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Cover Page Footnote

Wyoming Supreme Court Justice. I want to thank Bobbi Bronnenberg, my law clerk, who provided me substantial assistance with this article and whose research and input were crucial.

WYOMING'S JUDICIAL SELECTION PROCESS: IS IT GETTING THE JOB DONE?

Marilyn S. Kite*

INTRODUCTION

The rights guaranteed by the United States Constitution to the citizens of our country mean little without an independent judiciary to enforce those rights. As Alexander Hamilton commented in *THE FEDERALIST PAPERS*, the method by which judges are selected unavoidably impacts their ability to function independent from political influence.¹ In general, the goals of a judicial selection system should be to encourage judicial independence, recruit the highest quality judiciary, provide for accountability, create a representative judiciary, and maintain public confidence in the fairness and integrity of the judicial system.² Any time politics are inserted into the judicial selection process, judicial independence is compromised.³ Public perception of political influence on the judiciary, whether through money or political affiliation, undermines the citizenry's confidence in the integrity of the system. In the words of the primary author of Wyoming's judicial selection system, R. Stanley Lowe, an orderly society needs a judiciary that commands respect.⁴

In discussing the uniquely American concept of separation of powers, James Madison noted that for each branch of government to have a "will of its own," the members of each branch should have "as little agency as possible in the appointment of the members of the others," ideally requiring the people to select the mem-

* Wyoming Supreme Court Justice. I want to thank Bobbi Bronnenberg, my law clerk, who provided me substantial assistance with this article and whose research and input were crucial.

1. See *THE FEDERALIST NO. 78*, at 412-13 (Alexander Hamilton) (J.R. Pole ed., 2005) (arguing strongly for judicial appointment and life tenure).

2. Lawrence Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK. LITTLE ROCK L. REV. 281, 289 (1994).

3. See Interview by Bobbi Bronnenberg with R. Stanley Lowe, former director, Am. Judicature Soc'y, in Casper, Wyo. (May 22, 2006) [hereinafter Interview with R. Stanley Lowe]; see also *THE FEDERALIST NO. 51* (James Madison), *supra* note 1, at 281.

4. Interview with R. Stanley Lowe, *supra* note 3; cf. R. Stanley Lowe, *Reflections on the Judicial Selection Process*, WYO. LAW., Aug. 2003, at 55 [hereinafter Lowe, *Reflections*].

bers of each branch.⁵ Madison recognized that selection of the judiciary in that manner would be “inexpedient,” however, in part because the primary concern in the selection of the members of that branch of government should be qualification.⁶ The rejection of public election of the judiciary left appointment as the only viable method of selection. Appointment was deemed sufficiently compatible with the concept of separation of powers because, as the founders noted, life tenure for federal judges “must soon destroy all sense of dependence on the authority conferring them.”⁷ Thus, although federal judges are inherently affected by the political process at the outset of their judicial careers because they are appointed by the chief executive and confirmed by the Senate, lifetime appointments minimize political influence over time.⁸

Many state constitutions did not, however, follow the federal model.⁹ Thousands of state judicial positions are filled every year across our country by varying methods of selection, including appointments by the chief executive, partisan elections, non-partisan elections, and, as in Wyoming, gubernatorial appointments from lists of nominees chosen by judicial nominating commissions, usually followed by retention elections.¹⁰ Without life tenure, how can states select judges who are independent? The answer lies in the judicial nominating commission form of judicial selection. The advantage of the judicial nominating commission system, as opposed to politically-based systems such as elections or pure executive appointment, is that it focuses on the qualifications of the judicial candidate, rather than his or her political or personal connections.¹¹ The commission-based system is designed to emphasize the factors which should be relevant in choosing a judge, including judicial temperament, intellect, training, integrity, and experience.¹²

The purpose of this Article is to explain Wyoming’s commission-based judicial selection process, study how it has performed over the years, see what lessons we can learn from that history, and consider how it can be improved. Throughout this Article, the focus

5. THE FEDERALIST NO. 51, (James Madison) *supra* note 3, at 280.

6. *Id.*

7. *Id.*

8. THE FEDERALIST NO. 79 (Alexander Hamilton), *supra* note 1, at 418.

9. *See* Averill, *supra* note 2, at 289 & n.26.

10. *See id.* at 289-90 (outlining the different methods of judicial selection used for selection of state court judges throughout the United States).

11. *See* Interview with R. Stanley Lowe, *supra* note 3.

12. *Id.*

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will be on what attributes of a judicial selection system best result in an independent, accountable, and vibrant judiciary.

A HISTORY OF WYOMING'S JUDICIAL SELECTION PROCESS

Prior to 1972, judges in Wyoming were elected in non-partisan elections.¹³ Elected judges, like all political officials, were chosen by popular vote and not, necessarily, on qualifications or merit.¹⁴ If a vacancy occurred during the middle of a judicial term, which apparently happened quite frequently, the governor filled the vacancy by appointment.¹⁵ As is human nature, those appointments were often made on the basis of personal relationships or political affiliation rather than strictly upon the qualifications of the candidates.¹⁶

In the early 1970s, a movement began among judges and lawyers in Wyoming to change from a politically-based judicial selection system to a process which, to the greatest extent possible, removed the influence of politics from judicial selection and assured appointment of qualified candidates. One of the impetuses of this movement was an American Judicature Society presentation at a Wyoming State Bar meeting about the judicial nominating commission system commonly known as the "Missouri Plan."¹⁷ Two judges who had been elected under the old system—Judge John Ilsley of Sheridan County and Judge Alan Pearson of Park County—were impressed with the presentation and approached Wyoming attorney R. Stanley Lowe with the idea of adopting a commission-based judicial selection system in Wyoming.¹⁸ Mr. Lowe had worked on various Wyoming court improvement projects and sat on the board of directors for the American Judicature Society, so he was well-qualified to guide and advise the state in implementing a new judicial selection system.¹⁹

The American Judicature Society and the Wyoming State Bar conducted citizens' conferences throughout the state to discuss the advantages and disadvantages of changing the judicial selection

13. WYO. CONST. art. V, §§ 4, 6; Lowe, *Reflections*, *supra* note 4, at 55.

14. This is not to suggest that any of the elected judges were not qualified.

15. Interview with R. Stanley Lowe, *supra* note 3.

16. *Id.*

17. *Id.*; *see also* Lowe, *Reflections*, *supra* note 4, at 55.

18. Interview with R. Stanley Lowe, *supra* note 3; *see also* Lowe, *Reflections*, *supra* note 4, at 55. Wyoming's type of judicial selection plan is often referred to as the "Missouri Plan" because it was first adopted in Missouri in 1940. *See* Ronda Monger, *Judicial Retention Elections*, WYO. LAW., Feb. 2004, at 21.

