



Quality Judges is an initiative of IAALS 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, the *Quality Judges Initiative* empowers, encourages and enables continuous improvement in processes for choosing, evaluating, and retaining judges.

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- Chief Justice Ruth V. McGregor (Ret.), Supreme Court of Arizona, Chair
- Meryl Chertoff, Director, Justice and Society Program, The Aspen Institute
- Professor Talbot "Sandy" D'Alemberte, President Emeritus and Professor of Law, Florida State University
- Senator Bob Graham, United States Senate, 1987–2005
- Chief Justice Wallace B. Jefferson (Ret.), Partner, Alexander Dubose Jefferson & Townsend LLP
- Rebecca Love Kourlis, Executive Director, IAALS
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- H. Thomas Wells Jr., Partner and Founding Member, Maynard, Cooper & Gale, PC
- Governor Christine Todd Whitman, New Jersey, 1994–2001
- Mary G. Wilson, Past President, League of Women Voters of the United States

IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center dedicated to facilitating continuous improvement and advancing excellence in the American legal system.

Our mission is to forge innovative and practical solutions to problems in our system in collaboration with the best minds in the country.

We are a "think tank" that goes one step further—we are practical and solution oriented. Our specialty is the development and application of innovative solutions for the toughest problems facing our courts and profession, and we work with groups around the country to achieve our mission.

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 legal system.



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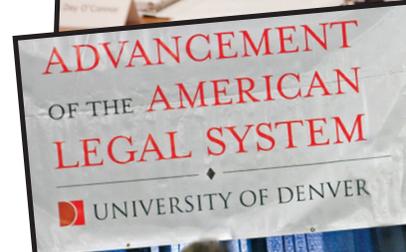
IAALS AND JUSTICE SANDRA DAY O'CONNOR

Justice O'Connor retired from the United States Supreme Court in 2006 and committed herself to two things she cares passionately about: judicial independence and civics education.

In 2007, Justice O'Connor received IAALS' inaugural Transparent Courthouse® Award for a lifetime of work to promote excellence in America's courts.

In 2009, when Justice O'Connor wrapped up the "Sandra Day O'Connor Project on the State of the Judiciary" at Georgetown Law School, she launched the *Quality Judges Initiative* at IAALS. She has served for more than five years as the honorary chair of the O'Connor Advisory Committee to the *Quality Judges Initiative*, and she has twice hosted Committee meetings at the United States Supreme Court.

After joining forces with IAALS, Justice O'Connor worked with the O'Connor Advisory Committee to develop what has become known as the O'Connor Judicial Selection Plan. The O'Connor Plan is a four-part recommended process for selecting and retaining state court judges who inspire public trust in our courts and the integrity of their decisions. The Plan calls for a judicial nominating commission to screen applicants and identify the best qualified candidates, appointment by the governor of one of those candidates, broad-based and objective evaluation of judges' performance on the bench, and periodic retention elections in which voters have access to judicial performance evaluation results.



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The IAALS *Quality Judges Initiative* benefits from the insight and dedication of many distinguished experts in the field, including supreme court justices, state governors, and other leaders in the legal profession. For media inquiries, please contact:

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JUSTICE REBECCA LOVE KOURLIS

Executive Director, IAALS—the Institute for the Advancement of the American Legal System

Kourlis served Colorado's judiciary for nearly two decades, first as a trial court judge and then as a justice of the Colorado Supreme Court. During her time on the bench, Kourlis witnessed a system increasingly under attack from outside forces—one that was failing to deliver the justice she swore to uphold. So, in January 2006, she resigned from the Supreme Court to do something about it. She established IAALS, where she serves as Executive Director.

Her work at the helm of IAALS is resolute in its focus of continuous improvement of the American legal system, and a logical off-shoot of her accomplishments on the bench where she spearheaded significant reforms in the judicial system relating to juries, family law, and attorney regulation.

Kourlis' legal expertise is rich and diverse. She began her career with the law firm of Davis Graham & Stubbs, and then started a small practice in rural northwest Colorado where she worked in natural resources, water, public lands, oil and gas, and mineral law. In 1987, Kourlis was appointed as a trial court judge with a general jurisdiction docket. She served as Water Judge and later as Chief Judge of the District. In 1994, Kourlis returned to Denver and worked as an arbitrator and mediator for the Judicial Arbitrator Group. She was appointed to the Colorado Supreme Court in 1995.

Justice Kourlis accepted the 2007 Legal Reform Organization of the Year honor from the U.S. Chamber of Commerce. She has also received numerous individual honors, including the American Bar Association (ABA) Justice Center's 2012 John Marshall Award, the ABA Judicial Division's 2009 Robert B. Yegge Award For Outstanding Contribution In The Field Of Judicial Administration, and the 2008 Regis College Civis Princeps citizenship award. Kourlis and her husband Tom were named the 2010 Citizens of the West by the National Western Stock Show.

Kourlis earned a B.A. in English from Stanford University and a J.D. from Stanford University Law School. She is a Colorado native and daughter of former Governor John A. Love.



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CHIEF JUSTICE RUTH V. MCGREGOR

Chair, O'Connor Advisory Committee

Chief Justice Ruth V. McGregor (Ret.) served on the Arizona Supreme Court from February 1998 until June 30, 2009. She was the Court's Chief Justice from June 2005 until her retirement. She was also a member of the Arizona Court of Appeals from 1989 until 1998, where she served as Chief Judge from 1995 to 1997. Before her appointment to the bench, Justice McGregor engaged in the private practice of law as a member of the Fennemore Craig law firm in Phoenix, Arizona. She served as law clerk to Justice Sandra Day O'Connor during Justice O'Connor's first term on the United States Supreme Court.

Justice McGregor received a Bachelor of Arts degree, summa cum laude, and a Master of Arts degree from the University of Iowa. She received her Doctor of Jurisprudence degree, summa cum laude, from Arizona State University in Tempe, Arizona, and a Master of Laws in the Judicial Process from the University of Virginia. Justice McGregor has participated extensively in professional activities, particularly those involving legal education and the discipline of lawyers and judges, and in organizations dedicated to assuring a fair and impartial judiciary.

Among other activities, she has served as an officer and a member of the Board of Trustees for the American Inns of Court Foundation, as an officer and Board member for the National Association of Women Judges, as a board member of the Conference of Chief Justices, and on the Legal Council of the American Bar Association Section of Legal Education and Admission to the Bar, which is the accrediting body for American law schools. Justice McGregor currently serves as a member of the Board of Directors of the Center for the Future of Arizona and of Justice at Stake; as section delegate for the ABA Section of Legal Education and Admission to the Bar.



MERYL CHERTOFF

Director, Justice and Society Program, The Aspen Institute

Meryl Justin Chertoff is Director of The Aspen Institute's Justice and Society Program. She is also an Adjunct Professor of Law at Georgetown Law School, where she teaches about state government, intergovernmental affairs, and state courts. From 2006-2009, Ms. Chertoff was Director of the Sandra Day O'Connor Project on the State of the Judiciary at Georgetown Law School, studying and educating the public about federal and state courts.

Ms. Chertoff served in the Office of Legislative Affairs at the Federal Emergency Management Agency (FEMA), participating in the agency's transition into the Department of Homeland Security in 2003. She has also been a legislative relations professional, Director of New Jersey's Washington, D.C. Office under two governors, and legislative counsel to the Chair of the New Jersey State Assembly Appropriations Committee. She is a magna cum laude graduate of Harvard-Radcliffe College and earned her J.D. from Harvard Law School. She practiced law for a number of years in New York City and New Jersey, and served as law clerk to Honorable Myron H. Thompson (U.S. District Ct., M.D. Ala).



CHIEF JUSTICE WALLACE JEFFERSON

Partner, Alexander Dubose Jefferson & Townsend LLP

Chief Justice Wallace B. Jefferson (Ret.) served on the Texas Supreme Court from March 2001 until October 2013. He served as Chief Justice from September 2004 until his resignation. Jefferson made Texas judicial history as the first African-American justice and the first African-American Chief Justice of the Texas Supreme Court. Upon resigning from the Court, Jefferson joined Alexander Dubose Jefferson & Townsend LLP, an internationally recognized appellate boutique law firm, as a named partner.

