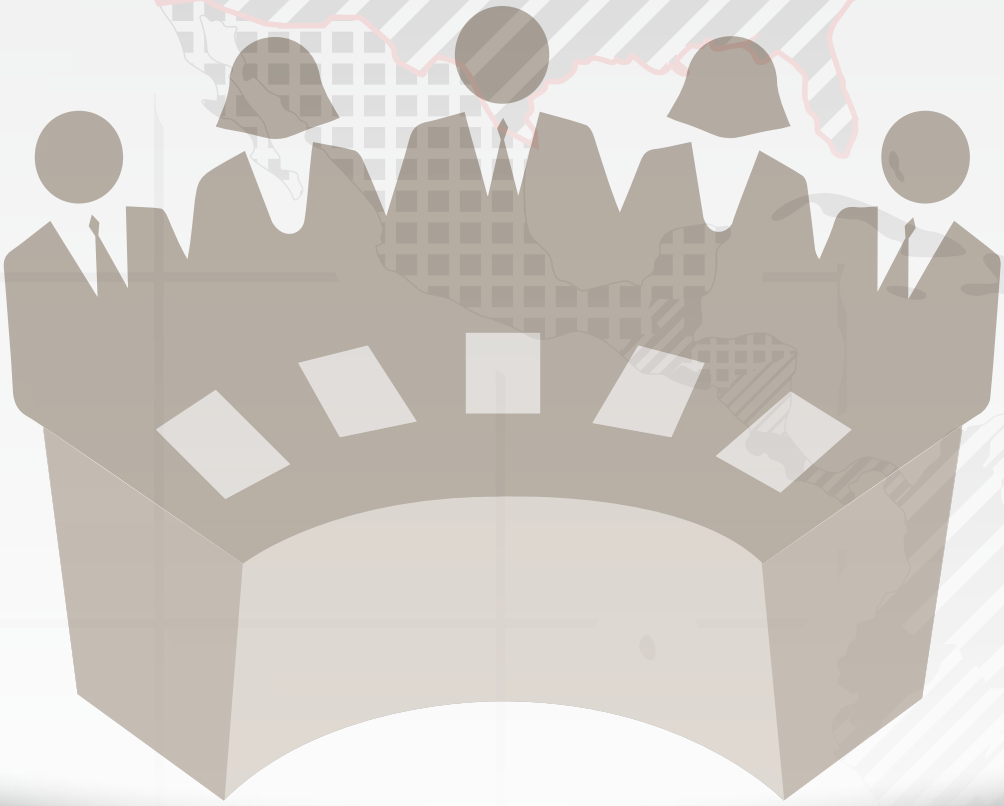
Choosing Judges

Judicial Nominating Commissions and the Selection of Supreme Court Justices



Quality Judges Initiative

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Institute for the Advancement of the American Legal System
University of Denver

CHOOSING JUDGES: JUDICIAL NOMINATING COMMISSIONS AND THE SELECTION OF SUPREME COURT JUSTICES

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IAALS, the Institute for the Advancement of the American Legal System, is a national independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable civil justice system.

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The *Quality Judges Initiative* is dedicated to advancing empirically informed models for choosing, evaluating, and retaining judges that preserve impartiality and accountability. Through comprehensive analysis of existing practices and the collaborative development of recommended models, *Quality Judges Initiative* empowers, encourages, and enables continuous improvement in processes for choosing, evaluating, and retaining judges.

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I. INTRODUCTION

In the ongoing debate about judicial selection in the United States, one of the more controversial topics is the appropriate role for judicial nominating commissions. How those commissions function, who serves as members of the commission, and how members are chosen are critical decisions in the quest to fill the nation's benches with well-qualified, impartial, and trusted men and women who will enforce the rule of law.

Two-thirds of the states use a commission-based gubernatorial appointment process to choose at least some supreme court justices. This is a process in which a specially created entity accepts applications for judicial vacancies, screens the applicants through steps laid out in state law, and recommends a shortlist of the best-qualified candidates to the governor for his or her ultimate appointment.

Such a selection process has come to be known by a variety of names, and it is important to be clear about what each of these terms does—and does not—mean. The technical term for a process in which a nominating commission recommends judicial applicants for appointment by the governor is "commission-based gubernatorial appointment." This process differs from straight gubernatorial appointment, where the governor has unfettered discretion to exercise his or her choice. In a commission-based system, the governor is limited to choosing among the applicants vetted and recommended by the nominating commission. A term for this type of judicial selection is merit selection, because it presumes that the nominating commissions will make their decisions on the basis of the merit of the various applicants. Typically under a commission-based appointment system, judges serve set terms and stand in retention elections to be reselected, but in a handful of these states, judges may be reappointed to the bench or enjoy life tenure without any voter involvement.

In this report, we use the terms commission-based gubernatorial appointment, commission-based appointment, and merit selection interchangeably. Two additional terms belong in the conversation and in the definitions of selection processes. As originally coined, the term "Missouri Plan" embodied commission-based appointment *plus* retention elections, and is often used in that sense today. The "O'Connor Judicial Selection Plan," authored by former U.S. Supreme Court Justice Sandra Day O'Connor and IAALS, is a four-part process that provides for: 1) commission screening and nomination; 2) gubernatorial appointment; 3) judicial performance evaluation; and 4) retention elections. Hence, the Missouri Plan is merit selection plus retention elections; the O'Connor Plan is merit selection plus judicial performance evaluation and retention elections.

This report focuses on the front end of the process—specifically on commission-based appointment. A commission-based appointment process can offer important benefits to the state judiciary. First and foremost, the judicial candidates need not have political connections, a campaign war chest, or the support of special interests to apply. Rather, the process can create an environment in which the selection decision focuses on candidates' experience, character, and qualifications—not their political penchants—and qualified candidates may be more motivated to throw their hat in the ring.

But the value of a commission-based gubernatorial appointment process is dependent wholly upon how the commission operates. If the commission's work is perceived as nothing more than political deal-making in a smoke-filled room, where powerful special interests dominate, a commission-based appointment process cannot realize its potential benefits. If, on the other hand, the commission's work is perceived as a balanced, rigorous, and transparent process in which the qualifications of the applicants are the determinative factor, then it can foster public confidence in the courts and bolster support for the third branch from the legislature and the executive. Thus, the choices as to who will select the members of the commission, what qualifications these commission members must have, and how the commission will function are critical to the commission's success.