19. Interview with R. Stanley Lowe, *supra* note 3.

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process in Wyoming.²⁰ These citizens' conferences were well-publicized and drew "widely represented audiences."²¹ At one of the citizens' conferences, a "geographically and professionally diverse steering committee" was formed to promote the revisions to Wyoming's judicial selection system.²² Around this same time, Mr. Lowe went to work as an associate director of the American Judicature Society and was, therefore, able to use all of the society's knowledge and resources to structure the best possible judicial selection system for Wyoming.²³

In order to fulfill the mission of creating a "politics free" judicial selection process in Wyoming, it was necessary to amend Article V of the Wyoming Constitution.²⁴ Then-State Representative Alan Simpson of Park County²⁵ introduced a constitutional amendment in the Wyoming legislature, which passed on February 28, 1971.²⁶ The citizenry adopted the constitutional amendment at the general election on November 7, 1972 and it became effective December 12, 1972.²⁷ The legislature then passed enabling legislation to implement the constitutional mandate.²⁸

STRUCTURE OF THE WYOMING JUDICIAL SELECTION PROCESS

Wyoming's judicial selection process applies to all levels of Wyoming state courts, including the supreme court, district courts, and circuit courts. It starts with the judicial nominating commission,²⁹ which consists of three attorneys elected by the members of the Wyoming State Bar and three non-attorney electors of the state

20. *Id.*; see also Averill, *supra* note 2, at 326.

21. Averill, *supra* note 2, at 326.

22. *Id.*; see also Interview with R. Stanley Lowe, *supra* note 3.

23. Interview with R. Stanley Lowe, *supra* note 3.

24. In Wyoming, a constitutional amendment may be proposed by either branch of the legislature and, if agreed to by two-thirds of the members of both houses, it is submitted to the electors of the State at the next general election. WYO. CONST. art. XX, § 1.

25. Mr. Simpson later became a very well-known and popular United States Senator for Wyoming.

26. WYO. CONST. art. V, §§ 4, 6; 1971 Wyo. Sess. Laws 719.

27. See Wyoming Judicial Nominating Committee Rules, available at <http://courts.state.wy.us/CourtRules.aspx> (under "Boards and Commissions," find "State of Wyoming Judicial Nominating Committee Rules").

28. See WYO. STAT. ANN. §§ 5-1-101 to -106 (2005).

29. WYO. CONST. art. V, § 4(c). In 2000, the Wyoming Legislature passed legislation creating the circuit court system. The circuit courts replaced county courts and, to the extent the commissioners of any county accepted the proposal, justice of the peace courts. Counties were entitled to retain their justice of the peace courts but, after July 1, 2000, the state no longer paid the costs associated with them. WYO. STAT. ANN. §§ 5-9-102, 5-9-104, 5-9-110.

appointed by the governor.³⁰ The constitution sets out geographic requirements for nominating commission members, ensuring that the various parts of the state are represented.³¹ The chief justice or his or her designee sits as the chairperson of the commission and votes only in the case of a tie.³² Nominating commission members each serve one four-year term, and the members' terms are staggered.³³ Nominating commission members are unpaid volunteers. The constitution expressly provides: "Members of the commission shall be entitled to no compensation other than expenses incurred for travel and subsistence while attending meetings of the commission."³⁴

Wyoming has a single nominating commission for all judicial vacancies,³⁵ in contrast to other states which have separate commissions for trial and appellate courts and/or districts or regions.³⁶ The determination to have just one nominating commission was made deliberately. Because an attorney is not eligible for appointment to a judicial office while serving on the judicial nominating commission, or for a period of one year after expiration of his or her term on the commission,³⁷ there was a concern that multiple commissions would result in fewer qualified attorneys being able to serve as judges. According to Mr. Lowe, considering Wyoming's small population and, consequently, small pool of judicial candidates, it was important to keep as many candidates eligible for appointment to vacant judgeships as possible.³⁸ The drafters recognized, however, that a single commission may not be suitably acquainted with potential candidates in all regions of the state to make proper appointments. In order to rectify this situation, article V, section 4(c) of the constitution provides:

In the case of courts having less than statewide authority, each judicial district not otherwise represented by a member on the commission, and each county, should the provisions hereof be extended by law to courts of lesser jurisdiction than district courts, shall be represented by two nonvoting advisors to the commission when an appointment to a court in such unrepre-

30. WYO. CONST. art. V, § 4(c).

31. *Id.*

32. *Id.* § 4(e).

33. WYO. STAT. ANN. § 5-1-102(a).

34. WYO. CONST. art. V, § 4(e).

35. *Id.* § 4.

36. *See, e.g.,* COLO. CONST. art. VI, § 24; NEB. CONST. art. V, § 21.

37. *E.g.,* WYO. CONST. art. V, § 4(d).

38. Interview with R. Stanley Lowe, *supra* note 3.

sented district, or county, is pending; both of such advisors shall be residents of the district, or county, and one shall be a member of the bar appointed by the governing body of the Wyoming state bar and one shall be a nonattorney advisor appointed by the governor.³⁹

The judicial nominating commission (“JNC”) operates pursuant to rules adopted by the Wyoming Supreme Court on March 5, 1973.⁴⁰ The JNC rules govern meetings of the judicial nominating commission (Rules 1-2), officers (Rules 3-4), record keeping (Rule 5), procedures for nominations to fill vacancies (Rules 6-9), and procedures for judges already holding office to seek retention (Rule 10).⁴¹

When a judicial vacancy occurs, the commission seeks nominations for the judgeship.⁴² In order to qualify to be a supreme court justice, the candidate must have been in actual practice for at least nine years, be at least thirty years old, be a citizen of the United States, and have resided in Wyoming for at least three years.⁴³ The qualifications for district and circuit court judges require less in the way of experience and years of residence.⁴⁴ A candidate submits an “expression of interest” indicating his or her willingness to be nominated for a vacant judicial position.⁴⁵ The expression of interest is a lengthy document, calling for information about the candidate’s background, professional experience, personality, and temperament.⁴⁶ The candidate is also asked to submit a writing sample and names of multiple references.⁴⁷ The political affiliation

39. WYO. CONST. art. V, § 4(c). As an interesting aside, Celeste Mori, a former lay member of the commission, indicated that, in her experience, the application of this provision occasionally resulted in more attorneys than lay members serving on the commission. In those situations, she felt “outnumbered” by the lawyers on the commission. See Telephone Interview with Celeste Mori, former Judicial Nominating Comm’n Member (July 5, 2006) [hereinafter Interview with Celeste Mori]. But see Averill, *supra* note 2, at 292 n.37 (reporting a conversation with then-Wyoming Chief Justice Michael Golden, who indicated the advisory process is mandatory under the constitution and was followed while he served as chairman of the nominating commission); Shirley Cheramy et al., *The Judicial Nomination Process*, WYO. LAW., Aug. 2003, at 45 (suggesting the commission has the option of requesting advisory members).

40. WYO. JUD. COMM’N NOM. R. pmbl. (West 2006).

41. *Id.* 1-10.

42. *Id.* 6-7.

43. WYO. CONST. art. V, § 8.

44. *Id.* § 12; WYO. STAT. ANN. § 5-9-111 (2005).

