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Merit Selection: Current Status, Procedures, and Issues

Jona Goldschmidt

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Merit Selection: Current Status, Procedures, and Issues

JONA GOLDSCHMIDT*

I. INTRODUCTION	1
II. A BRIEF HISTORY OF JUDICIAL SELECTION	4
A. <i>Judicial Selection in the United States</i>	4
B. <i>The History of Merit Selection</i>	7
C. <i>The AJS Model Judicial Selection Provisions</i>	14
III. CURRENT STATUS OF MERIT SELECTION	19
A. <i>Sources of Authority</i>	19
B. <i>Scope of Merit Selection</i>	20
C. <i>Composition of Nominating Commissions</i>	21
D. <i>The Nomination Process</i>	22
IV. RULES OF PROCEDURE	24
A. <i>Organization</i>	25
B. <i>Applications</i>	26
C. <i>Notices of Vacancy and Recruitment</i>	28
D. <i>Evaluative Criteria</i>	29
E. <i>Screening and Investigation</i>	31
F. <i>Confidentiality</i>	33
G. <i>Ethics and Discipline</i>	35
V. EMPIRICAL STUDIES OF MERIT SELECTION	38
A. <i>Characteristics of Judges</i>	40
B. <i>Education and Localism</i>	41
C. <i>Characteristics of Judicial Decisions and Courts</i>	43
D. <i>Courts in Their Political Context</i>	45
E. <i>Adoption of Merit Selection</i>	47
F. <i>Politics and the Nominating Process</i>	49
G. <i>Satisfaction with Merit Selection</i>	56
VI. CURRENT ISSUES	58
A. <i>The Americans with Disabilities Act</i>	58
B. <i>Diversity</i>	65

* American Judicature Society © 1994. Assistant Executive Director for Programs, American Judicature Society ("AJS"). B.S., 1972, University of Illinois; J.D., 1975, DePaul University, College of Law; Ph.D., 1990, Arizona State University, School of Justice Studies. I would like to thank Lyle Warrick, Natalie Mossalum, Seth Andersen, and Allison Kessler for their valuable research assistance, and Frances Kahn Zemans, Kathleen Sampson, and Ira Pilchen for their comments on earlier drafts.

C. <i>The Voting Rights Act</i>	70
D. <i>Judicial Performance Evaluations</i>	76
VII. CONCLUSION	78
APPENDIX A	79
APPENDIX B	93

"Too much thought has been given to the matter of getting less qualified judges off the bench. The real remedy is not to put them on."¹

I. INTRODUCTION

Merit selection of judges provides one such remedy. It is a process by which a nominating commission, consisting of lawyers, non-lawyers, and sometimes judges, recruits, investigates, interviews, and evaluates applicants for judicial office. The nominating commission sends a short list of those deemed most qualified to an appointing authority, usually the governor, who is then required to make his or her selection from that list.

Long advocated by the American Judicature Society ("AJS"), merit selection began in earnest with its adoption in 1940 by the State of Missouri. The "Missouri Plan," as it has also come to be known,² has been surrounded by controversy since it was first proposed. Controversy continues over the advantages, disadvantages, and effects, if any, of merit plans on the quality of the judiciary. The passage of time has not resolved the debate. Rather, additional issues have arisen in response to legal, political, and operational factors.

Proponents of merit selection offer it as a preferable alternative to the politics and fund raising inherent in judicial elections, but opponents maintain that the appointive process itself is political, and that, furthermore, people have a right to elect their judges. Despite lingering doubts by some about merit selection's effectiveness in eliminating politics from judicial selection, and the lack of "hard" evidence that it results in the selection of better judges, the merit plan has gained widespread acceptance. At this writing, thirty-four states and the District of Colum-

1. Roscoe Pound, *Introduction* to EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* ix, xiv (1944).

2. The process of merit selection is variously referred to as the "merit plan," the "non-partisan merit plan," or the "Missouri Plan." These terms are interchangeable, despite the fact that the concept takes many forms. Cf. Patrick W. Dunn, Note, *Judicial Selection in the States: A Critical Study with Proposals for Reform*, 4 HOFSTRA L. REV. 267, 285 n.71 (1976) ("The use of the term 'merit' in this context tends to be ambiguous and conclusive, implying that the Missouri system of judicial selection is based only on merit while alternative methods of selecting judges are not. The use of such prejudicial terminology is not conducive to an objective analysis of judicial selection systems."). The term "merit selection" is used here because, despite the warning above, it is commonly accepted. Moreover, at the time the above statement was published relatively little was known about the effects of merit selection.

bia use the merit plan for the selection of some or all of their judges. Furthermore, U.S. Senators have used at least seven nominating commissions in the recent past to assist them in deciding upon their recommendations to the President for federal judgeships.³

This Article provides a comprehensive review of the status of merit selection in the United States, and addresses a variety of current merit selection issues. Part II of the Article summarizes the history of judicial selection in the United States from colonial times to the present. Next, a history of merit selection is provided, followed by a description of the American Judicature Society's Model Judicial Selection Provisions.

Part III describes the structural features of existing merit plans: their scope, authority, and composition. A wide range of merit plans exists, and it is hoped that this overview of the status of merit selection will assist policy makers considering adoption or modification of merit plans.

An examination of the rules of procedure adopted by judicial nominating commissions is contained in Part IV. The information is drawn from a recently completed national survey by AJS that collected and reviewed the rules of procedure and application forms from 31 cooperating nominating commissions. These rules are described in the order in which they would become applicable in a typical case of judicial selection, from the commission's organizational meeting to ethical considerations for commission members.

References will be made in Parts III and IV to tables in Appendix A that summarize the data collected regarding nominating commission operations. The tables provide an overview of the scope of merit selection plans (Table 1), the composition of their membership (Table 2), the

3. California, Florida, Illinois, Michigan, New York, Pennsylvania, and Wisconsin. See *infra* Appendix A, Table I. See Larry Berkson, *Judicial Selection, Compensation, Discipline and Mandatory Retirement*, in *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE: THE JUDICIAL ADMINISTRATION DIVISION HANDBOOK* 61, 65 (Fannie J. Klein, ed., 6th ed. 1981) ("Since 1975, forty-eight U.S. senators in thirty states have established voluntary advisory committees to aid them in selecting federal district judges."). See also Sheldon Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 *JUDICATURE* 344, 352-53 (1981) (describing former President Carter's extensive use of nominating commissions).

Likewise, merit selection panels are required by federal law to screen applicants for federal magistrate positions. See 28 U.S.C. § 631(b)(5) (1993); Admin. Off. of the U.S. Courts, Reg. of the Jud. Conf. of the U.S. Establishing Standards and Procedures for the Appointment and Reappointment of U.S. Magistrate Judges, § 3.01, in *The Selection and Appointment of U.S. Magistrate Judges* (1993). See, e.g., Press Release of Bruce Barton, District Executive for the United States District Court for the Eastern District of New York (April 26, 1994) (on file with the author); Public Notice on Appointment of Magistrate Judge by the United States District Court for the Eastern District of New York (April 20, 1994) ("A Merit Selection Panel composed of attorneys and other residents of the district will review all applications and recommend in confidence to the judges of the district court the five persons whom it considers best qualified.") (on file with the author).

rules governing the submission of the list of nominees (Table 3), the rules of confidentiality (Table 4), and the other rules of procedure (Table 5). The AJS Model Judicial Selection Provisions are then presented in Appendix B.

Part V is a review of the empirical research on merit selection. The obvious problem of establishing the criteria for such subjective terms as a "good" judge or a "better" quality of justice has not deterred researchers from attempting to measure the effects of merit selection. This part of the Article describes the principal findings of these studies and suggests directions for future research.

Part VI explores a number of current merit selection issues that have arisen from recent legal developments, such as the passage of the Americans with Disabilities Act ("ADA") and the application of the Voting Rights Act ("VRA") to judicial elections. Other issues arising from the natural evolution of merit plans—such as the movement toward diversity provisions for commission membership and judicial nominations, and linkages between merit plans and judicial performance evaluations—are also discussed.

In conclusion, it is suggested that the merit plan, while not a panacea that would completely eliminate politics from judicial selection, is a far preferable system for enhancing public confidence in the courts than the electoral process. The arguments made by minority critics who do not share this view are also addressed. Merit selection can be harmonized with their concerns about establishing a more diverse bench without returning to judicial elections.

II. A BRIEF HISTORY OF JUDICIAL SELECTION

A. *Judicial Selection in the United States*

In 17th century England, the chancellor, acting for the king, appointed judges to dispense justice on the king's behalf. The judges could, however, be arbitrarily removed at the pleasure of the king. Later, after the English revolution of 1688, statutes gave judges life tenure "during good behavior."⁴

In the colonies, the king also had absolute control over the appointment and removal of judges. Commentators on judicial selection have often cited the reference to the king's treatment of colonial judges that appears in the list of grievances in the Declaration of Independence: "He has made Judges dependent on his Will alone, for the tenure of their

4. MARVIN COMISKY & PHILIP C. PATTERSON, *THE JUDICIARY—SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE* 3 (1987).

offices, and the amount and payment of their salaries.”⁵

Following the American Revolution, the thirteen original states retained—but diffused—the appointive power. Eight of the thirteen original states adopted the appointive process, but placed it in the hands of one or both houses of the legislature; three states provided for joint appointment by the governor and a council; and two states provided for gubernatorial appointment subject to confirmation by a council.⁶ For federal judges, the framers of the Constitution also retained the appointive power in the President, but diffused the power by the requiring Senate confirmation.⁷

In 1832, Mississippi became the first state to establish a partisan electoral process for statewide judicial selection.⁸ This marked the beginning of a trend in many states prompted by the emergence of Jacksonian Democracy. The shift to judicial elections from the 1830s until the 1850s:

was one phase of the general swing toward broadened suffrage and broader popular control of public office which Jacksonian Democracy built on the foundations laid by Jefferson. As such, the movement was based on emotion rather than on a deliberate evaluation of experience under the appointive system. . . .

. . . [It] was the result of . . . imitation and sentiment.⁹

By the Civil War, twenty-two of 34 states elected their judges, while the older Atlantic seaboard states retained the appointive method subject to legislative approval.¹⁰ It was not long before widespread dis-

5. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

6. COMISKY & PATTERSON, *supra* note 4, at 4-5; Berkson, *supra* note 3, at 61. Cf. Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966) (writing that seven states provided for appointment by the legislature, five by the governor and a council, and one by the governor and legislature jointly). The differences in these accounts regarding the states' post-Colonial judicial selection systems is attributable to the fact that in the 1700s Delaware switched from legislative to gubernatorial appointments.

7. See U.S. CONST. art. II, § 2.

8. Georgia, however, was the first to adopt the elective system for its lower court judges in 1812. Winters, *supra* note 6, at 1082.

9. JAMES W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 140 (1950). See also Winters, *supra* note 6, at 1082 (“[T]here is some indication that it was inspired in part by a feeling that judges were being appointed too frequently from the ranks of the wealthy and privileged.”).

10. George E. Brand, *Selection of Judges—The Fiction of Majority Election*, 34 J. AM. JUDICATURE SOC'Y 136, 136 (1951). After Mississippi, New York, in 1846, and all states entering the Union thereafter until the entrance of Alaska in 1958 adopted the elective system. Winters, *supra* note 6, at 1082 (citing EVAN HAYNES, *SELECTION AND TENURE OF JUDGES* 101 (1944)). As to the fact that the eastern seaboard states utilize the gubernatorial appointive process with legislative confirmation, this was the beginning of a pattern; there is a correlation between the region of the country and the method of judicial selection. Of the eight gubernatorial appointment systems, seven are in the Northeast; of the twenty states with partisan elections, twelve are in the South and four are in the Midwest; and of the fourteen states with non-partisan elections, eight are

satisfaction over political abuses in connection with partisan elections arose. Those abuses stemmed from the emerging power of political parties during the period from 1870 to 1930 to control judicial candidates, the elected judiciary, and the retention of judges in subsequent partisan elections.¹¹ As one historian put it, the history of early judicial elections "worked out as a *de facto* system of appointment."¹²

Roscoe Pound, in his famous August 29, 1906 speech, *The Causes of Popular Dissatisfaction with the Administration of Justice*, at the annual meeting of the American Bar Association ("ABA"), noted that "[p]utting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."¹³ By this time, the tradition of voters always "returning a sitting judge"¹⁴ was well established. By 1880, the ABA, the Association of the Bar of the City of New York, and other bar associations were formed in an effort to restore public confidence in the courts which was lost, in part, due to the political nature of partisan judicial elections.¹⁵

After the turn of the century, alternatives to partisan elections were suggested. Nonpartisan elections, direct judicial primaries, shortened ballots, and nominating committees were proposed and adopted in many states during the Progressive era (1900-1917). Progressivism was a reform movement that advocated greater efficiency and economy in

in the West and six in the Midwest. All but one of the latter fourteen regions are contiguous. Bradley C. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 LAW & SOC'Y REV. 579, 581 (1972).

11. This phenomenon continues today in Chicago, New York City, and other places where partisan elections are still used and one political party is dominant.

12. HURST, *supra* note 9, at 133. Also see Albert M. Kales, *Methods of Selecting and Retiring Judges*, 11 J. AM. JUDICATURE SOC'Y 133, 134-35 (1928):

It is one of our most absurd bits of political hypocrisy that we actually talk and act as if our judges were elected whenever the method of selection is, in form, by popular election.

In a great metropolitan district like Chicago, where we have a typical long ballot and the party machines are well organized and powerful, our judges, while they go through the form of election, are not selected by the people at all. They are appointed. The appointing power is lodged with the leaders of the party machines. These men appoint the nominees. They did it openly and with a certain degree of responsibility under the convention system. . . . In almost every case the story is one of preliminary service to the organization, recognition by the local organization chief and through him recognition and appointment of a nomination by the governing board of the party organization. Those who do not go by this road do not get in. The voter only selects which of two or three appointing powers he prefers. Whichever way he votes he merely approves an appointment by party organization leaders.

13. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 748 (1906).

14. HURST, *supra* note 9, at 134.

15. See Dunn, *supra* note 2, at 279-80.

government, prompted by Frederick W. Taylor's theory of scientific industrial management.¹⁶ The Progressive movement took the form of a number of separate, reform-minded groups that proposed a variety of programs designed to inject "efficiency" into government, in order that it "run like a well-tuned engine."¹⁷

B. *The History of Merit Selection*

The founders of the American Judicature Society were products of the Progressive movement.¹⁸ Roscoe Pound's 1906 speech was a major inspiration to them as well as other court reform-minded people.¹⁹ Pound argued that the "most efficient causes of present disaffection with the present administration of justice"²⁰ included the disorganized and antiquated court system that caused "[u]ncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice."²¹

While today AJS conducts a wide variety of programs, the advocacy of and education about the merit selection of judges as an alternative to the elective system has, since its formation, been the cornerstone of its activities. AJS was formed in 1913 with the general progressive mission of improving the "efficiency"²² of the administration of

16. See generally FREDERICK W. TAYLOR, *PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911); Lewis Gould, *Introduction: The Progressive Era*, in *THE PROGRESSIVE ERA* (Lewis L. Gould, ed., 1974).

17. See ROBERT M. CRUNDEN, *MINISTERS OF REFORM* ix (1982).

18. They include, among others, Herbert Harley, Jr., a Michigan law-trained journalist and a founder of AJS and secretary-treasurer from 1913 to 1945, Dean John H. Wigmore of Northwestern University School of Law, Albert M. Kales, a colleague of Wigmore at Northwestern, Harry Olson, Chief Justice of the Municipal Court of Chicago, Dean James Parker Hall of the University of Chicago, Governor Woodbridge Ferris of Michigan, and Dean Roscoe Pound, Jr. of Harvard Law School. MICHAEL R. BELKNAP, *TO IMPROVE THE ADMINISTRATION OF JUSTICE: A HISTORY OF THE AMERICAN JUDICATURE SOCIETY* 1-28 (1992).

19. See Pound, *supra* note 13 and accompanying text.

20. Note Pound's somewhat inapposite use of the progressive term "efficient" to describe the negative effects of the American judicial system.

21. See Pound, *supra* note 13, at 742.

22. The legal name of AJS at its date of incorporation (July 15, 1913) was the American Judicature Society to Promote the Efficient Administration of Justice. BELKNAP, *supra* note 18, at 24. The word Efficient was changed on August 12, 1974 to "Effective."

In the administration of justice the difference becomes meaningful. When we speak of efficiency in the courts we think of rapidly moving court calendars, no waste of time for judges, attorneys, jurors, witnesses or anybody; of court records that are complete, accurate and up to date; of adequate and convenient court facilities, and of typewriters and computers that work. When we say "effective" our attention turns from the operation to the result. If the administration of justice is effective, the right parties win, the innocent are vindicated, the guilty punished, court calendars are cleared, the laws are respected and obeyed and the people live in security and harmony.

It will, indeed, take more than judicial administration to accomplish all that,

justice.²³

The founders of AJS shared the commonplace Progressive belief that the solution to most of the country's problems lay in more efficient public administration. The Society's negative attitude toward the election of judges, for example, was part of a widespread denigration of partisan politics. Progressives tended to view partisanship as productive of inefficiency in governance and to believe that government should be run like a business corporation.²⁴

The Progressive court reformers of the day, therefore, focused on the negative effects (i.e., inefficiencies) of, among other things,²⁵ judicial elections, an area that was greatly in need of reform. It is ironic that reformers of one era (the Progressives) opposed a reform (i.e., elections) that was put in place by reformers of a different era (Jacksonian Democracy) as a substitute for gubernatorial appointment. But abuses of the political process and other weaknesses of electoral systems required the return to an appointive system of judicial selection, this time based upon merit.

In 1914, Albert M. Kales, law professor at Northwestern University and the AJS director of research, proposed a system to replace judicial elections. Judges would first be nominated for office by a nonpolitical commission that would affirmatively seek out the best qualified candidates. Under his plan, a popularly-elected chief justice would then make an appointment from the list of the commission's nominees. After a specified initial term of office, and for subsequent terms, judges would run in an unopposed retention election.²⁶

The August 1919 issue of the *Journal of the American Judicature Society* announced that the question of judicial selection, which had

but the more efficiently and effectively justice is administered, the nearer we will come to that ideal. Efficiency includes effectiveness. Whirring machines are useless if they turn out a defective product. Perhaps in changing our name we are not really changing much of anything. And shouldn't.

Editorial, Efficient Effective Justice, 57 JUDICATURE 437 (1974).

23. See generally BELKNAP, *supra* note 18; Herbert Harley, *The American Judicature Society, An Interpretation*, 62 U. PA. L. REV. 340 (1914); Herbert Harley, *Concerning the American Judicature Society: An Attempt to Give a Brief History of a Unique Organization and to Explain Its Objectives*, 20 J. AM. JUDICATURE SOC'Y 9 (1936).

24. BELKNAP, *supra* note 18, at 26.

25. See generally Herbert Harley, *The American Judicature Society, An Interpretation*, 62 U. PA. L. REV. 340 (1914); BELKNAP, *supra* note 18, Chapters 1-2, at 1-67. See also American Judicature Society, *Suggested Causes for Dissatisfaction with the Administration of Justice in Metropolitan Districts*, BULLETIN NO. I (American Judicature Soc'y), Jan. 1914 (criticisms and proposals offered in six areas: 1) selection, retirement, and discipline of judges; 2) organization of judges; 3) selection and use of juries; 4) methods of developing procedural rules; 5) selection of court officials; and 6) organization of the bar, including admission to practice and discipline).

26. Kales, *supra* note 12, at 142; Albert M. Kales, *Methods of Selecting and Retiring Judges in a Metropolitan District*, 52 ANNALS 1 (1914).

been deferred since the organization's birth in 1913 in favor of other court reform issues, would be addressed in the coming year.²⁷ Subsequent editorials spoke in opposition to elections, arguing that the populace can never have sufficient knowledge of judicial candidates to select the most qualified individuals.²⁸ The elective system, it was argued, should be seen for what it really was: a system of judicial selection by party leaders.²⁹ The role of the electorate, accordingly, should be limited to retention "at stated intervals."³⁰

In 1926, Harold Laski, a British political scientist, proposed that the executive, not the chief justice as in Kales's proposal, be given the appointment power.³¹ Two years later, AJS endorsed Kales's proposal as modified by Laski.³² The nominations presented to the governor under the AJS proposal would come from a committee of the bar.³³

In 1931, the Grand Jury Association of New York became the first to suggest that lay citizens be included in nonpartisan judicial nominating commissions.³⁴ Then, in 1937, the ABA adopted the merit plan.³⁵ It proposed:

(a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office.

(b) If further check upon appointment be desired, such check may

27. *Editorial*, 3 J. AM. JUDICATURE SOC'Y 35, 35 (1919).

28. *See Selecting and Retiring Judges*, 3 J. AM. JUDICATURE SOC'Y 165, 165 (1920).

29. *Id.* at 171.

30. *Id.* at 175.

31. *See* Harold J. Laski, *The Technique of Judicial Appointment*, 24 MICH. L. REV. 529, 533 (1926).

32. *See The Eligible List of Judicial Candidates*, 11 J. AM. JUDICATURE SOC'Y 131, 131-32 (1928).

33. *See id.*

The idea is that a governor empowered to appoint judges might be required to choose from a public list of eligible lawyers. . . . Such a list of eligibles should contain always two or three times as many names as there are positions to be filled, thus affording the governor considerable latitude, for he should carry a large share of the power and responsibility.

An eligible list could be created and maintained in various ways but it would seem that the best way would be through a bar plebiscite. That would seem to be the way to prevent a wild scramble for such a desirable position. . . .

. . . [T]he plebiscite would winnow out the deserving from the merely self-seeking.

Id.

34. *See* Glenn R. Winters, *Judicial Selection and Tenure*, in *SELECTED READINGS: JUDICIAL SELECTION AND TENURE* 36 (Glenn R. Winters, ed. 1973).

35. *See* John Perry Wood, *Basic Propositions Relating to Judicial Selection*, in *Fourth Session*, 23 A.B.A. J. 102, 105 (1937).

be supplied by the requirement of confirmation by the State Senate or other legislative body of appointments made through the dual agency suggested.³⁶

(c) The appointee shall after a period of service be eligible for reappointment periodically thereafter or go before the people upon his record with no opposing candidate, the people voting upon the question, Shall Judge Blank be retained in office?³⁷

In 1940, Missouri voters adopted the Kales-Laski plan for its appellate courts, the circuit and probate courts of St. Louis City and Jackson County (Kansas City), and the St. Louis courts of criminal correction.³⁸ The first state to adopt a statewide merit plan was Alaska, which adopted the system when it entered the Union in 1959.³⁹ Iowa and Nebraska followed suit in 1962 by adopting merit selection for their major trial and appellate judges.⁴⁰ In 1964, limited jurisdiction judges also came under merit plans in Colorado (the Denver County Court) and in Florida (the Dade County Metropolitan Court).⁴¹

A constitutional amendment or a statute is usually the source of authority for merit plans. Some jurisdictions, however, adopted merit selection through an executive order entered by the governor or mayor.⁴²

36. *Id.*

37. *Fourth Session*, 23 A.B.A. J. 102, 108 (1937). In 1962, the ABA adopted its Model State Judicial Article, which recommended a number of court reform measures, such as a merit selection system (i.e., the Missouri Plan for Judicial Selection, named after the first state to adopt a merit plan for some of its state judges), an expanded judicial department with the power to determine the number of judges needed, the establishment of jurisdiction by court rule rather than by statute, and a single, unified court system. BELKNAP, *supra* note 18, at 181-82.

38. MO. CONST. art. 5, § 29(a); *see also* RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR* 11-12 (1969); *see generally* Jack W. Peltason, *The Missouri Plan for the Selection of Judges*, 20 U. MO. STUDIES 1 (1945).

39. ALASKA CONST. art. IV, §§ 5-9; *see also* WATSON & DOWNING, *supra* note 38, at 12. An exception existed for limited jurisdiction judges, who were appointed by judges of the superior court.

40. IOWA CONST. art. 5, §§ 15-18; NEB. CONST. art. IV, § 11, art. V, §§ 4-5, 7, 10, 15, 20, 21.

41. *See* DENVER, COLO., HOME RULE CHARTER, §§ A13.8 to -3 (1964); *Bipartisan Commission to Select Denver Judges*, 48 J. AM. JUDICATURE Soc'y 117 (1964); DADE COUNTY, FLA., HOME RULE CHARTER, § 6.01 (1964); *Dade County Voters Approve Plan*, 47 J. AM. JUDICATURE Soc'y 117 (1963).

42. *See* Donna Vandenberg, *Voluntary Merit Selection: Its History and Current Status*, 66 JUDICATURE 265, 265-66, 268 (1983):

Proponents of merit selection have found the road to its adoption a rocky one. Proposed constitutional amendments have often failed in the legislature, or, once passed the legislators, fallen at the polls. Passage of a statutory plan is nearly as difficult. Merit selection supporters in the legislature have discovered their colleagues often reluctant to support even a limited plan.

However, in states where the power to appoint judges to initial or interim vacancies is vested in the governor, and where constitutional or statutory attempts at merit selection have failed, executives have chosen an easier means of instituting a plan—the executive order. These orders have commonly created a nominating

In New York City, for example, Mayor Robert Wagner established a nominating commission in 1961 to recommend nominees for mayoral appointments of city judges, a plan later extended by Mayors John Lindsay, Abraham D. Beame, Edward I. Koch, David Dinkins, and by the current Mayor Rudolph Giuliani.⁴³ Initial and midterm vacancies on the New York Court of Appeals (the court of last resort) are filled through merit selection. Midterm vacancies on the general jurisdiction supreme (trial) courts and initial and midterm vacancies on the Appellate Division of the Supreme Court and the Court of Claims are also filled thorough merit selection under the executive order enacted by former Governor Mario Cuomo.⁴⁴ All other judgeships in New York are filled through the elective process.

The following observation, made by former AJS executive director Glenn Winters in 1966, still holds true today:

In most of the elective states the governor is empowered to fill judicial and other vacancies by appointment, with tenure of these appointed judges extending until the next election or for a specified minimum time. Since forty to ninety percent of the judicial vacancies that occur are filled by the governor, even in the states that are nominally elective, a very substantial percentage, usually a majority, of the judges actually are appointed, and for these judges the subsequent election is significant only with respect to tenure. When the judges selected in those jurisdictions that have an appointive system are added to those appointed in the rest of the states under the governor's power to fill vacancies, it becomes clear that the judges initially selected by election are in the minority. This minority is bound to diminish as merit selection gains new adherents in the years ahead.⁴⁵

The history of merit selection also reflects the tension between the values of judicial independence and judicial accountability. On the one hand, the rule of law is bottomed on the existence of an independent judiciary that is not subject to shifting political winds and interests. On the other hand, the populist nature of American culture, from the Ameri-

commission to screen applicants for initial or interim vacancies to the courts over which the executive has appointing power

.... Unfortunately, not only is the ease of implementation the voluntary plan major benefit—it is also its major weakness. When the governor leaves office, the succeeding executive is not bound to extend the life of the executive order.

Id. at 265-66 (citation omitted). See also Winters, *supra* note 6, at 1086-87; *infra* Appendix A, Table 1.

43. See Winters, *supra* note 6, at 1086; *infra* Appendix A, Table 1.

44. See Exec. Order No. 134.2 of Gov. Mario Cuomo (September 10, 1992). As of this writing, New York's Governor George Pataki is reviewing all existing executive orders to determine whether to extend, modify, or rescind them.

45. See Winters, *supra* note 6, at 1087.

can Revolution through the Jacksonian and Progressive eras, reflects strong and continuing notions of governmental accountability. Opponents of merit selection believe that the people should select and remove their judiciary. This populist argument is most commonly advocated in non-urban areas, which traditionally have opposed merit selection.⁴⁶ "Legislators, judges, lawyers and residents in non-urban areas often fear the loss of local control and autonomy that accompanies a statewide solution proposed to solve organizational, administrative, financial and procedural problems that they associate with overcrowded and delay-burdened urban courts."⁴⁷

Often, the leadership of the legal community spearheads the movement toward adoption of merit selection.⁴⁸ Because they are usually the leaders of the statewide or the urban bar association, their efforts have a greater impact in urban areas.⁴⁹ This urban/rural tension can result in states having counties with widely divergent opinions regarding judicial selection.⁵⁰

Further balkanization of attitudes toward merit selection may be attributable to the existence of different "political cultures"⁵¹ in each

46. See Philip L. Dubois, *Voter Responses to Court Reform: Merit Judicial Selection on the Ballot*, 73 JUDICATURE 238, 244 (1990); see generally Henry R. Glick, *Innovation in State Judicial Administration: Effects on Court Management and Organization*, 9 AM. POL. Q. 49 (1981); Marsha Puro et al., *An Analysis of Judicial Diffusion: Adoption of the Missouri Plan in the American States*, 15 PUBLIUS 85, 89 (1985); Judith Ann Haydel, *Explaining Adoption of Judicial Merit Selection in the States, 1950-1980: A Multivariate Test* 102 (1987) (unpublished Ph.D. dissertation, University of New Orleans).

47. Dubois, *supra* note 46, at 244.

48. See Haydel, *supra* note 46, at 111.

49. Dubois, *supra* note 46, at 244.

50. See Glenn R. Winters, *The New Mexico Judicial Selection Campaign—A Case History*, 35 J. AM. JUDICATURE SOC'Y 166, 169 (1952); see also Dubois, *supra* note 46, at 239 (Table 1 provides the voter response to proposed merit plans in 28 state elections for the period 1941-1980. The data show that voter support for merit selection within each state studied varies from county to county.).

51. The concept was first articulated by DANIEL A. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATE* (1972). Elazar described three American political cultures that reflect citizens' attitudes toward their role in government and the role of government in society. These three cultures, shaped by migration and immigration patterns, urbanization, industrialization, and other factors, are: 1) the "individualistic" (in which the political system is considered a marketplace, where private interests compete for governmental outcomes, a place that "is the province of professionals" and that is "no place for amateurs"); 2) the "moralistic" (where people believe public servants should devote themselves to the public good and the public interest, where influence-peddling is unacceptable as a normal part of government); and 3) the "traditionalist" (where the status quo is valued by citizens who are both ambivalent about the government marketplace and maintain a highly elitist and paternalistic attitude about the commonwealth). *Id.* at 95. See also Dubois, *supra* note 46, at 247 ("[T]he major metropolitan areas which contain the vast majority of the voting public and which have been shown earlier to have been decisive in determining court reform elections are, almost without exception, dominated by the individualistic or moralistic cultures."); John Kincaid, *Political Culture and the Quality of Urban Life*, 10

state. Thus, some states, such as Kansas and Colorado,⁵² are literally a "patchwork quilt" of areas with different judicial selection methods in each county or court district.

As of this writing, six methods of judicial selection are prevalent in the United States. Merit selection is the method of both initial and interim selection of some or all judges in twenty-three states and the District of Columbia.⁵³ In fourteen states, interim vacancies for some or all judgeships are filled using merit selection.⁵⁴ Twelve states⁵⁵ use nonpartisan elections, while partisan elections are used in nine states.⁵⁶ A gubernatorial appointment system with legislative (Senate) confirmation is used in three states,⁵⁷ and only two states continue to use direct legislative appointments.⁵⁸ California is unique in its use of a gubernatorial appointment system by having a Commission on Judicial Appointments that has veto power over the selections.⁵⁹

There are several arguments raised in favor of merit selection. The first addresses the weaknesses of both partisan and nonpartisan elective systems. These methods do not allow for rational judicial selection: "Elections . . . are premised on a dubious assumption: that the public is attentive and well informed about the candidates."⁶⁰ In fact, it is com-

PUBLIUS 89, 92 (1980); Samuel C. Patterson, *The Political Culture of the American States*, 30 J. POL. 187 (1968).

52. See *infra* Appendix A, Table 1.

53. Alaska; Arizona (supreme, appellate, and superior court in counties with populations greater than 250,000); Colorado; Connecticut; Delaware; D.C.; Florida (supreme and appellate court; midterm vacancies on circuit and county courts); Hawaii; Indiana (supreme, appellate, Lake and St. Joseph and Allen County Superior Courts, and Marion County Municipal Court); Iowa, Kansas, Maryland; Massachusetts; Missouri (supreme, appellate, St. Louis, Kansas City and surrounding counties); Nebraska; New Mexico, New York (all appellate courts and some New York City courts); Oklahoma (supreme, and court of criminal appeals); Rhode Island (all trial courts currently, and supreme—if voters adopt constitutional amendment at November 8, 1994 election); South Dakota (supreme); Tennessee (all appellate); Utah; Vermont; Wyoming. *Infra* Appendix A, Table 1.

54. Alabama (circuit and/or district courts in Jefferson, Madison, Mobile, and Tuscaloosa Counties); Florida (circuit and county courts only); Georgia, Idaho, Kentucky; Minnesota (district courts only); Montana, Nevada, North Dakota; Oklahoma (courts of appeals and district court only); Pennsylvania, South Dakota (circuit court); West Virginia, and Wisconsin. *Infra* Appendix A, Table 1.

55. Georgia; Idaho; Kentucky; Michigan; Minnesota; Montana; Nevada; North Dakota; Ohio; Oregon; Washington; and Wisconsin. *Infra* Appendix A, Table 1. See *Judicial Selection in the States Appellate and General Jurisdiction Courts Summary of Initial Selection Methods* (1994) (on file with AJS).

56. Alabama; Arkansas; Illinois; Louisiana; Mississippi; North Carolina; Pennsylvania; Texas; West Virginia. *Infra* Appendix A, Table 1.

57. Maine; New Hampshire (confirmation by an Executive Council); and New Jersey. *Infra* Appendix A, Table 1.

58. South Carolina and Virginia. *Infra* Appendix A, Table 1.

59. *Infra* Appendix A, Table 1.

60. See Berkson, *supra* note 3, at 64.

mon knowledge that the public is uninformed about judicial candidates, and, worse still, some believe that ethnic name recognition is the basis for many voting decisions. Election contests are usually issueless and have low voter turnout. Most incumbents are easily reelected and often run unopposed.⁶¹

Elections also discourage many well-qualified people from seeking judicial office. "Many attorneys . . . have a philosophical distaste for politics and political campaigning, and thus refrain from seeking office."⁶² Elections also compromise the independence of the judiciary; "judicial officers, unlike other elected officials, should not be governed by the transient whims of the public which is likely to vote an unpopular, although competent, judge out of office for rendering correct but controversial decisions."⁶³ No less significant are the problems associated with judges who must campaign and seek campaign contributions and with getting court business accomplished during reelection time.⁶⁴

C. *The AJS Model Judicial Selection Provisions*

In 1984, AJS developed a model statute for the establishment of a

61. *Id.*

62. *Id.*

63. *Id.* at 65.