Jefferson was appointed to the Court in 2001 by Gov. Rick Perry, succeeding former Chief Justice Thomas R. Phillips as the 26th Chief Justice of Texas. He was subsequently elected to the bench in 2002. His appointment as Chief Justice was confirmed unanimously by the Texas Senate on March 9, 2005. He was elected Chief justice in 2006 and reelected to a full term in 2008.

During his time on the bench, Jefferson served as president of the Conference of Chief Justices, an association of chief justices from the 50 states and U.S. territories.

Jefferson joined the Court from private practice in San Antonio. As a partner in the appellate specialty firm Crofts, Callaway & Jefferson, he successfully argued two cases before the United States Supreme Court. He is a graduate of the James Madison College at Michigan State University and the University of Texas School of Law.



H. THOMAS WELLS JR.

Partner and Founding Member, Maynard,
Cooper & Gale, PC

H. Thomas Wells Jr. is a partner and founding member at Maynard, Cooper & Gale, PC, in Birmingham, Alabama. Wells served as president of the American Bar Association in 2008-09. He has served on numerous committees and in leadership roles in the Alabama State Bar, the Birmingham Bar Association, and the American Bar Association.

Wells has a litigation practice with emphasis on complex environmental, toxic tort law and products liability cases. He is a frequent speaker and participant in state and national programs dealing with trial and litigation issues. He is listed in the Best lawyers in America in the areas of Environmental Law, Mass Tort Litigation, Energy Law, Natural Resources Law, and Product Liability Litigation. Wells is a Fellow of the International Academy of Trial Lawyers and was named as one of the Top Ten Lawyers in Alabama for 2008 and 2009 by Super Lawyers.

Wells earned his bachelor's degree with honors from the University of Alabama, where he was president of the Student Government Association and was elected to Phi Beta Kappa. He earned his law degree, Order of the Coif, from the University of Alabama.



GOVERNOR CHRISTINE TODD WHITMAN

New Jersey, 1994 – 2001

Christine Todd Whitman was the 50th Governor of the State of New Jersey, serving as its first woman governor from 1994 until 2001. Governor Whitman served in the cabinet of President George W. Bush as Administrator of the Environmental Protection Agency from January of 2001 until June of 2003. As Governor, Whitman earned praise from both Republicans and Democrats for her commitment to preserve a record amount of New Jersey land as permanent green space. She was also recognized by the Natural Resources Defense Council for instituting the most comprehensive beach monitoring system in the nation. As EPA Administrator, she promoted common-sense environmental improvements such as watershed-based water protection policies. She championed regulations requiring non-road diesel engines to reduce sulfur emissions by more than 95 percent. She also established the first federal program to promote redevelopment and reuse of “brownfields,” that is, previously contaminated industrial sites.

Whitman now serves as President of The Whitman Strategy Group (WSG), a consulting firm that specializes in energy and environmental issues. She is also co-chair of the Republican Leadership Council (RLC). The RLC’s mission is to support fiscally conservative, socially tolerant candidates and to reclaim the word Republican. The RLC was created in March of 2007 by joining forces with Governor Whitman’s political action committee, It’s My Party Too. She is the author of a New York Times best seller by the same name, which was published in January of 2005 and released in paperback in March 2006.



QUALITY JUDGES
INITIATIVE

FAQS

JUDGES
in the
UNITED STATES



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FAQS: JUDGES IN THE UNITED STATES

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1. WHY DO WE HAVE BOTH STATE AND FEDERAL COURTS? HOW ARE THEY DIFFERENT?

According to the U.S. Constitution, Congress establishes federal courts to hear cases involving the Constitution and federal laws. (The U.S. Supreme Court is the only court created by the Constitution.) State courts are established in each state by constitution and statute to hear cases that raise issues of state law.

Some cases may be heard in either federal or state court, and the parties get to decide where to file such cases.

There is one federal court system that covers the whole United States. Each state has its own system. Within both the state and federal court systems, there are two types of courts—trial courts and appellate courts—with jurisdiction, or power, to hear specific types of cases. There are also municipal or local courts that hear matters under local ordinances.

2. ARE MORE CASES FILED IN STATE OR FEDERAL COURTS? ARE THERE MORE STATE OR FEDERAL JUDGES?

More than 100 million cases are filed each year in state trial courts, while roughly 400,000 cases are filed in federal trial courts.

There are approximately 30,000 state judges, compared to only 1,700 federal judges.

3. WHAT TYPES OF STATE COURTS ARE THERE?

State court systems have both trial and appellate courts. Trial courts are the courts where a case is first filed and an initial decision is made. Appellate courts review the decisions of those trial courts.

Appellate courts include courts of last resort and intermediate appellate courts. Every state has a court of last resort, usually called a supreme court. Many states also have an intermediate appellate court. Oklahoma and Texas each have two courts of last resort—one for criminal cases and one for civil cases. All but 10 states have an intermediate appellate court, often called the court of appeals. States like Alabama and Tennessee each have two intermediate appellate courts—one for criminal cases and one for civil cases.

General jurisdiction trial courts hear a wide range of civil and criminal cases. They are often called circuit, district, or superior courts. Many states have limited jurisdiction trial courts as well, to hear cases involving a specific area of law—e.g., probate, family, or juvenile law. States may also have municipal courts, county courts, or justices of the peace that hear civil cases involving a small amount of money and less serious criminal cases.

For information about the structure of the court system in your state—including the types of courts, the types of cases each court hears, and the number of judges that serve on each court—view the [State Court Structure Charts](#) provided by the National Center for State Courts.

4. HOW DOES A STATE JUDGE REACH THE BENCH?

States use one of five methods to choose their judges—commission-based appointment by the governor (or merit selection), appointment by the governor, partisan election, nonpartisan election, and legislative election.

In several states, there are different methods for selecting judges for different levels of courts. Often, trial court judges are elected, while appellate court judges are appointed in some way.

In a few states, the method for selecting trial court judges varies from county to county. Trial court judges in some counties may be chosen through commission-based appointment by the governor, while trial court judges in other counties are elected.

A. GOVERNOR AS APPOINTING AUTHORITY

In many states, the governor appoints judges. In most of these states, the governor makes the appointment from a list of candidates submitted by a judicial nominating commission. In some states, confirmation of the governor's appointee is required.

i. Governor appoints with nominating commission

In a commission-based appointment (or merit selection) process, a judicial nominating commission screens judicial applicants and recommends a shortlist of the best-qualified candidates to the governor for appointment.

Judges of the court of last resort are always chosen through a commission-based appointment process in 22 states and the District of Columbia. In 16 of the 40 states that have intermediate appellate courts, judges are always selected via this process, and judges of at least some major trial courts are always chosen this way in 17 states and D.C.

1. Who are the nominating commissioners?

Judges, attorneys, and laypersons serve on judicial nominating commissions. In many states, judges and attorneys comprise a majority of the commission's members, but in some states, the commission has a majority of lay members.

2. How are nominating commissioners chosen?

A handful of individuals and entities are involved in appointing judicial nominating commission members. In some states, the governor appoints all commission members. Some of these gubernatorial appointees to the commission come from nominees submitted by the state bar association or the legislature. In other states, the state bar may elect or appoint some nominating commission members. Legislative leaders have a role in selecting commissioners in a handful of states. In a few states, legislative confirmation is required for appointees to the commission.

3. When a nominating commission selects nominees, what happens next?

a. Governor appoints from nominees

Before making the appointment, and with assistance from staff, governors often conduct their own examination of each nominee's professional and personal background and interview each nominee. Most states place a time limit on the governor's appointment decision, ranging from 15 to 60 days. If the governor fails to make the appointment in the time allowed, the chief justice usually makes the appointment.

In some states, the governor may not be required to make the appointment from the nominating commission's initial list. In Delaware, New Hampshire, New Mexico, and Tennessee, the governor may request that the commission provide a supplemental list of nominees, and Maryland's governor may make the appointment from a list submitted for a previous judicial vacancy.

b. Governor appoints from nominees with legislative approval

In eight states and D.C., one or both houses of the legislature must confirm the governor's appointments from a nominating commission's shortlist.

c. Governor appoints from nominees with other approval

In Massachusetts and New Hampshire, the governor's council (or executive council) must confirm judicial appointees. (The governor's council is a constitutionally authorized body that advises the governor in state affairs and is elected by the voters.)

ii. Governor appoints without nominating commission

In these states, state court judges are appointed by the governor at his or her own discretion, without input from a judicial nominating commission. Judges of the court of last resort are always chosen this way in four states. The governor always appoints Intermediate appellate court judges in two of the 40 states that have such courts, and major trial court judges in two states.

