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# Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support

## **Cover Page Footnote**

Jere L. Beasley Professor of Law, University of Alabama School of Law; retired circuit judge, Sixth Judicial Circuit, State of Alabama. The author thanks the University of Alabama Law School Foundation for its generous support. I also thank Norman Greene for his leadership and tireless efforts to bring about judicial selection reform. I am indebted to Josh Donnelly, Scott Dunnagan, and Robert S. Elliott, who provided significant research assistance and helpful comments. The statements and opinions in this article are mine alone, and naturally, I alone remain responsible for any errors.

# RETHINKING JUDICIAL NOMINATING COMMISSIONS: INDEPENDENCE, ACCOUNTABILITY, AND PUBLIC SUPPORT

by Joseph A. Colquitt\*

*Of all the difficult choices confronting societies when they go about designing their legal systems, among the most controversial are those pertaining to judicial selection and retention.<sup>1</sup>*

## I. INTRODUCTION

There is no one best way to select judges.<sup>2</sup> Any judicial selection system has both strengths and weaknesses. In order to create the best judicial selection process possible, society must be willing to design and create selection paradigms that result in the best-available individuals taking the bench even though, in the process, some well-entrenched aspects of existing schemes must fall by the wayside.

Judges usually take the bench via election or appointment.<sup>3</sup> Regardless of the judicial selection method employed in a given jurisdiction, most judges, even those in states utilizing judicial elections, initially take the bench through appointment.<sup>4</sup> Therefore, it be-

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\* Jere L. Beasley Professor of Law, University of Alabama School of Law; retired circuit judge, Sixth Judicial Circuit, State of Alabama. The author thanks the University of Alabama Law School Foundation for its generous support. I also thank Norman Greene for his leadership and tireless efforts to bring about judicial selection reform. I am indebted to Josh Donnelly, Scott Dunnagan, and Robert S. Elliott, who provided significant research assistance and helpful comments. The statements and opinions in this article are mine alone, and naturally, I alone remain responsible for any errors.

1. LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 7 (2005).

2. I am not the first to make this statement. See Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 38 (1995) ("There is no one 'best' method for selection and retention of judges.").

3. I include partisan-political, non-partisan, legislative-election, and retention or merit-selection elections in the broad elections category.

4. See, e.g., Jonathan P. Nase, *The Governor's Impact on an Elected Judiciary: The Lessons from Pennsylvania*, 69 TEMP. L. REV. 1137, 1137 (1996) ("[I]n partisan and nonpartisan election states, most judges are initially appointed rather than elected. . . .") (citing scholarly writings to same effect)).

comes imperative to examine appointive procedures when evaluating the effectiveness of a judicial selection process.

This Article focuses on one of the pillars of the appointive process, the judicial nominating commission, although it warrants noting both that some jurisdictions that use judicial elections also use nominating commissions to fill vacancies, and that not all appointive systems utilize nominating commissions.<sup>5</sup> Although this Article eschews any analysis or discussion per se of the election alternative,<sup>6</sup> it suggests that all jurisdictions should have judicial nominating commissions. Naturally, a judicial nominating commission exists to screen and select nominees for judgeships. In discussing nominating commissions, the self-assigned purpose of this Article is to envision and describe a system that more likely will result in selecting the right person for the bench.<sup>7</sup>

The task in a good judicial selection system is not simply to fill vacancies, but to select the best candidates for judicial positions. Short of this goal, perhaps at the very least, a well-devised system can eliminate “seriously underqualified” candidates.<sup>8</sup> To accomplish this purpose through the use of a nominating commission scheme, we should strive to develop the ideal judicial nominating commission system.<sup>9</sup> That system should possess (at least) three principal features: it should adhere to democratic ideals; it should maintain as much independence as reasonably possible; and it should enjoy public acceptance and support. Additionally, local

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5. For example, in Michigan, Ohio, and Texas vacancies are filled by gubernatorial appointment without nominating commission action. See MICH. CONST. art. VI, § 23; OHIO CONST. art. IV, § 13; TEX. CONST. art. V, § 28(a). In New Jersey, the governor appoints with the advice and consent of the State Senate. See N.J. CONST. art. VI, § 6, ¶ 1.

6. Discussion, therefore, of judicial elections generally falls outside the scope of this Article, although at times it is necessary to mention one or more of the elective schemes listed in note 3.

7. See, e.g., STANDING COMM. ON JUDICIAL INDEPENDENCE, ABA, STANDARDS ON STATE JUDICIAL SELECTION: REPORT OF THE COMMISSION ON STATE JUDICIAL SELECTION STANDARDS iv (2001), available at <http://www.abanet.org/judind/downloads/reformat.pdf> [hereinafter ABA STANDARDS] (“The creation of credible, deliberative, non-partisan bodies to evaluate the qualifications of all judicial aspirants . . . serves to assure the public that those judicial aspirants have met a threshold set of qualifications.”).

8. Cf. Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 95 (1998) (“[T]he direct primary had the unintended effect of weakening the ability of party organizations to prevent the election of seriously underqualified judges.”).

9. We are by no means the first to make the attempt. See, e.g., MODEL JUDICIAL SELECTION PROVISIONS (Am. Judicature Soc’y 1994), <http://www.ajs.org/js/provisions.pdf> [hereinafter MODEL JUDICIAL SELECTION PROVISIONS].

conditions and requirements must be considered in designing any commission scheme. Obviously, the needs of the various states and locales differ.<sup>10</sup> Selecting the appropriate judicial nominating commission scheme can be challenging, but effective judicial nomination commissions will greatly aid in the effort to obtain the best judges possible.

Almost needless to say, these features and considerations conflict to some extent. Because of the tension between them, they greatly complicate efforts to design an ideal commission. Despite these difficulties, we should not compromise on the principal features of an ideal scheme any more than necessary to reach the best possible balance.<sup>11</sup> A delicate balancing of democratic ideals and independence will garner public support for a judicial nominating commission without over-compromising any of these core principles.

This Article consists of five Parts. Part I introduces the topic, briefly explains how I was introduced to the issues being aired,<sup>12</sup> and provides an overview of the three fundamental, principal concerns discussed, namely democratic ideals, independence, and public support. In Part II, the Article explores the process of properly designing a commission system. The first section of Part II identifies the goals for the appointment process and introduces the concept of commission capture. The second section of Part II focuses on the makeup of commissions. It examines potential sources of authority (i.e., constitutional, statutory, or executive order) and the strengths and weaknesses of each. It looks at the structure of the commission, including commissioner selection processes, and it also addresses diversity. In the third subdivision of Part II, the Article addresses the work of commissions, including guidance for commissioners, ethics, and the judicial selection process. In the latter subsection, the Article airs the opposing concerns of secrecy and openness. The fourth subpart of Part II briefly discusses the role of commissions with regard to renomination or retention of judges.

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10. This point seemingly is overlooked occasionally. *See id.* pt. 1 art. \_\_ § 2 & Alternatives A-B (suggesting a commission composed of seven members without any stated alternatives in light of local or state conditions or needs).

11. In almost any undertaking of this breadth, compromise is virtually guaranteed because decision-makers disagree on the choices to be made. With a project as important as a judicial appointment process, hopefully, compromised principles can be kept to a minimum.

12. And leaves it to the reader to determine how that information shapes the reader's view of opinions expressed in the Article.

Part III studies the challenging issue of desirable subjective attributes of judicial candidates and how commissions should address that issue. Part IV focuses on and discusses the need to sell the nominating commission process to the public and the political leadership. The Article's conclusion appears in Part V. We begin where I began: my appointment to the trial bench.

#### A. My Introduction to a System (in the Interest of Candor)<sup>13</sup>

I first became acquainted with a judicial selection process in August, 1971. Benny H. Mize, a very prominent and well-respected circuit judge in Alabama, had died. His death created a mid-term vacancy on the trial bench. Two friends called me, then a young attorney, to see if I could have lunch with them. Over lunch they told me that, as members of the governor's local political organization, they would be advising the governor about who should be appointed to the vacancy and wanted my input. We discussed my knowledge of each of the announced candidates for the seat on the court.

After our conversation, they asked for a copy of my resume (which I provided) so that they could mention my name to the governor during their meeting the next day, just in case the governor needed to appoint someone to a board or to represent the state for litigation purposes sometime in the future.<sup>14</sup> The next afternoon, after assuring the local news media that I had not received a bench appointment,<sup>15</sup> I received a call from the governor's press secretary who informed me that an Alabama state trooper was on his way to my office with my commission as a state circuit judge. That call was my first communication from, to, or with anyone in the governor's office about the matter.

Twenty years later, I served as the Chair of the Judicial Appointments Commission<sup>16</sup> that carefully considered candidates to replace me upon my retirement from the active bench. Thus, I have seen judicial selection firsthand from both extremes. The governor appointed me through a very political process. When I left office, I

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13. The account of this event is as I remember it. No records of the meeting exist to my knowledge.

14. At the time, I already represented the state as a special assistant attorney general in certain eminent domain proceedings for highway right-of-way condemnation purposes.

15. An understandable response to media inquiries in light of the fact that I did not know that I was even a candidate for the position.

16. See 1990 Ala. Laws Act 90-627 (repealed by ALA. CONST. amend. 741) (establishing a judicial nominating commission for the 6th Judicial Circuit).

served as Chair of our judicial nominating commission, one of only seven in the state.<sup>17</sup> Hence, my compilation of experiences have placed me in a unique position to critique straight appointment versus nominating commission schemes. Which do I think is the better system? Had a judicial selection commission existed locally in 1971, I likely would not have served as a circuit judge for the next twenty years. Nevertheless, I think a judicial appointments commission is an essential component of any properly designed judicial selection system, whether that system involves an elective or appointive scheme.

### **B. Judicial Appointments**

As noted previously, most judges originally take the bench by appointment.<sup>18</sup> Obviously, the quickest and most efficient way to fill a judicial vacancy is by appointment. Appointments are necessary to maintain efficient operation of the court in the event of a vacancy on the bench. The death or resignation of a judge from the active bench seriously disrupts the work of the court, and the speedy selection of a replacement is important to the litigants and the public. Most, perhaps virtually all, of these interim vacancies are filled by gubernatorial appointment.<sup>19</sup> In a few states, the legislature makes the appointment.<sup>20</sup> Alternatively, a state could choose a special election,<sup>21</sup> but that method entails uncertainty, delay, and costs. Appointment is the better method of filling vacancies.

Absent a commission, though, appointing authorities may appoint individuals more for their politics than for their ability. Governors tend to appoint individuals who have been active in state or local politics, particularly focusing on those who have helped the

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17. See ALA. CONST. amends. 83, 110, 408, 607, 615, 660, 741 (enactments establishing nominating commissions in certain counties in Alabama); 1990 Ala. Laws Act 90-627 (both provisions establishing a commission in Tuscaloosa County, Alabama).

18. See Nase, *supra* note 4, at 1137.

19. See, e.g., MICH. CONST. art. VI, § 14; OHIO CONST. art. IV, § 13; TEX. CONST. art. V, § 28(a).

20. See, e.g., S.C. CONST. art. V, §§ 3, 8, 13 (authorizing the general assembly to elect members of the state's courts); VA. CONST. art. VI, § 7; VA. CODE ANN. § 16.1-69.9:2 (West 2006) (authorizing the general assembly to fill district court judge vacancies).

21. See, e.g., 10 ILL. COMP. STAT. ANN. 5/2A-9(a-5) (West 2006) (requiring special elections to fill vacancies on the state supreme court); N.D. CENT. CODE § 27-25-04(3) (2005) (authorizing the governor to appoint a judge from a list of nominees from the judicial nominating committee, reject the list and order a new slate of nominees, or call a special election to fill the vacancy).

governor or the governor's party or allies.<sup>22</sup> Neither the gubernatorial nor the legislative appointment process is faultless. Both involve the political process and can involve significant delay. Moreover, neither gubernatorial nor legislative appointment schemes necessarily accomplish our objectives, namely to create an appointment process that adheres to democratic ideals, is independent of the political process (as much as possible), and enjoys widespread public acceptance and support. Inserting a properly crafted judicial nominating commission into the appointment process, though, can greatly enhance the likelihood of meeting these objectives. These three objectives, which are vital to any properly constructed judicial nominating commission, are discussed in the following subsections: i) Democratic Ideals, ii) Independence, and iii) Public Support.

i. *Democratic Ideals*

A properly functioning commission system must adhere to certain democratic ideals. Citizens must have at least some say in their government.<sup>23</sup> Although the judiciary is not considered a political branch, the courts are a part of our democratic form of government. In fact, in this country, the courts are an essential part of the government. We must also recognize, frankly, that politics are part of our governmental scheme. Our courts impact public policy and help shape the norms of society.<sup>24</sup> In that sense, at the very least, the courts are part of the political system.<sup>25</sup>

The amount of input the citizens of a state exercise with regard to their courts varies greatly from state to state. Citizens potentially have more direct input in states with an elected judiciary and less input in states with an appointed judiciary, but they have at least some input in all schemes. Some people would argue that the

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22. See, e.g., Michael Solimine, *Commentary: Constitutional Restrictions on the Partisan Appointment of Federal and State Judges*, 61 U. CIN. L. REV. 955, 955-56 (1993) ("It has long been understood that the governor only considers for appointment a member of his or her own political party and that, in fact, all or virtually all such appointees are members of his or her party.").

23. There just are not enough benevolent dictators to fill the needs.

24. See, e.g., WALTER F. MURPHY & C. HERMAN PRITCHETT, *COURTS, JUDGES, & POLITICS* 7 (4th ed. 1986) ("Because judges often affect public policy, they are important political actors . . ."); HENRY J. SCHMANDT, *COURTS IN THE AMERICAN POLITICAL SYSTEM* 5 (1968) (noting that court decisions have "important political, social, and economic consequences").

25. See SCHMANDT, *supra* note 24, at 17 ("Courts are political institutions in the sense that they participate in the authoritative allocation of values and resources for the community or nation.").



courts should be removed as much as possible from politics.<sup>26</sup> This Article explains how judicial nominating commissions, in part, serve that purpose, while maintaining that the commissions nevertheless must be representative and responsive to public sentiments. Therefore, even judicial nominating commissions have a political facet.

By utilizing a nominating commission approach, we can reduce the concentration of power in political officeholders by spreading the nomination and appointing powers. Political elites should not control judicial appointments. The courts, as part of our government, belong to the people, and the people should have a voice in who serves as their judges. Judicial nominating commissions better facilitate this input, at least at the appointment stage, without overly politicizing judicial selection.

Within the commission process, democratic ideals are primarily protected by the commission's structure and procedures. We can further our goal of maintaining the democratic ideal by structuring nominating commissions along democratic lines. Thus, the size and makeup of the commission, the commission's openness, the commissioner appointment scheme, and other factors will determine how closely the commission adheres to democratic ideals. Additionally, canons, which require the commissioners to follow procedural rules governing input the commission receives from the public, make the commission more democratic.

