a good lawyer, and the broader viewpoint of the layman on non-legal considerations of general intelligence, education, personal integrity, and other human qualities is needed.

Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure – It's Historical Development*, in JUDICIAL SELECTION AND TENURE: SELECTED READINGS (Glenn R. Winters, Ed., The American Judicature Society 1973) at 41.

[14] Most recently, these arguments have been put forward by members of The Federalist Society in a coordinated effort to alter or eliminate merit selection systems around the country. For example, Stephen J. Ware writes that:

> the legal profession desires a larger voice in judicial selection for the same reason that other interest groups do – to advance their cause through judicial policymaking. 'Merit' selection gives them that added leverage. All the better if they can sell their old line of increased political influence over the courts by using the attractive, but phony, label of 'neutral professionalism.' Critics of 'merit' selection point out that lawyers comprise an interest group just like other interest groups. Bar associations aggressively lobby for the interests of their lawyer-members. While they may also articulate reasons why the policies that favor them also serve the public interest, bar associations have repeatedly advocated for policies that favor lawyers and that have been viewed by others as harming the public as a whole. The selection of justices through a process controlled by the bar is just one example of this form of advocacy.

Stephen J. Ware, The Federalist Society, *Selection to the Kansas Supreme Court*, (2007) at 11; See also Stephen J. Ware, *The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 KAN. J. L. PUB. POL. 392 (2009); Brian T. Fitzpatrick, The Politics of Merit Selection, 74 MO. L. REV. 675 (2009).

[15] Richard A. Watson and Rondal G. Downing, THE POLITICS OF THE BENCH AND BAR: JUDICIAL SELECTION UNDER THE MISSOURI NON-PARTISAN COURT PLAN (New York: John Wiley & Sons 1969).

[16] Bradley Canon, Politics of the Bench and Bar: Judicial Selection Under the Missouri Non-Partisan Court Plan 31 J. POL. 1115 (1969).

[17] Watson & Downing, supra note 15.

[18] Ashman & Alfini, supra note 10.

[19] Ibid.

[20] Ibid. at 85.

[21] Beth M. Henschen, Robert Moog, and Steven Davis, *Judicial Nominating Commissioners: A national profile*, 73 Judicature 328 (1990).

[22] Ibid. at 334.

[23] Joanne Martin, American Bar Foundation, *Merit Selection Commissions: What Do They Do? How Effective Are They?* (1994).

[24] Henschen et. al. *supra* note 21 have a larger number of respondents to their national survey. But their work was restricted to personal characteristics rather than the work of the commission. There has been no study of nominating commission procedures and deliberative practices that has included as many respondents as the current study.

[25] American Judicature Society, JUDICIAL SELECTION IN THE STATES: JUDICIAL NOMINATING COMMISSIONS, *available at* http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state= ("In 2010, the legislature created a judicial vacancy advisory commission to assist the governor in filling midterm vacancies on the supreme court of appeals, circuit court, and family court. The commission is composed of eleven members. The governor (or the governor's designee), the president of the West Virginia State Bar, and the dean of the West Virginia University College of Law serve as *ex officio* commission members. In addition, the governor appoints four nonlawyer members, and four lawyer members from a list of ten to twenty nominees submitted by the board of governors of the state bar. No more than four appointed commission members may belong to the same political party, and no more than three appointed members may be residents of the same congressional district. Appointed members serve staggered, six-year terms. Commission members select one of the appointed members to serve as chair for a three-year term.")

[26] Georgia, Massachusetts, and Wisconsin are all states that use merit selection of judges by virtue of an executive order of the

Governor. Therefore, the governor has sole responsibility for establishing and populating the judicial nominating commission. In Minnesota, the nominating commission exists to fill interim vacancies. The Commission on Judicial Selection was established by the state legislature in 1989, and the governor is not required to use the Commission in screening candidates for the District Courts. Typically, the governor has used the Commission for District Court vacancies as well as vacancies on the supreme court and court of appeals. The governor is not required to appoint someone recommended by the commission. The governor and the supreme court are required to appoint both lawyers and non-lawyers; the governor's appointees serve at the pleasure of the governor while the supreme court's appointees serve four year terms that automatically end when a governor's term of office ends. Ibid.

[27] It is worth noting that in Rhode Island, despite statutory limitations on the terms of judicial nominating commission members, turnover is extremely rare and a large number of commissioners are currently serving past their initial term length, despite not being formally re-appointed to the position.

[28] Marla N. Greenstein, revised by Kathleen Sampson, American Judicature Society, *Handbook for Judicial Nominating Commissioners* (2004, 2nd Ed.).

[29] One non-lawyer commissioner reported that were appointed to the commission by the Bar Association. This appears to be an error in self-reporting, as the state in which they serve requires that all non-lawyers be appointed by the governor.

[30] A follow up question asked about the kind of litigants the practice represented (individuals, private entities, public entities, etc), but only 16 commissioners responded to the question, which does not allow sufficient information to merit discussion of the results.

[31] It is unclear, however, whether judges are referring to confirmation by the state legislature to become a judge, thereby requiring service on the nominating commission, or if they are referring to confirmation specifically to serve on the nominating commission. Therefore, a cautious interpretation of these results would indicate that it is likely that the percent of judges who serve on nominating commissions who were subject to legislative confirmation *for their service on the nominating commission* is actually lower than is reported here.

[32] Henschen, et. al., supra note 21.

[33] Henschen, et. al., supra note 21.

[34] Kevin M. Esterling & Seth S. Andersen, *Diversity and the Judicial Merit Selection Process: A Statistical Report*, in RESEARCH ON JUDICIAL SELECTION (Chicago: The American Judicature Society 1999); Ciara Torres-Spelliscy, Monique Chase & Emma Greenman, Brennan Center for Justice, *Increasing Judicial Diversity* (2010); Linda Merola & Jon Gould, The Lawyers Committee on Civil Rights under Law, The Justice At Stake Campaign, & The Center for Justice, Law, and Society, *Improving Diversity on the State Courts: A Report from the Bench* (2009).

[35] Greenstein & Sampson, supra note 28, at 33.

[36] The American Judicature Society, *Model Judicial Selection Provisions* (2008) available at http://www.judicialselection.us/uploads/documents/MJSP_ptr_3962CC5301809.pdf, at 4.

[37] The 25 individual respondents who indicated that they serve on multiple commissions have been removed from the dataset for purposes of these questions, because it is unclear which commission they would be referencing in their answers.

[38] Ashman and Alfini, supra note 10, at 42.

[39] Ashman and Alfini, supra note 10, at 42-43.

[40] A number of respondents volunteered that solicitation of applications was a function of the judicial branch, or that "this is something done for the commission, not by the commission."

[41] Ashman and Alfini, supra note 10, at 49 (writing that "Active recruitment poses certain problems. A commission member who personally solicits a certain individual who he feels is well qualified runs the risk of having this individual assume that he ultimately will be nominated if he throws his hat in the ring.")

[42] There are a few exceptions to this general rule. For example, for unexpected vacancies on the New York Court of Appeals (the state's highest appellate court), the commission has 120 days to submit names. At the other end of the spectrum, Iowa commissions that review applicants for positions as District Associate Judge and Magistrate Judge have 15-30 days.

[43] Martin's survey of Judicial Nominating Commission Chairs includes information about what information is included in "law enforcement agency background checks." The most common are personal history and history of the applicant's legal practice (38% and 30% respectively). The least common was information about psychiatric examinations (8%). Martin, *supra* note 23, at 12.

[44] Martin finds that only 63% of Commission Chairs reported seeking written recommendations, while 100% reported that their Commission relies on review of biographical data and interviews with the applicants. Martin, *supra* note 23, at 10.

[45] The American Judicature Society's *Handbook for Judicial Nominating Commissioners* recommends a preliminary screening process: "Commissions that regularly encounter a large pool of applicants often have the chair or a special subcommittee conduct a preliminary screening of the applications. Where the applicant pool exceeds by several times the number of names required to be submitted to the appointing authority, it may be advisable to employ a preliminary screening device. By reducing the number of applicants under consideration, a preliminary screening sets the stage for more efficient screening and investigation by the full commission." Greenstein & Sampson, *supra* note 28, at 106.

[46] Greenstein & Sampson, *supra* note 28, at 132.

[47] See Ashman and Alfini, *supra* note 10, at 54.

[48] Greenstein & Sampson, *supra* note 28, at 132-137.

[49] Greenstein & Sampson, *supra* note 28, at 137.

[50] Of the Commission Chairs surveyed by Joanne Martin in the mid-90s, 70% said that their Commission interviewed all applicants, 20% said that the Commission interviewed only those selected for final review, 8% said they interviewed any applicant who met the minimum requirements, and 3% said that they did not interview applicants. Regarding interview practices, she writes:

> Only two of the 76 responding commissioners said that their commission did not interview candidates; one of the two reported that a public hearing is held where the candidates may be asked questions and the other appeared to be making a distinction between 'commission' and 'commissioners,' implying that while the commission sitting as a whole did not interview candidates, the individual members of the commission did (p. 12).

Martin, *supra* note 23 at 12.

[51] Internal Rules of Procedure of State Judicial Nominating Commission. On file with author.

[52] In Nebraska, the rules explicitly invite the commission to hold private interviews with applicants: "The commission is encouraged to hold private interviews with candidates prior to or following the public hearing." *Available at* http://www.supremecourt.ne.gov/rules/pdf/Ch1Art6.pdf. Maryland is a state where merit selection is established by Executive Order, and rules are therefore established at the governor's discretion. Nonetheless, the guidelines for interviews do not explicitly or implicitly suggest that these individual meetings with judicial applicants are to occur. The executive order states that:

> A **Commission** shall **interview each applican**t for each vacancy for which it is responsible for recommending candidates. The interview shall be **in person** unless, due to extraordinary circumstances, a candidate is unable to appear in person. In cases of extraordinary circumstances, and upon prior approval of the Governor, **an interview may be held via video teleconference.** An example of an extraordinary circumstance is unavailability in person due to military service to the country. An example of a circumstance that is not extraordinary is a vacation. In considering a person's application for appointment to fill a vacancy, a Commission shall consider the applicant's integrity, maturity, temperament, diligence, legal knowledge, intellectual ability, professional experience, community service, and any other qualifications that the Commission deems important for judicial service, as well as the importance of having a diverse judiciary (emphasis added).

Available at http://www.gov.state.md.us/executiveorders/01.01.2008.04eo.pdf.

[53] Jeffrey D. Jackson, Beyond Quality: First Principles in Judicial Selection and their Application to a Commission-Based Selection System, 34 FORDHAM URB. L. J. 125 (2007) at 126.

[54] Maurice K. Rosenberg, *The Qualities of Justices – Are They Strainable?* 44 TEX. L. REV. 1063 (1966).

[55] Ashman and Alfini, supra note 10, at 57 (writing that "Not only do balloting procedures differ from one commission to another, but more than one balloting technique may be used at different times by a single commission.")

[56] Greenstein & Sampson, *supra* note 28, at 154.

[57] Watson and Downing, *supra* note 15, at 103.

[58] Greenstein & Sampson, *supra* note 28, at 154-157.

[59] A few states do include voting requirements in the constitutional or statutory language establishing the merit selection system. These may take the form of either specific procedural voting rules or, at least, a minimum threshold that applicants must achieve in order to be recommended to the appointing authority.

[60] See, for example, Ware, *supra* note 14, at 9-10 (fn 35).

[61] Elmo B. Hunter, *A Missouri Judge Views Judicial Selection and Tenure*, in JUDICIAL SELECTION AND TENURE: SELECTED READINGS (Glenn R. Winters, Ed., The American Judicature Society 1973) at 113.

[62] Missouri's rule 10.28 says:

> When a vacancy occurs or when it is known that a vacancy will occur at a definite future date, the chairman shall publicize the same and solicit the submission of names of individuals qualified for such vacancy. When the commission announces that it is accepting applications, it shall encourage members of the public to nominate well qualified candidates for the commission to consider. Prior to the meeting of the commission, an appropriate questionnaire shall be sent to each person whose name is proposed, to be completed and returned to the chairman of the commission. Copies of the completed questionnaire shall be provided each member of the commission prior to the meeting called for the taking of the formal action by the commission in making its nominations.
>
> (b) Except as provided in Rule 10.28(d), no publicity shall be given by the commission of the names of persons under consideration for nomination. The commission may submit the names of applicants to others on a confidential basis for the purpose of securing appropriate background information to the extent authorized by the applicants' signed written waivers.
>
> (c) Any meeting called for the purpose of taking formal action in making nominations necessarily involves discussion of applicants' personal information and shall, therefore, be a closed meeting. All matters discussed at said meeting, except the matters contained in the certificate of nomination, shall be kept confidential.
>
> (d) Prior to any meeting called to take formal action in making nominations, the commission will select from all the applicants those it will interview. Each of the selected applicants shall be interviewed by the commission as a whole, and those interviews shall be public. The names of those to be interviewed, the time and place of the public interviews, and information relating to the number and characteristics of all applicants shall be released prior to the public interviews. Other than the names of the persons it selects to interview, the commission shall not release any personally identifiable information about any person not included in the certificate of nomination.
>
> (e) Within 72 hours of submitting the certificate of nomination, the commission shall transmit to the governor the happlications and other information submitted to the commission pertaining to the persons contained in the certificate of

nomination. Within the same time, the commission shall make public a copy of the applications submitted by the persons included in the certificate of nomination, but with personal or confidential information redacted.

Judicial Branch of Missouri, Rule 10 – *Nonpartisan Judicial Commissions, Available at* http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/f17cc30b8a6987ba86256ca600521281?OpenDocument.

[63] Section Two of the Hawaii Judicial Selection Rules states:

SECTION TWO: CONFIDENTIALITY

A. Under the Constitution of the State of Hawai'i, the commission's proceedings must be confidential. Therefore, all commission records, proceedings, and business, including the names of all proposed nominees and the names of nominees forwarded to the appointing authority, shall be confidential and may not be discussed outside commission meetings, except among commission members, or as made necessary by Rule 9 or Rule 12, or pursuant to Rule 13.

B. No commissioner shall engage in ex parte communications on matters relating to commission proceedings, except as provided in these rules.

C. All communications between commissioners, between a commissioner and an applicant or petitioner, or between a commissioner and any other person or organization with respect to the judicial qualifications of an applicant or petitioner shall be kept confidential and discussed only among commission members. A commissioner or ex-commissioner shall not disclose confidential information, except as provided in these rules.

Supreme Court of the State of Hawai'I, *Judicial Selection Commission Rules, available at* http://www.state.hi.us/jud/ctrules/jscr.htm#SECTION%20TWO:%20CONFIDENTIALITY.

[64] Arizona Judicial Branch, *Uniform Rules of Procedure, available at* http://www.azcourts.gov/jnc/UniformRulesofProcedure.aspx.

[65] Similarly, Commission Chairs reported being generally satisfied with the quality of candidates that were referred to the appointing authority in Martin's 1994 study. 59% said they were satisfied in the majority of instances, and 30% said that they were always satisfied. Martin, *supra* note 23.

[66] Watson and Downing, *supra* note 15.

[67] 39.9% of respondents agreed with this statement, and 31.8% strongly agreed.

[68] Henschen et. al. *supra* note 21.

[69] See, for example, Brian Fitzpatrick's claim that:

> Even if bar associations are better able to identify more intelligent or more qualified judges than are voters or public officials, it does not follow that they are less inclined to consider the political beliefs of judicial candidates. In my view, state bar associations are just as likely to be concerned – if not more concerned – with the decisional propensities of judicial candidates as are voters and elected officials. Moreover, insofar as a judge's personal ideological preferences are correlated with his or her decisions, and insofar as those preferences are often more easily observed than his or her decisional propensities, it is hard for me to believe that state bar associations accord those preferences any less weight than voters or elected officials when they select judges. In short, I am skeptical that merit selection *removes* politics from judicial selection. Rather, merit selection may simply *move* the politics of judicial selection into closer alignment with the ideological preferences of the bar.

Fitzpatrick, *supra* note 14, at 676.

[70] All of these lawsuits have been brought in coordination with James Bopp's James Madison Center for Free Speech. *See Kirk v. Carpeneti* 623 F. 3d 889 (9th Cir. 2010); *Carlson v. Wiggins* 760 F. Supp. 2d 811 (S.D. IA 2011) Dist. Court, SD Iowa 2011; *Dool v. Burke* (D. Kansas 2010).

[71] Ashman and Alfini write that "The open-ended responses to our questionnaires reveal that very few lay members felt dominated by the lawyers and that equally few lawyer members felt the lay members to be superfluous" *supra* note 10 at 25. They continue by referencing a study of the Massachusetts commission that arrives at a similar conclusion, saying "the laymen... realized that they were as perceptive as the lawyers about people, and equally adept in evaluating available information. While laymen had to defer to lawyer opinions about legal experience, they had strong, independent views and were by no means dominated or manipulated by the lawyers. Lawyer perceptions of the lay members confirm the capacity and desirability of lay participation. Most felt that lay people provided a more detached view of the system, bringing a consumer citizen perspective to bear, and counteracting the 'chumminess' that tends to exist among lawyers." John A. Robertson and John B. Gordon, *Merit Screening of Judges in Massachusetts: The Experience of the Ad Hoc Committee*, 58 MASSACHUSETTS LAW Q., 138 (1973).

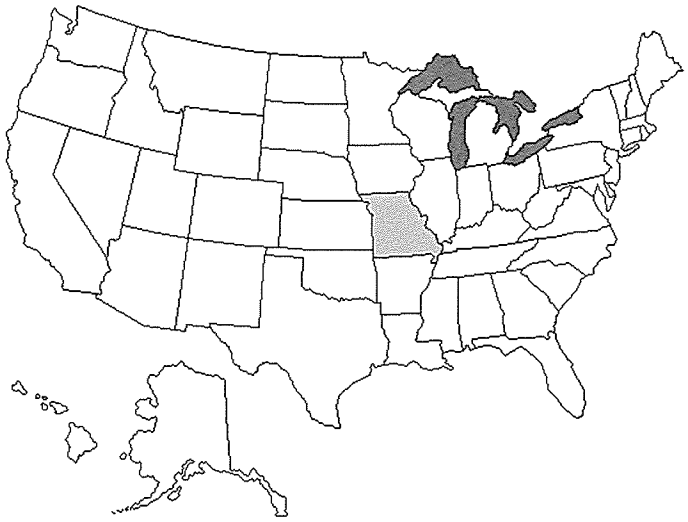
[72] Torres-Spelliscy, et. al., *supra* note 34.

[73] Ibid. at 23.

[74] See American Judicature Society, supra note 25 (including information about reported costs of Judicial Nominating Commissions).

Appendix A:
Progression of Judicial Merit Selection in the United States

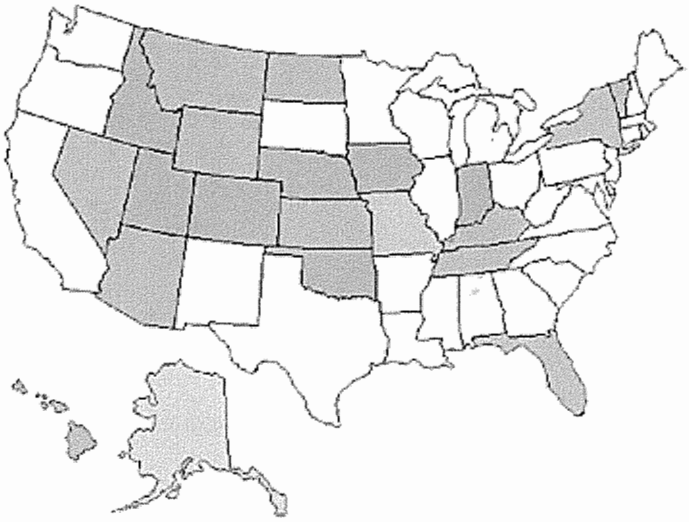
1940s



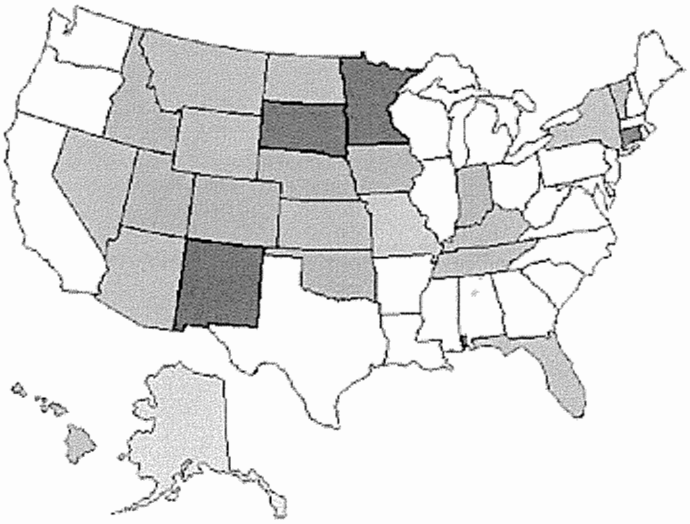
1950s

1960s

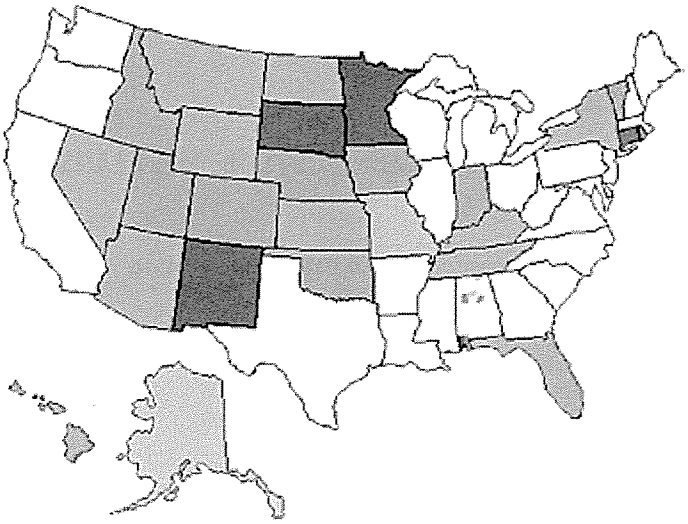
1970s



1980s

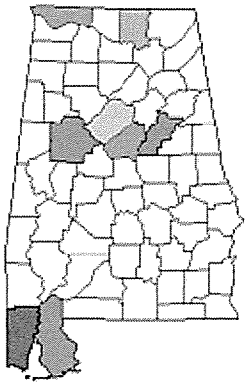


1990s



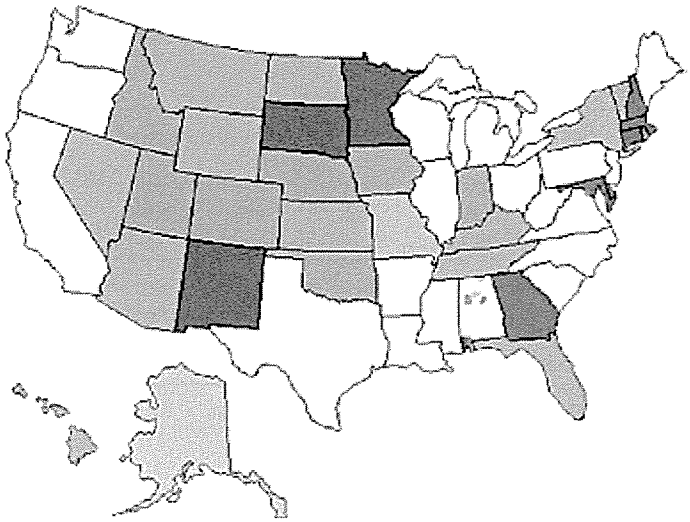
2008 ELECTIONS

MISSOURI



ALABAMA

JUDICIAL MERIT SELECTION TODAY



Appendix B:
Existing Merit Selection Systems

CHARACTERISTICS OF MERIT SELECTION PLANS: SCOPE OF THE PLANS

State/Jurisdiction	Year established	Level of court	Legal basis of plan	Type of vacancy	Number of commissions	Number of commissioners
Alabama						
Baldwin County	1999	Circuit Court District Court	CA	Interim	1	5: 1L; 3N; 1J
Jefferson County[1]	1950	Circuit Court	CA	Interim	1	5: 2L; 2N; 1J
Lauderdale County	2008	Ciruit Court District Court	CA	Interim	1	5: 2L; 3E
Madison County	1974, revised 1996	Circuit Court District Court	CA	Interim	1	9: 2L; 6N; 1J
Mobile County	1982	Circuit Court District Court	CA	Interim	1	5: 2L; 2N; 1J
Shelby County	2008	Ciruit Court District Court	CA	Interim	1	5: 2L; 2N; 1J
Talladega County	1996	Circuit Court District Court	CA	Interim	1	5: 1L; 3N; 1J
Tuscaloosa County	1990, revised 2002	Circuit Court District Court	CA	Interim	1	9: 5L; 3NL; 1J
Alaska	1959 1959 1980, amended 1985 1959	Supreme Court Superior Court Court of Appeals District Courts and Magistrates	C C S S	Initial and Interim Initial and Interim Initial and Interim Initial and Interim	1	7: 3L; 3N; 1J
Arizona	1974, amended 1992	Supreme Court Court of Appeals	C	Initial and Interim	1	16: 5L, 10NL, 1J
		Maricopa County Superior Court	C	Initial and Interim	1	
		Pima County Superior Court	C	Initial and Interim	1	
Colorado	1967	Supreme Court Court of Appeals	C	Initial and Interim	1	14: 6L, 7NL, 1J
		District Court	C	Initial and Interim	22	8: 1J; at least 4NL; no more than 3L[2]
		County Court Denver Juvenile Court Denver Probate Court	S	Initial and Interim		
Connecticut	1986	Supreme Court Appellate Court Superior Court	C	Initial and Interim	1	12: 6L, 6NL, 0J
Delaware	1977; revised 1978 , 1985, 2001, 2009	All Courts, including Magistrates	EO	Initial and Interim	1	11: 5L, 4NL, 2E
D.C.	1973, amended 1977, 1984, 1986, 1996	Court of Appeals Superior Court	HR	Initial and Interim	1	7: 2NL, 2L, 2E, 1J
Florida	1972; amended 1976, 1984, 1996, 1998, 2011	Supreme Court District Court of Appeal Circuit Court County Court	C C C	Initial and Interim Initial and Interim Interim	1 5 20	9: 6L, 3E, 0J
Georgia	1972 to present	Supreme Court Court of Appeals Superior Court State Court	EO	Interim	1	20[3]

