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CAREFUL WHAT YOU WISH FOR: TOUGH QUESTIONS, HONEST ANSWERS, AND INNOVATIVE APPROACHES TO APPOINTIVE JUDICIAL SELECTION

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Steven Zeidman

Abstract

This Essay, informed in significant part by personal experience, examines in greater detail some of the common features of appointive systems, and in the process raises issues, concerns, and questions. Every step of the way the goal remains the same—to devise an appointive system most likely to yield as outstanding a judiciary as possible.

KEYWORDS: Judges, Judicial Appointment, Judicial Selection, Nomination, Nominating, Nominating Committee, judicial performance, commission

CAREFUL WHAT YOU WISH FOR: TOUGH QUESTIONS, HONEST ANSWERS, AND INNOVATIVE APPROACHES TO APPOINTIVE JUDICIAL SELECTION

Steven Zeidman*

Judicial selection is a perennially hot topic.¹ For as long as there have been judges, there have been controversies about the way they are selected.² The longstanding interest in judicial selection makes perfect sense given the central role the judiciary performs in the American system of government. Many are rightly and passionately concerned with the manner in which we choose those who will ultimately judge us and our actions. The debate, reduced to its essence, centers primarily upon whether judges should be elected or appointed. Typically, elections are preferred by those who focus on the importance of judicial accountability to the citizenry, while appointments are favored by those who elevate the goal of judicial independence.³

The judicial selection question is now hotter than ever.⁴ In 2002, the United States Supreme Court waded into these treacherous

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1. For a historical analysis of judicial selection in the United States, see, for example, Kelly Armitage, *Denial Ain't Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 628-37 (2002); Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 274-76 (2002).

2. See, e.g., A.B.A., JUSTICE IN JEOPARDY 6-8 (2003) [hereinafter JUSTICE IN JEOPARDY].

3. See, e.g., Martha W. Barnett, *The 1997-1998 Florida Constitution Revision Commission: Judicial Election or Merit Selection*, 52 FLA. L. REV. 411, 413 (2000) ("Appointive-based methods are seen as fostering more judicial independence, while elections are credited with holding a judiciary more accountable to the electorate."); Symposium, *Judicial Selection White Papers: The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 355 (2002).

4. A recent Lexis-Nexis search for the phrase "judicial w/2 selection w/2 method" yielded fifty-six matches in the period from January 1, 2005 to the present. Included in those matches were articles from states as varied as Georgia, New Hampshire, and North Dakota. See, e.g., Patrick Emery Longan, *Judicial Professionalism in a New Era of Judicial Selection*, 56 MERCER L. REV. 913 (2005); Mark C. Miller, *Conflicts*

waters and struck down a rule prohibiting judicial candidates from announcing their views on disputed legal or political issues,⁵ and the fallout from that decision is still settling.⁶ More recently, in *Lopez Torres v. New York State Board of Elections*, the United States Court of Appeals for the Second Circuit jumped feet-first into the judicial selection quagmire.⁷ The opening sentence of the court's eighty-two page opinion makes clear that the court was knee-deep in the bog: "This case requires us to peer inside New York State's political clubhouses and determine whether party leaders have arrogated to themselves a choice that belongs to the people."⁸ Ultimately, the court rejected the political leaders' appeal of the district judge's ruling that scrapped New York's antediluvian, party-controlled convention system in favor of political primaries.

