

AMERICAN BAR ASSOCIATION
COALITION FOR JUSTICE

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Road maps

A “How-to” Series to Help the Community,
the Bench and the Bar Implement Change
in the Justice System

Judicial Selection:
The Process of
Choosing Judges

AMERICAN BAR ASSOCIATION

Judicial Selection



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Judicial Selection: The Process of Choosing Judges

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Why Is Judicial Selection Important?

WHY IS JUDICIAL SELECTION IMPORTANT?

The judiciary serves an important function within a democratic society—preserving the rule of law. To accomplish this, judges must interpret the law fairly and consistently and remain free from undue political influence. Because of the primacy of having competent and impartial judges, the process for selecting judges is of critical importance. The American Bar Association first addressed this issue in 1937, when its House of Delegates adopted a policy in favor of “merit selection” of judges. That position has been reaffirmed by the ABA in many ways during the succeeding sixty years. A summary of specific ABA policy in this arena may be obtained through the ABA Policy and Governance Group.

Concern regarding the process by which judges are selected should not, however, be the exclusive domain of lawyers and bar associations. Judicial decisions at all levels—from traffic court to the United States Supreme Court—affect each and every citizen every day. Although the ABA feels strongly that bar associations and their leaders should be at the forefront of this effort, progress cannot and should not be made without the thoughtful input of citizens with diverse backgrounds and interests.

We hope that those who utilize this “Roadmap” will learn about the methods of judicial selection currently in use and reforms that may be implemented to promote a highly qualified and impartial judiciary. Ultimately, we hope that such knowledge will inspire you to seek these reforms within your own states.

HISTORY OF JUDICIAL SELECTION

When the government of the United States was first established, judges in most states were appointed by chief executives and/or legislatures, to serve lifetime terms. As populist ideals began to emerge in the Jacksonian era, many states turned over the duty of selecting judges to the “will of the people,” and began limiting the terms judges would serve.

In the late nineteenth century, there was a backlash against the growing power of political party leaders, and several states moved to nonpartisan elections for judges. After the turn of the twentieth century, dissatisfaction with partisan politics and its influence on the court system led to early discussions about the need for more far-reaching “reform.”

In 1931, Albert Kales, co-founder of the American Judicature Society, proposed a new method of judicial selection whereby a state would create a bipartisan nominating commission composed of both lawyers and laypersons. This commission would identify highly qualified candidates, without regard for their political ties or party affiliation, for appointment by the governor. The governor would then appoint one of the recommended candidates to the bench. The plan also recognized the need for public accountability, and proposed that all sitting judges would regularly face a retention vote, where citizens would have the opportunity to determine whether judges remained in office after their initial terms.

The proposal stimulated discussions across the nation among those who wished to reduce the role of politics in judicial selection while still allowing for regular public participation in the process. Within the American Bar Association, the proposal led to the organization’s first policy statement on the issue. Passed in 1937, the first ABA resolution in favor of judicial merit selection—as the plan came to be known—remains the cornerstone of ABA policy today.

In 1940, the citizens of Missouri were the first to adopt the plan (now known as merit selection, commission-based appointment, or “The Missouri Plan”) after a politically motivated

attempt to elect an unqualified judicial candidate raised public awareness and concern. In response, a statewide citizen's committee was formed to study the problem and propose reforms. The committee took the bold position that politics had no place in the judicial branch of government.

These forward-thinking citizens advanced the argument that democratic government requires a qualified, capable, and independent judiciary free from political influence. Therefore, judges should be selected from the most talented lawyers available, should not have to engage in political campaigns, and should be secure in their positions as long as they do their jobs well. According to these principles, judges should devote one hundred percent of their time and energy to providing justice to the people of Missouri. The "Missouri Nonpartisan Court Plan" was placed on the ballot by initiative petition and adopted for the state's appellate courts and some trial courts by popular vote. This plan became the blueprint for merit selection proposals that followed many years later.

The trend toward commission-based appointment emerged slowly, with little activity in other states until the 1960s. Most of the states that now use a form of merit selection first adopted plans in the 60s, 70s, and early 80s, with several states doing so after holding citizens' conferences organized by the American Judicature Society. Today, thirty-three states and the District of Columbia use some form of merit selection to choose some or all of their judges.

Although recent years have seen renewed attention to judicial selection, few states have enacted significant changes to their selection method. A number of states have, however, successfully adopted reforms to improve or strengthen their selection processes. Examples are provided in a subsequent section of this publication.

CURRENT METHODS OF SELECTION

Methods of selecting state court judges vary widely among the states but can be placed into five broad categories—legislative appointment, executive appointment, nonpartisan election, partisan election, and merit selection. In many states, more than one method of selecting judges is used, with different selection methods for judges at different court levels or in different geographic areas. Even when the same selection method is used for all judges in a state, there are variations in how the process works in practice. The terms of office for judges and the procedures used to determine whether judges will retain their seats also differ from state to state.

The general selection categories are described briefly below.

Legislative Appointment

Only two states have retained this method of judicial selection, in which the legislature has sole power for appointing judges. Today, only two states (South Carolina and Virginia) use legislative appointment to choose judges. In South Carolina, the state has established a ten-member Judicial Merit Selection Commission consisting of both legislators and citizens to screen applicants and make recommendations to the legislature.

Executive Appointment

Originally, many states adopted the federal model of judicial selection, whereby the executive would appoint judges, subject to legislative confirmation. In the early 19th century, however, states began to move away from executive appointment. Today, there are only three states (California, Maine, and New Jersey) in which the governor has sole discretion in naming judicial appointees. In Maine and New Jersey, the governor's nominee must be confirmed by

the state Senate. In California, the nominee must be confirmed by a three-member Commission on Judicial Appointments.