State/Jurisdiction	Year established	Level of court	Legal basis of plan	Type of vacancy	Number of commissions	Number of commissioners
Hawaii	1959, amended 1978, 1994	Supreme Court Intermediate Court of Appeals Circuit Court District Court[4]	C	Initial, Interim, and Retention	1	9: 4L, 5NL, 0J
Idaho	1967; amended 1985, 1990	Supreme Court Court of Appeals District Court	S	Interim Interim Interim	1	7:2L, 3NL, 2J
Indiana	1970	Supreme Court Court of Appeals	C	Initial and Interim	1	7: 1J, 3L, 3NL
	1985	Tax Court	S	Initial and Interim		
Allen County	1983	Superior Court	S	Interim	1	7: 3L, 3NL, 1J
Lake County	1973	Superior Court	S	Initial and Interim	1	9: 4L, 4NL, 1J[5]
St. Joseph County	1973	Superior Court	S	Initial and Interim	1	7: 3L, 3NL, 1J
Iowa	1962, 1963; amended 1976, 1983	Supreme Court	C	Initial and Interim	1	15: 7L, 7E, 1J[6]
	1962, 1963; amended 1976, 1983	Court of Appeals	S	Initial and Interim		
	1962,1963; amended 1976, 1983	District Court	C	Initial and Interim	14	11: 5L, 5E, 1J[5]
	1983, amended 1986	District Associate Judges[6]	S	Initial and Interim	99	6: 2L, 3E, 1J
	1983; amended 1989, 1990, 1998	Magistrate Judges[7]	S	Initial and Interim		
Kansas	1958	Supreme Court	C	Initial and Interim	1	9: 5L, 4NL, 0J
	1975	Court of Appeals	S	Initial and Interim		
	1972	District Court (optional)	C	Initial and Interim	17	# of L's / NL's varies according to judicial district;[8] 1J
Kentucky	1976	Supreme Court Court of Appeals	C	Interim	1	7: 2L, 4NL, 1J
		Circuit Court District Court	C	Interim	56	
Maine[9]	2003	Supreme Judicial Court Superior Court		Initial and Interim	1	14L
Maryland	1970, revised 1974, 1979, 1982, 1987,	Court of Appeals Court of Special Appeals	EO	Initial and Interim	1	17
	1988, 1991, 1995, 1999, 2003, 2007	District Court Circuit Court	EO	Initial and Interim	16	9
Massachusetts	1970 to present	Appeals Court Trial Court	EO	Initial and Interim	1	21
Minnesota	1983, revised 1990, 1992	District Court Workers' Compensation Court of Appeals	S	Interim	1	13: up to 8L, at least 5NL, 0J[10]

State/Jurisdiction	Year established	Level of court	Legal basis of plan	Type of vacancy	Number of commissions	Number of commissioners
Missouri	1940, revised 1976	Supreme Court Court of Appeals	C	Initial and Interim	1	7: 3L, 3NL, 1J
City of St. Louis	1940, revised 1976	Circuit Judge Associate Circuit Judge	C	Initial and Interim	1	5: 2L, 2NL, 1J
Greene County	2008	Circuit Judge Associate Circuit Judge	C	Initial and Interim	1	
Jackson County	1940, revised 1976	Circuit Judge Associate Circuit Judge	C	Initial and Interim	1	
St. Louis County	1976	Circuit Judge Associate Circuit Judge	C	Initial and Interim	1	
Clay & Platte Counties	1976	Circuit Judge Associate Circuit Judge	C	Initial and Interim	2	
Montana	1973, amended 1977, 1979, 1987, 1991, 1992, 1991	Supreme Court District Court Worker's Compensation Judge	C S	Interim Initial and Interim	1	7: 2L, 4NL, 1J
	1987	Chief Water Judge	S	Initial and Interim		
Nebraska	1962, amended 1972	Supreme Court Court of Appeals District Court County Court Juvenile Court Worker's Compensation Court	C S C S S S	Initial and Interim Initial and Interim Initial and Interim Initial and Interim Initial and Interim Initial and Interim	7 6 12 4[11] 3 1	9: 4L, 4NL, 1J
Nevada	1976	Supreme Court District Court	C	Interim	1 1[12]	7:3L, 3NL, 1J 9:4L, 4NL, 1J
New Hampshire	2000, 2005	Supreme Court Superior Court District Court Probate Court	EO	Initial and Interim	1	11: 6L, 5NL
New Jersey	2006, amended 2010	Supreme Court	EO	Initial and Interim	1	7[13]
New Mexico	1988	Supreme Court Court of Appeals	C	Initial and Interim	1	14: 8L, 3NL, 3J[14]
	1988	District Court	C	Initial and Interim	13	14: 8L, 3NL, 3J[14]
		Metropolitan Court (Bernalillo County)	C	Initial and Interim	1	14: 8L, 3NL, 3J[14]
New York	1977	Court of Appeals	C	Initial and Interim	1	12: 4L, 4NL, 4E, 0J
	1975 to present	Appellate Div. of the Supreme Court	EO	Initial and Interim	4	13
		Supreme Court		Interim		
		Court of Claims	EO	Initial and Interim	1	13
		County Court Surrogate's Court Family Court	EO	Interim	4	14
New York City	1978 to present	Criminal Court Family Court	EO	Initial and Interim	1	19
		Civil Court		Interim		
North Dakota	1976; amended 1998	Supreme Court District Court	C	Interim	1 1	6: 3L/J, 3NL 9: 3L/J, 3NL, 3E[15]

State/Jurisdiction	Year established	Level of court	Legal basis of plan	Type of vacancy	Number of commissions	Number of commissioners
Oklahoma	1967, amended 2010	Supreme Court Court of Criminal Appeals	C	Initial and Interim	1	15: 6L, 9NL, 0J
	1987, amended 1996	Court of Civil Appeals	S	Initial and Interim		
	1980, amended 2001	District Court	S	Interim		
	1977	Workers' Compensation Court	S	Initial and Interim		
Rhode Island	1994	Supreme Court Superior Court Family Court District Court Worker's Compensation Court Administrative Adjudication Court	C	Initial and Interim	1	9: 4L, 4NL, 1E 0J
South Dakota	1980	Supreme Court Circuit Court	C	Initial and Interim Interim	1	7: 3L, 2NL, 2J
Tennessee	1971; amended 1974, 1986, 1994, 1999, 2001 2009	Supreme Court Court of Criminal Appeals Court of Appeals	S	Initial and Interim	1	17: At least 10L; at least 1N
	1994	Trial Courts	S	Interim		
Utah	1967, amended 1985, 1992, 1994, 2010	Supreme Court Court of Appeals	C	Initial and Interim	1	7: 2L, 2NL, 2E, 1J
		District Court Juvenile Court	C	Initial and Interim	8	7: 2L, 2NL, 2E, 1J
Vermont	1967; amended 1969, 1971, 1975, 1979, 1985	Supreme Court Superior Court District Court	C	Initial and Interim	1	11: 3L, 6NL, 2E
West Virginia	2010	Supreme Court of Appeals Circuit Court Family Court	S	Interim	1	11: 6L, 4NL, 1E[15]
Wisconsin[17]	2003	Supreme Court Court of Appeals Circuit Court	EO	Interim	7	9L
Wyoming	1973	Supreme Court District Court Circuit Court	C	Initial and Interim	1	7: 3L, 3NL, 1J[18]

C = Constitutional
S = Statutory
EO = Executive Order
HR = Home Rule

L = Lawyer
NL = Non-lawyer
E = Either Lawyer or Non-lawyer
J = Judge

1. **Alabama (Jefferson County).** The Jefferson County Commission nominates candidates for vacancies in the Birmingham Division only.

2. **Colorado.** In judicial districts with populations greater than 35,000, there must be three lawyer and four non-lawyer members. In judicial districts with populations of 35,000 or less, there must be at least four non-lawyer members; a majority vote of the governor, the attorney general, and the chief justice determines how many of the remaining three members must be lawyers.

3. **Georgia.** Under an Executive Order signed on January 10, 2011, Governor Nathan Deal appointed 20 members to the Commission, although there are no provisions that explicitly require 20 members.

4. **Hawaii.** The chief justice makes appointments to the district courts.

5. **Indiana (Lake County).** Two lawyer and two non-lawyer members must be men; two lawyer and two non-lawyer members must be women; at least one lawyer and one non-lawyer member must be a minority.

6. **Iowa.** The mandatory ratio of lawyers to non-lawyers is not specified; traditionally, the governor appoints only non-lawyers and the bar elects only lawyers. No more than a simple majority of members appointed by the governor may be of the same gender, and the bar must alternate between electing male and female members.

7. **Iowa.** District judges appoint district associate judges from lists of nominees recommended by the county magistrate appointing commission. The county magistrate appointing commission appoints magistrates.

8. **Kansas.** The number of commission members varies with the number of counties in each judicial district; however, there must be an equal number of lawyers and non-lawyers on each commission.

9. **Maine.** Governor Baldacci established the Judicial Selection Committee to "advise [him] about matters related to judicial appointments and recommend candidates to fill vacancies." Members include a representative from the attorney general's office and practicing attorneys.

10. **Minnesota.** There are nine commission members who serve "at-large" to fill any district court or workers' compensation court of appeals vacancies. In addition, there are four commission members—two lawyers and two non-lawyers—appointed from the district in which the vacancy exists.

11. **Nebraska.** The district court judicial nominating commissions also nominate county court judges, except in Districts 1, 3, 4, and 10, in which there are separate county and district judicial nominating commissions.

12. **Nevada.** Nominations for district court vacancies are made by temporary commissions that are assembled as each vacancy occurs and exist only until nominations have been submitted to the governor. These temporary commissions consist of members of the permanent commission and one lawyer and one non-lawyer resident of the judicial district in which the vacancy occurs.

13. **New Jersey.** Governor Christie's 2010 Executive Order 32 states that the Commission will be comprised of 7 members, with no fewer than 3 former judges. The Commission may include lawyers, but shall not include any lawyer serving as a member of the State Bar Association's Judicial and Prosecutorial Appointments committee.

14. **New Mexico.** The president of the state bar and the judges on the commission are authorized to make the minimum number of additional appointments of members of the state bar as is necessary for equal representation on the commission of the two largest political parties.

15. **North Dakota.** When a vacancy occurs on the district court, the governor, chief judge, and president of the state bar each appoint an additional temporary member, who may or may not be a lawyer, from the judicial district in which the vacancy occurs; these members serve until the vacancy is filled.

16. **West Virginia:** The governor (or the governor's designee), the President of the West Virginia State Bar, and the Dean of the West Virginia University College of Law serve *ex officio.*

17. **Wisconsin.** Pursuant to Executive Order 29, Governor Walker's Advisory Council on Judicial Selection reviews applications for interim judicial vacancies and recommends qualified candidates. All members are appointed by the governor and serve 12 month terms. The number of commissioners is not outlined in the Executive Order. The governor is not bound by the council's recommendations.

18. **Wyoming.** When a vacancy occurs on a district or circuit court, and that district or county is not represented on the commission, one lawyer and one non-lawyer from that district or county are appointed as temporary, nonvoting advisors to the commission.

Appendix C:
Letter to Invite Participation

ADVOCATING INTEGRITY IN
AMERICAN JUSTICE

10 August 2011

Dear Commissioner:

The American Judicature Society (AJS) is conducting a survey of judicial nominating commissioners. This survey is an attempt to learn more about the policies, practices, and procedures of judicial nominating commissions from those who know them best: the commissioners. Your service on a judicial nominating commission provides you with a unique opportunity to help us understand the workings of these commissions. To this end, we invite you to take 10-15 minutes of your time to complete the American Judicature Society's 2011 Survey of Judicial Nominating Commissioners. The survey is available online: http://www.ajs.org/selection/jnc/jnc_survey.asp. If you do not have internet access to complete the survey, please call us, and we will send you the survey in printed form.

The American Judicature Society, a nonpartisan, nonprofit membership organization, works to maintain the independence and integrity of the courts and to increase public understanding of the justice system. For nearly a century, the American Judicature Society has conducted research on issues regarding judicial selection and judicial administration.

Over the years, AJS has had the opportunity to speak with hundreds of nominating commissioners, many of whom have expressed an interest in learning more about other commissions and/or improving their own commission. Given these requests, AJS has periodically surveyed nominating commissioners and used the results to inform commissioners about the practices and procedures of commissions nationwide.

The results of this survey will be used to revise the American Judicature Society's Handbook for Judicial Nominating Commissioners, to update and evaluate AJS's Model Judicial Selection Provisions, and to enhance AJS's Judicial Nominating Commission Network. To learn more about these publications and the programs and services we offer to judicial nominating commissioners, please visit our website.

Your privacy is very important to us, and all responses to the survey will be anonymous. Should you have any questions about the survey or AJS, feel free to contact Dr. Rachel Paine Caufield, Research Fellow in the American Judicature Society's Hunter Center for Judicial Selection, at jncsurvey@ajs.org or toll free at (800) 626-4089. Thank you in advance for your participation in the survey.

Sincerely,

Seth S. Andersen

Seth S. Andersen
Executive Director

AMERICAN JUDICATURE SOCIETY
THE OPPERMAN CENTER AT DRAKE UNIVERSITY
2700 UNIVERSITY AVENUE | DES MOINES, IA 50311
800-626-4089 | FAX 515-279-3090 | AJS.ORG

Appendix D:
Survey Instrument

AMERICAN JUDICATURE SOCIETY SURVEY OF JUDICIAL NOMINATING COMMISSIONERS

Welcome to the 2011 Survey of Judicial Nominating Commissioners! Please answer the following questions thinking about your service on your current judicial nominating commission. If you serve on multiple commissions, please answer the questions thinking about the commission that has most recently reviewed applications.

Of course, your privacy is very important to us, and all responses to the survey will be anonymous. Should you have any questions about the survey or AJS, feel free to contact Dr. Rachel Paine Caufield, Research Fellow in the American Judicature Society's Hunter Center for Judicial Selection, at jncsurvey@ajs.org or toll free at (800) 626-4089. Thank you in advance for your participation in the survey.

1. How long have you served on your current commission?

Amount of Time Served: Number of Years: _____ Number of Months: _____

2. Since joining your current judicial nominating commission, how many times have you participated in the review of applicants to fill a judicial vacancy?

☐ I have not yet participated in the selection of candidates ☐ 1-3 times ☐ 4-6 times ☐ 7-10 times ☐ 11-15 times
☐ 16-20 times ☐ 21-25 times ☐ More than 25 times

3. Have you ever been a member of another judicial nominating commission?

☐ Yes ☐ No

4. Are you currently a member of multiple judicial nominating commissions?

☐ Yes ☐ No

5. Who appointed you to your current commission?

☐ Governor ☐ Bar Association ☐ State Legslature or State Legislator
☐ I serve ex officio or by virtue of my professional position ☐ Other (please specify)_____

6. Were you confirmed by the state legislature before you began serving on your current commission?

☐ Yes ☐ No

7. For which court(s) does your commission review applicants? (Indicate all that apply)

☐ Trial court(s) ☐ Intermediate appellate court ☐ State Supreme Court ☐ Other (please specify)_____

8. Which geographic area(s) does this include?

☐ Entire state ☐ One or more countries ☐ One or more municipalities ☐ Other (please specify)_____

9. Does your commission review applications for all judicial vacancies within its jurisdiction, or does the commission only review applications to fill interim vacancies?

☐ All judicial positions ☐ Interim vacancies only ☐ Don't know

10. Does your commission have written operating procedures?

☐ Yes ☐ No ☐ Don't know

11. Are members of your commission bound by written ethics provisions, such as prohibitions on political activity, requirements of confidentiality, and rules governing conflicts of interest?

☐ Yes ☐ No ☐ Don't know

12. When a judicial vacancy occurs, which of the following procedure(s) does your commission use to recruit applicants? (Indicate all that apply)

☐ Publication of notice in newspapers
☐ Publication of notice online
☐ Publication of notice in state or local bar publications/websites
☐ Publication of notice in minority bar association publications/websites
☐ Publication of notice in specialty bar association publications/websites
☐ Recommendations from public officials
☐ Recommendations from prominent lawyers
☐ Word of mouth
☐ Recommendations from labor unions, business associations, chambers of commerce, and/or other nonlegal organizations.
☐ Personal recruitment by members of the commission
☐ Other (please specify)

13. For a typical vacancy, how many applications does your commission receive?

☐ 1-5 Applications ☐ 6-10 Applications ☐ 11-15 Applications ☐ 16-20 Applications
☐ 21-25 Applications ☐ 25-30 Applications ☐ More than 30 Applications

14. Indicate how important each of the following sources of information are in your commission's review of an applicant. If your commission does not utilize a particular source of information, indicate N/A.

	Not very important	Somewhat important	Moderately important	Very important	Absolutely essential	N/A
Review of past professional work (including legal opinions, briefs, law review articles)	☐	☐	☐	☐	☐	☐
Interviews with members of the bench and bar	☐	☐	☐	☐	☐	☐
Solicitation of written recommendations	☐	☐	☐	☐	☐	☐
Review of candidate questionnaires	☐	☐	☐	☐	☐	☐
Review of records of disciplinary bodies	☐	☐	☐	☐	☐	☐
Interviews with the candidiates	☐	☐	☐	☐	☐	☐
Review of public input	☐	☐	☐	☐	☐	☐
Review of biographical data	☐	☐	☐	☐	☐	☐
Background check (criminal and/or tax)	☐	☐	☐	☐	☐	☐

Other (please specify)_____

15. Are the names of applicants available to the public?

☐ Yes ☐ No ☐ Don't know

16. Are applicant files (or portions of applications) available to the public?

☐ Yes ☐ No ☐ Don't know

17. Does your commission conduct formal candidate interviews?

☐ Yes ☐ No ☐ Don't know

18. Outside of formal interviews, do commissioners meet with and/or interview applicants individually?

☐ Yes ☐ No ☐ Don't know

19. Thinking about the formal candidate interviews your commission conducts, does the commission interview:

☐ All candidates
☐ Candidates who meet minimum requirements
☐ Only the candidates selected for final review
☐ Don't know

20. Who participates in the formal candidate interviews conducted by your commission?

☐ All members of the commission at a formal
☐ A subcommittee of the commission
☐ Individual members of the commission
☐ Don't know
☐ Other (please specify) _____

21. How long do formal candidate interviews typically last?

☐ 15 minutes or less
☐ 16-30 minutes
☐ 31-45 minutes
☐ 46-60 minutes
☐ More than one hour
☐ Don't know

22. Are applicant interviews open to the public?

☐ All interviews are open to the public
☐ Some applicant interviews are open to the public
☐ All applicant interviews are private
☐ Don't know

23. Are commission deliberations open to the public?

☐ Yes, deliberations are open to the public
☐ No, deliberations are not open to the public
☐ No, deliberations are not open to the public, but a record of the deliberations is available to the public
☐ Don't know

24. Which statement best describes your commission's voting procedures?

☐ My commission always uses the same set of voting procedures for each vacancy
☐ My commission has a set of voting procedures that are usually used, but the commission sometimes uses alternative voting rules
☐ My commission does not have a standard set of voting procedures
☐ Don't know

25. Thinking about your commission's voting procedures, how much support is needed for a candidate to be nominated?

☐ Majority Support
☐ Support of more than a majority of commissioners, but less than unanimous support
☐ Unanimous (or near-unanimous) support
☐ Other (please specify)

26. How does your commission usually vote?

☐ Secret ballot
☐ Voice vote
☐ Don't know
☐ Other (please specify) _____

27. Are commission votes a matter of public record?

☐ Yes ☐ No ☐ Don't know

We would like to hear from you about your experiences as a member of a judicial nominating commission. We'd first like to ask you some questions about your perceptions of your commission and the work it does.

28. Thinking about your time on a judicial nominating commission, please rate your agreement with the following statements:

	Strongly Disagree	Disagree	Neither agree nor Disagree	Agree	Strongly Agree
My commission's decision-making process is fair	☐	☐	☐	☐	☐
My work as a member of the commission promotes fair and impartial courts.	☐	☐	☐	☐	☐
The individuals that my commission recommends are more qualified than those who would be chosen through popular elections.	☐	☐	☐	☐	☐
My work on the commission helps to put highly-qualified judges on the bench.	☐	☐	☐	☐	☐
My commission's work promotes diversity on the bench better than popular elections.	☐	☐	☐	☐	☐
The time and energy that I devote to the nominating commission is worthwhile.	☐	☐	☐	☐	☐
My commission nominates individuals who would be unlikely to reach the bench through popular elections.	☐	☐	☐	☐	☐
Judicial nominating commissions are a better way to select judges than popular elections.	☐	☐	☐	☐	☐
My commission provides an appropriate check on the governor's (or other appointing authority's) ability to select judges.	☐	☐	☐	☐	☐
Judicial nominating commissions help to insulate the process of choosing judges from partisan politics.	☐	☐	☐	☐	☐
My commission nominates judges that represent the governor's (or other appointing authority's) views	☐	☐	☐	☐	☐

29. Thinking about your commission and it's decisionmaking process, please rate your agreement with the following statements:

	Strongly Disagree	Disagree	Neither agree nor Disagree	Agree	Strongly Agree
Members of my commission usually know an applicant's ethnic or racial background before meeting or interviewing them.	☐	☐	☐	☐	☐
My commission makes an effort to submit a diverse slate of candidates to the governor (or other appointing authority).	☐	☐	☐	☐	☐
Members of my commission usually know an applicant's sex (male or female) before meeting or interviewing them.	☐	☐	☐	☐	☐
Diversity in judges' sexual orientations or gender identities is an important consideration in my commission's decision to nominate an applicant.	☐	☐	☐	☐	☐
Gender diversity on the bench is an important consideration in my commission's decision to nominate an applicant.	☐	☐	☐	☐	☐
Members of my commission usually know an applicant's sexual orientation and/or gender identity before meeting or interviewing them.	☐	☐	☐	☐	☐
Racial and/or ethnic diversity on the bench is an important consideration in my commission's decision to nominate an applicant.	☐	☐	☐	☐	☐

30. Thinking about your commission and its decisionmaking process, please rate your agreement with the following statements:

	Strongly Disagree	Disagree	Neither agree nor Disagree	Agree	Strongly Agree
My commission purposely nominates some candidates who do not meet the governor's (or other appointing authority's) desired criteria.	☐	☐	☐	☐	☐
My commission tries to nominate candidates who meet the governor's (or other appointing authority's) desired criteria.	☐	☐	☐	☐	☐
The political preferences of the governor (or other appointing authority) have no effect on the decisions my commission makes.	☐	☐	☐	☐	☐
When compiling the list of nominees, members of my commission often know which candidate the governor (or other appointing authority) will select from the list of nominees.	☐	☐	☐	☐	☐
Upon initial review of applications, members of my commission typically know which applicant(s) the governor (or other appointing authority) would prefer to select.	☐	☐	☐	☐	☐
My commission chooses its nominees based on their professional qualifications rather than based on political calculations.	☐	☐	☐	☐	☐
Political considerations, such as applicants' party affiliations, play a role in my commission's nomination process.	☐	☐	☐	☐	☐
Members of my commission usually know applicants' party affiliations.	☐	☐	☐	☐	☐
Members of my commission typically know what attributes the governor (or other appointing authority) desires in a judge.	☐	☐	☐	☐	☐

31. Thinking about your commission and its decisionmaking process, please rate your agreement with the following statements:

	Strongly Disagree	Disagree	Neither agree nor Disagree	Agree	Strongly Agree
Nonlawyer members of the commission seem to respect and value the contributions of other nonlawyer members of the commission.	☐	☐	☐	☐	☐
Lawyer members of the commission seem to respect and value the contributions of nonlawyer members of the commission.	☐	☐	☐	☐	☐
Members of my commission participate equally in deliberations.	☐	☐	☐	☐	☐
Nonlawyer members of the commission seem to respect and value the contributions of lawyer members of the commission..	☐	☐	☐	☐	☐
Commission meetings and deliberations are dominated by a few commissioners.	☐	☐	☐	☐	☐
Lawyer members of the commission seem to respect and value the contributions of other lawyer members of the commission.	☐	☐	☐	☐	☐

32. Thinking about your commission and its decisionmaking process, please rate your agreement with the following statements:

	Strongly Disagree	Disagree	Neither agree nor Disagree	Agree	Strongly Agree
My commission has enough resources (e.g. time, staff, etc.) to conduct its work effectively.	☐	☐	☐	☐	☐

33. Next, we would like to hear from you about the criteria you use to evaluate applicants. Please indicate how important each of the following factors is to you when reviewing an applicant.

	Not very important	Somewhat important	Moderately important	Very important	Absolutely essential	N/A
Recommendations or ratings from public officials.	☐	☐	☐	☐	☐	☐
Applicant's prior service as a public defender	☐	☐	☐	☐	☐	☐
Recommendations or ratings from bar groups	☐	☐	☐	☐	☐	☐
Applicant's prior experience holding office in a political party	☐	☐	☐	☐	☐	☐
Applicant's physical health	☐	☐	☐	☐	☐	☐
Recommendations or ratings from labor unions	☐	☐	☐	☐	☐	☐
Recommendations or ratings from civil rights groups	☐	☐	☐	☐	☐	☐
Applicant's party affiliation	☐	☐	☐	☐	☐	☐
Applicant's written communication skills	☐	☐	☐	☐	☐	☐
Applicant's professional reputation	☐	☐	☐	☐	☐	☐
Applicant's participation in civic or community affairs	☐	☐	☐	☐	☐	☐
Applicant's race or ethnicity	☐	☐	☐	☐	☐	☐
Amount of academic or teaching experience	☐	☐	☐	☐	☐	☐
Amount of appellate experience	☐	☐	☐	☐	☐	☐
Number of years applicant has practiced law	☐	☐	☐	☐	☐	☐
Applicant's law school record (including their academic performance and the prestige of the law school)	☐	☐	☐	☐	☐	☐
Honors and distinctions applicant has received as an attorney, judge, and/or magistrate	☐	☐	☐	☐	☐	☐
Applicant's oral communication skills	☐	☐	☐	☐	☐	☐
Applicant's gender	☐	☐	☐	☐	☐	☐
Applicant's prior experience as an elected or appointed public official	☐	☐	☐	☐	☐	☐
Applicant's mental health	☐	☐	☐	☐	☐	☐
Amount of trial experience	☐	☐	☐	☐	☐	☐
Applicant's age	☐	☐	☐	☐	☐	☐
Applicant's sexual orientation or gender identity	☐	☐	☐	☐	☐	☐
Applicant's prior service as a judge or magistrate	☐	☐	☐	☐	☐	☐

33. (continued)

	Not very important	Somewhat important	Moderately important	Very important	Absolutely essential	N/A
Applicant's pro bono legal service	☐	☐	☐	☐	☐	☐
Recommendations or ratings from law enforcement	☐	☐	☐	☐	☐	☐
Recommendations or ratings from non-legal professional and business associations	☐	☐	☐	☐	☐	☐
Recommendations or ratings from other commission members	☐	☐	☐	☐	☐	☐

Other (please specify) _____

34. Is there anything else you'd like to share about the criteria you use to evaluate applicants for judicial position?

35. Thinking about the criteria used to evaluate applicants, please indicate your agreement with the following statements.