45. Interview with Celeste Mori, *supra* note 39; see also Cheramy et al., *supra* note 39, at 47.

46. Cheramy et al., *supra* note 39, at 47.

47. *Id.*

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of the candidate is not called for and is generally unknown to the commission unless it is obvious from his or her professional experience.⁴⁸

The JNC rules expressly recognize that well-qualified persons may be reluctant to throw their names in the hat for a vacant judgeship. Thus, JNC Rule 7 provides:

The commission should at all times take cognizance of the fact that the best qualified nominees may be those whom it would be most difficult to persuade to serve. Accordingly, the commission should not limit its consideration to persons who have been suggested by others or to persons who have indicated their willingness to serve. It shall be in order for the commission, if it sees fit to do so, to tender nomination to one (1) or more qualified persons, prior to, and subject to, the formal action by the commission in making nominations, in order to ascertain whether such a person will agree to serve if nominated.⁴⁹

JNC Rule 8 governs publication of the names of the nominees for the vacancy and provides the commission may, “in its discretion, publicize some, all or none of the names of the possible nominees who have been suggested to it or whom it had under consideration.”⁵⁰ The nominating commission is prohibited from describing possible nominees as “applicants” “or by any other term suggesting that they are seeking to be nominated.”⁵¹

The nominating commission selects three nominees,⁵² and the chairperson (the chief justice of the Wyoming Supreme Court or his or her designee) presents the list to the governor.⁵³ The list is provided to the governor with no ranking or order of preference among the three nominees.⁵⁴ The timeline for selection of a judge to fill a vacancy is quite short. The commission must submit its list to the governor within sixty days after the vacancy of a judicial office, or if the vacancy is foreseen, the commission may submit its list of nominations before the occurrence of the vacancy.⁵⁵ The governor must then make the appointment within thirty days from the date the list is submitted to him or her.⁵⁶ If the governor misses

48. Interview with Celeste Mori, *supra* note 39; *see also* Interview with Kathleen Hunt, Laramie, Wyo. (July 10, 2006).

49. WYO. JUD. COMM’N NOM. R. 7 (West 2006).

50. *Id.* R. 8.

51. *Id.*

52. WYO. CONST. art. V, § 4.

53. WYO. JUD. COMM’N NOM. R. 9.

54. Cheramy et al., *supra* note 39, at 47.

55. WYO. CONST. art. V, § 4(b); WYO. JUD. COMM’N NOM. R. 6.

56. WYO. CONST. art. V, § 4(b).

the deadline, the chief justice may make the appointment from the list.⁵⁷ Since the current system has been in place, the governor has never failed to make an appointment within the mandated time.

The appointment of a judge is not the end of the process, however. After serving for one year, a judge must be retained by a vote of the electorate at the next general election to remain in office for the remainder of his or her first term.⁵⁸ If the judge chooses to stand for retention at the end of his or her term, he or she must file a declaration of intent to stand for retention with the judicial nominating commission.⁵⁹ The retention election is non-partisan and involves only the electorate served by the judge.⁶⁰ Thus, a supreme court justice must stand for retention by the entire state electorate, while district and circuit court judges answer only to the electorate of their respective districts or circuits.⁶¹ A judge must be retained by the majority of those voting on the question.⁶² If the majority of the votes cast are in favor of retention, the judge is retained; if the majority votes against retention, the office becomes vacant at the end of the existing term.⁶³ Each judge who is retained after his or her first retention election serves for the remainder of his or her term. At the end of the term, the judge may again choose to stand for retention and may continue to do so until he or she reaches the mandatory retirement age of seventy.⁶⁴

In the retention process, the only formal source of information available to the public regarding the performance of judges is the Wyoming State Bar Judicial Advisory Poll. Each election year since 1976, the active, in-state members of the Wyoming State Bar have been polled regarding their opinions on the performance of the state's judges and whether those who are up for retention should be retained.⁶⁵ The poll is conducted by the University of Wyoming Survey Research Center (SRC), with the administrative

57. *Id.*

58. *Id.* § 4(g).

59. *Id.* § 4(h); WYO. JUD. COMM'N NOM. R. 10. Originally, the nominating commission had to approve a judge's retention plans. The system was changed in 1976 to eliminate the requirement that a judge gain prior approval from the nominating commission before he or she stands for retention. 1975 Wyo. Sess. Laws 471.

60. WYO. CONST. art. V, § 4(g); *see also* WYO. STAT. ANN. § 22-2-105 (2005).

61. WYO. CONST. art. V, § 4(g)

62. *Id.* § 4(h).

63. *Id.*

64. Wyoming judicial terms are: supreme court justices—eight years; district court judges—six years; circuit court judges—four years. WYO. CONST. art. V, §§ 4(f), 4(h); 5.

65. 2004 Wyoming State Bar Judicial Advisory Poll Results, WYO. LAW., Oct. 2004, at 24 [hereinafter 2004 Poll Results].

assistance of the Wyoming State Bar.⁶⁶ As of July 6, 2006, the Wyoming State Bar reported a total of 2,095 active members, not including members of the judiciary.⁶⁷ Of the active members, 1,395 were listed as Wyoming residents and, thus, eligible to participate in the judicial evaluation poll.⁶⁸ The stated purpose of the poll is “to provide feedback to judicial officials about their performance on the bench and to help the public make more informed judgments in judicial elections.”⁶⁹ It was developed in accordance with the American Bar Association guidelines, which state that the goal of judicial evaluation is to “improve the performance of individual judges and the judiciary as a whole.”⁷⁰ The commentary to ABA Guideline 1-1 states: “[P]rograms for evaluating the performance of sitting judges provide a basis for judges to maximize their potential for excellence through self-improvement without jeopardizing judicial integrity and independence.”⁷¹

The judicial evaluation poll asks questions pertaining to the factors identified earlier as the characteristics of a good judge, including temperament, competence, and diligence in performance of judicial duties.⁷² The poll, which is answered anonymously, includes questions requiring answers on a numeric rating scale and also provides opportunity for written comments by the respondent.⁷³ It is intended to obtain only the opinions of attorneys who are qualified by experience to provide opinions about a particular judge.⁷⁴ Consequently, respondents are asked certain questions, such as whether the attorney has appeared before that judge within the past twenty-four months, to determine whether they are qualified to express an opinion about that judge.⁷⁵ Only those who an-

66. *Id.* On at least one occasion, in 1984, the Wyoming State Bar apparently conducted the poll unilaterally, without involving the SRC. This practice led to criticism of the poll on the basis of bias. See Michael Horan & Kenyon Griffin, *Ousting the Judge: Campaign Politics in the 1984 Wyoming Judicial Retention Elections*, 24 *LAND & WATER L. REV.* 371, 386 (1989) [hereinafter Horan & Griffin, *Ousting the Judge*].

67. E-mail from Sharon Wilkinson, Commc’ns Dir. of the Wyo. State Bar, to author (July 6, 2006, 09:46 MDT) (on file with the Fordham Urban Law Journal).

68. See *id.*; see also *2004 Poll Results*, *supra* note 65, at 24.

69. See *2004 Poll Results*, *supra* note 65, at 24.

70. *Id.*, quoting ABA Judicial Comm., *Black Letter Guidelines for the Evaluation of Judicial Performance*, Guideline 1-1 (2005), available at <http://www.abanet.org/leadership/2005/midyear/daily/103.doc> (last visited Oct. 11, 2006).

71. See Commentary to the Black Letter Guidelines, App. I, available at <http://www.abanet.org/leadership/2005/midyear/daily/103.doc> (last visited Oct. 11, 2006).