Among the states that use contested elections to choose judges, twenty-eight authorize the governor to appoint judges to fill mid-term vacancies. These appointments are often only for unexpired terms and are therefore outside the formal selection process, but they still provide opportunities for political control by the executive, with appointees attaining the advantages of incumbency described in greater detail below.

Nonpartisan Election

In an effort to lessen political influence, many reformers in the early 1800s advocated for nonpartisan contested elections, where voters select a candidate at the polls, but the names of judicial candidates appear on the ballot without party labels. There may be a primary election, followed by a general election.

Conducting elections that are truly nonpartisan can be difficult. A few “nonpartisan” election states (Michigan and Ohio are the notable examples) require a judicial candidate to win a party primary or be nominated at a party convention before being placed on a nonpartisan ballot in the general election. In addition, recent federal court rulings have weakened states’ ability to limit judicial candidates’ participation in or affiliation with a political party, a trend that will likely undermine nonpartisan elections over time.

Partisan Election

In partisan elections, judicial candidates usually run initially in a party primary to win nomination. Subsequently, partisan nominees stand in the general election, in which party affiliation is indicated on the ballot.

Merit Selection

This method is often also referred to as the “Missouri Plan” or commission-based appointment. Although there are as many variations in the process as there are states that use this selection method, certain characteristics are fairly standard. A nominating commission screens applicants and selects the most highly-qualified candidates for a judicial vacancy. An elected official (usually the governor) appoints one of the recommended candidates.

There is significant variation in the composition of judicial nominating commissions. Most include lawyers selected by their peers, and non-lawyers selected by the Governor or other elected officials. In some states, a judge will serve as the ex-officio chair of the commission. In certain states, a specified number of representatives of each political party must be included to guarantee that the commission is bipartisan. The length of commissioner terms and limits on the number of terms any one individual may serve also differ from state to state. Some states have separate commissions for different courts or levels of courts.

The rules and procedures that govern the work of nominating commissions, including the solicitation of applications and the investigation and review of applicants, vary by state. Other details governing the process, like the number of names to be submitted to the appointing authority, time limits for commission deliberation, and the extent to which the records and meetings of the commission are open to the public are all determined by statutory or constitutional provisions. Legislative confirmation of gubernatorial appointees is required in some, but not all, merit selection states.

Most merit selection plans include the use of a retention election after the selected judge has served for a specified period. The incumbent’s name is placed on the ballot, and voters are

asked to cast a “yes” or “no” vote as to whether that judge should remain on the bench. If voters choose not to retain a judge, that seat is declared vacant and a new judge is appointed using the same merit selection process.

Chart 1 provides an overview of current judicial selection methods among the states.

**Chart 1:
Judicial Selection in the States: Appellate and General Jurisdiction Courts**

| Commission-based appointment¹ | Gubernatorial (G) or legislative (L) appointment | Partisan election | Nonpartisan election | Combined merit selection and other methods² |
|---|---|--------------------------|-----------------------------|---|
| Alaska | California (G) | Alabama | Arkansas | Arizona |
| Colorado | Maine (G) | Illinois | Georgia | Florida |
| Connecticut | New Jersey (G) | Louisiana | Idaho | Indiana |
| Delaware | South Carolina (L) | Ohio ³ | Kentucky | Kansas |
| D.C. | Virginia (L) | Pennsylvania | Michigan ⁴ | Missouri |
| Hawaii | | Texas | Minnesota | New York |
| Iowa | | | Mississippi | Oklahoma |
| Maryland | | | Montana | South Dakota |
| Massachusetts | | | Nevada | Tennessee |
| Nebraska | | | North Carolina | |
| New Hampshire | | | North Dakota | |
| New Mexico | | | Oregon | |
| Rhode Island | | | Washington | |
| Utah | | | West Virginia | |
| Vermont | | | | |
| Wyoming | | | | |

¹ The following nine states use commission-based appointment only to fill midterm vacancies on some or all levels of court: Alabama, Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, North Dakota, and Wisconsin.

² In these states, appellate court judges are chosen through commission-based appointment, and trial court judges are chosen through commission-based appointment or in partisan or nonpartisan elections.

³ Although party affiliations for judicial candidates are not listed on the general election ballot, candidates are nominated in partisan primary elections.

⁴ Although party affiliations for supreme court candidates are not listed on the general election ballot, candidates may be nominated at party conventions.

REASONS FOR REFORM

Given the primacy of the judiciary in protecting and advancing the rule of law in a democratic society, the method used to select judges is important to every American. While any method of judicial selection may have flaws, it is the belief of the ABA, the American Judicature Society, and many legal experts and scholars across the nation that some form of merit selection should be used in every state. Merit selection encourages community involvement in judicial selection, limits the role of political favoritism, and ensures that judges are well qualified to occupy positions of public trust.

The majority of states continue to use some form of elective system to select and/or retain their judges. The popularity of both contested and retention elections is premised on a belief that judges should be accountable to the public, as are leaders in other branches of government. Legislators and other elected officials are meant to be representatives of the views

of voters, but in a democratic society that depends upon and respects the rule of law, judges serve the people in a different way. Judges have a responsibility to know and impartially apply the law to the facts of the case at hand.

In important ways, today's judicial elections often undermine judges' ability to perform this essential role. All judges should be held accountable, but unlike other elected officials they should not be asked to strictly adhere to public opinion. Rather, they are rightly asked to strictly adhere to the law. When judicial elections are tainted by huge campaign war chests, special interest influence, and misleading advertising by candidates and advocacy groups, they do not advance the legal goal of fair and impartial justice for every citizen.