64. *Id.* Arguments against merit selection are: (1) it deprives citizens of their right of franchise; (2) it does not take politics out of judicial selection; (3) nominating commissioners are not representative of the population, and thus candidates will not be drawn from all segments of society; (4) it results in life-tenure for judges, who are rarely removed in retention elections; and (5) that elections serve to educate the public, whereas merit selection does not. *Id.* at 66. In response, (1) the history of judicial selection in this country as described in part II(A), *supra*, of this article does not support the notion of a "right of franchise" for judicial selection, the method of selection historically being a function of what the people in any given states, through their elected representatives, choose as their preferred system. Also, popular control and accountability is retained under merit selection by the retention election component of almost all merit plans; (2) merit selection may not eliminate politics, but it serves to reduce the "improper" politics inherent in the electoral system, as I point out in part V(F), *infra*; (3) diversity rules and statutory provisions are addressing the lack of representativeness in nominating commission membership, as I explain in part VI(B), *infra*; (4) judges, in general, whether they be elected or appointed, are rarely removed through contested elections or retention elections. A vigilant and adequately funded judicial conduct mechanism, however, is an integral part of any method of judicial selection, broadly defined, and provides a more effective means of removal of those judges that should be removed than the electoral system; and (5) a process by which a nominating commission recruits, screens, investigates, interviews, and selects a short list of the most qualified applicants for judicial office probably serves to educate the commission members, as representatives of the public, more about the candidates than a judicial election can educate the general public. Judicial ethics requirements being what they are, there is very little about which judges can publicly campaign. My purposes here, however, are not to debate all issues surrounding merit selection, but to (1) provide as objective a review of the status and empirical research about merit selection as is possible to inform policymakers, and (2) show how certain procedural recommendations of the *AJS Model Provisions* and the variety of rules of nominating commissions, as reflected in the tables in Appendix A, address emerging merit selection issues.

merit plan.⁶⁵ Under the *Model Judicial Selection Provisions* ("Model Provisions"), the gubernatorial appointment power is restricted to a list of two to five nominees selected by a seven member judicial nominating commission.⁶⁶ This model of judicial selection is a means of diffusing the gubernatorial appointment power. As explained in the *Model Provisions*, "[t]he separation of functions allows for independent and nonpartisan evaluations and nominations by a responsible commission and final appointment by a governor who is politically accountable."⁶⁷

The *Model Provisions* recommend a nominating commission composed of seven members: either three lawyers and four non-lawyers, or vice versa.⁶⁸ An alternative model is a seven member commission, with a chief justice or presiding judge serving as chair ex-officio.⁶⁹ Commissioners should be residents of the same state or judicial district in which the vacancy arose.⁷⁰ The lawyer members are appointed or elected by the state bar and the non-lawyers are appointed by the governor.⁷¹ Appointments are made with "due consideration to geographic representation and without regard to political affiliation."⁷² Commissioners may not hold any other political office for which monetary compensation is received, nor may they hold such an office for three (or four) years after serving as a nominating commissioner.⁷³

The recommendation that the appointing authority be presented with not less than two, nor more than five nominees' names is explained in this way:

Although the number of names submitted to the governor need not be fixed at five, the number should be sufficiently low so that the commission nominates only the most qualified candidates. Five names appears to be the optimum because it gives the governor a real choice while limiting the governor's appointing power. [Commissions in rural areas] . . . may have difficulty finding five qualified nominees and should therefore be allowed the flexibility to submit fewer

65. MODEL JUDICIAL SELECTION PROVISIONS (American Judicature Soc'y, 1984, revised 1994) [hereinafter MODEL PROVISIONS]; *infra* Appendix B. The *Model Provisions* contain a model executive order for states in which a governor, or cities in which a mayor, decide to establish a merit plan as part of their appointment powers, whether it be applicable to initial or interim judicial appointments. *Id.* at part 3.

66. *Id.* § 2.

67. *Id.* § 1, commentary.

68. *Id.*

69. *Id.* § 2, alternative B.

70. *Id.*

71. *Id.*

72. *Id.* The new diversity provisions for commissioners are discussed in *infra* notes 457-63 and accompanying text.

73. MODEL PROVISIONS § 2, alternative B.

names.⁷⁴

After receiving the nominees list, the governor has thirty days within which to make the appointment; if no appointment is made within that time, the chief justice (or presiding judge, where applicable) makes the appointment.⁷⁵ This provision is intended to ensure that the final appointment is made within a reasonable time.⁷⁶

The recommended terms for the initial commissioners are staggered among the lawyer and non-lawyer commission members and each group has a maximum of either four or six year terms.⁷⁷ The commentary to the *Model Provisions* states that "[m]embers should serve for a period long enough to enable them to develop selection skills,"⁷⁸ and that terms "should be staggered to encourage an independent commission and to provide some continuity."⁷⁹

Commissions should be provided with staff and equipment and empowered to adopt their own rules of procedure.⁸⁰ Part 2 of the *Model Provisions* consists of model rules for implementing a merit plan. These include rules that require submission of a list of "no more than five nor less than two persons qualified for the judicial office to the governor within 60 days of the occurrence of a vacancy."⁸¹ The chairman of the commission publicizes the vacancy and solicits the names of qualified applicants through press releases and public announcements.⁸²

Organizational meetings of the commission to discuss "the commission's procedures and requirements for the vacancy" are open to the public,⁸³ "final deliberations," however, are "secret and confidential"⁸⁴ in order to "encourage free and open discussion of the candidates' qualifications."⁸⁵ Additional rules of confidentiality shall be determined by each commission,⁸⁶ with the admonition that commission proceedings should be "as open as possible."⁸⁷

Names are submitted to the governor in alphabetical order, and an optional confidential memorandum may accompany the list of nominees

74. *Id.* § 1, commentary.

75. *Id.* § 1.

76. *Id.* § 1, commentary.

77. *Id.* § 3.

78. *Id.* § 2, commentary.

79. *Id.* § 3, commentary.

80. *Id.* § 5; see *infra* Appendix A, Tables 3 and 4.

81. *Id.* at Rule 1.

82. *Id.* at Rule 4.

83. *Id.* at Rule 5(a).

84. *Id.* at Rule 5(b).

85. *Id.* at Rule 5, commentary.

86. *Id.* at Rule 5(c).

87. *Id.* at Rule 5, commentary.

to "state facts concerning each of the nominees listed."⁸⁸ The governor then makes the names of the nominees public and encourages public comment about them.⁸⁹ "This is the point at which public preferences are appropriately voiced. By providing the opportunity for public participation, the governor also fosters public confidence in the final appointment."⁹⁰ Should the governor request additional information about a nominee, the commission may provide it in the form of a memorandum without indicating any commission preference.⁹¹

The *Model Provisions* recommend that candidates for membership on the nominating commission be a resident of the state for three years.⁹² This is included to ensure that commissioners "have knowledge of the state and of the community," an important quality since commissioners "sit in place of the electorate when selecting public officials."⁹³

For those states that follow the process of retention by the electorate, the *Model Provisions* recommend an uncontested retention election.⁹⁴ In addition, retention election ballots are separate from ballots for other public offices, and divided by sections corresponding to the different courts for which there are retention candidates.⁹⁵ The sole issue on the ballot is whether or not the candidate (sitting judge) should be retained.⁹⁶

In 1994, the AJS Executive Committee approved an amendment to the *Model Provisions* regarding the composition of nominating commissions. The amendment provides, "All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic and racial diversity of the jurisdiction."⁹⁷

Another new part was added to the *Model Provisions* in 1994.⁹⁸ Part 4 now recommends that merit plans establish two Commissions on Judicial Performance Evaluation, one for appellate judges and another for trial judges.⁹⁹ The purposes underlying the creation of these commissions are to:

- (1) provide persons voting on the retention of justices and judges

88. *Id.* at Rule 6(a), (b).

89. *Id.* at Rule 6(c).

90. *Id.* at Rule 6, commentary.

91. *Id.* at Rule 5, commentary.

92. *Id.* at Rule 7(a).

93. *Id.* at Rule 7, commentary.

94. *Id.* at Rule 8.

95. *Id.*

96. *Id.*

97. *Id.* § 2, alternative A, B.

98. MODEL PROVISIONS, Part 4, *Implementing a Retention Evaluation Program: Model Legislation (or Court Rules)* (American Judicature Society, 1994).

99. *Id.* §§ 2, 3.

with fair, responsible and constructive information about judicial performance; (2) facilitate self-improvement of all such justices and judges; (3) promote appropriate judicial assignments; (4) identify the need for an improvement of the content of judicial education programs; and (5) increase public awareness of the work of the judiciary.¹⁰⁰

Under the *Model Provisions*, the judicial performance commissions may also conduct midterm performance evaluations for judges not standing for retention.¹⁰¹

The judicial performance commissions are to develop techniques for judicial evaluations "on relevant criteria," including "integrity, impartiality, judicial temperament, knowledge and understanding of substantive and procedural law, communication skills, preparation, attentiveness and control over judicial proceedings, docket management and prompt case disposition, administrative skills, punctuality, and effectiveness in working with other participants in the judicial process."¹⁰² Additional duties include developing performance evaluation surveys by lawyers, jurors, peers, chief judges, court personnel and "others who have direct and continuing contact with justices and judges."¹⁰³ The criteria, forms, and procedures to be used in these evaluations are to be applied statewide.¹⁰⁴

Additional powers and duties of the judicial performance evaluation commissions include consulting with other performance evaluation commissions in the state,¹⁰⁵ subpoenaing witnesses,¹⁰⁶ requesting public comment and holding public hearings,¹⁰⁷ producing and publicizing no later than sixty (or ninety) days before a retention election "pertinent information concerning each appellate justice or judge subject to retention,"¹⁰⁸ and promulgating their own rules subject to supreme court or state judicial council approval.¹⁰⁹ Trial court commissions have additional power under these provisions to solicit information from judges through questionnaires and interviews.¹¹⁰

The recommended composition of judicial performance evaluation commissions is as follows (with optional alternatives indicated

100. *Id.* § 1.

101. *Id.* § 1.

102. *Id.* § 2(d).

103. *Id.* § 1(d)(2).

104. *Id.* § 1(d)(3).

105. *Id.* § 1(d)(4).

106. *Id.* § 1(d)(5).

107. *Id.* § 1(d)(6).

108. *Id.* § 1(d)(7).

109. *Id.* § 1(d)(8).

110. *Id.* § 3(d)(1).

parenthetically): eleven members for each of the two commissions, comprised of six (five) lay members appointed by the governor; three (four) attorney members (in states with integrated bars, appointed by the supreme court; in states with voluntary bars, elected or appointed by members of the bar); and two judge members.¹¹¹ On appellate commissions, the members selected from the judiciary should include the chief justice or a designee and one court of appeals judge appointed by the chief justice.¹¹² On trial court commissions, the judge member shall be the chief judge of the appropriate court of appeals.¹¹³ As with nominating commissions, the appointing authorities for each commission "shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic and racial diversity of the jurisdiction."¹¹⁴

These commissions, after completing their evaluations, prepare a "narrative profile" to be presented to the judge being evaluated no later than thirty days prior to the last day on which a justice or judge may declare an intent to stand for retention.¹¹⁵

Additional recommendations regarding nominating commission operations are contained in the *AJS Handbook for Judicial Nominating Commissioners*.¹¹⁶ This book was published as a companion to the Nominating Commissioner Institutes, which have been conducted by AJS at least once in nearly every merit plan jurisdiction. Relevant portions of the *Handbook* will be referred to in the discussion of rules of procedure for nominating commissions.

III. CURRENT STATUS OF MERIT SELECTION

A. Sources of Authority

Table 1 in Appendix A provides information about the scope of merit selection plans as gleaned from state constitutions and legislation. The table reflects the wide variation of existing plan structures. Currently, merit plans are in place by virtue of constitutional provisions in

111. *Id.* § 2(a), alternative A. Section 2(a), Alternative B provides for legislative appointment power and establishes the same number of commission members, but provides that the state's legislative leaders appoint two of the five (or six) lay members, one each by the leader of each house where there are two houses, two appointed by the chief justice, and two appointed by the governor, the remaining members being the same as Alternative A.

112. *Id.* § 2(a), alternative A, B.

113. *Id.* § 3(a), alternative A, B. Alternative B contains language authorizing legislative appointments to the commission in the same manner as for the appellate commission Alternative B, as described in *supra* note 111.

114. *Id.* §§ 2, 3.

115. *Id.* § 4.

116. MARLA N. GREENSTEIN, *HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONER* (1985) [hereinafter *HANDBOOK*].

seventeen states,¹¹⁷ by statutory provisions in three states and the District of Columbia,¹¹⁸ by executive orders in seven states,¹¹⁹ and by a combination of these in seven states.¹²⁰

B. Scope of Merit Selection

The merit plan, as noted earlier,¹²¹ was first implemented in Missouri and has since also come to be known as the "Missouri Plan." The most recent adoption of merit selection occurred in Rhode Island in 1994, when merit selection was adopted by statute for trial judges.¹²² AJS continues to receive numerous inquiries about merit selection from court reformers in a number of states, including Pennsylvania, West Virginia, Louisiana, Texas, and Florida.

Four states—Delaware, Hawaii, Massachusetts, and Nebraska—currently use merit selection for judicial appointments for every level of court in the state.¹²³ In twenty-three states, supreme court justices are initially appointed under a merit plan.¹²⁴ In nine states, merit plans are only used to fill interim vacancies for the supreme court.¹²⁵

In sixteen states, intermediate appellate judges are appointed under a merit plan.¹²⁶ In six states, these judges are appointed under a merit plan for interim vacancies only.¹²⁷ As for trial judges, Table 1 shows the range of general and limited jurisdiction trial judgeships that are filled through the merit selection process, both for initial and interim appointments.

States may establish more than one nominating commission,

117. Alabama, Colorado, Connecticut, Florida, Hawaii, Kansas, Kentucky, Missouri, Montana, Nebraska, Nevada, New Mexico Oklahoma, South Dakota, Utah, Vermont, and Wyoming. *Infra* Appendix A, Table 1.

118. Idaho, Minnesota, Tennessee, and District of Columbia. *Infra* Appendix A, Table 1.

119. Delaware, Georgia, Maryland, Massachusetts, Pennsylvania, West Virginia, and Wisconsin. *Infra* Appendix A, Table 1.

120. Alaska, Arizona, Indiana, Iowa, New York, and North Dakota, and Rhode Island (pending approval of constitutional amendment). *Infra* Appendix A, Table 1.

121. See *supra* note 2 and accompanying text.

122. See 1994 R.I. Pub. Laws; 2346sb, 2348sb.

123. See *infra* Appendix A, Table 1.

124. Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, New York, Oklahoma, South Dakota, Tennessee, Utah, Vermont, and Wyoming. *Infra* Appendix A, Table 1.

125. Georgia, Idaho, Kentucky, Montana, Nevada, North Dakota, Pennsylvania, Wisconsin, and West Virginia. *Id.* See generally LYLE WARRICK, JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS 9, 11 (2d ed. 1993).

126. Alaska, Arizona, Colorado, Connecticut, Florida, Indiana, Iowa, Kansas, Massachusetts, Maryland, Missouri, Nebraska, New Mexico, New York, Tennessee, and Utah. *Infra* Appendix A, Table 1.

127. Georgia, Idaho, Kentucky, Pennsylvania, Wisconsin, and West Virginia. See *infra* Appendix A, Table 1.

depending on the level of court for which merit selection has been adopted. The number of commissions in a given state ranges from a low of one, such as in Hawaii, to a high of ninety-nine, one for every county in the State of Iowa.¹²⁸

C. *Composition of Nominating Commissions*

The size of nominating commissions also varies widely nationwide. The smallest commissions identified have five members, while the largest is the Massachusetts commission with twenty-three members.¹²⁹ Nominating commissions in most states include non-lawyers, in numbers that may be less than,¹³⁰ equal to,¹³¹ or more than¹³² the number of attorneys on the commission. Some states merely prescribe the number of commissioners without specifying the required composition of the panel with respect to the lawyer versus lay membership ratio.¹³³

The terms of office for commissioners range from a low of one year¹³⁴ to a high of six years.¹³⁵ Some states, usually those with an executive order merit plan, provide that commissioners shall serve "at the pleasure of the Governor," without stating a specific term of office.¹³⁶

Nominating commission meetings are usually conducted by a chairperson. The chair may be a voting member of the commission,¹³⁷ or may be a non-voting chair *ex officio*.¹³⁸ Often, the chief justice of the state's supreme court or another justice is designated as the commission chair *ex officio*,¹³⁹ while one state specifies a law school dean for this position.¹⁴⁰ Chairs may also be appointed by the mayor¹⁴¹ or governor,¹⁴² or elected from among the commission's membership.¹⁴³

The attorney members of nominating commissions are either appointed by the governor,¹⁴⁴ or elected or appointed by the state or

128. *Id.*

129. *Id.*

130. *E.g.*, Delaware.

131. *E.g.*, Connecticut.

132. *E.g.*, Arizona.

133. *E.g.*, Massachusetts.

134. *E.g.*, Pennsylvania trial and appellate commissions.

135. *E.g.*, Tennessee.

136. *E.g.*, Massachusetts and Wisconsin.

137. *E.g.*, Vermont.

138. *E.g.*, Nebraska.

139. *E.g.*, Utah.

140. *E.g.*, New Mexico.

141. *E.g.*, New York City.

142. *E.g.*, North Dakota.

143. *E.g.*, Nevada.

144. *E.g.*, Massachusetts.

local bars.¹⁴⁵ The non-lawyer members are usually appointed by the governor,¹⁴⁶ but may be appointed by the legislature,¹⁴⁷ the governor with the consent of the Senate,¹⁴⁸ legislative leaders,¹⁴⁹ or the county board of supervisors.¹⁵⁰ Judicial members of a nominating commission may be appointed by the governor,¹⁵¹ the chief justice,¹⁵² or the state's judicial conference.¹⁵³ Alternatively, they may be elected by members of the supreme court,¹⁵⁴ other judges,¹⁵⁵ or the state bar, with the consent of the senate.¹⁵⁶

D. *The Nomination Process*

A nominating commission takes many steps before formulating a short list of the most qualified applicants for judicial office.¹⁵⁷ Different interests are at stake depending upon the length of the nomination list. If the list is too short, the governor's discretion may be too restricted. If the list is too long, there is an increased potential that the list will include nominees who are not highly qualified or that a "pure" political appointment may be made.

AJS recommends that "no more than five nor less than two" qualified persons be nominated for each vacancy.¹⁵⁸ "[T]he number should be sufficiently low so that the commission nominates only the most qualified candidates,"¹⁵⁹ but high enough to give the governor "a real choice while limiting the governor's appointing power."¹⁶⁰ Recently, following the 1993 Citizens' Conference on Merit Selection, the Hawaii legislature enacted a law authorizing a vote to amend the state's constitution by changing the number of names requirement from "not less than six nominees"¹⁶¹ to "not less than four nor more than six."¹⁶² The rationale for the change was that, with a higher number of names,

145. *E.g.*, Kentucky.

146. *E.g.*, Colorado.

147. *E.g.*, Alabama.

148. *E.g.*, Iowa appellate commission.

149. *E.g.*, Hawaii.

150. *E.g.*, Iowa and Kansas.

151. *E.g.*, Nebraska.

152. *E.g.*, Nevada.

153. *E.g.*, South Dakota.

154. *E.g.*, Missouri appellate commission.

155. *E.g.*, Montana.

156. *E.g.*, Idaho.

157. *See supra* part IV of this Article.

158. MODEL PROVISIONS, *supra* note 65, § 1.

159. *Id.* § 1, commentary.

160. *Id.*

161. HAW. CONST. art. VI, § 3.

162. S.B. 2294, H.D. 1, list of nominees.

the governor and/or Chief Justice [who makes appointments if not done so by the governor within thirty days of presentation of the list of nominees, or within ten days of the senate's rejection of a previous appointment] is given an opportunity to select the most political and not necessarily the best qualified nominee. The people who favored reducing the number felt that a reduction in the number should be made in order to put more power of selection into the Commission rather than into the appointing authority In addition, there was a feeling that particularly in some of the less popular positions, it was difficult to get six equally qualified nominees. According, it would enable the Commission to list all qualified nominees and not have to stretch to make it six. . . . At least it will make the public perception better in that the Commission will need to submit a lower number and therefore eliminate a substantial amount of the politicking.¹⁶³

The number of names required to be submitted by a commission is sometimes stated as a fixed figure, such as three,¹⁶⁴ or as a range, such as three to five,¹⁶⁵ two to four,¹⁶⁶ or five to seven.¹⁶⁷ Other commission rules require a minimum of names, for example, three,¹⁶⁸ or, alternatively, limit the number of names to a maximum of, for example, not more than seven.¹⁶⁹

The submission of the commission's list of nominees to the governor should be expeditious, so that the administration of justice is not adversely affected by a judicial vacancy, but long enough to allow nominating commissions time to perform their duty of selecting nominees on the basis of merit. Commissions, therefore, submit their list of nominees within times that range from as short a period as four to five days,¹⁷⁰ to as long a period as 120 days.¹⁷¹ Sixty days¹⁷² is frequently the time period specified as it strikes the necessary balance between speed and thorough review and investigation of applicants. Some rules allow a commission to seek an extension for submission of its nominees list if additional time is necessary,¹⁷³ while others operate without any time limit at all.¹⁷⁴

Many commission rules provide that the list of nominees shall be

163. Report of the Citizen's Conference on Judicial Selection, *Summary of Issues*, at 9 (1993).

164. *E.g.*, Indiana.

165. *E.g.*, Tuscaloosa County, Alabama.

166. *E.g.*, Idaho.

167. *E.g.*, Maryland appellate court commission.

168. *E.g.*, Nebraska.

169. *E.g.*, Maryland trial court commission.

170. *E.g.*, Tuscaloosa County, Alabama.

171. *E.g.*, Iowa appellate court commission.

172. *E.g.*, Minnesota.

173. *E.g.*, Massachusetts.

174. *E.g.*, Hawaii.

submitted in alphabetical order.¹⁷⁵ A minority of commissions submit names based upon rank order,¹⁷⁶ or by alphabetical order with ratings,¹⁷⁷ while some commission rules make no reference to the subject.¹⁷⁸

Nominating commissions sometimes send supplemental information to the governor in addition to the nominees list. This additional information variously includes bar survey results,¹⁷⁹ the applicant questionnaires,¹⁸⁰ the applicants' résumés and questionnaires,¹⁸¹ letters of recommendation and non-recommendation,¹⁸² written evaluations¹⁸³ or reports,¹⁸⁴ the entire file on each applicant,¹⁸⁵ or some combination of the above.¹⁸⁶

Additional nominating commission activities are also regulated. In Part IV of this article, other rules regulating commission activities, from the organizational meeting to ethics and discipline of commissioners, are described.

IV. RULES OF PROCEDURE

This part of the Article focuses on the rules of procedure¹⁸⁷ obtained through the AJS national survey of nominating commissions. In February 1994, AJS surveyed thirty-seven commissions and received rules of procedure from thirty-one of them. These rules were the source of the data used to prepare Tables 4 (Rules of Confidentiality) and 5 (Nominating Commission Procedures) of Appendix A.

Not all of the responses received were the rules and application forms that had been requested. Surprisingly, commissions in six states¹⁸⁸ responded that they had no rules of procedure.¹⁸⁹ AJS believes

175. *E.g.*, Alaska, Indiana, and Maryland.

176. *E.g.*, Tucson (Arizona) Magistrate's Court commission.

177. *E.g.*, Idaho.

178. *E.g.*, Connecticut.

179. *E.g.*, Alaska.

180. *E.g.*, Iowa appellate court commission.

181. *E.g.*, Delaware.

182. *E.g.*, Wisconsin.

183. *E.g.*, Indiana.

184. *E.g.*, New York Court of Appeals commission.

185. *E.g.*, Nebraska.

186. *E.g.*, Idaho.

187. Occasionally I refer to constitutional or statutory provisions, if that is the source of the applicable "rule" under discussion.

188. Alabama, Kansas, New Mexico, South Dakota, West Virginia, and the commission for New York City.

189. Ashman and Alfini, in their 1974 study, note that sixty percent of the responding commission indicated that their rules were neither written nor codified in any manner. ALLAN ASHMAN & JAMES J. ALFINI, *THE KEY TO MERIT SELECTION: THE NOMINATING PROCESS* 42 (1974). The researchers opined that the reasons for this might be that the rules were not circulated to all commissioners, especially new commissioners who received their survey, or because there

that nominating commissions should establish rules of procedure, not only to be fair to judicial applicants but to maintain public trust and confidence in the courts and the judicial selection process.¹⁹⁰

An examination of the rules collected as a part of this study exhibits efforts by many commissions to address a number of issues never contemplated by the founders of merit selection. Problems arising in one jurisdiction during the selection process often give rise to rule making on the subject. Then, as word of the adoption of certain rules becomes known through vehicles such as the AJS Institute for Judicial Nominating Commissioners,¹⁹¹ other commissions enact similar rules. AJS sees this as a positive, natural evolution and refinement of the merit selection process through the rule-making process.

A. Organization

Most nominating commissions are required to have an organizational meeting after they are formed. These organizational meetings serve multiple purposes.

First, the meeting can educate commissioners as to their responsibilities in the selection process. Second, commissioners can be informed of the type of vacancy they must fill. Third, the meeting can promote uniform judicial selection procedures. Fourth, background information on the commission and its role can be provided for each commission member and may prove especially helpful as an orientation for new commissioners. Finally, the organizational meeting can be used to anticipate problems that may arise during the selection process.¹⁹²

Some commission rules stress the importance of the organizational meeting:

The importance of this initial meeting cannot be overstated. If the

may be disagreement regarding what constitutes "Rules of Procedure." *Id.* at 42-43. "Some commissions have prepared written policy statements or manuals for new commission members which contain guidelines as to the objective and subjective criteria which should be applied in evaluating the candidates for judicial office." *Id.* at 43.

190. See ASHMAN & ALFINI, *supra* note 189, at 41 ("If the commission conducts its business in a careless, disorganized fashion it is almost certain that the plan will not exhibit the attributes of a good selection process.").

Further research is needed to examine how a commission without rules carries out its responsibilities in the judicial selection process, and whether that process is sufficiently consistent and fair both to applicants for judicial office and to the public.

191. AJS conducts a Nominating Commissioner Institute for nominating commissions who request this training program for their new commissioners. During these institutes, which cover all phases of the judicial selection process, AJS provides information about the rules of procedure of other commissions on various subjects. AJS also provides this information when testifying at the request of legislative committees considering merit selection, or when making other presentations on the subject.

192. See HANDBOOK, *supra* note 116, at 22.

commission is not well organized, it is likely to face problems later. The least of these problems is the inefficient use of limited time. More serious problems such as breaches of ethics and confidentiality or disputes over voting procedures may develop. The organizational meeting is used to anticipate these problems before they occur.

The commission should accomplish four things during the public portion of the organizational meeting. First, the commission should discuss issues of ethics and legal obligations. Second, the commission should consider any administrative or procedural questions. Third, the commission must develop a realistic time table in which to accomplish its many tasks. Fourth, the commission should receive oral and written testimony from the public. After the public portion of the meeting, the commission may go into executive session to discuss the qualifications of applicants.¹⁹³

Usually, the various commissions' rules for organizational meetings require a minimum number of meetings per year. Some rules require that such meetings take place in or after a given month of the year.¹⁹⁴ Other rules require that subsequent meetings of the commission occur as frequently as is necessary to conduct its business, and that such meetings may be called either by the chair or a specified minimum number of commissioners.¹⁹⁵ Still other rules provide for commission meetings at any time or place, subject to a waiver of the right of notice of such meetings by all commissioners.¹⁹⁶

B. *Applications*

All commissions require that an application form be submitted by those seeking judicial office. Those applications typically delve deeply into the background of the applicant, inquiring about one's personal, educational, and professional history and experiences.

Additional waiver forms that must be signed and submitted with the application are usually attached. Those waivers grant the commissions access to otherwise confidential data, such as criminal records, credit history, or records regarding payment of taxes or bankruptcy fil-

193. See UTAH MANUAL P. JUDICIAL NOMINATING COMM'N Rule 8 (revised 1991).

194. See, e.g., FLA. UNIFORM R.P. DIST. CT. APP. NOMINATING COMM'N sec. 4 (requiring annual meetings after July 1st of every year to elect a chair).

195. See, e.g., TENN. APP. CT. NOMINATING COMM'N, BYLAWS & R.P. Rule 3 ("The Commission shall meet as frequently as required for the purpose of electing officers and conducting other appropriate business. Meetings may be called by the Chairperson or three (3) members of the Commission on three days' notice.").

196. See, e.g., NEV. COMM'N JUDICIAL SELECTION Rule 5(b) ("Meetings of the Commission may be held without notice at any time or place whenever: (1) The meeting is one to which notice is waived by all members, or (2) The Commission, at a meeting, designates the time and place for a subsequent meeting and the secretary so informs any absent member.").

ings. A typical, completed application packet includes an application form, résumé, two copies of a recent photograph, a check to pay the cost of securing a credit report, and a waiver of the confidentiality of certain records.¹⁹⁷ Because many attorneys now combine their law practice with a mediation or arbitration practice, some applications specifically elicit information about such experiences in addition to traditional questions about law practice experience.

In many states, judges are required to file financial disclosure forms pursuant to either the state's code of judicial conduct or by statute. Commissions in states where this is a requirement, such as Colorado, specifically inquire about the applicant's familiarity with the duty to make such disclosures upon taking office.¹⁹⁸

Some commissions also ask applicants to provide a personal statement of some kind. The question may ask applicants to provide reasons for seeking the judicial position,¹⁹⁹ to describe what "potential contribution" the applicant believes he or she may make to the position,²⁰⁰ or to state why he or she is interested in the position.²⁰¹

Certain issues in particular stand out among the wide array of information solicited. For example, some application forms contain questions that could be considered discriminatory.²⁰² For example, questions that inquire about military experience may be inapplicable to women applicants, who generally have not had such experience. The presence of these questions may be interpreted by female applicants to mean that the nominating commission will give some weight to that experience, resulting in an unfair advantage for men over women who do not usually go into military service. Application forms should be drafted to eliminate questions that give an unfair advantage to one sex.

197. See, e.g., UTAH MANUAL P. JUDICIAL NOMINATING COMMISSIONS Rule IV. An additional and less common requirement in the aforementioned rule is that the applicant submit a signed waiver of the right to review the records of the commission. *Id.*

198. See Colorado Application for District Court Judgeship in the Second Judicial District 6 (revised July 23, 1990), which asks: "Do you understand a judge is required to file reports of compensation for quasi-judicial and extra-judicial activities in conformance with the Code of Judicial Conduct? . . . Do you understand that a judge must comply with the Public Official Disclosure Law (Section 24-6-202, C.R.S. 1988)?"

199. See, e.g., Idaho Judicial Council Application for Appointment to Judicial Office 14 (revised 1992) ("What are your reasons for seeking this position?").

200. See, e.g., Florida Application for Nomination to the Supreme Court 14 (undated) ("Explain the particular potential contribution you believe your selection would bring to this position.").

201. See, e.g., Kentucky Questionnaire to be Submitted to the Judicial Nominating Commission 6 (undated) ("Please elaborate on why you are interested in this judgeship.").

202. The questions inquiring about the applicants' mental or physical health are discussed at part VI(A) *infra*.

C. *Notices of Vacancy and Recruitment*

When a judicial vacancy arises, commissions customarily announce the vacancy in a variety of ways. Typically, they place announcements with the media within a certain time period after the vacancy arises.²⁰³ Often, the notice of vacancy takes the form of a press release.²⁰⁴

Additional efforts are made to notify members of the bar through bar associations.²⁰⁵ Some commissions go beyond notifying the media or bar associations of a vacancy through methods such as sending letters to chief judges of the state and federal courts.²⁰⁶

Most commissions are proactive and operate under rules encouraging external recruitment of qualified applicants by the commissioners.²⁰⁷ In Hawaii, commissioners are required to actively seek out people they believe would be qualified applicants. The rationale for this rule is that the most qualified candidates may not seek appointment and must be encouraged to apply.²⁰⁸

The *Handbook for Judicial Nominating Commissioners* makes note of an important caveat for recruiting commissioners:

[P]ersonal recruitment may place the recruiting commissioner in an awkward position by suggesting to the applicant that appointment is assured. It is imperative that commissioners indicate to recruited applicants that the mere solicitation of their application is not a promise of the commissioner's endorsement throughout the nominating process. Commissioners should solicit applicants on behalf of the commission as a whole and with the clear understanding that the recruited applicant will be subject to the same evaluative scrutiny as other applicants.²⁰⁹

203. See, e.g., MONT. JUDICIAL NOMINATION COMM'N Rule II (upon a vacancy, the secretary of the chief justice must provide notice to the media within ten days).

204. See, e.g., UTAH MANUAL P. JUDICIAL NOMINATING COMM'N Rule IV (notice of a vacancy is to be made in the form of a press release containing the jurisdiction of the court where a vacancy has arisen, the eligibility requirements for the judgeship, and additional information pertaining to the position and application procedures).

205. See, e.g., WIS. GOV. ADVISORY COUNCIL JUDICIAL SELECTION sec. 2, statement of procedures (providing that the chair, with the assistance of the governor's office, contact the state bar and/or the Milwaukee Bar Association who have agreed to notify their members of the vacancy).

206. See, e.g., D.C. JUDICIAL NOMINATION COMM'N P. Rule 8(a)(2) (providing for, inter alia, letters to the chief judges of the local and federal court, with the same solicitation to various publications and broadcast media).

207. See *infra* Appendix A, Table 5, col. five (External Recruitment Provision).

208. See R. HAW. JUDICIAL SELECTION COMM'N Rule 8. See also Section 2(a), Commonwealth of Pennsylvania Governor's Office, Exec. Order No. 1987-17 (1987) (providing that the commission shall "actively seek out and recruit highly qualified candidates to be recommended for appointment").

209. See HANDBOOK, *supra* note 116, at 40.

D. *Evaluative Criteria*

Nominating commissions usually list in their rules the criteria for evaluating applicants for judicial office. Typically, these criteria include the following attributes: integrity and moral courage, legal ability and experience, intelligence and wisdom, and a determination of whether the candidate would be deliberate and fair-minded in reaching decisions, whether the candidate would be prompt and industrious in performing judicial duties, whether the candidate's personal habits and outside activities are compatible with judicial office, and whether the candidate would be courteous and considerate on the bench.²¹⁰

Another formulation of these criteria is: (a) personal attributes—personal integrity, standing in the community, sobriety, moral conduct, ethics, and commitment to equal justice under the law; (b) competency and experience—general mental and physical health,²¹¹ intelligence, knowledge of the law, professional reputation, and knowledge of and experience in the relevant court; and (c) judicial capabilities—patience, decisiveness, impartiality, courtesy, civility, industriousness, promptness, administrative ability, possible reaction to judicial power, temperament, and independence.²¹² One commission considers the criterion of ability to “live and carry out family obligations on the judicial salary.”²¹³

Commissions often distinguish between evaluative criteria for trial and appellate judgeships. The *AJS Handbook for Judicial Nominating Commissioners* identifies decisiveness, speaking ability, and judicial temperament as particularly important characteristics for trial judges, while writing ability and collegiality²¹⁴ are designated as important qualities for appellate judges.²¹⁵ Similarly, organizational and interpersonal

210. See, e.g., COLO. R.P. FIRST JUDICIAL DIST. NOMINATING COMM'N Rule II(g).

211. Provisions requiring mental and physical health data are now prohibited under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(d). See *infra* part VI(B).

