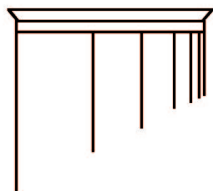


OPTIONS

for FEDERAL JUDICIAL SCREENING COMMITTEES



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LEGAL SYSTEM



JUNE 2010

OPTIONS FOR FEDERAL JUDICIAL SCREENING COMMITTEES
*Things to Consider in Establishing and Operating a Committee to Advise Legislators
About Candidates for District Judgeships (and Other Judicial System Positions)*

The Governance Institute and the Institute for the Advancement of the American Legal System at the University of Denver (IAALS) prepared this document, and will periodically revise it, to provide United States senators, other federal legislators, and their staffs, information about creating committees to screen potential judicial and law enforcement position nominees, and to provide them and committee members information about committee operations. It is not a “best practices” manual, in part because relatively little is known about how such committees work and even less about structure and processes that seem to work better than others. The most current version will be available at:

www.du.edu/legalinstitute

and

<http://www.brookings.edu/experts/wheelerr.aspx>

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The Governance Institute is a small non-partisan organization in Washington, D.C. that explores problems associated with the separation of powers in the federal system, including the gap between courts and Congress, contentiousness in federal judicial selection, courts and the media, and inspectors general and other aspects of the federal bureaucracy.

IAALS is a national, non-partisan organization dedicated to improving the process and culture of the civil justice system. Focusing on the needs of those who use the system, IAALS conducts research to identify problems and develop innovative, practical solutions.

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OPTIONS FOR FEDERAL JUDICIAL SCREENING COMMITTEES

EXECUTIVE SUMMARY

Federal judicial selection is a time-consuming and sometimes contentious process. Home state senators, particularly those of the president's political party, have historically enjoyed the prerogative to propose nominees to the White House; most identify those potential nominees through relatively informal means. This paper describes alternatives to those informal means that may be more open, transparent and inclusive, but that still preserve the senators' prerogative: senator-appointed committees to screen potential nominees.

The Governance Institute and the Institute for the Advancement of the American Legal System prepared this paper to describe, from the admittedly limited information currently available, how such screening committees have been constructed and how they typically work. It outlines factors that senators and their staffs may wish to consider in creating a committee, and highlights issues to consider with respect to committee operations. Our goal is to identify some of the choices that the legislators and their staffs, and committee members, will face, and to suggest an array of options; our goal is not to prescribe "best practices."

Screening committees have been in use by some senators for more than 30 years. In 1977, President Carter created a national committee to screen potential nominees for the U.S. courts of appeal, and he urged senators to appoint their own committees for district judgeships. Senators in 29 states responded, although by the time of President George W. Bush's administration, senators in only nine states had committees in place. In 2008, the American Bar Association reaffirmed its support for the use of committees, and 2009 saw an upswing in their use.

The number of committees shot up from nine in 2008 to at least 21 as of mid-June 2010. Nevertheless, information on their operation—even their existence—is not abundant, despite the best efforts of the American Judicature Society to identify and describe them. We have relied here on the Society's website list of senators who use committees¹ as well as information from the Congressional Research Service, legislators' websites, press reports, and conversations with committee members. Cumulatively, this information provides insight into the value that senators perceive screening committees to provide, as well as the factors to consider in structuring, appointing, and operating a committee.

The reasons why senators may choose to use screening committees include a hope that an individual who enjoys the endorsement of a committee may move to nomination and confirmation more quickly. That aspiration appears to have held true to some extent, although differences in confirmation times are affected by factors other than the committee process. Other advantages of a committee process may include the ability to screen applicants and catch problems before any ABA or White House involvement; providing a voice to varied constituencies, including non-lawyers and members of both political parties; and inviting applications from individuals who might not otherwise come to the senators' attention.

The composition of committees varies widely, in the number of members, leadership, and demographics. Similarly, charges from the senators as to committee tasks and operations vary as does the jurisdiction of the committees. The first decision is whether the committee will be created by one or both senators. Recommendations of a committee that has the support of both

JUNE 2010

senators—whether or not of the same political party—may have more traction than those of a single-senator created committee.

We also remind committees that individuals, once nominated, will undergo vigorous examinations by the Federal Bureau of Investigation, the American Bar Association Standing Committee on the Federal Judiciary, the Senate Judiciary Committee (which will post lengthy, nominee-completed questionnaires on its website), and sometimes by the press. Problems that surface in these investigations but that the committee missed might marginalize the committee in the eyes of the senators and the informed public.

Below is a decision tree for senators and their staff about creating a committee, and for committee members as well, about its operation: what are the decisions to be made and what are the options among which they will likely choose? The goal is to provide senators, staff, and committee members with a roadmap drawn from the experience of other senators.

REASONS to consider the use of screening committees:

- Ease contention and delay in the nomination-confirmation process
- Anticipate and complement ABA reports
- Provide a voice not from the president's party, without compromising the ultimate choice, to preserve partisan prerogatives in the appointment
- Open the process to more applicants
- Enhance public trust in the process

STRUCTURE of the committee:

- Creation by one or both senators
- One or more committees: a geographic question
- Bar association collaboration
- Jurisdiction of the committee: district judges only, or circuit judges, U.S. attorneys and/or marshals as well
- Permanent or ad hoc
- Committee size
- Formal bylaws or other governing documents, or informal process

APPOINTMENT of the committee members:

- Lawyers only or lawyers and lay persons, and what mix of trial lawyers and other lawyers
- Political representation/bipartisanship
- Demographic representation

JUNE 2010

- Judge participation
- Chair, co-chairs: independence, visibility, experience

OPERATIONS of the committee:

- Guidance from the senator(s)
 1. Criteria for evaluating applicants
 2. Confidential parts of the process versus public parts
 3. Roles of the senators' staff
 4. Whether the senators will interview the candidates
 5. What information the senators want from the committee in addition to names
- Funding committee operations
- Application process: notice, form, deadlines
- Developing the list of potential nominees to be vetted: procedures to govern the committee's decisions/process in advance (even if informal)
- Background research: who does it, how much and what portions are confidential
- Organizing and conducting interviews
- Releasing information: when, how much

This document will evolve over time. It is a living document, because each experience with the use of committees can further inform the next committee if the information is shared.

TABLE OF CONTENTS

- I. OVERVIEW OF FEDERAL JUDICIAL SELECTION SCREENING COMMITTEES
 - A. Screening committees in a nutshell
 - B. The history of screening committees
 - C. Reasons why senators may wish to create screening committees
 - D. Variations in committees
 - E. Comparison to state judicial nominating commissions
- II. FACTORS TO CONSIDER IN *STRUCTURING* A COMMITTEE
 - A. Using an existing state judicial nominating commission
 - B. Creation by one or both senators
 - C. Non-Senate appointers
 - D. Bar association collaboration
 - E. Jurisdiction
 - F. Permanent or *ad hoc* committees
 - G. Committee size
 - H. Formal bylaws or other governing document
- III. FACTORS TO CONSIDER IN *APPOINTING* A SCREENING COMMITTEE
 - A. Political Representation/Bipartisanship
 - B. Demographic representation
 - C. Judicial membership
 - D. Other characteristics of committee members
 - E. Chair, co-chairs
- IV. FACTORS TO CONSIDER ABOUT COMMITTEE OPERATIONS
 - A. Topics for senatorial guidance
 - B. Committee funding
 - C. The application process
 - D. Developing the list to present to the senator(s)
- V. CONCLUDING THOUGHTS

APPENDIX Screening committees in place in June 2010

OPTIONS FOR FEDERAL JUDICIAL SCREENING COMMITTEES
*Things to Consider in Establishing and Operating a Committee to Advise Legislators
About Candidates for District Judgeships (and Other Judicial System Positions)*

I. OVERVIEW OF FEDERAL JUDICIAL SELECTION SCREENING COMMITTEES

A. Screening committees in a nutshell

Senators (and sometimes other legislators) appoint committees to help them screen applicants for presidentially appointed judicial and law enforcement positions in their states. The committees conduct much of the research and legwork as to prospective candidates, and report their findings and recommendations back to the senators. Despite the similarity of purpose, screening committees vary considerably in size, composition, and operations. Important differences include whether the committees:

- Consider applicants for circuit as well as district judgeships;
- Consider judicial applicants only or applicants for U.S. attorney and marshal positions as well;
- Include members affiliated with both political parties and include non-lawyers, current or former public officials, and other categories of potentially interested groups;
- Are the agents of one or of both of the state's senators;
- Vet candidates for positions in all districts of a multi-district state; and
- Operate largely in the open, publicizing lists of applicants and of recommendations to senators, or work largely behind the scenes.