A major disadvantage to judicial elections is the need to campaign. Judicial campaigns can be both costly and time consuming, and create enormous ethical dilemmas for judges. Judicial candidates often pour millions of dollars into their campaigns, while special interest groups spend millions more in the form of issue-based advertising. Voters, however, are often left with little substantive information with which to evaluate candidates for judicial races. Many of the contributors to these campaigns are lawyers who will later appear in court before the judges they have supported (or failed to support), or business interests with significant cases that will be heard by state courts. In several recent elections across the country, battles have been waged by trial lawyers and large corporations, each side spending millions of dollars in support of judicial candidates whom they believe are sympathetic to their positions. This may prompt complaints that justice is "for sale" and decrease public trust in the judicial system. Some federal courts have recently ruled that sitting judges and judicial candidates must be allowed to directly solicit funds for their campaigns. At the very least, this creates an "appearance of impropriety" – a situation that judicial officers are bound by their rules of ethics to avoid.

Adding to this confluence of money, special interests, and negative advertising are new rules regarding how judicial candidates can campaign. To preserve the essential function that courts serve in a democratic society, most states have adopted provisions from the ABA Model Code of Judicial Conduct that limit the political activities of sitting judges and judicial candidates. However, in 2002, the U.S. Supreme Court ruled that judicial candidates must be permitted to discuss their views on political issues. Ongoing litigation since 2002 has furthered weakened the ability of states to limit the political behavior of sitting judges and judicial candidates on the campaign trail. By introducing overtly political influences and encouraging voters to choose based on politics, these changes have threatened judges' ability to be impartial once on the bench. They have also contributed to an erosion of public confidence in the impartial administration of justice.

Despite the increasingly contentious public debate in judicial elections, voters get little reliable information about judicial candidates. In partisan elections, voters know which party the candidates are associated with, but little else. Most judicial elections generate low voter turnout, likely due in part to this lack of information. The lack of relevant, reliable, nonpartisan, and nonpolitical information about judicial candidates can be remedied with judicial performance evaluations, a process some states have developed successfully (see discussion of Arizona below).

Finally, when judges are initially placed on the bench through contested elections, there is no effective means of screening potential candidates. A candidate whose only qualifications are a familiar-sounding name or a photogenic face may win ascension to the bench on that basis. Once elected, the incumbent's chances of later defeat are minimal. Incumbents have tremendous power, as lawyers may be reluctant to challenge a sitting judge. In addition, the incumbent is more likely to have name recognition. As voters have such limited information,

the fact that an individual is already a judge, whether good or bad, may well be the deciding factor at the polls. Merit selection, by contrast, guarantees that those individuals who are recommended to the governor will be the most qualified applicants.

Although accountability should certainly not be overlooked in any process, it must be weighed against the importance of fair and impartial courts. The use of a merit selection process is meant to strike the appropriate balance between preserving judicial independence and providing public accountability. The single most significant advantage to a merit selection system is quality assurance. Most citizens would agree that the goal in selecting judges should be to find those individuals who are the best qualified to serve. The nominating commission in a merit selection plan has a great deal of information about the professional background and experience of judicial applicants. In addition, most commissions interview the applicants and spend a great deal of time considering each one. The process provides an opportunity for the commission to receive and take into account input from the community, including bar associations, citizens, and other experts.

The element of accountability is also incorporated in virtually all merit selection systems. (Three merit selection states appoint judges for life, or to age 70.) Retention elections and reappointment processes allow for an assessment of judges' performance on the bench, whether by the public or the reappointing authority. Some states have established a systematic evaluation program to collect information on judges' performance and provide feedback to the judge and the public prior to retention elections (see discussion of Arizona below). This practice provides a measure of objective evaluation that can be of guidance to the judge for self-improvement purposes and to the general electorate in casting votes. And, as with any other selection method, all judges who have gained their seats through merit selection are subject to various disciplinary procedures and removal mechanisms.

While there is no system that can completely eliminate political influence, merit selection significantly diminishes such influence. Even when politics does enter into the process, the effect is tempered by the initial bipartisan screening process. The fact that the appointment can be made only from among a carefully selected few limits the opportunity for political cronyism. The ultimate appointment, usually by the governor, is constrained by the role of the broader-based commission. In addition, the governor is also subject to voter and media scrutiny.

The absence of full-blown contested elections saves both dollars and time. Rather than spending the last year or more of each term fundraising and campaigning, a judge can concentrate on doing her work and doing it well. The prospect of facing a costly or hotly contested election campaign may discourage some qualified candidates from throwing their hats into the ring. On the other hand, the more objective and less contentious merit selection process may attract a larger, more diverse, and more qualified pool of applicants. This, in turn, will lead to more judges who wish to serve the best interests of their community by following the law rather than acting on political motivations.

A merit selection system includes all of the necessary elements to provide the public with a qualified judiciary that will best fulfill the goal of fair and impartial justice for all citizens. At the same time, merit selection ensures that courts remain responsible and accountable for their actions. In short, it makes our courts the very best that they can be.

OPPOSITION TO MERIT SELECTION

The merit selection process is certainly not without its critics. One of the often-stated reasons for opposition to merit selection is the belief that the public should have the opportunity to select judicial candidates in open, contested elections as they do with other

government officials. Although retention elections are a feature of most merit selection systems, it is argued that voter turnout in retention elections is even lower than for other election processes, and incumbents gain an even greater advantage.

Contested elections, however, are inconsistent with the democratic goal of fair and impartial courts. They create a judicial system in which big money, special interests, and negative advertising pose substantial conflicts of interest for judges. While incumbent judges are likely to win retention elections, this does not diminish the valuable role that voters play in holding judges accountable when a judge consistently violates the public's trust. High rates of reelection among judges in those states that use merit selection reaffirms public confidence in the courts and voters' belief that these judges are following the law, not succumbing to political pressure.