Quite apart from the current appellate court interest in the subject matter, it is imperative that we focus on judicial selection for its own sake. We are not talking about the rarified federal courts—judicial selection in the federal arena is a *fait accompli*; all of those judges are appointed and there is no movement on the horizon to switch to an elective system.⁹ We are instead talking about state court judges. The states employ a variety of systems to select their judges,¹⁰ yet whichever system is utilized, it behooves us to do all that we can to ensure that we are selecting the best and the brightest. These, after all, are the judges who daily decide matters such as whether a child will be taken from her family, whether an ac-

Between the Massachusetts Supreme Judicial Court and the Legislature: Campaign Finance Reform and Same-Sex Marriage, 4 PIERCE L. REV. 279 (2006); Renata Olafson Selzer, Note, *The Future of Judicial Elections in North Dakota*, 82 N. D. L. REV. 197 (2006). Not surprisingly, there were also symposium and bibliography issues dedicated to judicial selection. See, e.g., Symposium, *Judicial Professionalism in a New Era of Judicial Selection*, 56 MERCER L. REV. 913 (2005); *Judicial Symposium Issue*, 38 AKRON L. REV. 551 (2005).

5. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

6. See, e.g., Penny J. White, *A Matter of Perspective*, 3 FIRST AMEND. L. REV. 5 (2004); Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791 (2004).

7. 462 F.3d 161 (2d Cir. 2006).

8. *Id.* at 169.

9. See U.S. CONST. art. II, § 2; Stephen P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 696 (1995) (re-marking that the prospect of electing federal judges is "unthinkable").

10. See, e.g., Barnett, *supra* note 3, at 412 (detailing Florida's "hybrid system" of judicial selection, incorporating both elections and merit selection); Bradley A. Smith, *Symposium on Judicial Elections: Selecting Judges in the 21st Century*, 30 CAP. U. L. REV. 437 (2002) ("Of the nation's more than 1200 state appellate judges, 47% are appointed, 40% face partisan elections; and 13% face non-partisan elections.").

cused will be held in jail, and whether a tenant will be evicted from her home.

This symposium invited the participants to move beyond the standard “election versus appointment” debate.¹¹ Instead, all were urged to “critically appraise” appointive selection—what exactly are the component parts of a gold standard appointive system? Designing a meritorious system is indeed challenging. In fact, while the devil is said to be in the details, in this context, it may be more apt to suggest that the devil is in the implementation.

This Essay, informed in significant part by personal experience, examines in greater detail some of the common features of appointive systems, and in the process raises issues, concerns, and questions. Every step of the way the goal remains the same—to devise an appointive system most likely to yield as outstanding a judiciary as possible.

It is accepted wisdom that the nominating commission is central to any appointive selection system.¹² But who are the people who will nominate potential judges for appointment by the executive or other appointing authority? How and by whom should the nominators themselves be appointed? Obviously, the nominating commission members wield a great deal of influence. Certainly, the commissioners must be independent. They should not be mere puppets or act at the beck and call of the executive or whoever appointed them to the commission.¹³

Similarly, it is now generally accepted that the commission must be diverse, both to ensure the commission’s legitimacy by having its membership mirror the population it serves, and to ensure a vast depth and breadth of experience and wisdom among the com-

11. The symposium, titled “Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges,” was held at Fordham University School of Law on April 7, 2006.

12. *See, e.g.,* Zeidman, *supra* note 6, at 831. This is apparently the case as well internationally. *See, e.g.,* Christine L. Nemacheck, Book Review, 16 *LAW & POL. BOOK REV.* 664, 666 (2006), available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/malleson-russell0906.html> (last visited Nov. 8, 2006) (reviewing *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* (Kate Malleson & Peter H. Russell eds., 2006)) (observing that the judicial appointment commission “is the most frequently used approach by countries revising their judicial appointment systems”).

13. *See, e.g.,* James J. Alfani & Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards*, 106 *DICK. L. REV.* 683, 707-08 (2002); Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence and Competence*, 14 *GEO. J. LEGAL ETHICS* 667, 673 (2001).

missioners.¹⁴ It is not enough, however, to simply state that the commission must be “diverse.” If we are to “critically appraise,” we must ask hard questions. What is meant by a “diverse” commission? Is it limited to racial diversity? How about gender, sexual orientation, age, ethnicity, or any other so-called immutable characteristics? What about other variables? Should the commission be split along political party lines? How about representing different geographic regions (i.e., upstate and downstate, south side and north side, etc.)? Should it have an equal amount of lawyers and laypersons? Just how should someone’s work history fit into the equation?¹⁵

Inextricably linked to the diversity of the nominating commission is the diversity of the commission’s nominees. All of the questions above come to the fore with great force once again when considering who is nominated by the nominating commission. Indisputably, there is a crying need to diversify the judiciary.¹⁶ The numbers are stark. It is not hyperbole to say that we have a country of white male judges wholly disproportionate to their percentage of the general population.¹⁷ A sound appointive system must be designed to overcome that national travesty, and yet must also address the multitude of issues encompassed by the call for “diversity.”