72. See *2004 Poll Results*, *supra* note 65, at 24.

73. *Id.*

74. *Id.*

75. *Id.*

swer affirmatively have their opinions included in the poll results.⁷⁶ With regard to supreme court justices, the respondents are asked the qualifying question of whether they have appeared before the appellate court or read any of the published opinions of the justice being evaluated.⁷⁷ As with the lower courts, only the responses of those who indicate they are qualified to offer their opinions are considered in the poll results. Unfortunately, as a result of the anonymity of the responses, there is no way to ensure the respondents are answering the qualifying questions truthfully.

By comparison, Colorado has a complex process for evaluating judicial performance, overseen by a state commission funded by legislative appropriation and grants.⁷⁸ The Colorado system employs polling groups to develop surveys which are distributed to lawyers, jurors, litigants, law enforcement personnel, attorneys within the district attorneys' and public defenders' offices, employees of local departments of social services, and victims of crimes.⁷⁹ In addition, the Colorado commission conducts public hearings on individual judges' performance, issues recommendations as to whether individual judges should be retained, and provides all of this information to the public through a voter's guide which is mailed to each elector and available on an official website.⁸⁰ Not surprisingly, some Colorado judges are not fond of the process and feel it simply provides a forum for disgruntled litigants to air their dissatisfaction with the rulings in their litigation.⁸¹

Besides retention elections, the constitution provides another source of oversight for judges in Wyoming—the Commission on Judicial Conduct and Ethics, known as the judicial conduct commission.⁸² Like the nominating commission, the judicial conduct

76. *Id.*

77. *Id.* Prior to 1998, the respondents were asked more detailed questions in order to qualify them for answering the questions about supreme court justices. The questions were changed, however, apparently with the blessing of the Bench-Bar Relations Committee of the Wyoming State Bar.

78. COLO. REV. STAT. §§ 13-5.5-101 to -108 (1997); Hon. Thomas F. Whelan, *Symposium on the Best Appointive System for Selection of State Court Judges*, SUFFOLK LAW., Apr. 2006, at 24.

79. COLO. REV. STAT. § 13-5.5-103(b).

80. *See* COLO. REV. STAT. §§ 13-5.5-101 to -106; Whelan, *supra* note 78, at 24.

81. *See* Whelan, *supra* note 78, at 24.

82. Pursuant to a 1996 amendment to WYO. CONST. art. V, § 6, the Commission on Judicial Conduct and Ethics replaced the Judicial Supervisory Commission. Section 2 of House Joint Resolution 3, which proposed the constitutional amendment, explained the rationale for the change as follows:

The adoption of this amendment will strengthen the commission's authority to discipline or remove judges for misconduct, provide procedures for the

commission operates under rules adopted by the Wyoming Supreme Court.⁸³ It is made up of two district judges, one circuit court judge, three members of the Wyoming State Bar, and six non-attorney electors of the State.⁸⁴ The judicial conduct commission oversees and enforces the Wyoming Code of Judicial Conduct.⁸⁵ It is divided into investigatory and adjudicatory panels for each case.⁸⁶ As suggested by its name, the investigatory panel reviews the statements or complaints made about a judge, conducts an investigation, evaluates the information, and decides initially whether to dismiss the complaint or conduct further inquiry.⁸⁷ If the investigatory panel finds reasonable cause to believe a judge engaged in judicial misconduct, they refer the matter to the adjudicatory panel for formal proceedings.⁸⁸ At the conclusion of the formal hearing, the adjudicatory panel issues a final determination as to whether there is clear and convincing evidence that the judge committed misconduct.⁸⁹ If the adjudicatory panel finds judicial misconduct, the entire commission convenes to recommend disciplinary action to the Wyoming Supreme Court.⁹⁰ The Wyoming Supreme Court ultimately imposes all formal discipline against Wyoming judges, and any judge recommended for discipline may petition the court to modify or reject the judicial conduct commission's recommendation.⁹¹

enforcement of a code of judicial ethics, establish a special panel for the discipline of supreme court justices, and expand the commission membership. This amendment will also change the name of the judicial supervisory commission to the commission on judicial conduct and ethics.

H.R. Res. 3, 53rd Leg., Budget Sess. (Wyo. 1996). The constitutional amendment was approved by the voters at the November 5, 1996 general election. 1996 Wyo. Sess. Laws 423. According to Carol Collins, the executive director of the judicial conduct commission, the primary purpose of the 1996 changes was to fulfill due process requirements by dividing the commission into separate investigatory and adjudicatory panels. Telephone Interview with Carol Collins, Exec. Director, Wyo. Comm'n on Judicial Conduct & Ethics (July 19, 2006).

83. WYO. CONST. art. V, § 6; RULES GOVERNING THE COMM'N ON JUDICIAL CONDUCT & ETHICS pt. I, pmbl. (Wyo. Judicial Conduct Comm'n 2006).

84. WYO. CONST. art. V, § 6; RULES GOVERNING THE COMM'N ON JUDICIAL CONDUCT & ETHICS pt. I, R. 1-2.

85. *See generally* RULES GOVERNING THE COMM'N ON JUDICIAL CONDUCT & ETHICS.

86. WYO. CONST. art. V, § 6; RULES GOVERNING THE COMM'N ON JUDICIAL CONDUCT & ETHICS pt. II, R. 3.

87. RULES GOVERNING THE COMM'N ON JUDICIAL CONDUCT & ETHICS pt. II, R. 10.

88. *Id.*

89. *Id.* pt. II, R. 21.

90. *Id.*

91. *Id.* pt. II, R. 24.

The constitution and the rules acknowledge that a disability, rather than malfeasance, may seriously interfere with a judge's performance of the duties of his or her office.⁹² Accordingly, there are special provisions which allow the judicial conduct commission to require a judge to retire on the basis of a disability.⁹³ All proceedings of the judicial conduct commission remain confidential until the matter is referred to the Wyoming Supreme Court for final action.⁹⁴

PERFORMANCE OF WYOMING'S JUDICIAL SELECTION PROCESS

One hundred six judges have been appointed since Wyoming adopted the current system of judicial selection in the early 1970s. Former members of the judicial nominating commission provide a rich resource for analyzing the performance of Wyoming's judicial selection process. In an August 2003 article published in the *Wyoming Lawyer* magazine, five current and former members of the judicial nominating commission explained and defended Wyoming's judicial nomination process.⁹⁵ Interestingly, the authors were all female lay members of the commission. They wrote the article in hopes of removing the "mystery" about what is basically a balanced and ethical selection process.⁹⁶ The authors of that article described the process used by the commission to initially screen the applicants through their expressions of interests and references. The commission members also may, and to varying extents do, perform independent reference checks on the nominees.⁹⁷ Ms. Cheramy and her co-authors emphasized that the commission members took their task very seriously and worked countless unpaid hours to make sure the best possible list of nominees was presented to the governor.⁹⁸ They vehemently denied being subjected to any political or special interest group lobbying.⁹⁹ The authors commented that, through discussion among the commission

92. WYO. CONST. art. V, § 6; RULES GOVERNING THE COMM'N ON JUDICIAL CONDUCT & ETHICS pt. II, R. 10, 17, 21.

93. RULES GOVERNING THE COMM'N ON JUDICIAL CONDUCT & ETHICS pt. II, R. 10, 17, 21.

94. *Id.* pt. II, R. 7

95. Cheramy et al., *supra* note 39, at 45.

96. *Id.*

97. *Id.* at 47.