	Strongly Disagree	Disagree	Neither agree nor Disagree	Agree	Strongly Agree
In general, there is little debate about the criteria that will be used to evaluate applicants.	☐	☐	☐	☐	☐
The attorney members of my commission seem to share my evaluative criteria.	☐	☐	☐	☐	☐
The nonattorney members of my commission seem to share my evaluative criteria.	☐	☐	☐	☐	☐
Most of the applicants my commission recommends are supported by nearly all of the commissioners.	☐	☐	☐	☐	☐
Most of the applicants my commission recommends receive only the minimum amount of support necessary to be nominated.	☐	☐	☐	☐	☐

36. Is there anything else you'd like to share about the criteria you use to evaluate applicants for judicial position?

37. In what year were you born?

Year: _____

38. In which state does your commission operate?

State: _____

39. Which of the following best descrbies your status as a member of your judicial nominating commission?

☐ Judge ☐ Attorney ☐ Nonattorney

40. Which of the following best describes the court upon which you sit?

☐ Limited jurisdiction trial court ☐ General jurisdiction trial court ☐ Intermediate appellate court
☐ State supreme court ☐ I am not a judge Judge

41. What is your race?

☐ White ☐ Black or African American ☐ American Indian
☐ Asian or Pacific Islander ☐ Prefer not to answer ☐ Other (please specify)_____

42. Are you of Hispanic, Latino, or Spanish origin?

☐ Yes ☐ No ☐ Prefer not to answer

43. What is your gender?

☐ Male ☐ Female ☐ Prefer not to answer

44. Do you consider yourself to be

☐ Heterosexual or straight ☐ Gay or lesbian ☐ Bisexual ☐ Prefer not to answer

45. Have you ever been elected or appointed to public office? (Indicate all that apply)

☐ Yes, I have held national office ☐ Yes, I have held statewide office
☐ Yes, I have held local office ☐ No, I have not held public office

46. Have you ever held office in a political party? (Indicate all that apply)

☐ Yes, I have held national party office ☐ Yes, I have held statewide party office
☐ Yes, I have held local party office ☐ No, I have not held party office

47. What is your political affiliation?

☐ Strong Democrat ☐ Moderate Democrat ☐ Independent leaning Democrat
☐ Independent ☐ Independent leaning Republican ☐ Moderate Republican
☐ Strong Republican ☐ Prefer not to answer ☐ Other (please specify)

BRENNAN
CENTER
FOR JUSTICE

Choosing State Judges: A Plan for Reform

By Alicia Bannon

Brennan Center for Justice at *New York University School of Law*

About the Brennan Center for Justice

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that works to reform, revitalize — and when necessary defend — our country's systems of democracy and justice. The Brennan Center is dedicated to protecting the rule of law and the values of constitutional democracy. We focus on voting rights, campaign finance reform, ending mass incarceration, and preserving our liberties while also maintaining our national security. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, in the courts, and in the court of public opinion.

About the Brennan Center's Democracy Program

The Brennan Center's Democracy Program encourages broad citizen participation by promoting voting and campaign finance reform. We work to secure fair courts and to advance a First Amendment jurisprudence that puts the rights of citizens — not special interests — at the center of our democracy. We collaborate with grassroots groups, advocacy organizations, and government officials to eliminate the obstacles to an effective democracy.

About the Author

Alicia Bannon is Deputy Director for Program Management in the Brennan Center's Democracy Program. She leads the Center's fair courts work, where she directs research, advocacy, and litigation to promote a fair and impartial judicial system. Ms. Bannon has authored several nationally recognized reports and articles on judicial selection, access to justice, and government dysfunction, including *Who Pays for Judicial Races?* (2017), *Rethinking Judicial Selection in State Courts* (2016), and *Criminal Justice Debt: A Barrier to Reentry* (2010). She was previously an adjunct professor at NYU School of Law, where she taught the Brennan Center Public Policy Advocacy Clinic, and at Seton Hall Law School, where she taught a course in professional responsibility and legal ethics. Prior to joining the Brennan Center, Ms. Bannon was a John J. Gibbons Fellow in Public Interest and Constitutional Law at Gibbons P.C. in Newark, N.J., where she engaged in a wide range of public interest litigation within New Jersey and nationally. Ms. Bannon was also previously a Liman Fellow and Counsel in the Brennan Center's Justice Program.

Ms. Bannon received her J.D. from Yale Law School, where she was a Comments Editor of the Yale Law Journal and a Student Director of the Lowenstein International Human Rights Clinic. She clerked for the Honorable Sonia Sotomayor in the Court of Appeals for the Second Circuit and the Honorable Kimba M. Wood in the Southern District of New York. She graduated from Harvard College summa cum laude with a degree in Social Studies. Prior to law school, she worked in Kenya and Uganda managing impact evaluations of education and health interventions, and at the Center for Global Development in Washington, D.C.

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Fair and impartial justice is under threat in state supreme courts across the country. Less than a generation ago, state supreme court elections were subdued affairs. No longer. Today, special interests routinely pour large sums into supreme court races. As of January 2017, 20 states had at least one justice on their supreme court who had been involved in a $1 million election.[1] And during the 2015-16 election cycle, more justices were elected in $1 million-plus elections than ever before.[2] Outside spending by special interest groups — most of which do not disclose their donors — also shattered previous records.[3] Perhaps unsurprisingly, nearly 90 percent of respondents to a 2013 poll said they believed that campaign cash affects judicial decisions.[4]

While the U.S. Supreme Court usually grabs the headlines, state supreme courts play a powerful role in American life. Ninety-five percent of all cases are filed in state courts, and state supreme courts are typically the final word on state law.[5] Their decisions can have profound effects on our lives and on states' legal and policy landscapes — from whether an Ohio town can regulate fracking,[6] to whether Kansas must increase public education spending by hundreds of millions of dollars,[7] to whether Massachusetts officials can detain people based on a request from federal immigration authorities.[8] At a time when the broken process for confirming justices to the U.S. Supreme Court is in sharp focus, safeguarding state courts as a backstop to defend our rights should be urgent business.

A judge's job is to apply the law fairly and protect our rights, even when doing so is unpopular or angers the wealthy and powerful. But the reality of competing in costly, highly politicized elections is at odds with this role. If a judge rules against a major donor, will that donor still fund her next campaign? If she angers a powerful political interest, will she face an avalanche of attack ads? These electoral pressures create a morass of conflicts of interest that threaten the appearance, and reality, of fair decision-making. They're also a roadblock for aspiring judges who can't tap million-dollar networks.

Left unchecked, these trends can undermine the integrity of state supreme courts and the public trust that undergirds their legitimacy. The implications for American justice are acute.

That's why the Brennan Center is urging states to reform their systems for choosing judges. We recommend that states do away with state supreme court elections completely. Instead, justices should be appointed through a publicly accountable process conducted by an independent nominating commission. Furthermore, to genuinely preserve judicial independence, all justices should serve a single, lengthy term. No matter the mechanism by which they reach the bench, be it an election or an appointment by the governor or legislature, justices should be freed from wondering if their rulings will affect their job security.

We are not the first to consider reforms to state judicial selection. Over the past 20 years, numerous bar associations, academics, judges, advocates, and other experts have offered ideas about how to mitigate special interest influence in judicial elections,[9] including public financing for judicial races and stronger ethics rules for judges. Many have called for eliminating contested judicial elections.[10] But states have been slow to act.[11] Meanwhile, recent trends — including the increased prevalence of high-cost elections and the growing role of outside interest groups — have created both heightened urgency and new policy challenges.

Nearly 90 percent of voters believe that campaign cash affects judicial decisions.

Our proposals are the result of a three-year project taking a fresh look at judicial selection. We focused on state supreme courts, where the rise of politicized elections has been most pronounced. We studied how each state selects its justices,[12] including individual case studies[13] and an in-depth examination of judicial nominating commissions.[14] We spoke to dozens of experts and stakeholders,[15] reviewed the extensive legal and social science literature on judicial selection, and considered reform proposals from bar associations, legislatures, and scholars.[16]

OUR PROPOSALS

1. End Supreme Court Elections & Use an Accountable Appointment System

Twenty-two states provide for contested supreme court elections, where multiple candidates can vie for a seat on the bench. These competitions should be replaced by a publicly accountable appointment system that is transparent and minimizes opportunities for political self-dealing. Likewise, the 19 states that use retention elections, where sitting justices must stand for uncontested up-or-down votes to retain their seats, should eliminate them.

One reason recent efforts to eliminate judicial elections have faltered is a lack of public trust in an alternative process. This skepticism is often well-placed. If an appointment system does not allow for public oversight and does not curb opportunities for political influence, it can wind up being vulnerable to many of the same pressures as judicial elections.

We therefore urge states to adopt a "merit selection" appointment process, in which an independent nominating commission vets judicial candidates and issues a short list. The governor then selects an appointee from the list provided to her.

But the mechanics and procedures underlying such a system are critical — both to promote public trust and to minimize opportunities for abuse. Nominating commissions should be bipartisan, appointed by diverse stakeholders, include non-lawyers, and have clear criteria for vetting candidates. The nominating process should be open and transparent, with publicly available data about the diversity of applicants and nominees. In addition, the governor, not the state legislature, should be empowered to select an appointee from the commission's short list. Finally, states should not use retention elections, where justices stand for an up-or-down vote, as part of a merit selection process.

Importantly, these recommendations also apply to states that already use appointments. Although 28 states appoint justices for an initial term on the bench, the overwhelming majority lack many of these safeguards.

2. State Supreme Court Justices Should Serve a Lengthy Single Term

Judicial selection debates usually focus on how judges first reach the bench, but far less attention has been paid to judicial retention. If anything, however, it is the process for retaining sitting judges that can have the most pernicious effects on judicial behavior. Extensive evidence suggests that election pressures impact judicial decision-making in a wide array of cases, and that retiring justices rule differently than those seeking to keep their jobs.[17] Similar effects are also seen among justices who don't face voters but who are subject to a political reappointment process — such as a decision by a governor about whether a justice can remain in office.

There is a simple solution to this problem: State supreme court justices should serve only a single, lengthy term on the bench so that they can decide cases without worrying that following the law could cost them their job. Alternatively, states can allow supreme court justices to serve indefinitely, with or without a mandatory retirement age, subject to the same "good behavior" rules as federal judges. Three states — Massachusetts, Rhode Island, and New Hampshire — follow this model. Or states can follow the practice of Hawaii and the District of Columbia, and have an independent commission determine whether a sitting justice should be retained.

Any of these changes would be transformative. In 46 states, supreme court justices serve for multiple terms and must go through a political process to retain their seats: Thirty-eight use elections for additional terms on the bench, and eight give the governor or legislature the power to renew judicial terms.

In addition, states that continue to elect justices should embrace other safeguards, such as judicial public financing and robust recusal rules governing when a justice should step aside from hearing a case involving a major donor. These policies can help curb the harmful effects of high-cost and politicized judicial elections.[18]

How Do States Select Their Justices?

Contested elections are the most common selection method, used by 22 states. In contested elections, multiple candidates vie for a court seat – similar to how candidates run for executive and legislative offices. In 15 states, these elections are **nonpartisan**, meaning that candidates do not have party labels. Six states use **partisan** elections, where candidates are affiliated with a party. In one additional state, New Mexico, partisan elections are part of a hybrid system in which justices are first appointed by the governor through merit selection. Most of these states also use contested elections when justices run for subsequent terms, but in Pennsylvania, Illinois, and New Mexico, once elected, justices face single-candidate **retention elections** where voters decide yea or nay if a judge will stay in office.

Merit/retention systems, also known as "merit selection" and the "Missouri Plan" (named after the first state to adopt the system), are used in 14 states. In merit/retention systems, an independent nominating commission screens and evaluates prospective justices and then presents a slate to the governor, who must choose from that list. Some states also require the governor to submit his or her pick for confirmation by the legislature. Once appointed, justices stand for additional terms in single-candidate retention elections. Two additional states, California and Maryland, use a gubernatorial appointment process coupled with retention elections but do not require the governor to select candidates based on the recommendations of a nominating commission.

Gubernatorial appointment, used in 10 states, has no electoral component.[14] All but one of these 10 states use some form of a nominating commission. Of the nine that do, seven use a nominating commission that presents a binding list of choices to the governor, akin to a merit selection system. And in the two other states, the nominating commission's selections are only advisory.

In six of the gubernatorial-appointment states, justices serve fixed terms and may be reappointed to additional terms by the governor or legislature. In one state, Hawaii, the state's judicial nominating commission determines whether to reappoint sitting justices, without a role for the governor or legislature. In the remaining three states, justices either serve for life or until they reach a mandatory retirement age.

Legislative appointment, where the state legislature appoints justices, is used in Virginia and South Carolina. South Carolina employs a nominating commission as part of the process; however, the majority of its commissioners are required to be members of the General Assembly.

FOR MORE INFORMATION ON JUDICIAL SELECTION IN THE STATES, SEE THE BRENNAN CENTER'S INTERACTIVE MAP
http://judicialselectionmap.brennancenter.org

There was a time when state supreme court elections were usually low-cost and relatively tame. Candidates — to the extent they actively campaigned at all — primarily discussed their qualifications and backgrounds.[20]

That era is over. Today, million-dollar campaigns are increasingly the norm.[21] Dark money — the sources of which remain anonymous — flows freely.[22] National political groups weigh in with heavy spending,[23] as do plaintiffs' lawyers and business interests.[24] As it now stands, one-third of all elected justices currently sitting on the bench have run in at least one $1 million race, according to a Brennan Center analysis.[25]

Where does all this money come from? Not surprisingly, when donors can be identified, they are usually businesses, plaintiffs' lawyers, or groups with close ties to a political party — all regular players in state courts. The perception that a judicial candidate is "business-friendly" or "pro-plaintiff" often drives election spending, as do broader efforts to change a court's ideological tilt.[26]

One result is that the race for voters becomes a race for money — and frequently leads to conflicts of interest in the courtroom.[27] In Louisiana, for example, a 2016 race for an open seat had plaintiffs' lawyers who bring environmental litigation backing one candidate and the oil and gas companies they sue backing another.[28] And, as is increasingly typical since the U.S. Supreme Court's decision in *Citizens United v. FEC*, more than half of the $4.9 million poured into the Louisiana race came from outside groups — and more than $1 million was "dark," meaning that the source of the funds was not publicly disclosed.[29]

Judicial decisions have also become frequent campaign fodder, with complex or nuanced legal and procedural issues often reduced to misleading and provocative attacks. One representative example is an ad from Washington state's 2016 supreme court election, in which a justice was condemned for "enabl[ing] child predators." In reality, the justice had ruled that police had not given adequate warning when searching a home without a warrant.[30] Both a retired supreme court justice and a former U.S. Attorney publicly criticized the spot, maintaining that it "misrepresent[ed] both the impacts — and motives" of the opinion and "borrow[ed] tactics from some of our country's ugliest political moments."[31] This kind of tone in a campaign spot is not unusual: More than one-third of television ads that ran during the 2015-16 supreme court election cycle were negative — and a majority of them attacked judicial rulings.[32]

There is also strong reason to be concerned that election pressures impact how judges decide cases. A 2001 survey of state court judges revealed that nearly half — 46 percent — believed campaign contributions had at least some impact on decisions.[33] As Richard Neely, a retired chief justice of the West Virginia Supreme Court of Appeals, observed in an interview with *The New York Times*, "It's pretty hard in big-money races not to take care of your friends. It's very hard not to dance with the one who brung you."[34] Other judges have echoed these sentiments.[35]

While precise causality is difficult to establish, numerous studies have likewise found strong correlations between donor support and favorable rulings for those donors.[36] One such study looked at the relationship between contributions from business interests and business-friendly outcomes. The most profound finding was that when judges were serving their last term before mandatory retirement — and therefore freed from having to curry favor with wealthy supporters to finance their next election — their favoring of business litigants essentially disappeared.[37] Another study found similar dynamics in election law cases. Judges who received more campaign money from political parties and allied groups were more likely to rule in favor of the party that supported them. However, the influence of campaign money largely disappeared when judges were no longer eligible for reelection.[38]

One-third of all elected justices currently sitting on the bench have run in at least one $1 million race.

There is also substantial evidence that election pressures affect criminal cases.[39] For example, one study released by the American Constitution Society found that as the number of television ads increased in a state's supreme court elections, justices were less likely to vote in favor of criminal defendants. The authors suggested that judges were reluctant to rule for a defendant lest they be attacked for being "soft on crime," an often-used weapon against incumbents.[40]

These dynamics pose a profound challenge to the use of supreme court elections in the current political environment. Judicial elections were first adopted in the 19th century as a reform measure to insulate the judiciary from the political branches of government and avoid what legal historian Jed Shugerman has described as the era's "partisan patronage politics of appointments."[41]

More recently, elections are more likely to be supported as a form of "public accountability" in which judges are answerable "to the people." This check, the theory goes, prevents judges from imposing their personal preferences under the guise of law and ensures that judicial philosophies align with the public at large, even at some cost to independence.[42] (Of course, other accountability mechanisms do not pose such tensions, such as appellate review or disciplinary procedures for inappropriate conduct.)

But while most discussions about judicial selection focus on the philosophical tension between judicial independence and accountability, the concrete reality is that today's high-cost and politicized elections undermine both values. When special interests pour millions into state supreme court elections, judges face substantial pressure to support those special interests when deciding cases, or face their wrath in the next election. This financial dependence is a clear threat to judicial independence.

These same dynamics also risk leaving justices more "accountable" to wealthy and powerful interests than to the public — especially since supreme court elections are usually low-information races where voters are unlikely to carefully evaluate a candidate's record.[43] The increasing prevalence of dark money further undermines accountability, denying voters a meaningful opportunity to assess crucial questions about judicial candidates — including who is supporting them and why.

Where to draw the line between judicial independence and public accountability is a hard question, but in today's political environment, it's also a false choice. With modern judicial elections not working as designed, states should look to alternative structures that can better forward both values.

So, what should judicial selection reform look like? As discussed in detail in an earlier Brennan Center white paper, *Rethinking Judicial Selection in State Courts*, assessing and comparing judicial selection systems requires normative judgments about what judicial selection is supposed to achieve and how best to take into account diverse values that can sometimes be in tension, including judicial independence, accountability, democratic legitimacy, diversity on the bench, public confidence in the courts, and judicial quality.[44]

These values undergird our recommendations. Thus, in developing our proposals, we asked whether potential reforms would:

- adequately protect judicial independence, so that we can be confident that judges are deciding cases fairly and not based on inappropriate political, partisan, or special interest pressure
- provide for sufficient input from the public or from democratically accountable actors, so that the judges chosen under the system are more likely to be seen as legitimate
- provide mechanisms to hold judges accountable for legal errors or ethical lapses
- be likely to produce a high-quality and diverse bench and to instill public confidence in the courts

Not surprisingly, we found that choosing a selection system involves tradeoffs. For example, requiring sitting judges to stand for reelection or retention can help advance the value of accountability. But requiring judges to hear cases in the looming shadow of an upcoming election can also threaten the value of judicial independence. In other instances, we found no consistent differences between elective and appointive systems. For example, empirical studies have found little difference in judicial qualifications among justices regardless of how they arrived on the bench — which may mean that all methods are about the same in this respect or that there are deficiencies in measurement.[45]

Nevertheless, as detailed in this report, there is compelling evidence that the judicial selection systems used in most states pose serious threats to many of these core values and that our proposed reforms would better safeguard them.

Replace Supreme Court Elections with an Accountable Appointment System

Whether states should elect or appoint supreme court justices has been hotly debated for decades.[46] But while the discussion is not new, big money state supreme court contests — and all the problems associated with them — have grown substantially this century. The number of state supreme courts with at least one member who has competed in a $1 million-plus election nearly tripled between 1999 and 2017 (inflation-adjusted).[47] And just as the U.S. Supreme Court's decision in *Citizens United v. FEC* transformed elections for political offices, judicial elections have followed a similar path.[48]

We believe that state supreme court elections in today's super-charged political environment pose too great a threat to both the appearance and reality of evenhanded justice to be a desirable selection method. The harder question, however, is how to craft an alternative to elections that does not raise a host of its own problems. As Shugerman has observed, "Appointments can be even more vulnerable to cronyism, patronage, and self-dealing than partisan elections."[49]

Our research indicates that appointment systems can be effective in insulating judges from political and special-interest pressure and influence. But it is essential that the process is structured so that opportunities for political influence are curtailed and there is meaningful public oversight. We therefore urge states to adopt a *publicly accountable* appointment process for supreme court justices — a variant on the so-called "merit selection" appointment process —with the following safeguards:

- Use an independent, bipartisan judicial nominating commission with diverse appointing authorities and membership, including non-lawyers. The commission should vet candidates on qualifications, temperament, ethics, and other nonpolitical considerations and then issue a *binding* short list of nominees to be considered for appointment.

- The application process should be clear and open, with transparent selection criteria, public interviews, and a public vote by the commissioners. Commissioners should be regulated by ethics rules, and public data should be collected about the diversity of candidates at each stage of the process.

- The final appointment decision should rest with the governor, who should be required to select a justice from the nominating commission's short list.

Even as part of a merit selection system, we recommend against judicial retention elections.

For additional information on best practices, including examples from the states, see Appendix 1.

1. The Mixed History of Judicial Appointments: Contending with the Disadvantages

The history of judicial appointment systems strongly suggests that their *success* often depends on their *structure.* Minimizing opportunities for political self-dealing and special interest influence is vital for promoting fair, independent, and diverse courts — and for public confidence.

Judges — especially state supreme court justices — regularly hear cases involving powerful interests. If a selection system creates even the appearance that judges are beholden to benefactors responsible for their appointment, it can undermine public trust in the appointment process and in the judiciary. Indeed, it was exactly these concerns that prompted many states to abandon appointment systems in favor of judicial elections in the 19th century.[50]

The most common judicial selection tool states have used to mitigate these concerns is judicial nominating commissions, which we support as the first step toward reform. While their size, structure, and appointment processes vary widely, judicial nominating commissions typically are independent bodies charged with evaluating judicial candidates on nonpolitical criteria and producing a short list of names from which the appointing authority (usually the governor) is required to select an appointee.[51]

Once a governor receives a short list from a nominating commission, she may consider whatever factors she wishes — judicial philosophy, political party membership, even personal friendship. But because the governor does not control the creation of the short list, ideally a nominating commission constrains the governor's discretion to appoint judges based on personal loyalty or the influence of partisan or special interests. As Shugerman has argued, because "the governor and the parties do not get the first crack at selecting judges," a nominating commission adds "a thicker layer of insulation from the political parties with a new set of veto points."[52] If the system works as intended, justices appointed through a nominating commission are less likely to be beholden to political or special interests, promoting public confidence in the integrity of the judicial system.

There is strong reason to believe many judicial nominating commissions do indeed avoid politically motivated

candidate evaluations and focus their attention on consideration of matters such as qualifications and temperament. For example, while studies of judicial nominating commission deliberations and processes are limited, a scholarly review by the American Judicature Society concluded that "while no judicial selection process will ever eradicate all traces of politics, the existing literature appears to indicate a significant trend toward reduction in arbitrary or politically motivated decision-making [in judicial nominating commissions]."[53]

This corresponds with how nominating commissioners describe their work in surveys[54] and how observers in many states describe judicial nominating commissions' processes.[55] Moreover, an analysis of the backgrounds of supreme court justices found that states using nominating commissions are less likely to have justices with ties to major political offices (such as former aides to the governor or state legislators) than states using an appointment system without nominating commissions,[56] suggesting that nominating commissions do constrain the governor in appointing political allies.

Nominating commissions are particularly important because judicial appointments have often been used as a reward for political insiders and donors. History provides many colorful examples, such as the Kansas "triple play" in 1956, where the governor retired days before the end of his term so he could be appointed by his lieutenant to a vacancy on the state supreme court — a move that prompted the state's adopting merit selection.[57]

Without a robust nominating commission, appointment systems are likely to remain a playground for patronage politics. A 2014 article by the Center for Public Integrity found, for example, that governors routinely appoint campaign contributors to judgeships, along with friends and political associates.[58] And the recent history of the federal appointment process, where the president nominates judges subject to Senate confirmation, highlights other avenues for political influence, such as special-interest lobbying, high-cost ad campaigns, and political gamesmanship and obstruction in confirmation.[59]

2. The Importance of Nominating Commission Transparency and Diversity

While adopting a judicial nominating commission is a key element of reform, doing so is only a first step. States' experiences suggest that a nominating commission's *structure* and *procedures* can make a substantial difference in how it functions and how it is perceived by the public. Thus, in designing a nominating commission system, states should pay close attention to the composition of the commission and how its members are selected, as well as the rules governing how the commission does its work.

A commission's membership and procedures are particularly important because appointment systems are often seen by the public — at least in the beginning — as less legitimate than elections. Research by political scientist James Gibson has found, for example, that all else being equal, judicial elections enhance courts' legitimacy in the public's eye, "most likely by reminding citizens that their courts are accountable to their constituents, the people."[60] To address this potential legitimacy deficit, it is important that a nominating commission's review process have multiple opportunities for public input and oversight and that it encourage the consideration of candidates with diverse backgrounds and experience.

APPOINTMENT AND MEMBERSHIP

In order to both limit potential political influence in the vetting process and enhance the likelihood of achieving diversity among nominees, commissioners should be appointed by a variety of sources (not just the governor) and should come from diverse backgrounds.

As it now stands, in nearly half the states that use nominating commissions, governors appoint the majority of commission slots.[61] In six states, governors appoint all members. Gubernatorial control can create the appearance that a commission essentially functions to ratify the governor's preferences, a concern that has been raised in several states and borne out in at least some.[62]

In addition, in 16 states, a majority of commissioners must be lawyers — themselves a major special interest — leaving nominating commissions open to questions about potential "capture" by the bar, particularly when state bars are responsible for appointing these commissioners.[63] Capture by partisan interests is another concern: Less than half of all states with nominating commissions have any kind of bipartisanship requirement.[64]

There is also often a stunning lack of diversity in commission membership, fostering the impression that judicial selection is controlled by an elite "old-boys" network. In a 2011 survey of nominating commissioners, for example, only 32 percent of respondents identified as women, and only 4 percent identified as African American.[65] A Brennan Center analysis of the professional background of commissioners found that public defenders and legal services lawyers were also rarely represented.[66] The Brennan Center also found that if commissions do not reserve seats for non-lawyer members, lawyers typically dominate.[67]

Diversity in all forms — professional, racial, gender, eth-

Best Practices for Selecting Nominating Commissioners

Power to appoint commissioners should be diffuse, with no single source having majority control.

- A majority of commissioners should be appointed by elected officials across the branches of government to ensure democratic input.
- There should also be an open application process allowing members of the public to serve as commissioners.

Commissions should have bipartisan membership, including independents.[i]

- Such representation could be achieved by a formal partisan representation requirement or by giving minority leaders of the state legislature the power to appoint commission members (in the case of minority party members) and/or by having an application and screening process for commissioners, a system used for California's redistricting commission.

The system should include concrete measures to encourage diversity among commissioners:

- Require appointing authorities to consider region, race, gender, sexual orientation, and other demographic factors in selecting commissioners.
- Require appointing authorities to ensure that the commission as a whole reflects a state's diversity.
- Reserve slots for underrepresented legal specialties, such as public defenders.
- Reserve slots for non-lawyers, who should comprise a majority of commissioners.
- Consider including ex officio representatives from the judiciary, the state bar, and the legal academy.

Commissioners should serve staggered terms, with term limits, to preserve institutional memory and prevent the formation of voting blocs.