1. Selection and appointment by governor

With input from staff, an advisory committee, or perhaps a state bar association committee, the governor may unilaterally appoint state judges in some instances. This method is most often used in elective states to fill vacancies that occur between elections, and many judges in those states first come to the bench by this process.

2. Selection and appointment by governor with legislative approval

The senate must confirm the governor's appointees to all courts in Maine, to the trial and supreme courts in New Jersey, and to the intermediate appellate court in Kansas.

3. Selection and appointment by governor with other approval

In California, the commission on judicial appointments—which includes the chief justice, the attorney general, and a senior presiding justice of the intermediate appellate court—must confirm the governor's appointees to the state's appellate courts.

In Massachusetts, where the governor appoints judges of the court of last resort, the governor's council must confirm the appointments.

B. ELECTION

i. Partisan election

Partisan elections of judges work in the same way as partisan elections for other offices. Candidates compete first in a primary election to win their party's nomination and then in the general election against the other party's candidate.

Judges of the court of last resort are chosen in partisan elections in nine states, and intermediate appellate court judges are selected this way in seven states. Judges of major trial courts may be chosen in partisan elections in 14 states.

ii. Nonpartisan election

In states with nonpartisan judicial elections, candidates compete in a nonpartisan primary. In most states, if one candidate does not get at least 50% of the vote, the top two candidates compete in the general election. Candidates are not identified on the ballot as a member of a political party.

Judges of the court of last resort are chosen in nonpartisan elections in 13 states, and intermediate appellate court judges are selected this way in 11 states. Judges of major trial courts may be chosen in nonpartisan elections in 20 states.

Arizona and Ohio have partisan primary elections and nonpartisan general elections for judges who run in contested elections. In Michigan, supreme court justices are nominated at party conventions and then run in a nonpartisan general election.

iii. Legislative election

Members of the legislature choose judges in two states—South Carolina and Virginia.

iv. Midterm, or interim, vacancies

In states where judges are elected, whether by voters or the legislature, judicial vacancies may arise between elections or when the legislature is not in session that need to be filled. Midterm, or interim, vacancies in these states may be filled via commission-based appointment by the governor (with or without confirmation), appointment by the governor (with or without confirmation), special election, or supreme court appointment.

For information about how judges in your state are selected, visit the American Judicature Society's [Judicial Selection in the States](#) website.

5. WHAT ARE THE QUALIFICATIONS FOR BEING A STATE JUDGE?

Each state determines the qualifications its judges must have, and qualifications may vary for different levels of courts.

In every state, judges of the court of last resort, intermediate appellate court, and major trial court are required to have a law degree, either explicitly or implicitly. States may also require that judges be a minimum age, have a certain number of years of legal experience, reside within the jurisdiction of the court on which they serve, and/or be a U.S. citizen.

Judges of minor trial courts are often not required to have a law degree.

For information about the qualifications of judges in your state, visit the American Judicature Society's [Judicial Selection in the States](#) website.

6. HOW LONG CAN A STATE JUDGE STAY ON THE BENCH?

Term lengths for judges vary from state to state and by level of court. In three states—Massachusetts, New Hampshire, and Rhode Island—judges enjoy life tenure or service to a mandatory retirement age of 70. In New Jersey, judges serve an initial seven-year term, and if they are reappointed, they serve to age 70. In all other states, judges serve set terms and must be reelected to serve additional terms.

A. TERM LENGTHS

i. Initial term

The initial term that a state judge serves may be shorter than a full term. In many commission-based appointment states, judges serve a short initial term—typically at least one to three years—before being reelected for a full term. In states with contested elections, judges may be selected to complete the unexpired term of a judge who has left the bench between elections.

ii. Subsequent terms

In states where judges do not enjoy life tenure, judicial terms range in length from four years to 15 years.

To learn more about the length of judges' terms in your state, visit the American Judicature Society's [Judicial Selection in the States](#) website.

B. TERM LIMITS

Some states place limits on the number of years or terms that governors and legislators may serve, but no state currently imposes term limits on judges.

C. MANDATORY RETIREMENT

32 states and D.C. have a mandatory retirement age for judges, ranging from 65 to 75. Judges may be required to leave the bench at the end of the calendar year in which they reach retirement age, or they may be allowed to complete their current term.

7. HOW DOES A STATE JUDGE STAY ON THE BENCH?

A. REELECTION

i. Partisan election

In almost all instances, judges chosen in partisan elections may be reelected—via partisan election—to subsequent terms. (Illinois, New Mexico, and Pennsylvania are exceptions; see below.)

ii. Nonpartisan election

Judges chosen in nonpartisan elections may be reelected—via nonpartisan election—to subsequent terms.

iii. Legislative election

Judges elected by the legislature may be reelected by the legislature to subsequent terms.

iv. Retention election

In a retention election, judges run unopposed. Voters are asked whether the judge should be retained in office, and in most states, a simple majority vote is required for retention. In New Mexico, the retention threshold is 57 percent, and in Illinois, it is 60 percent.

Retention elections are most often associated with a commission-based appointment (or merit selection) process. In 15 such states, judges stand in retention elections for subsequent terms.

In three states—Illinois, New Mexico, and Pennsylvania—where judges are initially chosen in partisan elections, judges stand in retention elections for subsequent terms.

In California, where the governor appoints all appellate court judges, and in Kansas, where the governor appoints intermediate appellate court judges, judges stand in retention elections for subsequent terms.

B. REAPPOINTMENT

i. By governor

In 3 states where judges are chosen by commission-based gubernatorial appointment, the governor may reappoint judges to subsequent 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 judges for subsequent terms.

In all but two states where governors appoint judges with approval of some sort, judges may be reappointed for subsequent terms. (California and Kansas are exceptions; see above.)

The same form of approval required for the initial appointment—e.g., one or both houses of the legislature, the governor's council—is required for reappointment.

ii. By nominating commission

In the District of Columbia and Hawaii, the nominating commission itself determines whether to reappoint justices for additional terms.

iii. By legislature

In Vermont, where judges are chosen via commission-based appointment, judges may be reappointed by a vote of the general assembly.

8. HOW CAN A STATE JUDGE BE DISCIPLINED?

Every state has a judicial discipline commission that is responsible for disciplining judges for misconduct, as defined in the state's code of judicial conduct. Members of these commissions include judges, lawyers, and laypersons. Members of the public may file complaints against judges with these commissions. If a complaint has merit, the commission will undertake a confidential investigation of the allegations, after which the commission may file formal charges against the judge.

The commission then decides what, if any, sanctions should be imposed. Possible sanctions include public or private reprimand, suspension with or without pay, involuntary retirement, or removal from office. In some states, the commission itself may impose the sanction. In other states, the commission makes a recommendation to the state court of last resort, which makes the final determination regarding sanctions.

For more information about discipline of state judges, visit the American Judicature Society's [Center for Judicial Ethics](#).

9. HOW CAN A STATE JUDGE BE REMOVED FROM OFFICE?

Historically, states have used three methods of removing judges from office—impeachment, bill of address, and recall election.

A. IMPEACHMENT

Nearly every state allows judges to be impeached and removed from office by the legislature for offenses identified by state law, including “malfeasance,” “misfeasance,” “gross misconduct,” “gross immorality,” “high crimes,” “habitual intemperance,” and “maladministration.” The impeachment process is rarely used to remove judges.

B. BILL OF ADDRESS

In 16 states, judges may be removed through a bill of address. This process allows the legislature, often with the governor's consent, to vote for a judge's removal, even if no impeachable offense has been committed.

C. RECALL ELECTION

A few states allow voters to recall judges, just as they may recall other government officials. Voters initiate the process with a recall petition signed by a sufficient number of voters and presented to election officials. Election officials set a date for the recall election, and the judge may be removed by a majority vote.