212. See FLA. UNIFORM R.P. CIRCUIT JUDICIAL NOMINATING COMM'N sec. IV(a)-(c).

213. See CONN. JUDICIAL SELECTION COMM'N, STANDARDS & CRITERIA II(20).

214. See, e.g., COMMISSIONER'S MANUAL: NEBRASKA JUDICIAL NOMINATING COMMISSIONS, app. 4 (August, 1992):

Collegiality. Because of the collective nature of an appellate decision, the candidate must be able to understand and respect the differing views of colleagues and to compromise. The candidate must also be able to give and receive criticism with grace.

Does this person tend to monopolize conversations?

Can this person respond well to criticism?

Is this person perceived as unreasonably rigid in his/her views?

Can this person constructively criticize others?

How long has this person been employed at his/her current place of business?

How long was he/she employed at his/her previous place of business?

Does this person indicate loyalty to his/her current or former employer?

215. See HANDBOOK, *supra* note 116, at 61-62.

skills are deemed important qualities for administrative judges.²¹⁶

The ABA addressed the qualities of a judge in its Standards Relating to Court Organization, which states:

All persons selected as judges should be of good moral character, emotionally stable and mature, physically able to discharge the duties of office, patient, courteous, and capable of deliberation and decisiveness when required to act on their own reasoned judgment. They should have a broad general and legal education and should have been admitted to the bar.²¹⁷

In 1983, the ABA Judicial Administration Division recognized that as "an increasing number of states have adopted plans calling for the use of nominating commissions and as many bar associations have committees screening judicial candidates, it is apparent that a need exists for a set of criteria to guide them in selecting the most qualified candidates."²¹⁸ Additional purposes cited for developing the guidelines are to "more fully delineate the qualities to be sought in judicial candidates"²¹⁹ and to "enhance the understanding and respect to which the judiciary is entitled in the community being served."²²⁰

The eight criteria suggested by the ABA "present minimum criteria for appointment,"²²¹ and "are not mutually exclusive, and cannot be wholly separated one from another."²²² The criteria are: integrity,²²³ legal knowledge and ability,²²⁴ professional experience,²²⁵ judicial tem-

216. *Id.*

217. *See* STANDARDS RELATING TO COURT ORGANIZATION § 1.21(a) (Judicial Admin. Div. ABA 1990).

218. *See* James D. Cameron, *Preface to GUIDELINES FOR REVIEWING QUALIFICATIONS OF CANDIDATES FOR STATE JUDICIAL OFFICE* (Judicial Admin. Div., ABA 1983).

219. *Id.* Cameron cautions that "the guidelines are not to be used in evaluating the performance of sitting judges. While certainly many of the traits sought for in judicial candidates ought also to be found in sitting judges, criteria to evaluate experienced judges need to be separately addressed." *Id.*

220. *Id.* at *Introduction*.

221. *Id.*

222. *Id.*

223. *Id.* ¶ 1. This includes: the ability "to speak the truth without exaggeration, admit responsibility for mistakes and put aside self-aggrandizement." Integrity also includes "intellectual honesty, fairness, impartiality, ability to disregard prejudices, obedience to the law and moral courage." Candidates should have demonstrated "consistent adherence to high ethical standards. . . . The reputation of the candidate for truthfulness and fair dealing in extra-legal contexts should also be considered." *Id.*

224. *Id.* ¶ 2. This includes: "a high degree of knowledge of established legal principles . . . a high degree of ability to interpret and apply them to specific factual situations." It also includes "the ability to reach concise decisions rapidly . . . the ability to respond to issues in a reasonably unequivocal manner and quickly to grasp the essence of questions presented." Knowledge is a "continual learning process involved in keeping abreast of changing concepts through education and study." *Id.*

225. *Id.* ¶ 3. This includes experience as a lawyer "long enough to provide a basis for the

perament,²²⁶ diligence,²²⁷ health,²²⁸ financial responsibility,²²⁹ and public service.²³⁰

E. Screening and Investigation

The screening and investigation function of nominating commissions varies widely in scope, depth, and method. In urban areas where there are a large number of applicants, some committees conduct initial

evaluation of the candidate's demonstrated performance and long enough to ensure that the candidate has had substantial exposure to legal problems and to the judicial process" as well as "substantial trial experience which "should be considered in light of the nature of the judicial vacancy that is being filled." For the appellate bench, especially desirable is "professional experience involving scholarly research and the development and expression of legal concepts." *Id.*

226. *Id.* ¶ 4. This includes "common sense, compassion, decisiveness, firmness, humility, openmindedness, patience, tact and understanding" as well as the "ability to deal with counsel, jurors, witnesses and parties calmly and courteously, and the willingness to hear and consider the views of all sides." The candidate should be "even-tempered, yet firm . . . confident, yet not egocentric." Also required is "a willingness and ability to assimilate data outside the judge's own experience" along with "a mature sense of proportion; reverence for the law, but appreciation that the role of law is not static and unchanging." Factors that indicate a lack of judicial temperament include "arrogance, impatience, pomposity, loquacity, irascibility, arbitrariness or tyranny." *Id.*

227. *Id.* ¶ 5. This includes "a constant and earnest effort to accomplish that which has been undertaken." The elements of diligence are "constancy, attentiveness, perseverance, painstakingness and assiduousness . . . the possession of good work habits and the ability to set priorities." Also important is "[p]unctuality . . . [as a] candidate should be known to meet procedural deadlines . . . and to keep appointments and commitments." *Id.*

228. *Id.* ¶ 6. This includes:

a condition of being sound in body and mind and with relative freedom from physical disease or pain . . . Any history of a past disabling condition or suggestion of a current disabling condition should require further inquiry as to the degree of impairment. Physical handicaps and diseases which do not prevent a person from fully performing judicial duties should not be a cause for rejection of a candidate. However, any serious condition must be considered carefully as to the possible effect it would have on the candidate's ability to perform the duties of a judge.

Good health includes the absence of erratic or bizarre behavior which would significantly affect the candidate's functioning as a fair and impartial judge." . . .

. . . A candidate should have developed the ability to refresh himself or herself occasionally with non-work-related activities and recreations.

Id.

229. *Id.* ¶ 7. Pertinent factors include the existence of "unsatisfied judgment or bankruptcy proceedings . . . whether the candidate has promptly and properly filed all required tax returns. Being financially responsible "demonstrates self-discipline and the ability to withstand pressures which might compromise independence and impartiality." *Id.*

230. *Id.* at ¶ 8. This includes: "public service and pro bono activities . . . [which] may indicate social consciousness and consideration for others." Those include "[s]ignificant and effective bar association work." Equally important is a "broad, nonlegal academic background, supported by varied and extensive non-academic achievements" such as "involvement in community affairs and participation in political activities, including election to public office. . . . There should be no issue-oriented litmus test for selection of a candidate. No candidate should be precluded from consideration because of his or her opinions or activities in regard to controversial public issues . . . [nor] excluded from consideration because of race, creed, sex or marital status." *Id.*

screening so that the number of interviewees is manageable. The method of screening, however, is not usually expressly described in nominating commission rules of procedure.

The *Handbook for Judicial Nominating Commissioners* recommends that the commission establish preliminary screening criteria in advance. Then, when the applications are reviewed, "the chairman or designated committee may quickly sort through the applications, weeding out those who clearly will not survive the rigors of the nominating process."²³¹ For example, the commission can quickly eliminate from consideration an applicant who does not meet the minimum legal qualifications for judicial office.²³²

A commission's investigation usually involves an inquiry into the applicants' history, including education, employment, medical,²³³ criminal, civil, credit, and professional discipline.²³⁴ Additional inquiries may be made into an applicant's age, citizenship, residency, taxes, law enforcement investigations and charges, service in the armed forces, and disciplinary action taken by the judicial conduct or state bar disciplinary agencies of other states.²³⁵ In at least one state, "[b]ecause the results of the investigation are confidential, the candidate has no opportunity to rebut claims made during the investigation."²³⁶

Commissions use a variety of means for conducting their investigations of applicants' backgrounds. In commissions that operate without a staff, commissioners themselves conduct the investigation, usually by dividing the investigation of different applicants among subcommittees, which present their findings to the commission. In other cases, commission rules provide for the state police, a law enforcement agency, or the state administrative office of the courts²³⁷ to conduct the investigations for the commission.

The *Handbook for Judicial Nominating Commissioners* recommends that commissions should develop a standard set of investigative

231. See HANDBOOK, *supra* note 116, at 86.

232. *Id.*

233. Provisions requiring mental and physical health data are now prohibited under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(d). See *infra* part VI(B).

234. See, e.g., ALASKA JUDICIAL COUNCIL SELECTION P. sec. B(3) ("Supreme Court Order 489, effective January 4, 1982, authorizes the Council to review bar applications and bar discipline records. During the course of its investigation, the Judicial Council may also seek information on candidate qualifications from such other public or private groups or individuals as may be deemed appropriate.").

235. See, e.g., NEB. SUMMARY NOMINATION PROCESS sec. B (authorizing the Administrative Office of Courts/Probation to investigate "disciplinary action by any judicial conduct commission or state bar association of any jurisdiction").

236. UTAH MANUAL P. JUDICIAL NOMINATING COMM'N Rule V.

237. See Section B, Nebraska Summary of the Nomination Process (probation department of administrative office of the courts to conduct background investigations).

procedures and questions to be asked of various agencies and personal and professional references.²³⁸ The commission also should set time limits for the investigative process.²³⁹ Standard procedures and questions and a prescribed time schedule are designed to ensure "a fair and through screening of each applicant."²⁴⁰

F. Confidentiality

The issue of confidentiality arises often in the nomination process.²⁴¹ The commissions whose rules were collected by AJS are divided almost equally between those that consider the applicants' identities confidential,²⁴² those that specifically made them public,²⁴³ and those that have no rule on the subject.²⁴⁴

Confidentiality may also extend to the records collected and generated by the nominating commission. Most commissions with rules on the subject expressly maintain the confidentiality of their records.²⁴⁵ An equal number have no rule governing the subject of confidentiality of records.²⁴⁶ A minority of commissions open their records to the public.²⁴⁷

The interview process itself is traditionally confidential, but most states have no specific rules governing the subject.²⁴⁸ Presumably, rules governing the confidentiality of commission records are interpreted to include the interview process itself. A minority of commissions hold interviews that are open to the public.²⁴⁹

Individuals who know commissioners often provide them with unsolicited information about judicial candidates under consideration, or believed by informants to be under consideration. Also, after a commission submits its nominee list, the governor who receives it may wish to contact the commission or an individual commissioner to request addi-

238. See HANDBOOK, *supra* note 116, at 87.

239. *Id.*

240. *Id.*

241. See *infra* Appendix A, Table 4.

242. *E.g.*, Colorado.

243. *E.g.*, Nebraska.

244. *E.g.*, Minnesota.

245. See *infra* Appendix A, Table 4, col. 2. For example, under Rule 4(5) of the Iowa Rules of Procedure of the State Judicial Nominating Commission, the minutes of the meeting are kept confidential for the duration of the nomination process and are sent to the clerk of the supreme court after the selections have been submitted to the governor, where they remain for five years after which they are destroyed.

246. *E.g.*, Wyoming.

247. *E.g.*, Alaska, Florida, Montana (except if a majority of the commissioners vote to keep the identity of the nominees confidential), and Tennessee.

248. See *infra* Appendix A, Table 4, col. 3.

249. *E.g.*, Arizona, Florida, Kansas, and Montana.

tional information. Questions arise regarding the confidentiality of such communications. Should unsolicited, external communications from a private citizen to a single commissioner, or the commission itself, be kept confidential? If received by an individual commissioner, should those communications be confidential as between the individual commissioner and the rest of the nominating commission? Some commissions have rules to address these specific issues.²⁵⁰

Eleven commissions regulate external communications from private citizens.²⁵¹ In one state, even oral communications between a commissioner and any person or organization are required to be summarized in writing by the commissioner, who is then required to provide a copy of the summary to the other commissioners.²⁵²

While most commissions have no rule on the subject, seven commissions do address the issue of the confidentiality of communications from the governor to the commission or an individual commissioner.²⁵³ Rules on this subject are deemed necessary by commissions that wish to minimize politics in the appointment process insofar as communications between the governor and his or her appointees to the commission. Some commissions require that any communication from the governor be made only through a majority of the commission.²⁵⁴

Voting is another process in which issues of confidentiality arise. Sixteen of the commissions surveyed have rules establishing the confidentiality of the deliberations leading to the voting process²⁵⁵ and of the voting process itself.²⁵⁶ Only three commissions specifically permit the voting process itself to be made public.²⁵⁷

Commissions also regulate the confidentiality of the identity of those whose names appear on the list of nominees submitted to the governor.²⁵⁸ The majority of commissions publicize the names of the nomi-

250. See *infra* Appendix A, Table 4, col. 4.

251. See *id.*

252. See R. GOVERNING MO. BAR & JUDICIARY Rule 10.32(c).

253. See *infra* Appendix A, Table 4, col. 6.

254. See, e.g., COLO. R.P. FIRST JUDICIAL DIST. NOMINATING COMM'N Rule III(c) ("The Commission through a majority of its voting members may be consulted about any nominee by the Governor at his request . . .").

255. See, e.g., R. IDAHO JUDICIAL COUNCIL, GEN. R.P. Rule 12 ("The deliberations of the Council relating to candidates, their names and their deemed qualifications shall be considered confidential and shall not be disclosed to anyone except the Governor.").

256. See, e.g., NEV. COMM'N JUDICIAL SELECTION Rule 9(A), (c) (providing that "[n]o persons other than Commission members and the Commission Secretary may attend" voting meetings and that "[v]oting shall be conducted by secret ballot").

257. E.g., Arizona, Florida, and Montana.

258. See *infra* Appendix A, Table 4, col. 7.

nees,²⁵⁹ while a minority require that they be kept confidential.²⁶⁰

G. *Ethics and Discipline*

The subject of ethics and discipline of nominating commissioners is a rapidly growing area of rule making because "[e]thical problems can arise at any stage of the selection process."²⁶¹ While AJS is unaware of any commission that has a "code of ethics"²⁶² per se, the Nebraska commission established "ethical considerations,"²⁶³ and the Florida commissions established "ethical responsibilities."²⁶⁴ The latter apply to a number of situations that typically raise conflict of interest questions

259. *E.g.*, Alabama, Arizona, Alaska, and Kentucky.

260. *E.g.*, Georgia, Hawaii, Massachusetts, and Vermont.

261. See HANDBOOK, *supra* note 116, at 127.

262. At the time of this writing, the Hawaii Judicial Selection Commission is considering rule changes, including the adoption of an ethics code for commissioners.

263. See R. NEB. JUDICIAL NOMINATING COMM'R, exhibit A, statement of understanding of ethical considerations:

In the performance of their duties, the judicial nominating commission members shall be ever mindful that they hold positions of public trust. No commission member shall conduct himself or herself in a manner which reflects discredit upon the judicial selection process or discloses partisanship or partiality in the consideration of applicants. Consideration of applicants shall be made impartially, discreetly, and objectively. A commission member shall disclose to the commission all personal and business relationships with a prospective applicant that may directly or indirectly influence his or her decision. After certification of a list of sufficiently qualified applicants to the Governor, no commission member shall attempt, directly or indirectly, to further influence the ultimate decision of the Governor. No attempt shall be made to rank such nominees whose names are made public or to otherwise disclose a preference of the commission.

In accordance with the above considerations, I will accept the following responsibilities:

1. I will disclose any conflict of interest that I may have with any of the applicants.
2. I will avoid preselection of nominees, "hidden agenda," or consideration of factors other than the merit of the applicants.
3. I agree not to discriminate against any applicant because of the applicant's race, religion, gender, political affiliation, age, or national origin.
4. I will not divulge any of the applicant's confidential information or the commission's deliberations except as provided by the Judicial Nominating Commission rules.

264. See Section 7, FLA. UNIFORM R.P. CIR. JUDICIAL NOMINATING COMM'N Rule VII:

Judicial nominating commissioners hold positions of public trust. No commissioners shall conduct themselves in a manner which reflects discredit upon the judicial selection process.

Consideration of applicants shall be made impartially, discreetly, and objectively.

A commissioner shall disclose to other commissioners all personal and business relationships with an applicant for judicial vacancy that may directly or indirectly influence the commissioner's decision. If a substantial conflict of interest is apparent, the commissioner shall disqualify himself from voting on further consideration of any affected applicants.

and, therefore, require the disqualification of a commission member from deliberation over and voting for a given applicant. One such rule states:

If a relationship between a commission member . . . and an applicant falls into one of the following four categories, the commission member . . . shall recuse himself or herself from the commission:

Any relationship to an applicant by blood or by marriage . . .

[A]n employment relationship . . . within the last five years.

Any relationship in which the commission member and applicant are actively engaged in managing a common profitmaking business or venture.

Any instance in which the member of the commission would cast his or her vote on a basis other than an applicant's qualification for the office.²⁶⁵

Disqualification provisions are contained in the rules of eleven nominating commissions²⁶⁶ and substantially follow the aforementioned Nebraska rule, except that Nebraska provides for a procedure in which applicants may challenge the impartiality of a commission chair or commissioner.²⁶⁷

Another means of regulating commissioner ethics is to require commissioners to take an oath of office.²⁶⁸ While most commissions do not require one, five of the commissions whose rules we studied require commissioners to take an oath of office.²⁶⁹ Idaho's oath rule states: "Before entering upon the duties of the Judicial Council, each member shall take and subscribe to an oath or affirmation to support the Constitution of the United States and the Constitution and laws of the State of Idaho, and to faithfully discharge all the duties of such office."²⁷⁰

Specific prohibitions upon political activities by commissioners

The commission shall not rank nominees or otherwise disclose a preference of the commission.

Each commissioner shall read and maintain working knowledge of these rules.

265. R. NEB. JUDICIAL NOMINATING COMM'R Rule B(1).

266. *E.g.*, Arizona, Hawaii, Missouri, and Utah.

267. *See* R. NEB. JUDICIAL NOMINATING COMM'R Rule B(3):

Any person may challenge the impartiality of a member or the chairperson of a judicial nominating commission. The challenge shall be in writing and directed to the Supreme Court member chairing such commission. If a challenge is raised regarding the impartiality of a member or the chairperson and the person so challenged declines to disqualify himself or herself, the unchallenged members of the commission shall rule on the challenge by a majority vote. Any such decision shall be attached to the information forwarded to the Governor and attached to the report submitted to the State Court Administrator.

268. *See infra* Appendix A, Table 5, col. 3.

269. *E.g.*, Colorado, Idaho, Kansas, Nebraska, Rhode Island, and Tennessee.

270. *See* R. IDAHO JUDICIAL COUNCIL, GEN. R.P. Rule 1.

exist in the rules of fifteen of the studied commissions.²⁷¹ Some commissions specifically prohibit activities such as campaign fund raising²⁷² or holding public office.²⁷³

Requirements that commissioners act objectively and impartially are other means of minimizing political considerations in the nomination process. Indiana commissioners are required to "consider each candidate for a judicial office in an impartial, objective manner."²⁷⁴ Florida's "ethical responsibilities" of commissioners require that they "not become an advocate for any applicant. Consideration of applicants shall be made impartially and objectively."²⁷⁵ In addition to promising not to discriminate against applicants based on race, religion, gender, political affiliation, age, or national origin, the Nebraska commissioners take an oath that states, "I will avoid preselection of nominees, 'hidden agenda,' or consideration of factors other than the merit of the applicants."²⁷⁶

Despite these requirements regarding commissioner conduct, very few commissions have their own disciplinary mechanism. In Florida, commissioner misconduct is addressed by an elaborate procedure including a hearing which takes into account the possibility of (1) individual commissioner misconduct, (2) misconduct of the chair of the commission, and (3) misconduct by a chair and one or more commissioners.²⁷⁷

271. See *infra* Appendix A, Table 5, col. 4.

272. See, e.g., Exec. Order No. 355 of Governor William F. Weld of Mass., Judicial Nominating Council, at § 12 (May 24, 1993): "All members of the Executive Committee and of the Regional Committees shall be prohibited from soliciting or receiving campaign contributions on behalf of any candidate for federal, state or local office to the same extent as the law prohibits public employees from soliciting or receiving such contributions."

273. See, e.g., OKLA. CONST. art. 7-B, § 3(f): "No Commissioner, while a member of the Commission, shall hold any other public office by election or appointment or any official position in a political party and he shall not be eligible, while a member of the Commission and for five (5) years thereafter, for nomination as a Judicial Officer."

274. See IND. JUDICIAL NOMINATING COMM'N Rule 9.

275. FLA. UNIFORM R.P. DIST. CT. APP. JUDICIAL NOMINATING COMM'N sec. VII.

276. See R. NEB. JUDICIAL NOMINATING COMM'N exhibit A.

277. See FLA. UNIFORM R.P. CIR. JUDICIAL NOMINATING COMM'N sec. VIII (amended January 29, 1993):

Each commissioner shall be accountable to the Governor, their appointing authority and the chair of their commission for compliance with these rules and the proper performance of their duties as a member of a judicial nominating commission. Each commissioner affirms that under these rules the Governor, their appointing authority and/or the chair of their commission may dispose of any legally sufficient written complaint alleging the misconduct of one or more commissioners or commissions, limited only by Article IV, Section 7 of the Constitution of the State of Florida. Each commissioner further acknowledges that pursuant to Article IV, Section 7 the Governor may suspend from office any commission member for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent disability to perform their official duties, or commission of a felony.

A complaint alleging the misconduct of one or more commissioners (other than

All too often commission rules specify various forms of misconduct and potential breaches of disqualification (or ethics) rules, without providing a remedy or sanctions for such misconduct. More commissions should develop such procedures as a means of enhancing public confidence in the selection process.

V. EMPIRICAL STUDIES OF MERIT SELECTION

In a review of the scholarly literature on merit selection, Victor E. Flango and Craig R. Ducat point out the following: "The sheer quantity of writing on the topic of judicial selection may mislead the casual reader into believing that this topic is one of the most over-researched subjects in the study of American government. This is not the case."²⁷⁸ They go on to explain that many of the published articles about merit selection are not empirical studies. Rather, they are "advocacy" studies based on anecdotal evidence that "more closely resemble a lawyer-like attempt to build a case than a dispassionate evaluation of the strengths and weaknesses of each method of judicial selection."²⁷⁹ The few empirical studies are primarily case studies that "do not provide a standard for comparison," and thus "it is impossible to ascribe either the

the chair) within a single judicial nominating commission shall be reported in writing to the chair of the affected commission for action. Upon the chair's receipt of any such charges, the subject commissioner(s) and the appointing authority of the subject commissioner(s) shall be immediately notified thereof and thereafter kept continuously apprised of their status through final disposition. The chair shall investigate any complaint if the allegations are in writing, signed by the complainant, and legally sufficient. A complaint is legally sufficient if the chair determines that it contains ultimate facts which show a violation of these rules or reflects discredit on the judicial selection process. Prior to determining legal sufficiency the chair may require supporting information or documentation as necessary for that determination. Upon determination of legal sufficiency each charge may be disposed of by the chair solely, or may be referred by the chair for disposition by the appointing authority of the subject commissioner, exclusively or with the concurrence of the chair, but in consultation with the Governor, the appointing authority of the subject commissioner, and all other members of the affected JNC who are not otherwise involved in the disposition. Disposition of a complaint shall include a hearing which affords the opportunity for the presentation of evidence to be evaluated by a clear and convincing standard of proof. Action shall be taken within 60 days of receipt of any written complaint and its final disposition shall be immediately reported.

Disciplinary action against the chair is undertaken using the same procedure, but the investigation and hearing is conducted by the appointing authority of the chair. Likewise, misconduct on the part of a commission chair and one or more commissioners is addressed using the same procedure, with the governor conducting the investigation and hearing. *Id.*

278. Victor E. Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25, 29 (1979).

279. *Id.* Some of these studies focus narrowly on a campaign to adopt merit selection in a single state, while "[o]thers are objective to the extent that they eschew exhortation in favor of describing a selection procedure used within a particular state either historically or currently." *Id.*

positive or negative characteristics of judges or courts to method of selection, rather than to the economic, political or social conditions peculiar to any given state."²⁸⁰

Flango and Ducat developed a taxonomy for classifying the studies²⁸¹ that are both "empirically-based" and "genuinely comparative."²⁸² They classified such studies into those that examined (1) characteristics of judges, (2) education, (3) localism (e.g., whether the candidate attended a local or out-of-state law school), (4) prior experience, (5) characteristics of judicial decisions, (6) characteristics of courts, and (7) courts in their political context.²⁸³ In addition to reviewing the literature on these topics, some of which are combined for discussion, Flango and Ducat also report the findings of their own study. They examined state-level socio-economic and court data and looked for patterns in the spread of merit selection across the states. The following is a summary of the conclusions they reached after reviewing the studies published through late 1979.²⁸⁴ AJS added to these findings the results of additional research on merit selection conducted since the Flango and Ducat

280. *Id.* at 30. Most of the small number of empirical studies drawing comparisons across states use a "historical or institutional, rather than a behavioral [sic] perspective." *Id.*

281. For a later but less comprehensive review of studies on judicial selection, see Mary L. Volcansek, *The Effects of Judicial-Selection Reform: What We Know and What We Do Not*, in *THE ANALYSIS OF JUDICIAL REFORM* 79, 86 (Philip L. Dubois ed., 1982) ("comparison of the actual quality of judges selected under various systems is a tricky task that has not been very successfully pursued").

282. Flango & Ducat, *supra* note 278, at 30.

283. *Id.* at 30-39. Steven Berlin presents another useful classification for a review of merit selection studies. He uses "pre-ascent" (i.e., before assuming judicial office) factors and "post-ascent" factors. Examples of the former are race, sex, age, prior experience, educational background, and other qualifications; examples of the latter are records of cases on appeal, disciplinary record, attorney and law professors' assessments, and frequency of citation by other courts. Steven Berlin, *Background Paper on Proposed Empirical Study of Judges' Performance Under Merit Selection 1* (Aug. 27, 1991) (unpublished paper on file with American Judicature Society).

284. Flango and Ducat also point out two methodological problems confronting those conducting comparative research in judicial selection. Classifying states as "merit selection states" itself is difficult due to the multiplicity of models extant across the United States, some of which do not have all of the required elements of a merit plan (i.e., nomination by commission, gubernatorial appointment, and retention election). For example, California, which uses a commission to exercise veto power over gubernatorial appointments, and Illinois, which uses a partisan elective system coupled with non-partisan, unopposed retention elections, do not have the three basic elements of a merit plan. Accordingly, neither was included in Flango and Ducat's definition of a merit selection state. Flango & Ducat, *supra* note 278, at 26.

The second problem confronting merit selection researchers is the fact that even in states that use the elective system of judicial selection, up to sixty-six percent of the judges might have been appointed to an interim vacancy occurring between elections, thus making comparative analysis difficult. *Id.* at 27. See Burton M. Atkins & Henry R. Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 AM. POL. Q. 427, 446 (1974) (finding that 40% of judges in states using partisan election and 66% of judges in states using non-partisan elections were initially appointed). See also Burton M. Atkins, *Judicial Elections: What the Evidence Shows*, 50

review.²⁸⁵

A. Characteristics of Judges

Flango and Ducat's review of the literature subdivided studies of the characteristics²⁸⁶ of judges into those that examined diversity from the standpoint of race, sex, and "role orientations."²⁸⁷ After pointing out the dearth of research on the subject of racial diversity, they cited two studies published in 1973²⁸⁸ and 1977²⁸⁹ that provided data regarding the number of African-American state judges and supreme court justices, respectively. No conclusions, however, could be drawn from this scant evidence regarding racial diversity. The few studies²⁹⁰ of women judges then available were "equally inconclusive."²⁹¹

Studies not cited by Flango and Ducat questioned whether merit

FLA. B.J. 152, 154 (1976) (finding that 57% of surveyed Florida judges who have served on the bench for over ten years, were initially appointed).

Flango and Ducat refer to another, perhaps more fundamental problem. Even if it is true that proponents of different selection systems have not "'come up with hard data about just what kinds of differences do in fact result from the adoption of alternative systems' . . . this incisive question begs a prior question. Even if 'hard data' were readily available or easily obtainable, *what type of data should be collected?*" Flango & Ducat, *supra* note 278, at 29 (citing Bradley C. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 LAW & SOC'Y REV. 579, 580 (1972)).

285. My purpose is merely to describe the results of the studies cited. A critical review of those studies is beyond the scope of this Article.

286. Early studies of the "social backgrounds" of state judges in four states revealed few differences associated with merit selection. *See, e.g.*, Canon, *supra* note 284, at 588 ("It seems clear that institutional mechanisms surrounding recruitment . . . do not have the impact on [judges] personal characteristics which advocates of competing selection systems often imply they have . . ."); *see also* Burton M. Atkins & Henry R. Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 AM. POL. Q. 427 (1974); and Philip L. Dubois, *The Influence of Selection System and Region on the Characteristics of a Trial Court Bench: The Case of California*, 8 JUST. SYS. J. 59 (1983); *cf.* Herbert Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. PUB. L. 104, 104-14 (1964).

287. *See* Flango & Ducat, *supra* note 278, at 30-31. Examples of role orientations include a conservative reliance upon precedent versus a "law making" orientation, and whether judges assumed "leadership roles" upon taking the bench in contrast to those not taking such a role. *Id.* at 31.

288. *See The Black Judge in America: A Statistical Profile*, 57 JUDICATURE 18, 19 (1973) (finding that 37.5% of the 167 respondents were elected, 32.7% were appointed, and 29.8% were initially appointed to fill an interim vacancy and were later retained in subsequent elections).

289. George W. Crockett, Jr., *National Roster of Black Judicial Officers* (March, 1977) (unpublished paper) (finding that of the eighteen judges sitting on appellate benches, only three were appointed in merit plan states). Additional data is provided in this study reflecting the number of black trial judges, but Flango and Ducat point out that "[H]ow many of these judges, whether trial or appellate, were actually elected and how many were initially appointed to fill an unexpired term of office is unknown." Flango & Ducat, *supra* note 278, at 30.

290. *See* Beverly B. Cook, *Women Judges: The End of Tokenism*, in *WOMEN IN THE COURTS* 84, 102-03 (Winifred L. Hepperle & Laura Crites eds., 1978).

291. *See* Flango & Ducat, *supra* note 278, at 30.

systems promote diversity on the bench.²⁹² Subsequent studies, however, found little evidence to support fears that merit selection excludes minorities from judicial office.²⁹³ Studies in 1985 by the Fund for Modern Courts²⁹⁴ and in 1986 by Karen L. Tokarz²⁹⁵ found that women and minorities rank higher as a percentage of total judges in merit states than in partisan election states. Justice Ben F. Overton of the Florida Supreme Court wrote in 1988 that nineteen of twenty-three African-American judges and forty-one of seventy-one women judges in Florida were merit selected.²⁹⁶ A recent study by the Fund for Modern Courts found that in New York City, where some judges are elected and others are appointed under a merit plan, the merit plan produced more minority and women judges than the electoral process.²⁹⁷

While the number of studies and available data regarding minority judges on the bench continues to increase, it may still be too early to reach a definitive conclusion regarding which selection method enhances diversity. The signs are, however, that merit selection is at least not an obstacle to diversity. In fact, when coupled with the trend to require that nominating commissions take diversity on the bench into account when making their nominations,²⁹⁸ it is likely that far greater numbers of minority and women judges will take the bench under a merit plan than ever before.

B. *Education and Localism*²⁹⁹

After analyzing the findings of three studies³⁰⁰ that examined the

292. See Kenyon N. Griffin & Michael J. Horan, *Merit Retention Elections: What Influences the Voters?*, 63 JUDICATURE 78 (1979); William Jenkins, Jr., *Retention Elections: Who Wins When No One Loses?*, 61 JUDICATURE 79 (1977). See also William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340 (1987), an article published after Flango and Ducat's article.

293. See Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228 (1987) (women and minorities are still underrepresented on state supreme courts, but it is not due to merit selection).

294. FUND FOR MODERN COURTS, INC., *THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS* (1985).

295. Karen L. Tokarz, *Women Judges and Merit Selection Under the Missouri Plan*, 64 WASH. U. L.Q. 903, 918 (1986).

296. See Justice Ben F. Overton, *Trial Judges and Political Elections: A Time for Re-Examination*, 2 U. FLA. J.L. & PUB. POL'Y 9, 20 (1988-89).

297. See M. L. Henry, Jr., *Characteristics of Elected Versus Merit-Selected New York City Judges, 1977-1992*, at 9-16 (April, 1992) (on file with American Judicature Society).

298. See *infra* and accompanying text; see also *infra* Appendix A, Table 5, col. 6.

299. Flango & Ducat, *supra* note 278, at 31-32, use separate classifications for "education," by which they refer to the law school education received by judges, and "localism," by which they refer to the judges' "local ties." The studies cited in the discussion of localism, Jacob, *supra* note 286, and Canon, *supra* note 284, examine the undergraduate college attended by judges. We chose to combine these two factors into a single discussion.

300. See Canon, *supra* note 284, at 585 (finding that supreme court justices appointed by

law school education of judges under different selection methods, Flango and Ducat concluded that, "[a]lthough judges selected by state legislatures do have slightly more formal education than judges selected by other methods, no method of selection consistently selects vastly more qualified judges where quality is measured by formal education."³⁰¹

The Watson and Downing study of the Missouri plan reached the following conclusions:

A summary assessment of the impact of the Plan on the Missouri judiciary indicates that it has pushed the age at which lawyers go to the bench upward, and it has also made prior judicial service a more important feature of an appellate judge's experience. Moreover, it has not affected the essentially parochial character of the Missouri bench; judges appointed under the Plan are even more likely than the former elective ones to have been born in the state and to have received their legal education there—many of them in local night law schools.³⁰²

In addition, the Watson and Downing study found general bar agreement that one consequence of the Missouri Plan "is that it results in putting 'better' judges on the bench than are usually chosen under an elective system. . . . [The] Plan has tended to eliminate highly incompetent persons from the state judiciary."³⁰³

In 1987, Glick and Emmert's study found that a few more merit-selected supreme court justices attended prestigious law schools than those selected by other methods.³⁰⁴ In addition, merit-selected judges are less likely to have attended college in-state and are less likely to have been born in-state.³⁰⁵ Further, the politics and demographics of the state in which a judge sits is more important than the type of selection

governors or legislators possessed more formal education than judges selected by other methods); Jacob, *supra* note 286, at 109 (finding that "[a]lmost no judges elected on a non-partisan ballot or selected by a legislature attended a proprietary or night law school; 28% of the gubernatorially appointed judges and 33% of the Missouri-Plan judges received such substandard education"); and STUART NAGEL, *COMPARING ELECTED AND APPOINTED JUDICIAL SYSTEMS* 11 (Sage Professional Paper in American Politics, No. 04-001, 1973) (arguing that, to be successful in elections, judges must have good vote-getting images, which translates in practice to 1) attending a prestigious law school, 2) having prior judicial experience, and 3) achieving recognition as a scholar, through publications or membership in honorary associations). In a study not cited by Flango and Ducat, Missouri judges recruited through legislative appointment and non-partisan elections were found more likely to have attended prestigious law schools. Burton M. Atkins, *Merit Selection of State Judges*, 50 FLA. B.J. 203, 208 (1976).