Perhaps even harder to address than the “who,” is the “how”—what process the commission should use to bolster its efforts to

14. See, e.g., Jona Goldschmidt, *Selection and Retention of Judges: Is Florida’s Present System Still the Best Compromise*, 49 U. MIAMI L. REV. 1, 67-68 (1994) (“There is a nationwide trend to address the lack of diversity on the bench by explicitly adding racial and gender diversity as a criterion for the selection of both nominating commissioners and judicial appointees.”).

15. See, e.g., Daniel Wise, *Majority of Giuliani Appointments to Criminal Bench are Prosecutors*, N.Y.L.J., Mar. 18, 1999, at 1 (observing that Mayor Giuliani’s Advisory Committee on the Judiciary, comprised of many former prosecutors, recommended a super-majority of prosecutors for appointment to the bench).

16. See, e.g., JUSTICE IN JEOPARDY, *supra* note 2, at 11 (promulgating the principle that “[t]he judicial system should be racially diverse and reflective of the society it serves”); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 409-11 (2000) (noting that beyond legitimacy and appearance, diversity on the bench will benefit judicial decision-making and promote fairness in the justice system); H.T. Smith, *Toward a More Diverse Judiciary*, A.B.A.J., July 1995, at 8 (“Judicial diversity is more important today than ever.”); Zeidman, *supra* note 6, at 811-18.

17. See, e.g., Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 95 (1997); see also Zeidman, *supra* note 6, at 811-18.

find and attract the best and the brightest.¹⁸ Two stalwart, standard features of any nominating commission process are the reference or background check, and the personal interview. As straightforward, common, and familiar as these devices seem, a critical appraisal reveals much more than meets the eye.

Most nominating commissions have some procedure whereby an applicant is fully vetted. Part of that procedure will no doubt include reference checks. Commission members or designated individuals contact the applicant's colleagues, adversaries, and judges familiar with her work to gather information about the applicant. What, though, is the underlying purpose of these efforts? What is the reference check supposed to achieve? Is it designed to ferret out that hopefully rare person who looks acceptable on paper but has left a trail of scorched earth in her path? Is it, reduced to its essence, aimed merely at skimming off the very worst—those who cannot even pass a routine reference check? Or, is it supposed to be more useful than that? Should it yield enough information so that the commission will be able to rank applicants? For example, if the references are asked a series of questions that require them to give the applicant a 1-10 ranking, then their answers could be used in a rough empirical way. This systemic, quasi-empirical model is hard to imagine. It is difficult to conceive of reducing these assessments to a series of numbers. Rather, these “interviews” are aimed at getting at subjective feelings and impressions—not the sort of endeavor readily capable of numerization.

Besides, what variables are the questions designed to address?¹⁹ How hard the applicant works? Whether she exhibited good judgment? Whether she has an even temperament? Even assuming we might be able to agree on an amalgam of characteristics we would like a judge to possess, could we get at those traits through this process?²⁰ In particular, your typical commission member is unlikely to be an expert, or even particularly skilled, in this informa-

18. One commentator suggests that “[i]mproving judicial selection is not just about getting better judges but also about getting a better process.” Norman L. Greene, *Perspectives on Judicial Selection*, 56 *MERCER L. REV.* 949, 954 (2005).