D. JUDICIAL DISCIPLINE PROCESS

The involvement of judicial discipline commissions in the removal of judges is a relatively recent development. The first such commission was created in California in 1960.

10. HOW IS THE PERFORMANCE OF STATE JUDGES EVALUATED?

In 17 states and D.C., there is an official program—established by constitution, statute, or court rule—in place to evaluate the performance of state judges. Such programs may serve a variety of purposes, including providing relevant information for retaining or reappointing judges, promoting judicial self-improvement, and enhancing public confidence in the courts.

In several other states, bar associations, newspapers, or civic organizations evaluate judicial performance and share evaluation results with the public.

A. JUDICIAL PERFORMANCE EVALUATIONS

i. How are judges evaluated?

The most common evaluation tool is a questionnaire, which may be completed by attorneys, jurors, litigants, and witnesses who have been in the judge's courtroom, as well as court staff and other judges. Other components of the evaluation process may include courtroom observation, interviews, and self-evaluation. In some states, public records (e.g., written opinions, case management information, sentencing practices, reversals on appeal) are taken into account as well.

ii. What information comes out of the evaluation and who gets to see it?

In states where judges stand for retention, a narrative profile of each judge and a summary of the judge's evaluation results are posted online and/or in a voter guide. In six of the seven states (Alaska, Colorado, Missouri, New Mexico, Tennessee, and Utah) where evaluation results provide information to voters in retention elections, the evaluation report includes a recommendation as to whether each judge should be retained. In the seventh state (Arizona), the report indicates whether each judge meets established performance standards. The availability of evaluation results is publicized via newspaper, radio, and/or the internet.

In states where judicial performance evaluation provides information to those who reappoint judges, evaluation results may only be shared with those making the reappointment decision. A summary report for each court, which does not identify individual judges, may be made public.

In states where judicial performance evaluation is intended to promote public confidence in the courts, a summary of evaluation results for each court is made public.

In states where judicial performance evaluation is solely for the purpose of self-improvement, evaluation results are shared only with the evaluated judge and perhaps with a supervisory judge.

iii. Who administers the evaluation process?

In most states with a judicial performance evaluation program, an independent commission composed of judges, attorneys, and laypersons oversees all aspects of the program, including determining what, if any, recommendation should be made regarding whether each judge should be reselected. The administrative office of the courts typically provides staff support to the commission.

iv. Who selects the members of the performance evaluation commission?

Members of the performance evaluation commission may be selected by a variety of government officials and entities, including the supreme court, the governor, legislative leaders, the state judicial council, and the state bar association.

For more information about official performance evaluation programs for state judges, visit IAALS' [Judicial Performance Evaluation in the States](#).

B. STATE BAR ASSOCIATION EVALUATIONS

To provide valuable information to those who reelect, retain, or reappoint judges, state bar associations in some states survey attorneys about judges' performance. Results of these surveys, which may range from simply asking attorneys whether judges should be reselected to asking attorneys to rate judges on particular criteria or specific aspects of their work, are posted on the bar association's website.

C. HOW DOES A NEGATIVE REVIEW AFFECT A JUDGE?

Voting data indicates that voters do take unfavorable evaluation results into account. However, a judge who receives a negative review may still be reselected. The ultimate decision is still left to the governor, the legislature, or the voters.

Judges may not be disciplined for receiving a negative evaluation, but several states use evaluation results to develop self-improvement plans for individual judges or to identify areas to address in continuing judicial education programs.

11. WHAT TYPES OF FEDERAL COURTS ARE THERE?

As with state court systems, there are both trial courts and appellate courts in the federal court system. Some courts hear a wide range of cases that fall under federal jurisdiction, and some only hear cases involving a specific area of the law. The U.S. Constitution's Article III created the Supreme Court, but Congress creates other courts, some through its authority under Article III and some under Article I.

A. ARTICLE III COURTS

In Article III, Congress vested "the judicial power of the United States" in the Supreme Court and "inferior courts" that Congress might create. Although a somewhat misleading term, "Article III" courts generally refer to courts whose principal judges have Article III's protections of essentially life tenure and non-reducible salaries. These courts include the U.S. Supreme Court (the court of last resort), the U.S. Courts of Appeals (the intermediate appellate courts), and the U.S. District Courts (the major trial courts). These courts hear a wide range of federal cases and are the federal courts we hear about most often.

Most judges of Article III courts are nominated by the President and confirmed by the Senate, and they enjoy life tenure. Also serving within the District Courts are bankruptcy judges and magistrate judges, who serve for set terms.

The U.S. Court of Appeals for the Federal Circuit only hears cases involving patents, trademarks, complaints by federal employees of unfair treatment, and appeals from the U.S. Court of International Trade, which hears cases involving trade agreements the United States has with other countries.

Congress decides how many federal judges there will be by specifying the number of "judgeships" on each court. There were originally only six justices on the U.S. Supreme Court, but since 1869, there have been nine justices on the Court.

Congress has divided the United States into 12 regional federal judicial circuits, and created a U.S. Court of Appeals in each circuit. These circuits are known as the First through the Eleventh Circuits and the D.C. Circuit. Each of the numbered circuits includes at least three states. The largest circuit (the Ninth) consists of nine states. The number of judgeships on each Court of Appeals ranges from six (the First) to 28 (the Ninth),

with a total of 179 Court of Appeals judgeships. The number of judges serving at any one time will depend on how many of the judgeships are temporarily vacant and how many semi-retired judges ("senior status judges") continue to perform some judicial work.

Congress has also created federal judicial districts within the circuits, and each district has a U.S. District Court. Some states comprise a single district; larger states contain as many as four districts. There are 91 districts in all—with as few as five in some circuits (the First and Third), while the Ninth circuit has 13 districts. (Three U.S. territories—Guam, the Northern Mariana Islands, and the Virgin Islands—also have district courts, but their judges do not have life tenure. In two other “non-states,” however—the District of Columbia and Puerto Rico, Congress has created full-fledged District Courts.) There are currently 680 District Court judgeships.

To learn more about the your state’s federal court of appeals and federal district courts, view this [map](#).

B. ARTICLE I COURTS

In addition to Congress’s power in Article III to create “inferior courts,” Article I authorizes Congress to “create tribunals inferior to the Supreme Court” to hear cases involving particular statutes; they are sometimes called “legislative courts” because they do not exercise “the judicial power of the United States” but instead help Congress implement its legislative powers. These courts are located within the agencies of the executive branch. Judges of these courts are usually selected in a way other than that described in Article II of the U.S. Constitution, and they serve limited terms rather than for life.

Examples of Article I courts include the U.S. Court of Appeals for the Armed Forces, which hears cases arising under the Uniform Code of Military Justice; the U.S. Tax Court, which hears cases involving the IRS code; the U.S. Court of Veterans Appeals; and judges within the Social Security administration who hear appeals involving Social Security benefits. Some decisions of these Article I courts may be appealed to U.S. District Courts or Courts of Appeals.

12. HOW DOES A FEDERAL JUDGE REACH THE BENCH?

Article II of the U.S. Constitution authorizes the President to appoint individuals to be federal judges, subject to Senate confirmation by majority vote. This applies to judgeships that have Article III’s protection of good behavior tenure (essentially life tenure): the Supreme Court, Courts of Appeals, District Courts, and the Court of International Trade.

About half the judges in the federal judicial branch do not have these protections. The president appoints judges of the three territorial courts (Guam, Northern Mariana Islands, Virgin Islands) to renewable ten-year terms and to the Court of Federal Claims for renewable 15-year terms; both appointments require Senate confirmation. Bankruptcy judges are appointed to 14-year, renewable terms by the Court of Appeals in the circuit where they serve; magistrate judges, who assist U.S. District Court judges in their duties, are appointed to eight-year renewable terms by the District Court judges.

Judges of Article I or legislative courts, who serve in the executive branch, are appointed in a variety of ways.

A. ROLE OF HOME-STATE SENATORS

Almost all judgeships on both the District Courts and Courts of Appeals are associated with particular states. Congress has statutorily designated district courts by state (e.g., the District of Colorado, the Eastern District of California). By tradition, seats on the Courts of Appeals are associated with particular states within the multi-state circuits. Home-state senators of the president’s political party are often active in suggesting judicial nominees, especially for the District Courts. When neither home-state senator is of the president’s party, other local political leaders may be sources of proposed nominees.