Although we refer to them as “screening committees,” there is no generic name for these bodies. Extant committees include, for example, a “Judicial Advisory Committee,” a “Federal Judicial Nominating Commission,” and a “Federal Judicial Selection Committee.” Some senators’ press releases provide no formal title, referring simply to the senators’ having named “a bipartisan judicial advisory commission.” “Judicial nominating committee,” a frequently used title, is a misnomer. Committees advise senators, who in turn recommend prospective nominees, but nomination lies with the president.

“Senator,” as used here, embraces other legislators who might participate in committee creation. Senators usually appoint screening committees, although some senators not of the president’s party share the appointments with House members of the president’s party, and sometimes those House members appoint their own committees.

B. The history of screening committees

Screening committees have been in use for more than 30 years. Florida’s senators created one in 1974. In 1977, President Carter created by executive order a national committee to suggest nominees for the U.S. courts of appeal, and he urged senators to appoint committees in their states to suggest district court nominees.² In doing so, he cited his experience with committees that he created as the governor of Georgia to recommend interim appointees to state judicial vacancies.³

Senators in 29 states appointed committees in response to Carter's request. President Reagan disbanded the circuit committee, but his attorney general, William French Smith, urged senators to continue to use state-level committees to screen potential district judge nominees.⁴ Nevertheless, the number of committees declined, and it appears that during President George W. Bush's administration, senators in nine states used them.

There has been an upsurge in committee creation. By September 2009, legislators in at least eleven more states and the District of Columbia had created or reactivated committees, joining the nine already operating. The reasons for the upsurge are unclear. The Obama administration has made no public call for their use. Legislators may have been responding to an August 2008 American Bar Association resolution urging senators in each state jointly to appoint bi-partisan committees of lawyers and non-lawyers to recommend would-be district nominees to the senators.⁵ Some senators have also emphasized that committees will screen U.S. attorney applicants, perhaps reacting to the controversy over U.S. attorney hirings and firings in 2006 and 2007.

The Appendix lists committees that appear to be in place or ready to go into operation when vacancies occur, as of June 2010.

C. Reasons why senators may wish to create screening committees

To ease contention and delay

Nominees who come with a committee endorsement—especially a bipartisan endorsement—may move to nomination and confirmation more quickly than they would otherwise. Although district judge nominations and confirmations have not been as contentious as those for would-be circuit judges, the process takes longer than it once did. The delay may discourage potential nominees, especially those in the private practice of law.

We have some partial comparative data about 68 George W. Bush district appointees from seven states in which senators used committees to develop lists of possible nominees. These appointees were confirmed on average in 163 days versus 179 days for other appointees. There was considerable variation, however, among the committee-state appointees—138 days on average for 19 Texas appointees, for example, versus 256 days for the four Georgia appointees. These numbers represent overall averages, and come with the caveat that we do not know if the committee-state appointees were committee-recommended or the degree to which, if at all, committee activity is responsible for the differences in confirmation times. (Of the 22 Barack Obama district court appointees as of June 18, 2010, the 12 from non-committee states were confirmed in an average 137 days from nomination, versus 120 days for the ten appointees from committee states, numbers too small to mean much.)

To anticipate and complement ABA reports to the White House of would-be nominees' professional qualifications

The American Bar Association's Standing Committee on the Federal Judiciary provides the White House with evaluations of prospective judicial nominees under serious presidential consideration. The ABA committee says the evaluation "focuses strictly on professional qualifications: integrity, professional competence and judicial temperament [and] does not take into account a prospective nominee's philosophy, political affiliation or ideology."⁶

The ABA is in a position to identify problems with a nominee only *after* a name gets to the White House. Screening committees may be able to identify any such problems much earlier.

Screening committees may also weigh such considerations as demographic diversity and role in the community—considerations as to which non-lawyer views may complement those of lawyers—and factors that the ABA says it does not consider.

As we note later, however, there is a flip side to anticipating the ABA evaluation. The ABA, as well as other investigations of nominees, may turn up problems that a screening committee missed.

To preserve prerogatives as to partisan appointments

Although some committees can provide bipartisan or non-partisan evaluations of potential nominees, they in no way hinder the prerogatives of senators to recommend, and presidents to nominate, candidates of their own choosing. In most cases, these candidates will be at least nominal members of the president's political party.

Of the 152 George W. Bush appointees from states in which committees apparently did not operate (from 2001 through 2006), 91 percent identified themselves as Republicans, versus 73 percent from committee states who so identified themselves. The difference exists mainly because 18 percent of committee-state appointees said they were independents, versus five percent of non-committee state appointees. The greater percentage of independents may be because committee state appointees are more likely to be sitting judges—67 percent from committee states versus 43 percent from states without a committee.⁷ (Caveat: note the same cautions referenced above as to time-to-confirmation.) Sitting judges who believe they may have lost their partisan connections may be more likely to apply to committees than directly to senators and their staffs. (Of Barack Obama's *nominees* through June 18, 2010, nine of the 21 from non-committee states were sitting judges when nominated, but 22 of the 34 from committee states were judges.)

To provide a voice to senators not of the president's party

Senators' joint appointment of bipartisan committees when one or both senators are not of the president's political party can provide those senators a stronger voice in the judicial selection process than they might otherwise have. As described below, during the George W. Bush administration, Democratic Senate delegations in California, Washington, and Wisconsin, in concert with Republican party leaders in each state, forwarded recommendations to the White House, as did the mixed Senate delegation in Florida. In the Obama administration, in addition to the Florida senators, the mixed Senate delegation in Ohio has created a committee; the Republican Senate delegation in Georgia uses its pre-existing committee to evaluate potential nominees provided by the White House; and the Republican Senate delegation in Texas says it has reconstituted its committee as bi-partisan to vet candidates forwarded by the White House (apparently competing with Texas Democratic House members, who have vetted candidates as well).

To open up the application process

One criticism of the traditional judicial nomination process has been that the only individuals considered are allies of the senator, or at least politically visible individuals. With a committee process, individuals can more easily self-select for consideration, which may encourage people who may not have, or have lost, specific political ties to consider applying; this group no doubt includes, as noted above, sitting judges.