19. One commentator lists, inter alia, the following evaluative criteria: impartiality, industry, integrity, professional skills, community contacts, and social awareness. MARLA N. GREENSTEIN, *AM. JUDICATURE SOC'Y, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS* 69-71 (Kathleen M. Sampson, rev. ed. 2004); see also Goldschmidt, *supra* note 14, at 29.

20. See, e.g., Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech for Judicial Office*, 35 *UCLA L. REV.* 207, 253 (1987) (“There are no ready-made measures to quantify judicial temperament, impartiality, intelligence, tact, and the other qualities that constitute judicial excellence.”).

tion-gathering technique. Is she trained to design the questions (including the more spontaneous follow-up questions), solicit the answers, and then analyze the responses across candidates?

From 1993-1996, the author had the privilege to serve on New York City Mayor Rudolph Giuliani's Advisory Committee on the Judiciary.²¹ Pursuant to an Executive Order, the Advisory Committee must include two members of the faculty from New York City area law schools, and I was appointed to fill one of those slots.²² While I had much experience and familiarity with the workings of the New York City Criminal Court, I did not possess any unique talent, or receive any special training, regarding how best to select a judge. I did not know how to sift through the many qualified applicants, and all the information their applications generated, to figure out who would make the best jurist. At the same time, I actively served on the Central Screening Committee of the Appellate Division, First Department, which was charged with reviewing applications from lawyers who wished to serve on the panel of attorneys eligible for assignment to represent indigent defendants in the New York City Criminal Court. In each Committee, we struggled with the issue of performance evaluation—how do you assess someone's performance in her career, and how do you predict how she will perform in the future in a new, and vitally important, role? As a necessary first step toward that evaluation, what information do you need to ensure sound decision-making, and how do you accumulate or elicit that data? In some cases, I called references, adversaries, and others with some knowledge of the applicant's work history. In other cases, I listened to reports from those vested with the authority to conduct the background check. Quickly, I came to realize that the legal community has its own pinstripe version of the police department's oft-noted "blue wall of silence." It was extremely uncommon for anyone to have anything particularly critical to say. In short order I came to more fully appreciate the phrase "damning with faint praise." If a reference said that the applicant was "OK," that seemed to hint at some underlying issue. Unfortunately, the hint seldom led to the substantive subtext.

21. The Advisory Committee on the Judiciary, created by Mayoral Executive Order in 1978, recommends a list of candidates to the Mayor for vacancies on the New York City Family and Criminal Courts. New York Mayor's Exec. Order No. 8, Mar. 4, 2002 (on file with the author) (reestablishing the Mayor's Advisory Committee on the Judiciary).

22. *Id.* At the time, the author was on the faculty of New York University School of Law.

The standard interview with the judicial candidate raises similar flags. On its face the interview is logical and necessary. When “critically appraised,” however, it falls far short of its intended goals. Again, we must first ask: What is the purpose of the interview? What are the interviewers attempting to discern? Is it a search, via the time-honored technique of a face-to-face interview, to determine whether the candidate exhibits a sufficient number of judicially-required attributes in a sufficiently qualitative way? Is it humanly possible to learn that in a typical thirty-minute or even one-hour-long interview? Layered on top of those concerns we must again ask whether the commission members have the requisite training, skills, or experience to enable them to achieve the stated purpose of the interview.

While I had interviewed job applicants in the past, I had no special interviewing skill or training. The interview evoked the same sense of futility as the vetting and reference check; it seemed to be the right thing to do but in practice raised more questions than it answered. The interview naturally and unconsciously devolved into my own personal set of likes and dislikes. Try as I might to pull myself back to the list of ideal judicial characteristics (i.e., integrity, industriousness, intelligence, temperament), I realized that it became more about a general sense of the interviewee. Inevitably, I found myself thinking platitudes like, “I like her” or “She’d probably make a good judge.” What were those impressions based on? It is almost impossible for me to say.