In this report, we drill down on the use of nominating commissions around the country in selecting state supreme court justices, exploring where these commissions are in place and how they are structured. But we begin by canvassing the various methods around the country for the selection of state justices.

II. Selecting Supreme Court Justices

States employ one of four methods to choose supreme court justices—contested elections, gubernatorial appointment, legislative selection, or commission-based gubernatorial appointment.

In 22 states, justices are chosen in contested elections, with the party affiliation of candidates indicated on the ballot in 7 states and nonpartisan ballots in 15 states.

- Alabama
- Arkansas
- Georgia
- Idaho
- Illinois
- Louisiana
- Kentucky
- Michigan
- Minnesota
- Mississippi
- Montana
- Nevada
- New Mexico
- North Carolina
- North Dakota
- Ohio
- Oregon
- Pennsylvania
- Texas
- Washington
- West Virginia
- Wisconsin

The distinction between partisan and nonpartisan elections for judges has become increasingly less relevant, as political parties have become more active in endorsing and providing financial support for judicial candidates and federal courts have rejected limitations on candidates identifying themselves as political party members and participating in party activities.

In four states, the governor appoints supreme court justices, with legislative or some other form of confirmation.

- California
- Maine
- Massachusetts
- New Jersey

In two states, the legislature itself chooses justices.

- South Carolina
- Virginia

In 22 states and the District of Columbia, a commission-based appointment process is always used to select supreme court justices.

- Alaska
- Arizona
- Colorado
- Connecticut
- Missouri
- Nebraska
- New Hampshire
- New York

- Delaware
- Florida
- Hawaii
- Indiana
- Iowa
- Kansas
- Maryland
- Oklahoma
- Rhode Island
- South Dakota
- Tennessee
- Utah
- Vermont
- Wyoming

A commission-based appointment process may also be in place for a limited purpose of filling vacancies in states with contested elections, where a nominating commission assists the governor in filling supreme court vacancies that occur between elections. In other contested election states, midterm vacancies may be filled by gubernatorial appointment without any commission involvement (often with legislative confirmation), supreme court appointment, or special election.

In these 8 states with contested elections of judges, governors use a commission-based appointment process to fill interim supreme court vacancies:

- Georgia
- Idaho
- Kentucky
- Montana
- Nevada
- New Mexico
- North Dakota
- West Virginia

In total, 30 states and D.C. use a judicial nominating commission in some way in choosing supreme court justices.[1]

III. Merit Selection Reform: Successes and Failures

Sixty percent of the states, then, use a merit selection process to choose at least some supreme court justices. Missouri was the first state to adopt such a process, known at the time as the Nonpartisan Court Plan, in 1940. It was not until 1958 that another state—Kansas—moved to the so-called Missouri Plan for its court of last resort. In 1959, Alaska entered the Union with commission-based gubernatorial appointment of all judges.

In the 1960s and 1970s, during what came to be known as the "heyday of merit selection," 13 states amended their constitutions to provide for commission-based appointment of supreme court justices. The last state to replace contested elections with merit selection was Utah, in 1985.[2] Rhode Island is the most recent state to create a judicial nominating commission by constitutional amendment, in 1994.

[1] The "30 states" figure is lower than the number of states (33) that use a commission-based appointment process to select at least some judges. This difference is due to the fact that judicial nominating commissions are used only to choose lower court judges in Alabama, Massachusetts, and Minnesota, though some Massachusetts and Minnesota governors at their discretion use the judicial nominating commission for supreme court appointments as well.

In a handful of other elective and appointive states, governors authorize advisory panels by executive order to assist them in filling judicial vacancies. These states include Maine, New Jersey, and Wisconsin. Such panels are typically composed solely of attorneys and merely offer the governor input on the qualifications of applicants.

[2] New Mexico amended its constitution to provide for commission-based gubernatorial appointment in 1988, but the process still allows for contested judicial elections. (Most judges are in fact initially chosen through a merit selection

In Missouri and a handful of other states that have adopted a commission-based appointment process, reform was prompted by political corruption involving the judiciary or scandals involving individual judges. We discuss some of these events and the range of responses to them below. These reform examples are chronicled in greater detail on the American Judicature Society's *Judicial Selection in the States* website. For more information about efforts to move to commission-based appointment of judges—in the states discussed below and others—visit www.judicialselection.us.

- **Missouri** (1940): Before the move to the Nonpartisan Court Plan, Missouri judges were elected, and Democratic Party boss Tom Pendergast and his political machine controlled who prevailed in these contests, based on whether incumbent judges had made favorable rulings. Machine politics were so influential that, from 1918 to 1941, only two sitting supreme court justices were reelected. A coalition of concerned citizens, lawyers, and judges organized an initiative petition effort to place the Plan on the 1940 ballot, and Missouri voters approved it by a 55-45 margin. In 1942, voters rejected a legislative repeal of the Nonpartisan Court Plan, 65%-35%, and in 1945, Missourians approved the adoption of a new constitution that included the Plan. Thus, in the first five years of the Nonpartisan Court Plan, voters expressed their approval three times.

- **Oklahoma** (1967): In the mid-1960s, one supreme court justice was impeached and removed from office on bribery charges and another was convicted of income tax evasion. A third justice was already serving time in federal prison for tax evasion. These events propelled the adoption of two constitutional amendments aimed at restoring and preserving judicial integrity—one that replaced contested elections of members of the state's two courts of last resort with merit selection and another that made elections of trial court judges nonpartisan.

- **Rhode Island** (1994): The move to merit selection was prompted by a series of scandals in the late 1980s and early 1990s. One chief justice resigned to avoid impeachment for misuse of public funds and employees, his successor was convicted of an array of abuse-of-office charges, and a superior court judge pled guilty to accepting bribes from an attorney who appeared before him. At the time, supreme court justices were elected by the general assembly, but voters approved by more than a two-to-one margin a constitutional amendment calling for commission-based gubernatorial appointment.