Some detractors may believe that judicial nominating commissions are not democratic.<sup>27</sup> Detractors prefer a system in which political actors, such as a governor, the legislature, or both, select judges. These detractors assert that the people elect these politicians and therefore, this approach is more democratic than the commission scheme.<sup>28</sup> Despite these contentions, a system in

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26. See, e.g., James L. Huffman, *Politics and Judicial Independence: A Proposal for Reform of Judicial Selection in Oregon*, 39 WILLAMETTE L. REV. 1425, 1429-30 (2003) ("The appeal for bipartisanship—for putting the public interest above politics—resonates at every level of government and from both political parties.").

27. Cf., e.g., Tillman J. Finley, Note, *Judicial Selection in Alaska: Justifications and Proposed Courses of Reform*, 20 ALASKA L. REV. 49, 60 (2003) (discussing merit selection generally, and noting that with smaller numbers of individuals involved in judicial selection comes greater potential for "secretive deals and private collaboration"). Within Finley's discussion of merit selection he naturally includes judicial nominating commissions along with retention elections. See *id.* at 59-60.

28. See, e.g., Martha W. Barnett, *The 1997-98 Florida Constitution Revision Commission: Judicial Election or Merit Selection*, 52 FLA. L. REV. 411, 419 (2000) ("Judicial nominating commissions are viewed by some as an 'elitist' group that 'allows a small handful of lawyers to decide for a community who shall be our judges.'" (quoting A.J. Barranco, *Don't Eliminate the Right to Elect Florida's Trial Judges*, FLA. B. NEWS,

which political actors select judges is generally not as democratic as a system with a properly constructed judicial nominating commission.

Looking at the approaches critically, a properly constituted judicial nominating commission system is a more democratic option. First, commissions which address trial court vacancies, as envisioned in this Article, are local entities<sup>29</sup>—their membership consists of local individuals. Therefore, the commissioners can actually be more knowledgeable about the local scene and the desires of the local people, with regard to their courts, than a governor who may be from, or located in, a distant city. Additionally, the governor may be a member of, or elected by, a political party (or a faction of a political party) that is not in power on the local level. Thus, potentially at least, it is the commission, not the governor, that is more representative of the local court district. The same is true with respect to a comparison of the local commission and the legislature.<sup>30</sup> As representative bodies, judicial nominating commissions better reflect democratic ideals. In order to operate as democratically as possible, a commission must maintain its independence.

#### ii. *Independence*

A commission's function should be to identify and nominate the most qualified individuals for judicial offices.<sup>31</sup> To perform that

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Aug. 15, 1999, at 4)); Peter Paul Olszewski, Sr., *Who's Judging Whom? Why Popular Elections Are Preferable to Merit Selection Systems*, 109 PENN ST. L. REV. 1, 2 (2004) (supporting election of judges and criticizing merit selection). "Popular elections provide the most democratic form of judicial selection because they give citizens a direct role in choosing the judges that represent them. When judges are appointed by a selection committee or by a governor, however, the citizenry is deprived of their fundamental right to vote and select judges." Olszewski, *supra*, at 2.

29. By local, I mean that the commission shares the geographical boundaries of the court to which it nominates judges. Thus, admittedly, an appellate commission for a court of statewide jurisdiction would not be "local." On the other hand, in the scheme being described, commissions that nominate to a local trial court or a district court of appeals would be as local as the court to which it nominates judges. See, e.g., COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, FEERICK COMMISSION REPORT 7 (2004), available at <http://www.courts.state.ny.us/reports/JudicialElectionsReport.pdf> [hereinafter COMM'N, FEERICK REPORT] (recommending a commission for each judicial district).

30. For a different view, see Thurgood Marshall, Comments on The Missouri Plan, Address before the American College of Trial Lawyers (Mar. 14, 1977), in MURPHY & PRITCHETT, *supra* note 24, at 179 ("These [nominating] committees typically are neither representative nor accountable bodies.").

31. See, e.g., IND. CODE ANN. § 33-27-3-2(2) (West 2006) (charging the commission to submit to the governor "names of only the three (3) most highly qualified

function, politics must be pushed to the side. Otherwise, the commission may become nothing more than a redundant step in a political process. The commission has its own goals and functions. It identifies the best qualified candidates for judicial office and makes its nominations to the appointing authority. To perform their tasks appropriately, judicial nominating commissions must be independent.

Independence encompasses both external and internal independence (explained later in a discussion of external and internal capture).<sup>32</sup> At this juncture, suffice it to say that we seek to divide the selection process in a way that reduces the power of individuals to select judges. The spread of power among a more representative group not only is more democratic, but it can also create a significant degree of independence.<sup>33</sup> Thus, the commission can be a separate, worthwhile component of the selection process. As a useful, independent, accountable component of the judicial appointment process, a commission scheme should garner and maintain public support.

### iii. *Public Support*

The commission must have the confidence and support of the public which it serves. A commission can gain and maintain public support in at least three ways. First, if the commission is representative and the commissioners are respected individuals, the public will likely support its decisions. Second, if the commission acts independently and engages in its selection process in a fair-minded way, public confidence in the commission will be enhanced. Third, the public is much more likely to support a nominating commission scheme if the commission is subject not only to public scrutiny, but also to regulation, review, and in appropriate cases, sanctions. When the people know that those in authority must answer for their actions, it is easier for the people to support the process.

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candidates”); R.I. UNIF. R. P. FOR THE JUDICIAL NOMINATING COMM’N § 5 (proposed revision Oct. 29, 2001), *available at* [http://www.rules.state.ri.us/rules/released/pdf/JNC/JNC\\_831.pdf](http://www.rules.state.ri.us/rules/released/pdf/JNC/JNC_831.pdf) (providing for selection of “highly qualified persons to fill each judicial vacancy”); UTAH CODE OF JUDICIAL ADMIN. app. A (West 2006) (Manual of Procedures for Judicial Nominating Commission) [hereinafter UTAH CODE OF JUDICIAL ADMIN.] (“[T]he over arching goal of the system [is] the nomination and appointment of the best qualified candidates . . .”).

32. *See infra* text accompanying notes 47-56.

33. *See, e.g.*, MODEL JUDICIAL SELECTION PROVISIONS, *supra* note 9, at pt. 1, art. \_\_ § 1 Alternative A, § 1, cmt. (“The separation of functions allows for independent and nonpartisan evaluations and nominations by a responsible commission . . .”).

If you read much about existing judicial nominating commissions, you will see accounts of public dissatisfaction and a desire to change commissions.<sup>34</sup> Sometimes that dissatisfaction may be fostered by political actors who want to grasp power. The governor or the legislature may not be satisfied with the fact that they no longer have the ability to appoint judges. In order to retain or regain power, they may work against judicial nominating commissions. Thus, to offset this possibility, judicial nominating commissions must have public acceptance and support.

To cultivate and maintain public support, a commission can conduct a public relations campaign. Possible strategies include establishing a public speakers' bureau of commissioners (and possibly judges and attorneys) to explain the commission's role to interested groups, having commissioners interviewed by the media, disseminating public service announcements about the commission and its activities, and, when possible, conducting its business in open proceedings to which the public has been invited. Commissioners can attend the meetings of other organizations such as civic clubs and local governments to explain the commission's function, answer questions, and receive comments. Such activities should help build public confidence in the judicial nomination system.

In sum, in considering democratic ideals, independence, and the need for public support, it appears that these goals may potentially conflict. Those people familiar with political science writings know that tensions exist between judicial accountability on one hand and independence on the other hand.<sup>35</sup> These same tensions arise when one addresses judicial nominating commissions. How can there be both independence and accountability? Actually, within reason, it is not an impossible task. Both goals can be achieved if they are recognized as goals and the commission scheme is structured insofar as possible to encompass both goals. The system may

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34. See, e.g., sources cited *supra* note 28; see also, e.g., The Federalist Soc'y for Law and Pub. Policy Studies, *Judicial Selection White Papers: The Case for Partisan Judicial Elections* (2003), available at <http://www.fed-soc.org/Publications/White%20Papers/judicialection.htm> (observing that "nominating commissions are dominated by lawyers"); The Judicial Selection Task Force of the Ass'n of the Bar of the City of N.Y., *Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York* (2003), available at <http://www.abcny.org/pdf/Judicial%20selection%20task%20force.pdf> ("A recurring criticism of merit selection is that it is elitist.").

35. See, e.g., Roger Handberg, *Judicial Accountability and Independence: Balancing Incompatibles?*, 49 U. MIAMI L. REV. 127, 131 (1994) ("Balancing judicial independence and judicial accountability has long haunted the judicial selection and retention process at the state level.").

be less than perfect, but the tensions can be minimized. Then, in regard to the third aspect—public acceptance and support—the task will be easier because the public will more likely support a commission plan that is accountable, yet independent. Hence, a reasonable balance of these concerns—democratic ideals, independence, and public support—should be attainable.

Each feature of a commission should be designed with these goals in mind. It is not enough that features of a commission scheme garner a consensus of a drafting committee or a legislature. Designing a commission is too important to become too much a product of compromise, accommodation, or a path-of-least-resistance approach.

## II. DEVELOPING THE SYSTEM

Embracing a judicial nominating commission scheme is not enough. Choosing the appropriate paradigm is paramount. As already noted, a number of states already have judicial nominating commissions; some do not. States with and without commissions should take interest in the issues and suggestions encompassed in this section. Jurisdictions with commissions might identify opportunities to improve the existing scheme. For example, those states that use commissions only for either appellate or trial court vacancies<sup>36</sup> could significantly improve their commission system by expanding their commissions' jurisdiction to encompass vacancies on all levels of courts.

Those charged with the task of forming new commissions or modifying existing commissions inevitably have to clear significant hurdles. They need to make numerous choices, and many of those choices have the potential to adversely impact the work of, and the support for, the commissions. This section discusses a number of the more significant choices involved in crafting an appropriate judicial nominating commission scheme.

### A. The Commission System's Scope

States developing a new commission scheme must decide whether they will focus solely on appellate courts or on all courts at all levels. Proponents of the nominating commission approach

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36. *See, e.g.*, ALA. CONST. amends. 83, 110, 408, 607, 615, 660, 741 (establishing nominating commissions for trial courts in certain counties in Alabama); MO. CONST. art. V, § 25(a) (establishing a commission nominating process for all appellate courts and trial courts only in the city of St. Louis and one county); MINN. STAT. ANN. § 480B.01 subdiv. 1 (West 2006) (addressing only trial courts).

seemingly should prefer the latter, although political reality in particular states may force them to accept the former.

Presently, approximately thirty-two states have judicial nominating commissions.<sup>37</sup> A number of states with nominating commissions include both appellate and trial courts within the purview of their commissions,<sup>38</sup> but some states have commissions only for appellate vacancies.<sup>39</sup> Some states may use commissions only for trial courts,<sup>40</sup> and a number of states do not utilize nominating commissions.<sup>41</sup> Furthermore, some states have commissions only for particular courts, such as Alabama, Arizona, and Missouri, which have commissions for trial courts only in the larger counties.<sup>42</sup> Regardless of the particular approach employed, the majority of states have judicial nominating commissions for at least some of their courts. These commissions must operate within certain parameters to best achieve a democratic ideal.

If commissions are to meet democratic ideals, they should operate within the same judicial districts as the courts for which they are responsible. Thus, if the appellate courts have statewide jurisdiction, a single appellate court nominating commission should nominate applicants to fill vacancies on those courts. If the intermediate appellate courts have districts, separate nominating commissions should exist for those districts. Trial court nominating commissions should exist within the trial court's jurisdictional

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37. See AM. JUDICATURE SOC'Y, JUDICIAL MERIT SELECTION: CURRENT STATUS 8-12 tbl.2 (2003), <http://www.ajs.org/js/JudicialMeritCharts.pdf>. The table lists thirty-two states and the District of Columbia. *Id.* Some commissions are for appellate courts only; some cover only certain counties within the state. *Id.* Therefore, I use "approximately" here because the number varies as we include or exclude courts or counties.

38. See, e.g., ALASKA CONST. art. IV, § 5 (encompassing both appellate and trial courts); VT. STAT. ANN. tit. 4, § 601(a) (2005) (same).

39. See, e.g., IND. CONST. art. VII, § 9 (addressing appointments to the state supreme court and court of appeals); N.Y. CONST. art. VI, § 2 (establishing a nominating commission for the state court of appeals).

40. See *supra* note 17 (addressing vacancies on trial courts in certain Alabama counties); see also MINN. STAT. ANN. § 480B.01 (pertaining to trial court vacancies).

41. See *supra* note 37 and accompanying text.

42. See ALA. CONST. art. VI, § 153 (providing for gubernatorial appointment but accommodating judicial nominating commissions in those counties with commissions); ARIZ. CONST. art. VI, § 37 (permitting gubernatorial appointment of trial judges without commission nomination in counties with populations under 250,000); MO. CONST. art. V, § 25(a)-(b) (restricting commission judicial candidate nomination to the City of St. Louis and Jackson County unless the commission scheme is adopted elsewhere by local referendum). Arizona and Missouri also have commissions for appellate courts. See ARIZ. CONST. art. VI, § 36; MO. CONST. art. V, § 25(a). Alabama does not have a similar commission for appellate courts. See ALA. CONST. art. VI, § 153.

boundaries, whether that be a single county or some combination of counties.

Sometimes it may not be practical to have nominating commissions for every court. For example, some states have multi-tiered trial courts, and the jurisdictions of those courts vary. A superior or circuit court, for example, might operate in multiple counties, while each of those counties might have a separate lower court of limited jurisdiction, such as a district or county court. It may be more practical in those states to have a single nominating commission with authority to nominate for vacancies on both the multi-county court and the single-county courts within the commission's region.

## **B. Designing the Appointments Commission Paradigm**

### *i. Judicial Appointment Goals*

Any judicial nominating commission should have well-defined goals, objective standards, and reasonable discretion. A principal goal, of course, is to nominate the best available candidates for judicial office. Other goals, such as diversity, also may exist. However that goal is defined, though, challenges will exist. Aside from the obvious fact that the best candidates for judicial office may be either uninterested or unavailable,<sup>43</sup> identification of the best candidates can further frustrate the process. The problems regarding identifying the best available candidates will be explored later in Part III of this Article, which discusses the desirable traits of candidates.

Commission objectives and standards may be stated in a statute<sup>44</sup> or a handbook.<sup>45</sup> Alternatively, the commission can identify

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43. Despite our goal to obtain the best judges possible, we must recognize that the best individuals may not be available, so we are left with the "best available candidates." Many reasons may exist why individuals choose not to become candidates. They may view their present position as more desirable than a judgeship. They may not like the prospect of public life, the nomination-appointment process, the potential loss of income, or the need to engage in a retention or reelection process.

44. *See, e.g.*, IND. CODE ANN. § 33-27-3-2(a) (West 2006) (listing seven considerations for commission evaluation in writing); MINN. STAT. ANN. § 480B.01 subd. 8 (requiring commission to consider eight "qualifications" for office, including judicial temperament and community service); NEB. REV. STAT. § 24-811.01 (2005) (stating seven considerations and authorizing supreme court promulgation of additional factors); S.D. CODIFIED LAWS § 16-1A-app. II at 3 (2006) (listing twenty-five criteria in three categories, including personal attributes, competency and experience, and judicial capabilities); VT. STAT. ANN. tit. 4, § 601(d) (2005) (stating factors including social consciousness and public service).