Supporters of appointive systems and nominating commissions must be honest—these information-gathering techniques require great training, skill, and time. Most nominating commissions are comprised of civic-minded, knowledgeable, experienced, hard-working, reliable, and serious people dedicated unstintingly to the task at hand. That is certainly an apt description of my fellow commissioners. And commissions are becoming increasingly diverse. Yet while the commissioners may possess an abundance of exceptional qualities, the real question is whether they are the most qualified people for this particular undertaking—are they best suited for the delicate and challenging tasks of filtering through applications, vetting the candidates, conducting interviews, and identifying those judicial aspirants who possess the right judicial stuff? In the end, we must ask how we can select commissioners who, within the necessary framework of diversity, are best able to perform the commission’s stated task. Who are the best qualified to evaluate who are the best qualified for the bench? That has to be the ulti-

mate question: does the commissioner have the requisite skill set for the vital task at hand?

Or, if we are truly taking judicial selection seriously, why not turn to professionals, to the purported experts in the relevant fields? After all, is it not hubris to think that a group of civic-minded lawyers and laypersons are necessarily up to this incredibly important task? Major firms, companies, and organizations have already reached this conclusion. Rather than handle the search for executives in-house, they turn to executive search firms—to professionals with training, education, and experience—who devote themselves to these endeavors.²³ Once the company identifies a personnel need, it identifies the characteristics of the person they are looking for, and then hands over the data gathering and analysis to the search firm.²⁴

While not a scientific endeavor, surely there are experts who know how to handle reference checks, ask questions, listen carefully to the responses, follow-up in ways designed to elicit even more information, and interpret the responses they produce. The burgeoning field of jury consultants provides food for thought. Jury consultants help trial counsel prepare to question prospective jurors. They design questions and analyze the resulting answers, but more importantly they strive to ensure that the interviewing technique and substance are well-adapted to the purpose of evaluating a potential juror on a number of personal characteristics. Many jury consultants have studied these techniques in depth and have graduate degrees in communications.²⁵ In fact, many claim to be able to assess jurors' responses for subtext and nuance, and to discern dishonest answers. Those skills are especially relevant in the judicial interview as the commissioners seek to determine if the candidate would be fair, impartial, and unbiased.²⁶

23. See, e.g., Edward Brunet, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts*, 23 BERKELEY J. EMP. & LAB. L. 107, 124 (2002) ("The growth and effectiveness of executive search 'headhunter' firms provide a type of information specialist or broker in the market for highly skilled employees."); J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115, 170 n.173 (1998) (citing Angela Ahn, *Headhunters Battle Second Class Image*, HOUSTON CHRONICLE, July 20, 1986, at 9) (noting the existence of more than 1,500 executive search firms).

24. For examples of major executive search firms and the services they provide, see Heidrick & Struggles Home Page, <http://www.heidrick.com>; Korn/Ferry International Home Page, <http://www.kornferry.com> (last visited Feb. 2, 2007).

25. See Diana G. Ratcliffe, *Using Trial Consultants: What Practitioners Need to Know*, 4 J. LEGAL ADVOC. & PRAC. 32, 34 (2002).

26. See Jeremy W. Barber, *The Jury is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 AM. CRIM. L. REV. 1225, 1234-36, 1243 (1994) (re-

At a minimum, it is time to reconsider the interview. A judge occupies a unique position and possesses incredible power. The interview must be tailored accordingly. The process demands new and creative thinking. What about the use of role-plays, hypotheticals, and other devices to make it a more dynamic and interactive process? What about giving written assignments or problems ahead of time? Is it inappropriate to imagine multiple-choice, essay, and short-answer questions on a variety of legal and ethical situations tailored to the particular court involved? The length of the typical interview must also be re-examined. Twenty minutes? A half-hour? One hour? Contrast the process for the appointment of law school faculty. In most cases, the “interview” is a full-day affair, the centerpiece of which is a presentation on a legal issue by the candidate to the full faculty. The interviewee will have to respond to numerous challenging—if not hostile—questions, and defend her position with clarity and vigor. Is the job of a law professor more demanding than a judge?