- **New Hampshire** (2000): New Hampshire has a system in which the governor makes appointments to the bench, subject to confirmation by an executive council. In 2000, four supreme court justices came under fire. One justice resigned, two others faced investigations into possible impeachment, and a fourth was impeached but not convicted. These events prompted several reform proposals to rehabilitate the court in the public eye, including the establishment of a judicial nominating commission by constitution or statute. When that effort failed, the governor created such a commission by executive order, and all but one of her successors has done the same.

- **West Virginia** (2010): In 2004, a coal company executive spent $3 million on a campaign to replace a sitting justice on the state's highest court with his preferred candidate. At the time, a $50 million dollar judgment against his company was making its way to the high court. The executive's candidate won the election and was part of a 3-2 majority that overturned the multi-million dollar verdict. In *Caperton v. Massey* (2009), the U.S. Supreme Court ruled in a 5-4 decision that the risk of actual judicial bias in this case was so great that it violated Caperton's right to due process of law. In an effort to restore citizens' confidence in the judiciary, the West Virginia legislature passed two statutes, one that

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process, and those who do reach the bench via contested election typically have served as a lower court judge and thus been screened and shortlisted by the nominating commission.)

established a pilot public financing program for state supreme court elections (made permanent in 2013) and another that created a judicial vacancy advisory commission to assist the governor in filling midterm vacancies.

Reaction to court-related scandals or potential scandals does not always lead to reform. As we have already mentioned, no state since 1994 has amended its constitution to establish a judicial nominating commission for choosing supreme court justices, though efforts to do so have been mounted in three states.[3] We briefly describe these reform efforts and their outcomes below.

- **Nevada** (2010): In 1976, Nevada voters amended the state constitution to create a judicial nominating commission to advise the governor in filling vacancies that arise between elections, but voters rejected a move to full merit selection in 1972 and 1988. Merit selection was again on the ballot in 2010. Retired U.S. Supreme Court Justice Sandra Day O'Connor lent her support to the effort, and a group called Nevadans for Qualified Judges led the charge. The name of that organization hinted at the fact that, in recent years, a handful of state judges had been found distinctly *un-* or *under*-qualified. A 2006 *Los Angeles Times* investigation showed that Nevada judges often ruled in favor of friends and business partners and raised hundreds of thousands in campaign funds from attorneys and others who had cases pending before them. Nevadans rejected full merit selection at the ballot box, 58%-42%, but the nominating commission for interim vacancies remains in place.

- **Pennsylvania** (ongoing): Since 1987, a reform organization known as Pennsylvanians for Modern Courts and groups such as the Pennsylvania Bar Association and the state League of Women Voters have worked toward improving judicial selection in the state. Four former governors, including two Democrats and two Republicans, have endorsed a move from partisan elections to merit selection, and bills to that effect have been proposed in the legislature over the years. At the same time, numerous scandals have occurred that conceivably could have fueled the reform effort. In the late 1980s, a number of Philadelphia judges were found to have accepted cash from local union leaders; in 1994, for the first time in the state's history, a supreme court justice was impeached and removed from office; in 2008, two Luzerne County judges were implicated in the "kids for cash" scandal; and in 2013, a supreme court justice was convicted and imprisoned on public corruption charges. But these events have not, to date, provoked change.

- **Minnesota** (ongoing): Reform advocates in Minnesota have pursued a move from nonpartisan elections to merit selection since 2007, based on a recommendation by the Citizens Commission for the Preservation of an Impartial Judiciary. Minnesota has not seen the high-dollar, contentious judicial campaigns that neighboring states like Illinois and Wisconsin have experienced, and merit selection proponents hope to avoid that possibility. The Coalition for Impartial Justice, a broad-based organization of business, labor, religious, and other non-profit groups, is leading the effort and has seen incremental legislative progress from session to session, but the measure has not yet gained sufficient support to be put to the voters.

[3] Two states in which commission-based appointment is already used to select appellate judges have seen unsuccessful campaigns to move to such a process for trial judges. In 2000, Floridians voted on a "local option" for merit selection of trial judges. The proposal was rejected in every county, with an average affirmative vote of only 32 percent. In 2004, voters in South Dakota weighed whether to use a commission-based appointment process to choose all district court judges, rather than simply to fill midterm vacancies. Voters rejected the proposed constitutional amendment by a 62-38 margin.

IV. Judicial Nominating Commissions in Action

Despite the prevalence of nominating commissions in the judicial selection process, no two judicial nominating commissions are identical. The variation begins with the source of the commission's authority and includes the role of the commission, its selection and composition, and the extent to which its work is open to the public.

A. Role of the Commission

Authority: A commission-based gubernatorial appointment process may be authorized by constitution, statute, or executive order. (See Appendix A.) In 22 states, use of a nominating commission in filling at least some supreme court vacancies is mandated by the constitution. In three states and D.C., statutory law requires commission-based appointment of justices, and in five states, current governors have created a nominating commission by executive order.

Scope: As we have already noted, a judicial nominating commission may be used to fill all or only some supreme court vacancies in a particular state. (See Appendix A.) Of the 31 jurisdictions with a commission-based gubernatorial process, such a process is used only for interim vacancies in eight of those 31 jurisdictions.

Number of Nominees: The number of nominees the commission must submit to the governor for supreme court vacancies ranges broadly. (See Appendix A.) In states like Alaska, Idaho, Nebraska, New Mexico, North Dakota, South Dakota, and West Virginia, nominating commissions may send as few as two names. As many as seven nominees are allowed in New York and North Dakota, while eight states impose no maximum on the number of nominees. In Vermont the commission may submit "as many as qualified."

Mandate or Option: In a handful of states, the extent to which supreme court vacancies may only be filled with commission nominees varies. (See Appendix A.) In Georgia and West Virginia, the governor is required by law to use a nominating commission in making vacancy appointments to the supreme court, but s/he is not obligated to appoint a commission-recommended candidate. In other states, the governor may request that the commission provide a supplemental list of nominees (Delaware, New Hampshire, New Mexico, and Tennessee) or may make the appointment from a list submitted for a previous vacancy (Maryland). In North Dakota, the governor has the option of calling a special election to fill a judicial vacancy, instead of making a commission-based appointment.