98. *Id.*

99. *Id.*

members, they were able to “almost always” reach full agreement on the final three nominees.¹⁰⁰

In an interview on July 5, 2006, Celeste Mori, who served as a lay member of the commission from 1996 through 2000, remarked about the importance of having strong lay persons on the commission.¹⁰¹ As is their wont, attorneys tend to assert their will if permitted. Ms. Mori commented that, under the able and perceptive leadership of Wyoming Supreme Court Chief Justice Larry Lehman, the commission developed a standardized form for the expressions of interest submitted by potential nominees and a process for interviewing the candidates.¹⁰² She believes these changes helped strengthen the positions of the lay members of the commission and made the process fairer and more meaningful for all participants.¹⁰³ Ms. Mori stated that, during her time on the commission, she was never contacted by the governor or any special interest group in an effort to lobby the commission.¹⁰⁴

Kathleen Hunt, an attorney member of the judicial nominating commission from 1999 through 2003, shares many of the views of the lay members. Ms. Hunt also commented on improvements to the application and interview processes under Chief Justice Lehman’s leadership.¹⁰⁵ She explained that the commission worked to develop a list of interview questions designed to discover whether a particular candidate possessed the skills and attributes necessary to be a good judge.¹⁰⁶ Ms. Hunt remarked that, during her tenure, the commission informally “trained” new members about the interview process and what qualities to look for in a good judge.¹⁰⁷ New members are also provided with materials from the American Judicature Society explaining the nomination process and describing the attributes of good judges.¹⁰⁸ Ms. Hunt commented that, before serving on the commission, she believed it was politically influenced.¹⁰⁹ Her experience, however, proved this belief incorrect. During her service, Ms. Hunt was not aware of any attempts by the

100. *Id.*

101. Interview with Celeste Mori, *supra* note 39.

102. *Id.*

103. *Id.*

104. *Id.*

105. Interview with Kathleen Hunt, *supra* note 48.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

governor or any special interest group to influence the nominating commission.¹¹⁰

Critical to understanding how the system has performed is an examination of the retention elections. Only six of the 106 judges appointed under the current system have been rejected by the electorate in retention elections. The unsuccessful judges were District Judges John Ilsley, Paul Lamos, Terry Rogers, and James Wolfe, Circuit Judge John Housel, and Supreme Court Justice Walter Urbigkit.¹¹¹ In each of the six cases, there appeared to be an, at least somewhat, organized effort to defeat the judge's retention efforts. In fact, it appears, anecdotally, in each instance where an organized effort has been waged to defeat a judge's retention bid, that effort has been successful, although the percentages by which the judges lost have been small.¹¹² At least three of the unsuccessful judges (Lamos, Rogers, and Urbigkit) were opposed by formal political action committees.¹¹³

University of Wyoming political science professors Kenyon N. Griffin and Michael J. Horan published a comprehensive study of District Court Judge Paul T. Lamos's failed bid for retention in the 1984 general election.¹¹⁴ Judge Lamos was a veteran member of the Wyoming bench, elected in 1972 under the old system of electing judges and retained by the voters under the current system in 1978.¹¹⁵ In 1984, two political action committees ("PACs") formed with the goal of ousting Judge Lamos from office. The primary criticisms of the judge involved his court management practices and some controversial sentences in criminal cases.¹¹⁶ The organized effort included publication of the PACs' criticisms of the judge.¹¹⁷ Although PACs also formed to support his retention, fifty-seven percent of the electorate who voted on the retention question rejected Judge Lamos.¹¹⁸ Interestingly, sixty-five percent

110. *Id.*

111. See Susan Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 JUDICATURE 211, 222 n.11, 226 (1980).

112. According to the records of the Wyoming Secretary of State, fifty-seven percent of the voters voted against retaining Judge Housel; Justice Urbigkit was voted out of office by fifty-one percent of the voters; and Judge Rogers received "no" votes from fifty-two percent of the electorate. See generally the Wyoming Secretary of State's official website, <http://soswy.state.wy.us> (last visited Oct. 11, 2006) [hereinafter Secretary of State website].

113. See Horan & Griffin, *Ousting the Judge*, *supra* note 66, at 386-87.

114. See generally *id.*

115. *Id.* at 377.

116. *Id.* at 379-80.

117. *Id.* at 374.

118. *Id.*

of the attorneys responding to the judicial evaluation poll that year did not favor retention of Judge Lamos.¹¹⁹

Judges who are confronted with opposition to their retention plans are placed in a difficult position. Wyoming Canons of Judicial Conduct 5(b) and 3(b)(9) forbid judges from raising funds to support their retention or from commenting on pending cases.¹²⁰ Another difficulty is that, unlike in contested elections where candidates are required to file before a certain deadline, those opposing a judge's retention have no obligation to make themselves known at any particular time.¹²¹ Consequently, the judge may not be aware he or she is facing opposition or realize the seriousness of it until late in the campaign season.¹²² In some cases, pro-judge groups have formed to "campaign" in favor of retention of a judge.¹²³ By the time supporters can mobilize a counter-attack, however, the opponents may have already had a great deal of time to influence the electorate. For an anecdotal example, in the case of District Judge Terry Rogers's unsuccessful retention campaign, the "Committee for the Opposition to Retention of Dist. Judge D. Terry Rogers" was formed on July 29, 2002, while the "Committee To Retain Judge D. Terry Rogers" did not form until the end of September 2002, giving the challengers a two-month advantage in convincing the electorate Judge Rogers should not be retained.

119. *Id.* at 386-87.

120. In *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002), the United States Supreme Court ruled that Minnesota's state supreme court canons of judicial conduct, prohibiting judicial candidates from stating their views of disputed legal and political issues, violated the First Amendment. The impact of the *White* decision in Wyoming is beyond the scope of this Article. For a basic analysis of the issue see Daniel Klein, Annotation, *Supreme Court's Views Regarding Federal Constitution's First Amendment Guarantees of Freedom of Speech or Press as Applied to Electoral Process*, 119 L. Ed. 2d 607 (1997). For our purposes here it is enough to acknowledge that Wyoming's judicial canons, at least facially, prohibit fundraising and discussion of pending judicial matters and, at the very least, have a chilling effect on a judge's response to criticism.

121. See, e.g., WYO. STAT. ANN. § 11-16-119 (1977) (governing time for filing for conservation district supervisors); *id.* § 18-15-106 (time for filing for trustee of senior citizen special district); *id.* § 22-22-202 (time for filing for school and college board trustee positions); *id.* § 22-22-302 (time for filing for municipal offices); *id.* § 22-5-209 (time for filing application for nomination by primary election); *cf.* WYO. CONST. art. V, § 4 (outlining procedures for non-contested judicial retention election); WYO. STAT. ANN. § 22-2-105 (outlining procedures for non-contested judicial retention election).

122. Anecdotally, the opposition to District Judge Wolfe's retention did not surface until a few weeks before the election.