D. Variations in federal-level committees

The composition and use of screening committees varies significantly by state. For example:

- California’s two Democratic senators have said they will alternate recommending nominees for vacancies in the state, and each has appointed four committees of five to seven members (Senator Feinstein specifically labeling hers bipartisan),⁸ all lawyers, for each of the state’s four judicial districts. During the George W. Bush administration, they had appointed some members of a screening committee chaired by a leading California Republican.⁹
- Connecticut’s two senators, one a Democrat, one an independent, announced in March 2009 what a news story called a committee of “lawyers, an educator, and a businessman” to “solicit, screen, and comment on candidates” for U.S. marshal and “other federal positions as appropriate.”¹⁰
- Colorado’s two Democratic senators have appointed a 10-member bipartisan committee, all lawyers, with Democratic and Republican co-chairs.¹¹
- Florida’s Democratic and Republican senators’ rules of procedure for their Federal Judicial Nominating Commission create three district “conferences” (21 members for the Southern and Middle districts and 16 for the Northern District) and provide for a “presiding” and “non-presiding” senator. The presiding senator, who appoints most members of the conferences, is the senator of the party of the president, unless both are, in which case the presiding senator is the senior senator. If neither senator is of the president’s party, “the Senators, in their discretion, may maintain, revise or suspend the operation of these rules.”¹² The conferences screen applicants for district judges and U.S. attorneys and marshals.
- Georgia’s House Democrats have appointed a 13-member committee, almost all lawyers and apparently all Democrats, including several state legislators.¹³ As well, Georgia’s two Republican senators maintain a six-member committee (one member told us it is “non-partisan” —he doesn’t know the affiliation of the members), which screened applicants during the George W. Bush administration but which the senators now ask to evaluate potential nominees referred to them by the White House.
- Illinois Democratic Senator Dick Durbin has appointed three bipartisan committees (almost all lawyers)—10 members for the large Northern District and six each for the smaller Central and Southern districts, to screen judicial, U.S. attorney, and U.S. marshal candidates. Senator Durbin said he would consult with Senator Roland Burris and the Illinois House Republicans before forwarding names to the White House.¹⁴
- Ohio’s Democratic and Republican senators have jointly appointed two bipartisan committees, one for each of the state’s two judicial districts. However, according to an April 2009 press release, “[t]o prevent any conflicts of interest,” each committee will screen applicants for vacancies in the other judicial district.¹⁵ Committee members include lawyers and non-lawyers, including former judges and former members of Congress.

- North Carolina Democratic Senator Kay Hagan has appointed a four-member committee, chaired by a former state chief justice and including one lawyer from each of the state's three judicial districts.¹⁶
- Texas's two Republican senators used a 31-person committee to screen applicants during the George W. Bush administration, and report having reconstituted it to a bipartisan committee to screen potential nominees sent to them by the Obama administration.¹⁷ Texas House Democrats have said they will also submit recommendations to the White House.
- Wisconsin's two Democratic senators use an 11-member committee created by charter to screen applicants for district and circuit judgeships, and U.S. attorney and marshal.¹⁸ The committee structure dates to 1979; the current senators activate the charter each time a vacancy arises.¹⁹ The committee chair is a law school dean from either the Eastern or Western District, depending on the location of the vacancy. The Wisconsin state bar appoints two members, and political leaders appoint the other members: four members each by the two senators of the president's political party, or, with a split delegation, five by the president's party's senator, three by the other. If neither senator is of the president's party, each appoints two members and four are appointed by "the most senior elected official of the President's party" (during the George W. Bush administration, Representative James Sensenbrenner).

E. Comparison to state judicial nominating commissions

Federal-level committees bear certain similarities to judicial nominating commissions at the state level. At least two federal-level committees are named "judicial nominating commissions" and observers often analogize their work to that of state judicial nominating commissions.

The goal envisioned for both is to broaden the perspectives that might otherwise be brought to bear on the process of selecting judges. State commission proponents often state a further goal of "depoliticizing" judicial selection in favor of selection on "merit." Although federal-level committees assume that senators will largely recommend and presidents will largely nominate members of the president's political party, committee proponents believe that committees can reduce some effects of the political polarization that has affected the federal judicial selection process.

However, there are substantial differences between state commissions and federal-level committees. First, the state bodies are created by state constitutions or statutes or occasionally by executive order, but the committees that senators create are purely creatures of the senators. Second, state bodies formally *nominate* would-be judges for the governor's consideration, while the federal level committees simply recommend individuals whom senators may or may not pass on to the White House and whom the White House has no obligation to nominate. Third, state statutes (or in one instance, a state constitution) mandate the composition of the commissions. Finally, state bodies often include, by law, sitting judges, and are often chaired by chief justices. By contrast, it appears that no federal judges, active or senior status, serve on any federal level committees, although a few former state and federal judges do. Because there are no statutory mandates analogous to those creating state nominating commissions, judicial service on federal committees might run afoul of state or federal judicial conduct codes.

II. FACTORS TO CONSIDER IN *STRUCTURING* A COMMITTEE

Senators have structured their committees in many different ways. This variation suggests several factors to consider in creating or modifying a committee.

A. Using an existing state judicial nominating commission

There are several reasons not to use an existing state judicial nominating commission for vetting federal judicial applicants, and we know of no federal legislators who have. State judges often have prominent roles on state commissions, which probably make those commissions inappropriate for the federal judicial selection process. Furthermore, practitioners on state commissions do not need and may not have the extensive federal court experience that many consider a valuable asset on federal screening committees. And state commissioners probably have enough to do without also screening federal judicial applicants.

However, states where nominating commissions operate may have a receptive culture for federal screening committees.

B. Creation by one or both senators

The 2008 ABA resolution (see above, text at note 5) and experiences of some committees suggest that committees are more effective when both senators appoint them jointly, regardless of the senators' party affiliation. When the committee serves only one senator, the other senator may give no credence to the recommendations. In 2008, Colorado Democratic Senator Ken Salazar appointed a committee, but Republican Senator Wayne Allard declined to participate, and as a result, the committee process was helpful to Senator Salazar, but Senator Allard did not subscribe to it.

C. Non-Senate appointers

As described above, the charter that structures the committee used in Wisconsin allocates appointing authority to the senators based in part on the party affiliation of the two senators and the president, and when they are not the same, vests authority to appoint four of eight members in "the most senior elected official of the President's party."²⁰

Senators might also consider whether to vest some appointments outside of political parties or having *ex officio* members. Again, the Wisconsin charter has the bar appoint two members and makes the dean of the major law school in either judicial district the chair of the committee, *ex officio*, depending on the location of the vacancy.

D. Bar association collaboration

Federal-level screening committees in Florida and Wisconsin are supported by their respective state bar associations, at least to the extent that the committees occupy a page on the associations' websites, with information about membership and committee operations. Similarly, the state bars of Hawaii, Vermont, and Wisconsin appoint members to screening committees in their respective states. Senators may wish to consider the advantages (possibly logistic support) of that arrangement and any possible disadvantages (such as fueling charges that committees are captives of the bar or segments of the bar). The 2008 ABA resolution encouraged senators to appoint nonlawyer members as well as lawyers who "reflect ... the diversity of the profession."²¹ Nevertheless, the *Wall Street Journal* editorial board, which has argued for eliminating or revamping state judicial nominating commissions, called the ABA resolution "the latest lawyer-led attempt to strip judicial selection from future Presidents" because, in the

board's words, "the chief arbiter of what qualifies as 'merit' soon becomes the lawyers' club, especially the trial bar."²²

E. Jurisdiction

Senators typically recommend candidates for district judgeships as well as for U.S. attorney and marshal positions, and some federal level committees screen candidates for all three positions. In fact, one or two committees were apparently created principally to vet law enforcement applicants, although they also consider would-be judges.

Senatorial prerogatives with respect to candidates for circuit judgeships are often more circumscribed than with respect to district judgeships, yet some committees (such as those in Hawaii and Wisconsin) also make recommendations when circuit judges resident in the state retire or leave office. (The 2008 ABA resolution urged senators to use committees to screen potential district court nominees, but, as to circuit judge nominees, simply "endorse[d] the use of bipartisan committees to consider and recommend" circuit judge nominees.)

There are also geographic considerations. Senators in some large, multi-district states (such as California, Florida, Illinois, and Ohio) have appointed committees (or sub-committees) for each district.

Finally, senators not of the president's party may decide to use a committee not to develop recommendations, but rather to review potential nominees that the White House sends to them. This type of committee, used (for example) by Georgia's two Republican senators, may help identify the likelihood of objections strenuous enough to prompt procedural moves to delay or prevent action on the nominee.