301. See Flango & Ducat, *supra* note 278, at 32.

302. WATSON & DOWNING, *supra* note 38, at 219.

303. *Id.* at 345.

304. See Glick & Emmert, *supra* note 293, at 231.

305. *Id.*

system in determining whether judges are born or educated in-state.³⁰⁶

The 1992 study of New York City judges also found that eighty-eight percent of elected judges graduated from in-state law schools, as compared to seventy-nine percent of those recruited through merit selection.³⁰⁷ In addition, only twenty-nine percent of elected judges attended a prestigious³⁰⁸ law school, compared to forty-one percent of judges recruited through merit selection.³⁰⁹

As for whether some selection systems tend to result in the recruitment of more "local" candidates (including in that definition the fact that a judge completed his or her undergraduate education in-state or out-of-state) the research findings are inconsistent. One study found that variations in localism are "the result of regional migration patterns and higher education structures," and not the method of selection.³¹⁰ Another found that those judges chosen through merit selection or partisan elections tended to be born and educated in the district where they presided.³¹¹ Yet another found that more "local" judges were chosen in states using the merit plan or partisan elections than those selected by other means.³¹²

While the evidence is not dispositive, it appears that merit selection tends to produce more judges with a prestigious law background and more local ties than judges recruited through other methods. In light of the dearth of research on this factor and the somewhat disparate findings of early studies on these questions, any conclusions drawn must certainly be tentative.

C. *Characteristics of Judicial Decisions and Courts*³¹³

If judges selected through different methods do, in fact, differ in their personal characteristics, the question becomes whether those char-

306. *Id.*

307. See Henry, *supra* note 297, at 16-18.

308. Henry notes that the term "prestigious" is based upon a classification employed in prior research that was based upon a survey of law school quality. *Id.* at 17-18. See Peter M. Blau & Rebecca Z. Margulies, *The Reputation of American Professional Schools*, 6 *CHANGE* 42, 44 (1974-75). For the studies in which it was employed, see JOHN R. SCHMIDHAUSER, *JUDGES AND JUSTICES: THE FEDERAL APPELLATE JUDICIARY* (1979), and John H. Culver, *Governors and Judicial Appointments in California*, 54 *STATE GOV'T* 130, 133 (1981).

309. See Henry, *supra* note 297, at 17.

310. See Canon, *supra* note 284, at 588.

311. See Atkins, *supra* note 300, at 208.

312. See Jacob, *supra* note 286, at 108. Nonpartisan elections were found to have the greatest potential for a "newcomer" to be selected as a judge. *Id.*

313. Again, I combine two of the classifications Flango and Ducat used to present their literature review for purposes of this Article. "Characteristics of judicial decisions" refers to studies of individual behavior and "characteristics of courts" refers to the dissent rates of appellate courts. See Flango & Ducat, *supra* note 278, at 33-34.

acteristics affect judicial decision making. There is a strand of judicial selection research, which Flango and Ducat reviewed, that focuses on this question.³¹⁴ After considering the findings of fourteen studies,³¹⁵ Flango and Ducat point out that attempts to relate background characteristics to individual judicial decision making "have not been very successful."³¹⁶ They note, however, that "party affiliation has been the variable most consistently associated with judicial decision-making."³¹⁷ They conclude with this observation: "[u]ntil background characteristics of judges are more meaningfully linked to decisional behavior, it would seem pointless to discover that judges chosen by different methods of selection possess marginally different attributes when these different characteristics do not seem to affect voting behavior or policy outcomes."³¹⁸

Subsequent studies have also failed to provide further evidence of a correlation between the method of selection and judicial decision making.³¹⁹

Flango and Ducat also asked whether the expression of dissent is more prevalent in courts whose judges are chosen by one method of

314. See Flango & Ducat, *supra* note 278, at 33-34.

315. *Id.* at 33-34 nn.53-59 (citing STUART S. NAGEL, *THE LEGAL PROCESS FROM A BEHAVIORAL PERSPECTIVE* (1969); GLENDON SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* (1959); Atkins & Glick, *supra* note 284; Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 AM. POL. SCI. REV. 374 (1966); Joel B. Grossman, *Social Backgrounds and Judicial Decisions: Notes for a Theory*, 29 J. OF POL. 334 (1967); Stuart S. Nagel, *Ethnic Affiliations and Judicial Propensities*, 24 J. POL. 92 (1962); Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L., CRIMINOLOGY & POL. SCI. 333 (1962); Stuart S. Nagel, *Testing Relations Between Judicial Characteristics and Judicial Decision-Making*, 15 W. POL. Q. 425 (1962)); S. Sidney Ulmer, *The Political Party Variable in the Michigan Supreme Court*, 11 J. PUB. L. 352 (1962); Jerry K. Beatty, *An Institutional and Behavioral Analysis of the Iowa Supreme Court—1965-1969* (1963) (unpublished Ph.D. dissertation, University of Michigan); Don R. Bowen, *The Explanation of Judicial Voting Behavior from Sociological Characteristics of Judges* (1965) (unpublished Ph.D. dissertation, Yale University); Craig R. Ducat, *Dimensions of Jurisprudence and Judicial Decision-Making in the Law of Obscenity* (1970) (unpublished Ph.D. dissertation, University of Minnesota); Sheldon Goldman, *Politics, Judges, and the Administration of Justice* (1965) (unpublished Ph.D. dissertation, Harvard University); Francis G. Lee, *Judicial Selection: An Explanatory of Judicial Behavior on Bi-Partisan State Supreme Courts* (1970) (unpublished Ph.D. dissertation, University of Pennsylvania)).

316. Flango & Ducat, *supra* note 278, at 34. Cf. WATSON & DOWNING, *supra* note 38 (observing that a review of appellate decisions is not an appropriate measure of judicial behavior because the fate of a case on appeal could result from similar or disparate leanings of the court or other extraneous variables).

317. Flango & Ducat, *supra* note 278, at 34.

318. *Id.*

319. See, e.g., Jerome O'Callaghan, *Another Test for the Merit Plan*, 14 JUST. SYS. J. 477, 484 (1991) (finding no difference between merit-selected and elected judges in their responsiveness to public opinion, as measured by sanctions imposed by judges on DWI offenders).

selection or another.³²⁰ This result might be hypothesized because "public criticism or unwillingness to accept judicial decisions may be related to dissent rates, regardless of which individual justices are responsible for the dissents."³²¹ After reviewing six studies,³²² they conclude:

there is little variation in the characteristics of judges or courts, regardless of the selection procedure which brought them to office. The marginal differences in background characteristics which do exist do not appear to have much influence on the voting behavior of individual justices or on the dissent rate of the court as a whole.³²³

There appears to be no further research that would change the latter conclusion.

D. Courts in Their Political Context

Social, economic, and political variables may be the real causes of different judicial selection systems and the resulting behavior of the judges selected, in which case the study of the effects of selection methods may be "misdirected."³²⁴ Flango and Ducat reviewed the research³²⁵ examining the relationship between politics and judicial

320. Flango & Ducat, *supra* note 278, at 34.

321. *Id.*

322. *Id.* at 34-35 nn.60-65 (citing HENRY R. GLICK & KENNETH N. VINES, *STATE COURT SYSTEMS* (1973); NAGEL, *COMPARING ELECTED AND APPOINTED JUDICIAL SYSTEMS*, *supra* note 300; Kenneth N. Vines, *Political Functions of a State Supreme Court*, in *TULANE STUDIES IN POLITICAL SCIENCE: STUDIES IN JUDICIAL POLITICS* (Kenneth N. Vines & Herbert Jacob eds., 1962); Kenneth N. Vines & Herbert Jacob, *State Courts*, in *POLITICS IN THE AMERICAN STATES* 299 (Herbert Jacob & Kenneth N. Vines eds., 1965); Bradley C. Canon & Dean Jaros, *External Variables, Institutional Structure and Dissent on State Supreme Courts*, 3 *POLITY* 175 (1970); Robert J. Sickels, *The Illusion of Judicial Consensus: Zoning Decisions in the Maryland Court of Appeals*, 59 *AM. POL. SCI. REV.* 100 (1965); Lee, *supra* note 315).

323. Flango & Ducat, *supra* note 278, at 35.

324. *Id.* See also Sheldon Goldman, *American Judges: Their Selection, Tenure, Variety, and Quality*, 61 *CURRENT HIST.* 1, 51 (1971) (arguing that it may be more fruitful to assess the quality of justice dispensed rather than the quality of judges, per se, since it is "more directly related to the central concerns of understanding, evaluating, and reforming a judicial system").

325. *Id.* at 36-37 nn.67-73 (citing CITIZENS CONFERENCE ON STATE LEGISLATURES, *STATE LEGISLATURES: AN EVALUATION OF THEIR EFFECTIVENESS* (1972); THOMAS R. DYE, *POLITICS, ECONOMICS AND THE PUBLIC: POLICY OUTCOMES IN THE AMERICAN STATES* (1966); ELAZAR, *supra* note 51; MALCOLM E. JEWELL, *THE STATE LEGISLATURE: POLITICS AND PRACTICE* (1969); IRA SHARKANSKY & RICHARD HOFFERBERT, *DIMENSIONS OF STATE POLITICS, ECONOMICS, AND PUBLIC POLICY* (1974); Austin Ranney, *Parties in State Politics*, in *POLITICS IN THE AMERICAN STATES*, *supra* note 322; Joseph Schlesinger, *The Politics of the Executive*, in *THE AMERICAN GOVERNOR IN BEHAVIORAL PERSPECTIVE* 141 (Thad Beyle & Oliver Williams, eds., 1972); Canon & Jaros, *supra* note 322; Richard E. Dawson & James A. Robinson, *Inter-Party Competition, Economic Variables, and Welfare Politics in the American States*, 25 *J. POL.* 265 (1963); Charles A. Johnson, *Political Culture in American States: Elazar's Formulation Examined*, 20 *AM. J. POL. SCI.* 491 (1976); Samuel Patterson, *The Political Cultures of the American States*, 30 *J. POL.* 187 (1968); Larry L. Berg et al., *The Consequences of Judicial Reforms: A Comparative Analysis of the California and Iowa Appellate Systems* (paper presented at the annual meeting of the

selection and reached the following conclusion:

Legislative elections are used in states where the governor is weak, but gubernatorial appointments tend to be used in states which have a strong legislature. Other patterns are weak, although it does appear that states with powerful executives and legislatures tend to select judges in non-partisan elections, whereas partisan elections are most often used in states where both branches of government are weak. The Missouri Plan is used most often in states with a professional, independent legislature but a weak governor.³²⁶

One study³²⁷ cited by Flango and Ducat made the following interesting observation regarding the relationship between a state's political culture and its method of judicial selection:

Either gubernatorial appointment, the method of selection continued from colonial experience, or legislative election, the method preferred by some states immediately after the American Revolution, are still used by most of the original thirteen states. Eastern and Southern states, affected by Jacksonian pressure for popular reforms via direct political action, favor partisan election of judges. Non-partisan election, stimulated by reaction to partisan abuses of political office, was generally adopted by the Western and Midwestern states which were entering the union as the Populist and Progressive movements swept the country in the latter part of the nineteenth and early part of the twentieth centuries. Finally, the Missouri Plan capitalized upon the desire to "professionalize" the judiciary by developing strong lawyers' professional associations and formal legal education requirements.³²⁸

After reviewing the socio-economic characteristics of states, Flango and Ducat made the following additional findings based upon the studies then available: (1) gubernatorial appointment systems tend to be used in states that are densely populated, rapidly growing, innovative, industrialized, and affluent; (2) legislative selection methods are used in densely populated, industrial, but poor states; (3) merit plans are adopted by small but growing agricultural states; (4) nonpartisan elections are used in non-manufacturing, agricultural, rural states; and (5) partisan elections are used by states that are industrialized and large, but have the

American Political Science Association, Chicago) (September, 1974); Eugene R. Declercq, Gubernatorial Power and Legislative Independence in the Fifty States (paper presented at the annual meeting of the Midwest Political Science Association, Chicago) (May, 1975); Justin J. Green & Thomas G. Walker, Partisan and Professional Influences in the Recruitment of Judicial Candidates (paper presented at the annual meeting of the Midwest Political Science Association, Chicago) (May, 1975)).

326. Flango & Ducat, *supra* note 278, at 37.

327. See GLICK & VINES, *supra* note 322, at 40-41.

328. *Id.*

least rapid growth.³²⁹

E. Adoption of Merit Selection

What are the factors leading to the adoption of merit selection? The involvement of the bar is believed to be a critical factor in a state's adoption of merit selection.³³⁰

[B]ar association activity is an important predictor of adoption of merit selection between 1950 and 1980. The relationship between adoption of merit selection and a less professionalized executive may reflect the conflict between legal groups and politicians over adoption of merit selection. Where the governor's powers are weak, bar associations are able to lobby successfully for adoption of merit selection. Where the governor's institutionalized powers are greater, he may have no need for judicial merit selection, for his powers are secure The conditions under which merit plans are adopted highlight the conflict over control over judicial selection and the importance of bar association activity in this endeavor. While bar association influence is important to adoption of merit selection, so are the political and socioeconomic characteristics of state populations. Legal groups appear to have more chance for success in influencing adoption of merit selection in states in which the governor is organizationally weak and in which the legislature is more professionalized. It appears, then, that adoption of merit selection is a more complex process than was previously thought.³³¹

In a recent survey³³² of bar leaders, it was found that attorneys generally support merit selection because they view themselves as having some influence over the process: "[j]udicial merit selection enhances the bar's perceived influence. . . . When the governor is compelled to follow the dictates of the nominating commission, the lawyers' groups are more confident of their influence over appointments. In contrast, partisan elections and legislative elections tend to discourage the bar."³³³

Understanding of the factors affecting the adoption of merit selection improved as a result of a recent study by Dubois.³³⁴ In that study, Dubois collected voting data from twenty-eight elections held between 1941 and 1980 in twenty-one states in which merit selection was submit-

329. See Flango & Ducat, *supra* note 278, at 37.

330. See Judith Ann Haydel, *Explaining Adoption of Judicial Merit Selection in the States, 1950-1980: A Multivariate Test* (Aug. 1987) (unpublished Ph.D. dissertation, University of New Orleans).

331. *Id.* at 99-100.

332. Charles H. Sheldon, *The Role of State Bar Associations in Judicial Selection*, 77 JUDICATURE 300 (1994).

333. *Id.* at 304-05.

334. See Philip L. Dubois, *Voter Responses to Court Reform: Merit Judicial Selection on the Ballot*, 73 JUDICATURE 238 (1990).

ted to the voters.³³⁵ The purpose of the study was to address these questions: "How frequently, and under what conditions, have merit plan proposals been successful before the voters? What factors seem to be most often associated with popular rejection of the plan? Are voters who typically support the plan distinguishable in some systematic way from those who typically oppose the reform?"³³⁶

Dubois found that voters in most cases have not been given the opportunity to vote on distinct proposals. "Far more frequently than not, the plan has gone before voters as part of either a larger package of reforms governing judicial discipline and tenure, a proposed revision of the entire judicial article in the state constitution, or as part of a wholesale revision of the entire state constitution."³³⁷ In other words, the voters were not afforded the opportunity to vote directly on the merit plan, "but had to accept or reject it as part of the larger package presented to them."³³⁸

Dubois also found that merit plans proposed in a constitutional revision process requiring strong legislative support are more likely to be successful than plans proposed via a constitutional convention, popular initiative, or by simple legislative majorities acting in a single session.³³⁹ Merit plan proposals in states that require extraordinary legislative majorities (or simple majorities in two successive legislatures) were successful 85% of the time and collected on average 57.4% of the vote in their favor.³⁴⁰

The extensiveness of the selection reform is another important factor in the adoption of merit selection.³⁴¹ Merit plan reforms, Dubois found, were more successful when they applied only to the selection of appellate judges.³⁴² He hypothesized that this was the result of the fact that "[a]t the appellate level . . . there are fewer judgeships involved and thus fewer interested political players threatened by a proposal to change the method of selection than one which includes the more numerous trial court positions."³⁴³

335. *Id.* at 240.

336. *Id.* at 239.

337. *Id.* at 240.

338. *Id.* In just nine of twenty-eight instances were voters asked directly to accept or reject a merit plan. *Id.* at 241.

339. *Id.* at 242.

340. *Id.*

341. *Id.*

342. *Id.* at 243.

343. *Id.* at 242. Dubois also found that there is an "uncertain association" between the existence of a voluntary merit plan (gubernatorial appointments for interim vacancies established through an executive order) and subsequent voter endorsement of a proposed merit plan. *Id.* at 243. Moreover, the electoral base for adoption of a merit plan "has been distinctly urban in nature" due to the fact legislators, judges, lawyers, and residents in nonurban areas "often fear the

F. *Politics and the Nominating Process*

Opponents of merit selection have pointed to some examples of what they perceive to be "political" appointments in a merit selection system. These, they argue, contradict what they purport to be a claim of merit plan proponents—that politics is "eliminated" from judicial selection. Thus, they assert, it is unfair to take away from the electorate the power to choose judges. But these opponents ignore the fact that the original motivation for finding an alternative to the elective method of selection was bottomed not on the elimination of politics, as such, but on the elimination of the influence of political party leaders:

Judges are usually not really elected, but are designated by the leaders of the party political machine dominant in the district. These leaders appoint the nomination. The electorate only decides which of two or three sets of nominees it prefers. . . .

These leaders have too little responsibility for the due administration of justice. They have the strongest motives for rewarding purely political service to an organization.³⁴⁴

The materials published by AJS do not contain any claim that politics will be altogether eliminated by the adoption of merit selection, despite the assertions of its opponents.

Watson and Downing's *The Politics of the Bench and the Bar: Judicial Selection Under the Missouri Nonpartisan Court Plan*³⁴⁵ was the first, and is still the most comprehensive study of the merit selection process. The researchers conducted an in-depth study of the three nominating commissions existing under the Missouri Non-Partisan Court Plan for the three appellate courts³⁴⁶ and two county general jurisdiction

loss of local control and autonomy that accompanies a statewide solution proposed to solve organizational, administrative, financial and procedural problems that they associate with overcrowded and delay-burdened urban courts" and because bar leadership for merit selection has been centered in statewide and urban bar associations. *Id.* at 244-45. According to Dubois, the merit plans are found among states with a "political culture" that is dominated by either the "moralistic" or "individualistic" cultures. *Id.* at 245-46. See ELAZAR, *supra* note 51 and accompanying text.

344. See American Judicature Society, *Suggested Causes for Dissatisfaction with the Administration of Justice in Metropolitan Districts*, BULLETIN No. I (American Judicature Soc'y 3-4) (January, 1914). See also Pound, *supra* note 1, at xii ("A judge who is part of a political administration or part of an administrative hierarchy, or a partisan of anything but the law, is out of place in our constitutional regime.").

345. See WATSON & DOWNING, *supra* note 38.

346. The appellate commission nominates candidates for the state supreme court and the three intermediate appellate courts in Kansas City, St. Louis, and Springfield. *Id.* at 13.

courts.³⁴⁷ Both interviews³⁴⁸ and survey questionnaires³⁴⁹ were employed in a study of all facets of the history, operations, politics, and consequences of the Missouri Plan.

While the study generally "brings to the surface the web of Bench-Bar relationships and forces which are present at a subterranean level in other judicial selection systems as well,"³⁵⁰ the portion relevant here is the discussion of the politics surrounding the nominating commission's functions. For proponents of merit selection, the study, on the one hand, disappointingly reports evidence of politics in the selection process from the appointment of commission members to the eventual selection of a nominee. At the same time, however, the reported consequences of the Missouri merit plan are quite favorable.³⁵¹

The entire "environment" in which merit selection operated at the time of the study reflected a variety of political interests at play. While the Missouri Plan did not eliminate politics in the selection process, fears that the legal profession's elite would decide who would sit on the bench were not well-founded. Instead, the study found that the selection system was "a highly pluralistic one that reflects diverse interests."³⁵² These interests originated from such "external" and "internal"³⁵³ factors as the ecology of the legal community,³⁵⁴ the economic and social clientele of the courts,³⁵⁵ the influence of incumbent judges,³⁵⁶ the partisan

347. These are the Circuit Courts for Jackson County (which includes Kansas City) and St. Louis City.

348. Over 200 persons were interviewed, including nominees, appointees, members of the nominating commissions; and others knowledgeable about the selection process, such as academicians, newspaper columnists, reporters, personal acquaintances of the researchers "who were assumed to be informed about the legal ecology, the political system, the factors relevant to the selection of nominating commissioners, or the judicial nominating and appointing processes," and others who were "influential in selection, or who were particularly well informed about it." *Id.* at vii, 361.

349. The survey was administered to one half of the members of the state bar 3,303 individuals in May, 1964, and responses were received from 1,233 lawyers, yielding a response rate of 37%. *Id.* at 367.

350. *Id.* at 3-4.

351. *See infra* part IV.G.

352. WATSON & DOWNING, *supra* note 38, at 6.

353. *Id.* at 75.

354. This refers to the cleavages in the bar between plaintiffs' and defense lawyers, as well as between criminal and corporate lawyers, which were found to be a "key factor" in the polarization of the metropolitan Missouri bars and which often results in conflicting bar recommendations to the public. *Id.* at 20-22, 76.

355. This refers to the repeat players in the courts, such as insurance companies, utilities, and railroads, which Watson and Downing term the "clientele groups," who they describe as "chary about taking any action that might be construed as an attempt to control the courts" and, instead, depend upon attorneys to "go to bat" for them without being asked. *Id.* at 77-79.

356. Incumbent judges have a "vital interest" in maintaining "an organizational system conducive to their own professional and emotional well-being"; their interest is in the nominees'

political setting,³⁵⁷ the "role orientation of the commissioners,"³⁵⁸ and the nominating and appointing "games" at play in the selection process.³⁵⁹

Several of those unfortunate "games" which lead to "panel-stacking" were observed during the selection process: (1) "panel-loading" the list of nominees (the list consists of "the strong political candidate that everybody knows will be selected by the governor and two others who are just window dressing"),³⁶⁰ (2) "panel-rigging" ("the selection of a combination of nominees so that the governor will, in effect, have no choice," e.g., "nominate one political friend of the governor, one political enemy, and one from the other party"),³⁶¹ and (3) "panel-wiring" (where the governor makes his preferences known to one or more commissioners, and the commission names a panel containing the name of the attorney preferred by the governor plus two others "chosen on a 'what difference does it make' basis").³⁶² "Rigging" and "loading"

personalities (since judges tend to socialize more with other judges than with any other groups), their capacity for work, and the quality of their work. *Id.* at 80.

357. While the patronage "allocation" of judgeships was eliminated with merit selection, some partisan political activity was still found to be a "virtual prerequisite for judicial office." *Id.* at 81-82.

358. This refers to "both normative components (expectations of those interacting with the occupant of a position with respect to his behavior, as well as the occupant's own expectations) and behavioral components." *Id.* at 87-88 n.12.

The lay commissioners were overwhelmingly from the business community, had close ties to the community, and were "pillars of the local community." *Id.* at 44-45. They had a political background, typified by previous work for individual candidates, especially gubernatorial, or in fund-raising efforts, but not necessarily in "gladiatorial" politics. *Id.* at 45. "The governor wants people on the commissions who know the local situation and who are able to protect his interests in seeing that lawyers well-regarded in their own areas are nominated for the bench." *Id.* at 47. The governors' "natural desire . . . to have persons on the commission whom they can trust" and who "can also act as a means of intelligence concerning the attitudes of the governor towards various candidates for the bench" results in the appointment of law commissioners who "have little need to inquire of others about the political acceptability of various judicial candidates. They already know." *Id.* at 47, 91. They are "widely viewed as spokesmen for the governor's interests in the nominating process." *Id.* at 88.

The role orientation of the lawyer members of the commissions studied was dependent upon the cleavages within the bar between the plaintiffs' and defense (or criminal and corporate) lawyers. Members of each group sought to insure that the nominees included those sympathetic with their interests. *Id.* at 170. The plaintiffs' bar, for example, concentrated its efforts on the circuit courts, while the corporate and defense bar concentrated their efforts on appellate appointments. *Id.* at 169.

The judge members of the commissioners were oriented toward the institutional interests of the court, i.e., sitting judges. See *supra* note 356.

359. *Id.* at 101-22.

360. *Id.* at 101.

361. *Id.* at 107.

362. *Id.* at 108. None of the commissioners interviewed would admit to serving as an agent of the governor. *Id.* at 109. Watson and Downing were "unable to obtain any reliable evidence to prove that governors as a general practice convey their wishes in appointments to lay commissioners either directly or through intermediaries, although there is a little question that this

occurred with far greater frequency than "wiring" in at least one county.³⁶³

"Logrolling" was another "game" observed in the Missouri study, which occurred with less frequency than the aforementioned "games."³⁶⁴ This is a bargaining technique in which nominees are selected based on agreements between individual commissioners, or groups of commissioners, for the reciprocal support of one another's candidates.³⁶⁵ The bargain may even extend to subsequent panels of nominees.³⁶⁶ These games, it is pointed out, do not always succeed. Sometimes the governor refuses to go along with a commission's attempt to load panels, and sometimes the commission rebuffs gubernatorial attempts to manipulate the list of candidates.³⁶⁷

Shortly after the publication of the Watson and Downing study of the merit selection process, AJS researchers Allan Ashman and James Alfini completed another study of the subject.³⁶⁸ Their study, based upon interviews³⁶⁹ and survey questionnaires,³⁷⁰ was conducted to "lay the foundation for the kinds of evaluative studies of the nonpartisan merit selection plan that will permit normative judgments."³⁷¹

Political influences affecting commissioner deliberations was an area explored by the survey. Ashman and Alfini acknowledged the concern expressed by many commentators over lay members being perceived as "either particularly susceptible to undue influence or . . . [as] mere ciphers who meekly defer to the political demands of the executive, the authoritative tone of the judicial member, or the glibness and legal expertise of the lawyer members."³⁷² The survey responses, however, revealed that "very few lay members felt dominated by the lawyers and that equally few lawyer members felt the lay members to be super-

has occurred on certain occasions." *Id.* at 47. "[G]iven the general expectations and Plan protocol that the lay members will act independently of the governor, it is seldom that these parties themselves will admit that such a practice has occurred." *Id.* Panel-stacking in the Missouri plan was, the researchers found, "a common occurrence." *Id.* at 101.

363. *Id.* at 110.

364. *Id.*

365. *Id.* at 109.

366. *Id.* at 110.

367. *Id.* at 111.

368. See ASHMAN & ALFINI, *supra* note 189.

369. While the total number of interviewees is not given in the study, the researchers conducted interviews in five states with merit plans: Alabama, New York, Alaska, Colorado, and Kansas. *Id.* at 2.

370. Surveys were mailed to 797 commissioners on nominating commissions in the five aforementioned states and 371 usable responses were received, yielding a response rate of 46.5% *Id.* at 23.

371. *Id.* at 3. The researchers also hoped that the study "will be of practical value to persons actively involved in the implementation or operation of a judicial merit selection plan." *Id.*

372. *Id.* at 25.

fluous.”³⁷³ Of those respondents who were members of nominating commissions that operated without written rules, 14% felt that political considerations were introduced into their deliberations frequently, while only 8% of the members of commissions that had written rules of procedure felt the same.³⁷⁴

“Of course, no judicial selection plan will ever be entirely free from political influences,” the researchers noted.³⁷⁵ They found that a merit plan “can create its own brand of politics which may be a mixture of both ‘party’ and ‘bar’ politics.”³⁷⁶ They recommended that rules be promulgated by commissions that require the governor to make judicial appointments without regard to political affiliation, or by expressly creating a bipartisan commission.³⁷⁷

The data in the Ashman and Alfini study show that 2% of all commissioners surveyed felt that political considerations were “always” introduced into their deliberations, 10% said this occurred “frequently,” 37% felt they were only “infrequently” introduced, and 51% said they were “never” a factor.³⁷⁸ Of those that felt that political considerations were introduced into their deliberations, 7% said that they were of “decisive” importance, 27% said they were of “some importance” but not decisive, 42% felt the political influences were of “little importance,” and 24% believed that they were of “no importance.”³⁷⁹ Thus, approximately one-third of all responding commissioners felt that political considerations were introduced into their deliberative process and had some effect—in many instances only minor—in determining the ultimate selection.

The study suggests that a merit plan can avoid, to some extent, the influence of partisan politics with a rule requiring governors to make appointments without regard to political affiliation.³⁸⁰ Such rules have,

373. *Id.* at 25. Ashman and Alfini also cite the findings of John A. Robertson & John B. Gordon, *Merit Screening of Judges in Massachusetts: The Experience of the Ad Hoc Committee*, 58 MASS. L.Q. 131, 138 (1973) (“While the laymen had to defer to lawyer opinions about [applicants’] legal experience, they had strong, independent views and were by no means dominated or manipulated by the lawyers.”).

374. *Id.* at 44. Of those members of commissions without rules, 24% said political considerations were of “some importance” in the eventual selection made, and 6% said these influences were of “decisive importance.” Of those members of commissions with rules, 15% said political considerations were of “some importance,” and only 2% said they were of “decisive importance.” *Id.*

375. *Id.* at 71.

376. *Id.*

377. *Id.*

378. *Id.* at 75.

379. *Id.* at 75-76.

380. *Id.* at 71.

in fact, been established for at least fifteen nominating commissions.³⁸¹

The third major study of nominating commissions was recently conducted by the American Bar Foundation for the ABA.³⁸² The study, based upon written surveys³⁸³ to chairs³⁸⁴ of nominating commissions in thirty-four states and the District of Columbia, examined "the perceived success of existing merit selection commissions in identifying and bringing qualified candidates to the bench."³⁸⁵

In the area of political influences on commissioners, two questions were asked. The first was: "Either on a personal or commission-wide basis, how often were political influence or considerations introduced into your deliberations about candidates for judicial positions?"³⁸⁶ The data show that 1% of the commissioners felt that political considerations "always" entered into their deliberations; 7% said "frequently"; 13% said "sometimes"; 31% said "infrequently"; and 48% said "never."³⁸⁷

The second question relating to politics was: "How important have political considerations been in determining the eventual selection made by the appointing authority?"³⁸⁸ The data show that 17% of the commissioners felt that political considerations were of "decisive importance," 34% felt they were of "some importance," 13% said they were of "little importance," 21% said they were of "no importance," and 15% said they were "unable to evaluate" the extent of political considerations in the selection process.³⁸⁹ The study concluded as follows with regard to the issue of politics:

While there seemed to be general agreement that political concerns did not intrude at the commission level, they may appear when the ultimate selection is made by the appointing authority. It should be remembered that the commissioners were satisfied with the candidate pool that they passed along for consideration, so the potential intrusion of politics at the final stage is mitigated because the pool is deemed qualified.³⁹⁰

381. See *infra* Appendix A, Table 5.

382. See JOANNE MARTIN, MERIT SELECTION COMMISSIONS: WHAT DO THEY DO? HOW EFFECTIVE ARE THEY? (1993).

383. Of the ninety-one surveys that were sent, seventy-six were returned, yielding a response rate of 84%. *Id.* at 4.

384. Chairs were chosen "because they were more likely than other commissioners to have a broader view of the process and to have experienced a longer term on the commission. The commission chairs were also likely to be the chief justices of their respective supreme courts." *Id.*

385. *Id.*

386. *Id.* at 34.

387. *Id.* at 20.

388. *Id.* at 34.

389. *Id.* at 21.

390. *Id.* at 23. Additional procedural concerns of respondents in the ABA study included: (1) the need for "methods of attracting more minority and women candidates," and high quality

The data regarding the influence of politics, as reflected in the aforementioned studies of merit selection show a declining level of political influences over time. Of course, it may be argued that the survey research and interview methods are inadequate measures of the level of political influences on commissioners, as Watson and Downing pointed out.³⁹¹ But as they also note in their study of the Missouri Plan:

[T]he Plan purports to provide representation for four general interests concerned with judicial selection: the organized Bar, the judiciary, the general public, and the state political system.

Viewed in this context, it is naive to suggest (as some of the Plan's supporters do) that the Plan takes the "politics" out of judicial selection. Instead, the Plan is designed to bring to bear on the process of selecting judges a variety of interests that are thought to have a legitimate concern in the matter and at the same time to discourage other interests. It may be assumed that these interests will engage in the "politics" of judicial selection, that is, they will maneuver to influence who will be chosen as judges (1) because such judgeships constitute prestigious positions for aspiring lawyers, and (2) because, in the course of making decisions, judges inevitably affect the fortunes of persons and groups involved in the litigation process. *Whether the Plan eliminates politics in judicial selection is a false issue. Instead, the key issue is whether the particular kind of politics that evolved under the Plan adequately represents the legal, judicial, public, and political perspectives thought to be important in determining who will sit on the bench.*³⁹²

Thus, politics can never be completely eliminated from the judicial selection process under a merit plan, or any plan, for that matter.³⁹³

candidates generally, (2) the problems "in identifying the requisite number of candidates to recommend," (3) the "lack of funds available to support commission work," (4) the "effects of media involvement" in the selection process, (5) "the interface between lawyer and lay members of the commission," (6) the "lack of training sessions," and (7) politics at the selection stage. *Id.* at 22-23.

See also Susan Carbon et al., *Women on the State Bench: Their Characteristics and Attitudes About Judicial Selection*, 65 JUDICATURE 294, 299-301 (1982):

The literature and our data suggest that women become actively involved in party politics less frequently than men. . . .

....
 Nearly 60 per cent of the women [judges] reported that prior professional experience was one of the most important factors in becoming a judge. Interestingly, those appointed by a governor using a nominating commission held this belief with greatest frequency. . . . These findings appear to lend credence to the claim that nominating commissions emphasize professional experience above other factors, such as party service.

391. See WATSON & DOWNING, *supra* note 38, at 359.

392. *Id.* at 331-32 (emphasis added).

393. See Goldman, *supra* note 324, at 2 ("Perhaps the most important point worthy of emphasis is that all selection methods involve politics.").

According to Watson and Downing, it may not even be necessary to strive toward that goal. Some political considerations will inevitably enter into the process and can be viewed as a necessary means of taking interest pluralism into account in lieu of party politics under an electoral system. The issue is how to balance the need for the articulation of interests by a variety of segments of society, including the general public, and minimize the "problem politics" that jeopardize the fairness of the process.

G. *Satisfaction with Merit Selection*

Despite the passage of almost fifty-five years since its adoption, surprisingly few surveys have been conducted of lawyers, judges, and others regarding their satisfaction with the merit plan. The Watson and Downing survey of Missouri lawyers, however, indicated "a clear preference of metropolitan lawyers in the state for using the Nonpartisan Plan to select circuit judges."³⁹⁴ Lawyers practicing in certain fields were more inclined to favor the merit plan than others:

[T]hose groups of lawyers who originally favored the Plan when it was first proposed (that is, those representing defendants in personal injury cases and corporations in general) continue to be its major supporters, while the plaintiffs' and criminal attorneys, who fought the Plan in the 1930's, are much less enthusiastic about it. However, all groups favor it over the method of popular election.³⁹⁵

Attorneys practicing outside the metropolitan areas in Missouri who were employed by corporations and medium-sized law firms were more supportive of the plan than solo practitioners or those in small firms.³⁹⁶ Judges were not surveyed regarding their attitudes toward the Missouri Plan.