Confirmation: In 11 jurisdictions, legislative or some other form of confirmation of gubernatorial appointments from a nominating commission's recommended candidates is required. (See Appendix A.)

Reselection of Judges: In some states, the nominating commission plays a role in the reselection of judges. (See Appendix A.) In the District of Columbia and Hawaii, the nominating commission itself determines whether to reappoint justices for additional terms. In Delaware and New York, when a judge's term expires, s/he applies to the nominating commission to fill the vacancy and competes with other candidates. In Connecticut, the governor may re-nominate and the legislature may reconfirm justices for subsequent terms, and in Vermont, judges may be reappointed by a vote of the general assembly. In New Hampshire and Rhode Island, once appointed, judges serve to age 70 or for life, respectively. In the remaining states, judges stand for retention or reelection for additional terms.

B. Selection of Commission Members

The selection of commission members is arguably the most important factor in determining the commission's capacity to inspire public trust and confidence in its work. After all, the individuals who serve on the commission are the public's representatives at the front end of the selection process, determining which applicants are best qualified for existing judicial vacancies, and who chooses them to perform this role is critical. It is perhaps not surprising, then, that the makeup of the judicial nominating commission, and in particular the identity of those who name commission members, is where we find the greatest variation in nominating commissions across the states.

A variety of individuals and entities may be responsible for appointing members of the nominating commission. (See Appendix B.) In several states, as under the original Missouri Plan, the state bar elects or appoints some commission members, the governor appoints others, and a supreme court justice serves as *ex officio* chair. In states like Arizona, Florida, Rhode Island, and Utah, as well as in some states where the nominating commission is created by executive order, the governor appoints all commission members. (A justice or judge may serve as chair and may or may not have a voting role.) Some of these gubernatorial appointees to the commission come from nominees submitted by the state bar association or the legislature. Legislative leaders select some commissioners in seven states, and in Alaska, Arizona, Idaho, and Iowa, legislative confirmation is required for at least some commission appointees. In nine states and D.C., at least three different appointing authorities name non-judge commission members. In Hawaii, for example, appointing authorities for commission members include the state bar and representatives of all three branches—the governor, chief justice, senate president, and house speaker.

C. Commission Composition

When it comes to the makeup of the nominating commission, states have a range of requirements with respect to professional, geographic, and political party diversity. (See Appendix B.) In terms of professional diversity, the chief justice of the supreme court serves on the commission *ex officio* in a handful of states and may or may not have a voting role. In other states, another justice may be selected to serve, while in 13 states, no judges serve on the commission.

Both lawyers and non-lawyers serve on existing judicial nominating commissions, though in a few states, the law may not explicitly require the appointment of non-lawyer members. In terms of the balance of lawyer and non-lawyer members, nine states call for a non-attorney majority or an equal number of attorneys and non-attorneys on the nominating commission, while a non-attorney majority is possible in five additional states. Other states mandate an attorney or attorney/judge majority.

In 15 states, geographic representation is required on the nominating commission, and 15 states mandate political party balance. (These are not, however, the same 15 states.) A number of states call for the appointing authority to take into account the gender and/or racial diversity of the nominating commission in appointing members,[4] but courts have rejected efforts to require such diversity in the form of targets or quotas. In Florida, for example, a 1991 statute required that one third of the members of each nominating commission be women or members of a racial or ethnic minority group. A federal district court ruled that the provision violated the Equal Protection Clause of the Fourteenth Amendment, and the decision was upheld on appeal.[5] Iowa's state judicial

[4] For example, according to Arizona's constitution: "In making or confirming appointments to the appellate court commission, the governor, the senate and the state bar shall endeavor to see that the commission reflects the diversity of Arizona's population."

[5] *Mallory v. Harkness*, 895 F.Supp. 1556 (S.D. Fla. 1995).

nominating commission is an exception, however. Members of the bar in each congressional district must alternate between electing male and female members, and the governor may not appoint more than four members of the same gender.

It is important to note that, while a commission-based appointment process may be enshrined in the constitution, the selection and composition of the commission itself may be prescribed by statute. This is the case for nominating commissions used to select all justices in Connecticut, Florida, Rhode Island, and Vermont. The practical impact of this distinction is that shifting partisan majorities may tinker with the makeup of the commission for political gain.[6]

D. Transparency

The extent to which the judicial nominating commission's work is open to the public varies significantly from state to state and task to task. (See Appendix C.) Of the 31 jurisdictions in which nominating commissions are used in selecting supreme court justices, the names of those who apply for judicial vacancies are made public in 20 states. Applicant interviews *may* be open to the public in 15 states, and commissions conduct at least some deliberations in open session in six states.

V. Opposition to Commission-Based Appointment

Critics and outright opponents of commission-based appointment of judges tend to paint all such systems with the same brush, typically labeling these processes the "Missouri Plan." Though the preceding section's discussion makes clear that this can be misleading, three general criticisms are made about the composition, transparency, and impartiality of judicial nominating commissions.

Perhaps the most common charge leveled against judicial merit selection is that it puts elites in control of selecting judges. According to *Justice Hijacked*, a 2010 publication of the American Justice Partnership:

> Under "merit selection," the power to select judges is transferred from the people to a small, unelected, unaccountable commission comprised primarily of legal elites, typically representing powerful special interest groups, such as state trial lawyers associations.

The *Wall Street Journal* echoed this critique in a September 2011 piece: "The Missouri Plan was intended to get politics out of the courtroom but has instead handed disproportionate power to trial lawyers and state bar associations."

A second oft-heard criticism of commission-based appointment of judges is that nominating commissions operate in secret with no public accountability. From the *National Review Online* in September 2012:

[6] We saw this in Florida in 2001. Since 1976, three nominating commission members had been lawyers appointed by the Florida Bar, three members were lawyers or non-lawyers appointed by the governor, and three members were non-lawyers selected by the other six commission members. In 2001, the legislature revised the statute to allow the governor to appoint all nine members of the state's nominating commissions. At least six members must be lawyers, with four of the six chosen from state bar nominees.