F. Permanent or ad hoc committees?

States with few judgeships rarely see vacancies, and legislators in those states may prefer to constitute a committee only when a vacancy occurs. Since 1990, for example, the District of Maine has had four vacancies to fill in its three authorized judgeships. District Judge D. Brock Hornby announced in July 2009 that he would take senior status in April 2010. In March, 2010, Maine's two House members, Mike Michaud and Chellie Pingree (both Democrats) formed a committee to screen applicants for the vacancy.²³ They had earlier formed a committee for a U.S. attorney vacancy.²⁴

G. Committee size

The screening committees currently in existence (for entire states or for individual districts within a state) appear to range in size from four members to over 30, but generally consist of six to 12 members. The most appropriate number of members depends on a variety of factors, including the number of judgeships for which recommendations will be needed (which in turn depends on the size of the state or district), and a membership that is small enough to function as a unit but with enough members that the work can get done without overburdening them.

H. Formal bylaws or other governing document

Senators in some states have described basic committee elements—the appointment protocols, basic procedures committees are to use (e.g., seeking candidates), and criteria for assessing candidates—either in charters or in press releases. The Florida charter appears to be the most detailed, describing not only appointment protocols but also procedural specifics, including

aspects that are public and otherwise will be made available to the public.²⁵ Wisconsin also has a detailed charter.²⁶

Senators might consider preparing a charter-type document in the interest of transparency and accountability—to provide interested members of the public information about selection processes involving important public offices, processes typically steeped in secrecy, and allow public evaluation of adherence to stated processes and criteria.

Similarly, creating a charter helps with comparative analysis. Information about screening committees is difficult to locate. While charters or other official descriptions of structure and operations may not necessarily convey accurately what committees actually do, they can provide a starting point for analysis that may assist senators who are considering creating or modifying a committee.

III. FACTORS TO CONSIDER IN *APPOINTING* A SCREENING COMMITTEE

The actual membership of a screening committee can be as important as its structure on paper. Accordingly, in appointing screening committees, senators may wish to consider the following factors:

A. Political Representation/Bipartisanship

The ABA and others recommend bipartisan committees—generally thought to mean members identified with both major political parties as well as political independents. A variation is a non-partisan committee—members chosen without regard to or perhaps even knowledge of political affiliation.

Of the committees operating in the 21 confirmed states, at least nine are described in press releases or news stories as bipartisan. “Bipartisan” is an elastic concept that can embrace an eight member committee with three loyal Democrats, three loyal Republicans, and two confirmed independents—OR an eight member committee with seven loyal Democrats and one independent leaning Republican—and numerous combinations in between. Furthermore, authorizing others to appoint some members or providing for *ex officio* members (e.g., bar presidents in either case) takes the partisan composition somewhat out of senators’ hands.

In any event, an endorsement by a group that includes representatives from both sides of the aisle may provide presidents and senators (and the public) an indication that individuals from across the political spectrum find the candidate meritorious while still recognizing the realities of federal judicial selection.

Bipartisan or non-partisan committees may be a tactical necessity for senators not of the president’s party who hope to have some influence in the selection process in addition to the threat of a hold or a blue slip.

B. Demographic Representation

The ABA resolution urges committees composed of “lawyers and other leaders, reflecting the diversity of the profession and the community.” A diverse committee might include representatives from each of the following groups:

- Segments of the bar—The reference to the “diversity of the profession” reflects the view that no one or two segments of the bar (including, but hardly limited to litigators) should

have exclusive access to senators concerning judicial applicants. On the other hand, at least for potential district judges and perhaps as well for potential circuit judges, substantial trial experience within the committee membership is probably a valuable, even essential, element to bring to bear on the vetting process.

- Non-lawyers—Including non-lawyers on the committee emphasizes the broader evaluative role of screening committees (as opposed to the more specific focus of the ABA Standing Committee on the Federal Judiciary). Of the 21 existing committees, at least seven appear to include non-lawyers. Some observers caution, however, that non-lawyers with little idea of what judges do, or with ideological axes to grind, may weaken a committee rather than enhance it.
- Diverse community representatives—Just as committee recommendations will carry more weight if they are not perceived to be controlled by members of the appointers' political party or narrow segment of the bar, those recommendations will probably also mean more if the committees are not perceived as dominated by one or more demographic groups. A 2009 controversy in Oregon, however, suggests that a demographically diverse committee will still prompt criticism, at least in some states, if the applicants it forwards to the senators are homogeneous. Senator Ron Wyden evidently appointed a committee including women and various minorities, but the committee recommended five white males, creating an uproar within the Oregon Women Lawyers' association and other groups.²⁷ This may explain why Senator Wyden added a male Hispanic state judge to the list he sent to the White House.

C. Judicial Membership

State judicial nominating commissions frequently include sitting judges by statutory or constitutional provision, but it does not appear that any of the federal judicial selection screening committees have included sitting judges (although some include former state or federal judges, such as those in California, Colorado, Illinois, North Carolina, and Ohio). Sitting judges could view committee membership as political activity forbidden by codes of judicial conduct. Professor Mary Clark of the Washington College of Law has analyzed in some depth the arguments for and against including judges on federal level committees, and recommends against it.²⁸

That judges do not serve on a committee, however, does not mean that the committee cannot solicit, on a confidential basis, the views of judges who are in a position to comment on the qualifications of a prospective nominee.

D. Other characteristics of Committee Members

Other considerations in appointing committee members include the ability to keep confidences, avoiding overly domineering personalities, and the costs and benefits of appointing individuals known to be close friends of one or both senators.

E. Chairs, Co-Chairs

In designating a committee chair, an obvious factor is the ability to lead a small group of accomplished individuals who may have different ideas about the committee's product. Other considerations include:

JUNE 2010

- Whether the designation will signal the importance of the committee's work. Ohio's senators, for example, appointed a former state attorney general and law school dean to chair one committee, and the executive vice president and general counsel of a large Cleveland bank to chair the other committee;
- Whether the chair is sufficiently independent of the senators to avoid the appearance of a set-up. Former Florida Republican Senator Connie Mack appointed a Democrat to chair the already-in-place committee when he entered the Senate in 1989. The Wisconsin charter makes the committee chair the dean of the law school in the area of the vacancy to be filled; and
- Appointing co-chairs may have benefits beyond a shared workload. Colorado Democratic Senators Bennet and Udall, for example, probably enhanced the bipartisanship of their committee by appointing a Democrat and Republican as co-chairs.

IV. FACTORS TO CONSIDER ABOUT COMMITTEE OPERATIONS

Screening committees are creatures of the senators who appoint them, and accordingly senators may wish to instruct the committee about how to operate. Operational rules or guidelines can provide important structure to the work of the committee, but rules that are too stringent and leave no room for committee discretion may discourage the service of able lawyers and non-lawyers as committee members.

A. Topics for Senatorial Guidance

It seems most appropriate for senators to provide guidance to their screening committees in the following areas:

- Criteria for evaluating applicants;
- Aspects of the process to release to the public or keep confidential (e.g., names of applicants, names of finalists, demographic breakdown of applicants, or finalists);
- Information the senators want to receive from the committee, such as information on the process (number of applicants, number interviewed, etc.), the number of applicants on the final list sent to the senators, background information on each applicant, and perhaps how and by whom it was gathered; and
- Roles and responsibilities of senators' staffs. Staff members likely will have considerable contact with the committee, serving to one degree or another as senator-committee liaisons (and making decisions that some committee members might think the senators should make). Matters that staff will be involved with may include initial contact with potential committee members, including explaining the committee's anticipated role and specific tasks; how to publicize vacancies, application deadlines, etc.; creating application forms, developing protocols for candidate interviews, background checks, etc.; and deciding how many candidates to interview and participating in the interview and selection process.

Senators may also want to establish at the outset their policies as to interviewing applicants forwarded by the committee. Among the considerations:

- Whether the senators will interview the applicants forwarded by the committee, review only the committee's work product, or simply forward the names to the White House;
- Whether they will regard staff summaries of the interviews and other information as sufficient; and
- Whether senators will require criminal background and/or tax return investigations before submitting names to White House.