We must think seriously about pre-judicial training, education, and certification as a prerequisite for appointment to the bench.²⁷ In order to apply for appointment, a candidate could first have to complete a rigorous judicial training program.²⁸ Maybe she would have to pass the course of study with high grades in order to apply, or maybe the grades received would be considered as part of the applicant’s qualifications. Or perhaps we should create a test like a bar examination that candidates must pass as a precondition to applying for appointment. One can easily imagine multiple-choice and essay questions designed to assess, *inter alia*, whether the applicant is familiar with the range of issues and problems of the particular court involved, and how those matters and the court itself

garding jury consultants’ ability to assess jurors’ responses to voir dire questions and to uncover dishonesty); Rachel Hartje, *A Jury of Your Peers?: How Jury Consultants May Actually Help Trial Lawyers Resolve Constitutional Limitations Imposed on the Selection of Juries*, 41 CAL. W. L. REV. 479, 499 (2005) (“As ‘prejudiced jurors rarely broadcast their biases in open court’, the questions are purposefully designed to bring out the subtle biases of potential jurors attempting to hide their true tendencies.” (quoting Neil J. Kressel & Dorit F. Kressel, *STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING* 67 (2002))). *But see* Shari Seidman Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 JUDICATURE 178, 180-81 (1990) (expressing skepticism about jury consultants).

27. See Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Back Room?*, 41 S. TEX. L. REV. 1197, 1226 (2000) (suggesting that “states consider developing special examinations to be administered to all judicial aspirants”).

28. The University of Nevada at Reno offers one of the few Masters and Doctorate programs in Judicial Studies. See Judicial Studies Program at the University of Nevada, Reno, <http://www.judicialstudies.unr.edu> (last visited Feb. 2, 2007).

affects individuals and communities. Or maybe passing the course and/or examination could simply be used as a highly valued credential in the applicant's favor.

Rather than seeming farfetched, pre-judicial training and certification seems eminently logical. In fact, if we were devising a judicial selection system from scratch, unencumbered by the systems already in place, isn't it likely that we would create some kind of judicial studies graduate school? While some bristle at the notion of pre-judge "school," examining the types of judicial selection models the United States exports provides illumination. In places such as Iraq, Afghanistan, and Palestine, the United States and others are involved in creating and implementing a number of judicial training programs for judicial aspirants.²⁹ Internationally, very few countries elect their judges.³⁰ Instead, the path to the judiciary is through a process of rigorous academic and practical training.³¹

29. See, e.g., Thomas Wallitsch, *Corruption, Lack of Resources Hobble Afghan Courts*, MORNING CALL, June 23, 2006, at A9 (detailing the Afghanistan Rule of Law Project); State Department Documents and Publications, USINFO Webchat transcript, Jun. 14, 2006, <http://usinfo.state.gov/usinfo/Archive/2006/Jun/14-98472.html> (detailing the efforts of the Department of Justice and the State Department training judges in Iraq and Afghanistan); U.S. DEPT. OF STATE, BUREAU OF NEAR EASTERN AFFAIRS, ARAB JUDICIAL FORUM 2003: JUDICIAL SYSTEMS IN THE 21ST CENTURY, <http://www.state.gov/p/nea/rls/24796.htm> (last visited Nov. 16, 2006) (detailing United States involvement in the Arab Judicial Forum 2003); Int'l Legal Assistance Consortium, Iraq, <http://www.ilac.se/default2.asp?xid=291> (last visited Nov. 16, 2006) (discussing the International Legal Assistance Consortium's recommendations for judicial reconstruction in Iraq).

30. See, e.g., Maria Dakolias, *Court Performance Around the World: A Comparative Perspective*, 2 YALE HUM. RTS. & DEV. L.J. 87 (1999). Professor Tarr has written: In contrast with judges on ordinary courts in civil-law systems, members of European constitutional courts are selected through a political process. In some countries, such as France, political officials directly name the judges; in others, such as Germany, the parliament elects the judges. Still other countries, such as Spain and Italy, employ a mixed system of selection, with some judges named by the executive, some named by the judiciary, and some elected by super-majorities in parliament.