A 1967 study³⁹⁷ of judges and attorneys in six jurisdictions³⁹⁸ found, "[i]f not overwhelming, the support for the Merit Plan in all states considered is substantial."³⁹⁹ The majority of judges in three jurisdictions⁴⁰⁰ favored merit selection over any other selection system, while those in the remaining three jurisdictions favored either straight gubernatorial appointment, gubernatorial appointment with legislative

394. See WATSON & DOWNING, *supra* note 38, at 243.

395. *Id.* at 243-44.

396. *Id.* at 249-50.

397. Charles H. Sheldon, *The Degree of Satisfaction with State Judicial Selection Systems: Lawyers vs. Judges*, 54 JUDICATURE 331 (1971).

398. Maine, New Hampshire, Nevada, Suffolk County in New York, Utah, and Vermont. *Id.* at 332.

399. *Id.*

400. Nevada, Utah, and Vermont. *Id.* at 333.

approval, or nonpartisan elections.⁴⁰¹ "Apparently it is the partisanship which bothers the judges as well as the lawyers."⁴⁰²

A 1980 survey asked women state court judges which selection system, in their opinion, produces the highest quality judiciary.⁴⁰³ A majority believed that the merit plan produced the highest quality judiciary, and nearly the same percentage believed that partisan elections produced the lowest quality.⁴⁰⁴ When controlling for the method by which the respondents themselves reached judicial office, appointed women were found to believe that the merit plan produces the highest quality judiciary, while elected women tended to believe that nonpartisan elections do.

Women selected by governors using nominating commissions overwhelmingly believe that their system produces the highest quality bench. A plurality of those selected in nonpartisan elections also believe their system produces the best judiciary. However, a majority of those selected by straight appointment and by partisan elections evidently believe that their systems do not produce the highest quality bench.⁴⁰⁵

Another study⁴⁰⁶ examined the attitudes of appellate judges toward different judicial selection methods. Of the 562 appellate judges from 49 states surveyed,⁴⁰⁷ 56% favored the merit plan for appellate courts and 48% favored it for trial courts, with nonpartisan elections coming in "a distant second."⁴⁰⁸ A geographic pattern was also found in the data, indicating that merit selection was most favored in the West and Midwest, where merit plans have been widely adopted.

Support for the merit plan is significantly weaker in the North and South, where judicial election is still a common phenomenon. Interestingly, judges in the North and South were much more likely to regard judicial selection as an 'urgent' problem than were judges in the West and Midwest. . . . One can infer that there is greater dissatisfaction with existing judicial selection systems in those states where judicial elections are still employed. Conversely, merit plans appear to produce little dissatisfaction among appellate judges.⁴⁰⁹

401. New Hampshire, Maine, and Suffolk County in New York. *Id.*

402. *Id.* at 334.

403. See Carbon et al., *supra* note 390, at 302-03.

404. *Id.* at 303.

405. *Id.*

406. John M. Scheb, II, *State Appellate Judges' Attitudes Toward Judicial Merit Selection and Retention: Results of a National Survey*, 72 JUDICATURE 170 (1988).

407. The response rate to the survey is reported to be 52.8%. *Id.* at 171.

408. *Id.* at 172.

409. *Id.* at 173. The researcher also found that, "while the Missouri Plan enjoys widespread support across selection mechanisms, there is an understandable tendency for judges to prefer those selection systems that brought them into the appellate judiciary." *Id.*

As the recent American Bar Foundation study⁴¹⁰ of merit commissions concluded, "Reviewing the merit selection process in its entirety, most of the commission chairs viewed it very positively. . . . 89 percent were satisfied either always or in the majority of instances with the quality of the candidates whose names they passed along to the appointing authorities."⁴¹¹

Thus, while only a few surveys have measured it, the available data show a high level of general satisfaction with merit selection among attorneys, trial and appellate judges, and women state court judges. More research is needed to elicit such satisfaction data from the general citizenry and, in particular, the frequent litigants in the court system.

VI. CURRENT ISSUES

In addition to the perpetually debated issues surrounding merit selection, such as whether it produces "better" judges and whether it reduces or eliminates politics from judicial selection, new issues continue to arise as a consequence of several factors. These include: (1) new legislation that impacts upon the merit system, such as changes in laws regulating employment; (2) new developments relating to judicial administration, such as judicial performance evaluations; (3) local controversies involving unethical or highly political commissioner conduct leading to objectionable judicial appointments and a resulting loss of public confidence in the process; and (4) social trends resulting in new policies, such as the movement toward equality and diversity. Some examples of these are discussed below.

A. *The Americans with Disabilities Act*

Congress enacted the Americans with Disabilities Act of 1990 ("ADA")⁴¹² upon its findings that society has historically discriminated against the disabled in, among other things, "such critical areas as employment."⁴¹³ The ADA protects a "qualified individual with a disability," defined as a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."⁴¹⁴ The ADA further defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being

410. See MARTIN, *supra* note 382.

411. *Id.* at 22.

412. 42 U.S.C. §§ 12101-12213 (1988).

413. 42 U.S.C. §§ 12101(a)(2)-(3) (1988).

414. 42 U.S.C. § 12111(8) (1988).

regarded as having such an impairment.”⁴¹⁵

Under Title I of the ADA, regulating employment, any “employer” is subject to the ADA; the United States is excepted from the act,⁴¹⁶ but states are not. The ADA, on its face, appears to apply to merit selection because it is part of the process of employing state judicial officers.

The clearest application of the ADA is to a nominating commission’s process of obtaining information about judicial applicants’ mental and physical condition. The ADA prohibits any employer at the “pre-employment” stage from either conducting or requiring any medical examination, and from making inquiries of a job applicant “as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.”⁴¹⁷ The only acceptable inquiries are those into “the ability of an applicant to perform job-related functions.”⁴¹⁸

An employer may, however, require a medical examination or inquire about a mental or physical condition “after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination” on the condition that (1) “all entering employees are subjected to such an examination regardless of disability” and (2) information about the applicant’s condition is kept confidential, with certain limited exceptions.⁴¹⁹

Immediate questions arise about the manner in which a nominating commission should carry out its functions in compliance with ADA requirements. A threshold question is whether appointed public officials such as judges are “employees” within the meaning of the ADA. If so, then the protections of the act apply to the judicial appointments process. In that case, the mental and physical health data previously requested and obtained by nominating commissions about judicial applicants would now appear to be unavailable under the ADA. Moreover, this leads to the question of whether elected public officials are “employees” within the meaning of the ADA, and the attendant implications of that interpretation with respect to candidates’ mental and physical health data.

415. 42 U.S.C. § 12102(2).

416. 42 U.S.C. § 12111(5)(B)(i) (1988).

417. 42 U.S.C. § 12112(d)(2)(A) (1988).

418. 42 U.S.C. § 12112(d)(2)(B) (1988). The “essential functions” of the employment position are determined, according to the ADA, by giving consideration “to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.” 42 U.S.C. §§ 12111(8).

419. See 42 U.S.C. § 12112(d)(3).

There appears to be only one instance in which these issues have been addressed in the merit selection context.⁴²⁰ An attorney for the Equal Employment Opportunity Commission (EEOC), which has jurisdiction over ADA compliance,⁴²¹ recently provided technical assistance to the legal services officer of a state supreme court who asked the above questions⁴²² in an effort to clarify the law as it applies to judges and judicial nominating commissions.

The EEOC letter⁴²³ stated that judges are covered "employees" under the ADA, that no exemptions apply to them, and that therefore both appointed and elected judges "*appear*"⁴²⁴ to be covered by the ADA, "although we are continuing to study this issue."⁴²⁵

As to the issue of medical information, the letter states that the prohibition upon a pre-offer request for or review of such information applies to judicial nominating commissions. Requesting that medical information be submitted in a sealed envelope, to be opened only in the event the applicant is ultimately selected from the list of nominees, would also violate the ADA, according to the EEOC letter.⁴²⁶

In applying the ADA to judicial elections, the letter further states, in somewhat of a contradiction to the earlier statement including elected judges within the ambit of the act, that restrictions upon pre-employment medical information "do not appear to be applicable, from a practical perspective, in most election situations."⁴²⁷ This is because "(1) there is generally no clearly identifiable pre-offer or post-offer stage;⁴²⁸ (2) there is no clearly identifiable offer and no practical mechanism for 'withdrawing' it"; and, (3) while the press and the public may inquire, no state usually inquires into disability-related questions in the election process.⁴²⁹ If commissions were to nominate those running for elective

420. See Letter from Elizabeth M. Thornton, Acting Legal Counsel, U.S. Equal Employment Opportunity Commission to David L. Withey, Legal Services Officer, Arizona Supreme Court (Sept. 15, 1993) (on file with the author).

421. See 42 U.S.C. § 12117.

422. See Letter from David L. Withey, Legal Services Officer, Arizona Supreme Court, to Richard Trujillo, Regional Attorney, EEOC (Aug. 6, 1993) (on file with the author).

423. The letter specifically states that it is "not an official opinion of the Equal Employment Opportunity Commission. . . . [T]he EEOC is continuing to study some of these issues; this letter reflects our initial impressions on these topics." Thornton, *supra* note 420, at 3.

424. *Id.* at 1.

425. *Id.*

426. *Id.* at 2.

427. *Id.*

428. *Id.* The letter notes that if an election involved a nominating committee, it could be argued that the "offer" is the committee's nomination of the person to the ballot. Alternatively, the "offer" can be said not to occur until the actual election to office, "since this is the point when the individual is actually offered employment." *Id.* at 3 n.3.

429. *Id.* at 2.

office, such commissions would be deemed to be acting as "employment agencies," which are also covered under the act.⁴³⁰

This view of the ADA's applicability to judicial nominating commissions may come as a surprise to those involved in the merit selection process. Yet recent decisions upholding the ADA's applicability to bar association character and fitness committees give early signs that the ADA is indeed applicable to judicial selection.⁴³¹

One approach taken recently to the prohibition on medical inquiries by the ADA is the development of a job description for judicial offices. The Alaska Judicial Council recently developed a "Judicial Position Description" for, *inter alia*, the District Court judgeship in Anchorage. It contains the "essential functions"⁴³² of the job of judging in that court.⁴³³ Similar judicial job descriptions will enable nominating com-

430. *Id.* at 2-3. See 42 U.S.C. § 12111(2).

431. See, e.g., *In re Underwood*, W.L. 649283 (Me. 1993) (holding that state bar inquiry regarding mental treatment violates the ADA); *Ellen S. v. Florida Bd. of Bar Examiners*, 859 F. Supp. 1489 (S.D. Fla. 1994) (denying defendant bar examiners' motion to dismiss complaint alleging ADA violation based on bar inquiry regarding plaintiffs' mental health). Cf. *Applicants v. Texas Bd. of Bar Examiners*, No. 93 CA 740SS (W.D. Tex. Oct. 10, 1994) (finding that "the Boards's narrowly focused inquiries and investigation into the mental fitness of applicants to the Texas bar who have been diagnosed or treated for bipolar disorder, schizophrenia, paranoia, or any psychotic disorder do not violate the ADA").

432. See *supra* note 418 and accompanying text.

433. *Judicial Position Description*, Anchorage District Court, Third Judicial District:

The Anchorage District Court judges preside over a limited jurisdiction trial court serving Anchorage in the Third Judicial District. In FY 1993, the Anchorage District Court had filings of 42,192 cases of which 8,860 were misdemeanor matters, 24,282 were traffic cases and 9,050 were civil matters (including 5,537 small claims cases). The nine Anchorage district court judges are responsible for managing this caseload.

A district court judge must be a citizen of the United States and of the state of Alaska, at least 21 years of age, resident of Alaska for five years immediately preceding appointment, and (1) have been engaged in the active practice of law for not less than three years immediately preceding appointment, and at the time of appointment be licensed to practice law in Alaska; or (2) have served for at least seven years as a magistrate in the state. A magistrate who seeks an appointment as a district court judge must also be a graduate of a law school accredited or approved by the Council of Legal Education of the American Bar Association or the Association of American Law Schools. The active practice of law is defined in AS 22.05.070.

To perform the job of district court judge in Alaska, a person must be able to understand written and oral communications, communicate well in writing and orally, be capable of a high level of analytical legal reasoning, possess unimpaired judgment and the ability to concentrate and evaluate evidence and arguments, and render decisions in a timely and even-handed fashion. A judge must be able to treat parties, attorneys, members of the public and employees with fairness, courtesy and respect, and to work under pressure. A judge must be familiar with Alaska law and procedure and trial practice. Judges in Alaska must conform their conduct to the Code of Judicial Conduct and to the laws of the State of Alaska and of the United States.

missions to obtain, for example, information about the applicant's ability to sit and concentrate for long periods of time on the bench, read extensively, maintain proper judicial temperament toward people before the court, and similar abilities, without making a medical inquiry.

Under existing law and regulations,⁴³⁴ nominating commissions are prohibited from requesting or obtaining medical information about any

In addition, fulfilling the responsibilities of a district court judge in Alaska often involves sitting (or standing) at a desk or bench for prolonged periods of time. Travel (usually by airplane, and often by small airplane) to rural areas, sometimes in cold or wet weather, often is required. The district court judges in Anchorage are assisted by and are responsible for the supervision of secretarial staff and two law clerks.

District court judges stand for retention at the first general election more than two years after initial appointment and every four years thereafter.
(on file with the author).

The relevant portion of a newly developed job description for Iowa's district court judges, after describing the nature of the cases heard by such judges, states:

District Judges, therefore, travel long distances and may be required to spend long hours on the job.

....
It is most desirable that the person acting as a judge be kind, considerate, patient, attentive, and thorough, as well as firm and direct when the occasion requires.

The Council on Judicial Selection, Handbook for Iowa Judicial Nominating Commissioners (May, 1990). As more states develop such judicial job descriptions, they will be further refined and include additional physical requirements.

434. The EEOC recently issued a document entitled EXECUTIVE SUMMARY ENFORCEMENT GUIDANCE ON PREEMPLOYMENT DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 (May 19, 1994), which is a set of guidelines that are to be included in Volume II of the EEOC COMPLIANCE MANUAL. The document contains, inter alia, examples of "very limited instances when an employer may be able to show that it could not reasonably evaluate non-medical information at the pre-offer stage." *Id.* at 37. In other words, an exception is created to the general rule prohibiting medical inquiries unless a bona fide offer of employment is made first. This exception is conditioned upon a satisfactory medical history for which examples are given. No specific reference is made in these guidelines, or in any other EEOC regulations, to employment situations like those under a merit selection system.

The exception is created for employers who give bona fide job offers "to fill reasonably anticipated openings," i.e., where "an employer may be able to demonstrate that, for legitimate purposes, it must provide a specific number of job offers to fill currently available positions or reasonably anticipated vacancies." *Id.* at 38. In those circumstances, the medical inquiries or tests would be allowed after the "offer" is made, although such employees do not in fact begin their employment immediately. "For example, an employer may demonstrate that it needs to have a pool of ready employees, and that a certain percentage of the offerees will likely be disqualified or will withdraw from the pool." *Id.*

Three examples are given. In one, a police department may be able to demonstrate that it needs to make offers to fifty applicants for twenty-five available positions because (1) for public safety reasons, it needs to have police officers who are ready and able to start work when a vacancy occurs, and (2) it is likely that approximately one-half of the offers will be revoked based on post-offer medical tests and inquiries or other reasons. *Id.* The second example given is a case in which a maritime industry employer may be able to demonstrate that it needs to make offers of employment to one hundred applicants to fill sixty available positions because (1) ships are in dry dock for a short period of time and the employer must have crew members who are ready and able

to fill any vacancies on outbound ships, and (2) it is likely that some of the offers will be revoked based on post-offer medical tests or inquiries or other reasons. *Id.* at 39.

The third example is most closely resembles judicial selection under a merit plan. This case describes a law firm that may wish to use the same argument to justify "offers" that will not result in immediate hiring followed by medical inquiries or tests. "It is unlikely that a typical law firm can demonstrate that it needs to make offers to three applicants for one available attorney position. The law firm probably cannot demonstrate that it must have a ready pool of lawyers to fill vacancies, and that offers to two of the three attorneys are likely to be revoked based on post-offer examinations or procedures." *Id.* Thus, given this third example, it is questionable whether the EEOC would treat a court system differently than a law firm.

Even assuming, *arguendo*, that the courts could be analogized to the police department example so as to justify the "hiring" of a pool of judicial applicants, additional problems arise. First, there is the issue of whether an appointing authority or a nominating commission has the legal authority to establish a pool of judicial applicants for vacancies that have not in fact yet arisen. Second, because the appointing authority under a merit plan is the official who makes the actual "offer" of employment, not the nominating commission, the commission would still be precluded under the ADA from making medical inquiries of anyone in such a pool. Third, since the appointing authority is the only official permitted to make a medical inquiry and he or she must first make a bona fide offer of employment in order to make such an inquiry, such an offer would first have to be made to all the nominees recommended by the nominating commission. That places the appointing authority in the untenable position of having to offer one judicial position to all of the nominees if all have unremarkable medical histories.

To complicate things further, the EEOC guidelines require that, in the case of pool employment, employers must establish the bona fides of their offers of employment to members of the pool by "preestablished, objective standards (such as the date of application)," that are "job-related and consistent with business necessity." *Id.* The purpose of this requirement is to assure that "the procedures used by the employer for taking individuals from the 'pool' in order to ensure that these standards are followed," and do not have an adverse impact upon protected individuals. *Id.*

According to the EEOC, "[s]uch pre-established objective standards are important to ensure that the individual knows whether his/her position in the hiring priority order has changed as a result of a post-offer medical evaluation. This furthers the ADA's objective of separating an evaluation of an individual's qualifications from his/her disability." *Id.* at 39 n.56.

The guidelines state that a valid example of an "objective standard" is the date of application. *Id.* at 39. An example of an invalid "objective standard" is an employer's policy that "evaluates which applicant in the pool should get the job only when an opening occurs. In this case, [the employer] did not make bona fide job offers for purposes of the ADA when it placed individuals into the pool." *Id.* at 40. Further, if the "objective standard" of hiring from the pool includes a policy of "re-ranking" the order of the members of the pool as a result of the post-offer medical inquiry, the guidelines require that members of the pool be informed of their "overall ranking" (1) "prior to any post-offer re-ranking" and (2) "after any post-offer re-ranking." *Id.* Finally, if an employer lowers the rank of an individual in a pool, "the employer must demonstrate to the investigator that the standard used to lower the rank is job-related and consistent with business necessity." *Id.*

The implications of the aforementioned requirements are (1) that nominating commissions may be able to claim an exemption from the ADA by virtue of the employment pool exception; (2) that the exception would require a ranking of all nominees, which is not currently a common practice among commissions; (3) that the ranking would need to be established by either the commission, the appointing authority, or both; and (4) that nominees would be entitled to notice of these rankings and the "objective standards" upon which they are based. In the event, therefore, that a nominee who is protected by the ADA is not appointed to judicial office under a merit plan and makes a claim under that statute, the nominating commission and appointing authority would be hard-pressed to establish their compliance with ADA, absent these elaborate policies and standards for pool hiring required by the EEOC.

judicial applicant unless voluntarily disclosed. State supreme courts, nominating commissions, judicial councils, and other entities that have a role in judicial selection should, therefore, consider establishing job descriptions that state the essential functions of the judicial position in order to maximize the legally obtainable information about an applicant's medical condition. Prudent nominating commissions and appointing authorities⁴³⁵ should provide prior and adequate notice to all applicants that an appointment to judicial office is contingent upon submission of medical information that establishes the nominee's fitness.⁴³⁶

The ADA will also affect the process by which nominating commissions conduct interviews of judicial applicants. Commentators point out the quandary in which employers find themselves under the act: they are prohibited from asking (at the pre-offer stage) about the existence, nature, or severity of a disability, an applicant's ability to perform major life functions, such as walking or standing, or whether an applicant needs accommodation in order to perform job-related tasks; but they *may* inquire about the ability to perform either essential or marginal job functions, and may ask the applicant to describe or demonstrate how

Clearly, this is an area that the EEOC must address, but it is doubtful that administrative regulations can be promulgated that create an exception to the ADA for merit selection processes, particularly in light of the difficulty of applying the employment pool exception to the case of merit selection. It is only a matter of time before the issue is litigated. The judiciary in merit selection states can either work towards the amendment of the ADA to exempt merit plans, or the promulgation of new EEOC regulations that address the features of merit selection that make it unique from other methods of employee selection.

435. Since apparently no state requires a physical fitness test for *elective* offices, the ADA prohibition upon pre-employment requests or review of medical information is irrelevant for those offices. If, however, as the aforementioned letter from the EEOC attorney suggests, a nominating committee decides on the nominees for an elective office, the ADA may apply. The question arises whether or not *political party* nominating committees, as distinguished from governmental nominating committees such as judicial nominating commissions, would be subject to the ADA. It would appear that they would be considered an "employment agency" under the ADA, as the EEOC's attorney suggests, and therefore prohibited from inquiring about an applicant's medical condition. See Thornton, *supra* note 420, at 2-3.

436. One possible future scenario is one in which an appointing authority makes his or her offer of employment, after which the medical inquiry establishes some type of unfitness for judicial office, and thus the next best nominee is selected. This raises issues under the aforementioned EEOC rules governing hiring from pools. See *supra* note 434. The most relevant rule here being the requirement that "objective standards" be established prior to hiring that initially rank and then later, after the first hiring, re-rank members of the pool. The application of this requirement to judicial merit plans, or any gubernatorial appointment system for that matter, will be particularly challenging. What governor will be willing to use the date of application, for instance, to determine rankings among the nominees recommended by a nominating commission? What other "objective standards" might be established for such rankings in the judicial selection setting?

Even assuming the problem of "objective standards" for ranking can be overcome, there is always the possibility that the next-ranked nominee will also have an adverse medical history. If all the nominees are disqualified from appointment due to adverse medical histories, the merit selection process will have to begin anew.

he or she would perform the job-related activities, with or without reasonable accommodation.⁴³⁷

B. Diversity

Research into the demographic composition of the judiciary began in the 1970s. One of the earliest studies found that African-American judges were on the bench in greater numbers in Northern states, and sat primarily in the limited jurisdiction courts which generally did not require bar membership.⁴³⁸ The concentration of minority judges in the courts of limited jurisdiction has continued to recent times, according to data reported in 1990.⁴³⁹ "It is likely that limited jurisdiction courts serve as important access routes for black judgeships in the state judiciary and subsequently advancing through the judicial hierarchy."⁴⁴⁰

Early efforts to determine which selection system is the most effective means of enhancing diversity on the bench reached different conclusions. While most minority judges in the South have historically been elected, in the North they have reached office through nonpartisan elections. Partisan elections were the least likely selection system for minority judges to attain office and appointment systems showed inconclusive results.⁴⁴¹

Other early research showed that, while fifty-five percent of minority judgeships were listed as elective, seventy-seven percent of African-American jurists surveyed were initially appointed to the bench, often to fill a judicial vacancy.⁴⁴² A minority candidate's professional standing, political party, and friendships were more influential in attaining judicial office than success in elections.⁴⁴³

437. Kimberly L. Love & Mary L. Lohrke, *New EEOC Guidelines Baffle Employers*, 65 OKLA. B.J. 3301 (1994).

438. See, e.g., Beverly B. Cook, *Black Representation in the Third Branch*, 1 BLACK L.J. 260, 271 (1971).

439. See Barbara L. Graham, *Judicial Recruitment and Racial Diversity on State Courts: An Overview*, 74 JUDICATURE 28, 30-31 (1990) ("The fact that most black judges [almost 60 percent] in the state judiciary are located on limited jurisdiction courts also suggests that they currently have limited opportunities to participate in judicial policymaking at the trial and appellate levels.").

440. *Id.* at 30-31. See also JOHN P. RYAN ET AL., *AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE* (1980); MICHAEL D. SMITH, *RACE VERSUS ROBE: THE DILEMMA OF BLACK JUDGES* (1983).

441. See Cook, *supra* note 438, at 264, 266.

442. See SMITH, *supra* note 440, at 60.

443. See also Barbara L. Graham, *Do Judicial Selection Systems Matter? A Study of Black Representation on State Courts*, 18 AM. POL. Q. 316, 322-23 (1990) (finding that, based on data from thirty-six states, formal structures made little difference in minority representation because most "informal" routes to judicial office came via initial appointments through either a gubernatorial or legislative appointment system).

A 1973 AJS study found that most African-American judges, then constituting 1.3% of the state judiciary nationwide, attained office through some form of appointment process. The low percentage was attributed largely to the small number of minority lawyers at the time.⁴⁴⁴

Thus, a prevailing view in the mid-1970s was that African-American judicial hopefuls were better off with the elective rather than the appointive process. "One of the reasons for this belief is that in the appointive process, blacks generally are not represented in sufficient numbers to make an impact, and thus are more likely to be overlooked in favor of their white counterparts."⁴⁴⁵ Merit selection, on the other hand, was only appropriate where "appointing bodies [are] . . . aware of and responsive to the need for more black judges."⁴⁴⁶

In 1985, the Fund for Modern Courts⁴⁴⁷ reported the results of its national survey of minorities and women on the state bench. It concluded, that "[t]he success of women and minorities in achieving judicial office depends in large measure upon the method of selection."⁴⁴⁸ A higher percentage of women and minorities achieved judicial office through an appointment process, either Executive Appointment (17.9%) or Merit Selection (17.1%), than an elective process, whether Judicial Election (11.7%), Partisan Election (11.2%), Nonpartisan Election (9.4%), or Legislative Election (6.9%).⁴⁴⁹

In its more recent 1992 study,⁴⁵⁰ the Fund for Modern Courts examined data from New York and concluded that "merit selection produces a more younger, more representative, better-educated, highly qualified and more politically diverse judiciary" than the elective system.⁴⁵¹

Subsequently in 1993, two additional AJS studies⁴⁵² corroborated

444. Cf. Dubois, *supra* note 286, at 64-65 (finding only minor differences between elective and appointive systems for female and non-white judges in California, but also attributing this fact to their underrepresentation in the legal profession); Nicholas O. Alozie, *Black Representation on State Judiciaries*, 69 Soc. Sci. Q. 979, 985 (1988) (finding that the percentage of minority lawyers in a state is the most significant factor in explaining the number of minority judges in that state, and not the formal methods of selection).

445. *The Black Judge in America: A Statistical Profile*, *supra* note 288, at 18.

446. *Id.* at 25. As one respondent to an early survey on the subject put it, before Voters' Rights Act litigation began in earnest, "The practical end of it is that since there are few registered black voters, both the elective and the assignment [appointive] processes of selecting judges is needed." See Coalition of Concerned Black Americans, *A Preliminary Report of the Experiences of the Minority Judiciary in the City of New York*, 18 How. L.J. 495, 542 (1975).

447. See FUND FOR MODERN COURTS, *supra* note 294.

448. *Id.* at 65-69.

449. *Id.*

450. See Henry, *supra* note 297.

451. *Id.* at 23.

452. African-American Judges Currently Serving on State Courts of Last Resort and Intermediate Appellate Courts: Methods of Initial Selection 1 (Jan. 1993) (unpublished study on

those findings for the appellate bench nationwide. The data revealed that, of the five major methods of judicial selection in the United States, the largest proportion of African-Americans (32%) and women (35%) attained judicial office through a merit plan.⁴⁵³

As for the demographic composition of nominating commissions, researchers reported in 1974 that there were only two African-Americans among the 194 lawyers (including judges) on nominating commissions nationwide. They concluded that "the goal of a representative cross-section of the community in terms of racial make-up is not being fulfilled."⁴⁵⁴ Only 10.4% of the commissioners were women.⁴⁵⁵

The only other national survey⁴⁵⁶ of nominating commissioners, published in 1990, found the following:

While there have been slight increases in the numbers of minority commissioners, as a group, judicial nominating commissioners remain overwhelmingly white A few states, however, have greater minority representation than the general pattern would suggest. . . . Variations across the states may be due to . . . the sensitivity of the appointing authority to placing minorities on the commissions and the size of the minority population in a given state.⁴⁵⁷

There is a nationwide trend to address the lack of diversity on the bench by explicitly adding racial and gender diversity as a criterion for the selection of both nominating commissioners and judicial appointees. AJS stated its position on the issue as follows:

Since nominating commissions are the cornerstone of the merit plan, it is essential that citizens perceive the commissions as reflecting the

file with American Judicature Society) [hereinafter African-American Judges]; Women Judges Currently Serving on State Courts of Last Resort and Intermediate Appellate Courts: Methods of Initial Selection 1 (Jan. 1993) (unpublished study on file with American Judicature Society) [hereinafter Women Judges].

453. For African-Americans, 20% were selected by gubernatorial appointment (without a nominating commission), 15% were elected in nonpartisan elections, 11% were elected in partisan elections, 6% were elected by state legislatures, and 15% reached the bench through other methods. African-American Judges, *supra* note 452, at 1. As to women judges, 27% reached the bench through gubernatorial appointments (without a nominating commission), 18% were elected in nonpartisan elections, 11% were elected in partisan elections, 4% were elected by state legislatures, and 6% reached the bench through other methods. Women Judges, *supra* note 452, at 1.

The debate regarding which judicial selection system is the best for enhancing diversity on the bench continues to rage. See *infra* Part VI.C (discussing the effect of Voting Rights Act litigation on the question).

454. ASHMAN & ALFINI, *supra* note 189, at 38.

455. *Id.* at 39.

456. See Beth M. Henschen et al., *Judicial Nominating Commissioners: A National Profile*, 73 JUDICATURE 328 (1990). The third and most recent study of nominating commissions by the ABA Foundation in 1993 did not inquire into demographic composition. MARTIN, *supra* note 382.

457. Henschen et al., *supra* note 456, at 330.

ethnic and gender diversity of the jurisdiction involved. Unfortunately, in the absence of diversity the legitimacy of some commissions may be called into question. . . .

. . . .

. . . [I]t must be recognized that the presence of demographically balanced commissions will foster public confidence in the commissions and enhance the credibility of their work . . . and in doing so assist in recruiting qualified applicants. . . .

. . . We are not advocating mathematical representation on either the commissions or the bench. However, we believe that recognition of our multicultural society in commission membership will lead to a richer judicial applicant pool and, inevitably, an even more distinguished bench.⁴⁵⁸

As noted previously,⁴⁵⁹ the *AJS Model Provisions* now contain a requirement that appointing authorities under merit plans "make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic, and racial diversity of the jurisdiction." The diversity provisions promulgated by or for nominating commissions in twelve states⁴⁶⁰ use similar language for the selection of commissioners, for the nominees selected by nominating commissions, and for the final judicial appointments.

As for commission membership, some states require a specified number of minority commissioners. Florida requires that all nominating commissions have at least one member of the state bar "who must be a member of a racial or ethnic minority group or a woman," at least one public member appointed by the governor who satisfies this criterion, and at least one public member elected by a majority vote of six sitting commissioners who satisfies this criterion.⁴⁶¹ Other states simply require appointing authorities to "ensure that the permanent members of the commission include women and minorities."⁴⁶²

In Tennessee, the speakers of both legislative houses select some of the commissioners from a list of nominees submitted by the state bar and other groups. According to the provisions, "[i]f the nominees do not reflect the diversity of the state's population, the speaker shall reject the entire list of a group and require the group to resubmit its list of nominees."⁴⁶³ Maryland requires that "[t]o the fullest extent possible, the

458. Editorial, *Judicial Nominating Commissions—the Need for Demographic Diversity*, 74 JUDICATURE 236 (1991).

459. See *supra* note 97 and accompanying text.

460. Arizona, Florida, Iowa, Maryland, Massachusetts, Minnesota, Missouri, New York, Rhode Island, Tennessee, Utah, and West Virginia. See *infra* Appendix A, Table 5.

461. FLA. STAT. ANN. § 43.29 (West 1991).

462. MINN. STAT. ANN. § 480B.01(2)(e) (West 1990).

463. TENN. CODE ANN. § 17-4-102(b)(2) (1994). "Each Speaker in making the appointments

composition of the members appointed by the Governor shall fairly and appropriately reflect the minority and female population of the area from which appointed."⁴⁶⁴

As for recruitment and selection of nominees by the nominating commissions, the Arizona State Constitution states that the nominating commissions for trial and appellate court appointments "shall consider the diversity of the state's population, however, the primary consideration shall be merit."⁴⁶⁵ In Massachusetts, "judicial candidates should be drawn from a cross-section of our community, representing not only geographically diverse parts of the Commonwealth, but reflecting as well a diversity of experience and background."⁴⁶⁶ In Utah, the interest in a diverse bench is expressed in this way:

When deciding among candidates whose qualifications appear in all other respects to be equal, it is relevant to consider the background and experience of the candidates in relation to the current composition of the bench for which the appointment is being made. The idea is to promote a judiciary of sufficient diversity that it can most effectively serve the needs of the community.⁴⁶⁷

As to the decision of the appointing authority, the Arizona Constitution contains a diversity provision applicable to gubernatorial appointments: "In making the appointment, the governor shall consider the diversity of the state's population for an appellate court appointment and the diversity of the county's population for a trial court appointment, however the primary consideration shall be merit."⁴⁶⁸

It is too early to evaluate the effect of these recent changes in merit plan selection criteria and procedures on diversity in the courts. Despite the gains made by minorities and women in reaching judicial office through merit plans, serious challenges to merit selection are now being

to the judicial selection commission shall appoint persons who approximate the population of the state with respect to race, including the dominant ethnic minority population, and gender." *Id.* § 17-4-102(b)(3).

464. See Exec. Order 01.01.1991.os of Gov. William D. Schaefer at § B(1)(b)(iv) (1991).

465. See ARIZ. CONST. art. VI, §§ 36, 41. Concerns by minority groups in Arizona regarding the composition of nominating commissions themselves led to the enactment of another constitutional change. There is now a procedure for the selection of a nominating *committee* from any county district in which there arises a nonattorney member vacancy on the nominating commission. The constitution provides that "The make-up of the committee shall, to the extent feasible, reflect the diversity of the population of the district." *Id.* § 41C. The governor then receives nominations for the position on the county nominating commission from that committee and makes the appointment to the commission, subject to legislative confirmation. In doing so, the governor, the legislature, and the state bar "shall endeavor to see that the commission reflects the diversity of the county's population." *Id.* § 41D.

466. See Exec. Order No. 355 of Gov. William F. Weld, 1 (May 24, 1993).

467. See Utah Manual of Procedures for Judicial Nominating Commissions 20 (revised 1991).

468. ARIZ. CONST. art. VI, § 37C.

heard from members of minority groups who are impatient with the perceived pace of minority judicial appointments. They contend that their best hope for achieving a diverse bench is not through merit selection, but an elective system that has been purged of any racial impact by the remedies afforded under the Voting Rights Act.