B. Committee Funding

The money a committee needs to operate may be affected by the geographic dispersal of its membership. Decisions regarding funding or reimbursement, however, appear to rest with individual senators. Among the considerations:

- Whether committee members will meet their own travel and subsistence costs, and if so whether such a requirement will discourage participation by some individuals (e.g., public interest lawyers without institutional affiliations);
- Who else might fund these travel costs and such items as posting vacancy notices and meeting room expenses;
- Whether committee chairs should be selected with an eye to their institutional resources to meet some costs;
- Whether public funds available to the senators should meet some or all of these costs. According to the Congressional Research Service, "Senate financial management regulations ... provide, in part, that individuals 'who are not Senate employees selected by Senators to serve on a panel or other body making recommendations for nominees to Federal Judgeships ... may be reimbursed for transportation, per diem, and for certain other expenses incurred in performing duties as a member of such panel or other body.'"²⁹; and
- Whether affiliation with the bar association is an effective way to have costs covered. (The rules of the Florida committee, to which the Florida bar evidently provides some support, nevertheless state that committee members "perform an important public service in a volunteer capacity and are responsible for all expenses associated with their service on the Commission."³⁰)

C. The Application Process

Advertising vacancies

Senators may wish to instruct the committee to advertise judicial vacancies and information on the application process in a variety of ways, including through state and local bar associations (including specialty and minority bar associations), on senators' websites, through press releases, and, if the district court with the vacancy is amenable, on its website.

The vacancy announcement should include sufficient information on the nature of the vacant position and the requirements expected of ideal candidates. There are almost no formal

requirements to be a federal district judge other than the statutory requirement (with a few exceptions) that judges (but not applicants) reside in the respective judicial district.

General statements of integrity, temperament or ability are probably expected, but senators may wish to include other requirements or preferences as well. This might include the preferred background characteristics of potential nominees (which may in turn depend on characteristics that the president has emphasized).

Although quota requirements are inappropriate, senators might take stock of the current and historic composition of any particular district court and provide guidance to committees, noting, for example:

- A dearth of women or judges of particular racial or ethnic groups, especially those well represented in the bar and general population; or
- The value of judges with particular types of practice experience (e.g., in complex civil litigation, criminal cases, or technology and intellectual property). Although most district courts assign cases randomly and district judges decide cases individually, judges seek one another's guidance and advice.

Senators may wish to include information on the salary and benefits available for the position.

It might also be helpful to include a summary of the selection process, including at least:

- The application form (see below);
- Information on the nature and extent of the committee background investigations;
- Other investigations of which applicants should be advised. For example, applicants should be aware that senators may request tax and other investigations before forwarding names to the White House; that names sent to the White House will be subjected to FBI and ABA investigations; that nominees will be subjected to a Senate Judiciary investigation; and that perhaps inquiries may be made by interest groups. Advising applicants of this information is not only fair but will discourage applications by those unwilling to undergo these investigations.
- State judicial performance evaluation results. For applicants who are or were state judges for whom judicial performance evaluation results are available, the committee might consider requesting those either from the applicant or from the applicable commission.

Finally, consider whether the vacancy notice should say whether the screening committee will release names of all applicants, or whether release will be limited to the names of interviewed applicants or the names of applicants submitted to the senators.

Application deadlines

Rather than specify a hard deadline, the committee may wish to state a "to ensure consideration" deadline, providing the flexibility to consider applications submitted late under special circumstances.

Application form

The senators and staffs, perhaps in conjunction with the committee, will probably decide on the form that applicants must complete. Some committees use, with slight modification, the form that either the White House or Senate Judiciary committee requires would-be or actual nominees

to complete. Someone also needs to determine whether applications and auxiliary information may be submitted in electronic form, or must be submitted in hard copy.

Auxiliary information to be provided by applicants

Rather than request tax returns, committees might consider including a “taxes current/any problems” question on the application form and advise applicants of the investigations they may undergo if submitted to the White House, investigations that will reveal embarrassing information.

The committee should give guidance to applicants on the number of reference letters to provide, and when, to whom and in what form the committee wishes to receive them. The committee may also consider a warning that it will look unfavorably on applicants who orchestrate campaigns to produce letters beyond those the committee requests, and that clear evidence of such campaigns may produce disqualification.

D. Developing the List to Present to the Senator(s)

The committee’s most demanding task is to winnow initial applications down to a relatively small number to submit to the senators.

Developing a process and criteria

The committee will need to winnow the initial pool of applicants down to those who will receive committee background investigations. This process typically begins by determining the number of applicants to undergo background research and committee interviews. The committee may then identify factors that cause non-discretionary exclusion (such as failure to meet certain qualifications specified in the application process, or clearly having instigated a letter-writing campaign). Once non-discretionary culling is completed, various methods are available for winnowing the applicant pool down to those who will be the object of background research, such as:

- In-person, by mail, by telephone conference;
- Initial screening by chair or a subcommittee to a reduced list for further committee action;
- Straight votes on candidates or by aggregating committee members’ rank order voting; or
- Iterative in-person processing to identify the final list.

As this stage, the committee might also determine whether, how, when, and by whom to inform applicants who did not make the initial cut.

Background research on candidates

Committees should understand that both the White House or Senate and the ABA will require a potential or actual nominee to give a waiver allowing them to make direct inquiries of the relevant bar or judicial disciplinary authorities about past or pending disciplinary matters. He or she will be subject to an FBI investigation. The nominee will complete a lengthy questionnaire that the Senate Judiciary Committee will post on its public website. Past and pending disciplinary actions, tax (including “nanny tax”) or criminal problems will surface in these investigations. A screening committee that does not explore these matters before forwarding its recommendations risks damaging its own credibility with the senators, or senators and the public

if a flawed would-be nominee goes forward. In other words, a screening committee's credibility, and hence its effectiveness, will depend on how thoroughly it plows the ground privately that the ABA will also plow privately and the Senate publicly. Anything the committee misses may rise up to bite it and the senators who appointed it.

In reviewing each candidate's background, the committee should consider from whom it will seek additional information about the candidates, and whether it will establish a minimum, maximum or set number of background inquiries for each applicant. Talking to the same or roughly the same number of individuals for each applicant may be the fairest approach but it may limit the committee's ability to learn what it needs to know about individuals with different backgrounds and qualifications, or to unearth any possible problems. Individuals whom the committee might contact include:

- References listed by the applicant;
- Opposing counsel in cases;
- For former or sitting judges, losing counsel in prominent cases; and
- Others recommended by initial interviewees.

Background investigations are often conducted by specific committee members. Factors to consider in assigning committee members to conduct background interviews on specific candidates include:

- Ensuring a roughly equal distribution of the work of interviewing to each committee member;
- Whether there should be a common set of questions for all interviews and if so, whether there should be any leeway to depart from those questions. Without a common set of questions, there will be no consistent metric by which to evaluate the interview data. But allowing no exceptions may deprive the committee of special facts about individual qualifications;
- The degree to which interviewers should be familiar with the applicant, his or her respective practice areas, the judge-applicant's court, etc. Is it better that interviewers having fewer preconceived (and perhaps unrecognized) ideas about the applicants? (The Ohio senators will have members of the committee they established in the Northern District screen applicants for Southern District vacancies, and vice versa, "[t]o prevent any conflicts of interest"³¹); and
- For committee members with lawyer and non-lawyer members, whether the committee should differentiate interview assignments—for example, lawyers to speak to other lawyers about professional background, lay members to seek information about applicants' other activities?

The committee, or the senators, may establish a confidentiality policy with respect to background interviews. If so, interviewers should explain the confidentiality policy when arranging the interview. In framing a confidentiality policy, committees should consider:

- Whether interviewers will report comments orally or in writing;

JUNE 2010

- Whether interviewers will divulge the identities of interviewees in their report or just the substance of the comments;
- Whether promises of confidentiality to interviewees cover reports and information released by the committee or reports within the committee as well. If the policy covers reports and information by the committee, does that include senators and staffs? What background interview information—including identities of interviewer and interviewees should be shared with senators and staff?; and
- Whether *interviewees* may waive confidentiality. If not, what policy will the committee follow if a member says the value of a statement depends on the credibility of the interviewee? Should the policy be to identify only orally, regardless?