123. See generally Secretary of State website, *supra* note 112.

Although the unsuccessful retention elections engendered some public interest, Wyoming voters generally are not interested in judicial retention issues. A 1983 study of voter participation in Wyoming's judicial retention elections demonstrated a dismal participation rate.¹²⁴ That study is dated now, but there is no reason to believe the general trends are any different today than they were in the 1980s. The study reported over eighteen percent of those voting on other candidates and issues simply abstained from voting on the retention of supreme court justices.¹²⁵ That phenomenon should not be too surprising given over half of the voters surveyed reported they had "no information" about the justice.¹²⁶ Even more indicative of the lack of informed decision-making by the voters was the fact that over twenty-three percent of those voting in favor of retention of the justice had "no explicable reason" for doing so.¹²⁷

Wyoming's judicial evaluation poll does provide voters with some information about judges standing for retention. The results of the poll are distributed to the general Wyoming media and published in their entirety in the *Wyoming Lawyer*.¹²⁸ The judicial evaluation poll, however, suffers from some shortcomings which undermine its validity. In small districts, the relatively small number of attorneys responding can allow a few to skew the results. In addition, the poll results are somewhat suspect because there is no way to guarantee a respondent who offers opinions about a particular judge is truly qualified, by personal experience, to evaluate that judge. Nevertheless, the results of the poll do not indicate that the respondents routinely use the judicial evaluation poll to undermine judges' bids for retention. For example, the 2004 Judicial Evaluation Poll had a forty-nine percent overall response rate, with 82.75% of those responding favoring retention of the supreme court justice, an average of close to 82% favoring retention of the district judges, and an average of 83.48% favoring retention of the circuit court judges.¹²⁹ Although Wyoming's judicial evaluation poll may not be fully defensible from a scientific point of view, to

124. Kenyon Griffin & Michael Horan, *Patterns of Voting Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming*, 67 JUDICATURE 68 (1983) [hereinafter Griffin & Horan, *Patterns*].

125. This study also showed that the favorable retention vote matched fairly closely with the favorable bar poll results. *Id.* at 70.

126. *Id.* at 72.

127. *Id.*

128. See generally *2004 Poll Results*, *supra* note 65.

129. *Id.* at 25.

the extent voters are aware of the poll results, it provides an important source of information for the electorate.

The other means of oversight of judicial performance under Wyoming's judicial selection system is the Commission on Judicial Conduct and Ethics. Relatively little is known about the operations of the judicial conduct commission because disciplinary proceedings concerning individual judges are confidential until they reach the supreme court.¹³⁰ Thus, it is difficult to determine the actual effect of the judicial conduct commission on the quality of the Wyoming judiciary. Nevertheless, the judicial conduct commission's general statistics are available to the public. Those statistics indicate the judicial conduct commission meets many times during any given year.¹³¹ In the years between 2000 and 2005, the commission received between fifty-seven and seventy-nine complaints on an annual basis.¹³² Of those, between twenty and twenty-four were verified each year.¹³³ The vast majority of the verified complaints were dismissed by the commission, with a small number being dismissed pursuant to settlement agreements between the

130. See *Wyoming Judicial Branch: Commission on Judicial Conduct and Ethics*, available at <http://courts.state.wy.us/CJCE.aspx> (follow link to "Questions and Answers About the Commission") (last visited Oct. 11, 2006).

131. Comm'n on Judicial Conduct and Ethics, *Statistical Report, Calendar Years 2000 – 5/16/06* [hereinafter *Statistical Report*] (on file with the Fordham Urban Law Journal).

132. *Id.*

133. Judicial Conduct and Ethics Rule 10 explains the verification requirement as follows:

(a) Complaints. All complaints shall be in writing and may be initiated by a member of the commission based upon any source that may be deemed reasonably reliable. Complaints shall be verified and addressed to the commission, except when initiated by commission inquiry. By presenting to the commission (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief formed after inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonable based on a lack of information or belief.

RULES GOVERNING THE COMM'N ON JUDICIAL CONDUCT & ETHICS pt. II, R. 10 (Wyo. Judicial Conduct Comm'n 2006).

judges and the commission.¹³⁴ On one occasion during the five year period, a judge was forced to retire from the bench.¹³⁵ In the entire history of the commission, only one judge has been publicly censured.¹³⁶

In evaluating the performance of the judicial selection system in Wyoming, one must also consider whether it has produced a diverse judiciary. As of April 25, 2006, fifty-nine judges presided over the supreme court, district courts, and circuit courts of Wyoming. Of those, seven (or twelve percent) were women and the remaining fifty-two (or eighty-eight percent) were men.¹³⁷ In comparison, nearly thirty percent of the entire bar is female and seventy percent is male.¹³⁸ Statistics from the University of Wyoming College of Law indicate the matriculating 2005 class was comprised of nearly equal numbers of men and women.¹³⁹ That has not been the case historically, however. In 1974, when this author graduated from University of Wyoming Law School, the class consisted of only seven women out of eighty-four total students. As a result of that history, it can be fairly presumed, although precise demographic data is not available, that experienced male attorneys far outnumber experienced women attorneys as viable candidates for judicial office in Wyoming. One would expect that, as a greater number of women gain more experience, more will be appointed to judgeships in Wyoming. This conclusion is supported by comments from former members of the judicial nominating commission. Celeste Mori stated that, during her tenure on the nominating commission, the women who applied for judgeships tended to be younger and less experienced than the male applicants.¹⁴⁰ Kathleen Hunt agreed with Ms. Mori's assessment. Ms. Hunt stated she believed the judicial appointments during her term on the nominat-

134. See *Statistical Report*, *supra* note 131.

135. *Id.*

136. *Id.*

137. See Wyoming Judicial Branch Home Page, <http://courts.state.wy.us> (listing judges of all Wyoming state courts) (last visited Oct. 11, 2006).

138. E-mail from Sharon Wilkinson, Commc'ns Dir. of the Wyo. State Bar, to Genevieve Blake, Notes and Articles Editor, *Fordham Urban Law Journal* (Sept. 27, 2006, 16:07 EDT) (on file with the *Fordham Urban Law Journal*) (explaining that of the Wyoming Bar's total active in-state membership of 1,428 attorneys, 422, or twenty-nine percent, are female).

139. See *Univ. of Wyo. College of Law Admissions Statistics*, http://uwadmnweb.uwyo.edu/law/admissions/admissions_stats.asp [hereinafter *Admissions Statistics*] (last visited Oct. 11, 2006).

140. Interview with Celeste Mori, *supra* note 39.

ing commission correctly reflected the diversity (or lack thereof) of the senior, experienced bar in Wyoming.¹⁴¹

The Wyoming State Bar does not keep statistics on the race of its members or the members of the judiciary. It is clear, however, from scanning the pages of the Wyoming State Bar directory that there is little in the way of racial diversity among the state's judiciary. Again, this is not surprising considering Wyoming has a very small and largely homogenous population. Census results indicate that there are just over 500,000 residents of the State of Wyoming. Of those, eighty-nine percent are white, with the remaining eleven percent classified as minority groups consisting mostly of people of Hispanic and Native American origins.¹⁴² The University of Wyoming College of Law admissions materials indicate it is dedicated to increasing the racial diversity in its student population.¹⁴³ Yet, in 2005 only ten percent of its first year class was made up of minority races.¹⁴⁴

The diversity of the judicial nominating commission is also important. Although the attorney commission member interviewed for this Article is a woman, the bar association has, over the years, elected only a handful of women to the judicial nominating commission.¹⁴⁵ It can be presumed that the number of female attorneys who have sought election to the commission has historically also been relatively small. Fortunately, in the recent past the governors have appointed a significant number of women as lay members of the nominating commission. Like the general population of Wyoming, the nominating commission has, historically, enjoyed little racial diversity.