Merit selection opponents further argue that politics is not eliminated from this system, just transferred from popular politics to behind-the-scenes political control. The governor's political influence, opponents point out, may simply be transferred from directly appointing judges themselves to appointing members of the nominating commissions.

Although the governor does make the final appointment in a merit selection system, the choice of nominee is limited by the work of the bipartisan nominating commission. This commission is composed of both citizens and lawyers, only some of whom are appointed by the governor. The commission gathers information and determines which applicants are best qualified and most capable of occupying a seat on the bench. Very few commissioners report that political influences enter into commission deliberations, and nearly all agree that the non-lawyer members of the commission are active and essential participants in the process. It is, of course, vitally important that commissions are broadly representative of the community. Most states achieve this by balancing the number of lawyers and non-lawyers, as well as the number of Republicans and Democrats.

Traditionally, one of the most vocal segments of the population questioning or even opposing merit selection processes has been minority organizations. These groups have expressed concerns that a merit selection system may exclude them from the bench or diminish their chances of filling judicial seats. Several studies have attempted to determine how different judicial selection methods affect judicial diversity. Results have been inconclusive, usually showing only minor differences in percentages of minorities on the bench in states with different systems. Analysis of results is particularly difficult because analysts most often compare different states to one another, creating a situation in which the varying results may be due to more than just the type of selection process utilized.

While few studies have established a link between merit selection and greater judicial diversity, research has shown that merit selection does not reduce the numbers of women and minorities who reach the bench. And, unlike an elective system, a merit selection process can be structured so that opportunities for selecting women and minority judges are enhanced. Those who are responsible for choosing nominating commission members can take into account the demographic diversity of the jurisdiction, and many merit selection states call for such consideration by constitution, statute, or commission rule. Research has demonstrated that demographically diverse nominating commissions attract more diverse applicants and select more diverse nominees. Governors may also prioritize judicial diversity in making their appointments.

The truth about which system provides greater access to the bench for women and minorities may depend greatly on the jurisdiction involved. In large urban areas with high minority populations, elections may put higher percentages of minorities onto the bench. In statewide elections, however, or in areas with minimal minority voting power, merit selection

may provide greater diversity. Similarly, in a gubernatorial appointment system, outcomes may depend to a large extent on the political ideology of the governor, and the extent to which he is dependent upon minority support to be re-elected.

Charts 2 and 3 provide an overview of the initial selection methods for women and minorities currently serving on state appellate courts. (Note that these charts indicate the methods through which judges actually attained their seats, as judges in some contested-election states were initially appointed to office.)

Chart 2
Women Judges on State Courts of Last Resort and Intermediate Appellate Courts

Merit Selection: 33.8%
Gubernatorial Appointment: 25.7%
Legislative Appointment: 1.6%
Partisan Election: 25.2%
Nonpartisan Election: 8.6%
Other Methods:* 5.1%

Source: American Judicature Society, May 2008.

*In Illinois the Supreme Court appoints judges to fill interim judicial vacancies, and in New Jersey the Chief Justice appoints judges to the intermediate appellate court.

Chart 3
Minority Judges on State Courts of Last Resort and Intermediate Appellate Courts

Merit Selection: 31.9%
Gubernatorial Appointment: 28.7%
Legislative Appointment: 1.3%
Partisan Election: 25.2%
Nonpartisan Election: 6.6%
Other Methods:* 6.3%

Source: American Judicature Society, May 2008.

*In Illinois the Supreme Court appoints judges to fill interim judicial vacancies, and in New Jersey the Chief Justice appoints judges to the intermediate appellate court.

WHERE SHOULD REFORM BEGIN?

The Process

Historically, the most effective selection reform efforts have involved groups from a broad spectrum of interests and a with wide range of perspectives, including communities that have traditionally opposed merit selection. Reform necessarily requires broad coalitions of support, and advocates should strive to inform all citizens of the benefits of change. Public education about the current system and available alternatives is a critical step in the process.

The media can be an invaluable resource in this endeavor, and efforts should be made to include members of the media as participants in the process.

Well-organized, existing citizen groups are also essential players. The League of Women Voters, Common Cause, and other similar groups should be brought in at the earliest stages. Other local stakeholders such as business and labor leaders, clergy and faith-based groups, educators and universities – to name only a few – must also be recruited as allies to help spread the word and encourage reform. Diversity among reform advocates is essential if any such reform is to be successful.

Some states have taken the first steps toward judicial selection reform with town hall meetings or citizens' conferences. When members of the public have an opportunity to express their feelings about the justice system, concerns about judges' fairness and impartiality are often paramount. These concerns should be channeled into concrete action toward reform.

One prominent example of collaborative coalition building can be seen in Minnesota, where the state Supreme Court appointed a commission to examine judicial selection after the 2002 U.S. Supreme Court ruling in *Republican Party of Minnesota v. White*. Chaired by former governor Al Quie, the bipartisan Minnesota Citizens Commission for the Preservation of an Impartial Judiciary was made up of prominent community leaders, including representatives from business, faith-based communities, good government groups, and academia, as well as judges and lawyers. The commission convened regularly over the course of a year to evaluate the threats to fair and impartial courts, the options available to respond to those threats, and the best solution for Minnesota. In early 2007, the commission released its report recommending a merit selection system with retention elections. Although the proposal has not yet been enacted, the early stages of the reform effort provide an instructive example of how to establish a broad coalition of support in the early stages.

PRELIMINARY REFORMS

It is critical that all concerned citizens take action to improve their judicial selection processes in order to preserve highly qualified, fair, and impartial courts. Even in jurisdictions where merit selection currently exists, there may be opportunities to update and improve the process. In states where significant change seems far off, there are incremental reforms that may be instituted more easily and that can lessen the negative influence of political forces. Some of these are discussed below.