> [U]nlike the federal method or elections, which provide for democratic accountability, the politics of the Missouri Plan happen behind closed doors and involve only a handful of unaccountable people.

Third, judicial nominating commissions are said to be highly political. According to the *National Review Online*, "[T]he more the issue is studied, the more we learn that the Missouri Plan is by far the most deeply politicized method for selecting judges." And the *Wall Street Journal* alleges that "[t]he effect has been to insulate the backroom-dealing from public scrutiny while stocking state courts with liberal judges." The overall goal of commission-based appointment, says *Justice Hijacked*, is to "exclude conservative, rule-of-law judges from the bench."

To address these concerns, those who object to commission-based selection of supreme court justices have offered a range of alternatives—from adopting another selection process, to giving the governor more authority in the nominating process, instituting senate confirmation of judges, and/or enhancing transparency. We chronicle such efforts over the last decade below, discussing the most recent activity in each area first.[7] Readers will begin to note a pattern with respect to the states in which merit selection regularly comes under attack.

A. Ending Merit Selection

The most obvious course of action available to those who oppose commission-based appointment is moving to another selection system, which in almost all instances requires a constitutional amendment. We have already highlighted the fact that no state has established a judicial nominating commission by constitutional amendment since 1994, but at the same time, no state has *ever* moved away from a constitutionally based merit selection process. This is not, however, for lack of trying.

- **Tennessee**:[8] In November 2014, Tennessee voters will decide whether to amend the state constitution to institute a modified federal judicial selection process, where governors appoint judges with legislative confirmation.[9] The "modification" is that, rather than enjoying life tenure as federal judges do, judges will stand for retention every eight years. Governors would have the option of creating a judicial nominating commission by executive order.

  In 2009, a majority of members of the house of representatives and the senate rejected a bill that would have eliminated the judicial nominating commission and instituted contested elections for appellate judges.

- **Kansas**: In 2013, the senate approved a proposed constitutional amendment that would have replaced commission-based appointment of appellate judges with a modified federal selection process

[7] In the context of this section, unless otherwise noted, "reform efforts" are proposals that at a minimum have been voted on in at least one chamber of the state legislature.

[8] Tennessee is an interesting case. The state constitution calls for judges to be elected, with the governor filling vacancies between elections. Since 1994, the legislature has provided by statute for commission-based appointment of supreme court justices, with periodic retention elections, and numerous court decisions over the years have held that retention elections satisfy the constitutional requirement that judges be elected.

[9] The Tennessee proposal differs from the modified federal selection process under consideration in other states in that it requires confirmation of judicial appointments by both houses of the legislature.

(gubernatorial appointment, senate confirmation, and retention elections), but the measure did not have the necessary two-thirds support in the house.[10]

- **Oklahoma**: Similarly, Oklahoma's senate approved a move to a modified federal selection process for appellate judges in 2011 and 2013, but the house failed to act.

- **Missouri**: Missouri Plan opponents offered two initiative petitions in 2013 that would have established partisan elections for appellate judges, increased the size of the supreme court from seven to nine justices, and reduced the terms of appellate judges from 12 to eight years; they did not obtain the requisite number of signatures. Another initiative petition drive in 2009 would have implemented partisan elections for all judges, but state courts determined in 2010 that many of the necessary signatures were invalid.

B. Enhancing Gubernatorial Authority

Several proposals aimed at giving the governor more power entail appointing more members to the nominating commission or receiving more nominees from the commission from which to make appointments. A 2014 ballot measure in Florida is more straightforward, authorizing the governor to make more judicial appointments.

- **Alaska**: In early 2014, conservative legislators introduced a proposed constitutional amendment that would have increased the size of the judicial nominating commission and allowed the governor to appoint a majority of its members. (It also would have required senate confirmation of all member appointments.) A house committee approved the measure, but the senate sponsor withdrew it when it became clear it did not have the necessary two-thirds support in the senate.

- **Florida**: In November 2014, Florida voters will decide whether to give the governor the power to make "prospective" judicial appointments. The proposed constitutional amendment would authorize a governor whose term is ending to replace justices whose terms are ending at the same time, rather than allowing the incoming governor to do so.

  In 2012, the senate approved a bill that would have eliminated tenure protections for nominating commission members appointed at the governor's discretion and stipulated that they serve at the governor's pleasure. A 2011 measure that passed the house would have allowed the governor to appoint all commission members without input from the state bar and would have made members' terms concurrent with the governor's. (Members' terms are currently staggered.)

- **Oklahoma**: In 2013, the senate approved a proposed constitutional amendment that would have empowered the governor, rather than the supreme court, to name the chief justice. The house took no action on the measure.

- **Arizona**: In 2012, Arizonans rejected a proposed constitutional amendment that would have (1) eliminated the state bar's role in nominating lawyers for five spots on the commission, giving sole discretion to the governor, and allowed the bar to name only one of the commission's 15 members; and

[10] Following failed attempts in 2011 and 2012, legislators established such a process by statute for the court of appeals in 2013. (In states where the court of appeals is statutorily created, the process for selecting its judges may be altered by statute rather than requiring constitutional amendment.)

(2) increased the minimum number of nominees sent to the governor from three to eight. In 2013, the legislature passed a statute that raised the number of nominees to at least five, but the state supreme court ruled it unconstitutional.

In 2011, the senate passed a bill that would have eliminated the state bar's role in naming potential commission members to be selected by the governor, but the bill was not voted on in the house.

- **Missouri**: In 2012, voters turned down a proposed constitutional amendment that would have allowed the governor to appoint a majority of members of the judicial nominating commission and given the governor four nominees, rather than three, to choose from in appointing appellate judges. The terms of the governor's four appointees to the commission would have been reduced from six to four years, so that all four appointees would be named in a single gubernatorial term.

  In 2009, the house of representatives passed but the senate filibustered a proposed constitutional amendment that would have expanded the governor's authority in several ways, including (1) allowing the governor to name an additional non-lawyer member of the nominating commission; (2) requiring the nominating commission to submit four nominees for each vacancy; and (3) enabling the governor to reject the first list of nominees and request a second list.