45. Model handbooks exist. *See, e.g.*, MARIA N. GREENSTEIN, AM. JUDICATURE SOC'Y, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS (Kathleen M. Samp-

them in an organizational meeting. Regardless of the method used, clear, specific objectives should be stated and readily available.<sup>46</sup> Additionally, commissioners should be well acquainted with, and strive to meet, those objectives. Having well-defined objectives and standards should enhance predictability without stifling a commission's independence or spontaneity.

Standards guide, rather than dictate, results. Commissioners must nominate at the end of the evaluation process. Therefore, they need a practical system that will facilitate this process while providing flexibility. Just because commissioners rely on standards to achieve uniformity in implementing criteria does not mean that these standards dictate a particular result in the ultimate candidate rankings. In the end, commissioners must exercise reasonable discretion in their choices. In other words, standards notwithstanding, commissioners should retain some degree of principled discretion in their decision-making process.

#### ii. *Combating Commission Capture*

For commissioners to exercise their discretion fully and have a real voice in the nomination process, the commission must be free of control from external and internal individuals or entities. A commission that operates under the dominance of individuals or entities is neither independent nor accountable. Moreover, if other entities control a commission, it likely is destined to lose public support for its actions.

In the interest of promoting accountability, independence, and public confidence, any system establishing or maintaining a judicial nominating commission must include safeguards against both external and internal capture. As used in this Article, capture does not equate "agency capture" as used in economic theory. Agency capture occurs if the entity being monitored actually captures the

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son rev. ed., 2d ed. 2004), *available at* <http://www.ajs.org/js/materials.htm> [hereinafter GREENSTEIN, AJS HANDBOOK]; ALASKA JUDICIAL COUNCIL, PROCEDURES FOR NOMINATING JUDICIAL CANDIDATES (2005), *available at* <http://www.ajc.state.ak.us/selection/Procedures/SelectionProcedures10-3-05.pdf> [hereinafter ALASKA JUDICIAL COUNCIL, NOMINATING PROCEDURES]; UTAH CODE OF JUDICIAL ADMIN., *supra* note 31, at app. A. These materials contain information about the process, evaluative criteria that commissioners should consider, and guidelines for legal compliance when undertaking their duties as commissioners.

46. In addition to the evaluative criteria contained in the AJS Handbook, GREENSTEIN, AJS HANDBOOK, *supra* note 45, at ch. 5, the American Bar Association has published standards on state judicial selection. *See* ABA STANDARDS *supra* note 7. These standards state the ABA's view of appropriate judicial qualifications, including evaluative criteria for the nominating process. *Id.* pt. A, Standard A 1.



administrative agency charged with conducting the monitoring.<sup>47</sup> Once agency capture occurs, the administrative agency favors the industry or entity it is charged with overseeing.<sup>48</sup> Commission capture, though, differs significantly from agency capture. Commission capture occurs in either of two ways (neither of which involves a regulated entity gaining control over the commission): a) an external individual or entity gains control over the commission (i.e., external capture); or b) some subset of commissioners control the commission (i.e., internal capture).

Because commissioners must be appointed or elected, a commissioner may be controlled, or at least greatly influenced, by the individual or group that selected the commissioner. External capture occurs when any outside agency, entity, organization, or individual unduly influences the decision-making process of either individual commissioners (i.e., partial capture) or, even more problematic, the commission (i.e., full capture).

The most blatant, but certainly not the only, example of external capture is a system in which the governor appoints commissioners to the judicial nominating commission, the commission nominates applicants for judicial positions, and the governor appoints the judges.<sup>49</sup> This scheme reeks of redundancy and inefficiency. In such scenarios, the governor actually controls the commission.<sup>50</sup> If so, why the bureaucracy? If the public wants the governor to con-

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47. See, e.g., Bradford C. Mank, *Superfund Contractors and Agency Capture*, 2 N.Y.U. ENVTL. L.J. 34, 34 (1993) (“Since the 1950s, commentators have been concerned about the ‘capture’ of administrative agencies by the industries they regulate.”).

48. See, e.g., *id.* at 34 n.1 (“‘An agency is captured when it favors the concerns of the industry it regulates, which is well-represented by its trade groups and lawyers, over the interests of the general public, which is often unrepresented.’” (quoting RICHARD J. PIERCE, JR., ET AL., *ADMINISTRATIVE LAW AND PROCESS* § 1.7.2 (2d ed. 1992))). There is a wealth of scholarly writings about agency capture. See, e.g., *id.* (listing articles that discuss agency capture).

49. See, e.g., KY. CONST. § 118 (providing that the governor appoints the four lay members of the seven person commission, and also appoints nominees to court vacancies); MINN. STAT. ANN. § 480B.01 subdiv. 2(a) (empowering the governor to appoint seven of nine at-large commissioners “who serve at the pleasure of the governor”); see also Mass. Exec. Order No. 470, § 1.4.5 (2006), [http://www.mass.gov/jnc/JNC%20-%20Executive%20Order%20470%20\(02.03.2006\).pdf](http://www.mass.gov/jnc/JNC%20-%20Executive%20Order%20470%20(02.03.2006).pdf) [hereinafter Mass. Exec. Order No. 470] (providing that “all Commissioners serve a one-year term at the pleasure of the Governor and may be removed without cause”). In Massachusetts, the governor appoints judges with the advice and consent of the Governor’s Council. See MASS. CONST. pt. 2, ch. II, § I, art. IX.

50. Similarly, if the bar association selects a majority of the commission, the commission may not be independent of the bar. This could occur, for example, if trial or defense attorneys, or Democrats or Republicans, dominate the bar. Under such circumstances, the dominant influence would flow through the election process and re-

trol the process, why not simply let the governor appoint judges and forego the complexity of a captured-commission scheme? If a nominating commission is to be an effective step in the judicial selection process, the commission must be relatively independent of other forces in the government.

It must be noted, though, that keeping the commission independent from the appointing authority presents challenges. A jurisdiction seeking to institute a commission process should expect those in power to seek to remain in power.<sup>51</sup> Governors (or legislators) who appoint judges are not likely to favor surrendering a virtually unfettered judicial-appointment prerogative. Similarly, reformers in jurisdictions with nominating commissions may meet resistance from political actors or groups if they attempt to strengthen an existing commission. Thus, for example, if a commission's nominations are subject to gubernatorial veto (i.e., a weak commission), it is unlikely that the governor will enthusiastically support a remedial measure to remove the governor's veto power.<sup>52</sup>

There seems to be a view that the governor (or legislature) possesses the constitutionally bestowed power to appoint judges and the nominating commission is merely a means to that end.<sup>53</sup> Nevertheless, although the appointment power may rest ultimately

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sult in nominations of judicial candidates who are unduly beholden or partial to the dominant group in the bar association.

51. As Daniel Webster reportedly observed: "There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters." Quote DB, <http://www.quotedb.com/authors/daniel-webster> (last visited Nov. 19, 2006).

52. Compare ALA. CONST. amend. 741, § 6(f) (providing that the nominating commission must submit another list of nominees if the governor fails to appoint from original list) and MINN. STAT. ANN. § 480B.01 subdiv. 1 ("If the governor declines to select a nominee to fill the vacancy from the list of nominees, . . . the governor may select a person to fill the vacancy without regard to the commission's recommendation."), with ARIZ. CONST. art. VI, § 37(C) (providing that the chief justice of the supreme court shall appoint from the list of nominees if the governor does not make the appointment within sixty days of receipt of the nominations), MONT. CONST. art. VII, § 8 (providing that the chief justice of the supreme court shall appoint from the list of nominees if the governor does not make the appointment within thirty days), and KAN. STAT. ANN. § 20-3009(a) (2005) (providing that the chief justice of the supreme court shall appoint from the list of nominees if the governor does not make the appointment within sixty days of receipt of the nominations).

53. Cf., e.g., *In re Advisory Opinion to the Governor*, 276 So. 2d 25, 29-30 (Fla. 1973) ("The appointment of a judge is an executive function and the screening of applicants which results in the nomination of those qualified is also an executive function . . . . Once the judicial nominating commissions have been established by the Legislature they become a part of the executive branch of government. The function of the commissions being inherently an executive function, such cannot be limited by legislative action.").

with the governor or the legislature, the nominating power is bestowed by law on the commission. Permitting the governor (or the legislature) to appoint both commissioners and judges nominated by those commissioners significantly raises the risk of external capture by the appointing authority. Even if the governor or legislature appoints the commissioners, however, the risk of external capture by the appointing authority can be lessened somewhat by prohibiting: a) the reappointment of a commissioner, or b) alternatively, consecutive terms for a commissioner,<sup>54</sup> or c) appointment of a commissioner to a judgeship during or shortly after the expiration of her term of office.<sup>55</sup> By prohibiting such potential rewards, commissioners have less reason to appease the appointing authority. Unfortunately, even this approach does not entirely eliminate external pressure. The appointing authority could always substitute an appointment to another desirable position such as a position on a university board of trustees, a local civil service board, or a governor's advisory committee on a subject of interest to the particular commissioner as a reward for favorable action as a commissioner.

Another way to reduce the possibility of external capture is to set a longer term of office for commissioners. If terms are fixed at, say, six years rather than two years, appointing authorities obviously would appoint commissioners less frequently. Thus, commissioners less likely would be reappointed as a reward for favorable action because the appointing authority would also change over time. For example, many governors are elected for only four-year terms.

External capture, though, is not our sole concern. Within the commission itself, the possibility of capture exists if a group of commissioners actually dictates the commission's actions. Because

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54. Some jurisdictions prohibit consecutive terms of nominating commissions. *See, e.g.*, ARIZ. CONST. art. VI, § 36; IOWA CONST. art. V, § 16; IND. CODE ANN. § 33-27-2-5 (West 2006); UTAH CODE ANN. §§ 20A-12-102 to -103 (West 2006).

55. *See, e.g.*, MINN. STAT. ANN. § 480B.01 subdiv. 6 (restricting commissioners from appointment to a district judgeship during their term of office on the commission and for one year thereafter); N.D. CENT. CODE § 27-25-07 (2005) (barring commissioners from judicial appointment candidacy during term on nominating committee); R.I. GEN. LAWS § 8-16.1-2 (2005) (providing commissioners are ineligible for judicial nomination during term and for one year after service on commission); Mass. Exec. Order No. 470, *supra* note 49, § 1.4.1 (barring eligibility for judicial office for commissioners and their immediate family during service as commissioners and for three years after service); *see also* MODEL JUDICIAL SELECTION PROVISIONS, *supra* note 9, at pt. 1, art. \_\_ § 2 Alternatives A-B (barring appointment of commissioners to judicial office during their term on the commission and a period of either three or four years thereafter).

no entity should dominate commission action or operations, the commission must also be internally independent and accountable. Internal capture exists when a particular group dictates the commission's actions or outvotes all other groups on a regular basis.<sup>56</sup> For example, if enough of the commissioners are attorneys who specialize in civil litigation, the applications of criminal or domestic-relations practitioners may receive short shrift. Likewise, if enough of the commissioners, whether lay or law-trained, belong to a particular political party, judicial applicants belonging to other parties may not receive favorable treatment.

The problems associated with internal and external capture elucidate the importance of independent nominating commissions. To ensure their independence, two things are necessary: 1) commissioner appointments must be structured in a way to defeat dominance by any appointing agency or individual; and, 2) the commission nomination process must negate the possibility of small-group dominance. Proponents of the nominating commission paradigm seek to reduce political influences in the selection of judges and reinforce public confidence in the judiciary. Making commissioners independent of the appointing authority is a logical, and arguably essential, starting point.

An independent nominating commission will reduce political influences and reinforce confidence in the selection process. Commissioners may regulate their activities, and always act with the best interest of the public and the judiciary in mind. Nevertheless, a system structured to reduce the chance that agendas, biases, or political ties will control the commission's actions will lessen the need to rely on the integrity of individual commissioners. If no faction, built on political, professional, socio-economic, ethnic, or other factors, possesses enough votes to make nominations without consideration of the positions of other commissioners, the commissioners more likely will identify better-qualified candidates capable of garnering support from the other commissioners. Such a process should better serve the goal of selecting individuals who are well-qualified and impartial.

The well-constructed system would include a collage of characteristics that many jurisdictions use to ensure independence. First, the number of commissioners would be determined in part based upon the need to have a distribution of power among the commis-

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56. An ad hoc coalition of subgroups in favor of or against a particular candidate would not constitute commission capture, which as defined requires commission dominance.

sioners. Second, a number of appointing authorities would appoint commissioners, thereby ensuring that no one individual has control over the commission or commissioners. Spreading power among a number of people, whether appointing authorities or commissioners, makes cooperation, consideration, and compromise among commissioners more likely, thus strengthening the system.

The commission system is also strengthened if commissioners are appointed or elected by someone other than the same person who appoints judges. For example, if the governor appoints judges to vacancies, the governor should not also appoint the judicial nominating commission. This spread of powers prevents the accumulation of too much power in a single person or entity. Collateral benefits may also arise. For example, this fracturing would likely raise the commission's image in the public's view and, in the same stroke, promote diversity of both commissioners and judicial nominees.

Avoiding internal capture may be a more difficult proposition than preventing external capture. An imbalance of power on the commission may arise even though the selection process is diluted and diverse. Nevertheless, the safeguards adopted to prevent external capture should help avoid internal capture, at least in part, through the distribution of the power to appoint commissioners among different appointing authorities.

### **C. Makeup of the Commission**

A commission's work and productivity are greatly affected by the source of its authority as well as its makeup. The concerns of independence, accountability, and public support are also significantly affected by the commission's makeup. These two realizations illustrate part of why it is so important to properly structure any commission to the needs and idiosyncrasies of each jurisdiction. As introductory stated, there is no one way to best select judges. The source of authority, structure, and diversity of the commission must reflect characteristics unique to the jurisdiction in order to maintain independence and public support. The exact composition of any commission is fraught with meticulous choices that prove to be the breeding ground of compromise. This Article cannot stress enough that the selection of judges is one of the most important decisions that a society makes. Commissions should enhance our ability to select outstanding judges. The constitution of a commission must be directed at furthering that function while preserving independence, accountability, and public support.

*i. Source of Authority for the Commission Structure*

Constitutional provisions, statutes, or executive orders may establish nominating commissions. Each of these possibilities has advantages and disadvantages. Commissions established by constitutional provision are less vulnerable to political change, but are nevertheless potentially vulnerable. If momentum for change arises, legislation may modify or even eliminate the commission, even though the commission was created by a constitutional amendment. Due to the difficulty in enacting constitutional amendments, though, the commission is reasonably protected against retaliatory action or politically motivated changes. On the other hand, it is more difficult to modify a commission scheme created by constitutional provision, should a need to modify arise, because a constitutional provision requires a concerted and continued effort to effect change. It also requires substantial public support and a marshaling of forces for the proposed change.