G. Alan Tarr, *Reform Proposals: Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1465-66 (2003); see also Nathan J. Brown, *Arab Judicial Structures: A Study Presented to the United Nations Development Program*, <http://www.pogar.org/publications/judiciary/nbrown/tappoint.html> (last visited Nov. 8, 2006) (discussing judicial appointment procedures in numerous Arab countries).

31. See, e.g., Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 869 (2002) ("Prospective judges in many other countries are trained for the demands and responsibilities of judging at an early point in their careers . . ."); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 848-49 (1985) (discussing the judicial certification process used in Germany); Linda S. Mullenix, *Lessons From Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 8 (2001) ("In civil law countries, the judiciary is highly professionalized and judicial aspirants elect a course of study in preparation to serve as a judge after the award of

One final procedural issue serves particularly well to drive home the importance of what is at stake. Suppose we have an appointive system in place and the executive authority appoints a number of judges to ten-year terms. What happens when their terms are up? In the symposium's spirit of focusing on appointive systems, I will assume we are considering the reappointment process instead of a retention election,³² and that we are not yet in a place where judges are limited to serving just one term.³³ How do we assess whether a judge should be reappointed? While the use of a variety of judicial performance evaluations to educate the public and the individual judge is on the rise,³⁴ the sad truth is that there appears to be much less focus on actual judicial performance than on initial judicial selection.³⁵ And while performance evaluations serve a utilitarian purpose, they do not get to the heart of the matter—what standard should be employed to evaluate whether a sitting judge should be reappointed? Is mere competence sufficient? Or can we ratchet up our expectations and ask whether the judge performed highly

academic degrees.”); Nemacheck, *supra* note 12, at 666 (discussing competitive exams and specialized judicial training in Spain, Germany, France and Italy). Japanese judges also attend educational programs:

[In Japan], aspiring lawyers typically study law at a university for four years after completing secondary (high) school. They then take an exam and, if successful, are admitted to a practical training program to become qualified as judges. Practical training begins with classroom-type instruction in the skills of a judge and continues with several-month apprenticeships at the courts and other legal institutions. Following completion of this practical training, students take a second bar examination.

James R. Maxeiner & Keiichi Yamamaka, *The New Japanese Law Schools: Putting the Professional Into Legal Education*, 13 PAC. RIM L. & POL'Y J. 303, 307-08 (2004).

32. Retention elections were designed as a way to make judges accountable to the citizenry by allowing a popular vote on the performance of a judge selected pursuant to a merit system. For trenchant discussions of retention elections, see, for example, Larry Aspin, *Trends in Judicial Retention Elections: 1964-1998*, 83 JUDICATURE 79 (1999); Honorable B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429 (2001).

33. That was the position advocated by the American Bar Association's Commission on the 21st Century Judiciary. See JUSTICE IN JEOPARDY, *supra* note 2, at 72-73. Given the concern that judges might feel pressured at the end of their terms to assuage either the electorate or the appointing authority, the Commission recommended that judges' tenure be limited to one, albeit relatively long, term. *Id.*

34. See, e.g., Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1066-67 (2002) (discussing the use of judicial performance evaluations to inform the public about the judiciary and to inform judges about their strengths and weaknesses).

35. See, e.g., A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 645 (1998) (“Historically, there has been much less emphasis placed on a judge's actual performance on the bench after selection.”).

competently? Let me suggest that we are asking the wrong question. Given the crucial nature of the judicial function, the ultimate question must be whether there is anyone in the pool of available applicants who might perform better. While that is sure to rankle many—in particular sitting judges—the question sets an appropriately high standard for such an important job, and signals in clear and certain terms that we take seriously our obligation to devise a system that produces only the best and the brightest.