FOR EXAMPLES OF STATE BEST PRACTICES, SEE APPENDIX 1.

nic, sexual orientation, geographic, and other demographic categories — is particularly important because commissioners frequently play a key role in *recruiting* judicial candidates, often through their professional networks. A lack of diversity among commissioners can therefore lead to a narrower field of applicants.[68] It can also leave the commission without the benefit of diverse perspectives in its own deliberations and open the door to unconscious biases or blind spots.[69]

We therefore recommend that states create a bipartisan nominating commission with diverse membership — including non-lawyer citizen members — that is appointed by multiple stakeholders. Ensuring a mix of appointing authorities and requiring bipartisan representation reduces the likelihood that the commission could be "captured" in support of a special interest or in service of an inappropriate political motive. For example, a commission that is appointed entirely by the governor is likely to find it far easier to function as the governor's agent, as compared to a commission with internal "checks and balances," including members from different political parties appointed by diverse interests, such as legislators and the state bar.[70]

Among other benefits, providing for diffuse appointing authorities may also affect the commission's deliberations and decisions, making "cooperation, consideration, and compromise among commissioners more likely," in the words of one former state judge.[71] It may also result in commissioners focusing more intently on judicial qualifications because it is an area of common ground.[72]

NOMINATING COMMISSION PROCESS

To counter possible behind-the-scenes political influence and build public confidence, the nominating process should also be clear, transparent, and public. Among other things, these attributes enable outsiders to evaluate how well the commission is working.[73]

The absence of clarity and transparency — including ethics rules for commissioners — can provide an opening for mischief. In Rhode Island, for example, commissioners have reportedly had behind-the-scenes discussions with governors while reviewing candidates[74] and governors have interviewed candidates even before the nominating commission submitted their list.[75] In Iowa, the governor recently appointed her father to a nominating commission, raising obvious questions about the commission's independence.[76]

When the commission process is opaque, meaningful evaluation by the public is also impossible. For example, a 2003 report from the American Judicature Society criticized the lack of transparency in Hawaii's nominating commission process, observing, "There is, in effect, no way to either validate or criticize the way the [commission] handled matters

Best Practices for Nominating Commission Procedures

A clear and open application process with transparent criteria for selecting nominees.

When there is a vacancy, there should be a public announcement and a formal application process. There should be transparent and public criteria for evaluating applicants and a standardized process.[ii] Notably, less than half the states with nominating commissions have any formal statutory criteria for assessing candidates.[iii]

Public disclosure of possible final nominees with public interviews and the chance for public comment.

While the initial pool of applicants may be kept private, commissions should publicly disclose a list of potential finalists, hold public interviews, and offer the public the chance to comment either in person or through written submissions. (States may also want to allow for closed commission meetings to allow for discussions of confidential information, such as a candidate's health status.) Some have expressed concern that a public process may discourage otherwise qualified applicants. However, many states already provide for transparent processes without any apparent difficulty in attracting qualified candidates.[iv]

Commission votes should be public.

The deliberations can be private to promote candor. However, votes on candidates should be made public so it is clear whether candidates have bipartisan support or if the commission has broken into factions.[v]

Commissioners should be bound by ethics rules.

There should be clear guidelines for when and how commissioners can communicate with candidates as well as the governor's office during the vetting and interview process. The Institute for the Advancement of the American Legal System (IAALS) published a model code of conduct for judicial nominating commissions that addresses such issues, as well as disclosure and recusal requirements for conflicts of interest.[vi]

Commissions should collect and publish diversity data for judges and candidates.

Data should be compiled and published on the diversity of the applicants at each stage of the process. A recent report by the American Constitution Society and Lambda Legal details best practices for collecting and releasing judicial diversity data.[vii]

because there is no way to know how those matters were, in fact, handled."[77] These concerns were echoed in a set of focus groups commissioned by the Hawaii judiciary the same year, which found that a lack of public information about judicial selection led the public to "think that the system is 'closed,' and that judges are selected through 'the old-boy system' or some other process that has little to do with the qualifications of the candidate."[78]

States also fall short in collecting diversity data about both sitting judges and applicants. A study by Lambda Legal and the American Constitution Society found that many states do not compile even basic demographic information about their judiciary. And no state collects and reports information across all basic categories, such as race, ethnicity, gender, gender identity, sexual orientation, and disability status, as well as professional background.[79] Collecting and publishing diversity data would help hold decisionmakers accountable for building a diverse bench as well as aid in identifying possible hurdles to achieving diversity.

3. The Benefits of Gubernatorial Selection

We also recommend that a state's governor, rather than the legislature, be given the authority to appoint justices from the list that is developed and submitted by the nominating commission.

As a matter of democratic practice, there are important reasons to give the final selection authority to an elected, politically accountable actor. Doing so furnishes the public with the means to register satisfaction or dissatisfaction with appointment decisions through the electoral process.[80]

The overwhelming majority of states that provide for appointments already vest final selection power with the governor. Only two states, Virginia and South Carolina, provide for legislative appointments. States' experiences suggest that gubernatorial appointments are preferable to appointments by state legislatures because concentrating power in one decision maker promotes greater accountability. While legislative appointments have not been subject to extensive study, the two states that currently use them exhibit signs of a politicized selection process, manifested by accounts of backroom dealing and logrolling of judicial appointees with other legislative business. In addition, there have been charges of nepotism and cronyism, as well as failure to fill vacancies due to legislative gridlock.[81]

We do not make a general recommendation as to wheth-

er the state legislature should confirm the governor's appointment. We believe the answer is context-specific. The advantage — and disadvantage — of a confirmation process is that it provides an additional veto point. Legislative confirmation can serve as another safeguard against cronyism or the appointment of unqualified nominees, and there are examples of the confirmation process playing this role.[82] On the other hand, legislative confirmation also can be (and has been) abused to stonewall a governor's agenda[83] or to wrest concessions on unrelated issues.[84] Moreover, a properly functioning nominating commission should already perform the oversight one would expect of a legislature.

If a state does adopt some form of legislative confirmation, there should be a rule that a nominee will be considered confirmed unless the legislature acts within a set time.[85] Such a provision helps prevent legislative obstruction that can leave courts understaffed.[86]

We also do not make a general recommendation about whether the governor should have the option of rejecting an entire list submitted by a judicial nominating commission and requesting a second one, which is permitted in some states.[87] In making such a choice, states may want to consider how many qualified candidates are likely to apply for supreme court positions and whether allowing for a second slate would preserve a meaningful vetting role for the nominating commission.[88] At the least, governors should only be permitted to request one additional list and should be subject to strict time limits for considering nominating commission recommendations.

4. The Politicization of Retention Elections

Finally, we recommend against retention elections, in which justices stand for an up-or-down vote, even as part of a merit/retention system. While intended to be nonpartisan, these elections increasingly mirror the politicization seen in head-to-head judicial contests.

Nineteen states provide for retention elections, including 14 states that initially appoint justices via merit selection.[89] Nine states with judicial nominating commissions do not hold retention elections, either providing for indefinite good behavior tenure or reappointment by the governor, legislature, or commission.[90]

Until recently, retention elections had generally attracted far less attention — and money — than contested elections.[91] But in 2010, three Iowa Supreme Court justices lost their seats following a million-dollar anti-retention campaign, backed by the National Organization for Marriage and other socially conservative groups — the fallout from a ruling holding that the state constitution provided a right to marriage for same-sex couples.[92]

It's now clear that 2010 marked a shift. While retention elections on average still attract less money than contested ones, they are increasingly showing similar patterns. Not a single retention election attracted more than $1 million in spending between 1999 and 2009. Since then, however, 16 justices in five states have had retention elections costing more than $1 million — and there's been at least one of these races in every election cycle.[93] (A California retention election in 1986 also attracted millions in spending, but it remained an outlier until 2010.)

Many proponents of retention elections as part of a "merit selection" model assumed that these elections would usually be noncompetitive and thus leave judges insulated from electoral pressure.[94] Now that retention elections increasingly mirror "standard" judicial elections, however, they pose similar threats to fair and evenhanded justice. And, while retention elections are often supported as an accountability mechanism, states have other tools to promote public accountability, such as the previously detailed safeguards for nominating commissions coupled with robust and public judicial evaluation and disciplinary processes, which are discussed in Appendix 2.

Eliminate Political Reselection

Most debates over state judicial selection focus on how justices should be selected for the bench. But one crucial element is often overlooked: the mechanism by which they keep their jobs. When sitting justices go through a political process to retain their position — while also hearing cases — the threat to judicial independence is substantial.

We urge states to take the politics out of judicial *reselection*, either by having justices serve a single fixed "one and done" term, providing for good behavior tenure, or vesting an independent commission with the power to make reappointments.

1. Pressures on Sitting Justices

In 1985, the late California Supreme Court Justice Otto Kaus famously said that deciding controversial cases under the shadow of a future election is like "finding a crocodile in your bathtub when you go in to shave in the morning: You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."[95] The next year, three California justices lost their seats in what was at the time the most expensive judicial election

in history, targeted in a campaign that attacked their record of overturning death penalty decisions.[96]

The politicization of judicial selection poses unique issues for sitting justices because they must hear cases with the knowledge that an unpopular decision — even if required by law — could cost them their job. And there is substantial evidence that judges respond, perhaps unconsciously, to electoral incentives. For example, as discussed above, there is a large body of research suggesting that elected judges take into account voter and donor preferences when deciding cases.[97] As retired Alabama Supreme Court Chief Justice Sue Bell Cobb observed, "Judges would have to be saints to ignore the political reality. And judges aren't saints."[98] Importantly, as we've noted, when judges face a mandatory retirement age and no longer face reelection, there is evidence their behavior changes.[99]

And while elections are the most common mechanism for judicial reselection, similar pressures exist in systems where judges are reappointed by a governor or legislature. For example, in 2006, New York Republican Gov. George Pataki declined to renew Judge George Smith for another term on the state's highest court, a decision that many observers attributed to Smith's opinion striking down the state's death penalty law.[100] In Connecticut, State Supreme Court Justice Richard Palmer was criticized by legislators during his 2017 reappointment process for writing majority opinions that eliminated the last vestiges of the state's capital punishment law and legalized same-sex marriage. He was ultimately reappointed, with a largely party-line vote in the state Senate.[101] While the impact of reappointment processes is less frequently studied, one analysis found that judges are more likely to rule in favor of the government litigants responsible for reappointing them to the bench.[102]

The number of state supreme courts with at least one member who has competed in a $1 million-plus election nearly tripled between 1999 and 2017.

Remarkably, while federal judges enjoy life tenure, nearly every state provides for multiple terms for supreme court justices and uses a political process (most commonly elections) to determine whether a sitting justice should serve an additional term. Because reselection pressures pose such a clear and direct threat to judicial independence, reform should be a priority. In particular, in states where the complete elimination of supreme court elections lacks public support, focusing on the *reelection* of judges offers a path to address many of the most harmful elements of electoral systems.

2. "One and Done" Term and Other Reforms

There are three principal options for states seeking to reduce reselection pressures. They can be applied in either an elective or an appointive system, and they should be coupled with robust judicial performance evaluation and discipline systems:

- **Justices serve only one lengthy term:** Justices serve a single fixed term in office, in the range of 14-18 years. As with good behavior tenure, during a "one and done" term, justices remain subject to removal by impeachment or through state disciplinary processes.

  No state currently utilizes such a system, but a Wisconsin Bar task force recently proposed adopting a single 16-year term for the state's (elected) supreme court,[103] while an Arkansas Bar task force proposed replacing the state's nonpartisan elections with a merit-selection appointment process, coupled with a single 14-year term.[104] There has also been growing scholarship[105] and public commentary[106] encouraging the adoption of an 18-year fixed term for the U.S. Supreme Court. The use of a lengthy single term is also a common feature of many European constitutional courts.[107]

- **Adopt good behavior tenure:** Justices serve indefinite terms, subject to removal by impeachment or through state disciplinary processes. Good behavior tenure systems are used for the federal courts, as well as in Rhode Island. Two additional states, Massachusetts and New Hampshire, provide for good behavior tenure for their justices, subject to a mandatory retirement age. No states with elected justices currently provide for good behavior tenure.

- **Have retention determined by an independent and bipartisan commission:** In this system, justices can continue to serve multiple terms, but at the end of each term an independent commission determines whether a justice retains her seat. Just like the proposal for nominating commissions, these bodies should be diverse in all respects and governed by clear, transparent, and apolitical guidelines for determining retention. Hawaii is the only state that uses a version of this system,[108] although it was also proposed in a recent judicial reform bill in Oregon.[109] The District of Columbia also uses a variant of this approach, where

judges rated "well-qualified" by a tenure commission are automatically granted new terms.[110]

While any of the above methods would be an improvement over the status quo, we favor a lengthy single term for state supreme court justices.

Adopting either a lengthy single term or good behavior tenure has the advantage of providing judges time to develop expertise. Several U.S. Supreme Court justices have said it took them three to five years to fully learn the job.[111] Both approaches also provide long-term job security, which can help in attracting high-quality applicants.

A lengthy single term also has several advantages compared to life tenure. First, it avoids entrenching power for generations at a time, providing regular opportunities for new justices to populate the bench and lowering the stakes for any given vacancy.[112] It also allows a court's membership to evolve so that it can reflect changing community values and makes it easier to achieve a more diverse bench over time.

In fact, a lengthy single fixed term may actually result in more turnover on a court — creating more opportunities for diversity — than an electoral retention system with unlimited shorter terms, given the advantages that usually attach to incumbents.[113] In 39 states, at least one supreme court justice during the past decade served for 20 or more years. Eleven states had at least one justice who served for 30 years or more.[114]

Some have raised the concern that a lengthy single term could discourage mid-career lawyers from seeking supreme court seats due to the prospect of finishing their term before retirement age. However, we believe it is unlikely that states will find it difficult to attract strong mid-career candidates, especially because many state supreme court justices move on to federal judgeships or political office, or find lucrative employment in the private sector.[115] Nevertheless, states can mitigate these concerns by allowing justices who have completed their terms to become a "senior judge" and preside over cases in the lower courts.[116] States may also need to amend their pension systems so justices' pensions can vest once they complete their term.

Finally, if a state chooses to use a commission-based reappointment system, the same cautions and recommendations about judicial nominating commissions apply. The main advantage of a commission-based system is that it provides an additional avenue for removing low-performing justices. However, absent a strong political will to create a depoliticized commission process, a commission-based retention scheme may not be sufficient to insulate judges from political pressure.

For a more detailed discussion about how to structure a "one and done" lengthy single term, see Appendix 2.

Adopt Additional Safeguards in States with Judicial Elections

States also have many additional tools to protect their courts from the appearance, and reality, of inappropriate political and special interest influence. These improvements have been underutilized, even as judicial elections have become increasingly politicized. And, while states implementing an accountable appointment system or single fixed term will in many instances need to amend their constitutions, the following reforms can generally be adopted within existing systems.

- **Adopt a publicly accountable process for interim appointments.** Nearly every state empowers the governor to make an interim appointment when a justice does not complete a full term. In states that use contested elections for their supreme courts, an astonishing 45 percent of justices first ascended to the bench via an interim appointment.[117] Yet at the interim appointment stage, only 30 states provide for any kind of nominating commission that makes binding recommendations to the governor.[118] Introducing safeguards in the interim appointment process would be a valuable first step for reform and an opportunity to experiment with a more accountable process.

- **Strengthen recusal rules to recognize the realities of high-cost elections,** including outside spending. Justices are generally required to step aside from a matter when "the judge's impartiality might be reasonably questioned."[119] However, only a minority of states have laws or rules that address when judicial campaign spending warrants recusal. In addition, most of the rules involving campaign spending concern direct contributions, even though independent expenditures are increasingly how major interests engage in supreme court races.[120] Only six states have rules clarifying when independent expenditures require that a judge step aside from hearing a case. Even fewer address how to treat the underlying donors to such groups.[121]

  The lack of clear recusal rules tied to campaign finance is far out of line with the public's views. A poll for the Brennan Center and Justice at Stake in 2013 found that more than 90 percent of voters believe judges should step aside from cases involving

major campaign supporters regardless of whether they contributed directly to judicial campaigns or made independent expenditures.[122] Many states also lack procedural safeguards for resolving recusal motions filed by litigants. Most often, it is the judges themselves who assess their own biases without any independent review.

The Brennan Center has previously published detailed recommendations about judicial recusal.[123] Key features include:

- Clear standards on when and how independent campaign expenditures require recusal, including factors such as whether the expenditures exceeded the maximum amount that may be contributed to a candidate directly.

- Requiring litigants to file a disclosure affidavit at the commencement of a proceeding. This affidavit should detail any campaign contributions or expenditures that parties or their attorneys have made in favor of (or against) the judge hearing the case or state that no such contributions or expenditures have been made. It should also include contributions to third-party entities, including outside groups and political parties.

- Determinations of recusal motions should be made by an independent judge, who should issue a public, written decision.

- **Adopt public financing for judicial elections:** A well-funded public financing system, particularly one that matches (and multiplies) small-donor contributions, can deepen the pool of judicial candidates and mitigate the conflicts posed by special interest spending. For example, a study of North Carolina's (recently eliminated) judicial public financing program found that justices who opted into the system were 60 percent less likely to vote in favor of donors who contributed to their campaigns, as compared to their colleagues who continued to rely exclusively on private donors.[124] Yet only two states, New Mexico and West Virginia, currently provide for judicial public financing.

- **Provide voter guides and judicial performance evaluations.** Most voters have little information about judicial candidates, and what information they do have is often the product of fevered, distorted campaign rhetoric. States should adopt, and make public, judicial performance evaluations and publish voter guides to encourage informed voting.

Conclusion

Courts are an essential bulwark of democracy. At a time when many of our institutions are under strain, we need strong and independent courts to protect fundamental rights and ensure that all are equal under the law. Yet it is increasingly apparent that most states' systems for choosing supreme court justices can subject them to pressures that undermine this crucial role.

Judicial selection is complex and sometimes requires tradeoffs between important values. Nonetheless, there is strong evidence that there are better alternatives to the status quo. States should replace supreme court elections with a publicly accountable appointment system and — regardless of whether a state uses elections or appointments — eliminate reselection pressures by adopting a one and done lengthy single term. And, even before a state undertakes a wholesale shift in its method for selecting and retaining justices, there are also several reforms most states can adopt immediately that can reduce the damage from highly politicized elections, from public financing to stronger judicial recusal rules.

The history of judicial selection in the states has featured long periods of stasis followed by waves of reform. The move to judicial elections in the 19th century followed this pattern. Later reforms, such as the adoption of nonpartisan elections in many states in the early 20th century, and the move to merit selection in the 1940s through the 1970s, did as well.[125] Just as past judicial selection reform movements responded to the needs of the time, states must act to address today's threats to fair and impartial justice.

Appendix 1

Elements of a Publicly Accountable Appointment System: State Examples

Provide for Diffuse Power to Appoint Commissioners

- In Hawaii, the governor, the president of the state Senate, and the speaker of the state House of Representatives each appoint two commissioners, the chief justice of the state Supreme Court appoints one, and the Hawaii State Bar Association elects two.[126]

- In New York, four commissioners each are appointed by the governor and chief judge, while the Assembly speaker, the Assembly minority leader, the Senate president, and the Senate minority leader each appoint one commissioner.[127]

- In New Mexico, the governor, speaker of the House, Senate president, and chief court of appeals judge each appoint two commissioners, the state bar appoints four commissioners, and the chief justice and dean of the University of New Mexico School of Law serve ex officio.[128]

Ensure Broad Partisan Input

- In New Mexico, the two major political parties are required to be represented equally on the state's judicial nominating commission.[129]

- In Colorado, not more than half the commissioners plus one, exclusive of the chief justice, shall be members of the same political party.[130]

- In New York, the majority and minority leaders of the state Senate and Assembly each have the power to appoint commissioners.[131]

Notably, no states currently require representation of independents or members of third parties on nominating commissions. States should consider adopting a provision holding seats for commissioners who are not members of the state's two largest parties. For example, the California Citizens Redistricting Commission, which is responsible for drawing federal and state legislative districts, is composed of five registered Democrats, five registered Republicans, and four persons not registered with either of those two parties.[132]

Implement a Public Application Process

- Colorado makes public announcements of nominating commission vacancies and has a formal application process to serve as a commissioner.[133]

- In New Mexico, the judicial nominating commission is required to advertise judicial vacancies broadly, including to state, county, and local bar associations, including women's, minority, and specialty bar groups. The commission holds public meetings, including an opportunity for public comment on applicants. Interviews are held in public, but confidential matters can be discussed in closed session. There are also rules setting out the criteria for assessing candidates.[134] Commission deliberations are closed, but final votes are cast in a public session.[135]

- In Arizona, the judicial nominating commission gives public notice of vacancies. The commission screens candidates and identifies a subset for interviews. Their materials are posted online, and the commission invites public comment on the candidates.[136]

Reserve Seats to Encourage Professional Diversity

- In New Mexico, the bar's four appointees must represent "civil and criminal prosecution and defense." The state constitution also requires the president of the state bar, in consultation with the judges on the commission, to appoint additional members of the bar to achieve political balance and ensure that "the diverse interests of the state bar are represented." The dean of the University of New Mexico School of Law (an ex officio member) is the final arbiter of whether diverse interests are represented.[137]

- In Montana, non-attorney commissioners are required to each represent "a different industry, business, or profession."[138]

- A recently repealed Tennessee law designated seats for the Tennessee Trial Lawyers Association, the Tennessee District Attorneys General Conference, and the Tennessee Association of Criminal Defense Lawyers.[139]

Require Non-Lawyer Commission Members

- In Indiana, the governor appoints three non-lawyers, the state bar association membership elects three lawyers, and the chief justice serves ex officio.[140]

- In New York, the governor appoints two lawyers and two non-lawyers, the chief judge appoints two lawyers and two non-lawyers, and the majority and minority leaders of the Assembly and Senate each appoint one member from any profession.[141]

- In Utah, the governor appoints four members, including at least two non-lawyers. The state bar association selects two members, generally lawyers, and the chief justice selects one member from the state's judicial council.[142]

Require Appointing Authorities to Consider Diversity When Selecting Commissioners

- In Rhode Island, the governor and other appointing authorities "shall exercise reasonable efforts to encourage racial, ethnic, and gender diversity within the commission."[143]

- In South Carolina, "race, gender, national origin, and other demographic factors should be considered to ensure nondiscrimination to the greatest extent possible as to all segments of the population of the State."[144]

- In Colorado, commissioners must represent each of the state's congressional districts.[145]

Appendix 2

Implementing a "One and Done" Lengthy Single Term

A lengthy single term for state supreme court justices should have the following elements:

- **Staggered terms:** States should structure vacancies so that there is a single open seat every two or four years, instead of replacing an entire court's membership at once or allowing a new justice to start a full term whenever a vacancy opens. A staggered appointment system is preferable because it introduces regularity into the selection process and discourages strategic retirement. It also reduces the likelihood of clustered vacancies, which may skew a court's membership. To preserve staggered terms, if a vacancy opens in the middle of a justice's term, his or her replacement should finish the existing term, rather than start a new full term.

  The adoption of staggered terms also has implications for the preferred length of a judicial term, depending on the number of justices on any given state's supreme court. For example, if a state has seven judges on its supreme court, staggered 14-year terms would mean that one vacancy would open every two years. For states that do not already have regularly staggered terms, it would be preferable to have a transition period with short terms for new justices, which would create room to implement a system of staggered lengthy terms.

- **A fixed, single term of at least 14 years:** In addition to considering the size of a state's supreme court bench, states should adopt a term sufficiently long to attract quality candidates. The ideal length may vary depending on a state's traditions and the realities of its legal market, including how long justices typically stay on the bench now. Excluding sitting justices, supreme court justices have sat on the bench for a median of 11 years since the 1970s, but figures vary substantially by state.

- **Provide for judicial performance evaluations and other accountability mechanisms:** Just because justices will serve only one term should not mean that they escape regular oversight. There should be robust mechanisms to hold judges accountable for misconduct or ethical lapses, as well as for deficits in temperament and skill. Regular performance evaluations can serve this purpose.

  Evaluations can identify deficiencies that may require justices to undergo additional training or even face disciplinary action. According to research by IAALS, only 17 states (plus the District of Columbia) have any kind of formal judicial performance evaluation,[146] and not all of these states make even summaries of the evaluations public.

  Another source of accountability is judicial discipline, including, in extreme cases, a process for removal of justices.[147] Judicial discipline processes should provide an opportunity for public comment, and at the very least, summary findings should be publicly disclosed. Public participation builds public confidence in the result. Thirty-four states now have public disciplinary hearings.[148]

- **Consider justices' options after the bench:** States may need to alter their pension systems so justices' pensions vest at the end of their term. States may also wish to consider creating a "senior judge" system, where supreme court justices whose terms have expired can preside over cases in lower courts. Because a single term system may increase the likelihood that former justices will reenter private practice, there should also be clear rules governing how justices and former justices can avoid conflicts.

Endnotes

1 Alicia Bannon et al., *Who Pays for Judicial Races? The Politics of Judicial Elections*, 2015-16, Brennan Center for Justice, 2017, 15-17, https://www.brennancenter.org/publication/politics-judicial-elections. The $1 million milestone is notable because such races are likely to require major infusions of campaign cash by donors or a substantial investment by outside spenders, and to have many of the trappings of campaigns for political offices.

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16 Our research can be found at "Rethinking Judicial Selection," *Brennan Center for Justice,* https://www.brennancenter.org/rethinking-judicial-selection.

17 *See* infra 4, 10-11.

18 *See* infra 12-13.

19 Each of these states also provides for the "confirmation" of justices by the legislature or another elected body.

20 Jed Handelsman Shugerman, *The People's Courts* (Cambridge: Harvard University Press, 2012), 247-248.

21 Bannon et al., *Who Pays for Judicial Races?*, 11 (figure is as of January 2017).

22 Ibid, 22-25.

23 Ibid, 21, 27-30.

24 Ibid, 11.

25 Ibid, 2 (figure is of January 2017).

26 Ibid, 27.

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28 Bannon et al., *Who Pays for Judicial Races?*, 12.

29 Ibid, 22.

30 Ibid, 35.

31 Ibid, 35.

32 Ibid, 33-36.

33 *Justice at Stake — State Judges Frequency Questionnaire*, Nov. 5, 2001-Jan. 2, 2002, https://www.brennancenter.org/sites/default/files/2001%20National%20Bipartisan%20Survey%20of%20Almost%202%2C500%20Judges.pdf.

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48 Ibid, 7-10.

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50 Ibid, 103-115.

51 Short lists are typically 3-5 candidates. Reddick and Kourlis, *Choosing Judges*, 15-16.

52 Shugerman, *The People's Courts*, 259.

53 Rachel Paine Caufield, *Inside Merit Selection: A National Survey of Judicial Nominating Commissioners,* American Judicature Society, 2011, 7, http://www.judicialselection.com/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pdf.

54 Ibid, 42-45.

55 *See, e.g.*, Cutting, *Judicial Retention in Hawaii*, 5; Day O'Connor and Andersen Jones, "Reflections on Arizona's Judicial Selection Process," 20; Marilyn S. Kite, "Wyoming's Judicial Selection Process: Is it Getting the Job Done?," *Fordham Urban Law Journal* 34 (2007): 226. However, assessing judicial appointment processes is challenging because key elements often occur behind closed doors. The governor's (or president's) decision-making process is typically opaque, and, in approximately 90 percent of states that use judicial nominating commissions, their meetings and deliberations are also private. Reddick and Kourlis, *Choosing Judges*, 21-22.