  In 2008, the house of representatives rejected a proposed constitutional amendment that would have (1) increased from three to five the number of judicial nominees sent to the governor; (2) allowed the governor to request a second list of five nominees; and (3) authorized the governor to name all commission members with senate confirmation.

- **Kansas**: Though no proposal has gone to a full-chamber vote in recent years, a handful of measures to increase the number of governor-appointed, non-lawyer nominating commission members have been taken up by committee. Kansas is the only state with an attorney majority among commission members where that attorney majority is named exclusively by the state bar.

C. Adding Senate Confirmation

Short of doing away with the nominating commission and moving to a modified federal selection process, legislatures in some states have sought to add more accountability to the process by adding senate confirmation of judicial appointments. In one state, senate reconfirmation would have replaced retention elections.

- **Florida**: In 2012, voters rejected a ballot measure that would have required senate confirmation of supreme court justices.

- **Oklahoma**: In 2011, the senate approved a proposed constitutional amendment that would have mandated senate confirmation of all judicial appointments, but it made no progress in the house.

- **Arizona**: Also in 2011, the senate passed a bill calling for senate confirmation and reconfirmation—rather than retention elections—of commission-based appointments.

- **Kansas**: In 2006, a proposed constitutional amendment that would have required senate confirmation of commission-based gubernatorial appointments fell five votes short of the two-thirds support needed to appear on the ballot.

D. Bringing More Transparency

In a number of states, the transparency of the nominating process is dictated by court rule. In recent years, in states like Iowa, Kansas, and Missouri, nominating commissions on their own initiative have opened up aspects of their work to the public. Greater transparency has also been pursued by statute and constitutional amendment.

- **Hawaii**: In the past, Hawaii has been one of only a few states where the names the nominating commission sends to the governor are not made public. In 2011, after a major newspaper sued the governor to force him to release the names of potential judicial appointees, the nominating commission amended its rules to require publication of those names at the same time they are submitted to the governor. In November 2014, Hawaiians will vote on whether to amend the constitution to require public release of the names of all nominees submitted to the governor for possible appointment. (Applicants' names would remain confidential.)

- **Missouri**: The 2008 and 2009 legislative proposals that would have enhanced gubernatorial authority in the nominating process also called for greater transparency. One would have made applicant's names and application materials available to the public, and the other would have opened commission interviews, deliberations, and votes to the public. (By court rule, the nominating commission began releasing the names of applicants in 2009 and conducting open interviews in 2010.)

- **Tennessee**: In 2008, Governor Phil Bredesen pushed for the judicial nominating commission to conduct its business in public, but the measure died in committee. (The current nominating commission holds public interviews but deliberates in executive session.)

VI. Why Nominating Commissions Matter

It is noteworthy that a number of states have sought to make the move to commission-based gubernatorial appointment systems as a reaction to scandals involving the courts or individual judges. The perception, at the very least, in these states seems to be that a commission-based gubernatorial appointment process is effective in identifying highly qualified, impartial, and trustworthy judges–perhaps more effective than an existing system of contested elections or even pure gubernatorial appointment.

Proponents of commission-based appointment would agree with this assertion. The premise is not that outstanding judges cannot be selected through elective or pure appointive systems but rather that the risk of a poorly qualified judge reaching the bench is minimized through commission-based appointment. Logically, this claim makes sense. With merit selection, candidates move forward in the process based on their qualifications and experience. In other systems, the amount of money spent in an election campaign, name recognition, and political or party connections can be the determinative factors.

That said, the empirical evidence on point is scant. One oft-cited study on the quality of justices selected in different ways finds that elected supreme court justices are more productive than their merit-selected counterparts, in that they write more opinions, while merit-selected justices write higher quality opinions, since they are cited more frequently by high courts in other states. Most commentators, however, feel these indicators do not shed much meaningful light on the overall quality of supreme court justices, as demonstrated by such characteristics as professional experience, legal knowledge, temperament, and administrative ability—characteristics that are admittedly difficult to measure.

Another option in assessing judicial quality is to compare disciplinary rates for merit-selected and other judges. In fact, one study has shown that elected trial judges are disciplined more often, and are more likely to be removed from office when they are disciplined, than merit-selected trial judges. But the variation across the states in judicial disciplinary processes, along with the infrequency with which supreme court justices are disciplined, makes it a challenge to conduct such a study at the supreme court level.

But we can look to anecdotal evidence regarding the extent to which various selection systems prioritize judicial quality. Three current examples—New Jersey, North Carolina, and Arizona—are instructive. New Jersey is a state with a modified federal selection process. The governor appoints justices with senate confirmation, and following an initial seven-year term, justices may be reappointed to age 70. Tensions among the three branches in New Jersey have never been higher. The governor, for political reasons, has in recent years declined to reappoint two sitting supreme court justices and instead has nominated individuals whose ideology is more in line with his own. The senate, in response, refused to schedule hearings for these nominees, and two supreme court seats were vacant from early 2012 to mid-2014 as a result. In June 2014, in exchange for the governor's re-nomination of the court's chief justice, senate leaders confirmed the appointment of an ally of the governor to the court. Insiders say the remaining vacancy on the high court will likely not be filled during the current governor's administration. Clearly, politics is playing a significant role in that system, and the functionality of the court may suffer as a result.

North Carolina is a state with contested elections for supreme court justices. Despite the nonpartisan status of these races, in that party affiliation does not appear on the ballot, judicial candidates are free to identify themselves as party members, and the political parties themselves endorse candidates. In 2012, even with a public financing program in place for supreme court campaigns, $4.4 million was spent in a single race by candidates and outside groups. In November 2014, four seats are on the ballot, and the ideological balance of the seven-member supreme court is at stake. More than $1.3 million was spent on ads related to the three-candidate primary election in May 2014. The conversation about judicial selection seems not to center on a careful review of candidates' professional qualifications to serve, but on whose pockets are deepest.