Because of a norm in the U.S. Senate known as senatorial courtesy, the Senate Judiciary Committee will not process judicial nominees who do not have the approval of both home-state senators. This tradition, sometimes called the “blue-slip” process because of the form on which senators indicate their approval, gives home-state

senators a virtual veto power over judicial nominees to seats in their states. Thus, it is in the best interests of the White House to get home-state senators' approval before submitting nominees. There is some evidence that home-state senators, especially those not of the president's party, have used this veto power more aggressively in recent years than in earlier years. For judgeships without home-state senators (in the District of Columbia, Puerto Rico, and on the Court of Appeals for the Federal Circuit) somewhat different processes operate.

B. ROLE OF THE PRESIDENT

Unlike nominations to the Supreme Court, presidents are usually not personally involved in nominations to the Courts of Appeals and District Courts. Other executive branch entities are involved in these nominations, however. Members of the White House staff and U.S. Department of Justice identify potential nominees and investigate their backgrounds, professional and otherwise, including reviewing an extensive and detailed questionnaire that each nominee must complete regarding his/her professional background and legal experience, among other things. The FBI investigates the personal backgrounds of potential nominees.

C. ROLE OF THE SENATE JUDICIARY COMMITTEE

The Senate Judiciary Committee undertakes its own investigation of nominees, including of the nominees' questionnaires. It conducts public hearings and makes recommendations regarding confirmation to the full Senate. (Neither of these steps is automatic; not all nominees get hearings or recommendations.)

Nominees usually get a Judiciary Committee hearing, most (but not all) of which are rather pro forma affairs attended by less than the full committee. A single hearing may involve several nominees, who answer fairly routine questions from the committee members in attendance (e.g., "Will you let your personal views affect your interpretation of the law in the cases before you?").

For the occasional controversial nominee, questioning may be more intense, and the committee may hear from interest group members and others about why the Senate should or should not confirm a nominee. The committee sometimes holds a private hearing with a nominee to discuss allegations deemed inappropriate for a public airing. At some point after the hearing, the committee will vote on whether to send the nomination to the full Senate for a confirmation vote.

D. ROLE OF THE SENATE

The final step in the appointment process is for the full Senate to approve the nominee (by majority vote). Court of Appeals and District Court nominees are rarely denied confirmation in floor votes, although they may fail to be confirmed because the Senate leadership decides not to bring the nomination to a vote.

E. FEDERAL JUDICIAL SCREENING COMMISSIONS

Some Senators have created commissions to screen or vet potential judicial nominees and recommend individuals that the Senators might then submit to the White House, principally for District Court judgeships in their states. The President is not bound to nominate a candidate recommended by one of these commissions, but some Presidents have reached agreements with Senators in some states to do just that.

Senators in 21 states currently use such commissions, which vary greatly in size and procedures, and, in any event, are not official government agencies. To learn more about these commissions, visit IAALS' [Options for Federal Judicial Screening Commissions](#).

F. AMERICAN BAR ASSOCIATION ROLE

With the exception of President George W. Bush, Presidents since Dwight Eisenhower have submitted the names of potential federal court nominees to the ABA's Committee on the Federal Judiciary, which evaluates the nominees' professional qualifications and rates them as Well Qualified, Qualified, or Not Qualified.

This rating figures into some Presidents' final decision in making nominations. A representative of the ABA committee sometimes testifies at the nominee's Senate Judiciary Committee hearings, in particular for Supreme Court nominees.

13. WHAT ARE THE QUALIFICATIONS FOR BEING A FEDERAL JUDGE?

There are almost no formal qualifications—such as a minimum age or years of experience—for most federal judges. U.S. Court of Appeals and District Court judges are not even required by law to have legal training, but today having a law degree is recognized as an implicit qualification for Article III judges. (Bankruptcy judges are required by statute to have a law degree, and magistrate judges must have been members of the bar for 5 years.)

14. HOW LONG DOES A FEDERAL JUDGE STAY ON THE BENCH?

According to the U.S. Constitution, most judges of Article III courts enjoy life tenure (the Constitution says they may hold office “during good Behaviour”). As explained below, they may be removed from office by Congress, but that is very rare.

There is no mandatory retirement age for federal judges, although Congress provides that judges who reach a certain age and have been judges for a certain amount of time may retire from full-time service and still earn their salaries. Bankruptcy judges and magistrate judges serve set terms and may be reappointed. Most judges in the executive branch also serve for set terms and may be reappointed, subject to maximum age limits.

15. HOW CAN A FEDERAL JUDGE BE DISCIPLINED?

Congress established in 1980 the process that is currently used to address allegations of impropriety or misconduct by judges of the U.S. District Courts and Courts of Appeals (including bankruptcy and magistrate judges). This process does not apply to U.S. Supreme Court justices.

The bulk of the disciplinary responsibility rests with the chief judges of the Courts of Appeals and circuit judicial councils. (There is a council in each circuit, comprising the chief circuit judge and an equal number of District Court and Court of Appeals judges.) Any person may file a complaint against any judge with the chief judge of the circuit. If the chief judge finds that the complaint is without merit or related to the substance of a judicial decision, s/he may dismiss the complaint. However, a chief judge who finds that the complaint alleges facts that are “reasonably in dispute” must appoint a committee of judges to investigate the complaint and report back to the judicial council. (Chief judges dismiss the great majority of complaints, most of which are filed by disappointed litigants unhappy with the judges' decision in their cases.)

The judicial council then determines what, if any, disciplinary action should be taken. Possibilities include public or private reprimand or censure, a request for the judge's resignation, a temporary suspension of the judge's duties, or even a recommendation that Congress consider removing the judge from office. But unlike state judge disciplinary processes, federal district and circuit judges may not be removed from office as part of the disciplinary process. (The councils can recommend that bankruptcy or magistrate judges be removed from office under specific legal provisions for that purpose.)

For more information about discipline of federal judges, visit the American Judicature Society's [Center for Judicial Ethics](#) and the U.S. Courts site on [Judicial Conduct & Disability](#).

16. HOW CAN A FEDERAL JUDGE BE REMOVED FROM OFFICE?

Federal judges may only be removed from office via the impeachment process. According to the U.S. Constitution, impeachable offenses include treason, bribery, and other “high crimes and misdemeanors.” The U.S. House of Representatives may impeach, or charge, judges by a majority vote. By a two-thirds vote, the U.S. Senate may convict and remove impeached judges from office.

The U.S. House of Representatives may begin impeachment proceedings on its own initiative or based on a recommendation from the U.S. Judicial Conference (generally acting on a recommendation of a judicial council).

Fifteen federal judges have been impeached, and eight have been convicted and removed from office. Three others resigned to avoid Senate conviction. One U.S. Supreme Court justice (Samuel Chase) was impeached in the midst of early battles between President Thomas Jefferson and the federal judiciary. Chase’s actions while serving (as justices did then) as a trial judge were highly partisan, but his acquittal set an important precedent—the process should not be used as a means of punishing federal judges for their decisions in cases.

17. HOW IS THE PERFORMANCE OF FEDERAL JUDGES EVALUATED?

The only programs within the judicial branch for evaluating the performance of federal judges have been implemented voluntarily by individual federal circuits, districts, or judges. The Ninth Circuit’s judicial council established a voluntary self-evaluation program for District Court judges in the early 1980s, but the program was discontinued due to limited participation. A committee of the U.S. Judicial Conference selected the U.S. District Court for the Central District of Illinois to pilot a performance evaluation program for its judges in 1991, but it was considered a mixed success. Since that time, some federal judges have developed their own self-evaluation processes. Performance evaluation programs are more common for U.S. bankruptcy judges, who often seek reappointment to office.

THE O'CONNOR JUDICIAL SELECTION PLAN

BY U.S. SUPREME COURT JUSTICE
SANDRA DAY O'CONNOR (RET.)

AND

IAALS

EMPOWERING IMPROVEMENT.
ADVANCING EXCELLENCE.