Committees may receive unsolicited comments about finalists. Accordingly, before the process commences the committee should consider:

- Whether committee members should accept unsolicited calls or letters on behalf of a nominee. The Florida committee rules provide that the committee and conference chairs “will accept *written* comments from interested members of the legal community and the general public”³² (emphasis added);
- Whether the committee should explain the confidentiality policy to unsolicited callers, and whether that policy should be the same as for solicited interviews; and
- What details about the unsolicited information the receiver should provide to the committee (such as the number of callers, names of callers, or a summary of information).

Committee interviews

After members conduct background research on finalists, the committee will probably want to conduct in-person interviews with the finalists *or* with a smaller subset of them, based on the background research.

If the committee narrows the field of candidates after completion of the background research, it should determine whether to advise applicants who did not make the cut or wait until it has formulated the final list for the senators. Advising those whom the committee will not interview is a courtesy, but it may spawn rumors about who may be on the final list.

Factors to consider in organizing the interviews include:

- Who should organize the interviews and set up the logistics (i.e., contacting interviewees, determining the location for the interviews)? Senate staff? Staff available to committee chairs? Bar association staff?
- Should the interviews be open or closed to public and the media? At least one commission, Florida’s, holds public interviews with finalists, although it prohibits any finalist from attending interviews with other finalists.
- Should Senate staff participate in the interviews, or perhaps observe interviews but not participate?

Committees probably want to construct a schedule of common questions for each interviewee rather than permit a free-for-all question session, with members asking whatever questions occur

to them. The American Judicature Society's HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS, 2d ed. (2004)³³ contains helpful guidance on this matter. Although it is for state nominating commissions, not federal-level screening committees, those committee members should consult it.

The HANDBOOK describes four types of questions that committees might pose to interviewees:

- Closed-ended, which call for “yes/no” answers (the HANDBOOK points out that these will be little needed, assuming well-designed application forms);
- Open-ended (e.g., “What are the specific aspects of this position that moved you to apply for it?”), which, if clear and precise, can provide valuable information;
- Situational, which ask how the interviewee believes a judge should respond to specific factual situations, such as requests for continuances posed by both parties; and
- Behavioral, which ask interviewees to describe specific events in their lives and how they handled them.

In developing interview questions, the committee should determine whether to construct a basic set of questions and, if so, who will ask each question. The committee should also consider who will develop questions, how they should be finalized, and whether pre-determined interview questions be distributed beforehand to interviewees.

Will the committee permit follow up questions (i.e., questions that are not predetermined and are in addition to those on the interview schedule)? If so, it should provide guidance to committee members about unacceptable questions (e.g., about marital status).

Certain interview protocols and logistics also warrant consideration:

- Whether the committee will require in-person interviews and require all committee members to attend, and if not, what alternatives it will permit (telephone interviews, video conference interviews);
- How long will interviews last and how much time will be allowed between interviews; and
- The order of interviews. It is probably wisest to schedule interviews randomly to avoid any appearance of favoritism or consigning those with down-alphabet last names automatically to appear at the end of the interview period. The committee should also have a policy to govern legitimate scheduling conflicts that disrupt the random sequence.

Identifying the list of applicants to submit to senators

The committee should establish a protocol for making final determinations—e.g., those receiving the highest number of votes, or an iterative process if no candidate receives a pre-determined minimum of votes.

The size of the list that the committee sends may depend on whether the senators specify the number of names they wish to receive. The Florida Commission rules, for example, provide that unless the presiding senator directs otherwise, the commission will submit “no less than three names . . . in unranked, alphabetical order.”³⁴ Without such guidance, the committee will have to determine a reasonable number on its own.

In addition to the list of finalists, the committee may wish to submit any or all of the following to the senators:

- Applicants' application form, letters of recommendation;
- Personal data summary—e.g., abbreviated, committee-prepared summary paragraph;
- Summary of background information;
- Individual committee members' opinions, if requested; and
- Separate committee narrative explaining recommendations.

Releasing information

The committee should determine when to advise finalists that they are not on the submitted list, keeping in mind the possibility that senators may reject all submitted names and ask for more.

Information that the committee or senators might choose to release to the public might include:

- Number of applications received, number of applicants interviewed;
- Names of applicants interviewed;
- Names of applicants submitted to senators; and
- Comparative demographic information on all applicants and applicants interviewed (e.g., number of women, vocational breakdown of applicants, etc).

Information gathered in interviews, letters of recommendation, and other sources may be sensitive, and committees may want to keep such information confidential. However, at least one committee, Florida's, operates under rules that (1) permit the committee to "seek, receive, and review pertinent information, in addition to the written applications," and (2) provide, subject to the chair's discretion to "exclude highly sensitive personal information" and "government information provided under terms of limited review," that "all materials received in connection with an application for appointment will be disseminated to the full Commission and made available to the general public for review."³⁵

Considerations as to what information to release include:

- Whether release of a specific type of information may foster trust in, and acceptance of, the process;
- Whether such release may create unfair inferences about unsuccessful applicants;
- Whether such release may discourage some qualified individuals from applying for future vacancies fearing negative impact on their professional practice; and
- Who (the committee or the senators) should release the information.

VI. CONCLUDING THOUGHTS

Vetting committees themselves will not eliminate the contentiousness and polarization that has affected federal judicial selection for the last two decades. Moreover, it is difficult, by the numbers alone, to say with certainty that the use of such committees guarantees speedier confirmations or demographically different nominees – although there is some evidence that they may. One challenge in assessing committee impact is the desire in some situations to keep confidential which names senators forwarded to the White House and whether those individuals were products of the committee process.

At the same time, screening committees do have the potential to improve public confidence in the nominating process and in the candidates who emerge from that process. Furthermore, many reasonable people have concluded that committees are likely to benefit the selection process by exposing potential nominees to broader scrutiny than they might otherwise receive. In this manner, strong candidates benefit from the committee's stamp of approval, and weak or problem candidates are vetted sufficiently early in the process to uncover potential problems that would otherwise come out during White House or ABA review, Senate Judiciary Committee investigations and confirmation hearings, or press and interest group inquiries.

¹ http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FD.

² Establishing the United States Circuit Judge Nominating Commission, Exec. Order 11972 (Feb. 14, 1977), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=6588>. See also Standards and Guidelines for the Merit Selection of United States District Judges, Exec. Order No. 12097 (Nov. 8, 1978) (encouraging the use of commissions to notify the public of vacancies and to make recommendations for district judges), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=30132>.

³ Gary W. Fowler, *Judicial Selection Under Reagan and Carter: A Comparison of Their Initial Recommendation Procedures*, 67 JUDICATURE 266-67 (1984).

⁴ Denis Steven Rutkus, Role of Home State Senators in the Selection of Lower Federal Court Judges CRS-37, n. 107 (Congressional Research Service 2008).

⁵ Resolution 118, available at <http://www.abanet.org/leadership/2008/annual/recommendations/OneHundredEighteen.doc>, viewed February 4, 2010.

⁶ American Bar Association Standing Committee on the Federal Judiciary, What It Is and How It Works, available at http://www.abanet.org/scfedjud/federal_judiciary09.pdf (viewed July 9, 2009).

⁷ Russell Wheeler, *Changing Backgrounds of U.S. District Court Judges*, 93 JUDICATURE 140, 148 (2010)

⁸ Press Release, Feinstein, Boxer Announce Plans to Recommend Judicial Nominees to President-Elect Obama (Dec. 29, 2008), available at <http://yubanet.com/california/Feinstein-Boxer-Announce-Plans-to-Recommend-Judicial-Nominees-to-President-Elect-Obama.php>.

⁹ Press Release, Senators Boxer and Feinstein Announce Bipartisan Judicial Nomination Panel (May 22, 2001), available at http://feinstein.senate.gov/releases01/judicial_nomination_panel.html.