Commissions created by statute are more vulnerable to politically motivated changes or retaliatory action because they can be modified by legislative action without the need for a constitutional amendment. Thus, if a commission's list of nominees fails to meet the expectations of the appointing authority or some other political actor, such as a legislator, the legislation establishing the commission may be amended, or the authorization for the commission may be repealed. Commissions based on statutes, therefore, are less independent than those created by constitutional provisions.

Consider, for example, the changes made to the commission for the Sixth Judicial Circuit of Alabama. At the time I chaired the commission, a statute<sup>57</sup> empowered our commission to nominate from three to five legally qualified candidates for each judicial vacancy. The statute required the governor to choose a judge from those nominees within sixty days of the receipt of the slate of candidates. If the governor did not act within sixty days, the chief justice made the appointment. Because both the governor and the chief justice in Alabama are elected officials, it was possible that they would be from different political parties,<sup>58</sup> but, even if they

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57. See 1990 Ala. Laws Act 90-627 (repealed by ALA. CONST. amend. 741). Although the governor possesses constitutional power to appoint judges, the constitution was amended to give counties a local option to create judicial commissions, and thereby modify the governor's constitutionally established power to appoint judges. See ALA. CONST. art. VI, § 153.

58. This was the situation in 1993-1995 and 1999-2003 in which James E. Folsom, Jr., and Don Siegelman, both Democrats, served as Governor of Alabama. During both terms, the chief justice was a Republican.

were from the same party, they would not necessarily have been political allies<sup>59</sup> or even acquaintances.

Subsequently, in 2002, a new constitutional amendment—repealing the statute and creating a new commission—was passed.<sup>60</sup> Several stringent aspects of the legislation creating the commission were excised. The amendment gave the governor the power to veto the submitted list of nominees, and repealed the residual power of the chief justice to appoint judges if the governor failed to do so within sixty days.<sup>61</sup> These changes greatly weakened the judicial nominating commission. The statute created an independent commission; the constitutional amendment almost eviscerated it. Although the new model retains an independent commission with regard to appointment of commissioners, currently the commission is not nearly as independent because the governor has more power, directly or indirectly, in the process. Thus, as this example demonstrates, commissions are subject to political forces and changes.

Commissions also may be created by executive order in some states,<sup>62</sup> but these commissions are particularly vulnerable if the governor is unsatisfied with the process or completes her term of office. There is no guarantee that a successor will enforce or extend the order. Of course, strength of executive orders flows from the fact that the governor, as the appointing authority, can agree to utilize a nominating commission without the need for legislative agreement or action. Additionally, executive orders can be implemented rather quickly.

## ii. *Structure*

Two issues arise concerning the structure of a commission: First, who selects the commissioners, and are they appointed or elected? Second, what is the optimal size for a commission?

### a. *Selection of Commissioners*

As is evident from the foregoing discussion of commission capture, one particularly challenging aspect of creating a commission scheme is identifying the appropriate manner of selecting commissioners and determining who should serve on the judicial nominat-

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59. For example, Governor Bob Riley and former Chief Justice Roy Moore were not political allies during the time both held political office, and, in 2006, they were opponents in the Republican primary for the position of Governor of Alabama.

60. See ALA. CONST. amend. 741.

61. See *id.*

62. See, e.g., Mass. Exec. Order No. 470, *supra* note 49, § 1.0 (establishing a state judicial nominating commission).

ing commission. Typically, commissions are composed of attorneys and lay-persons.<sup>63</sup> In some jurisdictions, judges also serve as commissioners.<sup>64</sup> Other jurisdictions prohibit commissioners from holding public office during their service on the commission.<sup>65</sup>

States with unified bars have an easier task in designing a selection process for the attorney members of commissions. The bar in these states could simply elect the attorneys who will serve as commissioners. To ensure diversity (in its broadest sense), various seats on the commission can be designated for particular specialties or types of practice. For example, the bar could elect attorneys who practice as civil (divided among plaintiff and defense), criminal (divided among prosecution and defense), or domestic relations litigators. Alternatively, the bar leadership could appoint the attorney members of the commission, but election of bar representatives to nominating commissions is more democratic.

In states without unified bars, the selection process is more problematic. The number of independent bar associations will greatly complicate the selection scheme in some locales. An alternative would be to allow all attorneys who practice in the court's jurisdictional area to vote for attorney candidates for commission seats regardless of the voters' bar memberships.

Non-lawyer members of commissions commonly are appointed by governors.<sup>66</sup> A more democratic approach involves authorizing the local legislative delegation to appoint the lay commissioners. That approach diverts the power from the governor, who usually will be charged with appointing judges from the slate nominated by the commission. Placing the power to appoint or elect commissioners in hands other than the appointing authority for judges better

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63. See, e.g., ALA. CONST. amend. 741; HAW. CONST. art. VI, § 4; IND. CONST. art. 7, § 9; WYO. CONST. art. 5, § 4(a).

64. See, e.g., ALA. CONST. amend. 741 (naming presiding (chief) circuit judge as ex officio member of the commission); IND. CONST. art. 7, § 9 (providing that the state chief justice or another designated judge serves ex officio as chair of the appellate nominating commission); N.M. CONST. art. VI, § 35 (designating several judges as ex officio members of appellate nominating commission). *But see* FLA. STAT. ANN. § 43.291(b)(2) (West 2006) (banning judges from membership on nominating commissions).

65. See, e.g., CONN. GEN. STAT. ANN. § 51-44a(a) (West 2006) ("None of the members shall be an elected or appointed official of the state or hold state-wide office in a political party."). *But see* FLA. STAT. ANN. § 43.291(b)(2) (permitting commissioners to hold non-judicial public offices).

66. See, e.g., MODEL JUDICIAL SELECTION PROVISIONS, *supra* note 9, at pt. 1, art. \_\_\_ § 2 Alternatives A-B (providing for gubernatorial appointment of lay members of the commission, subject to senate confirmation).



addresses both democratic ideals and commission-independence concerns.

Additionally, the selection process for commissioners should be relatively open. Individuals interested in serving on nominating commissions should have the opportunity to apply for vacancies on the commissions. Thus, information regarding the vacancy should be easily obtainable. To accomplish this goal, the vacancy and details about the application process should be publicized throughout the state or district from which the appointment will be made.<sup>67</sup> This should occur whenever there is a vacancy. Moreover, the appointment schedule should allow adequate time for applicants to apply and be considered for appointment. This approach keeps the process more democratic.

#### *b. Size of the Commission*

In creating a commission scheme, size does matter. Our concerns of democratic ideals, independence, and public support all potentially affect the commission's optimum size.<sup>68</sup> Other considerations, however, do exist. A statewide commission that nominates appellate court judges probably should be larger than a local commission charged with nominating trial judges. This is not because one level of the courts is more important than the other, but because a larger commission may be necessary if it is to be representative. If the entire state is to be represented by members of the commission drawn from districts or regions of the state, the number of districts may require a larger commission. Additionally, the public may be more willing to surrender the nominating role to a larger, more diverse and representative commission. On the local level, though, a smaller commission may be able to represent the county, circuit, or district adequately.

#### *iii. Diversity*

The membership of a judicial nominating commission must be diverse; in other words, it must be inclusive.<sup>69</sup> Promoting diversity

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67. See, e.g., *id.* at pt. 2, R. \_\_.07 cmt. (noting that the process for appointing commissioners "should be open and accessible").

68. See *id.* at pt. 1, art. \_\_ § 2 Alternatives A-B (suggesting a commission composed of seven members).

69. See, e.g., FLA. STAT. ANN. § 43.291(4) (requiring the governor "to the extent possible" to ensure racial, ethnic, and gender diversity, as well as geographic distribution); Mass. Exec. Order No. 470, *supra* note 49, § 1.1 (providing that to "the extent practicable, the Commissioners shall reflect diversity of race, gender, ethnicity, geography and, among Commissioners who are also members of the bar, various practice

in the membership of a commission ensures that the body is inclusive, which fosters public acceptance and promotes democratic ideals. Although easy to support, diversity may be difficult to attain. First, diversity must be defined. Is racial or gender representation sufficient to establish diversity, or should diversity also address other demographic, political, socioeconomic, geographic, or professional differentiations? For example, should we balance commission membership with regard to political party membership, legal specializations, or geographic representation?

Some commissions are rather small entities of five to nine persons,<sup>70</sup> so a truly diverse commission may become more difficult. For example, in appointing or electing a five-person commission, the path to ensuring representation of lay citizens, attorneys (including various specialties), minorities, and women, becomes a labyrinth. Moreover, in the case of some district commissions, the district itself may not be very diverse and a commission that mirrors the commission's population may appear to lack diversity. Statutes can establish specific diversity criteria, but such provisions—essentially quotas—pose a number of other problems. They limit the pool of prospective commissioners, disqualifying some highly qualified prospects for reasons not logically tied to their qualifications and perhaps provide over-representation to less-interested or even disinterested groups.

Constitutional provisions, statutes, or rules may seek to establish diversity across one or more of five categories. In such laws, commissioners are required to be either members of the bar or lay citizens,<sup>71</sup> members of particular legal specialty groups,<sup>72</sup> members of

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areas and size of practice"); MODEL JUDICIAL SELECTION PROVISIONS, *supra* note 9, at pt. 1, art. \_\_ § 2, to Alternative A-B (providing that "[a]ll appointing authorities shall make reasonable efforts to ensure that the commission substantially reflects the gender, ethnic and racial diversity of the jurisdiction").

70. *See, e.g.*, ALA. CONST. amends. 83, 660 (providing for a commission of five members); KY. CONST. § 118(2) (providing for a commission of seven members); FLA. STAT. ANN. § 43.291(1)(a)-(b) (providing for a commission of nine members); R.I. GEN. LAWS § 8-16.1-2 (2005) (same).

71. *See, e.g.*, ALA. CONST. amend. 741(a) (providing for a nine-member commission composed of one judge, one prosecutor, four attorneys, and three lay citizens); IND. CODE ANN. §§ 33-27-2-1 (West 2006) (providing for three lay and three attorney commissioners); MINN. STAT. ANN. § 480B.01 (West 2006) (providing for specific limits on the number of attorneys on the commission but permitting a majority of commissioners to be attorneys).

72. *See, e.g.*, ALA. CONST. amend. 741(a) (providing that the practicing bar shall be represented by five attorneys, one each of whom shall be "substantially engaged" in plaintiff civil practice, defense civil practice, domestic relations practice, and crimi-

political parties,<sup>73</sup> residents of certain geographic areas,<sup>74</sup> or members of certain racial, gender, or ethnic groups.<sup>75</sup> Rather than addressing the specifics, some states simply admonish appointing authorities to consider diversity in making appointments to nominating commissions.<sup>76</sup> Others, it seems, make no such demands.<sup>77</sup>

Both attorneys and the lay public should be represented on nominating commissions to ensure that they have a voice in judicial selection while providing socioeconomic and industrial diversity. The courts belong to the people; attorneys bring their unique experience and intense interest to the nominating process. Jurisdictions, though, should take care to ensure that the factions of the legal community are adequately represented. If the law-trained members of the commission are elected by the unified bar of a dis-

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nal defense practice; the district attorney serves *ex officio*, as does the presiding (chief) circuit judge).

73. *See, e.g.*, N.M. CONST. art. VI, § 35 (requiring equal representation of “the two largest major political parties”); CONN. GEN. STAT. ANN. § 51-44a(a) (West 2006) (“Not more than six of the members shall belong to the same political party.”); KY. REV. STAT. ANN. § 34.010(2)-(3) (West 2006) (requiring equal representation from the two major political parties).

74. *See, e.g.*, IOWA CONST. art. V, § 16 (“Due consideration shall be given to area representation in the appointment and election of judicial nominating commission members.”); IDAHO CODE ANN. § 1-2101(1) (2005) (“Appointments shall be made with due consideration of area representation and not more than three (3) of the permanent appointed members shall be from one (1) political party.”); IND. CODE ANN. §§ 33-27-2-1(d) to -2(c) (requiring commissioners to reside in the district they represent).

75. *See, e.g.*, FLA. STAT. ANN. § 43.291(4) (requiring the governor “to the extent possible” to ensure racial, ethnic, and gender diversity, as well as geographic distribution); IOWA CODE ANN. § 46.1 (West 2006) (“No more than a simple majority of the members appointed shall be of the same gender.”); R.I. GEN. LAWS § 8-16.1-2(a)(3) (2005) (“The governor and the nominating authorities hereunder shall exercise reasonable efforts to encourage racial, ethnic, and gender diversity within the commission.”); TENN. CODE ANN. § 17-4-102(b)(2) (West 2006) (“If 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.”).

76. *See, e.g.*, MINN. STAT. ANN. § 480B.01 subdiv. 2(e) (“The appointing authorities shall ensure that the permanent members of the commission include women and minorities.”); R.I. GEN. LAWS § 8-16.1-2(a)(3) (“The governor and the nominating authorities hereunder shall exercise reasonable efforts to encourage racial, ethnic, and gender diversity within the commission.”); S.C. CODE ANN. § 2-19-10(C) (2005) (“In making appointments to the commission, race, gender, national origin, and other demographic factors should be considered to ensure nondiscrimination to the greatest extent possible as to all segments of the population of the State.”).

77. *See, e.g.*, N.D. CENT. CODE § 27-25-02 (2005) (providing for the appointment of a nine-person nominating commission without any stated requirement of diversity or consideration of diversity other than requiring appointment of both members of the bar and non-attorneys). Of course, diversity may be addressed in North Dakota by another provision of law or custom, but it is not mentioned in the section governing the appointment of commissioners.

trict or state,<sup>78</sup> it is quite possible that some legal specialties, such as criminal prosecutors or domestic-relations specialists, will be under-represented unless the rules require such representation.<sup>79</sup> The lay community should also be represented because local interests and individuals are greatly affected by the makeup of the judiciary. The lay community may represent different regions of the jurisdiction, businesses, as well as different socioeconomic and ethnic groups. It is essential to democratic ideals that as many people as possible are afforded a chance to voice their opinions.

Some jurisdictions divide seats by political party to ensure a balance of political representation.<sup>80</sup> Actually, though, attempting to balance the representation of political parties by awarding each party an equal (or nearly equal) number of seats on the commission may well result in overrepresentation. For example, if the law requires a minimum of four members from each of the major parties (Democrat and Republican) on a nine-person commission, members of rival parties and independents must vie for the remaining seat regardless of their percentage of the population. Another example would be a provision that requires a fifty-fifty or sixty-forty split in a district where seventy-five to eighty percent of the voters belong to one party.

Regardless of whether the commission itself is diverse, it can be charged with the duty to consider diversity in its nominating process. More diversity on the commission, though, would possibly lead to more diversity in nominations.