Combination Selection Systems

Initial movement toward merit selection may be most readily achieved by limiting the change to only a small percentage of a state's judges. In several states (Florida, Oklahoma, and South Dakota are examples), merit selection is used only for appellate court judges. Introducing a limited proposal such as this may be one way to approach selection reform.

In most states with contested judicial elections, governors appoint judges to fill vacancies that arise between elections, and in some of these states (including Idaho, Kentucky, and Nevada, among others) the participation of a judicial nominating commission is required by constitution or statute. Short of constitutional or statutory change, however, governors may establish a merit selection process by executive order, as governors in such states as Georgia and New York have done.

Such limited systems should not be viewed as a final goal. Rather, movement in this manner should be seen only as a step toward more sweeping reform. Any effort to lessen the effects of electoral politics and, in so doing, improve the quality and independence of state courts is beneficial. A limited approach also provides a means of "testing" the new method,

thereby allowing elected officials, citizens, and judicial applicants to evaluate their roles in a merit selection system and the quality of judges produced by such systems.

Judicial Performance Evaluations

While judicial performance evaluation is an integral part of the merit-selection-and-retention process in several states, it can be used in states with other selection methods as well. Such programs serve to improve the quality of the judiciary by encouraging self-examination and improvement. They can also provide valuable information to voters – in both retention and contested elections – about judges seeking to remain on the bench. It is critical, however, that the evaluation process remain free from political, ideological, and issue-oriented considerations.

In the early 1980s, the American Bar Association undertook a project to develop guidelines for judicial performance evaluation. These guidelines were published in 1985 and revised in 2003, and they are available on the ABA's website ("Guidelines for the Evaluation of Judicial Performance," at www.abanet.org). Similarly, the American Judicature Society has drafted model legal provisions for implementing a performance evaluation program, available on the AJS website ("Model Judicial Selection Provisions," at www.ajs.org).

Official performance evaluation programs are typically administered by an independent commission, created for that purpose and responsible to the state's highest court. The composition of these commissions varies, but both the ABA and AJS recommend a broad-based, independent group of judges, lawyers, and non-lawyers familiar with the judicial system.

In many jurisdictions that use contested or retention elections, state and local bar associations may also conduct polls of their members to evaluate or recommend particular judicial candidates. These take on many different forms, and have met with differing levels of success and criticism. Bar polls differ from formal judicial evaluation programs in that the participants are limited to lawyers who are members of that bar association.

According to the ABA and AJS, recommended performance evaluation criteria include the following:

- Legal ability
- Integrity and impartiality
- Communication skills
- Professionalism and temperament
- Administrative capacity
- Necessary skills for level and/or jurisdiction of court

Care should be taken not to rank candidates or compare them directly. The evaluation process itself should be confidential, but in order to provide information to those responsible for retaining, reelecting, or reappointing judges, the final results must be made public and distributed as widely as possible.

The establishment of a formal evaluation process should not be the goal itself. Rather, it should be viewed as a first step toward greater public awareness of the quality of the judiciary. It can also be a starting point for moving public opinion toward support for a system that provides better quality justice and diminished political influence.

For more information about official evaluation programs, see "Shared Expectations: Judicial Accountability in Context," available at www.du.edu/legalinstitute/.

Voter Guides

Voter guides provide voters with information about judicial candidates and/or incumbents seeking to retain their seats. Candidates typically have the opportunity to include biographical information and a short statement to voters. In some jurisdictions, these are combined with performance evaluation results. In a few states, these pamphlets are distributed to all registered voters, at the expense of the state or in conjunction with candidate contributions.

Distribution of objective and unbiased information can reduce dependency on media and interest group preferences and provide all candidates with an equal opportunity to dispense facts to the voters. In states where surveys have been conducted regarding the resources that voters rely on when selecting judges, voters' guides are consistently among the most frequently cited resources. In recent years, a number of voter guides have been prepared and distributed by citizen groups. In some instances, these privately funded and distributed "guides" may be attempts to persuade voters based on political viewpoints or legal philosophy, but the best voters' guides will use established procedures for gathering unbiased information relevant to the job of the judge.

As with other preliminary reforms, these pamphlets do not produce sufficient levels of reform in and of themselves. They serve to promote public education about judges and courts and may therefore push voters to think more about judicial selection processes and make them receptive to more substantial reform.

For examples of voter guides, visit www.judicialselection.us.

Campaign Conduct Committees

During the 1970s, as judicial elections were starting to become more contentious in some places, a number of states set up campaign conduct committees to encourage ethical and appropriate campaigning by judicial candidates. Campaign conduct committees have four goals:

- Educate judges and judicial candidates about ethical campaign conduct.
- Encourage and support appropriate campaign conduct, and work to deter inappropriate conduct.
- Publicly criticize inappropriate campaign conduct that cannot be otherwise resolved.
- Protect the public interest in having a fair and impartial judiciary.

These committees, usually composed of both lawyers and non-lawyers, can take many forms, and may be formally organized under statutory authority or informally organized by state and local bar associations or good government groups within the state. Both the National Center for State Courts and the ABA have recommended that these committees be formed by state and local bar associations.

For more information about campaign conduct committees, visit www.judicialcampaignconduct.org.

Campaign Finance Reform

Public concerns about the influence of money in judicial campaigns have prompted considerable efforts to reform campaign financing in these races. Examples of reform include more stringent disclosure requirements, better recusal standards for judges whose contributors later appear before them in cases, stricter limits on campaign contributions, and public financing of judicial campaigns. North Carolina became the first state to adopt full public financing for judicial candidates in 2002, the same year that the ABA Standing Committee on

Judicial Independence recommended that states using contested elections finance judicial races with public funds (see “Public Financing of Judicial Campaigns,” available at www.abanet.org/judind/).