56 Goelzhauser, *Choosing State Supreme Court Justices*, 57-58.

57 In 1956, Gov. Fred Hall lost his bid for reelection in the primary; he made an agreement with then-Chief Justice William Smith, who then resigned from the Supreme Court and three days later, Hall resigned as governor. Hall's lieutenant governor became governor and appointed Hall to the Supreme Court. In response to this scandal, in 1958, voters approved a constitutional amendment to select Supreme Court judges via merit selection. See Stephen J. Ware, "Selection to the Kansas Supreme Court," *Kansas Journal of Law and Public Policy* 386 (2007) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1315493; Justice Fred Six, "The Threat to Merit Selection: An Ominous Political Cloud Hovers Over the Capitol, Casting a Dark Shadow on the Judiciary," *Journal of the Kansas Bar Association* (2012) https://heinonline.org/HOL/LandingPage?handle=hein.barjournals/jkabr0081&div=128&id=&page=.

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67 Analysis on file at the Brennan Center. Surveys and interviews of nominating commissioners suggest that both attorneys and non-attorneys offer important, and different, perspectives in vetting judicial candidates, and that having non-attorney representation is valuable. Caufield, *Inside Merit Selection.*

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Lambda Legal and the American Constitution Society for Law and Policy, 2017, 23, https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/20170607_diversity-counts.pdf.

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81 Keith and Robbins, "Legislative Appointments for Judges: Lessons from South Carolina, Virginia, and Rhode Island," 3.

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83 *See, e.g.*, Brent Johnson, "Sweeney slaps down Christie over N.J. Supreme Court nominee," *NJ.com,* March 2, 2016, https://www.nj.com/politics/index.ssf/2016/03/sweeney_slaps_christie_over_nj_supreme_court_nomin.html (New Jersey Senate President, Stephen Sweeney, a Democrat, "led efforts to block four of [Gov. Chris Christie (R)'s] nominees," arguing "As Senate president, I don't get to select the governor I am going to work with, but I do get to choose who and what I fight for," and that he would consider a Christie nominee "if the governor preserves judicial independence by submitting a Democrat for the court."); *see also* Joseph De Avila, "Connecticut Supreme Court Nominee Is Blocked by State Republicans," *The Wall Street Journal,* March 27, 2018, https://www.wsj.com/articles/connecticut-supreme-court-nominee-is-blocked-by-state-republicans-1522186710.

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137 N.M. Const. art. VI, § 35.

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139 Tenn. Code Ann. § 17-4-102.

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141 N.Y. Const. art. VI, § 2(d).

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RESEARCH

Judicial Nominating Commissions

An analysis finds that despite varying methods of selecting them, state commissioners are almost uniformly professionally homogeneous.

By Douglas Keith

In a recent report, the Brennan Center proposed reforms to judicial selection methods that would reduce partisan and political pressures on judges.[1] One key element of that proposal is an independent, publicly accountable nominating commission to recruit, evaluate, and recommend judicial candidates for appointment.

Thirty-four states and the District of Columbia already use a commission as part of the selection process for at least some of their high court judges, but not all commissions are alike.[2] Commissions differ in size, composition, and legal authority, not to mention the backgrounds of the individual commissioners that serve on them.

Building on prior research, this paper assesses who has influence on commissions today, both on paper and in practice, by examining the commissions' members. It first analyzes the relevant provisions of state constitutions, statutes, and executive orders dictating who serves on commissions and who appoints commissioners. Then the paper details the findings of a first-of-its-kind nationwide analysis of the professional background of nearly 340 nominating commissioners in 26 jurisdictions that use commissions to fill all vacancies on their high courts.[3]

Ultimately, this analysis shows key variations in the design of nominating commissions that have implications for who has power over, or a voice in, the commission's process of recruiting, vetting, and recommending judicial applicants. It also shows that despite the variety of commission designs, there is a near-uniform lack of professional diversity among commissioners. Among the key findings:

- **Governors appoint a majority of commissioners in less than half of commission states.** Majority control gives governors substantial power to shape a commission's priorities in 15 states, but that power is far from universal. In more jurisdictions — 16 of 35 — no single authority appoints a majority of commissioners.

- **Lawyers predominate, even when the law does not require it.** In 26 of 35 jurisdictions, lawyers filled a majority of commission seats, even though only 15 require lawyer majorities. Lawyers have a unique perspective highly relevant to judges' work, but they are not fully representative of the public whose rights those judges' decisions will affect. Nonlawyer commissioners fill a majority of commission seats in just six states and half of the seats in three states.

- **Many jurisdictions reserve seats for various political, geographic, and professional interests.** Nearly half of jurisdictions either reserve seats for each of the two major political parties or limit the ability of one party to command a supermajority on the commission. Twenty-one also require commissioners from different geographic regions in the state. A few even mandate representation for commissioners with particular professional backgrounds such as prosecutors, defense attorneys, or corporate counsel. While 10 states call for their commissioners to reflect the state's demographic diversity, these provisions are likely not specific enough to ensure this kind of diversity without appointing authorities who independently make it a priority.

- **Corporate and plaintiffs' attorneys are best represented.** Attorney commissioners with those backgrounds had seats on 22 and 20 commissions, respectively, of the 26 for which we analyzed professional background. Meanwhile, other relevant voices including current and former prosecutors, public defenders, and civil legal service providers sat on just eight, five, and two commissions, respectively. By way of comparison, lobbyists sat on nine commissions.

- **Nonlawyer commissioners are also homogeneous.** Nearly two-thirds of those commissioners came from either private industry or the legislative or executive branches of government.

What Are Judicial Nominating Commissions?

Judicial nominating commissions (JNCs) are bodies responsible for vetting and recommending applicants for judicial vacancies.[4] The power to select nominating commissioners generally belongs to political officials, judges, or the state bar's leaders or members, though some commissioners serve ex officio on the basis of their current position.[5] No state popularly elects commissioners. The commissions analyzed in this paper range in size from six to seventeen members.

The work of commissioners varies only slightly from state to state.[6] Typically commissioners solicit applications, review written submissions from applicants, conduct interviews, call references, and discuss candidates as a group.[7] In some states, commissioners also actively recruit applicants that the commission will later consider as a whole.[8] After considering those applications, commissions recommend candidates to the official or the body ultimately responsible for making the appointment — most commonly the governor, but sometimes the state legislature.[9] In most states, that official must appoint a candidate recommended by the commission.[10] In five states, however, the commission's recommendations are nonbinding, meaning the governor may appoint someone whom the commission did not recommend.[11] The number of candidates the commission recommends, and the information it provides the governor or other appointing body, are generally set by law. Most nominating commissions make their decisions by majority vote.[12]

The most common use of nominating commissions is as part of a "merit selection" plan (also called "merit/retention"), which 14 states employ for their high courts.[13] Under merit selection, states use commissions when appointing judges to their first term on the bench. Following their appointment, judges must stand for uncontested "retention" elections, in which voters get to choose whether to retain that judge.[14]

Even more states use commissions in hybrid or appointment-only systems. In five, governors with the exclusive power to appoint judges voluntarily use nominating commissions to evaluate and recommend candidates for appointment.[15] Seven other states and the District of Columbia use nominating commissions as part of selection systems that vary somewhat from both merit selection and executive appointments; for example, a state may use a commission to reappoint sitting judges in addition to recommending initial appointments.[16] Finally, eight states use commissions to fill only interim vacancies on their high court.[17]

Rules Determining Commission Makeup

Each of the state constitutions, statutes, and executive orders establishing a judicial nominating commission contains provisions dictating who can and cannot serve on the commission and who has the power to select commissioners. These rules lay the foundation for how judges are selected in a majority of the country. They dictate which elected and unelected officials have a say in the selection process by appointing commissioners or serving themselves, and which segments of the population can or must be incorporated into that process.

The analysis presented below examines who appoints commissioners; the proportions of lawyer and nonlawyer commission members; and provisions that require representation of particular political, geographic, professional, and demographic interests. Foremost, this analysis shows that there is significant variety in how states structure their nominating commissions. These variations reflect states' choices about whether to empower the governor, the state bar, or legislators to appoint commissioners; whether to incorporate nonlawyers; and whether to reserve seats for interest groups or segments of the state's population otherwise unlikely to have a voice in the selection process.

1. Appointing Authority

A fundamental way officials and others shape commissions is by appointing commissioners, and how a jurisdiction distributes the appointment power will determine who has such influence. States most commonly grant appointment authority to the governor, the state's bar association, and state legislative leaders.[18] Many also provide for certain officials, such as a judge or the dean of the state's largest law school, to serve ex officio without appointment. Several states grant appointing power to other officials, including state high court judges, the state attorney general, and already-sitting members of the nominating commission.[19] Even the president of the United States appoints one commissioner to the District of Columbia's nominating commission.[20]

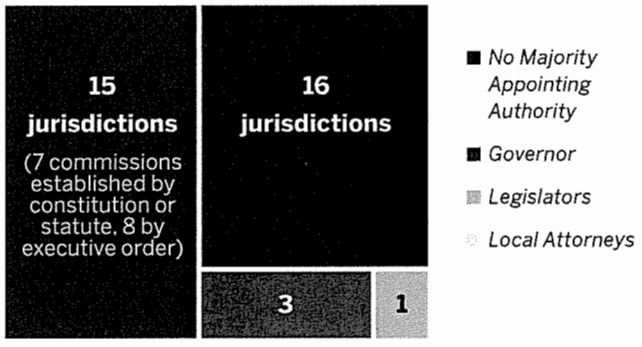
One crucial question is who, if anyone, has the power to appoint a controlling block of commissioners. Even though the appointing authorities themselves do not sit on the commission, they wield power in shaping it and are likely to appoint individuals whose judgment they trust and with whom they share values or political preferences. In the first survey of nominating commissioners in 1969, for example, commissioners reported that gubernatorial appointees were often "close friends" of the governor and were more likely to recommend the governor's preferred candidates.[21] Much more recently, governors in Iowa and Florida have come under fire for appointing political allies and donors to their states' nominating commissions.[22] Appointment power concentrated in the hands of one official makes it more likely that the commission will merely ratify that official's preferences. Conversely, a mix of appointing authorities reduces the chance that a single political agenda will drive the commission's work.[23]

States take several different approaches in distributing appointment power. As Figure 1 shows, governors in 15 states — less than half of all states using nominating commissions — have the power to appoint the majority of commissioners.[24] Approximately half of those are states in which the governor has voluntarily established a commission through executive order, and included in this group are all five of the commissions whose recommendations are not binding on the governor.

In a plurality of jurisdictions, however, no single authority appoints a majority of commissioners. Among those 16 jurisdictions there is substantial variation as to which authorities have a hand in appointing commissioners. For example, in New York, the executive, legislative, and judicial branches each appoint an equal number of commissioners, while in South Dakota the state bar association appoints a plurality, but not a majority, of commissioners.[25]

In the four remaining states, attorneys within the state or legislators appoint a majority of commissioners. Appendix II details who appoints commissioners in each jurisdiction.

Figure 1. Who Appoints the Majority of Commissioners in Each State?



2. The Role of Lawyers

Many jurisdictions have provisions dictating the proportions of lawyers and nonlawyers on a commission. Some mandate that a certain number of commissioners be lawyers, others require that certain entities appointing commissioners choose only lawyers or reserve seats for lawyers serving ex officio, and in others the bar is not required to appoint only lawyers but does so by custom.[26]

The proportion of lawyers versus nonlawyers is important because of its potential impact on committee deliberations and outcomes. Lawyers' specialized knowledge and professional networks may give them unique insights into judicial candidates. Yet lawyers are not fully representative of the public at large.[27] Moreover, their status as repeat players in the courtroom may lead them to differ from the general public in the attributes they value and the policies they prefer.[28]

In most jurisdictions that use nominating commissions, the underlying laws and executive orders do not require lawyer majorities on the commissions. Nevertheless, when the law gives the appointing authorities flexibility as to whom to appoint, they overwhelmingly appoint lawyers.

As reflected in Figure 2, 14 states and the District of Columbia require that a majority of nominating commissioners be lawyers.[29] In three states, the law requires that nonlawyers make up exactly half of the nominating commission,[30] while in six, the law mandates that nonlawyers make up a majority of the commission.[31] In the remaining 11 jurisdictions, the appointing authorities have discretion as to whether to appoint a majority of lawyers.

In the 11 states where majority control by lawyers or nonlawyers is not set by law, however, lawyers still dominate. In all 11, lawyers currently make up a majority of the commission, and in two of those states, the commission consists entirely of lawyers.[32] Thus a total of 25 states and the District of Columbia currently have nominating commissions with a lawyer majority, even though only 15 jurisdictions require it.

But not all attorney commissioners arrive on their commissions in the same way. Of the 30 jurisdictions that designate "lawyer" slots, 21 either empower multiple authorities to select lawyers to serve as commissioners or have at least one lawyer serving ex officio. This distribution of appointment power generally makes it less likely that all lawyers on a commission will represent the same interests. In Florida and Utah, the governor has the authority to reject lawyers nominated to serve on the commission by the state bar, giving the governor the ability to undermine the distribution of appointment authority.[33]

Figure 2: Judicial Nominating Commission Membership

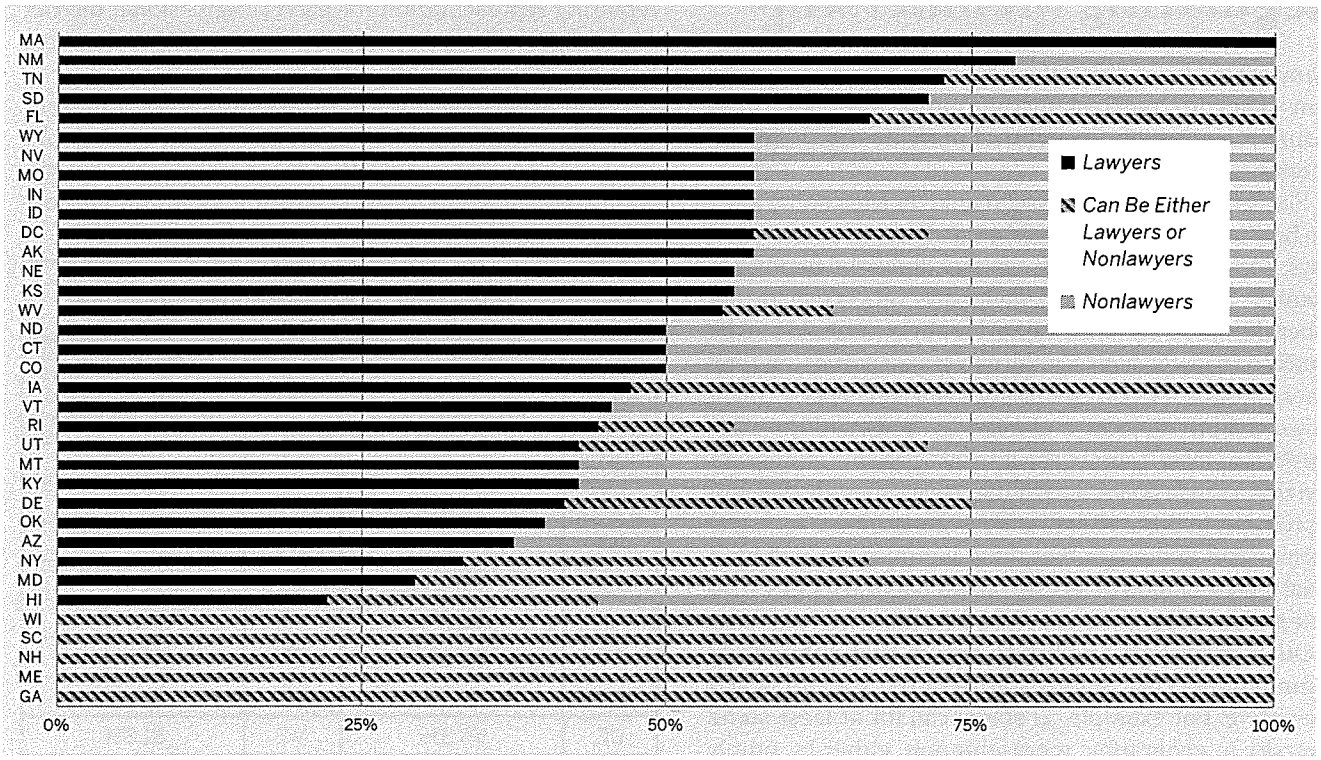
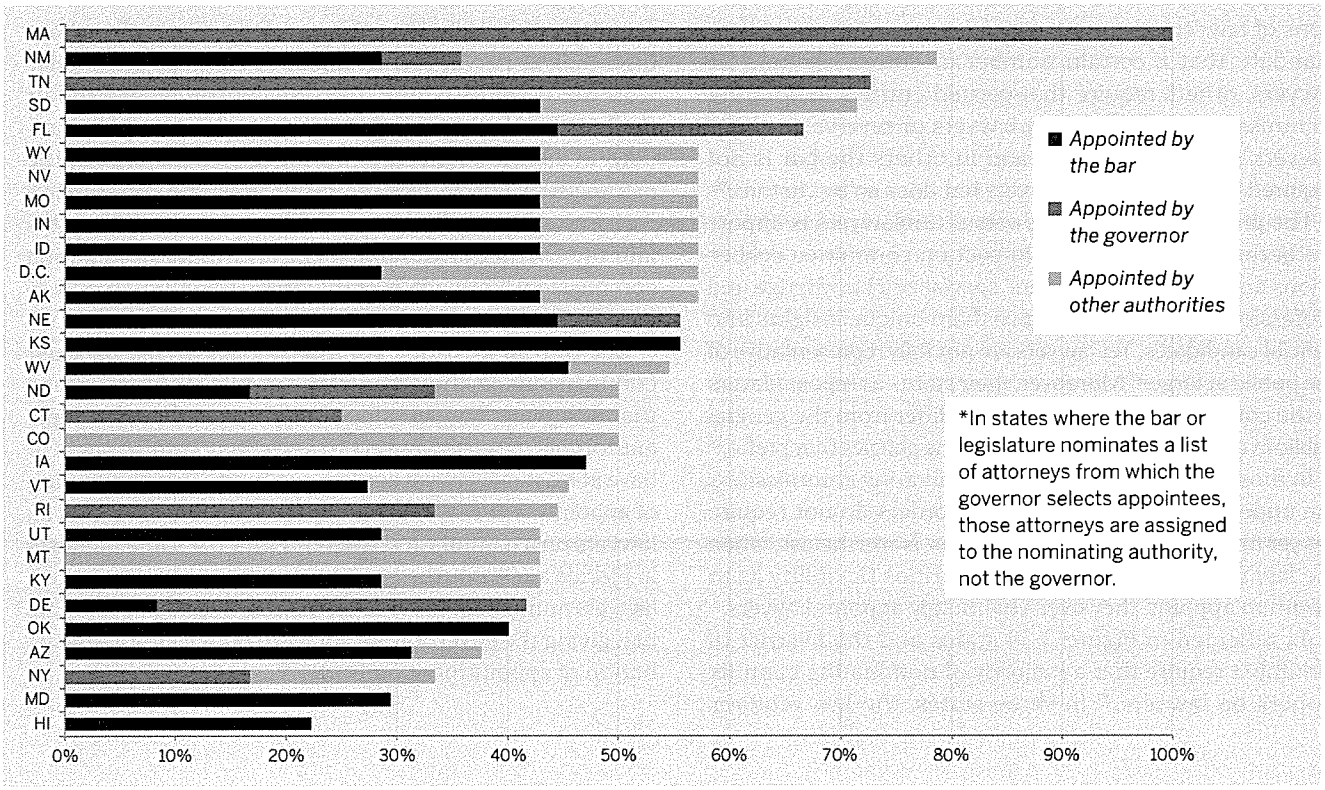


Figure 3: Percentage of Commissioners Who Must Be Lawyers, and Who Appoints Them*



3. Additional Provisions Regulating Membership

Many states have also taken steps to reserve commission seats for particular community interests or to ensure members of one political party do not dominate a commission.

Sixteen states, for example, require at least some partisan balance on their commissions, and they do so in several ways. Some use a numerical cap that limits the number of members that may be from a single party, others require that either the entire commission or certain commissioners be equally distributed between the two largest parties, and still others provide for partisan balance by giving appointment power to both majority and minority leaders of the state legislature. Table 1 shows the greatest possible representation that a single political party may have under the different approaches in these 16 states. New Mexico, New York, and Connecticut guarantee that their commissions will have equal representation of the two largest political parties.[34] No state requires representation of third parties or independents.

Other provisions attempt to ensure that nominating commissioners are representative of the state in which they serve. For example, 21 states call for at least some diversity in geographic representation, either by simply instructing appointers to take geography into account when selecting commissioners or, more concretely, by requiring representation for each congressional district or prohibiting the appointment of multiple commissioners from the same county.[35]

Fewer states call for commissioners who represent the racial and gender diversity of the state's population.[36] Ten states have provisions that mention diversity among commissioners as a goal to which appointing authori-

Table 1: Partisan Balance Provisions

State	Maximum Single Party Representation	State	Maximum Single Party Representation
CT	50.0%	WV	63.6%
NM	50.0%	KY	71.4%
NY	50.0%	NV	71.4%
NE	55.6%	SD	71.4%
AZ	56.3%	UT	71.4%
CO	56.3%	OK	73.3%
ID	57.1%	RI	77.8%
DE	58.3%	VT	81.8%

ties should aspire, though most of those provisions fail to define diversity and are likely unenforceable.[37] In Delaware, for example, the executive order establishing the commission states that members "shall reflect the broad diversity of the citizenry of Delaware."[38] Florida more explicitly calls for the governor to "ensure that, to the extent possible, the membership of each commission reflects the racial, ethnic, and gender diversity and geographic distribution of the relevant jurisdiction."[39]

Finally, several jurisdictions have taken steps to ensure commissioners have diverse professional backgrounds, or even that they represent specified areas of expertise. The New Mexico Constitution, for example, requires that the state bar association's four appointees represent "civil and criminal prosecution and defense."[40] Taking professional diversity even further, Tennessee, until 2009, reserved commission seats for representatives of the Tennessee Trial Lawyers Association, the Tennessee District Attorneys General Conference, and the Tennessee Association of Criminal Defense Lawyers.[41] The executive order establishing Georgia's nominating commission, while less specific, similarly requires that commissioners have experience "as former judges, former magistrates, trial counsel, government counsel, or corporate counsel."[42] These provisions are not limited to attorney commissioners. Montana requires that each of its non-attorney commissioners represents "a different industry, business, or profession."[43]

Professional Background of Commissioners

While states' structural choices affect who influences their commissions, those choices often set only the outer bounds of whom authorities can appoint to the commissions. Within those boundaries, appointing authorities have great discretion in selecting the individual commissioners — persons with great power to mold a state's courts. To better grasp how commissions shape judicial appointments, it is necessary to understand who the commissioners are, what knowledge and experiences they bring to their work, and which relevant voices are represented on commissions at the expense of others.

Previous surveys provide valuable information about the demographic and professional makeup of nominating commissioners. Notably, in 2011, the American Judicature Society (AJS) surveyed nearly 500 nominating commissioners across 31 jurisdictions and found a striking lack of diversity by race, gender, and sexual orientation. According to that survey, 89 percent of nominating commissioners identified as white, 65 percent as men, and 93 percent as heterosexual.[44] AJS also gathered data on commissioners' professional backgrounds. Among lawyer commissioners, the survey found that 22 percent represented primarily plaintiffs, 26 percent represented primarily defendants, and 48 percent represented both.[45] Among nonlawyer commissioners, the survey found that approximately 25 percent worked for private, for-profit companies, 20 percent worked for nonprofits, 20 percent held government jobs, and 15 percent responded that they were retired.[46]

This paper adds to this existing research by providing more detailed information regarding commissioners' professional backgrounds, as well as by analyzing these data both nationally and across jurisdictions.

Understanding who actually serves on nominating commissions is important for assessing whether particular interests could unduly influence the selection process.[47] Importantly, even if interest groups are not using membership on commissions for professional advantage, underrepresentation of certain professional backgrounds can undermine the work of the commissions in other ways. Commissioners may be less capable of recruiting and evaluating candidates with backgrounds in fields they are not a part of, or they may be unintentionally partial to candidates with backgrounds similar to their own.[48] State high courts also decide a wide array of cases, and homogeneous professional representation may make it more difficult for a commission to evaluate whether a candidate could handle that diverse docket. A criminal defense attorney or a prosecutor, for example, may be less aware of the characteristics necessary to manage and decide civil cases.

The discussion below analyzes the professional background of 324 nominating commissioners in 26 states that use nominating commissions to fill both initial and interim vacancies on the state's high court. The data are a snapshot of commission membership as of September 2016. The analysis treats the backgrounds of lawyer and nonlawyer commissioners separately, but at the outset it is worth noting that the majority of commissioners — 65 percent of the analyzed group — were lawyers. For a detailed methodology, including definitions for each professional category, see Appendix I.

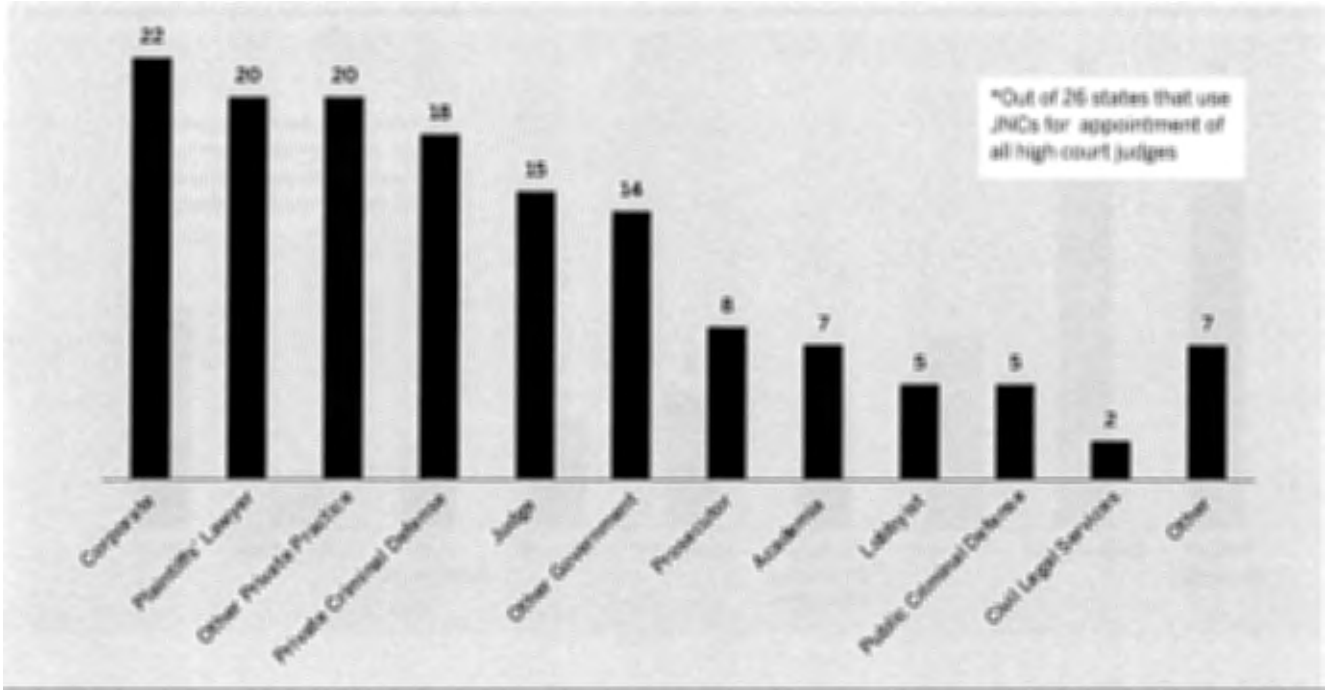
1. Lack of Professional Diversity Among Commissioners

As Figure 4 shows, some categories of lawyers were consistently present on commissions, while others were not. In 22 out of 26 states analyzed, at least one corporate lawyer or a lawyer with a significant history practicing corporate law had a seat on the nominating commission, and on most commissions there were at least two such lawyers. Plaintiffs' lawyers were also well represented, serving on commissions in 20 states. In some states, plaintiffs' attorneys were particularly well represented. For example, three out of the four lawyers serving on commissions in Missouri and Indiana were plaintiffs' attorneys. In total, 41 percent of attorneys on commissions were practicing or had a significant history practicing corporate law, and 23 percent of commissioners were or had been plaintiffs' attorneys.