Another area of judicial diversity that is of concern is diversity in professional experience. In a poll conducted recently by the Wyoming State Bar, some respondents indicated a perceived bias in the

141. Interview with Kathleen Hunt, *supra* note 48.

142. See Census Statistics, <http://quickfacts.census.gov/qfd/states/56000.htm> (last visited Oct. 11, 2006). The census data indicates other minority groups, such as Black and Asian persons, live in Wyoming but amount to less than one percent of the state's total population. *Id.*

143. See Admissions Requirements, Nondiscrimination and Diversity, http://uwadmweb.uwyo.edu/law/admissions/admissions_requirements.asp (explaining that the College recognizes a commitment to creating opportunities for members of historically marginalized groups) (last visited Oct. 11, 2006).

144. See *Admissions Statistics*, *supra* note 139.

145. See Wyo. Bar Ass'n, Records of Judicial Nominating Commission Membership (on file with the Fordham Urban Law Journal).

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judicial selection process against “government” attorneys.¹⁴⁶ They expressed a concern that attorneys whose careers have focused on a general private practice have a better chance of being appointed as judges than attorneys who have chosen governmental service for their legal careers.¹⁴⁷ Although it is difficult to verify that concern, it is a perception of which the judicial nominating commission should be aware. If one were to review most sources discussing important characteristics to consider in the selection of judges, government practice likely would be seen as an advantage. In fact, the biographies of several current members of the U.S. Supreme Court indicate, prior to being appointed to the bench, their professional experience was comprised almost exclusively of governmental work.¹⁴⁸

A recent poll of the Wyoming State Bar concerning the judicial selection process indicates there are some other perceptions about the types of attorneys who are selected as judges. Some poll respondents indicated they believed that judges with criminal law backgrounds come largely from the prosecution rather than from the criminal defense bar.¹⁴⁹ It is not feasible to review the professional experience of all of the judges in Wyoming. A review of the résumés of the current supreme court justices, however, shows that perception is incorrect. While Wyoming Supreme Court Justice William Hill was a former prosecutor, Justice E. James Burke had substantial experience as a criminal defense attorney before he joined the bench. Chief Justice Barton Voigt and Justice Michael Golden spent time as both prosecutors and defense attorneys. This author had virtually no criminal law experience prior to appointment to the Wyoming Supreme Court.

Another popular belief, which is shared by some members of the legislature, is that the civil plaintiffs’ bar (often referred to as the “trial attorneys”) has undue influence on the selection process.¹⁵⁰ It is difficult to rebut that perception without examining the résumés of all of the attorney members of the judicial nominating

146. Service in Wyoming, *Judiciary Survey Results*, Mar. 30, 2006, at 13 [hereinafter *Judiciary Survey*] (on file with the Fordham Urban Law Journal).

147. *Id.*

148. Some notable examples include United States Supreme Court Associate Justices Clarence Thomas, David Souter, and Stephen Breyer. Each of these distinguished federal judges’ biographies indicates his professional experience was almost exclusively in the governmental sector. See United States Supreme Court, *The Justices of the Supreme Court*, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Nov. 14, 2006).

149. *Judiciary Survey*, *supra* note 146, at 18.

150. *Id.* at 2, 8.

commission over the years. The current members of the commission, however, represent a wide variety of professional backgrounds. As explained earlier in this Article, the commissioners strongly deny being influenced by any special interest groups, which would include the plaintiffs' bar.¹⁵¹ Furthermore, the current make-up of the Wyoming Supreme Court again illustrates this popular belief is incorrect. Justices Golden and Burke represented both plaintiffs and defendants in their civil practices, while the author, Justice Kite, primarily represented defendants. Neither Justice Hill nor Justice Voigt could be described as civil plaintiff attorneys. Some may suggest that simply allowing lawyers to have any say in the process of judicial selection is a mistake. If we assume that knowledge of the law is an important qualification for a judge, however, who could be better to evaluate potential candidates' legal knowledge than their peers? The equal number of lay members on the commission prevents attorneys from having a disproportionate amount of influence in the process.

Despite some legislative efforts, Wyoming's current system of judicial selection has remained essentially unchanged since it was adopted.¹⁵² The proposed changes to the system, however, provide some insight into its shortcomings. Shortly after adoption of the system, a bill was proposed to require the judicial nominating and supervisory commissions to keep minutes.¹⁵³ Under that proposal, the minutes would be filed with the clerk of the Wyoming Supreme Court and available for inspection as public records.¹⁵⁴ The scope of the bill was limited by amendment in the house, reducing the amount of information to be included in the minutes and removing the judicial supervisory commission (now known as the Commission on Judicial Conduct and Ethics) from its operation.¹⁵⁵ The

151. Interview with Celeste Mori, *supra* note 39; Interview with Kathleen Hunt, *supra* note 48.

152. As described *supra* note 82, the constitution was amended in 1996, changing the Judicial Supervisory Commission to the Commission on Judicial Conduct and Ethics. The successful 1996 effort followed a similar, though unsuccessful, effort to clarify the duties of the judicial supervisory commission in 1994. *See* H.J. Res. 16, 52nd Leg., Budget Sess. (Wyo. 1994).

153. H.B. 202, 43rd Leg., Gen. Sess. (Wyo. 1975). It is important to note that Judicial Nominating Commission Rule 5 requires the nominating commission to keep minutes recording the names of the members present, any objections to the holding of the meeting on the basis of the lack or insufficiency of notice, any actions taken by the commission, and "any other matters that the commission may deem appropriate." WYO. R. CT. JUD. NOM. COMM'N R. 5 (West 2006).

154. Wyo. H.B. 202.

155. WYO. JOURNAL OF THE HOUSE 270 (1975).

amended bill passed both houses of the legislature, but was vetoed by the governor.¹⁵⁶

In 1999, a proposal was submitted to amend the constitution to require judges to receive a majority of the votes of all persons voting in an election in order to be retained rather than a majority of all votes cast on the question of retention.¹⁵⁷ The proposed amendment also called for the creation of a “judicial review commission” to evaluate and report upon the performance of each justice or judge standing for retention.¹⁵⁸ That proposal was indefinitely postponed after being referred to a house committee.

These proposals indicate a concern that the process was too insular and that public information about the operation of the commission is needed. They also demonstrate the need for more information about the performance of judges so that the public can exercise an informed decision when voting on retention.

The most serious attack on the current system of judicial selection was waged in 2003. Wyoming State Senator Charles Scott and Wyoming State Representative Doug Osborn proposed Senate Joint Resolution 9 which would have given the governor greater power in the judicial selection process and implemented senate confirmation for certain judicial appointments.¹⁵⁹ The 2003 proposal was motivated, at least in part, by legislative dissatisfaction with a series of decisions by the Wyoming Supreme Court pertaining to the state constitutional requirements for funding public education in Wyoming.¹⁶⁰ The *Casper Star Tribune*, the only state-wide newspaper, ran an article reporting on an October 2001 legislative meeting about school finance issues.¹⁶¹ The article stated:

Sen. Charles Scott, R-Casper, said the legislators’ questions reflect the difficulty they are having with the court’s decisions. The school finance system, he said, is “getting so complicated nobody can understand it.”