There are a wealth of resources available in this area. Here we list just a few. The National Institute on Money in State Politics (www.followthemoney.org) tracks contributions to judicial candidates and the sources of those contributions. The Brennan Center for Justice has published a monograph describing emerging threats to impartial courts and offering proposals for strengthening state recusal systems (see “Fair Courts: Setting Recusal Standards,” available at www.brennancenter.org). The Justice at Stake Campaign’s “The New Politics of Judicial Elections” reports (available at www.justiceatstake.org) document the role of money and special interests in judicial elections since 2000.

State Experiences

Space does not permit an in-depth analysis of the steps each state has taken to convert to a merit selection system, strengthen a long-standing merit selection system, or improve existing elective systems. However, several states with recent activity in this arena have been selected as examples for others considering these measures. These brief overviews should provide an understanding of some of the ways in which judicial selection reform may be approached and accomplished.

Rhode Island: Merit Selection by Constitutional Amendment

Rhode Island has the distinction of being the most recent state to adopt merit selection by constitutional amendment. It did so in 1994. A long history of political control of judicial appointments by the Rhode Island legislature ultimately led to this reform. Trial court judges were previously appointed by the Governor, with Senate confirmation. By informal agreement, this had evolved into a system whereby the Governor, the President of the Senate, and the Speaker of the House alternated control over the selection of appointees. Supreme Court appointments had traditionally been the product of action by the “Grand Committee” – both chambers of the state legislature acting together. This process gave the greatest level of control to the Speaker of the House. A well-developed, long-standing patronage operation was the result.

The move to merit selection was prompted by a series of scandals in the late 1980s and early 1990s involving Supreme Court justices. During this time, two justices resigned under threat of impeachment, and one was convicted of soliciting bribes and sent to prison. In the summer of 1993, a local newspaper publicized the scandals, exposing the levels to which the patronage problems had escalated. RIght Now!, a coalition of forces that had previously tackled other reforms within the state, sprang back into action to address the issue of judicial selection.

The leading organizations in this effort were Common Cause of Rhode Island, the Rhode Island Bar Association, and the Rhode Island League of Women Voters. Other groups that made up the coalition included the Chamber of Commerce, the Rhode Island State Council of Churches, several environmental groups, the Catholic Diocese of Rhode Island, and prominent business leaders. They received assistance with factual information and other expertise from the American Judicature Society.

The first task undertaken by this group was a campaign to convince the legislature to withhold appointment of a new Chief Justice of the Supreme Court until systematic changes could be put into place. As a result of this effort, a majority of the Senate agreed to a moratorium, and the foundation for reform had been set.

The road to change was not an easy one. Even though the public was well aware of the problems caused by the old system, they did not readily embrace the new one. The development of a specific plan came from the three leading coalition members, and the other members of the broad-based coalition embraced those proposals. Part of the process toward reform was a public relations campaign to inform and educate the people of the state about the importance of an independent judiciary and the value of merit selection. This was a grass roots effort that, armed with facts and figures, reached out to citizens in a variety of ways, including through churches and schools.

The efforts paid off. Some compromises needed to be forged, of course, including the relinquishment of any formal role for the bar association on the nominating commission. Once details were agreed on, the state legislature in June of 1994 approved a merit selection system for Rhode Island's trial courts. A constitutional amendment approved by the voters in November of that year established merit selection as the sole means of choosing judges at all court levels, including the Supreme Court.

The system now in place in Rhode Island relies on a nine-member nominating commission, with five seats filled by the legislature and four by the governor. Nominees to the lower courts are confirmed by the Senate, while Supreme Court nominees must be confirmed by both chambers of the legislature. The result of the efforts of dedicated reformers is a judicial selection system with a lower risk of political control and greater public trust.

New Hampshire: Merit Selection by Executive Order

The New Hampshire Constitution dictates that all judges are nominated by the Governor and confirmed by the Executive Council, a five-member body elected by the people to advise the Governor. In 1975, the state legislature passed a bill establishing a judicial nominating commission for judicial appointments. The bill was vetoed by then-Governor Thomson but re-introduced in 1977. During the debate over the bill, the legislature requested an opinion from the state Supreme Court on the constitutionality of establishing a judicial nominating commission by statute rather than constitutional amendment. The New Hampshire Supreme Court issued an advisory opinion stating that the legislation would be unconstitutional, as it would severely limit the powers of the Governor and the Executive Council. Merit selection, therefore, would need to be established by constitutional amendment.

Twenty-three years later, in 2000, four justices of the New Hampshire Supreme Court came under fire for questionable recusal practices. One justice resigned, two others faced impeachment hearings, and a third was impeached but not convicted. These events prompted a series of reform proposals. Two proposals were passed into law: a requirement that justices of the Supreme Court serve as Chief Justice for rotating five-year terms based on seniority, and the creation of an independent disciplinary panel for judges. Other proposals—to establish a judicial nominating commission by constitutional amendment or statute, to create renewable terms for judges, to provide regular judicial performance review, and to require senate confirmation of judicial appointees—failed.

In the midst of the controversy, on June 30, 2000, Governor Jeanne Shaheen became the first New Hampshire governor to establish a judicial nominating commission by executive order. The new eleven-person nominating commission, composed of seven lawyers and four non-lawyers, all of whom were appointed by the governor for three-year terms, would screen applicants for all state courts. In 2003, Governor Craig Benson signed an executive order abolishing the judicial nominating commission, but in 2005, Governor John Lynch reestablished the commission by executive order, with six lawyers and five non-lawyers serving for three-

year terms. Three of the five justices currently serving on the New Hampshire Supreme Court were appointed through a merit selection process.