#### D. Work of the Commissions

##### i. *Establishing Procedures and Developing Guidance*

Providing training and guidance to commissioners is essential for the proper functioning of a nominating commission. Stated succinctly, before commissioners set about to nominate candidates for judicial office, they should be briefed on the role of the commission, educated about the desired characteristics of judicial candidates, provided with objective criteria and a structured process for

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78. See, e.g., KY. CONST. § 118 (“Two members of each commission shall be members of the bar, who shall be elected by their fellow members.”); VT. STAT. ANN. tit. 4, § 601(b)(4) (2005) (authorizing attorneys admitted to practice before the state supreme court to elect three members to the nominating board).

79. See, e.g., ALA. CONST. amend. 741 (assigning one seat on the commission to the local district attorney and authorizing the local bar to elect the remaining attorney-commissioners).

80. See *supra* note 73 and accompanying text.

selecting judges, and instructed on state and federal law with regard to permissible interview practices. Some jurisdictions do train commissioners;<sup>81</sup> others supply handbooks,<sup>82</sup> rules,<sup>83</sup> or statutory guidance.<sup>84</sup>

ii. *Ethics of Commissioners*

It would be naive to believe that all commissioners would always act ethically and legally absent consequences for misconduct.<sup>85</sup> Therefore, any commission should operate under statutory directions, a code of conduct, and an oath.<sup>86</sup> Providing statutory guidance and an ethics code, though, is insufficient without a process for enforcing the statutes and code. The commission's role and identified goals help shape an appropriate code of conduct for judicial nominating commissions. A logical starting point for creating a code of conduct for commissioners is to determine the types of conduct to permit or prohibit. The code must both inform commissioners of appropriate conduct and proscribe inappropriate activities.

To provide this guidance, the code must be tailored to the work of commissioners. A code can take the form of general canons, much like the American Bar Association's Model Code of Conduct that is applicable to judges in a number of states. Thus, commis-

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81. *See, e.g.*, KATHLEEN M. SAMPSON, INSTITUTE FOR NOMINATING COMMISSIONERS, AM. JUDICATURE SOC'Y, FACILITATOR'S GUIDE 1 (2005), available at [http://www.ajs.org/js/AJS\\_JudNomEduHandbook.pdf](http://www.ajs.org/js/AJS_JudNomEduHandbook.pdf) ("The Institute for Judicial Nominating Commissioners is a one-day program covering key steps in the commission process, which can range from an initial organizational meeting to submitting names to the appointing authority.").

82. *See supra* sources cited note 45.

83. *See, e.g.*, HAW. JUDICIAL SELECTION COMM'N R., [hereinafter HAW. JUDICIAL SELECTION COMM'N R.] available at <http://www.hawaii.gov/jud/ctrules/jsr.htm> (last visited Jan. 11, 2007); R.I. UNIFORM R. P. FOR THE JUDICIAL NOMINATING COMM'N § IV (proposed revision Oct. 29, 2001), [hereinafter R.I. UNIFORM R.P. FOR THE NOMINATING COMM'N] available at [http://www.rules.state.ri.us/rules/released/pdf/JNC/JNC\\_831\\_.pdf](http://www.rules.state.ri.us/rules/released/pdf/JNC/JNC_831_.pdf) (last visited Jan. 11, 2007).

84. *See, e.g.*, IND. CODE ANN. § 33-27-3-2(a) (West 2006) (providing statutory guidance to commissioners for nominating process).

85. Nevertheless, we always can hope. *See* HAW. JUDICIAL SELECTION COMM'N R., *supra* note 83, pmb. ("Judicial selection commissioners hold positions of public trust and shall conduct themselves in a manner which reflects credit upon the judicial selection process."). But Hawaii does not rest on platitudes—Rule 5 sets forth a code of conduct for commissioners. *See id.* R. 5 (setting forth a code of conduct for commission members).

86. An oath impresses the obligations of the office on the commissioners as they assume a position of trust. Oaths are required by statute in some jurisdictions. *See, e.g.*, R.I. GEN. LAWS § 8-16.1-2(h) (2005).

sioners should be persons of integrity<sup>87</sup> who avoid inappropriate conduct.<sup>88</sup> For example, commissioners would have to refrain from incompatible political activities<sup>89</sup> both as individuals and commissioners. Inappropriate considerations such as public criticism or the possibility of political rewards should not sway commissioners.<sup>90</sup> They should limit their non-commission activities insofar as those activities might conflict with their role as commissioners.<sup>91</sup> Moreover, they should be diligent and impartial in their work,<sup>92</sup> and they should refrain from discussing confidential commission facts with others.<sup>93</sup> If their impartiality is impaired or questionable, they should remove themselves from the deliberative process.<sup>94</sup> Although a newly drafted code of ethics for commissioners could address these concerns, it would be quicker and easier simply to modify—and apply the modified version of—the American Bar Association’s Model Code of Conduct to judicial nominating commissions.

The commission needs to be open to, and receptive of, external input. Rules of conduct should help reduce political control, not eliminate public input. Nevertheless, a code of ethics must address the external pressures that may exert themselves upon the commissioners. Political pressure may come from individuals, political parties, and industry and special interest groups that exist within the constituency. Commissioners should receive information from constituents, whether those constituents speak individually or collectively through organizations. Such information, however, should be properly channeled to the commission as an entity and

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87. See MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2000) (“A judge shall uphold the integrity and independence of the judiciary.”).

88. *Id.* Canon 2 (“A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”).

89. *Id.* Canon 5 (“A judge . . . shall refrain from inappropriate political activity.”).

90. *Id.* Canon 3(B)(2) (“A judge shall not be swayed by partisan interests, public clamor or fear of criticism.”).

91. *Id.* Canon 4 (“A judge shall so conduct the judge’s extra-judicial activities as to minimize the risk of conflict with judicial obligations.”).

92. *Id.* Canon 3(B)(5) (“A judge shall perform judicial duties without bias or prejudice.”); *id.* Canon 3(B)(8) (“A judge shall dispose of all judicial matters promptly, efficiently and fairly.”).

93. *Id.* Canon 3(B)(11) (“A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.”).

94. *Id.* Canon 3(E)(1) (“A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned . . . .”); see also Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 744 (2001) (“The appearance of propriety is as important as the absence of impropriety.”).

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not to individual commissioners by way of surreptitious meetings or *ex parte* communications.

External pressures are not the only concern. The commission should not be subject to the individual political opinions, biases, or prejudices of the commissioners. Thus, for example, a commissioner should not use her position to either promote the nomination of a friend or colleague to the bench, or derail the candidacy of others because of racial, gender, or other inappropriate considerations. Commissioners should discharge their duties in much the same manner that the judges they nominate should perform their judicial functions.

If commissioners fail to abide by applicable ethics rules, they should be subject to discipline through an enforcement process. The enforcement process should constitute a two-tiered approach. In the two-tiered scheme, complaints could be filed with an investigatory board. If, after investigation, the inquiry board finds the complaint warrants prosecution, an investigatory body could refer the case to a hearing board. The enforcement process is essential for the effectiveness of any ethics code. The enforcement process must operate properly. As in any selection process, some candidates will not be selected. Those who fail to gain a nomination might be disgruntled and, therefore, prone to file complaints. The two-tiered approach provides a system that mandates compliance on the part of commissioners and provides consequences for infractions. It also ensures that enforcement arises only when justified and, even then, that it is applied in a measured and informed fashion.

Some states already have such entities in place for judicial oversight. For example, Alabama<sup>95</sup> and Pennsylvania<sup>96</sup> utilize investigatory bodies that receive and investigate complaints against judges. Similarly, these states have entities to hear those complaints that the investigatory bodies file against judges. In Alabama, the hearing body is the Court of the Judiciary;<sup>97</sup> in Pennsylvania, it is the Court of Judicial Discipline.<sup>98</sup>

In Delaware, the process works somewhat differently. The Court of the Judiciary receives the complaints.<sup>99</sup> After initial

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95. See ALA. CONST. art. VI, § 156 (establishing the Judicial Inquiry Commission).

96. See PA. CONST. art. V, § 18(a) (establishing the Judicial Conduct Board).

97. See ALA. CONST. art. VI, § 157 (establishing the Court of the Judiciary).

98. See PA. CONST. art. V, § 18(b) (establishing the Court of Judicial Discipline).

99. See DEL. CONST. art. IV, § 37 (establishing the Court of the Judiciary).

screenings by the clerk and the Chief Justice,<sup>100</sup> complaints deemed worthy of investigation are referred to panels of the Preliminary Investigatory Committee.<sup>101</sup> Although all of these systems possess pros and cons, they are generally effective. It should be relatively easy to expand the jurisdiction of such agencies to judicial nominating commissions. Massachusetts simply provides that violation of the code of conduct constitutes a resignation from the commission.<sup>102</sup>

The utility of using judicial canons as models for a commission code of ethics and an existing judicial oversight entity as the enforcement agency is two-fold. First, the canons are generally accepted, understood, and include extensive commentary. Second, the enforcement entity should be quite familiar with the rules and the sanctions available for canon violations. Of course, the complaint-and-enforcement process should also apply to violations of statutory provisions governing the work of the commission. Again, the enforcement entity should have experience in addressing violations of statutory provisions or rules by judicial officers. The widespread acceptance of the canons, the general familiarity with their application among enforcement authorities, and the existence of enforcement agencies make this approach a very efficient and effective method for establishing productive codes of ethics for commissioners.

### iii. *Judicial Selection Process*

#### a. *In General*

How the commission conducts its business will have significant impact on the public's view of the nominating process. Public support is important, and the commission can cultivate or decrease public support through its actions. For example, the question of a quorum is an important factor in the perception of legitimacy. Commissions should not have the authority to meet and conduct business without a quorum with a high threshold.<sup>103</sup> Requiring a

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100. *See* DEL. R. JUDICIARY CT. 5 (2006) (establishing procedure for receipt of complaints).

101. *See id.* R. 3 (establishing the Preliminary Investigatory Committee).

102. *See* Mass. Exec. Order No. 470, *supra* note 49, § 1.4.5.

103. *See, e.g.*, MINN. STAT. ANN. § 480B.01 subdiv. 2(a)-(d) to subdiv. 5 (West 2006) (establishing a quorum of seven members of a nine- to eleven-person commission); VT. STAT. ANN. tit. 4, § 601(e) (2005) (setting quorum at eight members of an eleven person commission). *But see* UTAH CODE ANN. § 20A-12-104(2)(c)(iv) (West 2006) (permitting a nomination on a vote of three members of a seven person commission if only four members are present due to absences of the remaining three members due



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substantial number of commissioners to be present in order to constitute an official meeting enhances the appearance of propriety, and the commission acts in a more representative fashion.

Commissions should have the authority to act immediately to find qualified candidates if the announcement of an impending departure is final and enforceable. Work demands of many courts dictate that commissions should identify and select nominees as soon as possible. Otherwise, in the case of trial courts, judges will not be in a place to hear and decide cases in a timely fashion. Similarly, on appellate courts, vacancies may delay or greatly affect those courts' rulings.

Once a vacancy occurs (or, possibly, an impending vacancy is announced),<sup>104</sup> the commission should provide notice of the opening to all potential applicants. If the position were for a court of statewide jurisdiction, all attorneys in the state should be notified of the vacancy and the method by which they can apply for the position.<sup>105</sup> Similarly, if the opening were for a local position, all local attorneys should be notified. After notifying potential applicants, the commission will need to process the applications for the position. Vacancies are not guaranteed to bring either adequate or reasonable numbers of applications. Certainly, a commission should seek a sufficient number of suitable applicants from which to select the requisite number of nominees.

This raises the question of whether the commission should consider nominations before there is a vacancy. In other words, should commissions commence the application and screening process as soon as someone announces that she will retire on a certain date, or should (or must) they wait until an actual vacancy occurs? Some states do permit their commissions to act once a vacancy is certain to occur.<sup>106</sup> Commissioners should not be eligible for nomination to the court while they are serving on, and perhaps for some years after they leave, the commission. Otherwise, the commis-

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to inability to attend, recusal, or disqualification). By setting a high quorum, it is possible that a meeting may be difficult unless provision is made for the appointment of substitute commissioners in the case of extended illness, disqualification, or other inability to serve on the part of any commissioners.

104. *See, e.g.*, IND. CODE ANN. § 33-27-3-1(d) (West 2006) (authorizing commission action once "it is known that a vacancy will occur at a definite future date . . .").

105. The notice should be given to all attorneys whether they are qualified for the judgeship for two reasons. First, it helps ensure that the notice reaches all qualified attorneys. Second, the commission should not expend the effort to pre-qualify persons who may not apply for the position because of efficiency, costs, and the possibility of error.

106. *See supra* note 104 and accompanying text.

sioner may have a conflict of interest in that the commissioner may use her position to further her own nomination (and appointment) to the bench.

Commissions that encounter a large pool of applicants often have the staff, chair, or a special subcommittee, conduct a preliminary screening of the applications.<sup>107</sup> This sets the stage for the full commission to conduct more efficient applicant investigation and screening. Although an initial screening allows a commission to trim the number of applications in an efficient and timely manner, it also raises concerns. If the chair, a small committee, or commission staff, conducts an initial screening, the commission as a whole may never consider some qualified applicants. This does not mean that a commission cannot engage in an initial screening, but if screening is necessary, it should be well-planned, appropriately structured, fair, and regulated.

A preliminary screening approach promotes efficiency in weeding out those who clearly will not survive the rigors of the nominating process, but it should be conducted in a careful manner and utilize criteria established in advance. Fixed and uniform criteria that apply to all applicants create predictability and warrant public support. When a commission delegates preliminary screening responsibilities to the chair, a screening committee, or staff, the commission should nevertheless remain involved. To ensure that the entire commission reviews and considers each candidate, the subcommittee or staff should provide each commissioner with a list of the applicants recommended for summary elimination. Each commissioner could then request that the entire commission consider a particular application.

Alternatively, the commission could use a screening-vote procedure. For example, in Utah, although the staff initially verifies that each candidate meets the legal qualifications for judicial office, it is the commission members who preliminarily review the applications, discuss the applicants' qualifications, compare the information with the evaluative criteria, and vote (via secret ballot) to retain or eliminate an applicant.<sup>108</sup> This screening-vote procedure is more democratic than preliminary screening by the chair, a

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107. See, e.g., UTAH CODE OF JUDICIAL ADMIN., *supra* note 31, at app. A ¶ Organizational Meeting (G) (West 2006) (providing for staff screening and elimination of applicants not qualified by law for the judicial position, followed by commission summary screening of remaining candidates to reduce the field of applicants to a "manageable number").

108. See *id.*

screening committee, or commission staff because it allows all commission members to vote for each applicant's retention in, or elimination from, the nomination process. The process need not necessarily be that complex. A more expeditious process might simply involve a procedure such as reading each applicant's name, asking whether commissioners favor an interview of that applicant, and eliminating those applicants who fail to garner the support of a sufficient number of commissioners. The number of votes necessary for an application to survive an initial screening could be relatively small. There is no need for a majority vote on initial screening decisions.

Another initial screening option is for commission subcommittees (e.g., three commissioners, including at least one attorney and one layperson) to conduct preliminary interviews of a specified number of applicants. The panels would then recommend meritorious applicants for a final interview before the full commission. This option, too, seems less democratic because it does not involve the entire commission in the screening process. This option is potentially dangerous because the panel could eliminate an applicant who would have otherwise been nominated by the commission because the panel was different compared to the larger group.