Meanwhile, many other types of legal practice were not represented on most commissions. Attorneys representing low-income or indigent clients in either criminal or civil cases served on only seven out of the 26 commissions. Current or former prosecutors served on only eight commissions — less than one-third of those analyzed. This underrepresentation of public defenders and prosecutors is particularly striking when one considers the composition of cases heard by state high courts; on average, criminal cases make up about half of state high court dockets.[49]

Nevertheless, lawyers from a single practice area are seldom so well represented that they control a majority of

Figure 4: Number of Commissions with at Least One Lawyer from a Given Professional Background*



the seats on a commission. A majority of lawyer commissioners shared a common practice area in only 4 of the 26 states. In Georgia, Maine, and Tennessee, the governor has unfettered discretion to appoint commissioners, and a majority of all commissioners practiced corporate law.[50] No professional cohort had a majority of seats on a commission in any other jurisdiction.

Nonlawyer commissioners may bring a distinct perspective to the work of nominating commissions, but as a group they also lack substantial professional diversity. Forty-four percent of nonlawyer commissioners worked for private businesses, and 29 percent either were serving or previously served in government (outside of education and law enforcement). Educators, law enforcement officers, healthcare workers, and others had minimal representation on nominating commissions.

Figure 5 (next page) shows that in the case of non-attorneys, commissioners employed by private business were present on 16 of 21 commissions, as were those with significant experience in government. As with attorney commissioners, that representation came at the expense of other cohorts: No other professional background for nonlawyer commissioners was represented on more than one-third of nominating commissions.

In at least five states, nonlawyer commissioners working in government were appointed to the commission by the elected official they serve.[51] In 10 states, commissioners were either current or former members of the state legislature.[52] Commissioners with such backgrounds may understand the qualities that are valuable in a public official in their state, but they may also be more likely to bring to their role political considerations that states intended commissions to minimize. Current government employees, for example, may feel pressure to represent the interests of an appointer who is also their employer, and legislators may be swayed by the politics of their constituencies.

Finally, this analysis suggests that the provisions in several states requiring professional diversity among commissioners are effective. In New Mexico, where the constitution requires that the state bar association appoint commissioners with experience in both defense and prosecution of both civil and criminal matters, a commission recently constituted to select judges for the state's intermediate appellate court included attorneys from all four practice areas.[53] Only five states' commissions, of the 26 analyzed, have representatives from all four of those fields.[54] In Georgia, where the executive order identifies five distinct practice areas that should be represented, all five practice areas were represented and nearly all of the 17 attorney commissioners brought one of those experiences with them.[55] In Montana too, where non-attorney commissioners must each represent "a different industry, business, or profession," the four non-attorney commissioners came with diverse backgrounds; they include a retired adviser to the governor, president of a labor union, a nonprofit accountant, and a legislator-turned-electrician.[56]

Figure 5: Number of Commissions with at Least One Nonlawyer from a Given Professional Background*

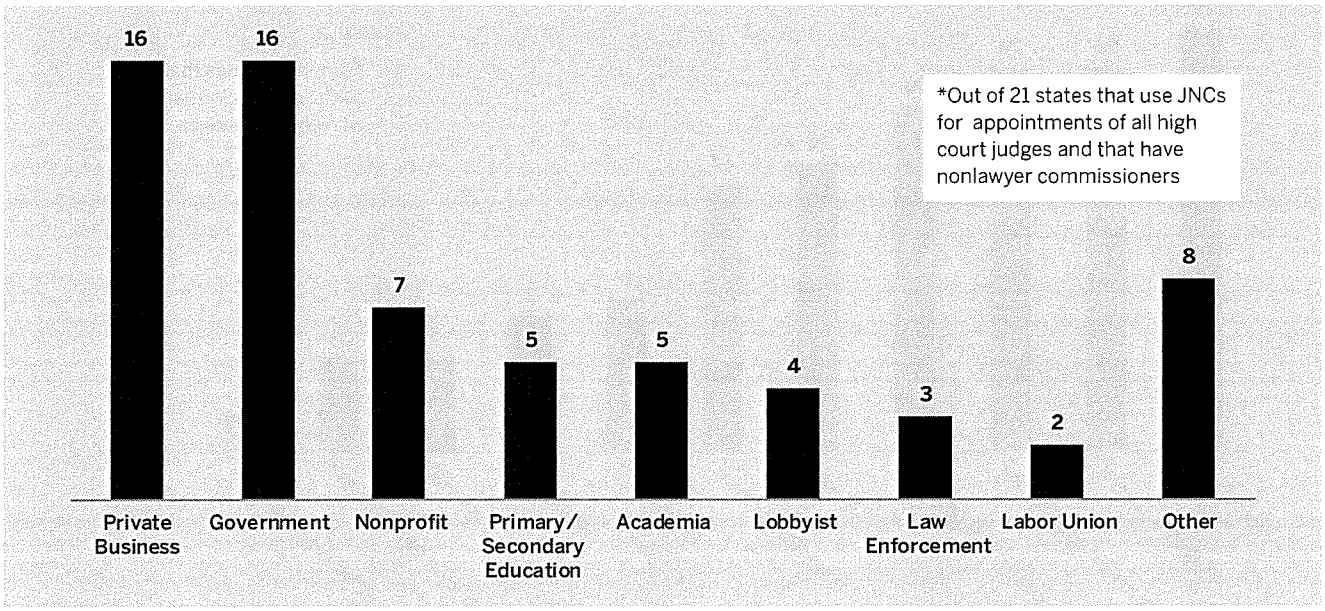
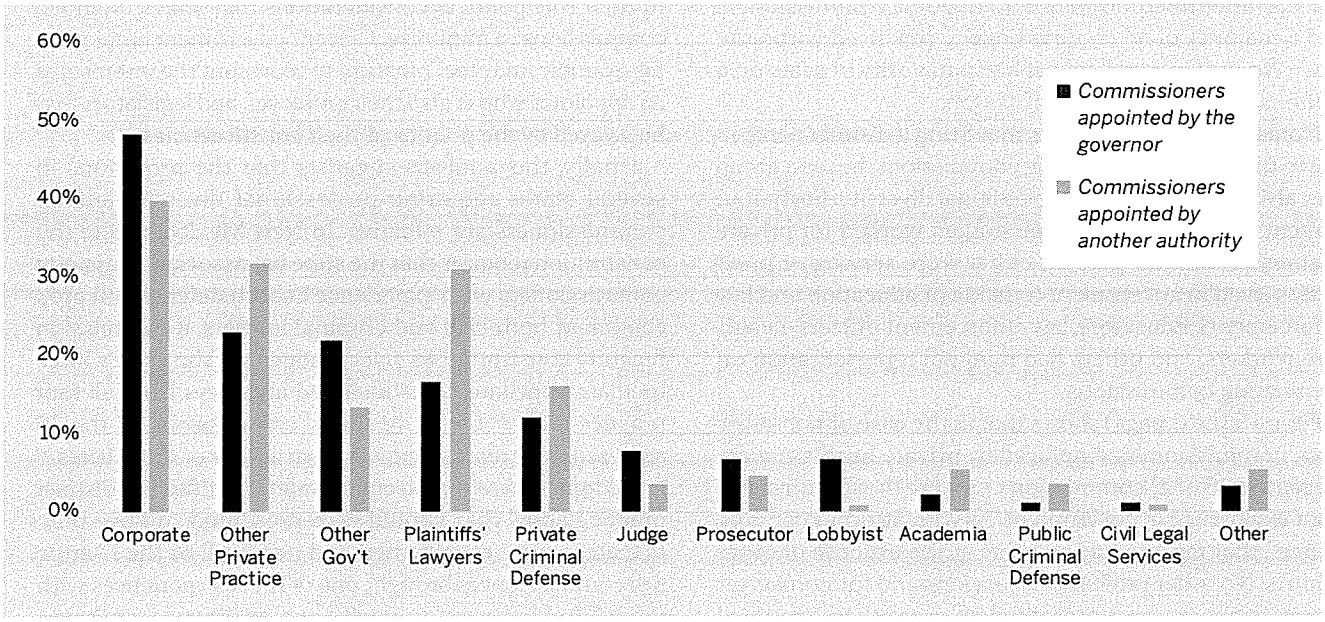


Figure 6: Percentage of Lawyer Commissioners with a Given Background



2. Commissioners' Backgrounds Differ Depending on Who Appoints Them

Attorneys who were appointed by a governor were also in some ways substantially different from their fellow commissioners.[57] A greater share of the gubernatorial appointees analyzed had a corporate background, and a smaller share had experience as plaintiffs' lawyers, than did attorney commissioners appointed by other authorities. Forty-eight percent of lawyer commissioners appointed by governors had a background in corporate law, as compared to 40 percent of lawyers appointed by any other entity. Meanwhile, 16 percent of gubernatorial appointees were plaintiffs' lawyers, as compared to 31 percent of all other appointees.

Some of the distinct characteristics of gubernatorial appointees were likely attributable to the politics of the governors doing the appointing. Two-thirds of the analyzed states had Republican governors and one-third Democratic.[58] Because plaintiffs' lawyers traditionally have closer ties to the Democratic Party, and because governors are likely to appoint commissioners who share their political views, it may be that a different political makeup of governors would lead to nominating commissioners that more closely resembled non-gubernatorial appointees.[59]

In other categories less commonly tied to political ideology, however, gubernatorial appointees were still different from other commissioners. Though the numbers are small, governors appear more likely than other appointers to place both lobbyists and current and former judges on nominating commissions. Seven attorney commissioners, across five states, were lobbyists or specialized in government affairs, and governors appointed all but one of them.[60] Finally, gubernatorial appointees were twice as likely to have judicial experience as other appointees are.

Some of the conspicuous gaps in the backgrounds of attorney commissioners remained no matter the appointing authority. Civil and criminal legal services and prosecutors had little representation across all appointing authorities.

Conclusion

Nominating commissions across the country are designed in a great variety of ways, and any discussion of their strengths and weakness must be grounded in that understanding. From the ability, or inability, of governors to appoint a majority of commissioners, to the proportions of lawyer and nonlawyer members, to provisions guaranteeing certain representation on the basis of professional, political, and geographic diversity, states have empowered different stakeholders through the design of the commissions.

What is nearly universal across commissions today is a lack of professional diversity. Corporate and plaintiffs' lawyers consistently have a seat at the commission table, while prosecutors, public defenders, and civil legal service providers are mostly left out of the process along with the interests of those they represent. Similarly, non-attorney commissioners are drawn from private, for-profit businesses or government, and few others have a voice on commissions.

But if states want to diversify their commissions or avoid giving undue influence to any political body or category of lawyer, existing designs also provide models for change. Across the country, there are examples of commissions that effectively mandate representation for nonlawyers, reserve seats for certain types of lawyers that would otherwise be unlikely to find their way onto commissions, or prohibit gubernatorial appointees from having majority control of a commission.

This research also suggests areas for further investigation. For example, while the paper highlights a lack of professional diversity, any discussion of nominating commissions would also benefit from greater information about demographic diversity. For data on the race, ethnicity, gender, and sexual orientation of current nominating commissioners to be comprehensive enough to determine what communities are disproportionately included or excluded from the commission process, states will need to improve how they collect this information and make it public.[61] Additionally, while the information about appointment power provides insights into who can influence commissions through their memberships, it is equally important to know whether officials or interest groups are influencing commissions in other ways. Governors may use informal channels to communicate their goals and preferences directly to a commission or individual members.[62] And members of the public may influence commissioners by submitting public comments to them, providing recommendations for candidates, or conducting more informal outreach to commissioners when not prohibited.

For now, this research creates a clearer picture of a group of people who have a large hand in selecting judges, how they arrived in this position, and the concrete steps states can take to improve their commissions.

Appendix I

Methodology for Coding of Nominating Commissioners

For each state that uses a nominating commission to fill all vacancies on its high court, we compiled a list of nominating commissioners as of September 2016. The names of current commissioners are publicly available in 26 of the 27 states that use nominating commissions to fill regular high court vacancies.[63] We then attempted to determine the professional background of as many commissioners as possible, both lawyers and nonlawyers, by conducting internet searches for each individual.

We relied primarily on information from law firm and company websites. If those resources did not exist for a given commissioner, we searched recent news articles, professional directories such as Martindale-Hubbell for attorneys, and government agency directories. For individuals who had a potentially common name, we did our best to corroborate their identity by looking for references to their service on a commission or on another public body that would be likely to share membership with a nominating commission.

The varied professional backgrounds of some lawyer commissioners required us to assign them to more than one category. We did this if the person was an attorney who actively practiced law in more than one of our categories. We also did this for commissioners who had spent a significant portion of their career in a field other than the one that currently occupied them. If it was apparent from our research, for example, that a personal injury lawyer had recently joined a law firm but had spent the previous 10 years serving as a legislator, then that commissioner would be identified as both a "plaintiffs' lawyer" and "other government." Both of these backgrounds are relevant to the questions being investigated, and to leave out one or the other would paint an incomplete picture.

The categories we created are imperfect, but they enable us to identify generally the professions currently represented on nominating commissions and to draw comparisons across states. For lawyers, our categories and definitions are:

- **Academia:** Those who serve as professors, administrators, and deans of private and public universities and law schools.
- **Corporate:** As part of a law firm or as in-house counsel, those who represent for-profit organizations in a wide range of matters including, but not limited to, business transactions and litigation, bankruptcy, defense against insurance claims, intellectual property, and securities litigation.
- **Lobbyist:** Lawyers who specialize in government relations, serve as lobbyists, or work for trade associations.
- **Plaintiffs' Lawyers:** People who represent plaintiffs with claims related to personal injury, workers compensation, product liability, medical and legal malpractice, and wrongful death.
- **Private Criminal Defense:** Lawyers who represent defendants in criminal cases of any kind, including white collar defense.
- **Other Private Practice:** Those who represent clients in cases that fall outside of the other categories, including matrimonial law, real estate transactions, and wills and estates.
- **Public Criminal Defense:** Lawyers who are employed by a state, local, or federal public defender's office.
- **Civil Legal Services:** Those who provide subsidized legal services to low-income and indigent clients in noncriminal matters.
- **Prosecutor:** People who prosecute criminal cases for a local, state, or federal government office.
- **Judge:** Those of any level; civil, criminal, or administrative; federal, state, or local.
- **Other Government:** Government employees who are not a judge or a prosecutor. Examples include legislators or heads of state agencies.

For nonlawyers, our categories are similar and more self-explanatory. The four unique categories for non-lawyer commissioners are those employed by private for-profit entities, private nonprofit entities, or labor unions, and those serving as law enforcement officers, by which we mean police officers, not district attorneys or others involved in prosecuting criminal defendants.

Appendix II

Jurisdiction	Type of Vacancy	# of Commissioners	Appointing Authority and Commissioner Profession	Requirements for Commissioner Diversity						Citation(s)
				Non-specific	Gender	Racial	Party	Geographic	Professional	
Alaska	Initial and Interim	7	**Governor:** Appoints 3 nonlawyers **State Bar Association Board of Governors:** Appoints 3 lawyers **Chief Justice:** Serves ex officio	No	No	No	No	Yes	No	Alaska Const. art. IV, §§ 5, 8
Arizona	Initial and Interim	16	**Governor:** Appoints 10 nonlawyers **State Bar Association Board of Governors:** Nominates 5 lawyers, appointed by Governor **Chief Justice:** Serves ex officio	Yes	No	No	Yes	Yes	No	Ariz. Const. art. VI, §§ 36, 37
Colorado	Initial and Interim	16	**Governor:** Appoints 8 nonlawyers **Governor, Attorney General, and Chief Justice:** Appoint 7 lawyers by majority action **Chief Justice or Acting Chief Justice:** Serves ex officio	No	No	No	Yes	Yes	No	Colo. Const. art. VI, §§ 20(1), 24
Connecticut	Initial and Interim	12	**Governor:** Appoints 3 lawyers and 3 nonlawyers **Speaker of the House:** Appoints 1 nonlawyer **House Majority Leader:** Appoints 1 lawyer **House Minority Leader:** Appoints 1 lawyer **President Pro Tempore of the Senate:** Appoints 1 lawyer **Senate Majority Leader:** Appoints 1 nonlawyer **Senate Minority Leader:** Appoints 1 nonlawyer	No	No	No	Yes	Yes	No	Conn. Const. art. V, § 2 Conn. Gen. Stat. § 51-44a
Delaware*	Initial and Interim	12	**Governor:** Appoints 11 members, including at least 4 lawyers and 3 nonlawyers **President of Delaware State Bar Association:** Nominates 1 lawyer, appointed by the Governor	Yes	No	No	Yes	No	No	Exec. Order No. 7, 246 Del Gov't Reg. 12 (LexisNexis May 2017), http://governor.delaware.gov/executive-orders/eo07/

Appendix II contd.

Jurisdiction (contd.)	Type of Vacancy	# of Commissioners	Appointing Authority and Commissioner Profession	Requirements for Commissioner Diversity						Citation(s)
				Non-specific	Gender	Racial	Party	Geographic	Professional	
Florida*	Initial and Interim	9	**Governor:** Appoints 5 members, including at least 2 lawyers **State Bar Association Board of Governors:** Nominates 4 members appointed by the Governor	No	Yes	Yes	No	Yes	No	Fla. Const. art. V, § 11(a) Fla. Stat. § 43.291
Georgia	Interim	Unfixed	**Governor:** Appoints all members of any profession	Yes	No	No	No	Yes	Yes	Exec. Order (Feb. 7, 2019), https://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/document/02.07.19.01.pdf
Hawaii*	Initial and Interim	9	**Governor:** Appoints 2 members, including at least 1 nonlawyer **President of the Senate:** Appoints 2 members of any profession **Speaker of the House:** Appoints 2 members of any profession **Chief Justice:** Appoints 1 member of any profession **Members of the State Bar:** Elect 2 lawyers	No	No	No	No	Yes	No	Haw. Const. art. VI, § 4
Idaho	Interim	7	**Governor:** Appoints 3 nonlawyers **State Bar Association Board of Commissioners:** Appoints 3 lawyers, including one district judge **Chief Justice:** Serves ex officio	No	No	No	Yes	Yes	No	Idaho Code §1-2101
Indiana	Initial and Interim	7	**Governor:** Appoints 3 nonlawyers **Members of the State Bar:** Elect 3 lawyers **Chief Justice:** Serves ex officio, or designates another justice to do so	No	No	No	No	Yes	No	Ind. Const. art. VII, § 9 Ind. Code § 33-27-2 et seq.
Kansas	Initial and Interim	9	**Governor:** Appoints 4 nonlawyers **Members of the State Bar:** Elect 5 lawyers	No	No	No	No	Yes	No	Kan. Const. art. III, § 5(d)-(g) Kan. Stat. Ann. § 20-119 et seq.
Kentucky	Interim	7	**Governor:** Appoints 4 nonlawyers **Members of the State Bar:** Elect 2 lawyers **Chief Justice:** Serves ex officio	No	No	No	Yes	No	No	KY. Const. § 118 Ky. Sup. Ct. R. 6.000, et seq.

Appendix II contd.

Jurisdiction (contd.)	Type of Vacancy	# of Commissioners	Appointing Authority and Commissioner Profession	Requirements for Commissioner Diversity						Citation(s)
				Non-specific	Gender	Racial	Party	Geographic	Professional	
Maryland*	Initial and Interim	17	**Governor:** Appoints 12 members of any profession **State Bar Association President:** Appoints 5 lawyers	No	No	No	No	No	No	Exec. Order No. 01.01.2015.09, 42-4 Md. Reg. 416 (Feb. 20, 2015), http://www.dsd.state.md.us/comar/comarht-ml/01/01.01.2015.09.htm
Massachusetts	Initial and Interim	12	**Governor:** Appoints 12 lawyers	Yes	No	No	No	No	No	Exec. Order No. 566, 1307 Mass. Reg. 3 (Feb. 26, 2016), http://www.mass.gov/courts/docs/lawlib/eo500-599/eo566.pdf
Missouri	Initial and Interim	7	**Governor:** Appoints 3 nonlawyers **Members of the State Bar:** Elect 3 lawyers Supreme Court: Selects 1 of its members	No	No	No	No	Yes	No	Mo. Const. art. V, § 25(a),(d)
Montana	Interim	7	**Governor:** Appoints 4 nonlawyers **Supreme Court:** Appoints 2 lawyers Judges of the District Courts: Elect 1 district court judge	No	No	No	No	Yes	Yes	Mont. Const. art. VII, § 8 Mont. Code Ann. § 3-1-1001 et seq.
Nebraska*	Initial and Interim	9	**Governor:** Appoints 1 justice of the Supreme Court and appoints 4 non-lawyers **Members of the State Bar:** Elect 4 lawyers	No	No	No	Yes	Yes	No	Neb. Const. art. V, § 21(4) Neb. Rev. Stat. § 24-801.01 et seq.
Nevada	Interim	7	**Governor:** Appoints 3 nonlawyers **State Bar Association Board of Governors:** Appoints 3 lawyers **Chief Justice:** Serves ex officio, or designates another justice to do so	No	No	No	Yes	Yes	No	Nev. Const. art. VI, § 20 Nev. Rev. Stat. §§ 1.380-1.410
New Hampshire	Initial and Interim	9-11	**Governor:** Appoints all members of any profession	No	No	No	No	Yes	No	Exec. Order No. 2017-01, 249 N.H. Gov't Reg. 8 (LexisNexis Feb. 2017), http://sos.nh.gov/nhsos_content.aspx?id=8589967037

Appendix II contd.

Jurisdiction (contd.)	Type of Vacancy	# of Commissioners	Appointing Authority and Commissioner Profession	Requirements for Commissioner Diversity						Citation(s)
				Non-specific	Gender	Racial	Party	Geographic	Professional	
New York	Initial and Interim	12	**Governor:** Appoints 2 lawyers and 2 nonlawyers **Chief Judge:** Appoints 2 lawyers and 2 nonlawyers **Speaker of the Assembly:** Appoints 1 member of any profession **Temporary President of the Senate:** Appoints 1 member of any profession **Assembly Minority Leader:** Appoints 1 member of any profession **Senate Minority Leader:** Appoints 1 member of any profession	No	No	No	Yes	No	No	N.Y. Const. art. VI, § 2 N.Y. Jud. Ct. Acts. Law § 61 et seq.
Oklahoma	Initial and interim	15	**Governor:** Appoints 6 nonlawyers **Members of the State Bar:** Elect 6 lawyers **Commission:** Appoints 1 nonlawyer by agreement of at least 8 commission members **Speaker of the House:** Appoints 1 nonlawyer **President Pro Tempore of the Senate:** Appoints 1 nonlawyer	No	No	No	Yes	Yes	No	Okla. Const. art. VII-B, § 3.
Rhode Island*	Initial and Interim	9	**Governor:** Appoints 4 commissioners, including 3 lawyers and 1 nonlawyer **Speaker of the House:** Nominates 1 lawyer appointed by Governor **President of the Senate:** Nominates 1 member of any profession appointed by Governor **Speaker of the House and President of the Senate:** Nominate 1 non-lawyer appointed by Governor **House Minority Leader:** Nominates 1 non-lawyer appointed by Governor **Senate Minority Leader:** Nominates 1 nonlawyer appointed by Governor	No	Yes	Yes	Yes	No	No	R.I. Const. art. X, § 4 R.I. Gen. Laws § 8-16.1-2 et seq.

Appendix II contd.

Jurisdiction (contd.)	Type of Vacancy	# of Commissioners	Appointing Authority and Commissioner Profession	Requirements for Commissioner Diversity						Citation(s)
				Non-specific	Gender	Racial	Party	Geographic	Professional	
South Dakota	Initial and Interim	7	**Governor:** Appoints 2 members of any profession **Judicial Conference:** Elects 2 circuit court judges **State Bar Association Commissioners:** Appoint 3 lawyers	No	No	No	Yes	No	No	S.D. Const. art. V, § 7 S.D. Codified Laws § 16-1A-2 et seq.
Tennessee	Initial and Interim	11	**Governor:** Appoints all 11 members, including at least 8 lawyers	Yes	No	No	No	Yes	No	Exec. Order No. 54 (May 17, 2016), http://share.tn.gov/sos/pub/execorders/exec-orders-haslam54.pdf
Utah*	Initial and Interim	7	**Governor:** Appoints 4 members including at least 2 nonlawyers **State Bar Association:** Nominates 2 lawyers appointed by Governor **Chief Justice:** Appoints 1 member of the Judicial Council	No	No	No	Yes	No	No	Utah Const. art. VIII, § 8 Utah Code Ann. § 78A-10-201 et seq.
Vermont	Initial and Interim	11	**Governor:** Appoints 2 nonlawyers **Senate:** Elects 3 of its own members, including at least 2 nonlawyers **House:** Elects 3 of its own members, including at least 2 nonlawyers **Members of the State Bar:** Elect 3 lawyers	No	No	No	Yes	Yes	No	Vt. Const. ch. II, §§ 32-33 Vt. Stat. Ann. tit. 4, § 601 Vt. Sup. Ct. Admin. Order 1
West Virginia*	Interim	11	**Governor:** Appoints 4 nonlawyers, and Governor (or designee) serves ex officio **State Bar Association Board of Governors:** Nominates 4 lawyers appointed by Governor **State Bar Association President:** Serves ex officio **Dean of West Virginia University College of Law:** Serves ex officio	No	No	No	Yes	Yes	No	W. Va. Code § 3-10-3a

Appendix II contd.

Jurisdiction (contd.)	Type of Vacancy	# of Commissioners	Appointing Authority and Commissioner Profession	Requirements for Commissioner Diversity						Citation(s)
				Non-specific	Gender	Racial	Party	Geographic	Professional	
Wisconsin	Interim	Unfixed	**Governor:** Appoints all members of any profession	No	No	No	No	No	No	Exec. Order No. 29, 665 Wis. Admin. Reg. 26 (May 31, 2011), https://walker.wi.gov/sites/default/files/executive-orders/EO_2011_29.pdf (reestablished by Exec. Order No. 6 (2019))
Wyoming	Initial and Interim	7	**Governor:** Appoints 3 nonlawyers **Members of the State Bar:** Elect 3 lawyers **Chief Justice:** Serves ex officio or designates another Justice to do so	No	No	No	No	Yes	No	Wyo. Const. art. V, § 4 Wyo. Stat. Ann. § 5-1-102

Appendix II contd.