New Hampshire judges do not stand for retention, but serve for lifetime appointments until mandatory retirement at age 70.

Arizona: Judicial Performance Evaluation

With a 1974 constitutional amendment, voters in Arizona adopted merit selection for judges of the Supreme Court and Court of Appeals, and Superior Court judges in the state's two largest counties. Over the next several years, the system faced various challenges in the form of efforts both to abolish merit selection and return to judicial elections and to alter the process to require legislative confirmation of judicial appointees. At the same time, the public grew dissatisfied with the quality of information available about judges who were standing for retention. The State Bar of Arizona had formalized its judicial evaluation process when the state moved to merit selection, but there were still limitations to the bar polls. In particular, lawyers could respond to questionnaires for judges even if they had no professional contact with them, and bar poll results were not widely publicized because of budget constraints.

Both the legislature and the Supreme Court began to explore better methods of evaluating judicial performance. An effective evaluation program would provide meaningful information to voters in retention elections and, in turn, mollify some critics of the merit selection system. In 1992, a judicial performance review (JPR) program was presented to voters as part of Proposition 109, a three-pronged proposal to reform the merit selection process. (The other two aspects of the proposal addressed the size and demographic diversity of the judicial nominating commission.) Proposition 109 was approved by 58% of voters, making Arizona the only state with a constitutionally mandated judicial evaluation program.

Proposition 109 called for the creation of a thirty-member commission on judicial performance review (CJPR) that included lawyers, judges, and members of the public. The commission would survey those who came into contact with judges, asking them to evaluate judges on their legal ability, integrity, judicial temperament, communication skills, and administrative performance. Based on responses to these surveys, commission members would vote on whether a judge "meets" or "does not meet" judicial performance standards. Judges would also complete self-evaluation surveys and meet with conference teams composed of a judge, an attorney, and a member of the public to discuss their performance review. The results of pre-election performance reviews would be made public, while mid-term reviews would be confidential.

The new JPR program improved upon bar polls in two essential ways. First, it included the broader public. Along with attorneys, litigants, jurors, and witnesses who had interacted with judges were also asked to evaluate their performance. Also, public input surveys and applications for positions on the CJPR and conference teams were posted on the Supreme Court's website. Second, a variety of approaches were explored to provide the most widespread dissemination of evaluation results. Today, evaluation results and retention recommendations are available on the Supreme Court's website and included in the ballot information pamphlet that is mailed to voters and provided at public centers such as libraries, banks, and groceries stores.

For more information about Arizona's judicial performance evaluation program, visit www.azjudges.info.

Washington: Judicial Voter Guides

Judges in Washington State have been chosen in nonpartisan elections since 1907. In 1995, the Chief Justice of the Supreme Court, the Governor, and legislative officials appointed the Walsh Commission to study the state's judicial selection process and recommend improvements. The commission was created in response to a survey conducted earlier that year revealing that two thirds of Washingtonians believed they seldom had enough information to make rational decisions in judicial elections. Perhaps because of this lack of information, between 30 and 50 percent of those who cast votes in other races failed to vote in judicial elections. The twenty-four member commission consisted of legislative, judicial, education, and community leaders.

The commission focused on four aspects of the judicial selection process: judicial qualifications, judicial selection, judicial performance, and voter information. To gather the necessary background on these topics, the committee gathered extensive research, took testimony from a broad spectrum of interest groups, hosted an interactive town hall meeting that was broadcast statewide, convened focus groups throughout the state, and spoke with leaders in states with other selection methods. The commission's recommendations were published in a 1996 report that called for a variety of reforms: establishing citizen-based nominating commissions to screen candidates for interim judicial appointments, imposing campaign contribution and expenditure limits for judicial elections, developing an official judicial performance evaluation program, and disseminating voter pamphlets that provided information about judicial candidates and the court system.

To facilitate the preparation and distribution of a judicial voter guide, the Supreme Court appointed an advisory committee consisting of judges from all court levels, a representative of the state League of Women Voters, and two attorneys. Based on the committee's report, the court ordered the publication of a voter pamphlet for the primary elections that would include biographical data and position statements for all candidates facing contested judicial elections, along with basic information about the courts and the selection process. The guide was prepared and distributed through a public/private partnership between the Office of the Administrator of the Courts (OAC) and the state's daily newspapers. In addition to being posted on the OAC's website, hard copies of the guide were sent to 1.2 million newspaper subscribers and made available at special kiosks in supermarkets, malls, and other public places. A video voter guide aired on the statewide public affairs cable network.

The 1996 voter education effort was deemed a success. According to a poll conducted immediately following the primary elections, 71% of those who voted for judicial candidates viewed the voter information pamphlet as an important source of information. It was also the most commonly used source of information, as nearly half of those voting in judicial races reported referring to the guide. The judicial voter pamphlet was prepared again in 1998. In 2000, the Secretary of State's office published its first voter pamphlet for the primary elections and worked with the OAC to provide expanded information about judicial candidates. In 2002, the OAC and Washington newspapers again assumed the responsibility for preparing and disseminating the judicial voter pamphlet for the primary elections.

For more information about Washington's judicial voter pamphlet, visit www.courts.wa.gov/voters/.

Alabama: Campaign Oversight Committees

Since 1867, all of Alabama's judges have been chosen in partisan elections. In the 1980s and early 1990s, these elections became increasingly expensive and contentious, in large part

because of the controversy over tort reform. Responding to the state's growing reputation as a favorable venue for civil lawsuits, the Alabama legislature had passed a tort reform package in 1987, but by 1993 the Alabama Supreme Court had struck down all significant pieces of this legislation.