C. *The Voting Rights Act*

In 1965 Congress enacted the Voting Rights Act ("VRA"),⁴⁶⁹ which prohibits state action that denies or abridges the right to vote and guarantees equal participation in the political processes leading to elections. Before 1982, discriminatory intent was required to establish a violation of Section 2 of the VRA.⁴⁷⁰ In 1982, Congress amended the VRA to eliminate the requirement of discriminatory intent. Instead, a violation can now be established by evidence that an election system *results* in racial discrimination.⁴⁷¹

The VRA was originally used to challenge at-large elections⁴⁷² and discriminatory districting plans for elected positions in Congress, state

469. 42 U.S.C §§ 1971, 1973 to 1973bb-1 (1988):

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

470. See *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980).

471. See 42 U.S.C. § 1973 (1988); see *supra* note 469.

472. See Brenda Wright, *The Bench and the Ballot: Applying the Protections of the Voting Rights Act to Judicial Elections*, 19 FLA. ST. U.L. REV. 669, 670 (1992).

The potentially discriminatory features of at-large election systems are readily understood. When multiple officeholders are elected at large from a predominantly white election district, a minority group within the district may be unable to elect its preferred candidates to any positions. This occurs when voting is polarized along racial lines. The white electorate's ability to control the outcome of all of the elections under an at-large system creates a winner-take-all advantage for the majority group; even a substantial minority population may be effectively disenfranchised.

Id. (citations omitted).

legislatures, city councils, and other public bodies and boards.⁴⁷³ Until the mid-1980s, judicial elections had not been challenged under the VRA.⁴⁷⁴

A Section 2 violation of the VRA was first established in a Mississippi case in 1986, when the federal court found racial discrimination in the use of at-large elections for judges.⁴⁷⁵ The court remedied the situation by creating additional subdistricts in the state which would allow some subdistricts to have a majority of black voters.⁴⁷⁶ A flurry of suits followed, challenging both at-large voting schemes and judicial district lines.⁴⁷⁷ There were, however, still some lingering doubts about whether Section 2 of the VRA applied to judicial elections.⁴⁷⁸

The question of the applicability of Section 2 was specifically answered in the affirmative in 1991 when the United States Supreme Court decided *Chisom v. Roemer*.⁴⁷⁹ That case held that the language in the act stating that a violation could be established by proof that minorities have unequal opportunities to elect "representatives of their choice"⁴⁸⁰ applied as equally to judges as to any other elected public official.⁴⁸¹ A number of VRA cases have since been filed challenging state judicial elections.⁴⁸²

These suits resulted in a variety of remedial plans to cure violations of Section 2 of the VRA, either by agreement of the parties or by court order. In determining whether to approve the state's remedial plan, the federal court must defer to the state's policies as long as the plan cures the dilution of minority voting strength. The state is given an opportunity to propose a remedial plan⁴⁸³ before the federal court imposes

473. See Robert B. McDuff, *Judicial Elections and the Voting Rights Act*, 38 LOYOLA L. REV. 931, 934-35 (1993).

474. *Id.* "Because racial vote dilution lawsuits have typically been viewed as battles over the fair allocation of political power, this notion that judges are removed from representative politics at least partially accounts for the early absence of vote dilution challenges to judicial election systems." *Id.* at 935.

475. See *Martin v. Allain*, 658 F. Supp. 1183, 1194 (S.D. Miss. 1987).

476. See *Martin v. Mabus*, 700 F. Supp. 327, 349 (S.D. Miss. 1988).

477. See McDuff, *supra* note 473, at 938-39.

478. See *League of United Latin Am. Citizen Council No. 4434 v. Clements*, 914 F.2d 620, 621 (5th Cir. 1990) (en banc) (overruling a panel decision, the court held that Section 2 of the VRA was inapplicable to judicial elections).

479. 111 S. Ct. 2354 (1991).

480. 42 U.S.C. § 1973(b) (1988).

481. *Chisom*, 111 S. Ct. at 2364. The United States Supreme Court also held in *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991), decided on the same day as *Chisom*, that there are no differences between appellate and trial judges for purposes of the applicability of the VRA.

482. See McDuff, *supra* note 473, at 945.

483. Some states, when proposing a plan to remedy a Section 2 violation, must also obtain

one.⁴⁸⁴

[A] federal court hearing a judicial elections case has no power itself to impose merit selection or some other form of judicial appointment as a remedy. When a federal court is forced to fashion its own remedy in a voting rights case, the court is required to adhere to state policy as much as possible while still curing the violation. Because state laws or the state constitution already prescribe the election of judges as state policy in such a situation, abolishing competitive elections altogether in favor of some form of appointment would be much too drastic surgery.⁴⁸⁵

The recent dismissal by commentators⁴⁸⁶ of merit selection as a potential remedial measure under the VRA illustrates the challenge that merit selection supporters face with the minority community. It is true that the Supreme Court in *Chisom v. Roemer* said that, "Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed,"⁴⁸⁷ but commentators suggest that the shift itself is subject to a Section 2 challenge.⁴⁸⁸ "[T]here is something rather sinister about removing the power to vote for judges at the very time litigation under the Voting

preclearance from the U.S. Department of Justice if they were previously found to have histories of electoral discrimination. 42 U.S.C. § 1973c (1988); 28 C.F.R. § 55.

484. See Wright, *supra* note 472, at 683 (citing Upham v. Seamon, 456 U.S. 37, 42-43 (1982); White v. Weiser, 412 U.S. 783, 795 (1973); Cook v. Luckett, 735 F.2d 912, 918 (5th Cir. 1984)).

485. See McDuff, *supra* note 473, at 978 (citation omitted).

486. See, e.g., *id.* McDuff's recent article described two sets of remedial measures under the VRA, one that is "insufficient," and another that "can work." *Id.* at 977, 984. The "insufficient" remedies include (1) appointive systems, including merit selection, (2) retaining electoral systems but eliminating the majority vote requirement ("a plurality vote would be sufficient to win an election, and no runoff would be necessary in those elections where the candidates failed to garner a majority"), and (3) pure at-large elections in which only the number of posts are modified (i.e., "all candidates run in a pool and the winners are determined based on the number of seats open for election"; "[e]ach voter retains the same number of votes as there are seats available although voters can vote for fewer candidates if they desire"). *Id.* at 977-83.

Remedies that "can work" include (1) subdistricting, (2) limited voting ("all candidates run in a pool without designated divisions and the recipients of the top number of votes equivalent to the number of vacant seats are the winners"; "voters have fewer votes than the number of seats available"), (3) cumulative voting ("each voter has a number of votes equal to the number of seats available for election and can cast all of them for one candidate or for any combination of candidates"), and (4) realignment of existing district lines. *Id.* at 984-90.

487. See *Chisom v. Roemer*, 111 S. Ct. 2354, 2367 (1991).

488. See, e.g., Wright, *supra* note 472, at 689 (noting that according to H.R. REP. NO. 227, 97th Cong., 1st Sess. 18 (1981), "shifts from elective to appointive office" were given as an example of "practices or procedures in the electoral process" that may violate section 2 under the "totality of circumstances test). Wright points out that the Court's statement in *Chisom* regarding instituting appointive systems "may well have been made with reference to pure appointive systems similar to those used for federal judges, not the merit retention systems often used by states in selecting judges," which usually include retention elections. Wright, *supra* note 472, at 690. "Switching to retention elections in areas where there are few or no black judges would effectively exclude minority candidates." *Id.*

Rights Act promises that minority citizens will finally have their fair share of that power.”⁴⁸⁹ The United States Attorney General may also refuse to grant a preclearance for such a change.⁴⁹⁰ Moreover, the VRA is intended

to increase the opportunity of minority voters to elect candidates of *their* choice, not the choice of Governor. . . .

Even if the objective were [sic] conceived simply as increasing the number of minority judges—rather than giving minority voters a greater choice in the selection of judges—an appointive system in no way guarantees a fair number of minority judges. . . . [A]n effective remedy must be ensured by the court and not left to the discretion of a single state official.⁴⁹¹

Commentators have also considered using a nominating commission for each subdistrict when subdistricting is the remedy chosen to correct past racial disparities in judicial elections; “[e]ven then, however, several variables could prevent the appointment of a reasonable number of minority judges.”⁴⁹² The fact that most merit proposals, as part of a potential Section 2 remedial measure, would “grandfather-in” the nearly all-white judiciaries, critics argue, would also “serve to perpetuate, rather than eliminate, the vestiges of any Voting Rights Act violations.”⁴⁹³

According to early evidence on the effect of judicial election subdistricting as a remedial measure for Section 2 violations, minorities are in fact achieving success in securing more judicial positions. One researcher studying the effects of a voluntary subdistricting scheme that was implemented in Cook County, Illinois, in response to a VRA suit, wrote: “These results, although preliminary, must be heartening to those who advocated for changes in the system of selecting judges in order to dramatically increase minority representation on the bench. The ‘demographic goal’ of the Voting Rights Act appears on its way to being

489. McDuff, *supra* note 473, at 978.

490. See FRANK R. PARKER, BLACK VOTES COUNT 98 (1990); see also *Allen v. State Bd. of Elections*, 393 U.S. 544, 570-71 (holding that a change from an elective to an appointive system in a covered jurisdiction must be precleared under section 5 of the VRA).

Preclearance will be denied unless the jurisdiction meets the burden of establishing that the submitted change does not have a racially discriminatory purpose and will not have a racially discriminatory effect. If the election system is eliminated in favor of an appointive system in response to litigation under section 2, a jurisdiction will face the difficult task of explaining why such a change was made just at the moment when the election system was about to be opened to meaningful participation by minority voters.

Wright, *supra* note 472, at 689 (citations omitted).

491. See McDuff, *supra* note 473, at 979.

492. *Id.* at 980. No such “variables,” however, were noted.

493. *Id.*

met."⁴⁹⁴

Thus, merit selection proponents are often frustrated by the rejection by minorities of merit plans in favor of the electoral process, with all of its attendant problems. While the desire of minorities to achieve faster gains in terms of diversity on the bench is understandable, it should not be ignored that the popular election of judges, no matter how representative, is problematic. The challenge, therefore, for some jurisdictions is to design a judicial selection method that eradicates the discriminatory effects of past judicial elections by increasing diversity on the bench, while at the same time ensuring that both new and sitting judges attain office because they are among the most qualified.

The proposed settlement in *Brooks v. State Board of Elections*⁴⁹⁵ was an attempt to strike that balance. The plaintiffs in *Brooks* complained that certain changes made to Georgia's election law violated the preclearance requirement of Section 5 of the VRA; the federal district court consequently enjoined the filling of judicial positions that had not been precleared.⁴⁹⁶ The injunction was continued until the parties submitted a settlement agreement to the court for approval.⁴⁹⁷

The state agreed that: (1) a merit plan coupled with retention elections would be substituted for judicial elections; (2) at least twenty-five African-American judges would be on the Georgia bench by the end of 1994, through the creation of new judgeships and appointment of qualified African-American candidates to unfilled positions; and (3) the state's goal would be to achieve a diverse judiciary "reflective of the population of the State as a whole."⁴⁹⁸ The federal court's rejection of the proposed settlement in this class action case, now on appeal, was based primarily upon objections raised by intervenors who argued that the agreement deprived them of their state and federal constitutional right to vote.⁴⁹⁹ In addition, the federal court found that, to approve the settlement, would

494. See Larry Golden, *Voting Rights and the Judiciary: Assessing the Cook County, Illinois Judicial Election Controversy* 26 (June 1994) (unpublished paper presented at the annual meeting of the Law & Society Association, Phoenix, Arizona). The researcher then states, recklessly, in my judgment, and without citation of authority, that "[i]t is highly improbable, given past appointment decisions, that there would be as significant an increase if selection were to be made through a 'merit,' as compared to an electoral process." *Id.* The studies cited herein, *supra* part VI(B), establish the incorrectness of this conclusion.

495. 848 F. Supp. 1548 (S.D. Ga. 1994).

496. 775 F. Supp. 1470, 1472-74, 1484 (S.D. Ga. 1989), *modified on other grounds*, 775 F. Supp. 1490, 1491, *aff'd*, 498 U.S. 916 (1990).

497. *Brooks v. State Bd. of Elections*, 775 F. Supp. 1490, 1491 (S.D. Ga. 1990); *Brooks v. State Bd. of Elections*, 790 F. Supp. 1156, 1159 (S.D. Ga. 1992).

498. 848 F. Supp. 1548, 1563-64.

499. *Id.* at 1564, 1569.

violate both the language and spirit of the 1983 Georgia Constitution and the laws promulgated thereunder. Specifically, the system created under the consent decree would violate the Georgia Constitution's requirement that judges be elected, impermissibly alter the structure of power currently embodied in the 1983 Georgia Constitution regarding the election of judges, and violate several fundamental Georgia statutes.⁵⁰⁰

Merit selection proponents face opposition from minority groups who are expectedly dissatisfied with the lack of progress being made in increasing diversity on the bench. A combination of the aforementioned commission rules of procedure that require objectivity, impartiality, nonpolitical nominations and appointments, diversity, ethical conduct, and disciplinary mechanisms for commissioners will help in achieving greater diversity in the future. This is particularly so if merit selection is "merged" with the VRA remedy of subdistricting, so as to replace at-large elective systems with nominating commissions for each subdistrict, as was proposed in *Brooks*.⁵⁰¹

Given that incumbent judges cannot be forced from office and are usually retained in retention elections,⁵⁰² it is understandable for minorities to rely upon the Voting Rights Act for a remedy to the situation. This remedy, however, will result in short-term increases in minorities on the bench without addressing the greater issue of judicial competence. As one commentator observed, "Years later, after a fair election system has been instituted and a state's judiciary is well integrated, it might make more sense to move to appointment of judges."⁵⁰³ If this is true, it is hoped that the time will come sooner rather than later.

500. *Id.* at 1564. The court also refused to find that the retention elections, made part of the proposed settlement and consent decree, were "elections" under Georgia law. *Id.* at 1564-66; cf. *Bradley v. Indiana State Election Bd.*, 797 F. Supp. 694, 697 (S.D. Ind. 1992) (holding that retention elections were "elections" within the meaning of the Voting Rights Act).

501. This approach is not new, having been previously proposed during judicial selection debates in Louisiana, Texas, and Illinois. See JUDICIAL REFORM IN THE STATES 86, 111 (Anthony Champagne & Judith Haydel eds. 1993); David Heckelman, *House Reviews Bill for Merit Selection*, CHI. DAILY L. BULL., Feb. 22, 1995, at 1, 18.

502. See Robert C. Luskin et al., *How Minority Judges Fare in Retention Elections*, 77 JUDICATURE 316, 321 (1994) (finding little correlation between whether a judge is White, African-American or Hispanic and the percentage of affirmative votes the judge received).

It takes an awful lot for a sitting judge to lose a retention election, and so far as we can see this is roughly as true of black and Hispanic as of white judges. . . . There is no convincing evidence . . . that the judge's race or ethnicity played any significant part in his or her loss.

.....

As far as retention elections themselves are concerned, the verdict seems clear: The prospect of more judicial retention elections, per se, offers minorities little to fear.

Id.

503. McDuff, *supra* note 473, at 981.

D. Judicial Performance Evaluations

Just as merit selection was proposed as a means of addressing the problem of the electorate's lack of knowledge about the background of candidates and their abilities to hold judicial office, proponents of judicial performance evaluations offer them as a means of generating information about *sitting* judges for retention purposes. As stated in the AJS position on the subject,

[h]ow is a voter to know what a particular judge's record is? In some jurisdictions, bar associations conduct judicial evaluation polls of their members, but the results are not always perceived as reliable and usually are not widely disseminated. The uncontested nature of retention elections, the ethical restraints on judges' campaign behavior, and voters' lack of knowledge about the candidates all combine to form an information vacuum.⁵⁰⁴

Judicial performance evaluations, adopted in five states,⁵⁰⁵ use data collected from a variety of sources for several purposes. In some states,⁵⁰⁶ the data are used to educate voters before retention elections; in Hawaii, the Judicial Selection Commission uses performance evaluations in deciding the question of retention. In all states that have adopted it, judicial performance evaluations are also used for developmental purposes.⁵⁰⁷

A commission conducts the performance evaluations, as provided for by constitutional provision,⁵⁰⁸ state statute, or rule of court. Like nominating commissions, lawyers, nonlawyers, and judges sit on these performance commissions.

Performance commissions obtain their data from a variety of

504. Editorial, *The Need for Judicial Performance Evaluations for Retention Elections*, 75 JUDICATURE 124, 124 (1991). That article also notes the consequences of this "information vacuum": (1) voter apathy, (2) "uninformed voting without regard to an individual judge's qualifications," and (3) "organized, well-funded opposition from interest groups who object to a judge's decision or series of decisions on a particular issue, as happened last fall in the retention election of the Chief Justice of the Florida Supreme Court," referring to a campaign against the justice's retention by a pro-life group. *Id.*

505. Alaska, Arizona, Colorado, Hawaii, and Utah.

506. Arizona, Colorado, and Utah.

507. See also SPECIAL COMM. ON EVALUATION OF JUDICIAL PERFORMANCE, ABA GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE, at ix (August, 1985) [hereinafter ABA GUIDELINES]. That report stated that the goal of performance evaluations should be

to improve the performance of individual judges and the judiciary as a whole. Self-improvement should be the primary use of judicial performance evaluation. Additional uses . . . include: (A) the effective assignment and use of judges within the judiciary, (B) the improved design and content of continuing judicial education programs, and (C) the retention or continuation of judges in office.

Id.

508. See, e.g., ALASKA CONST. art. IV, § 90.

sources. These include surveys of bar members, law enforcement and probation personnel, litigants, witnesses, jurors, judges or justices, and other frequent court users, as well as the judges' self-evaluations, health⁵⁰⁹ and disciplinary records, and caseload evaluations.⁵¹⁰

As is the case for nominating commissions, performance commissions are developing different policies regarding the confidentiality of the performance data collected.⁵¹¹ Thus, the deliberations of the commission in some states are confidential, whereas the voting is made public.⁵¹² In other states, all proceedings are confidential, but the information on the evaluated judges is publicly disseminated through a voters' pamphlet⁵¹³ or a commission report.⁵¹⁴

Used in conjunction with a judicial selection commission, as in Hawaii, or with a typical merit plan that requires appointed judges to stand for an uncontested retention election, performance evaluations will go far in providing information on which to base retention decisions. While these evaluations and the procedures used for arriving at them may, not unexpectedly, stir some controversy within the judiciary, no longer will voters in states be forced to guess, use ethnic name recognition, or read bar polls in order to gain the information required to cast an informed retention vote.

More states will adopt judicial performance evaluations as the experiences of the first five states with such programs become known.⁵¹⁵ The challenge to the jurisdictions with a merit plan is to adopt performance evaluation programs so that the same scrutiny, by lawyers and nonlawyers, of an applicant's potential for holding judicial office is also applied to the question of retention after the office is attained; a system

509. These data, now collected in Alaska, are probably unavailable under the ADA. See *supra* notes 417-439 and accompanying text.

510. See ABA GUIDELINES, *supra* note 507, at xiii ("Reliable sources of information should be developed for judicial evaluation programs and multiple sources should be used whenever feasible. Alternate sources from which to obtain information include but are not limited to lawyers, other judges, public records, court personnel, litigants, and other appropriate sources.").

511. The ABA Guidelines recommend that "Provisions for confidentiality should be established such that the source of particular information cannot be identified." ABA GUIDELINES, *supra* note 507, at xiii.

512. See, e.g., Arizona.

513. See, e.g., Alaska.

514. See, e.g., Arizona. The ABA Guidelines recommend that "The dissemination of results and data from the judicial evaluation program should be consistent with and conform to the uses for the program. Except to the extent required by the particular program, the results and data should be confidential." ABA GUIDELINES, *supra* note 507, at xiii.

515. See, e.g., Anne R. Mahoney, *Citizen Evaluation of Judicial Performance: The Colorado Experience*, 72 JUDICATURE 210, 216 (1989) (arguing that citizen evaluations of judges hold the potential for increasing citizen involvement, interaction, and exchange with the courts).

that uses both comes closer than any other method to assuring the highest quality of justice.

VII. CONCLUSION

This Article provides a comprehensive review of the history and current status of merit selection. The major shortcomings of the elective system of judicial selection are eliminated under the merit plan. Politics has not been eradicated under merit selection, but it has been greatly minimized. The wide variety of rules of procedure described herein reflect evolutionary refinements that address the concerns of critics regarding politics, ethics, diversity, and other issues that have arisen in conjunction with merit selection.

The issues raised by minority critics who argue that merit selection is an inadequate remedy for addressing prior racial disparities in judicial elections constitute the latest challenge to proponents of the merit plan. Experimentation with new models of merit selection is needed, especially with models that enhance the diversity of commissions themselves, as well as the diversity of judicial nominees and appointees, and with models that establish multiple commissions for subdistricts in lieu of at-large elections. Most importantly, we should not "throw out the baby with the bathwater" when proposing remedies to the unfair at-large elections of the past.

To date, no state that has adopted a merit plan has opted to replace it with an elective system. This fact alone, notwithstanding the empirical studies and anecdotal evidence cited herein in support of merit selection, is the best evidence that it is the superior method of judicial selection.

APPENDIX A

TABLE 1. CHARACTERISTICS OF MERIT SELECTION PLANS: SCOPE OF THE PLANS

State	Year established	Level of court	Legal basis of plan	Type of vacancy	Number of commissions	Number of commissioners
Alabama						
Jefferson County	1951	Circuit	C	Interim	1	5: 2L, 2N, 1J
Madison County	1974	Circuit	C	Interim	1	5: 2L, 2N, 1J
Mobile County	1982	Circuit, District	C	Interim	1	5: 2L, 2N, 1J
Tuscaloosa County	1990	Circuit, District	C	Interim	1	9: 5L, 3N, 1J
Alaska	1959	Supreme Court	C	Initial and Interim	1	7: 3L, 3N, 1J
		Superior Court	C			
		Court of Appeals	S			
		District Court	S			
Arizona	1974, amended 1992	Supreme Court	C	Initial and Interim	1	16: 5L, 10N, 1J
		Court of Appeals				
Pima & Maricopa Counties	1974, amended 1992	Superior, in counties with population of 250,000 or more	C	Initial and Interim	2	16: 5L, 10N, 1J ¹
Tucson	1978	Magistrate's Court	CC	Initial and Interim	1	9: 4L, 5N, 0J
Phoenix	1975	Magistrate's Court	CC	Initial and Interim	1	7: 2L, 3N, 2J
Colorado	1966	Appellate	C	Initial and Interim	1	13: 6L, 7N, 0J
		All courts of record except appellate, municipal, and Denver County Court	C	Initial and Interim	22	7: 3L, 4N, 0J
Connecticut	1986	Supreme Court	C	Initial and Interim	1	12: 6L, 6N, 0J
		Appellate Court		Reappointment of Incumbent Judges		
		Superior Court				
Delaware	1977; revised 1978, 1985	All, including Magistrates Court	EO	Initial and Interim	1	9: 5L, 4N, 0J
			EO	Initial and Interim	1	9: 5L, 4N, 0J
D.C.	1973	Superior Court, Court of Appeals	HR	Initial and Interim	1	7: 4L, 2N, 1J
Florida	1973	Supreme Court	C	Initial and Interim	6	9: 3L, 3N, 0J ²
	1973, amended 1976, 1984 & 1991	Court of Appeals				
		Circuit Court	C	Interim	20	9: 3L, 3N, 0J ²
		County Court				
Georgia	1975, 1983, revised 1984, 1991	Appellate Court	EO	Interim	1	9: 5L, 4N
		Superior Court				
		State Court				
Hawaii	1979	All	C	Initial and Retention	1	9: 4L, 5N, 0J
Idaho	1967; amended 1985	Supreme Court	S	Interim	1	7: 2L, 3N, 2J
		Court of Appeals				
		District Court				
Indiana	1970; amended 1986, 1988	Supreme Court	C	Initial and Interim	1	7: 3L, 3N, 1J
		Court of Appeals				
Lake County	1973	Superior Court	S	Initial and Interim	1	7: 3L, 3N, 1J
St. Joseph County	1973	Superior Court	S	Initial and Interim	1	7: 3L, 3N, 1J
Marion County	1971	Municipal Courts	S	Initial and Interim	1	11: 3L, 4N, 2J ³
Allen County	1983	Superior Court	S	Initial and Interim	1	7: 3L, 3N, 1J
Iowa	1962	Supreme Court	C	Initial and Interim	1	13: 6L, 6N, 1J
		Court of Appeals				
	1962	District Court	C	Initial and Interim	14	11: 5L, 5N, 1J
	1983; Amended 1986	District associate judges	S	Initial and Interim	1 per county (99 counties)	6: 2L, 3N, 1J
Kansas	1958	Supreme Court	C	Initial and Interim	1	11: 6L, 5N, 0J
		Court of Appeals				
	1974	District Courts (optional)	C	Initial and Interim	17	13: 6L, 6N, 1J ⁴
Kentucky	1975	Supreme Court	C	Interim	1	7: 2L, 4N, 1J
		Court of Appeals				
		Circuit Court	C		56	7: 2L, 4N, 1J
		District Court				

TABLE 1. CHARACTERISTICS OF MERIT SELECTION PLANS: SCOPE
OF THE PLANS (CONTINUED)

State	Year established	Level of court	Legal basis of plan	Type of vacancy	Number of commissions	Number of commissioners
Maryland	1970; revised 1974, 1979, 1982, 1987, 1988, 1991	Appellate Court Trial Courts	EO	Initial and Interim	1	13: 6L, 6N, 0J ⁵
			EO	Initial and Interim	15	13: 6L, 6N, 0J ⁵
Massachusetts	1975; revised 1979, 1983, 1987, 1991	All	EO	Initial and Interim	1	23 ⁶
Minnesota	1983; revised 1987, 1989, 1992	District Court	S	Interim	1	13 ⁷
Missouri	1940	Supreme Court	C	Initial and Interim	1	7: 3L, 3N, 1J
		Court of Appeals				
	1940	Jackson County	C	Initial and Interim	1	5: 2L, 2N, 1J
	1940	St. Louis City	C	Initial and Interim	1	5: 2L, 2N, 1J
	1970	St. Louis County	C	Initial and Interim	1	5: 2L, 2N, 1J
	1973	Clay & Platte Counties	C	Initial and Interim	2	5: 2L, 2N, 1J
Montana	1972	Supreme Court District Court	C	Interim	1	7: 2L, 4N, 1J
Nebraska	1962; amended 1972	All	C	Initial and Interim	53	9: 4L, 4N, 1J
Nevada	1976	Supreme Court District Court	C	Interim Interim	1	7: 3L, 3N, 1J 9: 4L, 4N, 1J ⁸
New Mexico	1988	Appellate Courts	C	Initial and Interim	1	14: 8L, 3N, 3J ⁹
		District Courts	C	Initial and Interim	13	14: 8L, 3N, 3J
		Metropolitan Courts	C	Initial and Interim	1	14: 8L, 3N, 3J
New York	1977	Court of Appeals	C, S	Initial and Interim	1	12: 4L, 4N, 0J ¹⁰
	1976, amended	Appellate Div. of Supreme Court	EO	Initial/Appellate Div. of Supreme Court	4	10: ¹¹
	1990	Court of Claims	EO	Court of Claims	1	12 (appt'd by Governor)
	1983	Supreme, Surrogate, County, Family Criminal Court	EO	All others interim only.		
New York City	1978; amended 1990, 1994	Family Court Civil Court	EO (Mayor)	Interim Civil Ct. Others: Initial and Interim	1	19: ¹²
North Dakota	1981	Supreme Court	C	Interim	1	9: 3L, 3N, 0J ¹³
	1983	District Court County Court	S	Interim	1	9: 3L, 3N, 0J ¹³
Oklahoma	1967	Supreme Court Court of Criminal Appeals	C	Initial and Interim	1	13: 6L, 7N, 0J
		Court of Appeals District Court	C	Interim		
Pennsylvania	1964; revised 1973, 1979, 1987 1964; revised 1973, 1979, 1987 1988	Appellate Courts	EO	Interim	1	7: 4L, 3N, 0J
		Trial Courts	EO	Interim	59	5: 3L, 2N, 0J
		Philadelphia Trial Courts	EO	Interim	1	9: 5L, 4N, 0J
Rhode Island	1994	Supreme Court	C*	Initial and Interim	1	9: 4L, 4N, 0J ¹⁴
		Superior Court Family Court District Court Worker's Comp. Ct. Administrative Adjudication Court	S		1	9: 4L, 4N, 0J ¹⁴
South Dakota	1980	Supreme Court Circuit Court	C	Initial and Interim Interim	1	7: 3L, 2N, 2J

TABLE 1. CHARACTERISTICS OF MERIT SELECTION PLANS: SCOPE
OF THE PLANS (CONTINUED)

State	Year established	Level of court	Legal basis of plan	Type of vacancy	Number of commissions	Number of commissioners
Tennessee	1971; amended 1986, 1994	Supreme Court Court of Appeals Court of Criminal Appeals	S	Initial and Interim	1	15: 12L, 3N, 0J
	1994	Trial Courts	S	Interim		
Utah	1984; amended 1987, 1988; 1991; 1994	Appellate Courts District Court Circuit Court Juvenile Court	C	Initial and Interim	1 8 ¹⁵ 8 ¹⁵ 8 ¹⁵	7: 2L, 4N, 1J
Vermont	1967, amended 1969, 1971, 1975, 1979, 1985	Supreme Court Superior Court District Court	C	Initial and Interim	1	11: 5L, 6N, 0J
West Virginia	1981, 1989	—	EO	Interim	1	9: 5L ¹⁶
Wisconsin	1983 rev. 1987	Supreme Court Court of Appeals Circuit Court	EO	Interim	1	NIsu ¹⁷]
Wyoming	1972	Supreme Court District Court County Court	C	Initial and Interim	1	7: 3L, 3N, 1J ¹⁸

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

L = Lawyers
N = Nonlawyer
J = Judges
CC = City Code

* Amendment goes before voters in Nov., 1994.

TABLE 2. COMPOSITION OF NOMINATING COMMISSION

State	Term of service	Chairman appointed/ elected by	Lawyers appointed/ elected by	Non-lawyers appointed/elected by	Judges appointed/ elected by
Alabama	6 years	NI	State Bar	Legislature	Circuit judges
Jefferson Cty. Madison Cty. Mobile Cty. Tuscaloosa Cty.	6 years		County Bar	Legislature	Presiding Judge serves ex officio
Alaska	Chief Justice 3 yrs. Others 6 years	Chief Justice serves ex-officio	State Bar	Governor with confirmation by legislature	Chief Justice serves ex-officio
Arizona	4 years	Chief Justice serves	State Bar, Governor with consent of Senate	Governor with consent of Senate ¹⁹	Chief Justice serves
Appellate Courts Superior Court Magistrate's Court (Tucson)	1 year	NI	County Bar	3 appointed by governing body of majority political party; 2 appointed by governing body of minority political party	—
Magistrate's Court (Phoenix)	2 years	NI	State and County Bars	City Council	Presiding Judge Superior Court
Colorado	6 years	Chairman is ex-officio non-voting member of supreme court	Governor, Attorney General, Chief Justice	Governor	Supreme court justices serve ex-officio
All other courts of record except appellate, municipal and Denver Cty.	6 years	Same as above	Governor, Attorney General, Chief Justice	Governor	Same as above
Connecticut	3 years	Commission members ²⁰	Governor	Senate Pres.pro tem (1), Speaker of House (1), House and Senate Minority Leaders (1 each) House and Senate Majority Leader (1 each)	—
Delaware	3 years	Governor	Governor, State Bar	Governor	—
D.C.	6 years ²¹	Commission members	See FN 22	See FN 22	See FN 22
Florida	4 years	Commission members	State Bar	3/Governor, 3/Commission	—
Appellate Courts Circuit Courts					
Georgia	At pleasure of appointing authority; (2 serve ex-officio) ²²	Governor	Governor (3) ²⁴ 2 serve ex-officio	Governor (2) ²³ Lt. Governor (1) Spkr. of House (1)	—
Hawaii	6 years	Commission members	Governor, Chief Justice, State Bar, Legislative Leaders	Governor, Chief Justice, Legislative leaders	—
Idaho	6 years	Chief Justice serves ex-officio	State Bar with consent of Senate	Governor with consent of Senate	State Bar with consent of Senate
Indiana					
Appellate Courts	3 years	Chief Justice serves ex-officio	Peers	Governor	Chief Justice serves ex-officio
Lake County	4 years	Chief Justice	Lake County attorneys	Governor	Chief Justice
St. Joseph County	4 years	Chief Justice	St. Joseph County attorneys	See FN 26	Chief Justice
Marion County	2 years	See FN 27	County Bar, Superior Court	Governor and Mayor of largest city in county	See FN 28
Allen County	4 years	Chief Justice	Allen Co. attorneys	Governor	Chief Justice

TABLE 2. COMPOSITION OF NOMINATING COMMISSION (CONTINUED)

State	Term of service	Chairman appointed/ elected by	Lawyers appointed/ elected by	Non-lawyers appointed/elected by	Judges appointed/ elected by
Iowa					
Appellate Courts	6 years	Senior Supreme Court Justice (other than Chief Justice) serves ex-officio	State Bar	Governor with consent of Senate	Justice serves by virtue of his tenure
District Courts	6 years	Senior District Court Judge in district	District Bar	Governor	Judge serves by virtue of his tenure
District associate judges	6 years	Designated by chief judge of district	County Bar	County Board of Supervisors	Chief judge of district
Kansas					
Appellate Courts	5 years	State Bar	Lawyers in congressional district	Governor	—
District Courts	4 years	Chief Justice	Lawyers in applicable district	County Commissioners	—
Kentucky	4 years	Chief Justice serves ex-officio	State and local bars	Governor	Chief Justice serves ex-officio
Maryland	Co-extensive with Governor	Governor	Lawyers in applicable district	Governor	—
Massachusetts	At Governor's pleasure	Governor	Governor	Governor	—
Minnesota	At Governor's pleasure, some co-extensive with Governor	Governor, Supreme Court Justices	Governor, Supreme Court Justices	Governor, Supreme Court Justices	Governor, Supreme Court Justices
Missouri					
Appellate Courts	6 years	Commission members	Lawyers in each appellate district	Governor	Members of supreme court
Circuit Courts	6 years	Commission members	Lawyers in each circuit	Governor	Chief Judge serves ex-officio
Montana	4 years	Commission members	Supreme Court	Governor	District judges
Nebraska	4 years	Supreme Court Justices serve ex-officio	State Bar	Governor	Governor
Nevada	4 years	Commission members	State Bar	Governor	Chief Justice
New Mexico					
Appellate Courts		Dean UNM Law School serves ex-officio	State Bar President; Judges on committee (4); Governor, Speaker of House, President of Senate (1 app't each)	Governor; Speaker of House; President of Senate	Chief Justice; Chief Judge Court of Appeals (2)
District Courts		Dean UNM Law School serves ex-officio	State Bar President; Judges on committee (4); Governor, Speaker of House, President of Senate (1 app't each)	Governor; Speaker of House; President of Senate	Chief Justice; Chief Judge Court of Appeals; Chief Judge of District ²⁹
Metropolitan Courts		Dean UNM Law School serves ex-officio	State Bar President; Judges on committee (4); Governor, Speaker of House, President of Senate (1 app't each)	Governor; Speaker of House; President of Senate	Chief Justice; Chief Judge of District; Chief Judge of Metropolitan Court ²⁹
New York					
Court of Appeals	4 years	Commission members	Governor; Chief Judge, Court of Appeals	Governor; Chief Judge, Court of Appeals	—
Appellate Division and Trial Courts outside N.Y. Cty.	Co-extensive with Governor	Governor	See FN 10, 11	See FN 10, 11	—
New York Cty.	2-1 years	Mayor	See FN 12	See FN 12	—
North Dakota	3 years	Governor	See FN 13	See FN 13	See FN 13
Oklahoma	Chairman-1 year Others-6 years At-large member-2 years	Commission members	Attorneys in district	Governor, but 1 member selected by commission	—