Notes:	
Delaware	Bar appointees need not be lawyers by law, but the bar traditionally appoints lawyer commissioners.
Florida	Governor appoints the bar's nominees from 4 separate lists of 3 nominees provided by the bar. The governor may reject the bar's nominees and request new lists.
Hawaii	Overall no more than 4 members may be lawyers.
Iowa	Bar appointees need not be lawyers by law, but the bar traditionally appoints lawyer commissioners. Governors formerly appointed nonlawyers by tradition, but Iowa's current governor has departed from that practice.
Maryland	Bar appointees need not be lawyers by law, but the bar traditionally appoints lawyer commissioners.
Nebraska	There is a different commission for each of the seven seats on the Nebraska Supreme Court. There are 9 commissioners on each commission, but 63 commissioners total.
New Mexico	If the first 14 members are not balanced by political party, the State Bar Association President and judges on the commission will appoint additional lawyer members as necessary to achieve partisan balance.
Rhode Island	Governor appoints the Speaker of the House's nominee from a list of 3 lawyers, the President of the Senate's nominee from a list of 3 people of any profession, the Speaker of the House and President of the Senate's joint nominee from a list of 4 nonlawyers, the House Minority Leader's nominee from a list of 3 nonlawyers, and the Senate Minority Leader's nominee from a list of 3 nonlawyers.
Utah	Governor appoints the bar's nominees from a list of 6 nominees provided by the bar. Bar appointees need not be lawyers by law, but the bar traditionally appoints lawyer commissioners. The governor may reject the bar's nominees and request a new list.
West Virginia	Governor appoints the bar's nominees from a list of 10-20 nominees provided by the bar.

Endnotes

1 Alicia Bannon, *Choosing State Judges: A Plan for Reform*, Brennan Center for Justice, 2018, https://www.brennancenter.org/publication/choosing-state-judges-plan-reform.

2 See "Judicial Selection: An Interactive Map," Brennan Center for Justice, accessed June 27, 2017, http://judicialselectionmap.brennancenter.org. This figure includes states that use commissions to make interim appointments when an otherwise-elected seat becomes vacant in the middle of a judge's term. Interim appointments are very common. One recent study by the Brennan Center found that, in the 22 states that elect high court judges, nearly half of the sitting justices had been initially appointed. Kate Berry and Cathleen Lisk, *Appointed and Advantaged: How Interim Appointments Shape State Courts*, Brennan Center for Justice, 2017, https://www.brennancenter.org/sites/default/files/analysis/Appointed_and_Advantaged_How_Interim_Appointments_Shape_State_Courts_0.pdf.

3 New Mexico uses a commission to fill all vacancies but appoints a commission only when a vacancy arises. For this reason, we were unable to analyze a Judicial Nominating Commission for New Mexico's Supreme Court. E-mail from New Mexico Judicial Selection Office (August 12, 2016) (on file with author). All nominating commissioners analyzed were serving in September 2016.

4 *See* Malia Reddick and Rebecca Love Kourlis, *Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices*, Institute for the Advancement of the American Legal System, 2014, http://iaals.du.edu/sites/default/files/documents/publications/choosing_judges_jnc_report.pdf. Several states do not mandate the size of their commissions. *See* Appendix II.

5 *See* Reddick and Kourlis, *Choosing Judges*, 7.

6 *See* Reddick and Kourlis, *Choosing Judges*, 6.

7 *See, e.g.*, Executive Office of the Governor, "Florida Judicial Nominating Commissioner 2015 Manual," http://www.flgov.com/wp-content/uploads/pdfs/2015_JNC_Manual.pdf.

8 *See* Rachel Paine Caufield, *Inside Merit Selection*, American Judicature Society, 2011, 21-24, http://www.judicialselection.com/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pdfAJS.

9 *See* Reddick and Kourlis, *Choosing Judges*, 6; S.C. Const. art. V, § 27.

10 *See* Reddick and Kourlis, *Choosing Judges*, 6.

11 Georgia, Maine, Maryland, Massachusetts, and Wisconsin. In other states, the governor can request that the commission provide additional names not on the initial list. *See, e.g.*, State of New Mexico, Rules Governing Judicial Nominating Commissions, § 11, http://lawschool.unm.edu/judsel/process/rulesgoverningjudicialnominatingcommissions0711.pdf.

12 Several states take action by something other than a majority vote. *See, e.g.*, CONN. GEN. STAT. § 51-44a(i) (Connecticut requires a majority plus one to recommend a candidate to the governor); Executive Office of the Governor, "Florida Judicial Nominating Commissioner 2015 Manual," Florida Supreme Court Judicial Nominating Commission Rules of Procedure, § 7, http://www.flgov.com/wp-content/uploads/pdfs/2015_JNC_Manual.pdf (giving commissioners multiple votes and recommending the applicants receiving the greatest number of votes).

13 Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming. For citations, see Appendix II. While Tennessee voters recently removed the nominating commission from the state constitution, the governor has since readopted it via executive order. *See* Tenn. Exec. Order No. 54 (May 17, 2016). State officials and advocates have given a handful of explanations for the adoption of nominating commissions, with the three most common being to insulate courts from politics, to make them more independent from other branches of government, and to improve the legal and administrative abilities of judges. *See* Jed Handelsman Shugerman, The People's Courts (Cambridge: Harvard University Press, 2012), 200, 211, 216, 232; *see* also Reddick and Kourlis, *Choosing Judges*, 4-5. Still, many governors adopting nominating commissions voluntarily by executive order have stated that the commission's task is merely to assist the governor in identifying qualified candidates. *See*, e.g., Wisc. Exec. Order No. 29, 665 Wis. Admin. Reg. 26 (May 11, 2011) ("the Governor will benefit from the advice of a Committee composed of distinguished members of Wisconsin's legal community who are committed to finding and recommending only the highest caliber individuals who share a commitment to the rule of law."). For a thorough history of the adoption of merit selection in particular, including the less public goals of stemming the electoral power of organized labor and communities of color, *see* generally Shugerman, *The People's Courts*, 208-240.

14 *See* Alicia Bannon, Rethinking Judicial Selection in State Courts, Brennan Center for Justice, 2016, 4, https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf.

15 Delaware, Maine, Maryland, Massachusetts, and New Hampshire.

16 Connecticut, District of Columbia, Hawaii, New Mexico, New York, Rhode Island, South Carolina, and Vermont.

17 Georgia, Idaho, Kentucky, Montana, Nevada, North Dakota, West Virginia, and Wisconsin.

18 State bars select commissioners in different ways. In some cases, attorneys in the state elect commissioners, while in others the bar association's leadership selects commissioners directly. *Compare S.D. Codified Laws § 16-1A-2 (the state bar's commissioners appoint three lawyers) with* MO. CONST. ART. V, § 25(d) (attorneys admitted to the state bar elect a lawyer from each of the state's court of appeals districts).

19 *See, e.g.*, COLO. CONST. ART. VI, § 24(4); OKLA. CONST. ART. VII-B, § 3.

20 D.C. Code § 1-204.34(b)(4)(A).

21 Richard A. Watson and Rondal G. Downing, *The Politics of the Bench and the Bar* (New York: John Wiley and Sons, Inc., 1969), 48, 186-87.

22 Mike Wiser, "Iowa Gov. Branstad Taps Big Donors for Judicial Nominating Slots," *Sioux City Journal*, January 27, 2013, http://siouxcityjournal.com/news/state-and-regional/iowa/iowa-gov-branstad-taps-big-donors-for-judicial-nominating-slots/article_e4bf4d59-a4de-5933-a9ac-e76a06859864.html; Erin Jordan, "Branstad Names No Democrats to Pick Iowa Judges," *The Gazette*, November 27, 2016, http://www.thegazette.com/subject/news/politics/election/iowa-statehouse/branstad-names-no-democrats-to-pick-iowa-judges-20161127; David Pitt, "Reynolds Appoints Campaign Donor to Judicial Commission," *Associated Press*, May 10, 2019, https://www.apnews.com/80b8faf3e7ac432181cc611fe6ba7798; Marc Caputo and Jay Weaver, "Mystery Man in Rick Scott Attack Ad Unveiled, Misleads About Charlie Crist and Ponzi Scheme," *Miami Herald*, September 16, 2014, http://www.miamiherald.com/news/politics-government/state-politics/article2128861.html.

23 American Judicature Society, Hawai'i Chapter, Special Committee on Judicial Independence and Accountability, *Report to the Board of Directors of the Hawai'i Chapter of the American Judicature Society*, 2008, 10, http://www.ajshawaii.org/assets/judicial_independence__accountability.pdf ("the composition of the JSC is one of its greatest strengths, with appointees from each branch of government and the bar, acting as checks and balances to any real or perceived bias that might result from lesser diversity.").

24 In one of those 14 states, Nebraska, the Supreme Court justice

is a nonvoting member, and thus the governor appoints a majority of commissioners, but not a voting majority. NEB. CONST. ART. V, § 21(4). This loss, however, is balanced out by Colorado, where, because the chief justice of the Supreme Court is also a nonvoting member, the governor appoints a voting majority of commissioners despite not appointing an absolute majority. COLO. CONST. ART. VI, § 24.

25 *See* Appendix II.

26 Ibid.

27 *See* Brian T. Fitzpatrick, "The Politics of Merit Selection," *Missouri Law Review* 74 (2009): 690.

28 Indeed, surveys of nominating commissioners suggest that, for better or worse, the proportion of lay and attorney members on a commission may alter a commission's determinations. Surveys have repeatedly found that attorney and lay commissioners place different weight on particular applicant characteristics, including political views, prior judicial experience, and the applicants' "common sense." *See* Watson and Downing, *The Politics of the Bench and the Bar*, 186 (some respondents reported that lay members placed increased value on "common sense," while others reported that lay members were too focused on politics); Caufield, *Inside Merit Selection*, 24, 30 (finding that non-attorney commissioners had different views regarding the importance of prior judicial experience and the value of input from the public and attorney colleagues). And, according to a 2011 survey, nonlawyer commissioners were less likely to view the commission as a check on the governor's power and more likely to report that the commission nominates judges "that represent the governor's (or other appointing authority's) views." Ibid., 39-41. *See also* Watson and Downing, *The Politics of the Bench and the Bar*, 187 (some respondents reporting that lay commissioners' lack of legal knowledge makes them more likely to adhere to the wishes of the official who appointed them to the commission).

29 *See* Appendix I; *see also* Fitzpatrick, "The Politics of Merit Selection," 680. Moreover, in one of those states, Nebraska, the lawyer commissioner providing lawyers a simple majority is a nonvoting chairperson. NEB. CONST. ART. V, § 21(4).

30 Connecticut, Colorado, and North Dakota. In Colorado, nonlawyers hold a voting majority because the chief justice of the Supreme Court is a nonvoting member. COLO. CONST. ART. VI, § 24.

31 Arizona, Hawaii, Kentucky, Montana, Oklahoma, and Vermont.

32 Data on file with authors for nine states. For Wisconsin, *see* Eric Litke, "Party Politics Color Governor's Judicial Picks," *Green Bay Press-Gazette*, January 29, 2016, http://www.greenbaypress-gazette.com/story/news/2016/01/29/wisconsin-judicial-appointments--partisanship-walker-doyle/79509122/. The two states in which commissioners are exclusively lawyers despite the governor's discretion are Maine and Georgia.

33 *See* Steve Bousquet, "Gov. Rick Scott Often Rejects Florida Bar's Lists of Lawyers to Nominate Judges," *Tampa Bay Times*, October 29, 2013, https://www.tampabay.com/news/politics/gubernatorial/gov-rick-scott-often-rejects-florida-bars-lists-of-lawyers-to-nominate/2149521.

34 Twelve states also prohibit political party officials from serving on a nominating commission. *See* COLO. CONST. art. VI, § 24(4); CONN. GEN. STAT. § 51-44a(a); HAW. CONST. art. VI, § 4; IND. CONST. art. VII, § 9; KAN. CONST. art. III, § 5(g); KY. CONST. § 118(2); MD. EXEC. ORDER NO. 01.01.2015.09(B)(1)(e), 42-4 MD. REG. 416 (FEB. 20, 2015); MO. CONST. art. V, § 25(d); N.Y. CONST. art. VI, § 2(d)(1); OKLA. CONST. art. VII-B, § 3(f); R.I. GEN. LAWS § 8-16.1-2; Tenn. Exec. Order No. 54(2)(n) (May 17, 2016).

35 *See, e.g.*, ALASKA CONST. art. IV, § 8 ("Appointments shall be made with due consideration to area representation"); CONN. GEN. STAT. § 51-44a(b) ("The Governor shall appoint six members, one from each congressional district and one at-large member"); ARIZ. CONST. art. VI, § 36 ("not more than two attorney members shall be residents of any one county").

36 *See also* Leo M. Romero, *"Enhancing Diversity in an Appointive System of Selecting Judges,"* Fordham Urban Law Journal 34 (2007): 487-490.

37 There may be obstacles to states going much further in requiring diversity on their commissions. Florida previously required that one-third of commissioners be women or racial or ethnic minorities, but a federal district court found those rigid quotas violated the equal protection clause of the Fourteenth Amendment. Mallory v. Harkness, 895 F. Supp. 1556 (S.D. Fla. 1995); *see also* Back v. Carter, 933 F. Supp. 738, 746 (N.D. Ind. 1996) (enjoining Indiana's race and gender quotas for commissioners). Iowa is the only state that currently provides a numerical requirement with respect to commissioner diversity. *See* Iowa Code § 46.1. ("No more than a simple majority of the members appointed shall be of the same gender"). Florida originally adopted its quota to improve commissions' abilities to recruit minority applicants, recommend minority judges to the governor, and improve the administration of justice in the state. See Deborah Hardin Wagner, ed., *Where the Injured Fly for Justice: Reforming Practices Which Impede the Dispensation of Justice to Minorities in Florida*, Florida Supreme Court, 1990, Executive Summary 4, http://www.flcourts.org/core/fileparse.php/243/urlt/bias_study-part2.pdf.

38 Del. Exec. Order No. 7, 246 Del Gov't Reg. 12 (March 9, 2017).

39 FLA. STAT. ANN. § 43.291(4).

40 N.M. CONST. ART. VI, § 35.

41 TENN. CODE ANN. § 17-4-102 (2008); TENN. CODE ANN. § 17-4-102 (2009).

42 Ga. Exec. Order (Feb. 7 2019).

43 MONT. CODE ANN. § 3-1-1001(a).

44 *See* Caufield, *Inside Merit Selection*, 17. That was a modest increase in diversity from a 1990 survey that found 93 percent of commissioners identified as white and 75 percent as men. Ibid.

45 Caufield, *Inside Merit Selection*, 15. Commissioners did not respond in sufficient numbers to that survey's questions seeking greater detail about their practice. Ibid., 15 n. 30.

46 Caufield, *Inside Merit Selection*, 15. Of those nonlawyer commissioners employed at the time, 18 percent reported that they worked in education, and the remainder reported employment distributed across 10 broad categories. Ibid., 16.

47 Plaintiffs' lawyers — attorneys that represent plaintiffs in personal injury, workers compensation, medical malpractice, and similar civil lawsuits — are the subset of lawyers that have attracted the most attention in academic critiques of nominating commissions as having undue influence over, and a significant economic stake in, commission decisions. *See, e.g.*, Fitzpatrick, "The Politics of Merit Selection," 686; *see also* Dan Pero, "Merit Selection of Judges Can Be Political, Too," *PennLive*, June 25, 2012, http://www.pennlive.com/editorials/index.ssf/2012/06/merit_selection_of_judges_can.html (alleging that trial lawyers altered the outcome of a judicial nomination in Missouri). But other groups of both lawyers and nonlawyers may also have self-interested preferences — prosecutors, defense attorneys, corporate lawyers, and others may associate certain qualities in a judicial applicant with better outcomes for them or their clients. *See* Michael R. Dimino, Sr., "The Worst Way of Selecting Judges Except All the Others That Have Been Tried," *Northern Kentucky Law Review* 32 (2005): 299.

48 *See* Iona M. Latu, Marianne Schmid Mast, and Tracie L. Stewart, "Gender Biases in (Inter) Action," Psychology of Women Quarterly 39 (2015) (finding implicit stereotypes, held by both the interviewer and the applicant, negatively affect outcomes for women applicants in mixed-gender job interviews).

49 "Court Statistics Project Introduction," National Center for State Courts, http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro, accessed June 27, 2017 (select "Total Appeals," "Appeals by Case Category by Court Type," and "Court of Last Resort").

50 The fourth state, South Carolina, requires legislators to serve on the commission; thus a majority of South Carolina's lawyer commissioners also share the profession of legislator.

51 Arizona, Connecticut, Kansas, Maryland, and New York.

52 Arizona, Connecticut, Hawaii, Maryland, New York, Oklahoma, South Carolina, Iowa, Vermont, and Nebraska.

53 N.M. CONST. ART. VI, § 35. Data regarding the lower court nominating commissioners on file with author.

54 Colorado, Maine, Utah, Nebraska, and Massachusetts.

55 Ga. Exec. Order (Feb. 7, 2019).

56 Mont. Code Ann. § 3-1-1001(1)(a).

57 Because only a small number of non-attorney commissioners are appointed by an entity other than the governor, any comparisons between gubernatorial appointees and others would not yield reliable findings.

58 Data on file with author.

59 See "American Association for Justice: Summary," Open Secrets, Center for Responsive Politics, accessed July 27, 2017, https://www.opensecrets.org/orgs/summary.php?id=D000000065&cycle=2016. For the last six election cycles, the American Association for Justice, formerly the Association of Trial Lawyers of America, has contributed more than 10 times as much to Democrats as it has to Republicans. See *also* Mike Wiser, "Iowa Gov. Branstad Taps Big Donors For Judicial Nominating Slots," *Sioux City Journal*, January 27, 2013, http://siouxcityjournal.com/news/state-and-regional/iowa/iowa-gov-branstad-taps-big-donors-for-judicial-nominating-slots/article_e4bf4d59-a4de-5933-a9ac-e76a06859864.html; Erin Jordan, "Branstad Names No Democrats to Pick Iowa Judges," The Gazette, November 27, 2016, http://www.thegazette.com/subject/news/politics/election/iowa-statehouse/branstad-names-no-democrats-to-pick-iowa-judges-20161127.

60 Five nonlawyer commissioners are also lobbyists, and governors appointed four of those commissioners, though governors appoint far more nonlawyer commissioners than any other authority.

61 See Ciara Torres-Spelliscy, Monique Chase, and Emma Greenman, *Improving Judicial Diversity,* Brennan Center for Justice, 2010, 30-31, http://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf; see *also* Yuvraj Joshi, *Diversity Counts, Lambda Legal and American Constitution Society*, 2017, 24-33, https://www.lambdalegal.org/diversity-counts (describing best practices for collecting data on judicial diversity).

62 See Watson and Downing, *The Politics of the Bench and the Bar*, 108 (explaining that governors will make their preferred candidates known to commissioners).

63 New Mexico names commissioners only when a vacancy arises. E-mail from New Mexico Judicial Selection Office (August 12, 2016) (on file with author).

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Text

[*729]

I. Introduction

As one judicial selection scholar noted, "It is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past 50 years as the subject of judicial selection." [1] Central to the judicial selection debate is the appropriate balance between judicial independence and judicial accountability. Generally, judicial independence refers to the common law tradition of a judiciary that is institutionally immune from outside political pressures in the resolution of individual cases, whereas judicial accountability comports with democratic principles and allows the judiciary to be responsive to changes in public opinion. Lifetime appointment systems are said to ensure judicial independence; popular elections at frequent intervals are favored by those who value judicial accountability.

The so-called "merit plan" for selecting judges was introduced in the 1930s as a means of promoting both independence and accountability. Merit selection calls for gubernatorial appointment of judges from a list of names submitted by an independent nominating commission. After a brief period in office, judges run in retention elections where only one question is posed to voters--should the judge be retained in office. In addition to balancing judicial independence and accountability, merit selection systems are said to produce highly qualified judges, since candidates are screened by nonpartisan commissions.

[*730] A large body of social scientific research has developed that seeks to evaluate the claims made by proponents of merit selection. Specifically, researchers have examined the extent to which nominating commissions insulate judicial selection from the political process, whether retention elections make judges accountable to the public, and whether merit-selected judges are distinguishable from judges selected through other means. I consider

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[1] Philip L. Dubois, Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections, 40 Sw. L.J. 31, 31 (1986).

that research here, summarizing the qualitative and quantitative studies that have attempted to measure the actual effects of merit selection of judges. [2]

This review takes three parts. In the first two, I consider the key features of merit selection systems--judicial nominating commissions and retention elections. In the third part, I compare the products of merit systems--the judges themselves--to the products of other selection systems.

II. Judicial Nominating Commissions

Allan Ashman and James Alfini describe judicial nominating commissions as "the cornerstone of the merit selection plan." [3] Empirical research has focused on two aspects of judicial nominating commissions: the extent to which commission members and their nominees reflect the diversity of the larger community and the role of politics in the nominating process.

A. Diversity and Judicial Nominating Commissions

Because the composition of judicial nominating commissions may affect who the nominees will ultimately be, three major studies have explored the gender and racial diversity of these commissions. In 1973, Allan Ashman and James Alfini surveyed members of nominating commissions in thirteen states. [4] Beth Henschen, Robert Moog, and Steven Davis conducted a similar survey of nominating commissioners in thirty-four states in 1989. [5] The most recent study of the racial and gender makeup of nominating commissions was conducted by Kevin **[*731]** Esterling and Seth Andersen, who gathered demographic information on nominating commissioners in eight states in the 1990s. [6]

In the first major study, Ashman and Alfini found that nominating commissioners were overwhelmingly white and male. More specifically, nominating commissioners were 97.8 percent white and 89.6 percent male. [7] This study also compared the characteristics of lawyer and non-lawyer commissioners. Only two of 194 lawyer members were non-white, and only one was a woman. [8] Of the 153 lay members, 3.3 percent were non-white, and 22.3 percent were women. [9]

Sixteen years later, Henschen, Moog and Davis reported notable gains in the representation of women on judicial nominating commissions. [10] Twenty-five percent of commissioner respondents were women, and the percentage of women among attorney commissioners had increased to 10 percent. [11] This study showed only slight increases

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[2] The reader will note that much of the empirical research on merit selection systems was conducted in the late 1970s and early 1980s. The reason for this is that fourteen states had adopted merit plans by the end of the 1970s, so that assessing the effects of merit selection was particularly relevant during this time. See Henry R. Glick & Craig F. Emmert, Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges, 70 Judicature 228 (1987).

[3] Allan Ashman & James J. Alfini, The Key to Judicial Merit Selection: The Nominating Process 22 (1974).

[4] Id.

[5] Beth M. Henschen et al., Judicial Nominating Commissioners: A National Profile, 73 Judicature 328, 334 (1990).

[6] Kevin M. Esterling & Seth S. Andersen, Diversity and the Judicial Merit Selection Process: A Statistical Report, in Research on Judicial Selection 1999 (Am. Judicature Soc'y ed., 1999).

[7] Ashman & Alfini, supra note 3, at 38.

[8] Id. at 38-39.

[9] Id.

[10] Henschen et al., supra note 5, at 330.

[11] Id.

in the proportion of minority commissioners, with 7 percent of commissioners being non-white. [12] As in the Ashman and Alfini study, there were fewer minorities among lawyer members, 5 percent, than lay members, 14 percent. [13] The Henschen study also reported significant variation in the racial and gender composition of nominating commissions across states. [14] This variation was later confirmed in the data collected by Esterling and Andersen. [15] States with a significant proportion of Hispanic commissioners included New Mexico, at 30.9 percent, and Arizona, at 25.8 percent, while states with substantial African-American representation were Tennessee, at 20 percent, and Florida, at 18.1 percent. [16] The extent of gender diversity on these commissions ranged from 22 percent in Alabama to nearly 47 percent in Tennessee. [17]

Esterling and Andersen examined the effects of gender and racial diversity within nominating commissions on the gender and racial diversity of applicants and nominees. In the five states for which data was available, there was some evidence that diverse commissions **[*732]** attracted more diverse applicants and selected more diverse nominees. [18]

B. Politics and Other External Influences in the Nominating Process

1. Politics

Nominating commissions represent an attempt to reduce or eliminate the influence of partisan politics in the selection of judges. The Ashman and Alfini study summarized state efforts to insulate nominating commissions from political pressures. [19] Some states require the appointing authority to make commission appointments without regard to political affiliation. [20] Other states mandate partisan balance among commission members and restrict the political activities of sitting commissioners. [21] Many states also limit the number of consecutive terms that commissioners may serve and preclude commissioners' eligibility for judicial office for a period of time after their service. [22]

A substantial body of research exists on the extent to which politics plays a role in the selection of members of nominating commissions and the decisions that they make. The most comprehensive study in this regard is the Richard A. Watson and Randal C. Downing study of the Missouri Non-Partisan Court Plan. [23] According to this study, political influences were present in the selection of both lawyer and lay commissioners. [24] Lawyer commissioners were elected in a competitive "two party" system, where plaintiffs' lawyers and defendants' lawyers each sought to elect like-minded colleagues to the nominating commissions and thus to promote the selection of

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[12] Id. at 329.

[13] Id. at 330.

[14] Id.

[15] Esterling & Anderson, supra note 6, at 24-25.

[16] Id. at 24.

[17] Id. at 25.

[18] Id. at 24-28.

[19] Ashman & Alfini, supra note 3, at 70-79.

[20] Id. at 72.

[21] Id. at 72-73.

[22] Id. at 73.

[23] Richard A. Watson & Rondal G. Downing, The Politics Of Bench And Bar (1969).

[24] Id. at 19-48.

judges who would protect their clients' interests. [25] Politics also figured in the appointment of lay commissioners, who tended to be from the same political party as the governor. [26]

The Henschen study discovered extensive political activity among nominating commissioners prior to their selection. Two-thirds of the commissioners belonged to civic organizations, more than one-fourth served in a party office, and nearly one-third held public office. [27] Lay **[*733]** commissioners were particularly active, with 33 percent having served in a party office and 24 percent having held public office. [28] According to Henschen, the extent of political involvement among commissioners "raised the somewhat troubling spectre of political favoritism." [29]

Watson and Downing also presented evidence of political influences in the selection of nominees by the commissions. [30] Their study documented various forms of "panel stacking" and "logrolling." "Panelstacking" occurs when a commission submits a combination of nominees to the governor that offers no real choice. [31] "Logrolling" describes a situation in which individual commissioners or groups of commissioners agree to support one another's nominees. [32]

Studies have shown that politics not only plays a role in the selection of commissioners but also in their deliberations. Two studies have gauged the opinions of nominating commission members regarding the role of politics in their deliberations. Ashman and Alfini reported that approximately one-third of the commissioners surveyed believed that political considerations were introduced in their deliberations and that they had at least some influence on their decisions. [33] The commissioner responses from four states, accounting for over 75 percent of the respondents, revealed an interesting distinction. In Colorado, where commissions must be bipartisan, only 15 percent of respondents felt that politics affected their decisions. [34] In Iowa, Florida, and Maryland, where partisan balance is not required, between 37 percent and 41 percent of respondents believed that political considerations influenced their decisions. [35]

In another study, Joanne Martin questioned the chairs of nominating commissions in thirty-four states and the District of Columbia. [36] Slightly more than half indicated that political considerations entered into their deliberations at least "infrequently" and that they were of at least "some importance." [37]

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[25] Id. at 20-43.