Utilizing an appropriately designed preliminary screening process should ensure fairness and efficiency in weeding out those who clearly will not survive the rigors of the nominating process. Additionally, an effective screening process could garner public support by establishing a set of criteria that are generally applicable to all applicants, thus promoting predictability. It might also be helpful to develop certain procedures to expedite the application process. Requiring that persons seeking consideration complete a formal application and provide a list of character witnesses will quicken the pace and remove unmotivated nominees who are not committed to the process.

### 1. Investigation

A potential candidate provides the initial source of information about her candidacy. Requiring candidates to complete formal, written applications can provide a substantial portion of the information necessary for the commission. For example, Alaska requires applicants to complete questionnaires as part of its application process which provide information about the applicants, and requires the applicants to grant waivers of confidential-

ity on all materials used for the investigation.<sup>109</sup> The commission obtains the right to examine financial information such as tax returns and financial statements.<sup>110</sup> Gathering personal information in this manner provides documentary evidence of the potential nominees' qualifications and financial interests, and offers intimations about their private life and character. These written questionnaires and the accompanying waivers constitute an efficient way to garner information at the beginning of an investigation.

Regardless of the detail and precision of the applicant questionnaire, the commission cannot thoroughly, or completely, evaluate an applicant solely on paper. Each applicant who survives the preliminary screening warrants the commission's further investigation. The investigation may consist solely of interviewing a candidate's references and possibly other persons who know the applicant professionally or personally. Additionally, commission rules should establish a uniform list of agencies for the commission to contact (such as law enforcement and the bar), for additional information about each of the applicants. The commission should also obtain appropriate records, such as bar disciplinary records or law enforcement records, and integrate them into the applicants' packets. Staff members, law enforcement, or in small jurisdictions, commissioners could conduct the investigations. Regardless of the method of investigation, each candidate should undergo the same level of investigation and scrutiny.

If feasible, the commission may wish to survey all attorneys (or, alternatively, at least a statistically reliable sample of attorneys), in the jurisdiction to determine whether applicants have suitable characteristics for judicial office. Some states already conduct such surveys.<sup>111</sup> Additionally, the commission may seek comments from interested members of the public.<sup>112</sup> For example, some states publicly release the applicants' names and hold hearings at which public comments are invited. The commission could also utilize press releases or media advertisements to solicit comments. Any process

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109. See, e.g., ALASKA JUDICIAL COUNCIL, APPLICATION FOR JUDICIAL APPOINTMENT, available at <http://www.ajc.state.ak.us/Selection/AppFillin12.pdf> (last visited Jan. 11, 2006).

110. See *id.*

111. See, e.g., ALASKA JUDICIAL COUNCIL, NOMINATING PROCEDURES, *supra* note 45, § III(A) (explaining bar polling); GREENSTEIN, AJS HANDBOOK, *supra* note 45, ch. 6, p. 109 (noting that Alaska and Idaho conduct surveys of the bar; including examples of survey forms in appendix C).

112. See, e.g., ALASKA JUDICIAL COUNCIL, NOMINATING PROCEDURES, *supra* note 45, § III(B).

that increases public participation works to increase public acceptance of the commission while ensuring democratic ideals.

## 2. Interviews

Commissions obviously should interview the candidates. Although a preliminary screening can eliminate those applicants who fail to meet legal qualifications, and an en banc initial screening by the commission may be used to reduce the field of candidates to a workable number, the commission should interview most, if not all, viable candidates. These interviews may be conducted in public or private sessions. At least one commission leaves that choice to the candidate,<sup>113</sup> although more than the candidate's wishes should go into the decision whether to open or close the interviews.

Interviews of other individuals personally or professionally acquainted with an applicant are another potentially helpful method for collecting information about candidates, although some commissions may have too many vacancies and/or candidates to permit such a time-consuming process. Alaska, though, utilizes an interview process in which the commission invites any person to come before the commission for an interview.<sup>114</sup> This process provides another perspective of potential nominees. People who personally know the potential candidate have information and perspectives that the commission cannot acquire without considerable time and effort. If the commission has the time to hear witnesses, it not only provides the commission with that information, but also adds to the commission's image as an independent and responsible body.

### *b. A Passive Application Process Versus Proactive Recruitment*

Whether a commission will actively recruit judicial applicants is an important issue warranting careful consideration. Two distinct models exist. Some commissions are proactive in identifying, cultivating, and nominating judicial candidates.<sup>115</sup> Other commissions

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113. See, e.g., ALASKA JUDICIAL COUNCIL, APPLICATION FOR JUDICIAL APPOINTMENT, *supra* note 109, at 15.

114. See ALASKA JUDICIAL COUNCIL, NOMINATING PROCEDURES, *supra* note 45, § III(B) ("The Council holds a public hearing to receive public comments.").

115. See, e.g., *id.* § I(A)(2) ("Council members and staff may actively encourage qualified persons to apply for a judicial position."); HAW. JUDICIAL SELECTION COMM'N R., *supra* note 83, at R. 7A ("Commissioners may actively seek out and encourage qualified individuals to apply for judicial office."); KAN. STAT. ANN. § 20-2909(a)(2) to (b) (2005) (providing that the commission is not limited to candidates but may tender nominations to other persons conditioned on commission approval, and authorizing nominations of attorneys who do not reside in the district served by the court on which the vacancy exists); MINN. STAT. ANN. § 480B.01 subdiv. 7 (West

only provide notices of vacancies and await applications.<sup>116</sup> Naturally, there are pros and cons for each approach.

A proactive commission may identify potential candidates who would not present themselves for nomination.<sup>117</sup> Unfortunately, this approach has costs. First, the public (as well as the bar) may not view the proactive commission as “neutral” in its nomination process.<sup>118</sup> The public might believe that the commission is biased in its work. Potential candidates whom the commission does not contact in its recruiting process may decide not to seek judicial office. Thus, while the proactive approach may cultivate additional candidates, it may also drive potential candidates away.

If a commission possesses a reputation for balanced, principled action, and provides sufficient notice of vacancies to potential candidates, there should be little need for the commission to proactively recruit candidates.<sup>119</sup> On balance, it would seem prudent for commissions to review applications rather than recruit candidates. In this way, the commission remains more neutral, does not inadvertently drive qualified applicants away, and can maintain public support.

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2006) (“The commission shall actively seek out and encourage qualified individuals, including women and minorities, to apply for judicial offices.”); R.I. UNIFORM R. P. FOR THE JUDICIAL NOMINATING COMM’N, *supra* note 83, § 1 (proposed revision Oct. 29, 2001), available at [http://www.rules.state.ri.us/rules/released/pdf/JNC/JNC\\_831.pdf](http://www.rules.state.ri.us/rules/released/pdf/JNC/JNC_831.pdf) (providing that the “Commission shall actively seek out and encourage applications from qualified individuals . . . .”); *see also* COMM’N, FEERICK REPORT, *supra* note 29, at 7 (recommending that proposed New York commissions “should actively recruit judicial candidates . . . .”).

116. *See, e.g.*, TUSCALOOSA COUNTY (ALA.) JUDICIAL COMM’N R. 7 (2003) (on file with author) (“The members of the Judicial Commission will not solicit any person to submit his name or the name of another specified person for consideration for nomination by the Governor.”).

117. *See, e.g.*, HAW. JUDICIAL SELECTION COMM’N R., *supra* note 83, at 7A (“Commissioners should always keep in mind that often persons with the highest qualifications will not actively seek judicial appointment.”).

118. *See, e.g.*, TUSCALOOSA CTY. (ALA.) JUDICIAL COMM’N R. 7 (“The Commission considers that any such solicitation is incompatible with the utmost freedom of choice that must be possessed by members of the Commission in voting for nominees, and hence is inconsistent in principle with Rule 4 . . . , prohibiting a member of the Commission from taking any action that implies a commitment to vote for any particular person.”).

119. If a commission needs to recruit candidates because there are insufficient applications or only less worthy applicants, perhaps the benefits of holding judicial office in that jurisdiction need review.

*c. Secrecy Versus An Open Process*

*[M]aking [judicial] selection invisible . . . muffles conflict, avoids widespread competition, and strengthens the hands of political elites.*<sup>120</sup>

In establishing a new (or modifying an established) nominating commission, one of the most important issues involves the extent to which the proceedings and records of the commission will be open to public scrutiny. This decision greatly impacts the balancing of democratic ideals and public confidence on the one hand against the independence and effectiveness of the commission on the other.

Openness should bolster public support. Open proceedings allow a greater opportunity for public input and enhance public confidence in the judicial selection system. It is in the interest of democracy and public confidence to allow the public to follow the commission's proceedings, and, when appropriate, to present the commission with pertinent information about potential judicial nominees.

Providing the public with an opportunity to be heard accomplishes several purposes. First, information obtained from the public helps the commission identify the best candidates for judicial office. Second, it boosts public confidence in the commission and its proceedings.<sup>121</sup> The quest to determine whether an individual is a person of integrity can prove rather difficult. Input from members of the community where the potential nominee lives and practices may be the best, if not the only, source of this kind of information. Thus, public hearings constitute one additional way to enhance the likelihood that relevant information may surface.

The democratic ideal of transparency and the public confidence that openness engenders should significantly increase the public's acceptance of the commission paradigm. This is not to say that the public should have unfettered access to all of the commission's information, or that everything that a commission does will garner public support, but there should be enough openness to ensure that the public will be sufficiently informed and confident that the nominating commission operates without corruption or bias.<sup>122</sup>

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120. HENRY R. GLICK, COURTS, POLITICS AND JUSTICE 112 (3d ed. 1993).

121. See *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995).

122. See, e.g., MODEL JUDICIAL SELECTION PROVISIONS, *supra* note 9, at pt. 2, R. \_\_\_ .05 cmt. ("Commission proceedings should be as open as possible.").

Obviously, a nominating commission cannot conduct all of its business in the open.<sup>123</sup> For instance, a commission must be able to deliberate effectively about prospective nominees. Thus, commissioners must have access to personal and confidential information about nominees that pries far deeper into personal information about individual applicants than might otherwise be, or should be, publicly available. The commissioners also must be able to candidly discuss the nominees, and in so doing, be free from the general public's emotional appeals and pressure from interested political actors.<sup>124</sup> At the same time, sufficient openness must exist to demonstrate that the commission is free from the cronyism and commission-captures that threaten its independence. Such transparency catalyzes public confidence about the fairness of the process.

Thus, a carefully constructed balance must be struck between the two diametrically opposed objectives of openness and confidentiality. This can be accomplished by allowing for public hearings followed by confidential interviews of the prospective nominees and commission deliberations. The balancing of concerns means that the commission should release basic biographical, professional, and certain personal information of prospective nominees. At a minimum, this information should include where they are from, where they were educated, how long they have lived in the state or district, and the nature of their main areas of practice and expertise. The commission should maintain confidentiality with regard to more private information, such as financial, health-related, or intimately personal information.

All jurisdictions allow commissions to hold confidential hearings, and some jurisdictions require them.<sup>125</sup> Other commissions hold public hearings prior to any closed proceedings.<sup>126</sup> Closed pro-

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123. See, e.g., *Guy*, 659 A.2d at 782 (observing that "not all public business can be transacted completely in the open, that public officials are entitled to the private advice of their subordinates and to confer among themselves freely and frankly, without fear of disclosure, otherwise the advice received and the exchange of views may not be as frank and honest as the public good requires . . . ." (quoting *Soucie v. David*, 448 F.2d 1067, 1080-81 (D.C. Cir. 1971) (Wilkey, J., concurring))).

124. See, e.g., MINN. STAT. ANN. § 480B.01 subdiv. 12 (West 2006) ("Meetings of the commission may be closed to discuss the candidates."); MODEL JUDICIAL SELECTION PROVISIONS, *supra* note 9, at pt. 2, R. \_\_ .05(b) ("All final deliberations of the judicial nominating commission shall be secret and confidential.").

125. See, e.g., KY. SUP. CT. R. 6.050 (providing that commission meetings "shall be closed to the public").

126. See, e.g., *Marks v. Judicial Nominating Comm'n*, 461 N.W.2d 551, 552-53 (Neb. 1990) (describing the work of a commission using such a process).



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ceedings permit a more candid discussion as well as the most effective and honest evaluation of the potential nominees.<sup>127</sup> The ballots, notes, deliberations (written and spoken), and the commissioners' votes should be kept confidential to ensure the independence and effectiveness of the nominating commission.<sup>128</sup> Additionally, personal information, such as marital status, medical records, grievance records, and unproductive criminal investigations, should be kept private to protect the nominee's privacy.<sup>129</sup> Courts usually protect the confidentiality of these proceedings and records under state law,<sup>130</sup> rubrics of executive privilege<sup>131</sup> or public interest privilege,<sup>132</sup> or as exceptions to state sunshine or disclosure laws.<sup>133</sup>

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127. See, e.g., *Guy*, 659 A.2d at 780-83 (discussing the need for confidentiality of records and frankness of discussions, and recognizing an executive privilege with regard to commission records and proceedings).

128. See, e.g., *Justice Coal. v. First Dist. Court of Appeal Judicial Nominating Comm'n*, 823 So. 2d 185, 193 (Fla. Dist. Ct. App. 2002) (concluding that commission vote sheets, ballot tally sheets, and ballots were not open to public exposure under constitutional provisions creating commission); see also MODEL JUDICIAL SELECTION PROVISIONS, *supra* note 9, at pt. 2, R. \_\_.05(b) (providing that commission deliberations shall be "secret and confidential"). But see CONN. GEN. STAT. ANN. § 51-44a(i) (West 2006) ("No vote of the commission on a new nominee shall be by secret ballot.").

129. See, e.g., James J. Alfini & Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards*, 106 DICK. L. REV. 683, 712 (2002) ("Due to the sensitive nature of such information, individuals may be apprehensive about applying for judgeships. In an effort to reduce the fear candidates may have of exposing their private histories, commissioners should keep candidate information confidential.").

130. See, e.g., KY. SUP. CT. R. 6.050 (providing that records and proceedings of the nominating commission are confidential); *Justice Coal.*, 823 So. 2d at 189 (concluding that commission vote sheets, ballot tally sheets, and ballots were not open to public exposure under constitutional provisions creating commission).

131. See, e.g., *Kanner v. Frumkes*, 353 So. 2d 196, 197 (Fla. Dist. Ct. App. 1977) (noting the fact that nominating commissions possess an executive privilege, and holding them exempt from state sunshine laws).

132. See, e.g., *Lambert v. Barsky*, 398 N.Y.S.2d 84, 86 (N.Y. Sup. Ct. 1977) (quashing subpoena for commission records on basis of a common law public interest privilege for confidential public documents).