Contrast the filling of a vacancy on the Arizona Supreme Court in 2012. Arizonans adopted a commission-based appointment process for choosing appellate judges and some trial judges in 1974. The commission's nominating process has been transparent for nearly two decades. In June 2012, the commission gave public notice of a vacancy on the high court and invited applications. Following the application deadline, the nominating commission had 60 days in which to screen applicants and identify the best suited for the vacancy, for which 14 attorneys applied. The applicant pool included appellate judges, trial judges, practicing attorneys, and senior officials in the attorney general's office. The commission selected nine of the 14 applicants for interviews, posted their application materials online, and invited public comment. Following the applicant interviews, deliberations, and voting—all of which were conducted in open session—the commission sent three nominees to the governor. Upon receipt of the nominees, the governor had 60 days in which to make the appointment. By October, the supreme court had a new justice, appointed from the commission's three nominees. She had been a sitting intermediate appellate court judge and a finalist for a previous supreme court vacancy.

That is a functioning merit selection process in action. At the outset, the nominating commission reviews the professional *merit* of judicial applicants, based on their application materials, a background check, and perhaps public input. The commission then may or may not opt to interview all applicants, based on their qualifications. Following the interview, the commission discusses the applicants and votes on which of them are best suited to fill the vacancy. This screening process that all applicants undergo is straightforward and routinized, and both applicants and the public know what to expect.

VII. Conclusion

The selection of judges is an important, and thus controversial, topic. When a role is delegated to a judicial nominating commission at the front end, that group serves a critical filter function. In fact, commission members are acting as citizen representatives to make the first cut regarding individuals who would be qualified to serve as judges. With this report, we have examined why nominating commissions are established in the first place, how their structure and operation differ across the nation, and what some of the best practices might be in building public trust in the process. Nominating commissions can—and should—operate in a way that invites public input, minimizes special interest influence, and instills confidence.

APPENDIX A:

LEGAL AUTHORIZATION

State	Constitution, statute, or executive order	All or interim vacancies?	Number of nominees?	Governor required to appoint nominee?	Legislative confirmation of nominee required?	Reselection
Alaska	Constitution	All	At least 2	Yes	No	Retention election
Arizona	Constitution	All	At least 3	Yes	No	Retention election
Colorado	Constitution	All	3	Yes	No	Retention election
Connecticut	Constitution	All	n/i	Yes	Yes	Reappointment
Delaware	Executive Order	All	At least 3	Other	Yes	Reappointment
District of Columbia	Statute	All	3	Yes (President)	Yes	Reappointment by commission
Florida	Constitution	All	3-6	Yes	No	Retention election
Georgia	Executive Order	Interim	5	No	No	Reelection
Hawaii	Constitution	All	4-6	Yes	Yes	Reappointment by commission
Idaho	Statute	Interim	2-4	Yes	No	Reelection
Indiana	Constitution	All	3	Yes	No	Retention election
Iowa	Constitution	All	3	Yes	No	Retention election
Kansas	Constitution	All	3	Yes	No	Retention election
Kentucky	Constitution	Interim	3	Yes	No	Reelection
Maryland	Executive Order	All	At least 3	Other	Yes	Retention election
Missouri	Constitution	All	3	Yes	No	Retention election
Montana	Statute	Interim	3-5	Yes	Yes	Reelection/Retention election
Nebraska	Constitution	All	At least 2	Yes	No	Retention election
Nevada	Constitution	Interim	3	Yes	No	Reelection
New Hampshire	Executive Order	All	n/i	Other	Other	Serve to age 70
New Mexico	Constitution	Interim	At least 2	Other	No	Reelection
New York	Constitution	All	3-7	Yes	Yes	Reappointment
North Dakota	Constitution	Interim	2-7	Other	No	Reelection
Oklahoma	Constitution	All	3	Yes	No	Retention election
Rhode Island	Constitution	All	3-5	Yes	Yes	Serve for life
South Dakota	Constitution	All	2 or more	Yes	No	Retention election

State	Constitution, statute, or executive order	All or interim vacancies?	Number of nominees?	Governor required to appoint nominee?	Legislative confirmation of nominee required?	Reselection
Tennessee	Executive Order	All	3	Other	No	Retention election
Utah	Constitution	All	At least 3	Yes	Yes	Retention election
Vermont	Constitution	All	As many as qualified	Yes	Yes	Reappointment
West Virginia	Statute	Interim	2-5	No	No	Reelection
Wyoming	Constitution	All	3	Yes	No	Retention election

n/i = not indicated

APPENDIX B:

COMPOSITION OF JUDICIAL NOMINATING COMMISSIONS

State (Number of members)	**Appointment**			**Attorney, attorney/judge, or non-attorney majority?**	**Geographic representation required?**	**Partisan balance required?**
	Judge members	**Attorney members**	**Non-attorney members**			
Alaska (7)	1: Chief justice serves *ex officio*	3: State bar board of governors	3: Governor w/ legislature's consent	Attorney /judge	No	No
Arizona (16)	1: Chief justice chairs	5: State bar nominates; governor appoints w/ senate confirmation	10: Governor w/ senate confirmation	Non-attorney	Yes	Yes
Colorado (16)	1: Chief justice serves *ex officio*	7: Joint action of the governor, attorney general, and chief justice	8: Governor	Non-attorney (chief justice is non-voting member)	Yes	Yes
Connecticut (12)	n/a	3: Governor 3: One each by senate president pro tem, house majority leader, and house minority leader	3: Governor 3: One each by house speaker, senate majority leader, and senate minority leader	Equal number of attorneys and non-attorneys	Yes	Yes
Delaware (11)	n/a	4-5: Governor 1: State bar president nominates, governor appoints	4-6: Governor	Attorney or non-attorney possible	No	Yes
District of Columbia (7)	1: Federal judge appointed by chief judge of U.S. District Court for D.C.	1: U.S. President 2: D.C. bar board of governors 1: D.C. mayor	1: D.C. mayor 1: D.C. Council	Attorney/judge	No	No
Florida (9)	n/a	6-9: Governor (4 appointed from state bar nominees)	0-3: Governor	Attorney	No	No
Georgia (n/i)	n/i: Governor	n/i: Governor	n/i: Governor	n/i	No	No
Hawaii (9)	n/a	2: State bar 0-1: Governor	1-2: Governor	Non-attorney (no more than 4 attorneys)	No	No
		0-1: Chief justice 0-2: Senate president 0-2: House speaker				
Idaho (7)	1: Chief justice chairs	2: State bar board of commissioners w/ senate consent	3: Governor w/ senate consent	Attorney/judge	No	Yes