TABLE 2. COMPOSITION OF NOMINATING COMMISSION (CONTINUED)

State	Term of service	Chairman appointed/ elected by	Lawyers appointed/ elected by	Non-lawyers appointed/elected by	Judges appointed/ elected by
Pennsylvania					
Trial and Appellate	1 year	Governor	Governor	Governor	—
Philadelphia	3-3 years	Governor	Governor	Governor	—
	3-2 years				
	3-1 year				
Rhode Island	4 years	Governor	Governor ³⁰	Governor ³⁰	—
South Dakota	4 years	Commission members	State Bar President	Governor	Judicial Conference
Tennessee	6 years	Commission members	Speakers of House and Senate ³¹	Speakers of House and Senate	—
Utah	4 years	Governor	Governor	Governor	Chief Justice or Assoc. Justice serves ex-officio
Appellate Courts					Chief Justice
District Court	4 years	Governor	Governor	Governor	Same as above
Circuit Court	4 years	Governor	Governor	Governor	Same as above
Juvenile Court	4 years	Governor	Governor	Governor	Same as above
Vermont	2 years	Commission members	See FN 32	See FN 32	—
West Virginia	At Governor's pleasure	Governor	Governor	See FN 33	See FN 33
Wisconsin	Pleasure of Governor	Governor	Governor	Governor	—
Wyoming	4 years	Chief Justice serves ex-officio	State Bar	Governor	Chief Justice serves ex-officio

TABLE 3. RULES GOVERNING SUBMISSION OF LIST OF NOMINEES

State	Days allowed to submit list	Number names submitted	Order names submitted	Add'l Inf. sent to apptg. auth.	Governor bound by recom.	Legis. confirm required	Names made public
Alabama	NI	3	Alpha	None	Yes	No	All nom.
Jefferson Cty.							
Madison Cty.							
Mobile Cty.							
Tuscaloosa Cty.	4-5	3-5	NI	NI	Yes	No	NI
Alaska	90	2 or more	Alpha	Bar survey results, AQ	Yes	No	All appl.
Arizona							
Appellate Courts	60	3 or more	Alpha	AQ, LOR, LNR	Yes	No	All nom.
Superior Courts	60	3 or more	Alpha	AQ, LOR, LNR	Yes	No	All interviewees
Magistrate's Court	30	3 or more	Rank	Entire File	City Council	City	All interviewees
(Tucson)						Council	
Magistrate's Court	NI	NI	Alpha	Entire File	City Council	City	All interviewees
(Phoenix)						Council	
Colorado							
Supreme Court	30	3	Alpha	AQ	Yes	No	All nom.
All other courts of record except appellate, municipal and Denver Cty.	30	2-3	Alpha	AQ	Yes	No	All nom.
Connecticut	NI	NI	NI	NI	Yes	See FN 34	NI
Delaware	60	3 or more	Alpha	AQ, AR	Yes ³⁵	Yes	Appt. only
D.C.	60	3	Alpha	Investigative file* LOR	Yes (Pres.)	Yes	All nom.
Florida							
Appellate Courts	30 ³⁴	Not more than 3	Alpha	AQ, Writing samples financial and tax statements	Yes	No	All nom.
Circuit Court		3 or more					
County Court		3 or more					
Georgia	NI	Not more than 5	NSO	AQ, Vote on nominees	No	No	No
Hawaii	No limit	6	Alpha	AQ	Yes	Yes	No
Idaho	No limit	2-4	Alpha w/rating	AR, AQ, Rating LNR, LOR	Yes	No	All nom.
Indiana							
Appellate Courts	70	3	Alpha	Written eval.	Yes	No	All appl. & all nom.
Lake County	60						
St. Joseph Cty.	60						
Marion County	60						
Allen County	60	3	NSO	Written eval.	Yes	No	
Iowa							
Appellate Courts	120	3 Supreme Court 5 Court of Appeals	Alpha	AQ	Yes	No	All appl.
District Courts	NI	2	NSO	AQ	Yes	No	All appl.
Dist. assoc. judges & magistrates	30	3	NI	NI	See FN 37	No	NI
Kansas							
Appellate Courts	60	2 or 3	NSO	AQ, Written material	Yes	No	All nom.
District Courts	30	2 or 3	NSO	AQ, Written material	Yes	No	All nom.
Kentucky	NI	3	Alpha	AQ	Yes	No	All nom.
Maryland							
Appellate	70	5-7	Alpha	AR, AQ, LOR	Yes ³⁸	Yes	All appl.
Trial	70	Not more than 7	Alpha	AR, AQ, LOR	Yes ³⁸	No	All appl.
Massachusetts	15, extendable to 30	NI	NSO	AQ, Juris. and history of ct., number of votes rec'd., LOR	Yes	See FN 39	Appt. only
Minnesota	60	3-5	NSO	AQ	No	No	All nom.
Missouri	60	3	NSO	AQ	Yes	No	All nom.

TABLE 3. RULES GOVERNING SUBMISSION OF LIST OF
NOMINEES (CONTINUED)

State	Days allowed to submit list	Number names submitted	Order names submitted	Add'l Inf. sent to apptg. auth.	Governor bound by recom.	Legis. confirm required	Names made public
Montana	30	3-5	Order of qualification	AQ	Yes	Yes	All appl.
Nebraska	60	3 (minimum)	NSO	All available information	Yes	No	All appl.
Nevada	No limit	3	Alpha	AR, AQ	Yes	No	All nom.
New Mexico	30	NI	Alphabetical order	Application Form	Yes ⁴⁰	No	NI
New York Court of Appeals	See FN 41	Chief Judge-7 Associate-3-7	Alpha	Written report, entire file	Yes	Yes	All nom.
App. Div. and Trial Cts. outside N.Y. Cty.	NI	NI	NSO	Written eval., entire file	Yes	Yes	Appt. only
New York Cty.	90	3	NI	NI	No, but Mayor is bound	No	Appt. only
North Dakota	60	2-7	NSO	None	No	No	All nom.
Oklahoma	NI	3	NSO	None	Yes ⁴²	No	All appl.
Pennsylvania Appellate Courts	20	5	NSO	None	Yes	No	No
Trial Courts	30	5	NSO	None	Yes	No	No
Philadelphia Courts	30	5	NSO	None	Yes	No	No
Rhode Island	60-supreme 45-any other state court	3-5	NI	NI	Yes	Yes	NI ⁴³
South Dakota	No limit	2 or more	Alpha	AQ	Yes	No	Nom. (only if agreed upon by gov. & nom.)
Tennessee	60	3	Alpha	None	See FN 44	No	All nom.
Utah	30 ⁴⁵	See FN 46	Alpha	AR, AQ	Yes	Yes	Appt. only
Vermont	Open	At least 3	NSO	AQ	Yes	Yes	Appt. only
West Virginia	NI	NI	Alpha	See FN 47	No ⁴⁶	No	NI
Wisconsin	6 weeks	3-5	NSO	AR, AQ, LOR, LNR	Yes	No	All nom.
Wyoming	60	3	Alpha	NI	Yes	No	Appt. only; others at comm'n discretion

Key:

All appl. = All applicants
 Appt. only = Appointee only
 AQ = Applicant questionnaire
 AR = Applicant resume

LNR = Letters of non-recommendation

LOR = Letters of recommendation

NI = Not indicated

NSO = No specified order

* = If requested

NOTES TO TABLES 1-3

1. Arizona. Pima and Maricopa Counties are each divided into 5 supervisory districts, each of which must be equally represented on the superior court nominating commissions. The two nonattorney members from a given district may not be of the same political party.
2. Florida. Each appointing authority must appoint at least one member from a racial or ethnic minority, or a woman. The 3 gubernatorial appointees may or may not be attorneys.
3. Indiana (Marion County). Two additional members appointed by the mayor of the largest city in the county may or may not be attorneys.
4. Kansas. Statutes indicate that each district commission may be composed of an equal number of lawyers and nonlawyers. Total number of commissioners on each commission varies with the number of counties in each judicial district. The justice presiding is nonvoting.
5. Maryland. The 13th trial court commissioner, or the 15th appellate court commissioner, each of whom is chairperson of the respective commission, may or may not be an attorney.
6. Massachusetts. The commission is composed of 29 members. Ratio of lawyers to nonlawyers is not specified.
7. Minnesota. 9 commissioners are appointed by the governor. Of these, no more than 6 may be lawyers. Four commissioners are appointed by the supreme court justices. No more than 2 may be lawyers.
8. Nevada. The district commission is the same as the supreme court commission, except that 1 lawyer and 1 nonlawyer from the appropriate district are temporarily added.
9. New Mexico. The president of the state bar and judges on the committee shall make the minimum number of additional appointments of members of the state bar as is necessary for equal representation on the committee of the two largest major political parties. These figures exclude the chair, who votes only in the event of a tie.
10. New York. The commission is composed of 12 members. The governor and the chief judge each appoint two lawyers and two nonlawyers. The speaker and minority leader of the assembly and the temporary president and minority leader of the senate each appoint one member, who, in each case, may or may not be a lawyer.
11. New York. Four members of each departmental committee are appointed by the governor, 2 by the chief judge of the State of New York, and 1 is chosen by the presiding justice of the appellate division of each department and one by the president of the New York State Bar Association. The remaining 2 members are selected jointly by the speaker and minority leader of the assembly and the majority and minority leaders of the senate. The ratio of lawyers to nonlawyers is not specified.
12. New York City. Mayor chooses 9 members, presiding justices of the appellate division for the first and second judicial departments each choose 8 members, deans of 2 law schools appoint 1 each. Ratio of lawyers to nonlawyers not specified.
13. North Dakota. The governor, chief justice and president of the state bar each select 2 permanent members of the commission, 1 nonlawyer and 1 lawyer who may or may not be a judge. When a district or county court vacancy occurs, each selector appoints 1 additional temporary member from the district or county in which the vacancy occurs. The statute does not specify whether temporary members should be lawyers or nonlawyers.
14. Rhode Island. The ninth member may be either a lawyer or a nonlawyer.
15. Utah. The commission serves in each judicial district for all trial courts within that geographical area.
16. West Virginia. Executive order specifies only that "at least five" members must be licensed to practice law in the state. Number of nonlawyer or judge members not specified.
17. Wisconsin. The commission consists of an unspecified number of permanent members; the lawyer/nonlawyer/judge composition is not designated. To fill supreme court or court of appeals vacancies, 2 temporary members are added; in the case of a circuit court vacancy, the commission chair appoints 2 temporary members from the appropriate circuit.
18. Wyoming. When a vacancy occurs in a local district court or county, and that district or county is not represented on the commission, 1 lawyer and 1 nonlawyer from the district are appointed as temporary, nonvoting advisors to the commission.
19. Arizona. Pima & Maricopa counties are each divided into 5 supervisory districts. Each district has a 7-member nominating committee for the purpose of recommending prospective nonattorney members of the superior court nominating commission to the Governor. Actual appointment is made by the governor, with consent of the senate.
20. Connecticut. The chair must be elected by commission members from among those members appointed by the governor.
21. D.C. All terms are for 6 years except for one member, appointed by the president of the United States, whose term is for 5 years.
22. D.C. Two members are appointed by the Board of governors of the United Bar of the District of Columbia. One member who must be a sitting judge is appointed by the civil judge of the U.S. District Court for the D.C.: The mayor of the District appoints 2 members, one of whom must be a nonlawyer; one nonlawyer member is appointed by the council of the District of Columbia, and one member is appointed by the president of the United States.
23. Georgia. Seven commission members serve at the pleasure of the appointing authority. The remaining two serve ex-officio.
24. Georgia. Three lawyer commissioners are appointed by the governor. Two of these serve ex-officio.
25. Georgia. Nonlawyer commission members are appointed as follows: Two by the governor, one by the lieutenant governor, and one by the speaker of the house.
26. Indiana (St. Joseph County). Appointment of nonlawyer members is made by a selection commission composed of the judges of the St. Joseph County Circuit Court, the president of the Board of County Commissioners, and mayors of each of the 2 largest cities in the county.
27. Indiana (Marion County). Chair is a judge of the Indiana Court of Appeals who is a legal resident of the court of appeals district in which the municipal court is located.
28. Indiana (Marion County). Circuit court judge serves by virtue of residency in county in which municipal court located.
29. New Mexico. The chief judges themselves may serve or may designate another judge from their respective courts.

30. Rhode Island. The governor appoints three attorneys and one nonlawyer of his or her choice. The governor also appoints five additional commission members, one from each of the following lists: (1) a list of at least three persons who may be lawyers and/or nonlawyers from the senate majority leader; (2) a list of three lawyers from the speaker of the house; (3) a joint list of four nonlawyers from the majority leader and the speaker; (4) a list of three nonlawyers from the minority leader of the house; and (5) a list of three nonlawyers from the minority leader of the senate.
31. Tennessee. Lawyers are appointed from lists submitted by the Tennessee Bar Association, Tennessee Defense Lawyers Association, Tennessee Trial Lawyers Association, Tennessee District Attorneys General Conference and Tennessee Association of Criminal Defense Lawyers.
32. Vermont. The senate and house each appoint 3 members, 1 lawyer, and 2 nonlawyers. Attorneys admitted to practice before the supreme court elect 3 from their membership. Governor appoints 2 nonlawyers.
33. West Virginia. Executive order specifies that "at least five" members must be licensed to practice law. Governor appoints all commissioners. See FN 18.
34. Connecticut. The governor selects a nominee from the commission's list, sends the name to the general assembly, and the general assembly makes the appointment. The governor may nominate only from the list submitted by the commission.
35. Delaware. The governor may refuse to appoint from the first list and may require the commission to submit one supplementary list.
36. Florida. Time limit for submission of nominee list may be extended by the governor.
37. Iowa. District judges appoint associate district judges from list of nominees recommended by the county magistrate appointing commission. The county magistrate appointing commission appoints magistrates.
38. Maryland. The governor may also fill the vacancy by selecting a person from any list submitted by the appropriate commission for a vacancy on the same court, provided the previous list was submitted within one calendar year of the current vacancy, and provided information on the nominees is updated.
39. Massachusetts. Appointment requires advice and consent of Governor's Council.
40. New Mexico. The governor may make one request to the commission for additional names, and the commission shall do so if a majority of the commission finds that additional persons would be qualified and recommends those persons for appointment.
41. New York. For an expected vacancy, the commission has a fixed deadline which is in December of the year preceding the January 1 date when the vacancy occurs, except that in nonelection years, the deadline is October 15. In case of an unexpected vacancy, the commission is given 120 days to submit its recommendations.
42. Oklahoma. Except regarding the appellate court, where the governor may consider the commission's recommendations.
43. Rhode Island. However, the senate, as part of the confirmation process, conducts a public hearing on the qualifications of nominees for trial court judgeships. If the constitutional amendment for a merit plan for the supreme court is adopted in 11/94, the judiciary committees of the house and senate will separately conduct such a hearing.
44. Tennessee. The governor may request an additional list of three names, but must give reasons for rejecting the initial list. However, he must appoint from a commission list.
45. Utah. May be extended an additional 30 days if there are fewer than 9 applicants.
46. Utah. For appellate court commission, 5-7 names are submitted. For trial court commissions, 3-5 names are submitted.
47. West Virginia. Written evaluation of each nominee as to his/her professional competence, experience and reputation; personal integrity; impartiality and fairness; temperament; commitment to public service; and capacity to work.
48. West Virginia. Executive order states "The committee's report shall be advisory only, but the Governor shall give it full consideration."

TABLE 4. RULES OF CONFIDENTIALITY

State	Identity of Applicants	Records	Interviews	External Communications to Commissioners*	Deliberations (Voting)	Communications with Appointing Authority	Identity of Nominees
Alabama							no
Alaska	no	no	yes ¹				no
Arizona	no	yes	no	yes	no ²	yes	no
Colorado ³	yes	yes	yes	yes ⁴	yes	yes ⁴	no
Connecticut		yes					
Delaware	yes	yes			yes	yes	yes
DC	yes	yes	yes	yes	yes		no
Florida ⁵	no	no	no	no	yes		no
Georgia	no	See FN 6	yes		yes		yes
Hawaii	yes	yes	yes	yes	yes	yes	yes
Idaho	yes ⁷	yes			yes		yes ⁷
Indiana	no		no	yes			no
Iowa	no	yes		yes	yes		no
Kansas ⁸	no		no ⁹				no ⁹
Kentucky	no	yes			yes		no
Maryland ¹⁰	no		yes		yes		
Massachusetts	yes	yes			yes		yes
Minnesota							no
Missouri				yes ¹¹		yes ¹¹	no
Montana	no ¹²	no ¹²	no ¹²		no ¹²		no ¹²
Nebraska	no		See FN 13		yes		no
Nevada	no	yes		yes	yes		
New Mexico							
New York ¹⁴	yes ¹³	yes ¹³	yes ¹³	yes		yes	no ¹³
North Dakota							no
Oklahoma	no						
Pennsylvania	yes				yes	yes	yes
Rhode Island ¹⁶							
South Dakota							no ¹⁷
Tennessee	no	no	See FN 18		yes		no
Utah	yes	yes	yes	yes	yes		yes ¹⁹
Vermont	yes	yes		yes			yes
West Virginia		yes ²⁰	yes ²⁰		yes ²⁰	yes ²⁰	
Wisconsin	yes	yes	yes		yes		no
Wyoming	yes						no ²¹

* Included under this heading are regulations concerning communications to one or more commissioners from outside the commission.

KEY: No = data/procedure not confidential; yes = data/procedure confidential; no entry = no information on this issue exists in commission rules.

1. In Alaska, interviews are conducted in executive session unless the applicant requests an interview in public session.
2. In Arizona, all voting is held in public session, but deliberations may be confidential (held in executive session) upon a two-thirds vote of commission members.
3. These data are drawn from the rules of the 1st District and Supreme Court Nominating Commissions.
4. These data are drawn from the rules of the 1st District Court Nominating Commission. The Supreme Court Nominating Commission contains no reference to this subject.
5. These data are drawn from the rules of the District, Circuit, and Supreme Court Nominating Commissions. The Circuit Court Nominating Commission is utilized only in the case of a gubernatorial appointment for interim judicial vacancies.
6. While most information is not confidential, the Supreme Court Nominating Commission reserves the right to keep information confidential.
7. While the identity of the applicants are considered confidential, the rules provide that after the deadline for submitting applications for the judicial vacancy the names of the applicants may be disclosed.
8. These data are drawn from the state statutes of the Supreme, District, and Appellate Court Nominating Commissions.
9. These data are drawn from the state statutes of the District Court Nominating Commission. The Supreme and Appellate Court Nominating Commissions contain no reference to this subject.
10. These data are drawn from the rules of the Appellate and Trial Court Nominating Commissions.
11. The information resulting from communication must be summarized in writing and provided to the members of the nominating commission.

TABLE 4. RULES OF CONFIDENTIALITY (CONTINUED)

-
12. All meetings, documents, and proceedings may, however, be kept confidential upon a majority vote of the commissioners that the interest in individual privacy exceeds that of public disclosure.
 13. Private interviews are encouraged.
 14. These data are drawn from rules of procedure established pursuant to Governor Mario Cuomo's Executive Order No. 134.2 (September 10, 1994), which applies to the Appellate Division of the Supreme Court, Court of Claims, Supreme Surrogate, County, and Family Courts, and Mayor Rudolph Giuliani's Executive Order No. 10 (July 20, 1994), for which no rules of procedure have been promulgated. For the Court of Appeals, this information is drawn from New York Judiciary Law, Sec. 83.
 15. These data are drawn from Governor Cuomo's Executive Order No. 134.2 and the procedural rules of the state's nominating commission. Mayor Giuliani's Executive Order No. 10 contains no reference to this subject. For all courts except the Court of Appeals, only the appointee's names are made public.
 16. Legislation establishing merit selection for general and limited jurisdiction trial courts was enacted on June 2, 1994. Legislation providing for submission to the electorate of the question of whether to adopt merit selection for the state supreme court was enacted on June 2, 1994. The question will be decided at the next statewide general election and will take effect upon ratification of a constitutional amendment. Provisions regarding the future merit selection commission's composition and procedures are taken from that Legislation (i.e. Public Law Chapter 94-041:2346ab and 2348ab).
 17. In South Dakota, nominees' names may be made public only if agreed upon by the Governor and the nominee.
 18. In Tennessee, after one public hearing where any member of the public may suggest possible nominees or oppose or support possible nominees, the commission may hold such additional private or public meetings as it deems necessary.
 19. In Utah, only the name of the appointee is made public.
 20. West Virginia Executive Order 20-89 states, "all proceedings, materials, and reports of the Committee shall remain confidential, except upon agreement of the Governor and the Committee."
 21. The identity of the nominees may be made public at the discretion of the commission.

TABLE 5. NOMINATING COMMISSION PROCEDURES

State	Disqualification Provision	Ethics Provisions	Oath of Office	Political Activity Prohibition	External Recruitment Provision	Diversity Provision for	Rule Against Discrimination	Judicial performance evaluation available to nominating commission
Alabama				x				
Alaska								
Arizona	x			x	x	applicants ¹ commissioners ¹		
Colorado ²			x ³	x ³				
Connecticut								x
Delaware	x			x ⁴	x			
DC								x
Florida ⁴	x	x			x	applicants commissioners		
Georgia								
Hawaii	x			x ⁶	x		x	x
Idaho								
Indiana	x			x	x			
Iowa					x	commissioners ¹		
Kansas ⁵	x ⁶		x ⁷	x ⁷	x			
Kentucky				x				
Maryland ⁸	x ⁹			x		commissioners ^{1,9}		
Massachusetts					x	applicants	x	
Minnesota					x	applicants ¹ commissioners		
Missouri	x				x	applicants ¹		
Montana								
Nebraska	x ¹⁰	x	x				x	
Nevada	x				x		x	
New Mexico								
New York ¹¹				x ¹²	x	applicants ¹² commissioners ¹²		
North Dakota								
Oklahoma				x ¹⁴				
Pennsylvania					x			
Rhode Island ¹³			x	x		applicants ¹ commissioners ¹		
South Dakota								
Tennessee		x	x	x	x	commissioners ¹⁴		
Utah	x	x		x	x ⁷	applicants ¹		
Vermont								
West Virginia					x	commissioners		
Wisconsin					x			
Wyoming				x	x			

1. Diversity is a factor to be considered, but not a requirement.

2. These data reflect the rules of the 1st District and Supreme Court Nominating Commissions. There are 2 district nominating commissions in Colorado, one for each judicial district: these have been examined and generally follow the rules of the 1st District Nominating Commission.

3. These data are drawn from the rules of the 1st District Nominating Commission. The Supreme Court Nominating Commission contains no reference to this subject.

4. These data reflect the rules of the District, Circuit, and Supreme Court Nominating Commissions. The Circuit Court Nominating Commission is utilized only in the case of gubernatorial appointments for interim judicial vacancies.

5. These data are drawn from the state statutes of the Supreme, District, and Appellate Court Nominating Commissions.

6. These data are drawn from the state statutes of the Supreme and District Court Nominating Commissions. The Appellate Court Nominating Commission contains no reference to this subject.

7. These data are drawn from the state statutes of the District Court Nominating Commission. The Supreme and Appellate Court Nominating Commissions contain no reference to this subject.

8. These data are drawn from the rules of the Appellate and Trial Court Nominating Commissions.

9. These data are drawn from the rules of the Appellate Court Nominating Commission. The Trial Court Nominating Commission contains no reference to this subject.

TABLE 5. NOMINATING COMMISSION PROCEDURES (CONTINUED)

-
10. For disqualification purposes, the third degree relationship test is applied.
 11. These data are drawn from rules of procedure established pursuant to Governor Mario Cuomo's Executive Order No. 134.2 (September 10, 1994), which applies to the judges of the Appellate Division of the Supreme Court, Court of Claims, Supreme, Surrogate, County, and Family Courts, and Mayor Rudolph Giuliani's Executive Order No. 10 (July 20, 1994), for which no rules of procedure have been promulgated.
 12. These data are drawn from Governor Cuomo's Executive Order No. 134.2 and the procedural rules of the state's nominating commission. Mayor Giuliani's Executive Order No. 10 contains no reference to this subject.
 13. Legislation establishing merit selection for general and limited jurisdiction trial courts was enacted on June 2, 1994. Legislation providing for submission to the electorate of the question of whether to adopt merit selection for the state supreme court was enacted on June 2, 1994. The question will be decided at the next statewide general election and will take effect upon ratification of a constitutional amendment. Provisions regarding the future merit selection commission's composition and procedures are taken from that legislation (i.e. Public Law Chapter 94-042; 234sb and 2348sb).
 14. Diversity is required.

APPENDIX B

Model Judicial Selection Provisions

Revised 1994



AMERICAN JUDICATURE SOCIETY

Model Judicial Selection Provisions
Revised 1994

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AJS Stock Number 292

American Judicature Society
25 E. Washington, Suite 1600
Chicago, Illinois 60602
(312) 558-6900

Contents

Preface	v
Introduction	vii
Part 1	Establishing a Commission Plan Through Constitutional Provisions 1
Part 2	Implementing a Commission Plan: Model Court Rules (or Legislation) 9
Part 3	Establishing a Commission Plan by Executive Order (or Legislation) 13
Part 4	Implementing a Retention-Evaluation Program: Model Legislation (or Court Rules) 21
Part 5	Model Procedural Rules for Retention-Evaluation Commission 27

PREFACE TO THE 1994 REVISED MODEL PROVISIONS

In 1984 the American Judicature Society first published *Model Judicial Selection Provisions*, which reflected the accumulated experience of state merit selection plans across the country. Ten years later, this revised version of the model provisions reflects the changing experience of those states.

Two major changes appear. The first is language promoting demographic diversity on the judicial nominating commission. The other adds judicial performance evaluation programs to provide information to voters as a component of retention elections.

Over the past few years several states have mandated that their nominating commissions include women and minority members. In an editorial in *Judicature*, the Society endorsed this development and encouraged all states to adopt this requirement (Vol. 74, No. 5, 1991). The editorial noted that a diverse nominating commission (1) will tend to recruit a more broadly representative pool of applicants, and (2) will send the implicit message that the nominating-commission process is an open one. The result should be a more representative bench, which will help enhance public trust and confidence in the courts. For language on commission diversity, see Article 2, page 2, "Judicial Nominating Commission," and all subsequent provisions establishing the commission.

The second major change in the model provisions mirrors an emerging trend in the merit plan states—evaluating judges standing for retention and providing credible and meaningful information to voters in retention elections. This trend also was endorsed in an editorial in *Judicature* (Vol. 75, No. 3, 1991).

In a few merit-plan states judges either are reappointed or serve until retirement. However, in the majority of merit-plan states judges run for subsequent terms in nonpartisan, uncontested elections where the voter answers *yes* or *no* to the question, "Shall Judge X be retained as a [judge] [justice] of the ____ court?" Experience has shown, however, that voters have limited information to guide them in making informed choices in retention elections. Insufficient information, in turn, can leave judges vulnerable to opposition from interest groups who disagree with certain judicial decisions. Furthermore, there often is significant voter falloff in judicial elections compared with the top of the ballot.

As was done in the earlier version, the 1994 model provisions still offer retention elections or retention by commission as alternatives. However, to allow voters to make more informed decisions and to reflect actual practice in some merit-plan states, new language has been added to establish a performance-evaluation program as an adjunct to retention elections. (See Article 6, page 6, and Article 7, page 7.) Model legislation to implement a retention-

evaluation program begins on page 21, and model procedural rules for retention-evaluation commissions begin on page 27.

The changes and additions to the *AJS Model Judicial Selection Provisions* were developed by a special committee chaired by AJS president Guy A. Zoghby and consisting of two judges (B. Michael Dann of the Maricopa County Superior Court, Phoenix, and Leander J. Shaw, Jr., of the Florida Supreme Court), two attorneys (Robert T. Gruit of Nebraska and Stephen S. Dunham of Colorado), and a layperson (Sara B. Davies of Indiana). For more than a year, they reviewed the demographic diversity statutes and retention-evaluation program governing provisions and rules, and adapted and modified the best elements of each.

Members of the Society's board of directors reviewed a draft of the revised provisions at the AJS midyear meeting in March 1994, and the committee made several changes as a result of their comments. In June 1994, the Society's executive committee approved the model provisions as they appear here.

INTRODUCTION

Since its founding in 1913, the American Judicature Society has been dedicated to improving the quality of the judiciary. Improving the judiciary meant improving judicial selection methods that often were confusing or controlled by political party organizations. These methods of selection often required electioneering by judicial candidates and led to appointments based on political obligations rather than objective qualifications.

The Society developed what has been termed a judicial "merit" selection plan. The plan establishes a nonpartisan commission composed of both lawyers and nonlawyers who recruit and screen applicants and ultimately submit names of the most qualified candidates to an appointing authority. The appointing authority then makes the final selection after conducting further investigative proceedings. These elements are present in each of 34 states currently having some form of "merit" or "commission" plan for judicial selection.

Apart from these fundamental characteristics, the legal bases and forms of commission plans vary. Some states have established their plans by constitutional provisions with accompanying implementing court rules or legislation. Other states based their plans on legislation or executive orders. Executive orders are also used where the mayor of a city has appointing powers for that city's judicial offices. Some states have one commission for all vacancies in the state while others have one commission for each judicial district in the state. Commission plans can be statewide, or exist in only certain districts or municipalities. Some commission plans encompass all vacancies, while others fill vacancies on certain courts and still others exist to fill only interim vacancies.

The model provisions that follow are a product of the experience with judicial selection over the past few decades. These provisions incorporate existing constitutional and statutory provisions, executive orders, earlier efforts to develop selection plans, and recent experiences of judicial nominating commissioners across the country.

Because one goal of the commission method for selecting judges is to shelter the commission as much as possible from outside political pressures, this selection method ideally should be established by the state constitution. In any event, constitutional provisions will be required whenever commission plan legislation would conflict with existing constitutional provisions. An opportune time for adopting the provisions is during a state constitutional convention. If the constitution is not under revision, amendment is often possible by referendum or act of the state legislature. Because these latter alternatives are often difficult to achieve, commission plan legislation can be used whenever the constitution allows the legislature to determine how judges are selected. Executive orders may be used whenever the chief executive has the power to make judicial appointments.

The model judicial selection provisions outline the essential components of a nominating commission including commission membership and basic procedures. Each article, section, or rule that has been subject to debate is followed by suggested alternate provisions. Provisions that do not appear to be self-explanatory have been supplemented with brief commentary.

The merit plan as proposed by the American Judicature Society and the American Bar Association and in existence in many states includes some form of retention review. Jurisdictions differ, however, as to the form that a retention review should take. In some states judges reapply to the nominating commission and may or may not be renominated for appointment. In others, there is no retention review because merit-appointed judges serve until retirement.

The revised model provisions now include suggested language for establishing and implementing a process to review judges standing for retention. See Article 7 on page seven, and Parts Four and Five, beginning on page 21.

For further information and publications on merit selection and judicial performance evaluation programs for retention review and their implementation in the various states, please contact the American Judicature Society, 25 East Washington Street, Suite 1600, Chicago, Illinois 60602, telephone 312/558-6900.

PART 1

Establishing a Commission Plan Through Constitutional Provisions

Art. __§1

Section 1. Nomination and Appointment.

The governor shall fill any vacancy in an office of __ court justice or __ court judge by appointing one person nominated by the judicial nominating commission [for the district where the vacancy occurs]. The judicial nominating commission shall nominate no more than five nor less than two most highly qualified persons for each vacancy. If the governor fails to fill a vacancy within 30 days from the day the names are submitted, the [chief justice] [presiding judge for that district] shall appoint one of the nominated persons.

Alternative A

Providing only for interim appointments

Art. __§1

Section 1. Nomination and Appointment.

The governor shall fill any vacancy occurring between elections in an office of __ court justice or __ court judge by appointing one person nominated by the judicial nominating commission [for the district where the vacancy occurs]. The judicial nominating commission shall nominate no more than five nor less than two most highly qualified persons for each vacancy. If the governor fails to fill a vacancy within 30 days from the day the names are submitted, the [chief justice] [presiding judge for that district] shall appoint one of the nominated persons.

Commentary:

Although the number of names submitted to the governor need not be fixed at five, the number should be sufficiently low so that the commission nominates only the most highly qualified candidates. Five names appears to be the optimum because it gives the governor a real choice while limiting the governor's appointing power. Commissions in less populated areas may have difficulty finding five most highly qualified nominees and should therefore be allowed the flexibility to submit fewer names. In some states, the names submitted to the governor are listed in alphabetical order to avoid any indication of a commission's

preference. Thirty days is allowed as a reasonable amount of time for the governor to conduct an investigation of the nominees. In the event that the governor fails to act within that reasonable time period, a judicial officer may appoint from the commission's list. This provision ensures that the final appointment will be made within a reasonable time and from the list of nominees. The separation of functions allows for independent and nonpartisan evaluations and nominations by a responsible commission and final appointment by a governor who is politically accountable.

Art. __§2

Section 2. Judicial Nominating Commission.

[The] [Each] judicial nominating commission shall consist of seven members. Three attorney members shall be selected for [six-year] [four-year] terms by the bar of the [state] [judicial district] except as provided by Art. __§3. Four lay members shall be appointed [from among the residents of the same area] for [six-year] [four-year] terms, except as provided in Art. __§3, by the governor [subject to confirmation by a majority of the members of the senate]. Appointments and elections to the commission[s] shall be made with due consideration to geographic representation and without regard to political affiliation. All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic and racial diversity of the jurisdiction. Vacancies shall be filled for an unexpired term in like manner. No member of [the] [a] nominating commission may hold any other office under the United States, the State or other governmental entity for which monetary compensation is received. No member shall be eligible for appointment to a state judicial office so long as he or she is a commission member and for [four] [three] years thereafter nor serve for more than two full terms as a member of the nominating commission.

Alternative A

Providing for a majority of lawyer members

Art. __§2

Section 2. Judicial Nominating Commission.

[The] [Each] judicial nominating commission shall consist of seven members. Four attorney members shall be selected for [six-year] [four-year] terms by the bar of the [state] [judicial district] except as provided by Art. __§3. Three lay members shall be appointed [from among the residents of the same area] for [six-year] [four-year] terms, except as provided in Art. __§3, by the governor [subject to confirmation by a majority of the members of the

senate]. Appointments and elections to the commission[s] shall be made with due consideration to geographic representation and without regard to political affiliation. All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic and racial diversity of the jurisdiction. Vacancies shall be filled for an unexpired term in like manner. No member of [the] [a] nominating commission may hold any other office under the United States, the State or other governmental entity for which monetary compensation is received. No member shall be eligible for appointment to a state judicial office so long as he or she is a commission member and for [four] [three] years thereafter nor serve for more than two full terms as a member of the nominating commission.