133. See, e.g., UTAH CODE ANN. § 20A-12-104(4) (West 2006) (exempting nominating commissions from state open meetings and records laws); *Judiciary Comm. Of the Gen. Assembly v. Freedom of Info. Comm'n*, 473 A.2d 1248, 1250-51 (Conn. Super. Ct. 1983) (reversing administrative agency's order of access to certain records of commission based on exemptions in state freedom of information act and failure of agency to conduct proper balancing analysis; noting exemption which does not allow the disclosure of "personnel or medical files and similar files" as "invasion[s] of personal privacy" (quoting CONN. GEN. STAT. § 1-19(b)(2) (West 2006))); *Lambert v. Executive Dir. of the Judicial Nominating Council*, 681 N.E.2d 285, 287-88 (Mass. 1997) (holding commission and its records not within state freedom of information or open meetings laws).

The need for transparency in commission operations and public confidence in the nomination process necessitate that at least part of judicial nominating commissions' work should not only be subject to public scrutiny, but even should be publicized. In fact, a majority of states that employ a commission approach probably should make more extensive public and press disclosures regarding nominees. Thus, for example, at the very minimum, the names of the potential nominees, limited biographical and professional information, and the final commission's recommendations should be released to the public and the press.<sup>134</sup> A limited release of information can provide some control over the nature and extent of information that is made available to the public, protect the individuals under consideration for judicial posts, enable the commission to obtain and address information of personal and prying nature, and provide adequate information and notice to the public to permit scrutiny and, if desired, appropriate participation. Yet, some commissions do not normally release even that modicum of information.<sup>135</sup>

*d. Inaction*

As an essential part of a judicial nominating scheme, a person or an entity should be authorized to act upon the default of the appointing authority.<sup>136</sup> Otherwise, an impasse could arise, or an appointing authority could simply procrastinate while the court vacancy remains unfilled. In a strong-commission system, the appointing authority must appoint from the list of nominees. If the appointing authority fails to do so within a fixed period of time, another person or entity, such as the chief justice of the state su-

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134. Alternatively, the governor should release the names if the commission fails to do so. See, e.g., MODEL JUDICIAL SELECTION PROVISIONS, *supra* note 9, at pt. 2, R. \_\_ .06, <http://www.ajs.org/js/provisions.pdf> (providing that the governor shall release the names of nominees). Releasing such information to the press helps ensure the accuracy of news accounts. Without such information, news stories may be speculative and inaccurate.

135. See, e.g., HAW. JUDICIAL SELECTION COMM'N R., *supra* note 83, at R. § 2(A) (1979) (noting that "all commission records, proceedings, and business, including the names of all proposed nominees and the names of nominees forwarded to the appointing authority shall be confidential and may not be discussed outside commission meetings . . ."); R.I. UNIFORM R. P. FOR THE JUDICIAL NOMINATING COMM'N, *supra* note 83, § VI (proposed revision Oct. 29, 2001) (requiring only the publication of the names of the nominees recommended to the governor).

136. See, e.g., MODEL JUDICIAL SELECTION PROVISIONS, *supra* note 9, at pt. 1, art. \_\_ § 1 & Alternative A (suggesting that a judicial officer make the appointment if the governor fails to act within thirty days).

preme court<sup>137</sup> or the commission itself<sup>138</sup> makes the appointment. In weak-commission systems, the appointing authority can veto the list of nominees either by failing to appoint a judge within a set period of time or by requesting a new slate of nominees.<sup>139</sup> This approach virtually authorizes external capture<sup>140</sup> of the commission by the appointing authority.

*e. Renomination or Retention*

Thus far, we have considered initial appointments. The remaining issue to be considered is whether the judicial nominating commission scheme is amenable to the retention decision. In some states, judges are elected to new terms of office through either partisan political elections<sup>141</sup> or through retention-election processes.<sup>142</sup> In other states, the governor, the legislature, or both, reappoint judges to new terms.<sup>143</sup>

Can a judicial nominating commission process be juxtaposed on an existing re-selection scheme? The question is worthy of a separate article, and all of the issues cannot be addressed in the space available, but should a jurisdiction decide to implement such a process, it does appear feasible.<sup>144</sup> Alaska's Judicial Council, for example, provides extensive retention information on each judge

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137. *See, e.g.*, ARIZ. CONST. art. VI, § 37 (providing that the chief justice of the supreme court shall appoint from the list of nominees if the governor does not make the appointment within sixty days of receipt of the nominations); MONT. CONST. art. VII, § 8 (allowing only thirty days); IND. CODE ANN. § 33-27-3-4 (West 2006) (same); KAN. STAT. ANN. § 20-3009(a) (2005) (same).

138. *See, e.g.*, HAW. CONST. art. VI, § 3 (authorizing the commission to appoint the judge if the governor fails to act on an appellate or circuit court vacancy within thirty days of receipt of the list of nominations or within ten days of rejection by the state senate of an appointment by the governor, or if the chief justice fails to act on a district court vacancy within thirty days of receipt of the list of nominations or within ten days of rejection by the state senate of an appointment by the chief justice).

139. *See, e.g.*, ALA. CONST. amend. 741(f) (requiring the commission to submit a new list of nominees if the governor fails to make an appointment from the initial list within sixty days); N.M. CONST. art. VI, § 35 (permitting governor to make one request that commission submit additional names).

140. *See supra* Part II.B.ii (discussing commission capture).

141. *See, e.g.*, ALA. CONST. art. VI, § 152 (providing for election of all state judges); MICH. CONST. art. VI, § 22 (providing for election of intermediate-appellate and trial judges).

142. *See, e.g.*, ARIZ. CONST. art. VI, § 38 (providing for retention elections; applicable to appellate and trial judges); ILL. CONST. art. VI, § 12(d).

143. *See, e.g.*, VA. CONST. art. VI, § 7 (authorizing state general assembly to elect judges).

144. *See, e.g.*, MODEL JUDICIAL SELECTION PROVISIONS, *supra* note 9, at pt. 4 ("Implementing a Retention Evaluation Program: Model Legislation (or Court Rules).").

seeking retention to the voters prior to the retention election.<sup>145</sup> Moreover, such a process could help reduce the impact of raw politics while adhering to democratic ideals, supporting independence, and perhaps fostering public support for the judiciary.

In a jurisdiction in which the governor or legislature reappoints judges, once the political powers accept the concept, inserting a judicial nominating commission into the reappointment process should not be too difficult. Judges simply would notify the commission of their intent to seek reappointment. The commission could review their applications and decide whether or not to re-nominate the incumbents. Should the commission decide not to re-nominate an incumbent, the seat would be deemed vacant and the commission would commence the nomination process for a successor. Hawaii utilizes this approach.<sup>146</sup>

In jurisdictions that employ ballot retention or reelection schemes, inserting a judicial nominating commission into the scheme may prove more problematic, but feasible through modification. In this modified process, judges who choose to seek reelection or retention would notify the commission of their intent to seek reelection or retention. The commission then would review the candidacy and determine whether the incumbent judge could meet the minimum requirements to run for reelection or seek retention as an incumbent. If the commission decided in the candidate's favor, the reelection-retention process would ensue. If the commission rejected the candidacy, a vacancy would be declared, and the commission would commence the nomination process for a successor.

Inserting a commission into these re-selection schemes brings positive and negative attributes. Using a commission in this manner potentially reduces political powers and increases independence and public confidence in the process. If the commission is not structured and positioned well, however its presence could have contrary results by increasing the influence of politics, creating dependency, and causing public concern. These issues are worthy of much more investigation and discussion than this Article can provide.

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145. See Alaska Judicial Council, Retention Evaluation Information, <http://www.ajc.state.ak.us/retention/retent.htm> (last visited Jan. 11, 2006).

146. See HAW. CONST. art. VI, § 3 (providing for judicial selection commission re-appointment of incumbent justices and judges).

### III. DESIRABLE ATTRIBUTES OF CANDIDATES

To commence this discussion, we must distinguish judicial qualifications from desired attributes. Constitutional law<sup>147</sup> or statutes<sup>148</sup> may provide certain minimum qualifications for judicial officers, such as a period of residency in the judicial district,<sup>149</sup> a minimum (or maximum) age,<sup>150</sup> possession of a law degree, or a certain number of years of legal practice,<sup>151</sup> but little more than such basic criteria. Candidates are qualified for judicial posts only if they meet these bare-bones provisions, and the provisions truly may be bare-boned. For example, the Alabama Constitution provides only that judges shall be licensed to practice law and possess such other qualifications as the state legislature may provide.<sup>152</sup> Obviously, any judicial nominating commission would ensure that all viable candidates for appointment possess such minimal legal qualifications.<sup>153</sup> The commission's staff can perform this screening to ensure that the applicants meet the basic legal qualifications for the judicial post they seek.

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147. *See, e.g.*, TEX. CONST. art. V, § 7 (stating citizenship and residency requirements, and making bar membership a prerequisite, but omitting any age requirement); UTAH CONST. art. VIII, § 7 (stating age, citizenship, and residency requirement for judicial candidates). Although the Texas Constitution omits an age requirement, the legislature has added one by statute. *See* TEX. GOV'T CODE ANN. § 24.001 (Vernon 2006) (setting twenty-five years of age as the minimum for state district judges).

148. *See, e.g.*, ALASKA STAT. § 22.15.160 (2005) (establishing minimum age, residency, and experience requirements for state district judges); TEX. GOV'T CODE ANN. § 24.001 (setting twenty-five years of age as the minimum for state district judges).

149. *See, e.g.*, N.M. CONST. art. VI, §§ 8, 14 (specifying a minimum of three years state residency, and providing that trial judges must reside in district); UTAH CONST. art. VIII, § 7 (requiring U.S. and Utah citizenship, and for courts with geographically defined districts, residency within the respective district).

150. *See, e.g.*, N.M. CONST. art. VI, §§ 8, 14 (setting the minimum age for judges at thirty-five); UTAH CONST. art. VIII, § 7 (establishing a minimum age of thirty for state supreme court justices and twenty-five for judges of other courts of record); TEX. GOV'T CODE ANN. § 24.001 (setting twenty-five years of age as the minimum age for district judges).

151. *See, e.g.*, N.M. CONST. art. VI, §§ 8, 14 (requiring ten years legal experience for supreme court justice nominees and six years legal practice for district judgeships); N.Y. CONST. art. VI, § 20(a) (providing that judges must have been admitted to practice for at least ten years prior to assuming state judicial office, or five years for certain lower court judgeships).

152. *See* ALA. CONST. art. VI, § 6.14.

153. *See, e.g.*, UTAH CODE OF JUDICIAL ADMIN., *supra* note 31, at app. A § D (stating that "the staff person assigned to a nominating commission reviews the applications to screen out those applicants not meeting the minimum constitutional qualifications for office").

This section addresses the criteria or attributes used by the commissioners to rank the candidates and select the nominees. These criteria or factors are not qualifications in the legal sense; therefore, it is important that everyone involved in the process understand the role, as well as the importance, of these criteria. Furthermore, it is equally important that the commissioners and their staff understand that the identification and selection of, as well as the determination of the absence or presence of these criteria, can only be made by the commissioners. The staff, the commission chair, or a subcommittee of the commission can verify that applicants are legally qualified, but only the commissioners can determine and weigh the criteria about to be discussed. Otherwise, legally qualified applicants could be screened out and never considered by the commission based upon factors beyond pertinent constitutional and statutory qualifications for judicial office. That understood, what are these criteria or considerations?

Juxtaposed on the basic qualifications for judicial office are desired attributes, sometimes referred to as qualifications,<sup>154</sup> although not established as qualifications by law. Even if a law did establish these factors as qualifications for office,<sup>155</sup> one would be hard pressed to assess the factors as qualifications. These attributes can range from objective criteria such as diversity considerations (e.g., race or gender) to more subjective considerations such as legal ability, judicial demeanor, integrity and good moral character, impartiality, intelligence, emotional stability, and social consciousness.<sup>156</sup> Additionally, judges must be good managers to handle the heavy caseloads of today's courts.<sup>157</sup> Discerning whether a candidate meets certain objective criteria should be a relatively easy endeavor. Measuring the presence of subjective criteria proves to be much more difficult because of the impossibility of defining or

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154. See, e.g., ABA, American Bar Association Standing Committee on Federal Judiciary, <http://www.abanet.org/scfedjud/home.html> (last visited Jan. 11, 2006) (referring to the desired professional attributes for federal judicial nominees of "integrity, professional competence and judicial temperament" as "professional qualifications").

155. See, e.g., MINN. STAT. ANN. § 480B.01 subd. 8 (West 2006) (requiring commission to consider eight "qualifications" for office, including judicial temperament and community service).

156. See, e.g., GREENSTEIN, *AJS HANDBOOK*, *supra* note 45, ch. 5 (listing and discussing many of the criteria mentioned in the text).

157. See Colquitt, *supra* note 94, at 743 ("With tremendous caseloads, civil and criminal, . . . judges are pressed to be effective managers . . ."); Joseph A. Colquitt & Jane W. Nelson, *Become a Master of Judicial Studies*, 27 JUDGE'S J. 18 (1988) ("[J]udges must use appropriate decision-making skills and competently manage caseloads and personnel.").

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identifying those criteria in a way that is not based upon individual perception. What seems to be acceptable judicial temperament to one commissioner can be an obnoxious or over-bearing demeanor to another, and there is no quantifiable way to establish which commissioner is correct.

Subjective criteria exacerbate differences between commissioners because they leave open to interpretation any attempt to set which of the criterion should gain prominence over the others and be deemed essential for a candidate to possess. Disqualifying a candidate because she “is not collegial enough” is a very subjective decision. Qualifications for judicial office should be stated in objective terms. Subjective criteria, though, must be included in the selection process.<sup>158</sup> We must trust commissioners to fairly and evenly apply such subjective criteria during the selection process. Otherwise, commissioners would exercise unfettered discretion in selecting nominees from a larger group of legally qualified applicants.

In establishing its selection matrix, the commission should identify those professional and personal attributes that are desirable. Commissioners should be reminded of those qualities desired,<sup>159</sup> and the selection process should be focused on those attributes.<sup>160</sup> Thus, the application and supporting materials, bar polls, public comments, and candidate interviews should be structured in a way to enhance the ability of the commission to garner the necessary information upon which to decide the relative rankings of the candidates.

The subjective nature of these evaluative criteria presents at least four problems. First, it is difficult, if not virtually impossible, to quantify the considerations because they are highly subjective.<sup>161</sup>

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158. No one argues that nominating commissions should not consider these important character traits in selecting the best nominees for the bench. Such considerations, however, rarely have the force of law as “qualifications” for judicial office. Whether someone without social consciousness should be a judge is quite a different question than whether someone is disqualified from consideration because they lack social consciousness (assuming we can agree on a level of social consciousness that establishes a threshold).

159. See *supra* Part II.D.1 (discussing training of commissioners).

160. The standards also should be applied uniformly to all candidates. See, e.g., COMM’N, FEERICK REPORT, *supra* note 29, at 7 (recommending that the commission “apply consistent and public criteria to all candidates”).