State (Number of members)	**Appointment**			**Attorney, attorney/judge, or non-attorney majority?**	**Geographic representation required?**	**Partisan balance required?**
	Judge members	**Attorney members**	**Non-attorney members**			
	1: District judge serves as attorney member					
Indiana (7)	1: Chief justice serves *ex officio*	3: State bar elects	3: Governor	Attorney/judge	Yes	No
Iowa (15)	1: Senior associate justice serves *ex officio*	7: State bar elects		Attorney/judge	Yes	No
		7: Governor w/ senate consent				
Kansas (9)	n/a	5: State bar elects	4: Governor	Attorney	Yes	No
Kentucky (7)	1: Chief justice chairs	2: State bar elects	4: Governor	Non-attorney	No	Yes
Maryland (17)	n/a	0-12: Governor 5: State bar president	0-12: Governor	Attorney or non-attorney possible	No	No
Missouri (7)	1: Justice selected by fellow justices	3: State bar elects	3: Governor	Attorney/judge	Yes	No
Montana (7)	1: District judge elected by district judges	2: Supreme court	4: Governor	Non-attorney	Yes	No
Nebraska (9)	1: Governor designates justice	4: State bar elects	4: Governor	Attorney/judge	Yes	Yes
Nevada (7)	1: Chief justice or designated justice	3: State bar board of governors appoints	3: Governor	Attorney/judge	Yes	Yes
New Hampshire (9-11)	n/a	n/i: Governor	n/i: Governor	n/i	Yes	No
New Mexico (14)	3: Chief justice or associate designee serves; chief judge appoints two court of appeals judges	3: Governor, house speaker, and senate president pro tem each appoint one 1: Dean of UNM law school serves as chair and votes in case of tie 4: State bar president and judge members	3: Governor, house speaker, and senate president pro tem each appoint one	Attorney	No	Yes
New York (12)	n/a	4: Governor and chief judge each appoint two	4: Governor and chief judge each appoint two	Attorney or non-attorney possible	No	Yes
		4: Assembly speaker, senate president, assembly minority leader, and senate minority leader each appoint one member				

State (Number of members)	**Appointment**			**Attorney, attorney/judge, or non-attorney majority?**	**Geographic representation required?**	**Partisan balance required?**
	Judge members	**Attorney members**	**Non-attorney members**			
North Dakota (6)	3: Chief justice, governor, state bar president each appoint judge or attorney		3: Chief justice, governor, state bar president each appoint	Equal number of attorneys/judges and non-attorneys	No	No
Oklahoma (15)	n/a	6: State bar elects	6: Governor 1: Senate president pro tem 1: House speaker 1: Commission selects	Non-attorney	Yes	Yes
Rhode Island (9)	n/a	4-5: Governor, all but three from nominations by house speaker, senate majority leader, house minority leader, and senate minority leader	4-5: Governor, all but one from nominations by house speaker, senate majority leader, house minority leader, and senate minority leader	Attorney or non-attorney possible	No	No
South Dakota (7)	2: Judicial conference elects	3: State bar president	2: Governor	Attorney/judge	No	Yes
Tennessee (17)	n/a	10-17	0-7	Attorney	Yes	No
		5: House speaker; 5: Senate speaker; 1: House and senate speakers jointly; 6: Governor in consultation with house and senate speakers				
Utah (7)	1: Chief justice appoints non-voting member of judicial council	2-4: Governor, at least two from bar nominations	2-4: Governor	Attorney or non-attorney possible	No	Yes
Vermont (11)	n/a	3: State bar elects 0-1: Senate elects from senate 0-1: House elects from house	2: Governor 2-3: Senate elects from senate 2-3: House elects from house	Non-attorney	No	Yes
West Virginia (11)	n/a	4: Governor from nominees by state bar board of governors 1: State bar president serves *ex officio* 1: Dean of WVU law school serves *ex officio*	4: Governor	Attorney	Yes	Yes

State (Number of members)	**Appointment**			**Attorney, attorney/judge, or non-attorney majority?**	**Geographic representation required?**	**Partisan balance required?**
	Judge members	**Attorney members**	**Non-attorney members**			
		1: Governor or designee serves *ex officio*				
Wyoming (7)	1: Chief justice or designee chairs	3: State bar elects	3: Governor	Attorney/judge	Yes	No

APPENDIX C:

TRANSPARENCY/OPENNESS

	(Yes = Open to the public; No = Confidential)		
State	**Identity of Applicants**	**Interviews**	**Deliberations**
Alaska	Yes	A candidate may choose to be interviewed publicly or in an executive session	May convene executive session
Arizona	Yes	Yes	May convene executive session
Colorado	No	No	No
Connecticut	No	No	No
Delaware	No	No	No
District of Columbia	No	No	No
Florida	Yes	Yes	No
Georgia	Yes	No	No
Hawaii	No	No	No
Idaho	Yes	Yes	No
Indiana	Yes	Yes	May convene executive session
Iowa	Yes	Yes	No
Kansas	Yes	Yes	No
Kentucky	Yes	No	No
Maryland	Yes	No	No
Missouri	Yes	Yes	No
Montana	Yes	Yes	Yes
Nebraska	Yes	Public and private Interviews	No
Nevada	Yes	Yes	Yes
New Hampshire	No	No	No
New Mexico	Yes	Yes	No
New York	No	No	No
North Dakota	Yes	Yes	Yes
Oklahoma	Yes	No	No
Rhode Island	Yes	Yes	No
South Dakota	No	No	No
Tennessee	Yes	Yes	No
Utah	No	No	No

	(Yes = Open to the public; No = Confidential)		
State	**Identity of Applicants**	**Interviews**	**Deliberations**
Vermont	No	No	No
West Virginia	Yes	No	No
Wyoming	No	No	No