[26] Id. at 43-48.

[27] Henschen et al., supra note 5, at 331-32.

[28] Id. at 332. These findings regarding lay commissioners contrast with those of Watson and Downing, who reported that lay commissioners participated heavily in civic and social organizations but were not involved in political activities. See Watson & Downing, supra note 23, 44-45.

[29] Henschen et al., supra note 5, at 334.

[30] Watson & Downing, supra note 23, at 101-11.

[31] Id. at 107-08.

[32] Id. at 109-11.

[33] Ashman & Alfini, supra note 3, at 75.

[34] Id. at 76-77.

[35] Id.

[36] Joanne Martin, Merit Selection Commissions: What Do They Do? How Effective Are They? (1993).

[37] Id. at 20-22.

2. Other External Influences

Researchers have explored other external influences on the nominating process, including bar associations. Many of the attorneys interviewed for Watson and Downing's study of the Missouri Non-partisan Court Plan indicated that the Plan "had not eliminated "politics' but merely had substituted Bar politics and gubernatorial politics for the traditional politics of party leaders and machines." [38] Ashman and Alfini examined a variety of ways in which bar associations may influence the composition and deliberations of judicial nominating commissions and suggested that this was a fruitful avenue for further research. [39]

In 1990, Charles Sheldon surveyed leaders of state bar associations regarding their organizations' involvement in judicial selection. [40] In states where the bar elects lawyer members of judicial nominating commissions, the bar leadership appoints lawyer commission members, or the bar nominates or recommends lawyers to the governor to be appointed to nominating commissions, state bar leaders believed that the bar was, at a minimum, fairly effective in influencing judicial selection. [41] Bar leaders were less enthusiastic about bar efforts to affect judicial elections, including committee recommendations to the public and bar polls. [42]

III. Retention Elections

Retention elections were introduced as a compromise between those who wanted to insulate the judiciary from political pressures and those who wanted the judiciary to remain responsive to public concerns. Empirical studies of judicial retention elections have explored determinants of voter behavior in retention elections, the effectiveness of efforts to inform voters about the performance of judges standing for retention, and the extent to which retention elections ensure judicial accountability.

A. Voting Behavior in Retention Elections

Much of the research on judicial retention elections has been conducted by Larry T. Aspin and William K. Hall, who have collected **[*735]** and examined data on retention elections in ten states between 1964 and 1998. Between 1964 and 1998, only fifty-two of 4,588 candidates in judicial retention elections were not retained by voters. [43] The average affirmative vote has ranged from a high of 84.7 percent in 1964 to a low of 69.4 percent in 1990. [44] Hall and Aspin attributed variations in affirmative vote rates over time at least in part to changes in levels of political trust. [45]

Researchers have also explored other influences on voter decisions in judicial retention elections. A recent study of voter behavior in judicial elections demonstrated that retention elections are not immune from partisan politics and other contextual forces. [46] In states characterized by competitive party politics, supreme court justices received

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[38] Watson & Downing, supra note 23, at 258.

[39] Ashman & Alfini, supra note 3, at 79-85.

[40] Charles H. Sheldon, The Role of State Bar Associations in Judicial Selection, 77 Judicature 300 (1994).

[41] Id. at 301-02.

[42] Id. at 302-03. Interestingly, bar polls in partisan elections were rated as more effective than those in nonpartisan elections.

[43] Larry Aspin, Trends in Judicial Retention Elections, 1964-1998, 83 Judicature 79, 79 (1999).

[44] Id. at 80.

[45] Id. at 79; see also William K. Hall & Larry T. Aspin, What Twenty Years of Judicial Retention Election Have Told Us, 70 Judicature 340 (1987) [hereinafter Hall]; Larry T. Aspin & William K. Hall, Political Trust and Judicial Retention Elections, 9 L. & Pol'y 451 (1987).

[46] Melinda Gann Hall, State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform, 95 Am. Pol. Sci. Rev. 315 (2001).

fewer votes in favor of retention. In states where the murder rates decreased, affirmative votes declined, [47] suggesting that voters held accountable justices who were up for retention.

There is also some evidence that voters fail to differentiate among judges on the same ballot. For example, judges in the same district received very similar proportions of affirmative votes. [48] In addition, voters within a judge's home county tend to take stronger positions on the judge, either for or against, than do non-home county voters. [49] Voters are also slightly more likely to vote to retain a judge in presidential election years than in non-presidential election years. [50]

One factor that does not appear to be correlated with voter decisions in retention elections is the race of the judge. A study of retention elections between 1980 and 1990 found that there were only slight differences in the proportion of affirmative votes received by white, black, and Hispanic judges. [51]

Voter rolloff in judicial retention elections, or voters who cast **[*736]** ballots in other electoral contests but do not vote in retention elections, has declined over the years and reached an all-time low of 29.5 percent in 1998. [52] While rolloff is not affected by whether it is a presidential election year, there is less voter rolloff in close retention elections, defined as elections where the judge receives less than a 60 percent affirmative vote, than in non-close elections. [53] Other studies have shown that voter rolloff in retention elections for judges of major trial courts is positively related to the size of judicial districts; as the size of the district increases, so does the number of voters who do not participate in retention elections. [54]

B. Bar Polls and Other Judicial Evaluation Programs

1. Bar Polls

Bar associations, which are active in the initial selection of judges in many merit plan states, may also play a role in judicial retention. Many state and local bar associations have developed polls and other evaluation techniques to assess the performance of judges seeking retention. Studies of the effectiveness of bar association activities in informing voters, and of the influence of poll results on voter decisions, have reached mixed conclusions.

Some researchers have examined the extent to which voters are aware of bar evaluations of judicial candidates. Kenyon N. Griffin and Michael J. Horan reported that only 12.8 percent of voters in Wyoming's 1978 judicial retention elections had any knowledge of the state bar's poll. [55] Similarly, a study of bar evaluations of judicial candidates in Texas revealed that fewer than 8 percent of voters had received information from any legal source. [56] Contrary evidence is provided by Joel H. Goldstein, who found that voters in a 1977 Kentucky judicial primary

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[47] Id. at 324.

[48] See Hall, supra note 45, at 346; Aspin, supra note 43, at 81.

[49] See Larry T. Aspin & William K. Hall, The Friends and Neighbors Effect in Judicial Retention Elections, 40 W. Pol. Q. 703 (1986); see also Hall, supra note 45, at 346.

[50] Hall, supra note 45, at 344.

[51] Robert C. Luskin et al., How Minority Judges Fare in Retention Elections, 77 Judicature 316 (1994).

[52] Aspin, supra note 43, at 81.

[53] William K. Hall & Larry T. Aspin, The Roll-Off Effect in Judicial Retention Elections, 24 Soc. Sci. J. 415, 422-23 (1987) [hereinafter Hall, Roll-Off].

[54] See Hall, supra note 45, at 347; Hall, Roll-Off, supra note 53, at 420-21.

[55] Kenyon N. Griffin & Michael J. Horan, Merit Retention Elections: What Influences the Voters?, 63 Judicature 78, 85 (1979).

[56] Charles A. Johnson et al., The Salience of Judicial Candidates and Elections, 59 Soc. Sci. Q. 371, 377 (1978).

election ranked a bar poll as second only to "personal knowledge" in terms of importance as a source of information. [57]

Other studies have examined the influence of bar-sponsored evaluation programs on voter decisions in judicial retention elections. **[*737]** John Scheb found no evidence that the Florida Bar Advisory Preference Polls conducted in 1978, 1980, and 1982 had a significant impact on voter decisions. [58] William Hall, however, concluded that "bar evaluations of sitting jurists do affect the outcomes of retention elections" in Illinois; [59] in judicial retention elections from 1964 to 1982, nearly every negative bar evaluation resulted in a lower mean affirmative vote for the judge being evaluated. [60]

James H. Guterman and Errol E. Meidinger suggested that the absence of a relationship between poll results and voting behavior may be due to the way the results are disseminated. [61] They described two models of bar association activities with respect to communicating the results and recommendations of bar polls. Taking a "public service approach," bar associations simply provide poll results to the media and the public. [62] Using a "special interest approach," bar associations try to secure a particular result. [63] Guterman and Meidinger identified only four bar associations of the fifty they studied who actively campaigned on behalf of candidates they favored, providing advertising and funding. [64]

Studies of the influence of bar polls on the outcomes of the 1976 and 1978 retention elections in Maricopa County, Arizona, seem to bear out the Guterman and Meidinger hypothesis. William Jenkins noted that, in Maricopa County's 1976 retention elections, the three judges with the lowest bar ratings were retained by voters by substantial margins, suggesting that voters were either unaware of or unconcerned about bar poll results. [65] John A. Stookey and George Watson, however, reported that the Maricopa County Bar Association's 1978 poll increased voter awareness of judges on the ballot and even "influenced some voters to oppose the retention of some judges." [66] Stookey and Watson noted that the Maricopa County Bar released its 1976 poll results without recommendations or follow-up activity, while, in 1978, the Bar actively campaigned against the three judges who had received low ratings, using **[*738]** paid newspaper advertisements, printed material that was distributed to the public, and a speakers' bureau discussing the poll and its recommendations. [67]

2. Other Judicial Evaluation

Six states that utilize merit selection to fill both initial and interim vacancies have established official, state-sponsored, judicial performance evaluation programs to provide voters with objective information on the

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[57] Joel H. Goldstein, Bar Poll Ratings as the Leading Influence on a Non-partisan Judicial Election, 63 Judicature 377, 382 (1980).

[58] John M. Scheb, II, Is Anyone Listening? Assessing Bar Influence on Merit Retention Elections in Florida, 67 Judicature 112 (1983).

[59] William K. Hall, Judicial Retention Elections: Do Bar Association Polls Increase Voter Awareness? 16 (1985).

[60] Id. In Illinois, judges are initially selected in competitive, partisan elections; they run in retention elections for subsequent terms.

[61] James H. Guterman & Errol E. Meidinger, In the Opinion of the Bar: A National Survey of Bar Polling Practices (1977).

[62] Id. at 8-10.

[63] Id.

[64] Id. at 45-48.

[65] William Jenkins, Jr., Retention Elections: Who Wins When No One Loses?, 61 Judicature 79, 83-84 (1977).

[66] John A. Stookey & George Watson, Merit Retention Elections: Can the Bar Influence Voters?, 64 Judicature 234, 241 (1980).

[67] Id. at 240-41.

performance of judges standing for retention. [68] Kevin M. Esterling and Kathleen M. Sampson evaluated the effectiveness of these programs in four states, Alaska, Arizona, Colorado, and Utah, in making information available to voters and the extent to which the evaluations influenced voter decisions. [69] The percentage of exit survey respondents who were aware of judicial evaluation commission reports ranged from 15.2 percent in Phoenix to 40.2 percent in Salt Lake City. [70] Among respondents who were aware of the reports, between 13.8 percent in Denver and 26.8 percent in Phoenix based their decisions solely on the evaluations, and between 39.3 percent in Phoenix and 62.5 percent in Denver indicated that their voting decisions were helped by this information. [71] In addition, an analysis of the relationship between judicial ratings and election outcomes in Alaska from 1976 to 1996 showed a positive relationship between ratings and affirmative votes.

While state-sponsored evaluation programs are viewed as a valuable means of enabling voters to make informed choices, some have questioned the methods, accuracy, and fairness of these programs. [72] Esterling and Sampson reported that nearly half of the Utah judges whom they interviewed felt that the evaluation commission did not accurately measure their on-the-bench performance. [73] In addition, they discovered that judges' assessments of the fairness of these programs seemed to depend on the opportunity that they were given to respond to **[*739]** the commissions' findings. [74] Perhaps most significantly, more than one-fourth of evaluated judges believed that the evaluation process undermined their independence as judges. [75]

C. Retention Elections and Accountability

Judicial retention elections were intended to introduce an element of accountability to judicial appointment systems, but some observers have charged that retention elections insulate judges from popular control. A study of retention elections from 1942 to 1978 revealed that only thirty-three judges were not retained. [76] Of the thirty-three unsuccessful judges, approximately 75 percent were opposed for significant reasons, with the most common reason being that they lacked professional competence. [77] In two-thirds of the cases in which judges were not retained, they were opposed for more than one reason. [78] The organized bar, the public, and the press also played a role in these judges' failed bids for retention. [79] Of the thirty-three judges who were not retained between 1942 and 1978, nineteen (58 percent) were the subjects of public campaigns to remove them from office. [80] In addition,

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[68] These states are Alaska, Arizona, Colorado, New Mexico, Tennessee, and Utah. For a description of these programs, see Seth S. Andersen, Judicial Retention Evaluation Program, *34 Loy. L.A. L. Rev. 1375 (2001).*

[69] Kevin M. Esterling & Kathleen M. Sampson, Judicial Retention Evaluation Programs in Four States: A Report with Recommendations (1998).

[70] Id. at 36.

[71] Id. at 39.

[72] For a discussion of similar concerns with respect to bar evaluation polls, see Errol E. Meidinger, Bar Polls: What They Measure, What They Miss, 60 Judicature 469 (1977); Steven Flanders, Evaluating Judges: How Should the Bar Do It?, 61 Judicature 304 (1978); Theodore C. Koebel, The Problem of Bias in Judicial Evaluation Surveys, 67 Judicature 224 (1983).

[73] Esterling & Sampson, supra note 69, at 44.

[74] Id. at 43.

[75] Id. at 44.

[76] Susan B. Carbon, Judicial Retention Elections: Are They Serving Their Intended Purpose?, 64 Judicature 210, 221 (1980).

[77] Id.

[78] Id. at 221-23.

[79] Id. at 229-32.

[80] Id. at 230.

sixteen of the thirty-three received negative bar evaluations, [81] and fifteen received exclusively unfavorable editorial comment in the newspapers. [82]

Susan B. Carbon used these findings to assert that "retention elections are a useful tool for holding judges accountable, especially in urban areas, where the bar, the press and citizen groups can make the public aware of those judges they believe to be unqualified for office." [83] Jenkins, however, disagreed. Examining retention elections held in 1976, he found that only three of 353 judges were rejected by the voters, in many cases in spite of unfavorable bar ratings. [84] Jenkins described judicial retention elections as "merely a rubber-stamp approval of incumbent judges." [85]

In a 1991 survey of judges who had recently stood for retention, **[*740]** Aspin and Hall addressed the issue of retention elections as a means of accountability. [86] Three-fifths of the judges who participated in the survey indicated that retention elections have a pronounced effect on their behavior on the bench. [87] While a small minority, almost 14 percent, believed that retention elections give judges independence from voters, the remaining judges perceived themselves as responding to their environment. [88] Nearly 28 percent of responding judges reported that retention elections made them more sensitive to their environment, almost 12 percent felt that they motivated them to do a good job, and nearly 6 percent believed that they improved their judicial performance. [89] When asked about the most effective thing judges can do to win a retention election, more than half of the respondents mentioned competent judicial performance. [90]

IV. Comparisons of Merit Selection with Other Selection Systems

A number of scholars have addressed the question of whether merit-selected judges differ in significant ways from judges selected through other means. Comparisons of the products of judicial selection systems have focused on three dimensions: gender and racial diversity, background characteristics, and behavior on the bench. [91]

A. Gender and Racial Diversity

What influence, if any, the method of judicial selection has on the success of women and minorities attaining judgeships is a point of contention between those seeking to diversify the bench and those who advocate merit selection. Proponents of a diverse bench argue that merit selection prevents women and minorities from reaching

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[81] Id. at 229. Interestingly, six of those thirty-three judges received positive evaluations. Id.

[82] Id. at 232.

[83] Id. at 233.

[84] Jenkins, supra note 65, at 80.

[85] Id.

[86] Larry T. Aspin & William K. Hall, Retention Elections and Judicial Behavior, 77 Judicature 306 (1994).

[87] Id. at 312.

[88] Id.

[89] Id. at 312-13.

[90] Id. at 314.

[91] While many judges initially reach the bench via appointment, even in elective states, most studies of variations across selection systems focus on formal methods of judicial selection. One noteworthy exception is a study by Barbara Graham, who examines the relationship between judicial selection methods and the degree of black representation on state trial courts. Barbara Luck Graham, Do Judicial Selection Systems Matter? A Study of Black Representation on State Courts, 18 Am. Pol. Q. 316 (1990). While there is no correlation between formal methods of selection and racial distribution on the bench, blacks are more likely to be selected through appointment, whether formal or informal, than through election. Id. at 331. Unless otherwise noted, the results discussed in this section are based on formal methods of selection.

the bench by entrenching a system dominated "by state and local bar associations **[*741]** whose members overwhelmingly are white, male, Protestant, conservative "establishment' attorneys." [92] Some empirical studies of the relationship between judicial diversity on state courts and judicial selection methods validate this assertion. [93] At the same time, several studies find no correlation between selection method and diversity, [94] and others show a positive correlation between merit selection and the diversity of the bench. [95]

The most recent study of selection systems and judicial diversity finds no evidence that women and minorities are more likely to become state appellate judges under merit systems than they are under non-merit systems. [96] Their findings indicate that the proportion of minorities selected under merit systems was slightly less than the proportion of minorities on state courts nationwide.

B. Other Background Characteristics

In addition to comparing the race and gender of judges chosen through various selection systems, researchers have also examined other judicial characteristics such as political and legal experience, education, religious affiliation, and localism. [97] The most recent and comprehensive **[*742]** study of the relationship between judicial backgrounds and selection systems was conducted by Henry R. Glick and Craig F. Emmert. [98] Analyzing all sitting high court judges in 1980 and 1981, Glick and Emmert found few differences in terms of qualifications between judges identified through merit plans and judges chosen through other systems. Merit-selected judges did not have more legal or judicial experience than judges chosen by other means, and they were just as likely as other judges to have had partisan political careers. [99]

In terms of education, more judges chosen through merit plans went to prestigious law schools than did judges who were elected, although the authors caution that the numbers are small. [100] In addition, merit plans were less likely than other systems to place religious minorities, defined as low-status Protestants, Catholics, and Jews, on the

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[92] Glick & Emmert, supra note 2, at 230.

[93] See, e.g., Gary S. Brown, Characteristics of Elected Versus Merit-Selected New York City Judges, 1992-1997 (1998) (examining women and minority judges in New York City from 1992 to 1997).

[94] See, e.g., Nicholas O. Alozie, Black Representation on State Judiciaries, 69 Soc. Sci. Q. 979 (1988) (examining the number of blacks on all state courts); Nicholas O. Alozie, Distribution of Women and Minority Judges: The Effect of Judicial Selection Methods, 71 Soc. Sci. Q. 315 (1990) (examining the numbers of women, blacks, and Hispanics on all state courts); Nicholas O. Alozie, Selection Methods and the Recruitment of Women to State Courts of Last Resort, 77 Soc. Sci. Q. 110 (1996) (examining the number of women on state courts of last resort).

[95] See, e.g., M.L. Henry, The Success of Women and Minorities in Achieving Judicial Office (1985) (examining the numbers of women and minorities on all state courts); Karen L. Tokarz, Women Judges and Merit Selection Under the Missouri Plan, 64 Wash. U. L.Q. 903 (1986) (examining the number of women on Missouri courts); M.L. Henry, Characteristics of Elected Versus Merit-Selected New York City Judges, 1977-1992 (1992) (examining the numbers of women and minority judges on New York City's Civil, Family, and Criminal Courts from 1977 through 1992).

[96] Mark S. Hurwitz & Drew Noble Lanier, Women and Minorities on State and Federal Appellate Benches: A Cross-Time Comparison, 1985 to 1999, 85 Judicature 84 (2001).

[97] Several scholars have cautioned that regional forces may also contribute to variations in judicial characteristics, so that regional factors should be taken into account when comparing the effects of judicial selection systems. See, e.g., Bradley C. Canon, The Impact of Formal Selection Processes on the Characteristics of Judges--Reconsidered, 6 Law & Soc'y Rev. 579 (1972); Philip L. Dubois, The Influence of Selection System and Region on the Characteristics of a Trial Court Bench: The Case of California, 8 Just. Sys. J. 59 (1983); Glick & Emmert, supra note 2.

[98] Early studies of variations in judicial background characteristics across selection systems were conducted by Herbert Jacob, The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges, 13 J. Pub. L. 104 (1964) (examining characteristics of supreme court and major trial court judges in twelve states in 1955); Watson & Downing, supra note 23 (comparing characteristics of trial court judges selected before and after Missouri adopted a merit plan in 1940); Canon,

bench. [101] Finally, local ties, in terms of whether judges were born in-state or educated in-state, were less important for merit-selected judges than for elected judges. [102]

C. Judicial Behavior and Performance

One of the earliest studies of behavioral differences between merit-selected and elected judges was conducted by Watson and Downing for trial court judges before and after Missouri adopted a merit selection system in 1940. They found no evidence that merit plan judges were more or less likely than elected judges to favor the plaintiff in personal injury litigation, and they extended this finding to conclude that these judges did not differ in their general ideological stances. [103]

More recent analyses of the decision-making of merit judges versus elected judges have revealed no important differences between the two **[*743]** groups, whether regarding supreme court support for various categories of litigants, [104] trial court sentencing in driving-while-intoxicated cases, [105] or supreme court rulings in racial discrimination cases. [106]

A number of studies have failed to distinguish between merit systems and other appointive processes and have simply made comparisons between appointed and elected judges. Some of these studies have discovered marked discrepancies in the decisionmaking of appointed and elected judges, [107] while others have revealed no significant differences in their behavioral tendencies. [108]

In addition to assessing the decisional tendencies of merit-selected and elected trial court judges, Watson and Downing also compared the performance of these judges. Based on attorney evaluations of these judges' overall

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supra note 97 (examining characteristics of state high court justices sitting between 1961 and 1968); Stuart S. Nagel, Comparing Elected and Appointed Judicial Systems (1973) (comparing backgrounds of elected and interim-appointed judges on state supreme courts in 1955); and Larry L. Berg et al., The Consequences of Judicial Reform: A Comparative Analysis of the California and Iowa Appellate Systems, 28 W. Pol. Q. 263 (1975) (comparing characteristics of appellate judges in Iowa and California at six different points in time).

[99] Glick & Emmert, supra note 2, at 232-33.

[100] Id. at 231-32.

[101] Id. at 233-35.

[102] Id. at 231-32.

[103] Watson & Downing, supra note 23, at 324-26.

[104] Burton M. Atkins & Henry R. Glick, Formal Judicial Recruitment and State Supreme Court Decisions, 2 Am. Pol. Q. 427 (1974).

[105] Jerome O'Callaghan, Another Test for the Merit Plan, 14 Just. Sys. J. 477 (1991).

[106] Francine Sanders Romero, David W. Romero & Victoria Ford, The Influence of Selection Method on Racial Discrimination Cases: A Longitudinal State Supreme Court Analysis, in 2 Research on Judical Selection 17 (Am. Judicature Soc'y ed., 2002).

[107] See, e.g., Gerald S. Gryski et al., Models of State High Court Decision Making in Sex Discrimination Cases, 48 J. Pol. 143 (1986) (showing that state supreme court decisions upholding sex discrimination claims were more likely to occur in appointive states than in elective states); Paul Brace & Melinda Gann Hall, Studying Courts Comparatively: The View from the American States, 48 Pol. Res. Q. 5 (1995) (concluding that the influence of judicial selection system on decisions in death penalty cases

performance, the authors concluded that a merit plan "tended to eliminate the selection of very poor judges." [109] While large proportions of both merit and elected judges were ranked in the highest **[*744]** quartile, fewer merit judges were ranked in the lowest quartile.

V. Conclusion

This review of social scientific research on merit selection systems does not lend much credence to proponents' claims that merit selection insulates judicial selection from political forces, makes judges accountable to the public, and identifies judges who are substantially different from judges chosen through other systems. Evidence shows that many nominating commissioners have held political and public offices and that political considerations figure into at least some of their deliberations. Bar associations are able to influence the process through identifying commission members and evaluating judges.

In addition, support for the effectiveness of retention elections in holding judges accountable to the public is limited. Judges rarely fail in their bids for retention, and approximately one-third of those who cast votes in other races do not vote in retention elections. There is some evidence, however, that judicial evaluation programs are effective in informing and influencing voters.

Finally, there are no significant, systematic differences between merit-selected judges and other judges. Some evidence suggests that merit plans may place fewer racial and religious minorities on the bench. The finding that merit plans may prevent the selection of bad judges is noteworthy, but this appears to be an isolated result.

Lest this review be interpreted as a call to abandon merit selection, I would suggest an additional criterion on which judicial selection systems should be judged--their impact upon the public's trust and confidence in the courts. By this standard, merit selection is preferable to judicial elections. As we saw in the 2000 judicial elections in states such as Alabama, Michigan, and Ohio, campaigning for office can transform judicial candidates into ordinary politicians, giving sound bites and raising campaign funds. Judicial elections tend to politicize the judiciary in the eyes of the public. [110] To foster the appearance of an independent **[*745]** and impartial judiciary, we need a

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depended on the extent of partisan competition in the state--in states where partisan competition was high, elected justices were more likely to vote in favor of the death penalty, while appointed justices were more likely to oppose it); Daniel R. Pinello, The Impact of Judicial-Selection Method on State-Supreme-Court Policy: Innovation, Reaction, and Atrophy (1995) (reporting that appointed judges tended to favor the individual over the state in criminal procedure cases, and were more likely than elected or legislatively selected judges to introduce new policies in business law cases); Andrew F. Hanssen, The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges, *28 J. Legal Stud. 205 (1999)* (finding higher litigation rates in appointed state high courts than in elected high courts).

[108] See, e.g., Nagel, supra note 98 (examining the judicial behavior of elected and interim-appointed judges serving on the same state high courts); Ronald Schneider & Ralph Maughan, Does the Appointment of Judges Lead to a More Conservative Bench? The Case of California, 5 Just. Sys. J. 45 (1979) (comparing the liberalism of the California Supreme Court before and after gubernatorial appointment replaced partisan elections in 1935); John Blume & Theodore Eisenberg, Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study, *72 S. Cal. L. Rev. 465 (1999)* (comparing the propensities of partisan-elected appellate judges with other appellate judges to uphold death sentences).

[109] Watson & Downing, supra note 23, at 283.

[110] The results of two recent national surveys support the assertion that judicial elections jeopardize public trust and confidence in the courts. In a 1999 survey commissioned by the National Center for State Courts, 75 percent of the respondents agreed that having to raise campaign funds influences elected judges. National Center for State Courts, How the Public Views the State Courts, *http://www.ncsc.dni.us/PTC/results/results.pdf* (May 14, 1999). According to a national poll conducted in 2001 in association with the Justice at Stake Campaign, 76 percent of voters believed that campaign contributions made to judges have at least some influence on their decisions, and more than two-thirds felt that "individuals or groups who give money to judicial candidates often get favorable treatment." Letter from Stan Greenberg, Chairman and CEO, Greenberg Quinlan Rosner Research, and Linda A. DiVall, President, American Viewpoint, to Geri Palast, Executive Director, Justice at Stake Campaign (Feb. 14, 2002), at *http://www.justiceatstake.org/content* Viewer.asp?breadcrumb=5,268.

system that emphasizes judicial qualifications, opens the process to all who meet the legal requirements, and in most instances, eliminates the need for political campaigning. Merit selection is such a system.

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