161. Consider, for example, “the elusive quality called judicial temperament.” GREENSTEIN, AJS HANDBOOK, *supra* note 45, at 73. A number of existing commissions for judicial nominations or evaluations use judicial temperament (or a similar or the same trait by another name) to evaluate judicial candidates. See, e.g., HAW. JUDICIAL SELECTION COMM’N R., *supra* note 83, at R. 10A(6), (instructing the commission

Second, individual commissioners (or the commission itself) may choose to act ad hoc by relying upon more objective, but unstated, considerations. Thus, instead of attempting to quantify “integrity,” a commissioner may resort to using defaults such as whether the candidate is active in her church or has held positions of trust in the past. Third, ambiguities in the criteria leave room for biased commissioners to make decisions based on their preferences or prejudices while cloaking their judgments in vague, but explicitly identified criteria.<sup>162</sup> Fourth, the criteria usually are not contained in any statutes or constitutional provisions; therefore, they are not the product of legislative action. Instead, if the foregoing approach is taken, the criteria are developed by the commission (or, perhaps, its staff). This results in a system that permits commissioners to act beyond legislative guidance.

As noted, some of the subjective considerations are so undefined and broad that it would be difficult for a judicial nominating commission to evaluate whether a candidate possesses them within the time allowed and resources available. This leads to reliance on more definable, albeit perhaps less important, criteria in an attempt to identify the best-available judicial candidates. Consider, for example, a screening device that borders between objective and subjective: the writing sample. Virtually anyone would agree that judges—appellate judges in particular, and trial judges perhaps less

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to consider judicial temperament); R.I. UNIFORM R. P. FOR THE JUDICIAL NOMINATING COMM’N, *supra* note 83, § IV (listing temperament as a criterion demonstrating “judicial capabilities”); *see also* BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE, Guideline 5-4 (2005), *available at* [http://www.abanet.org/jd/lawyersconf/pdf/jpec\\_final.pdf](http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf) (referring to instructive evaluation of candidates’ judicial temperament). The American Judicature Society defines this quality as follows:

Judicial temperament encompasses a variety of noble qualities. One of these qualities is dignity. To be dignified a judge must possess ‘quiet, tactful ways, and calm yet firm assurance.’ A jurist with appropriate judicial temperament uses authority gracefully. Judicial temperament also requires sensitivity and understanding. An understanding judge is sensitive to the feelings of those before the court, recognizing that each and every case is important to participants. Finally, a candidate is not temperamentally suited for the bench unless he or she possesses great patience. Patience is simply the ability to be even-tempered and to exercise restraint in trying situations.

GREENSTEIN, *AJS HANDBOOK*, *supra* note 45, at 73. Suffice it to say that it might be a mite difficult to determine the existence of, or quantify, a “calm yet firm assurance,” “grace,” or “great patience.” It likely would be even more difficult for a commission of say, nine individuals to agree on which of the candidates possessed more grace or evidenced more calm assurance.

162. Thus, party loyalists could choose fellow party members, or pro- or anti-tort reform advocates could promote like-minded individuals while justifying their choices with nebulous considerations.



so—should be able to write. Some states use writing samples during the nominating process as a way of evaluating judicial ability.<sup>163</sup> Alaska, for example, “carefully analyzes each writing sample for correct grammar and syntax . . . .”<sup>164</sup> Alaska also reviews the writing’s substantive content. The Alaska Judicial Council’s staff members conduct the evaluations.<sup>165</sup> The evaluations are included in the candidates’ files, which are provided to each of the Council’s members.<sup>166</sup>

Weighty consideration of writing samples, though, depreciates the fact that almost all judicial candidates must have a law degree. A law degree obviously indicates that the individual has a higher than average level of formal education that requires reasonably well-developed communicative skills. Likewise, a person possessing a law degree has to be able to write intelligibly to receive a law degree. Identifying grammatical errors and building a tally is not necessarily the most effective way to test a person’s legal (or judicial) ability. We can count the number of words in a sentence, argue about structure, and debate style. But even properly structured, grammatically correct sentences may ineffectively communicate a point in a judicial opinion.

It seems ill-advised to rely too much on the evaluation of a single writing sample, even one that the candidate selected for inclusion in the application packet. As stated, most candidates for courts of record have law degrees. They may not possess stellar writing skills, but they should be able to communicate. Also, judicial writing courses are available to assist judges in this area.<sup>167</sup> Unfortunately, rather than giving necessary consideration to more subjective and ill-defined criteria, commissioners asked to choose a few nominees from a large number of candidates may rely too

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163. See, e.g., IND. CODE ANN. § 33-27-3-2(a)(1) (2006); UT. R. J. NOM COMM MAN app. A, § 4C (providing that applicants selected for interviews may be required to submit a writing sample in response to a question proffered by the commission chair); ALASKA JUDICIAL COUNCIL, NOMINATING PROCEDURES, *supra* note 45 (requiring a writing sample as part of the application packet and establishing the criteria to be used by the council staff in evaluating the samples).

164. See ALASKA JUDICIAL COUNCIL, NOMINATING PROCEDURES, *supra* note 45, § II(B)(3).

165. *Id.*

166. *Id.* § IV(2).

167. For example, the National Judicial College offers courses in *Judicial Writing, and Logic and Opinion Writing*. See The National Judicial College, 2006 Chronological Course Listing, <http://www.judges.org/courses/chrono/2006> (last visited Jan. 11, 2007).

much on the “more objective” writing sample to narrow their choices.

Seemingly, a judicial nominating commission can find a more efficient and effective way to assess the bona fides of judicial candidates, such as spending its time and resources conducting peer reviews of other attorneys or asking judges or arbitrators before whom the candidates have appeared for their assessment of the legal ability and professional competence of the individual.<sup>168</sup> Alaska does all, or virtually all, of the above,<sup>169</sup> but that does not mean that other jurisdictions that elect to study a writing sample’s structure, syntax, and substance will not overly rely on writing samples.

Considerations such as integrity, judicial temperament, and collegiality are not easily quantifiable, and are only ascertainable by observation (perhaps over a long period of time). Commissioners are unlikely to have an adequate opportunity to observe, so they may be left with the proffered opinions of others concerning such important criteria. Moreover, other considerations such as industry and impartiality may be truly ascertainable only after a candidate has reached the bench. And even if a commissioner has ample opportunity to observe, she may be guided only by maxims such as, “[t]he model judge must know instinctively the difference between that which is important and that which is merely interesting.”<sup>170</sup> The ability of any person, no matter how qualified, to quantify the instinctive ability of another person is purely subjective, thereby making it inherently suspect.

Although commissioners must use subjective criteria in ranking candidates and choosing nominees, they must be careful in the process.<sup>171</sup> Because the criteria are ill-defined,<sup>172</sup> possibly quite elusive, and potentially unverifiable, proper identification of the

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168. Alaska uses this approach. See ALASKA JUDICIAL COUNCIL, NOMINATING PROCEDURES, *supra* note 45, § III(A) (detailing an extensive polling process).

169. See *id.* §§ I-V (detailing an extensive application, investigation, interview, and polling process).

170. GREENSTEIN, AJS HANDBOOK, *supra* note 45, at 74 (quoting Ruggero Aldisert, *What Makes a Good Judge?*, 14 IJA REP. 1, 2 (Spring 1982)); see also Ruggero J. Aldisert, In Memoriam, *Max Rosenn: An Ideal Appellate Judge*, 154 U. PA. L. REV. 1025, 1030 (2006) (“The model judge must instinctively know the difference between the important and the merely interesting.”).

171. For example, the focus on community contacts is easy enough to ascertain, but it also breeds cronyism in the face of a judicial nominating commission that is not properly diverse.

172. For example, reliance upon judicial temperament may lead commissioners to select those that fit the preconceived stereotype of what a judge should be, which may lead to selection of only those individuals that have certain cultural backgrounds.

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factors to be considered and training of the commissioners in the use of the criteria are important. Commissioners should base their decision upon the more quantifiable or ascertainable attributes rather than upon considerations that do not necessarily reflect the ability of the candidate or the democratic ideals that a merit selection system is supposed to promote. Other easily identifiable criteria besides writing samples also rely upon attributes that do not reflect democratic ideals.

By carefully compiling adequate data and letting the commissioners decide the relative importance of various criteria after a training session,<sup>173</sup> commissioners can more reliably identify and weigh appropriate attributes of candidates. This approach would give each commissioner adequate discretion in the nomination process. Not only would the commissioners decide which attributes are present, but they also would weigh the criteria and decide whether candidates meet the desired standards. The American Judicature Society asserts that “[n]either graduation from law school nor the fulfillment of a minimum requirement of years admitted to practice is sufficient to acquire the professional skills needed for judicial office.”<sup>174</sup> This statement, in effect, contradicts many state provisions that establish these criteria as the basis for eligibility. Contrary to the Society’s view, a candidate is legally qualified for judicial office if the constitutional or statutory qualifications are met, regardless of whether the candidate has acquired the necessary professional skills. The additional criteria are used to assess the candidate’s standing among competitors, not determine whether the candidate is qualified for judicial office. If the representative bodies of those jurisdictions felt that graduation from law school and a certain number of years in practice qualifies an individual for judicial office, a judicial nominating commission lacks the prerogative to substitute its judgment for that of the legislature.

In sum, the legislatures of the various states have set the qualifications for judicial office in their states. Judicial nominating commissions cannot usurp the prerogative of the legislature by juxtaposing additional qualifications on those already established by law. Limiting the use of additional, more subjective criteria to

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173. Former Justice Thurgood Marshall expressed concerns about the results of this approach. See Marshall, *supra* note 30, at 178 (“I am troubled by judicial selection by committee because it seems to me that two biases, or risks of biases, inhere in the process: (1) objective criteria will be given undue weight; and (2) to the extent subjective factors are considered, they will be value-free or technical ones.”).

174. GREENSTEIN, *AJS HANDBOOK*, *supra* note 45, at 74.

the ranking and selection phases of the commission's nominating process appropriately separates legal qualifications and desirable attributes. Additionally, the separation places the determination and weighing of the desirable attributes squarely on the commissioners.

#### IV. SELLING THE APPOINTING PROCESS

Some states already use commissions to select judicial nominees.<sup>175</sup> In those states without commissions, adopting a commission approach may involve more than mere legislation. The public must support the effort; otherwise, it may not succeed. Therefore, in those jurisdictions without judicial nominating commissions, an extensive public relations campaign designed to educate and animate the public should be the first step toward adopting the commission process.

One example of a well-planned and fruitful effort to educate and enlist the public to significantly change the judicial structure and process is Alabama's effort to pass a constitutional amendment, commonly known as the Judicial Article. The effort began in the mid-1960s and continued into the early 1970s. Through the work of the Citizens' Conference on Alabama State Courts, former Chief Justice Howell Heflin, the State Bar, the American Judicature Society, corporations, associations, and individuals, widespread public support developed for a wholesale overhaul of the Alabama judicial system. One issue raised at the initial meeting in 1966 was judicial merit retention for judges—"the Missouri plan or a variation of it."<sup>176</sup>

In 1972, by a vote of nearly 2-to-1, a constitutional amendment was adopted that created a unified, modern judicial system for the state.<sup>177</sup> One of the first steps was the organization of public support;<sup>178</sup> the result was a new court system.<sup>179</sup> A similar effort to

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175. See *supra* notes 37-42 and accompanying text.

176. Pelham J. Merrill, *The Facts About Alabama Courts and Judges Today*, 28 ALA. LAW. 139, 144 (1967). At the time, Judge Merrill served as a Justice on the Supreme Court of Alabama. *Id.*

177. For more complete accounts of the Alabama judicial-article effort, see *A Consensus Statement of the Citizens' Conference on Alabama's Judicial System*, 34 ALA. LAW. 152 (1973) [hereinafter *A Consensus Statement*]; *Citizens' Conference on Alabama State Courts*, 28 ALA. LAW. 131 (1967) [hereinafter *Citizens' Conference*].

178. The building of public support began at the beginning of the effort. "From the outset there was no question that every segment of the population of Alabama should be represented . . ." *Citizens' Conference*, *supra* note 177, at 133. The conferees included over 100 diverse representatives from thirty-seven of Alabama's sixty-seven counties. *Id.* at 134-38.

educate and animate public-minded citizens would prove most helpful in establishing an appointment commission scheme in any state without such a system.

Animating the public is not enough. Citizens may agree that nominating commissions are important, yet the message may be derailed or lost in the legislative process. For example, in 1973, the Alabama Citizens' Conference reported: "Judges should not be elected but chosen under a non-political merit system of selection, and laymen should participate in the nominating process."<sup>180</sup> As successful as the Conference was, and it was very successful overall,<sup>181</sup> its recommendation on merit selection and retention essentially slid into oblivion. Alabama continues to elect its judges through a partisan political process.

## V. CONCLUSION

Our goal is to place the best available candidates on our courts. Although there is no one best way to select judges, regardless of the method we choose—elective or appointive—judicial nominating commissions at least offer us a more desirable method for filling vacancies. The task, though, is greater than merely filling vacancies. We must strive to seat the best candidates on the courts. If we fail in that effort, at least we can strive to eliminate the seriously under-qualified applicants.

Because most judges come to the bench by appointment to vacancies, judicial nominating commissions are the most worthy, arguably critical, components of the judicial selection process even in jurisdictions that elect their judges. Nominating commissions, though, are only as good as their organization, members, and procedures permit. As we have identified previously,<sup>182</sup> commissions

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179. Interestingly, the one proposal that failed in the Judicial Article implementation was a new method of selecting judges. It was suggested in order to change from a popular partisan political campaign, to some type of merit selection, as it was then called. But that particular aspect of the sweeping Judicial Article died. Nevertheless, there was a constitutional provision passed stating that, on local option, judicial districts could have judicial nominating commissions. Seven circuits in Alabama have opted to use judicial nominating commissions. See ALA. CONST. amends. 83, 110, 408, 607, 615, 660, 741.

180. *A Consensus Statement*, *supra* note 177, at 154.

181. See ALA. CONST. amend. 328 (codified as ALA. CONST. art. VI, §§ 139-72) (containing a comprehensive revision of the Alabama judiciary; "judicial article"); Jim Bennett & Sallie C. Creel, *Alabama Citizens' Commission for Constitutional Reform*, 33 CUMB. L. REV. 597, 608 (2003) ("The new Judicial Article . . . transformed Alabama's sluggish and often ridiculed judicial branch into a model of organization.").

182. See *supra* Part I.B.

should possess at least three attributes: they should be democratic; they should be as independent as reasonably possible; and, they should enjoy public acceptance and support. The commission, to the extent possible, should be a diverse, representative body that is designed to address local needs. Furthermore, it should operate independent of the appointing authority and in a manner that will generate and maintain public support. Preferably, the nominating commission system should encompass all courts within a state, but if that is not feasible, the commission scheme should include as many courts as possible.

In a 1977 speech, former Justice Thurgood Marshall pertinently opined, “The crucial questions are what types of persons make ‘the fittest’ judges, and by what process are they best elevated to the bench.”<sup>183</sup> Three decades later, those crucial questions remain, but despite his misgivings, appropriately designed judicial nominating commissions constitute perhaps the best method for resolving at least the latter issue.

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183. Marshall, *supra* note 30, at 177.