As judicial elections took on heightened significance during this time, campaign fundraising became more important. Between 1986 and 1996, expenditures by Supreme Court candidates grew by 776%. Views on the tort reform issue sparked increasingly politicized debate that frequently devolved into mudslinging between the candidates. The year 1996 came to be known as "the year of the skunk" because of an ad run by an incumbent justice in a high court race that year that alluded to his opponent and featured pictures of a skunk, accompanied by the caption "Some things you can smell a mile away." The two candidates in this contest spent a total of \$4.5 million on their campaigns. Special interest groups joined the fray as well, with trial attorneys and business groups spending \$11.2 million on judicial elections in 1994 and 1996.

The nastiness of these campaigns, and a February 1997 statewide poll showing high levels of public dissatisfaction with the judiciary and distrust of judges' impartiality, convinced the Alabama Supreme Court to take action to improve the tone and conduct of judicial campaigns. The court revised the Canons of Judicial Ethics to restrict personal solicitation of contributions and to require candidates to take responsibility for ads created by their campaigns. The court also authorized the creation of a judicial campaign oversight committee for the 1998 elections.

This twelve-member committee, composed of judges, attorneys, and private citizens, acted as a resource for candidates regarding questions of appropriate campaign conduct. It met with candidates to review the Canons of Judicial Ethics and convinced most of them to sign a pledge demonstrating their commitment to compliance with the ethical principles therein. Additionally, the committee handled over 350 formal inquiries regarding permissible conduct and countless informal requests for advice about the ethics of judicial campaigning. Though the committee had no formal disciplinary power, it could issue public statements. Members viewed the committee's role as that of a "neighborhood watch" for bad behavior.

Lawyers, judges, and private citizens, as well as the members of the committee itself, reported that the work of the 1998 committee prevented the intense negativity seen during the 1996 election. Based on the committee's success in taming the tone, if not the expense, of the 1998 elections, a similar committee was established for the 2000 elections. This committee was larger, with twenty-six lawyers and judges, and a new procedure was created that allowed rapid response to complaints brought throughout the state. One study of the 2000 elections noted that while more money was spent than ever (more than \$13 million) and litigation arose over one specific ad, judicial elections in Alabama remained overall more civil than elections in other states that saw contentious races. A committee was also established for the 2006 elections.

For more information about the Alabama committee and campaign oversight committees nationwide, visit www.judicialcampaignconduct.org.

DISCUSSION POINTS AND QUESTIONS

Convening and facilitating meetings in your community to engage the public in meaningful discussions about the justice system are vital steps toward involving the public in the process of reforming the judicial selection system. The questions set forth below are designed to stimulate a frank and open colloquy on the issues, concerns, and attitudes in your community that can affect the judicial selection process.

Meetings should be in a small group setting of 25 - 30 participants, with an independent facilitator. For the discussions to be most productive, the group should be a diverse one, which includes lawyers and non-lawyers and a mix of racial backgrounds, gender, and age groups.

Overview

1. What are the most important personal qualities you would like to see in a judge? [To help propel discussion, participants could be asked to write down their "top five" list, and then share with the group. Suggestions include independence, intelligence, fairness, impartiality, etc.]
2. What specific objective criteria should judicial candidates possess? [These could include age, years of practice, educational background, type of practice, community involvement and the like.]
3. Do you know how judges are currently selected in this state?
4. Does the current method of selecting judges produce ideal judges?
5. Have you ever had any direct interaction with judges? In what way? Was your overall impression of the judge(s) positive or negative?

Selection Methods

1. What is the best method of selecting judges? Should the method differ at different court levels?
2. Do you feel the current method of selecting judges is fair? If yes, why? If no, why not? How could it be improved?
3. Who should determine how judges are selected and what qualifications they should possess?

Judicial Elections

1. Is the election of judges good or bad for the justice system? What are the pluses and minuses of publicly elected judges?
2. Is the public given enough information about judicial candidates to make informed election decisions?
3. Should a judicial candidate's party affiliation (Democrat, Republican) be known to voters?

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4. Should judicial candidates be permitted to solicit campaign funds? What restrictions, if any, should be placed on amounts or sources of contributions? Should lawyers be allowed to contribute? Under what circumstances should judges be required to recuse themselves when contributors appear before them in court?

Merit Selection

1. In most merit selection systems, a nominating commission screens candidates. Who should sit on such a commission?
2. How should commission members be appointed?
3. Should there be mandatory requirements for the composition of the commission?
[Examples would include lawyers and non-lawyers, party affiliation, ethnic or gender diversity, geographical diversity, and the like.]

Judicial Review

1. What is the best means by which non-elected judges can be held accountable for their performance?
2. If merit selection is utilized, should there be an evaluation process of the judge's performance? What criteria should be used? Who should conduct the evaluations?
3. Do we have sufficient safeguards against bad judges? How could they be improved?

RESOURCES

For more information about judicial selection and related topics, including additional publications and resources, visit the websites of these organizations:

American Bar Association's Standing Committee on Judicial Independence

www.abanet.org/judind

American Judicature Society

www.ajs.org

www.judicialselection.us

Brennan Center for Justice at NYU School of Law

www.brennancenter.org

Committee for Economic Development

www.ced.org

The Constitution Project

www.constitutionproject.org

Institute for the Advancement of the American Legal System

www.du.edu/legalinstitute/

Institute on Money in State Politics

www.followthemoney.org

Justice at Stake Campaign

www.justiceatstake.org

League of Women Voters Judicial Independence Project

www.lwv.org/fairandimpartialcourts

National Center for State Courts

www.ncsconline.org