THE O'CONNOR JUDICIAL SELECTION PLAN

JUSTICE SANDRA DAY O'CONNOR (RET.)
United States Supreme Court

&

IAALS

The Institute for the Advancement of the
American Legal System

June 2014

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INSTITUTE *for the* ADVANCEMENT
of the AMERICAN LEGAL SYSTEM



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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.



The Quality Judges Initiative serves to advance empirically informed models for choosing, evaluating, and retaining judges that preserve impartiality and accountability in the civil justice system.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR (RET.)

June 2014

Dear Reader,

For the last several years, I have worked closely with IAALS and the Advisory Committee to its *Quality Judges Initiative* to promote processes for selecting and retaining state judges that inspire public trust in our courts and the integrity of their decisions.

In our view, the O'Connor Judicial Selection Plan best achieves these ends. The O'Connor Plan calls for commission-based gubernatorial appointment of judges, with performance evaluation and periodic retention elections.

With this publication, we offer recommendations for structuring each stage of the selection process to encourage highly qualified individuals to apply for judgeships, assure that the best judicial candidates are selected and retained, and engender support for the judiciary from the other two branches. These recommendations are based on IAALS' and other research.

As an example, the O'Connor Plan suggests that more than one entity should select the members of the judicial nominating commission. After receiving a commission's nominees, the governor should have a finite period of time in which to make the appointment. Voters in retention elections should have access to nonpartisan information about the judges on the ballot. Evaluations of judges' performance should focus on the legal analysis, clarity, and fairness of their decisions instead of the outcome of their decisions.

In recent years, I have been distressed to see persistent efforts in some states to politicize the bench and the role of our judges. This Plan is a step toward developing systems that prioritize the qualifications and impartiality of judges, while still building in tools for accountability through an informed election process. Our recommendations here can help states set a course toward improving and refining their processes, and, ultimately, strengthening their judiciary. We all must seek to achieve those goals, because the courts are the bulwark of our democracy and we can ill afford to see them undermined.

Sincerely,



Sandra Day O'Connor





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INTRODUCTION

IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, has a deep and abiding interest in protecting the quality and integrity of the judiciary. To that end, IAALS formed our *Quality Judges Initiative* in 2007. IAALS has worked closely with an extremely qualified Advisory Committee chaired by United States Supreme Court Justice Sandra Day O'Connor (Ret.).

With her assistance, and based upon IAALS' independent research and compilation of existing research, IAALS and Justice O'Connor have identified a model for judicial selection that we believe best balances the dual goals of impartiality and accountability.

This four-part model includes: 1) Screening and nomination of applicants from an open field by a commission that is politically balanced and that includes a majority of non-attorneys; 2) Appointment from among those nominees by the sitting governor of the state; 3) Robust evaluation of the judge by individuals who appear before him or her and circulation of that information to voters; and 4) Retention election on a regular basis in which all voters may cast an informed vote for or against the judge, with the benefit of the evaluation data.

THE O'CONNOR ADVISORY COMMITTEE IS COMPRISED OF:

Justice Sandra Day O'Connor (Ret.),
Honorary Chair

Chief Justice Ruth V. McGregor (Ret.),
Chair

Meryl Chertoff, Director, Justice
and Society Program, The Aspen
Institute

Talbot "Sandy" D'Alemberte,
President Emeritus, Florida State
University

Senator Bob Graham, United States
Senate, 1987–2005

Chief Justice Wallace Jefferson,
Partner, Alexander Dubose Jefferson
& Townsend LLP

Rebecca Love Kourlis, Executive
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Larry D. Thompson, Executive Vice
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General Counsel, and Corporate
Secretary, PepsiCo, Inc.

H. Thomas Wells, Jr., Partner and
Founding Member, Maynard,
Cooper & Gale, PC

Governor Christine Todd Whitman,
New Jersey, 1994 – 2001

Mary G. Wilson, Past President,
League of Women Voters of the
United States

We were honored to have the late Thomas Moyer, Chief Justice of the Ohio Supreme Court, as one of the original members of the Advisory Committee.

CORE VALUES IN THE JUDICIARY

As a prerequisite to the development of a recommended model for judicial selection, we identified and defined as Core Values the desired attributes of a judge and of a judicial system. IAALS, Justice O'Connor, and the Advisory Committee asked a diverse group of experts—including federal and state judges, academics who study judicial selection, and practicing lawyers who have a role in selecting judges—what they expected from judges and from court systems, with the assumption that those individuals were presenting (as plaintiff or defense) a case that was important to them. The Core Values that we list here comprise the information we gleaned from that inquiry.

VALUES DESIRED IN INDIVIDUAL JUDGES

FAIRNESS AND IMPARTIALITY.

- Judges must be fundamentally fair and impartial.
- Judges must approach each case with an open mind.
- Judges must eschew actual bias and the appearance of bias.
- Judges must be willing to reconsider personal points of view.
- Judges must be honest and even-handed.

COMPETENCE.

- Judges must have excellent analytical ability.
- Judges must demonstrate excellent substantive legal knowledge, or a willingness to learn at the earliest opportunity.
- Judges must undertake the research necessary to gain command of the facts and issues presented.

JUDICIAL PHILOSOPHY.

- Judges must be principled and intellectually curious.
- Judges must be collaborative and open to new learning to achieve deliberative excellence.
- Judges must recognize the impact and consequences of a decision but not allow these factors to drive the decision.
- Judges must appreciate stability in law and precedent, while recognizing the need for change.
- Judges must have sufficient decisional independence to decide issues in ways that contravene majority opinion, if such decisions are consistent with existing law.

PRODUCTIVITY AND EFFICIENCY.

- Judges must attend to tasks.
- Judges must demonstrate a strong work ethic.
- Judges must strive to achieve timely docket management without sacrificing due process.

“If decisions are in fact not fair and impartial—or even if they are perceived as being biased—the basis of support for our courts crumbles.”

Justice Sandra Day O'Connor
Drake Law Review
Spring 2012



“

The sections on core values—both for what we want in judges and in court systems—represent an important contribution to the public dialogue and reflect conversation among practitioners and scholars from very different points on the political spectrum. They show that there are some values we all share when we think about our judges and courts.

”

Meryl Chertoff

Director, Justice and Society Program
The Aspen Institute



CLARITY.

Judges must have excellent written and oral communication skills.

Judges must communicate in a straightforward and precise manner, and provide reasoning for decisions.

DEMEANOR AND TEMPERAMENT.

Judges must be patient and even-keeled.

Judges must be collegial and humble.

Judges must be respectful and courteous.

Judges must command respect from the community and from those who enter the courthouse.

Judges must work to make the courtroom a comfortable place for those who enter it, while acting as necessary to maintain appropriate respect and decorum at all times.

COMMUNITY.

Judges must share the fundamental values to which communities should aspire—values such as respect for individual rights, democratic government, and the rule of law.

Judges must be members of their community—not completely isolated from them.

Judges must be encouraged to engage in community service activities when those activities do not contravene or appear to contravene their decisional independence.

Judge must take an active role in the community to promote the values and principles of the judicial system.

Judges must build public understanding of the legal system and public confidence in the judicial branch through appropriate communications and attendance at community events.

SEPARATION OF POLITICS FROM ADJUDICATION.

Judges must not engage in partisan politics, which threatens independent decision-making and erodes public confidence in the judicial system.



VALUES DESIRED IN COURT SYSTEMS

COMMITMENT TO PUBLIC SERVICE.

Judges and court staff must ensure their actions as public servants align with the best interests of the public.

TRANSPARENCY.

Judges and court staff must make opinions, orders, and court statistics publicly available and accessible, except where the circumstances of individual cases warrant confidentiality.

Judicial performance evaluations must be accessible to the public, partly as a means of educating citizens about the role of the courts and the expectations courts and judges have for their own performance.

ACCOUNTABILITY.

Courts must commit to continuous improvement in their service to the public.

Courts must hold themselves accountable to the public to provide a fair and efficient adjudicative process.

Courts must work to remedy their processes if considered to be unfair, inefficient, or too costly by a substantial portion of the public.

Voters must have the opportunity to hold courts accountable for their overall performance.

ACCESSIBILITY.

Courts must be accessible to all, and each party should have a day in court if so desired.

Courts must not be perceived to be unavailable to potential litigants or the public.

FAIR, EFFICIENT, AND PREDICTABLE PROCESS.