¹⁰ Edmund H. Mahony, *Patronage By Committee*, HARTFORD COURANT, Mar. 6, 2009, available at http://articles.courant.com/2009-03-06/news/usatty0306.art_1_patronage-appointments-christopher-j-dodd-joseph-lieberman.

¹¹ *Colorado Senators Appoint Advisory Panel to Help Find Federal Judges*, DENVER BUS. J. (April 2, 2009), available at <http://denver.bizjournals.com/denver/stories/2009/03/30/daily60.html>.

¹² Nominating Commission Rule of Procedure 5, available on commission website hosted by Florida Bar at <<http://www.floridabar.org/TFB/TFBComm.nsf/6b07501281c8e567852570000072a0b9/04c1fedbfa11cdcb852571b6005b9bf4?OpenDocument>>

¹³ Amy Leigh Womak, Judicial panel set to get down to federal business, Macon.com, March 7, 2009, available at <http://www.macon.com/198/story/636418.html>, viewed March 10, 2010

¹⁴ Press Release, Durbin Forwards Recommendations for Federal Judges and U.S. Marshal to White House (Aug. 7, 2009), available at <http://durbin.senate.gov/showRelease.cfm?releaseId=317001>.

¹⁵ Press Release, Senators Establish Judicial Advisory Commissions to Receive Recommendations for U.S. District Court Judges in Northern and Southern Districts of Ohio (April 27, 2009), available at http://brown.senate.gov/newsroom/press_releases/release/?id=92033778-d2c0-496b-bba3-8dd961eb41f5.

¹⁶ Jim Morrill, *Panel to Advise Hagan*, CHARLOTTE OBSERVER (April 1, 2009), available at <http://www.newsobserver.com/politics/story/65954.html?storylink=mirelated>.

¹⁷ Todd J. Gillman, *Texas Watch: GOP Senators Give Democrats Voice on Federal Judge Picks*, THE DALLAS MORNING NEWS (June 21, 2009), available at http://www.dallasnews.com/sharedcontent/dws/news/washington/columnists/tgillman/stories/DN-texwatch_21nat.ART.State.Edition1.4b27df1.html. See also Denise Malan, *Judicial Nominations Subject of Confusion*, CORPUS CHRISTI CALLER TIMES (July 11, 2009) (noting the “confusion” created by competing efforts to screen judicial candidates), available at <http://www.caller.com/news/2009/jul/11/judicial-nominations-subject-of-confusion/>.

¹⁸ Available on the Commission website, hosted by the Wisconsin State Bar, at http://www.wisbar.org/am/template.cfm?section=press_releases&template=/cm/contentdisplay.cfm&contentid=65784

¹⁹ *E.g.*, Press Release, Office of Senator Herb Kohl, Kohl, Feingold Announce Activation of Wisconsin Federal Nominating Commission (Aug. 6, 2009), available at http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=3020.

²⁰ Wisconsin Federal Nominating Commission Charter, *supra* note 18, §IV(d)(2).

²¹ *See* Resolution 118, *supra* note 5.

²² Editorial, *The ABA Plots a Judicial Coup*, WALL ST. J. (Aug. 14, 2008) at A12.

²³ Trevor Maxwell, *Transition Will Create Vacancy for Federal Judge*, PORTLAND PRESS HERALD (July 7, 2009), available at <http://pressherald.maintoday.com/story.php?id=266639&ac=PHnws>.

²⁴ Press Release, Reps. Pingree and Michaud Announce Advisory Committee on U.S. Attorney (Feb. 27, 2009), available at <http://pingree.house.gov/2009/02/rep-pingree-and-michaud-announce-advisory-committee-on-us-attorney.shtml>.

²⁵ *See* Nominating Commission Rules of Procedure, *supra* note 12.

²⁶ *See* Wisconsin Federal Nominating Commission Charter, *supra* note 18.

²⁷ Nigel Jaquiss, *Vanilla Slice: Wyden Disappoints by Recommending Five Straight White Males for Judge*, WILLAMETTE WEEK ONLINE (July 22, 2009), available at <http://week.com/editorial/3537/12852/>.

²⁸ Mary L. Clark, *Judges Judging Judicial Candidates: Should Currently Serving Judges Participate in Commissions to Screen and Recommend Article III Candidates Below the Supreme Court Level?*, 114 PENN ST. L. REV. 49 (2009).

²⁹ Denis Steven Rutkus, *Role of Home State Senators in the Selection of Lower Federal Court Judges* CRS-34, n. 96 (Congressional Research Service 2008).

³⁰ *See* Nominating Commission Rules of Procedure, *supra* note 12, Rule 15.

³¹ Press release, available at <http://www.vorys.com/newsevents-news-218.html>

³² *See* Nominating Commission Rules of Procedure, *supra* note 12, Rule 22.

³³ Especially Chapter 7, available at http://www.judicialselection.us/judicial_selection_materials/index.cfm

³⁴ *See* Nominating Commission Rules of Procedure, *supra* note 12, Rule 27.

³⁵ *See id.*, Rule 21

JUNE 2010

APPENDIX

This table lists the federal judicial screening committees that appear to have operated in 2009 or stand ready to operate as of June 2010. The table amplifies information on the American Judicature Society website's Federal Judicial Selection page¹ with information from legislators' websites, press reports, and conversations with committee members.

"POSITIONS CONSIDERED" indicates the positions for which the committee screens candidates; DJ-district court; CA-court of appeals seats traditionally filled from the state; USA-U.S. attorney; USM-U.S. marshal.

The final column indicates individuals nominated from the state in question for district judges (and circuit judgeships if the committee screens would-be circuit nominees) from January 20, 2009 through June 18, 2010, along with the district if a multi-district state and the nominee's gender, ethnicity or race, and position held at the time of nomination. We do not have, in most cases, certain information that the nominees listed were necessarily recommended by the committee.

STATE	YEAR CREATED	COMMENTS	COMPOSITION	POSITIONS CONSIDERED	NOMINEES
Alabama	Dec. 2008	Alabama senators do not use a committee but Rep. Artur Davis (D) created a committee in 2008, as did the state Democratic Party. In January, 2009, Davis submitted a candidate for a US attorney position; the party committee submitted the same name. In February, Davis submitted two names to fill a vacancy on the federal district court, one of whom was nominated on July 31, 2009, and confirmed on November 21, 2009.	7 members: 5 current or former judges and 2 law school deans	DJ, USA, USM	Abdul K. Kallon, ND, M, Af-Am.; priv. prac.
California	2001; reconstituted 2009	Senators Boxer and Feinstein (both D) used 6-member Judicial Advisory Committees during the Bush administration; 3 members were selected by the senators and 3 by the administration's state chair for judicial appointments. In late 2008 and early 2009, each senator announced the creation of bipartisan Judicial Advisory Committees in each of California's four judicial districts to alternate presenting nominees for vacancies.	From 5 to 7 members (all lawyers) in 8 committees (2 for each of the 4 judicial districts)	DJ, USA, USM	Jacqueline H. Nguyen, CD, F, As-Am.; st. j. Edward Chen, ND, M, As-Am.; U.S. Mag. J. Dolly M. Gee, CD, F, As-Am.; priv. prac. Richard G. Seeborg, ND, M, Cauc.; U.S. Mag J. Lucy Koh, ND, F, As-Am.; st. j. Josephine Tucker,