Alternative B

Providing for judge as ex-officio chair

Art. __§2

Section 2. Judicial Nominating Commission.

[The] [Each] judicial nominating commission shall consist of seven members. Three attorney members shall be selected for [six-year] [four-year] terms by the bar of the [state] [judicial district] except as provided by Art. __§3. Three lay members shall be appointed [from among the residents of the same area] for [six-year] [four-year] terms, except as provided in Art. __§3, by the governor [subject to confirmation by a majority of the members of the senate]. The [chief justice] [presiding judge] shall act as ex-officio chair over the commission but shall only vote when to do so would change the result. Appointments and elections to the commission[s] shall be made with due consideration to geographic representation and without regard to political affiliation. All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic and racial diversity of the jurisdiction. Vacancies shall be filled for an unexpired term in like manner. No member of [the] [a] nominating commission may hold any other office under the United States, the State or other governmental entity for which monetary compensation is received. No member shall be eligible for appointment to a state judicial office so long as he or she is a commission member and for [four] [three] years thereafter, nor serve for more than two full terms as a member of the nominating commission.

Commentary:

In a democratic society it is important that public bodies such as judicial nominating commissions be broadly representative of the communities they serve. Care should be taken to ensure that the composition of the commission be reflective of the demographic makeup of the state or district. If a judge is a member of the commission, the judge should have limited power so as to avoid exercising undue influence over other commission members. A

method for selecting the attorney members has not been specified since bar organizations vary significantly from state to state. Many states hold elections to select the attorney members, while in other states bar leaders handle the appointments. Members should serve for a period long enough to enable them to develop selection skills. No member of a commission should seek judicial office until a sufficient amount of time has passed to ensure a commission's objectivity and preserve public confidence. Commission members should be limited to two terms to ensure that the commission continues to be representative and vital.

Art. __§3

Section 3. Terms of Initial Commission Members. (six-year term)

The initial members of [the] [each] judicial nominating commission shall serve for terms as follows: the three attorney members for two, four, and six years respectively, and the four lay members for two, three, five and six years respectively.

Section 3. Terms of Initial Commission Members. (four-year term)

The initial members of [the] [each] judicial nominating commission shall serve for terms as follows: the three lay members for one, two, and three years respectively, and the four attorney members for one, two, three and four years respectively.

Alternative A

Providing for a majority of lawyer members

Art. __§3

Section 3. Terms of Initial Commission Members. (six-year term)

The initial members of [the] [each] judicial nominating commission shall serve for terms as follows: the three lay members for two, four, and six years respectively, and the four attorney members for two, three, five and six years respectively.

Section 3. Terms of Initial Commission Members. (four-year term)

The initial members of [the] [each] judicial nominating commission shall serve for terms as follows: the three lay members for one, two, and three years respectively, and the four attorney members for one, two, three and four years respectively.

Alternative B
Providing for judge as ex-officio chair

Art. __§3

Section 3. Terms of Initial Commission Members. (six-year term)

The initial members of [the] [each] judicial nominating commission shall serve for terms as follows: the three attorney members for two, four, and six years respectively, and the three lay members for two, three, five and six years respectively, and the judge, as chair, for six years or until the [judge] [justice] leaves his/her judicial position, whichever occurs first.

Section 3. Terms of Initial Commission Members. (four-year term)

The initial members of [the] [each] judicial nominating commission shall serve for terms as follows: the three attorney members for one, two, and four years respectively, and the three lay members for two, three and four years respectively, and the judge, as chair, for four years or until the [judge] [justice] leaves his/her judicial position, whichever occurs first.

Commentary:

The terms of the commission members should be staggered to encourage an independent commission and to provide some continuity.

Art. __§4

Section 4. Reimbursement and Administrative Assistance.

(a) Members of [the] [each] judicial nominating commission shall be reimbursed for all expenses incurred in the carrying out of their official duties. Additional compensation may be prescribed by law.

(b) The State Administrative Office of the Courts shall make staff, equipment and materials available to assist [the] [each] commission in carrying out its official duties.

Commentary:

To foster an effective commission, certain minimal services should be made available. These services should include typists, copying facilities, stationery and postage and be provided to the commission promptly upon request.

Art. __\$5**Section 5. Powers of the Judicial Nominating Commission.**

[The] [Each] judicial nominating commission shall have the power to adopt any rules and procedures which aid in its selection of the most qualified nominees for judicial office.

*Alternative retention provisions:***Art. __\$6****Section 6. Retention Elections.**

Any judge who seeks additional terms for the same judicial office shall be retained in office by vote of the electorate. The retention election shall be nonpartisan, shall require the affirmative vote of [a majority] [60%] of those voting on the question to retain the judge, and shall be coupled with a retention-evaluation program that will provide information to voters in retention elections. (See Article 7 below.)

Art. __\$6**Section 6. Retention by Commission.**

Any judge who seeks additional terms for the same judicial office shall be retained in office by a finding of the judicial nominating commission that the judge has served competently and with integrity.

Commentary:

The competence of all judges should be periodically reviewed although appropriate forms of retention may vary. In some jurisdictions it may be preferable to hold retention elections, in others to delegate the responsibility to a judicial nominating commission familiar with the task of evaluating judicial ability. Combinations of these procedures are also possible. For example, the nominating commission or a separate evaluation committee could rate the judges up for retention, publicize the rating, and allow the public to then vote in a retention election. One criterion to consider in choosing a procedure is the number of judges to be evaluated. Regardless of the form it takes, judicial retention should be designed to ensure that only qualified judges remain on the bench.

Art. __§7**Section 7. Retention Evaluation of Justices and Judges**

The (supreme court) (judicial council) shall establish, after public hearings, a process for evaluating judicial performance for all justices and judges who file a declaration to be retained in office, (and shall provide a recommendation to the public at a time reasonably prior to the election, but in no event less than 60 days before the election) (and shall provide information gathered in the evaluation process to the entity responsible for the justices' and judges' reappointment). The rules governing the evaluation process shall include written performance standards and performance reviews that survey opinions of persons who have knowledge of the justice's or judge's performance. The public shall have a full and fair opportunity to participate in the evaluation process.

PART 2

Implementing a Commission Plan: Model Court Rules (or Legislation)

Rule __. JUDICIAL NOMINATING COMMISSION

Rule __.01. Vacancy.

The commission shall meet and submit a list names of no more than five nor less than two persons qualified for the judicial office to the governor within 60 days of the occurrence of a vacancy.

Rule __.02. Quorum.

The commission cannot act unless a quorum exists. A quorum consists of a majority of the commission plus one.

In the absence of a constitutionally mandated chair:

Rule __.03. Chair.

The commission shall choose one of its members as chair and establish the chair's term. The chair shall preside at all meetings. When the chair is absent, the commission shall choose a member to act as temporary chair.

Commentary:

The role of the chair is to call commission meetings, keep commission members notified of commission business, and act as a spokesperson for the commission.

Rule __.04. Publicity.

When a judicial vacancy occurs or when it is known that a vacancy will occur at a definite date, the chair shall publicize the vacancy and solicit the submission of names of qualified individuals by press release to the media and posting in the courthouse[s] of the [state] [district].

Commentary:

These requirements are minimal and should be supplemented with active recruitment techniques.

Rule __.05. Open meetings.

(a) All organizational meetings of the judicial nominating commission shall be open to the public. A notice outlining the topics to be discussed should be given to the public 72 hours prior to the meeting. Public participation should be encouraged at each organizational meeting. An "organizational meeting" is an initial meeting to discuss the commission's procedures and requirements for the vacancy.

(b) All final deliberations of the judicial nominating commission shall be secret and confidential.

(c) The confidentiality of other proceedings of the judicial nominating commission shall be determined by commission rule.

Commentary:

Commission proceedings should be as open as possible. Commissions might want to consider, for example, holding open interviews or releasing the names of all applicants, both of which are done in some jurisdictions. The final deliberations and selection of nominees should remain confidential to encourage free and open discussion of the candidates' qualifications. To preserve confidentiality of these proceedings, some states may need to exempt the final deliberations from the state Open Meetings Act.

Rule __.06. Submitting names of nominees to the governor.

(a) The names of nominees shall be submitted to the governor in alphabetical order.

(b) A confidential memorandum may accompany the list of nominees and may state facts concerning each of the nominees listed.

(c) Upon submission of the names to the governor, the governor shall make the names public and public comment should be encouraged.

Commentary:

Once the names of nominees are submitted to the governor, the commission may provide additional information only on request of the governor. If the commission would like to provide supplemental background information on the nominees, it may do so in a confidential memo without indicating any commission preference. A great majority of states also allow for public comment at this point in the selection process. This is the point at which public preferences are appropriately voiced. By providing the opportunity for public participation, the governor also fosters public confidence in the final appointment.

Rule __.07. Candidacy and selection of commission members.

(a) Any individual wishing to serve on the judicial nominating commission can declare his or her candidacy as follows:

Any person may be considered for an attorney position by declaring his or her candidacy in writing to the ____ at ____, if that person has been a resident of this state for 3 years and is licensed to practice law in this state.

Any person may be considered for a lay position by declaring his or her candidacy in writing to the governor's office at ____, if that person has been a resident of this state for 3 years.

(b) Declarations of candidacy must be submitted within 30 days after publication of notice of the vacancy and should be accompanied by descriptions of the candidates' qualifications for service on the commission.

(c) A commission member's term shall commence on ____, the day of appointment. A commissioner may remain on the commission until his/her replacement has actually been appointed.

Commentary:

The process for declaring an interest in serving on the judicial nominating commission should be open and accessible. A residency requirement of three years' duration has been included to ensure that commissioners have knowledge of the state and the community. This knowledge is particularly necessary in judicial nominating commissioners who must sit in place of the electorate when selecting public officials. In addition, virtually every state has durational residency requirements for some or all of its public officials.

For those states using retention elections add:

Rule __.08. Judicial retention ballot.

A separate nonpartisan judicial ballot shall be designed for each judicial district in which a justice or judge is seeking an additional term. The ballot shall be divided into ____ parts corresponding to the court to which the candidate is seeking to be retained. Within each part the ballot shall read:

"Shall ____ be retained as [justice] [judge] of the ____ court for ____ years?

____ yes ____ no"

PART 3

Establishing a Commission Plan by Executive Order (or Legislation)

I, ____, [Governor] [Mayor] of the [State] [City] of ____, desiring to maintain the highest quality of justice in this [state] [city], establish a Judicial Nominating Commission to nominate most highly qualified lawyers through a fair and open process that does not create barriers to ethnic or racial minorities or women.

Section 1. Nomination and Appointment.

The [governor] [mayor] shall fill any vacancy in an office of ____ court justice or ____ court judge by appointing one person nominated by the judicial nominating commission [for the district where the vacancy occurs]. The judicial nominating commission shall nominate no more than five nor less than two most qualified persons for each vacancy.

Alternative A *Providing only for interim appointments*

Section 1. Nomination and Appointment.

The [governor] [mayor] shall fill an interim vacancy in an office of ____ court justice or ____ court judge by appointing one person nominated by the judicial nominating commission [for the district where the vacancy occurs]. The judicial nominating commission shall nominate no more than five nor less than two most highly qualified persons for each vacancy.

Commentary:

Although the number of names submitted to the appointing authority need not be fixed at five, the number should be sufficiently low so that the commission nominates only the most highly qualified candidates. Five names appears to be the optimum because it gives the appointing authority a real choice while limiting that person's appointing power. Commissions in less populated areas may have difficulty finding five most highly qualified nominees and should therefore be allowed the flexibility to submit fewer names. In some jurisdictions, the names submitted to the appointing authority are listed in alphabetical order to avoid any indication of a commission's preference. The separation of functions allows for independent and nonpartisan evaluations and nominations by a responsible commission and final appointment by a public official who is politically accountable.

Section 2. Judicial Nominating Commission.

(a) [The] [Each] judicial nominating commission shall consist of seven members. Three attorney members shall be selected for [six-year] [four-year] terms by the bar of the [state] [municipality] except as provided by Section 3. Four lay members shall be appointed [from among the residents of the same area] for [six-year] [four-year] terms, except as provided in Section 3, by the [governor] [mayor] [subject to confirmation by a majority of the members of the (senate) (city council)]. Appointments and elections to the commission[s] shall be made with due consideration to [geographic] [community] representation and without regard to political affiliation. All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic and racial diversity of the jurisdiction. Vacancies shall be filled for an unexpired term in like manner. No member of [the] [a] nominating commission may hold any other office under the United States, the State or other governmental entity for which monetary compensation is received. No member shall be eligible for appointment to a state judicial office so long as he or she is a commission member and for [four] [three] years thereafter, nor serve for more than two full terms as a member of the nominating commission.

(b) Any individual wishing to serve on the judicial nominating commission can declare his or her candidacy as follows:

Any person may be considered for an attorney position by declaring his or her candidacy in writing to the [governor's] [mayor's] office at ____, if that person has been a resident of this [state] [city] for 3 years and is licensed to practice law in this state.

Any person may be considered for a lay position by declaring his or her candidacy in writing to the [governor's] [mayor's] office at ____, if that person has been a resident of this [state] [city] for 3 years.

(c) Declarations of candidacy must be submitted within 30 days after publication of notice of the vacancy and should be accompanied by descriptions of the candidates' qualifications for service on the commission.

Alternative A

Providing for a majority of lawyer members

Section 2. Judicial Nominating Commission.

(a) [The] [Each] judicial nominating commission shall consist of seven members. Four attorney members shall be selected for [six-year] [four-year] terms by the bar of the [state] [municipality] except as provided by Section 3. Three lay members shall be appointed [from among the residents of the same area] for [six-year] [four-year] terms, except as provided in Section 3, by the [governor] [mayor] [subject to confirmation by a majority of the members

of the (senate) (city council)). Appointments and elections to the commission[s] shall be made with due consideration to [geographic] [community] representation and without regard to political affiliation. All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic and racial diversity of the jurisdiction. Vacancies shall be filled for an unexpired term in like manner. No member of [the] [a] nominating commission may hold any other office under the United States, the State or other governmental entity for which monetary compensation is received. No member shall be eligible for appointment to a state judicial office so long as he or she is a commission member and for [four] [three] years thereafter, nor serve for more than two full terms as a member of the nominating commission.

(b) Any individual wishing to serve on the judicial nominating commission can declare his or her candidacy as follows:

Any person may be considered for an attorney position by declaring his or her candidacy in writing to the [governor's] [mayor's] office at ____, if that person has been a resident of this [state] [city] for 3 years and is licensed to practice law in this state.

Any person may be considered for a lay position by declaring his or her candidacy in writing to the [governor's] [mayor's] office at ____, if that person has been a resident of this [state] [city] for 3 years.

(c) Declarations of candidacy must be submitted within 30 days after publication of notice of the vacancy and should be accompanied by descriptions of the candidates' qualifications for service on the commission.

Alternative B
Providing for judge as ex-officio chair.

Section 2. Judicial Nominating Commission.

(a) [The] [Each] judicial nominating commission shall consist of seven members. Three attorney members shall be selected for [six-year] [four-year] terms by the bar of the [state] [municipality] except as provided by Section 3. Three lay members shall be appointed [from among the residents of the same area] for [six-year] [four-year] terms, except as provided in Section 3, by the [governor] [mayor] [subject to confirmation by a majority of the members of the (senate) (city council)]. The [chief justice] [presiding judge] shall act as ex-officio chair over the commission but shall only vote when to do so would change the result. Appointments and elections to the commission[s] shall be made with due consideration to [geographic] [community] representation and without regard to political affiliation. All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic and racial diversity of the jurisdiction. Vacancies shall be

filled for an unexpired term in like manner. No member of [the] [a] nominating commission may hold any other office under the United States, the State or other governmental entity for which monetary compensation is received. No member shall be eligible for appointment to a state judicial office so long as he or she is a commission member and for [four] [three] years thereafter nor serve for more than two full terms as a member of the nominating commission.

(b) Any individual wishing to serve on the judicial nominating commission can declare his or her candidacy as follows:

Any person may be considered for an attorney position by declaring his or her candidacy in writing to the [governor's] [mayor's] office at ____, if that person has been a resident of this [state] [city] for 3 years and is licensed to practice law in this state.

Any person may be considered for a lay position by declaring his or her candidacy in writing to the [governor's] [mayor's] office at ____, if that person has been a resident of this [state] [city] for 3 years.

(c) Declarations of candidacy must be submitted within 30 days after publication of notice of the vacancy and should be accompanied by descriptions of the candidates' qualifications for service on the commission.

Commentary:

In a democratic society it is important that public bodies such as judicial nominating commissions be broadly representative of the communities they serve. Care should be taken to ensure that the composition of the commission be reflective of the demographic makeup of the state or district. If a judge is a member of the commission, the judge should have limited power so as to avoid exercising undue influence over other commission members. A method for selecting the attorney members has not been specified since bar organizations vary significantly from state to state. Many states hold elections to select the attorney members, while in other states bar leaders handle the appointments. Members should serve for a period long enough to enable them to develop selection skills. No member of a commission should seek judicial office until a sufficient amount of time has passed to ensure a commission's objectivity and preserve public confidence. Commission members should be limited to two terms to ensure that the commission continues to be representative and vital.

The process for declaring an interest in serving on the judicial nominating commission should be open and accessible. A residency requirement of three years' duration has been included to assure that commissioners have knowledge of the state and the community. This knowledge is particularly necessary in judicial nominating commissioners who must sit in place of the electorate when selecting public officials. In addition, virtually every state has durational residency requirements for some or all of its public officials.

Section 3. Terms of Initial Commission Members. (six-year term)

The initial members of [the] [each] judicial nominating commission shall serve for terms as follows: the three attorney members for two, four, and six years respectively, and the four lay members for two, three, five and six years respectively.

Section 3. Terms of Initial Commission Members. (four-year term)

The initial members of [the] [each] judicial nominating commission shall serve for terms as follows: the three attorney members for one, two, and three years respectively, and the four lay members for one, two, three and four years respectively.

Alternative A***Providing for a majority of lawyer members*****Section 3. Terms of Initial Commission Members. (six-year term)**

The initial members of [the] [each] judicial nominating commission shall serve for terms as follows: the three lay members for two, four, and six years respectively, and the four attorney members for two, three, five and six years respectively.

Section 3. Terms of Initial Commission Members. (four-year term)

The initial members of [the] [each] judicial nominating commission shall serve for terms as follows: the three lay members for one, two, and three years respectively, and the four attorney members for one, two, three and four years respectively.

Alternative B***Providing for judge as ex-officio chair*****Section 3. Terms of Initial Commission Members. (six-year term)**

The initial members of [the] [each] judicial nominating commission shall serve for terms as follows: the three attorney members for two, four, and six years respectively, and the three lay members for two, three and five years respectively, and the judge, as chair, for six years or until the [judge] [justice] leaves his/her judicial position, whichever occurs first.

Section 3. Terms of Initial Commission Members. (four-year term)

The initial members of [the] [each] judicial nominating commission shall serve for terms as follows: the three attorney members for one, two, and three years respectively, and the three

lay members for two, three and four years respectively, and the judge, as chair, for six years of until the [judge] [justice] leaves his/her judicial position, whichever occurs first.

Commentary:

The terms of the commission members should be staggered to encourage an independent commission and to provide some continuity.

Section 4. Reimbursement and Administrative Assistance.

(a) Members of [the] [each] judicial nominating commission shall be reimbursed for all expenses incurred in the carrying out of their official duties.

(b) [The State Administrative Office of the Courts] [The Office of the Clerk of the Municipal Court] shall make staff, equipment and materials available to assist [the] [each] commission in carrying out its official duties.

Commentary:

To foster an effective commission, certain minimal services should be made available. These services should include typists, copying facilities, stationery and postage, and be provided to the commission promptly upon request.

Section 5. Powers of the Judicial Nominating Commission.

[The] [Each] judicial nominating commission shall have the power to adopt any rules and procedures which aid in its selection of the most qualified nominees for judicial office.

Section 6. Vacancies.

Within 60 days of the occurrence of a vacancy, the judicial nominating commission shall meet and submit a list of no more than five nor less than two persons qualified for the judicial office.

Section 7. Quorum.

The commission cannot act unless a quorum exists. A quorum consists of a majority of the commission plus one.

In the absence of an ex-officio chair:

Section 8. Chair.

The commission shall choose one of its members as chair and establish the chair's term. The chair shall preside at all meetings. When the chair is absent, the commission shall choose a member to act as temporary chair.

Commentary:

The role of the chair is to order commission meetings, keep commission members notified of commission business, and act as a spokesperson for the commission.

Section 9. Publicity.

When a judicial vacancy occurs or when it is known that a vacancy will occur at a definite date, the chair shall publicize the vacancy and solicit the submission of qualified individuals by press release to the media and posting in the courthouse[s] of the [state] [district].

Commentary:

These requirements are minimal and should be supplemented with active recruitment techniques.

Section 10. Open Meetings.

(a) All organizational meetings of the judicial nominating commission shall be open to the public. A notice outlining the topics to be discussed should be given to the public 72 hours prior to the meeting. Public participation should be encouraged at each organizational meeting. An "organizational meeting" is an initial meeting to discuss the commission's procedures and requirements for the vacancy.

(b) All final deliberations of the judicial nominating commission shall be secret and confidential.

(c) The confidentiality of other proceedings of the judicial nominating commission shall be determined by commission rule.

Commentary:

Commission proceedings should be as open as possible. Commissions might want to consider, for example, holding open interviews or releasing the names of all applicants, both of which are done in some jurisdictions. The final deliberations and selection of nominees should remain confidential to encourage free and open discussion of the candidates' qualifications. To preserve confidentiality of these proceedings, some states may need to exempt the final deliberations from the state Open Meetings Act.

Section 11. Submitting Names of Nominees to the [Governor] [Mayor].

(a) The names of nominees shall be submitted to the [governor] [mayor] in alphabetical order.

(b) A confidential memorandum may accompany the list of nominees and may state objective facts concerning each of the nominees listed.

(c) Upon submission of the names to the [governor] [mayor], the [governor] [mayor] shall make the names public and public comment should be encouraged.

Commentary:

Once the names of nominees are submitted to the appointing authority the commission should provide additional information only on request of the appointing authority. If the commission would like to provide supplemental background information on the nominees, it may do so in a confidential memo without indicating any commission preference. A great majority of states also allow for public comment at this point in the selection process. By providing the opportunity for public participation, the appointing authority can foster public trust in the final appointment.

PART 4

Implementing a Retention Evaluation Program: Model Legislation (or Court Rules)

Section ____ Judicial Performance Evaluation for Retention in Office

Section ____ .01 Purposes

This legislation is (these rules are) intended to establish a judicial performance evaluation program that will (1) provide persons voting on the retention of justices and judges with fair, responsible and constructive information about judicial performance; (2) facilitate self-improvement of all such justices and judges; (3) promote appropriate judicial assignments; (4) identify the need for and improve the content of judicial education programs; and (5) increase public awareness of the work of the judiciary. Any commission established under this legislation (these court rules) also may conduct midterm evaluations of judges not then standing for retention.

Section ____ .02 Appellate Commission on Judicial Performance Evaluation.

The periodic evaluation of appellate judges subject to retention shall be conducted by the Appellate Commission on Judicial Performance Evaluation. The appointment of commissioners and activities and operations of the commission shall be governed by the following provisions:

Alternative A

Providing for various appointing authorities and either a lay or attorney/judge majority

(a) *Appointment of Commissioners.*: The commission shall consist of eleven (11) members appointed as follows: six (five) lay members appointed by the governor; three (four) attorney members (*in states with integrated bars*: appointed by the supreme court from a list provided by the state bar board of governors) (*in states with voluntary bars*: elected or appointed by members of the bar); and two judge members consisting of the chief justice or his or her designee and one court of appeals judge appointed by the chief justice. All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic and racial diversity of the jurisdiction.

*Alternative B**Adding legislative appointing authorities and providing for either a lay or attorney/judge majority*

(a) *Appointment of Commissioners.* The commission shall consist of eleven (11) members appointed as follows: six (five) lay members: two appointed by legislative leaders, one each by the leader of each house if there are two houses; two (one) appointed by the chief justice; and two appointed by the governor; three (four) attorney members elected or appointed by the state bar; and two judge members consisting of the chief justice or his or her designee and one court of appeals judge appointed by the chief justice. All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic and racial diversity of the jurisdiction.

(b) *Terms.* All members of the commission shall serve terms of four years except that, of those first appointed, three lay members and two attorneys shall serve for a term of three years. No member may serve more than two terms. Vacancies on the commission shall be filled by the original appointing authority.

*Alternative A**Providing for an elected chair and vice-chair*

(c) *Chair and Vice-Chair.* Commission members shall elect a chair and a vice-chair every two years. The chair shall preside at all meetings of the commission and shall be the designated spokesperson for the commission. In the absence of the chair, the vice-chair shall preside.

*Alternative B**Providing for an ex officio judge chair and an elected or appointed vice-chair*

(c) *Chair and Vice-Chair.* The chief justice or his or her designee shall chair the commission. The chair shall preside at all meetings of the commission and shall be the designated spokesperson for the commission. The chair may appoint [commission members may elect] a vice-chair, who shall preside in the absence of the chair.

(d) *Powers and Duties of the Commission.* The powers and duties of the commission shall be as follows:

- (1) To develop techniques for evaluating all justices and judges subject to retention on relevant performance criteria, which include, but are not limited to: integrity; impartiality; judicial temperament; knowledge and understanding of substantive and

procedural law; communication skills; preparation; attentiveness and control over judicial proceedings; docket management and prompt case disposition; administrative skills; punctuality; and effectiveness working with other participants in the judicial process.

- (2) To develop performance evaluation surveys of lawyers, jurors, peers, chief judges, court personnel and others who have direct and continuing contact with justices and judges;
- (3) To develop uniform statewide evaluation criteria, forms and procedures;
- (4) To consult with trial court commissions on evaluation criteria, techniques and sources;
- (5) To subpoena witnesses and hire agents;
- (6) To request public comment and hold public hearings on the performance of appellate justices and judges;
- (7) To produce and distribute to the public (to the entity responsible for retention) no later than 60 days before the election (no later than [90] [120] days before the judge's term expires) pertinent information concerning each appellate justice or judge subject to retention.
- (8) To promulgate, subject to approval by the supreme court (judicial council) rules necessary to implement the provisions of this legislation.

Optional provision for midterm evaluations

- (9) To conduct confidential midterm evaluations of the performance of appellate judges not then standing for retention. The results shall be shared only with the reviewed judge and an appropriate supervising judge or justice as determined by the commission.

Section ____ .03 Trial Court Commissions on Judicial Performance Evaluation

Alternative A

*Providing for various appointing authorities and
either a lay or attorney/judge majority*

(a) *Appointments of Commissioners.* There is hereby established in each judicial district a trial court commission on judicial performance evaluation. Each such commission shall consist of eleven (11) members appointed as follows: six (five) lay members to be appointed by the governor, four (five) attorney members (to be appointed by the supreme court from

a list submitted by the state bar board of governors) (to be elected or appointed by members of the bar); and the chief judge of the appropriate court of appeals district or his or her designee. All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic and racial diversity of the jurisdiction.

Alternative B

Adding legislative appointing authorities and providing for either a lay or attorney/judge majority

(a) *Appointment of Commissioners.* There is hereby established in each judicial district a commission on judicial performance evaluation. The commission shall consist of eleven (11) members appointed as follows: six (five) lay members: two (one) appointed by the chief justice; two appointed by the governor; and two appointed by the legislative leaders, one each by the leader of each house if there are two houses; four (five) attorney members appointed or elected by members of the state bar; and the chief judge of the appropriate court of appeals division or his or her designee. All appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic and racial diversity of the jurisdiction.

(b) *Terms.* All members of the commission shall serve terms of four years except that, of those first appointed, three public members and two attorneys shall serve for a term of three years. No member may serve more than two terms. Vacancies on the commission shall be filled by the original appointing authority.

Alternative A

Providing for an elected chair and vice-chair

(c) *Chair and Vice-Chair.* Commission members shall elect a chair and a vice-chair every two years. The chair shall preside at all meetings of the commission and shall be the designated spokesperson for the commission. In the absence of the chair, the vice-chair shall preside.

Alternative B

Providing for an ex officio judge chair and an elected or appointed vice-chair

(c) *Chair and Vice-Chair.* The chief judge of the appropriate court of appeals division or his or her designee shall be commission chair. The chair shall preside at all meetings of the commission and shall be the designated spokesperson for the commission. The chair may

appoint [commission members may elect] a vice-chair, who shall preside in the absence of the chair.

(d) *Powers and Duties of the Commission.* In addition to other powers and duties conferred on the trial court commissions by this legislation, a trial court commission has the following powers and duties:

- (1) To distribute questionnaires and interview judges under the state commission's direction;
- (2) To produce and distribute to the public no later than 60 days before the election (to the entity responsible for retention no later than [90] [120] days before the judge's term expires) pertinent information concerning each district judge subject to retention.

Optional provision for midterm evaluations

- (3) To conduct confidential midterm evaluations of the performance of trial court judges not then standing for retention. The results shall be shared only with the reviewed judge and an appropriate supervising judge or justice as determined by the commission.

Section____.04 Recommendations on Retention of Justices and Judges.

(a) The state appellate commission and each trial court commission shall conduct an evaluation of each justice of the supreme court and each judge of the court of appeals and the district court who is subject to retention. Evaluations shall be completed and a narrative profile prepared for communication to the justice or judge no later than thirty days prior to the last day on which a justice or judge can declare his or her intent to stand for retention. The appellate justice or judge shall have the opportunity to meet with the appropriate commission or otherwise respond to the evaluation no later than ten days following receipt of such evaluation. If such a meeting is held or response is made, the commission may revise its evaluation.

Alternative A

Providing for a factual summary of evaluation findings to be released to the public

(b) After the requirement in paragraph (a) is met, a factual report concerning each justice or judge subject to retention shall be released to the public (given to the entity responsible for retention). The report shall include a narrative summary of the evaluation findings, and shall state whether the judge exceeds, meets, or fails to meet performance criteria.

*Alternative B**Providing for a recommendation regarding the judge or justice subject to retention*

(b) After the requirement in paragraph (a) is met, the relevant commission shall compile a narrative summary of the evaluation findings, and shall make a recommendation to the public (to the entity responsible for retention) regarding the justice or judge subject to retention. The recommendation shall be stated as retain, do not retain, or no opinion. A no opinion recommendation shall be made only when the commission concludes that there is insufficient reliable information to make a firm recommendation, and shall be accompanied by a detailed explanation.

Section ____ .05 Administrative Assistance.

(a) The State Court Administrative Office shall staff and provide other assistance to the state appellate commission in carrying out its duties. The district administrator of each judicial district shall provide similar assistance.

(b) Commission members shall receive no compensation, but shall be reimbursed for all reasonable expenses incurred in carrying out their official duties.

Section ____ .06 Privilege and Immunity.

All documents and information obtained by or submitted to the committee and all results of judicial evaluations are absolutely privileged and no lawsuit predicated thereon may be brought. Statements made to the commission are absolutely privileged, provided, however, that this absolute privilege does not apply to statements made in any other forum. Members of the committee and staff shall be immune from suit and liability for any conduct in the course of their duties.

PART 5

Model Procedural Rules For Retention-Evaluation Commissions

Rule 1. Meetings, Quorum, Majority, Minutes.

The commission shall meet at the call of the chair and shall conduct no business except upon the attendance of at least six members. Members shall be permitted to attend and participate in meetings by telephone or videoconference. All meetings shall be open to the public except as provided in Rule 3 below. All actions shall require a majority vote of those present, except for the meeting when the commission determines its retention recommendation. That meeting shall require a majority vote of the commission. Except for the requirements of Rule 3, minutes of meetings of the commission shall be considered public documents.

Rule 2. Public Comment and Hearings.

In each election year (Prior to a justice's or judge's retention by reappointment) the commission shall request written public comment and hold one or more public hearings with respect to justices or judges subject to retention. The public shall be notified of the hearing(s) through newspaper advertisements and public service announcements on radio and television. Public hearings shall be tape recorded and public comments shall be considered by the commission when formulating its retention recommendation(s).

Rule 3. Executive Session.

The commission shall meet in executive session at the time of (1) presentation and discussion of a judge's written response or the results of any interview with a justice or judge concerning the commission's draft evaluation; (2) discussion of the commission's recommendations to the voters (discussion of whether a justice or judge meets, exceeds or fails to meet performance standards); and (3) voting on the retention recommendation (voting on whether the factual report shall say the justice or judge meets, exceeds or fails to meet performance standards). The commission may meet in executive session at any other time upon two-thirds vote of commission members then in attendance. The substance of deliberations in executive session shall be confidential.

Rule 4. Removal of Commissioners.

Any member may be removed from the commission by the (chief justice) (judicial council) (appointing authority) for conduct that substantially interferes with the performance of the commissioner's duties.

Rule 5. Commissioner Impartiality and Disqualification.

- (a) A commissioner shall perform his or her duties in an impartial and objective manner.
- (b) A commissioner is disqualified from taking any action with respect to a judge who is a family member within the third degree of consanguinity, or a judge who was a commissioner's business associate, attorney or client within the preceding (three) (five) years.
- (c) A commissioner shall disclose to the full commission any relationship with a reviewed justice or judge, whether business, personal, or attorney-client, or any other cause for conflict of interest, and the commission shall determine whether a commissioner shall be disqualified.
- (d) A commissioner shall promptly report to the full commission any information conveyed to him or her concerning any judicial officer under review. The commissioner also shall promptly report to the full commission any attempt by any person or organization to influence him or her other than by fact or opinion.

Rule 6. Data Collection.

- (a) The commission shall (may) employ a qualified contractor whose duty it shall be to prepare the survey forms referred to herein, process the survey responses, and compile the statistical reports of the survey results in manner that will ensure the confidentiality and accuracy of the process.
- (b) The commission also may formulate a judge's self-evaluation questionnaire, contact the state's judicial conduct commission, interview the reviewed judge's colleagues on the bench, and seek other relevant information that will ensure a full and fair evaluation process.

Rule 7. Confidentiality and Disclosure of Records.

- (a) All information, completed survey forms, letters, notes, memoranda, and other data obtained and used in the course of any judicial performance evaluation shall be strictly confidential and shall not be disclosed by any commissioner, staff person or agent except as provided herein. All survey forms and other evaluation information shall be anonymous.
- (b) Under no circumstances shall the data collected or the results of the evaluation be used to discipline an individual judge or justice or be disclosed to authorities charged with disciplinary responsibility, unless required by law or by the Code of Judicial Conduct.
- (c) Notwithstanding the foregoing, information disclosing a criminal act may be provided to law enforcement authorities at the direction of the supreme court. Requests for such information in the possession of a commission shall be made by written petition setting forth the specific information needed. All information and data provided to law enforcement authorities pursuant to this paragraph shall no longer be deemed confidential.