Courts must be as committed to the fairness and predictability of procedures as they are to the fairness and predictability of outcomes.

Litigants must feel that they had the opportunity to be heard before the decision was rendered.

Individual judge procedures must not be so different from those of other judges that these variations encourage forum shopping.

RESPECT FOR DEMOGRAPHICS/SOCIAL MAKEUP OF COMMUNITY.

The overall makeup of the court must reflect respect for the community it serves. Those responsible for selecting judges should be mindful of this.

This does not mean that the race, gender, or ethnicity of the judges must be perfectly proportionate to the demographics of the community (although such factors might be among those considered). It does mean, however, that every judge in the courthouse should be cognizant of the community that he or she serves.

“

The best defense against threats to judicial independence is a culture in which citizens appreciate and respect the role of impartial courts in upholding the rule of law; in which they recognize that the defense of the unpopular is a part of what makes our judiciary the envy of the world. The key to creating such a culture is education.

”

Justice Sandra Day O'Connor
Philadelphia Bar Association
June 2013



“

The judicial nominating commission is the key to the judicial merit selection process, and thus the decisions about who serves on the commission, who selects them, and how the commission operates are critical to the process.

”

Chief Justice
Ruth V. McGregor (Ret.)
Arizona Supreme Court



THE O'CONNOR JUDICIAL SELECTION PLAN

We turn now to the four components of the O'Connor Plan, and our recommendations as to the elements of each. These recommendations are based upon the compiled information and experience available to IAALS, Justice O'Connor, and the Advisory Committee, and comprise a system that is designed to produce judges and courts that fulfill the Core Values.

JUDICIAL NOMINATING COMMISSIONS

Nominating commissions are at the front end of the process. They should be the screening entity that identifies the list of final candidates for the Governor. Their structure and composition must provide a climate that fosters public confidence in the process while encouraging highly qualified applicants to apply. They must not be a political or partisan entity and should be representative of the community to be served by the judge. Our recommendations for the elements that comprise an effective nominating commission are taken primarily from existing nominating commission processes that we offer as better practices:

To ensure the stability of the process, nominating commissions should be constitutionally based.

The number of nominating commissions in a state may vary, but at the very least, there should be an appellate nominating commission and one or more trial court nominating commissions.

Multiple appointing authorities should select nominating commission members. This bolsters public confidence in the commission's independence by making it less likely that a majority of the members will be appointed by a single entity.

In order to assure that the public viewpoint is well represented, a nominating commission should include a majority of non-attorney members who have a range of professional backgrounds and personal experience. Nominating commissions must not be viewed as captive to attorney groups.

Nominating commissions should be balanced politically, ideologically, and demographically. Race/ethnic, gender, and geographical diversity among commission members should be encouraged, if not required.

Members of nominating commissions must receive training so that they understand their role, and the role, responsibilities, and duties of judicial officers.

Nominating commission proceedings should reflect openness and transparency, carefully balancing the applicants' need for confidentiality with the public's right to know.

The respective terms of commission members should be staggered so that no one leadership group has a predominant voice. Staggered terms also prevent complete turnover in the commission's membership, which provides new members with the benefit of existing members' experience and ensures rotation among appointing authorities.

There should be a default provision in place should the nominating commission fail to act.

GUBERNATORIAL APPOINTMENT

At this point in the process, the sitting Governor is able to exercise his or her preference among the nominees. That decision may, indeed, have partisan overtones because it is being made by an elected official who has a particular approach to judicial appointments. If the nominating commission has done its job, all nominees will be well qualified for the position. It is important that the nominating process be honored and that the Governor's choice be limited to nominees whose names come from that process. Furthermore, a finite time for the appointment is important so as to avoid the possible 'limbo' of nominations that stretch on indefinitely and become political bargaining chips. A finite time also assures that the nominees themselves are able to continue their practice, or their current position, with only a limited period of uncertainty. Accordingly, we recommend these three elements of the gubernatorial appointment process as better practices:

The Governor should be given an appropriately limited number of nominees for each position, and a limited time in which to make the appointment.

There should be a default provision in place should the Governor fail to act timely.

The Governor should not be allowed to make an appointment outside of the list of recommended nominees.

“

Appointing judges is one of the most important responsibilities of a governor. In making judicial appointments, the governor should prioritize the qualifications of potential appointees over partisan considerations. The O'Connor Plan accomplishes this goal through a process that allows a nominating commission to screen nominees, on a bipartisan basis, and then give the governor the ultimate choice.

”

Governor
Christine Todd Whitman
New Jersey, 1994–2001



“

Any system for selecting and retaining state court judges should allow voters to have a voice, but in a way that does not require judges to align themselves with partisan interests. The O'Connor Plan provides for appropriate accountability of judges through judicial performance evaluation—not through the grinder of partisan, contested elections.

”

Chief Justice
Wallace Jefferson (Ret.)
Texas Supreme Court



JUDICIAL PERFORMANCE EVALUATION

This is the point in the process where accountability plays a role. Most Americans undergo job evaluations, and there is no reason why judges should not do the same. On the other hand, the data must be broad and deep and the inquiries must be about procedural fairness, demeanor, and knowledge—not about particular outcomes in individual cases. We offer these better practices as our recommendations for effective judicial performance evaluation:

Judicial Performance Evaluation (JPE) programs should be created by constitution or statute, rather than by a rule or directive.

JPE programs should publically disseminate regular evaluations of the performance of individual judges, based on criteria generally understood to be characteristics of a good judge:

- Command of relevant substantive law and procedural rules
- Impartiality and freedom from bias
- Clarity of oral and written communications
- Judicial temperament that demonstrates appropriate respect for everyone in the courtroom
- Administrative skills, including competent docket management
- Appropriate public outreach

JPE of appellate judges should include a process for evaluating the legal reasoning and analysis, fairness, and clarity of a selection of the judge's written opinions, without regard to the particular outcomes reached.

Evaluations should be completed by people who have interacted with the judges in the courtroom and in the office.

The entity responsible for administrating the JPE process should be viewed as independent from other entities in performing its role. It should not be affiliated with the judicial branch.

Like judicial nominating commissions, the members of a judicial performance evaluation commission should be selected by multiple appointing authorities and be comprised of a majority of lay members. It should reflect diversity, be politically, ideologically, and geographically balanced, and the terms of its members should be staggered.

As part of JPE, judges should receive regular training. In addition to basic and broad judicial education, education programs should be tailored to the extent possible to the areas in which judges have been found wanting in their respective performance evaluations.

RETENTION ELECTIONS

This is the point in the process where the voters have their say about judges. We do not recommend that elections be contested and partisan, but we endorse the opportunity for citizens to make their choice. The compromise is a retention election in which the judges are ‘retained’ in office or not on the basis of the vote of the electorate. Judicial performance evaluation plays a crucial role in providing voters with objective and broad-based information about the judge’s performance—information that is often lacking in judicial elections, especially when they are highly politicized. While JPE has purpose in self-improvement and feedback to individual judges, its primary purpose is to allow voters to cast informed votes when the judges appear on their ballots. Accordingly, we recommend these elements of the retention election process as better practices:

Retention elections are the final, critical piece of a selection system that embraces the core judicial values listed above. Accountability of judges to the public is the pivotal part of this approach to judicial selection.

Judges do not run against opponents; they do not run on party lines; they do not (except in extraordinary circumstances) need to raise money or make stump speeches that may affect their impartiality or the appearance of impartiality.

However, they do need to stand for election before the public whom they serve.

That voter base must have ready access to the JPE information that allows each voter to cast an informed vote about the judge—based upon his or her actual performance on the bench.

In retention elections, judges stand for retention after a provisional term of two to three years. This allows for the collection of sufficient data about the judge’s performance.

Judges’ terms of office vary after that, so JPE data collection should be continuing and as frequent as possible to coincide with the judge’s respective term.

This four-part Plan is a suggestion. It is based upon information about processes in various states, but is ultimately the recommendation of IAALS, the members of the Advisory Committee, and Justice O’Connor. We do not offer it as perfect; no selection system is. As its proponents, we offer the O’Conner Plan as an alternative that protects impartiality of the judiciary by insulating judges from campaign fundraising and campaign promises, yet still ensures accountability. Ultimately, what we all want is the best qualified judges sitting on the courts of this nation, as that is how the courts can best serve as protectors and defenders of our individual liberties and of our way of life. We must all muster our best efforts to, in turn, protect and defend them.