¹ http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FD

JUNE 2010

STATE	YEAR CREATED	COMMENTS	COMPOSITION	POSITIONS CONSIDERED	NOMINEES
					CD, F, Cauc., st. j. Kimberly Mueller; ED, F, Cauc., U.S. Mag. J. Edward Davila, ND, M, Hisp., st. j. Anthony Battaglia, SD, M, Cauc., st. j.
Colorado	2008; reconstituted 2009	Then-Senator Salazar (D) appointed a committee in 2008. In 2009, Senators Udall and Bennet (both D) appointed what their press release called a “Judicial Selection Advisory Panel.”	10 lawyers, Democratic and Republican co-chairs	DJ	William Martinez, M, Hisp., priv. prac.
Connecticut	2009	Senators Dodd (D) and Lieberman (I) created a committee in 2009	5 lawyers, 1 educator, 1 businessman	USA and “other federal positions”	
Dist. of Columbia	1993; reconstituted 2009	DC delegate Norton (D) created a committee during the Clinton administration and appointed a reconstituted “Federal Law Enforcement Advisory Committee” in early 2009.	17 members	DJ	Robert Wilkins, M, Af-Amer., priv. prac. James Boasberg, M., Cauc., st. j. Amy Jackson, F, Cauc., priv. prac.
Florida	1974, and revised occasionally	Florida’s senators have used what is currently called a “Federal Judicial Nominating Commission” since 1974, under varying procedures that have shifted based on the party make up of the state’s Senate delegation and control of the White House	58 members serving in one of three “conferences” corresponding to the states three judicial districts	DJ, USA, USM	Charlene Honeywell, MD, F, Af-Am.; st. j.
Georgia	2005; separate panel formed by House Democrats in 2009	Georgia’s two Republican senators used a screening panel during the Bush administration; that committee is still in place to review potential nominees that the White House refers to the senators. The state’s Democratic representatives have also created what a press release refers to as an informal Judicial Advisory Panel.	House panel -12 Democrats, nearly all attorneys, including some state legislators Senators’ committee - 4 members, all attorneys, non- partisan	Senators’ committee reviews candidates for DJ, CA; House committee recommends DJ, USA, USM	Beverly Martin, CA- 11, F, Cauc.; U.S. Dist. J. Mark Treadwell, ND, M, Cauc.; priv. prac. Amy Totenberg, ND, F, Cauc.; priv. prac.

JUNE 2010

STATE	YEAR CREATED	COMMENTS	COMPOSITION	POSITIONS CONSIDERED	NOMINEES
Hawaii	2006	On June 1, 2009, Senators Inouye and Akaka (both D) announced, upon a district judge’s taking senior status, they were “standing up” the Hawaii Federal Judicial Selection Commission that was created in 2006 but that had no vacancies to consider until 2009.	9 members: 4 appointed by Sen. Inouye, 3 by Sen. Akaka, 2 by the state bar	DC, CA	Leslie Kobayashi, F, As-Am., U.S. Mag. J.
Illinois	Screening committees used during the Clinton administration and were reconstituted 2009	Senator Durbin (D), alone, has created what his press release calls “three bipartisan screening committees” to screen candidates for vacancies in the three federal districts. Similar committees reportedly operated during the Clinton administration.	3 committees—10 members for the Northern District and 6 for the 2 smaller districts	DJ, USA, USM	Gary Feineman, ND, M, Cauc.; priv. prac. Sharon Coleman, ND, F-Af-Am.; st. j. Edmond Chang, ND, M, As-Am., fed; pros. James Shadid, CD, M, Cauc., st. j. Sue Myerscough, CD, F, Cauc., st. j.
Maine	2009	Rep. Michaud and Pingree (both D) have appointed committees to recommend candidates for a U.S. attorney and district judge vacancy.		DJ, USA	
Massachusetts	2009	Senators Kennedy and Kerry (both D) announced in February 2009 creation of a 12-lawyer Advisory Committee at least for prosecutor vacancies, and announced in June that it would also screen district judge candidates. In January, 2010, Kerry and Senator Kirk forwarded a potential nominee to the White House, which nominated her in April. We do not know if the committee is still functioning and, if so, whether it has the support of Senator Brown.	12 members, all lawyers	DJ, USA, USM	Denise Casper, F, Af-Am., st. pros.
Michigan	2009	Senators Levin and Stabenow (both D) created “Judicial Vetting Committees” for the state’s two federal judicial districts.	Eastern District – 25 members Western District – 22 members	DJ, USA, USM	Mark Goldsmith, ED, M, Cauc.; st. j.

JUNE 2010

STATE	YEAR CREATED	COMMENTS	COMPOSITION	POSITIONS CONSIDERED	NOMINEES
Minnesota	2009	Senator Klobuchar (D) formed a Judicial Selection Committee in August 2009 to assist her in making recommendations to fill an upcoming vacancy.	8 members, all lawyers and current or former judges	DJ	Susan Nelson, F, Cauc., U.S. Mag. Judge
North Carolina	2009	Senator Hagen (D) announced the creation a committee in March 2009.	4 members – all lawyers: the former state chief justice plus one member each from the three geographic regions of the state.	DJ, USA	Catherine Eagles, MD, F, Cauc.; st. j. Max Cogburn, M, Cauc., priv. prac.
Ohio	2009	Senators Brown (D) and Voinovich (R) have created two “bipartisan judicial advisory commissions” for the states two federal judicial districts. They say that to avoid conflicts of interest, the northern district committee will vet candidates for southern district positions and vice versa.	Each committee has 17 members, most of whom are lawyers	DJ, USA	Benita Pearson, ND, F, Af-Am.; U.S. Mag. J. Timothy Black, SD, M, Cauc.; U.S. Mag. J.
Oregon	2009, apparently reconstituted from earlier committee	A July 2009 press release from Senator Wyden (D) announced that in April he and Senator Merkley (D) had appointed “a 13-member selection committee to find replacements” for two retiring district judges. A separate panel was named in August 2009 to recommend USA candidates.	13 members –Wyden – 9 (6 of whom were women or from minority groups); Merkley – 4	DJ, USA, USM	
Pennsylvania	1981	Senators Casey (D) and Specter (D) use the long-running Federal Judicial Nominating Commissions for the Eastern and Western Districts of Pennsylvania. A 2008 press release indicated this is a “a bipartisan process, which included a judicial nominating panel, made up of prominent citizens,” to identify prospective nominees. An August 31, 2009 report indicated that the Senators were in the process of organizing efforts to make recommendations for the judicial vacancies in anticipation of the confirmation of Judge Thomas Vanaskie to the Third Circuit.	14 members on each judicial nominating commission. A 16-member commission was used for U.S. attorney candidates in 2009.	DJ, USA	

JUNE 2010

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Texas	1986, reconstituted 2009	Senators Cornyn and Hutchison (both R) used a Federal Judicial Evaluation Committee originally created in 1986 during the George W. Bush administration. After the Nov. 2008 election, and following statements by Texas House Democrats that they would forward prospective nominees to the White House, the press reported that the senators released the names of a newly constituted committee that was, unlike the previous committee, bipartisan, and that would continue to screen candidates for the senators' recommendations to the White House.	Over 30 members, apparently all lawyers	DJ, USA	
Vermont	2009	Senators Leahy (D) and Sanders (I) have appointed a Vermont Judicial Selection Commission. A Leahy news release said that House member-at-large Welch will also have a role in the process	9 attorneys: Leahy – 3, Sanders - 3, Vermont Bar Association - 3	DJ	Christina Reiss, F, Cauc.; st. j.
Washington	2002	Following a nomination in early 2002 of a candidate vetted by a committee established by Rep. Jennifer Dunn (R), the state's Democratic Senators worked with the Bush administration to establish a bipartisan committee to make future recommendations. In 2003, Senator Murray (D) referred to a "bi-partisan commission process to forward names to the White House" originally developed in 1997, that she and Senator Cantwell (D) were continuing and through which "[b]oth sides have equal representation on the commission."	6 members	DJ	Rosanna Peterson, ED, F, Cauc.; law prof.

JUNE 2010

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Wisconsin	1979	In 1979, the states' two senators created a "Wisconsin Judicial Nominating Commission," with a charter that provides for shifting appointing authority between the two senators and senior House members depending on the composition of the Senate delegation and party control of the White House; the state bar also appoints members, and one or both of the deans of the state's two law schools serve depending on the vacancy to be filled.	11 members – 8 appointed by elected officials, 2 appointed by the state bar, and a law school dean (for CA vacancies both of the state's law school deans are appointed)	DJ, CA, USA, USM	Louis Butler, WD, M, Af-Am.; law prof. William Conley, M, Cauc.; priv. prac.