“

Businesses today are fast becoming the largest contributors to judicial candidates. Support of the O’Connor Judicial Selection Plan eliminates campaign investment in contested judicial elections, ensures a fair, accessible, and transparent court, and ultimately encourages and sustains a strong and vibrant business environment.

”

Maureen E. Schafer
Chief Corporate
Development Officer
LifeNexus, Inc.



“

There are many ways to harness the core attributes of the merit selection process—the screening of qualified candidates, the minimization of political and financial influence, the preservation of judicial impartiality—while enhancing public awareness of those benefits.

”

Justice Sandra Day O'Connor
Missouri Bar National Summit on
Merit Selection
August 2011



THE O'CONNOR PLAN IN THE STATES

STATES THAT USE THE O'CONNOR PLAN TO SELECT AND RETAIN JUDGES:

In 7 states (Alaska, Arizona, Colorado, Missouri, New Mexico, Tennessee, Utah), all four components of the O'Connor Plan are used in selecting and retaining at least some judges.

In 3 states (Alaska, Colorado, Utah), all four components are used in selecting and retaining all judges.

In 3 states (Arizona, Missouri, Tennessee), all four components are used in selecting and retaining appellate court judges and, with the exception of Tennessee, some trial court judges.

In 1 state (New Mexico), the governor's appointee may be challenged in a partisan election, followed by subsequent retention elections.

STATES THAT USE SOME, BUT NOT ALL, COMPONENTS OF THE O'CONNOR PLAN:

In 33 states and the District of Columbia, a commission-based appointment process (i.e., the first two components of the O'Connor Plan) is used to select at least some judges.

In 22 states and D.C., a commission-based appointment process is always used to select most or all judges.

In 6 states that use partisan or nonpartisan elections to select judges, a commission-based appointment process is used only to fill vacancies that occur between elections.

In 5 states, a judicial nominating commission advises the governor in making judicial appointments, but the governor is not required by law to appoint a commission-recommended candidate.

Of the 22 states that use a commission-based appointment process to select most or all judges, 16 states use periodic retention elections to retain judges.

In 17 states and the District of Columbia, there is an official program for evaluating judicial performance.

As discussed above, in 7 states performance evaluation results are provided to voters for use in retention elections.

In 3 states and the District of Columbia, performance evaluation results are provided to those responsible for reappointing judges.

In 2 states, summary performance evaluation results (i.e., individual judges are not identified) are provided to the public to enhance confidence in the courts.

In 5 states, performance evaluations are provided only to individual judges for the purpose of self-improvement.

SPECIFIC STATE PRACTICES

To illustrate the O'Connor Plan in action, we highlight some similarities and differences in its operation in the seven states where it is in place.

JUDICIAL NOMINATING COMMISSIONS:

In Arizona and Utah, the Governor appoints all members of the Commission, with attorney members chosen from candidates recommended by the State Bar. In other states, a combination of entities—which may include the Governor, the State Bar, the Chief Justice, and legislative leaders—appoints Commission members.

In Arizona and Colorado, a majority of Commission members are non-lawyers, and in Utah, the Commission may have a non-lawyer majority.

Arizona, Colorado, New Mexico, and Utah require partisan balance among Commission members.

In five O'Connor Plan states—Alaska, Arizona, Missouri, New Mexico, and Tennessee—some aspects of the Commission's screening process are open to the public.

GUBERNATORIAL APPOINTMENT:

In O'Connor Plan states, the Governor has a limited time—ranging from 15 days in Colorado to 60 days in Arizona, Missouri, and Tennessee—to make a judicial appointment after receiving the Commission's list of nominees.

If the Governor fails to do so, most states authorize the Chief Justice to make the appointment, but in Missouri, that responsibility falls to the Judicial Nominating Commission.

In New Mexico and Tennessee, the Governor may request that the Commission submit a second panel of nominees.

Utah is the only O'Connor Plan state in which Senate confirmation of gubernatorial appointments is required.

JUDICIAL PERFORMANCE EVALUATION:

Arizona is the only state with a constitutionally authorized JPE program; in other O'Connor Plan states, programs are authorized by statute or court rule.

JPE programs for trial court judges include courtroom observation in Alaska, Colorado, and Utah. Programs for appellate court judges include written opinion review in Colorado, Missouri, New Mexico, and Tennessee.

In Arizona, Colorado, New Mexico, and Utah, judges are evaluated at least twice per term—mid-term to facilitate self-improvement and pre-retention election to inform voters.

Self-Improvement: In Arizona and Colorado, judges write their own performance improvement plans, approved by the Commissions, for areas in which their evaluations show problems.

“

The best way to ensure fair and impartial courts is to choose judges through screening by a diverse citizen commission and appointment by the governor. Though no solution can remove politics entirely from judicial selection, a transparent process like this upholds judicial qualifications over campaign rhetoric.

”

H. Thomas Wells, Jr.

Partner and Founding Member
Maynard, Cooper & Gale, PC



“

Thus, even states that use a merit selection system to select judges should scrutinize their plans to preserve what is essential to judicial independence and reform those aspects of the plan that are expendable and might otherwise endanger the whole.

”

Justice Sandra Day O'Connor
Missouri Law Review
 June 2009



RETENTION ELECTIONS:

Terms of Office: In O'Connor Plan states, judges serve a short initial term—typically at least one to three years—before standing for retention for a full term. The length of a full term varies from state to state and by level of court.

Term lengths for judges of major trial courts range from four years in Arizona to eight years in Tennessee. Trial court judges in the other O'Connor Plan states have six-year terms.

Judges of intermediate appellate courts serve terms ranging from six years in Arizona and Utah to twelve years in Missouri. Term lengths for intermediate appellate court judges are eight years in the other O'Connor Plan states.

Term lengths for Supreme Court justices range from six years in Arizona to twelve years in Missouri. In New Mexico and Tennessee, justices serve eight-year terms; in Alaska, Colorado, and Utah, justices serve ten-year terms.

In O'Connor Plan states, judges who wish to campaign for retention must establish a campaign committee to fundraise and seek public statements of support on their behalf. In Alaska, Colorado, Missouri, and Utah, judges may not mount a campaign unless there is active opposition to their retention; in Arizona, New Mexico, and Tennessee, no such restrictions are in place.



ADDITIONAL RESOURCES

JUDICIAL NOMINATING COMMISSIONS IN THE STATES

Nominating commissions are used in selecting at least some judges in many states around the country. This resource tracks the nominating commissions in the states and links to detailed information about each state's program.

Available at <http://iaals.du.edu/initiatives/quality-judges-initiative/implementation/judicial-nominating-commission>

JUDICIAL PERFORMANCE EVALUATION IN THE STATES

Judicial performance evaluation exists in many states as an official program. This resource tracks these programs and contains detailed information about each of them.

Available at <http://iaals.du.edu/initiatives/quality-judges-initiative/implementation/judicial-performance-evaluation>

AN UNCOMMON DIALOGUE: WHAT DO WE WANT IN OUR JUDGES & HOW DO WE GET THERE?

In March of 2013, IAALS sponsored "An Uncommon Dialogue" about judicial selection. IAALS convened a group of ideologically and experientially diverse legal experts for two days to share perspectives on essential attributes for judges and how to put judges with those attributes on the bench.

Available at <http://iaals.du.edu/initiatives/quality-judges-initiative/research/an-uncommon-dialogue>

TRANSPARENT COURTHOUSE®: A BLUEPRINT FOR JUDICIAL PERFORMANCE EVALUATION

This publication provides useful tools to aid jurisdictions interested in establishing or improving a judicial performance evaluation program for trial court judges.

Available at <http://iaals.du.edu/library/publications/transparent-courthouse-a-blueprint-for-judicial-performance-evaluation>

RECOMMENDED TOOLS FOR EVALUATING APPELLATE JUDGES

This publication provides useful tools to aid jurisdictions interested in establishing or improving a judicial performance evaluation program for appellate court judges.

Available at <http://iaals.du.edu/library/publications/recommended-tools-for-evaluating-appellate-judges>



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