“We’re going to have to start things outside the box,” Scott said. “We have to look at a constitutional amendment and at court reform and particularly judicial selection.”¹⁶²

156. *Id.* at 271.

157. H.J. Res. 11, 55th Leg., Gen. Sess. (Wyo. 1999).

158. *Id.*

159. S.J. Res. 9, 57th Leg., Gen. Sess. (Wyo. 2003).

160. *See, e.g.*, State v. Campbell County Sch. Dist., 2001 WY 19, 19 P.3d 518 (Wyo. 2001); Campbell County Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995).

161. Joan Barron, *Legislators Question Court Opinion on School Capital Construction*, CASPER STAR TRIB. (on file with the Fordham Urban Law Journal).

162. *Id.* Interestingly, this situation is not limited to Wyoming. In an *Associated Press* article on March 25, 2005, Carl Manning reported the Kansas legislature was

Under the 2003 proposal, the governor could refuse to appoint any of the three nominees submitted to him by the judicial nominating commission and require the commission to submit a new list of nominees.¹⁶³ If after three tries the governor still was not satisfied with the judicial nominating commission's list of nominees, he could appoint someone who was not nominated by the commission.¹⁶⁴ Under the legislative proposal, any appointment from outside the judicial nominating commission's lists of nominees would have been subject to confirmation by the Wyoming State Senate.¹⁶⁵ In 2003, Senate Joint Resolution 9 gained more traction in the legislature than any previous proposal. The bill passed out of committee and was amended on the senate floor to include senate confirmation of all supreme court justices, regardless of whether nominated by the judicial nominating commission or not.¹⁶⁶ Although the bill received majority support, it did not garner the full two-thirds vote required for constitutional amendments in Wyoming and, consequently, failed on the third reading before the entire senate.¹⁶⁷

STRENGTHS AND WEAKNESSES OF WYOMING'S JUDICIAL SELECTION PROCESS

In analyzing the efficacy of any judicial selection system, we must again be reminded of the role of the judiciary in a representative democracy such as ours. Our founding fathers stated with particular clarity why they believed an independent judiciary was fundamental to the structure of our constitutional form of government. Alexander Hamilton described how the Constitution expresses the will of the people and places limitations upon the powers of government. He explained, "[T]he complete independence of the courts of justice is peculiarly essential in a limited Constitution."¹⁶⁸ The limitations on governmental power con-

upset with the Kansas Supreme Court for ruling the legislature had "failed in its 'constitutional duty' to provide suitable education for Kansas students." Carl Manning, *Legislators Angered by High Court Decisions*, ASSOCIATED PRESS, Mar. 27, 2005, http://www2.1jworld.com/news/2005/mar/27/legislators_angered_by/?print.

163. Wyo. S.J. Res. 9.

164. *Id.*

165. *Id.*

166. WYO. JOURNAL OF THE SENATE 268 (2003).

167. *Id.*; see also WYO. CONST. art. XX, § 1 (outlining the process for amending the Wyoming Constitution).

168. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 413.

tained in our Constitution take the form of protected rights of individual citizens, and

Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.¹⁶⁹

A judicial selection process should, therefore, be capable of protecting, as much as possible, the independence of the judiciary as well as assuring the quality of those selected.

An examination of the structure of Wyoming's judicial selection process discloses certain strengths and weaknesses in its ability to reach that goal. In the words of Stan Lowe, its purpose was "to remove the judiciary from politics as far as is humanly possible and give every qualified person, regardless of gender, race, religion, etc., an opportunity to become a judge."¹⁷⁰ Can we fairly say that Wyoming's process has minimized the influence of partisan politics? Without question, the final selection by the governor may be politically influenced since the governor is, by definition, a political figure. We can confidently conclude, however, that political influence has not been brought to bear on the members of the judicial nominating commission. While it would be impossible to know all communications with the multitude of commission members over the nearly forty years since the inception of the system, we have learned from certain former commission members, governors, and judges selected by the system that little or no partisan political or special interest influence has been imposed on the nomination process. Thus, although any individual governor's ultimate choice may be, and most likely has been, influenced by politics, his options have been limited to selecting from three attorneys who have, in the first instance, been deemed qualified without concern for their political persuasion.

With regard to the goal of having a selection process which engenders the confidence of the public in an unbiased, independent judiciary, Wyoming's judicial selection process gets a lower grade. The problem is not necessarily that the public is dissatisfied with or distrustful of the judiciary in Wyoming. Instead, the whole process suffers from a lack of public knowledge and involvement. The simple fact is too much of Wyoming's judicial selection process func-

169. *Id.* at 414.

170. Lowe, *Reflections*, *supra* note 4, at 55.

tions in secret. When a judicial vacancy occurs, a public announcement is made, as well as an announcement to the bar, and that has historically been the last time the public hears about the process until the announcement of the governor's appointee is made.

Although the Judicial Nominating Commission Rules expressly allow publication of the names of the possible nominees for a judgeship, as a matter of practice for many years, the commission did not publicize either the pool of possible nominees it was considering, or the three nominees it provided to the governor for his consideration. As is obvious from the tone of the commission's rules, some possible nominees may prefer not to have their names made public. It has been argued that publicizing the names of nominees would deter qualified attorneys from indicating an interest in judicial positions, because they would be concerned about clients learning they were possibly leaving the practice of law.¹⁷¹ While it might be human nature to prefer anonymity in such a venture, it seems unlikely that solid candidates for judicial position would take themselves out of consideration simply because it may become public that they were not ultimately nominated. On the other hand, it seems very likely that, if members of the public were aware of possible nominees, they could provide valuable input to, and be more invested in, the judicial selection process.

In the absence of broad public knowledge about the possible nominees, two things have happened. First, those close to the process, nominees or their supporters and commission members themselves, are informed about the pool of candidates. In addition, when commission members conduct their own investigation of possible nominees, selected members of the public become informed and have input. When the commission selects the three nominees to submit to the governor, those nominees, their friends, family, and supporters usually are aware and likewise have opportunity for input. Consequently, some select members of the public are able to participate in the process, but the majority is excluded. That result contributes to the perception that the process is "political" and not open to all.

The second result is predictable. Numerous rumors swirl about concerning the identity of the nominees and which three the commission has chosen. When the governor finally announces his appointment, interested parties come to their own, uninformed

171. Interview with R. Stanley Lowe, *supra* note 3.

conclusions about the selection process and the reasoning behind who was and was not chosen. In this author's recollection, the governor began to announce the names of the commission's three nominees in the mid-1990s.¹⁷² When that announcement was made, the public had an opportunity to provide input to the governor for his consideration. This practice reduced the secrecy surrounding the process and, to some extent, the suspicion about how politics may have affected the process and whether the ultimate choice was a wise one. Because, however, under the commission's current practice the governor has discretion in deciding whether to release the names of the three nominees, the public's ability to be informed and involved is tenuous.

A lack of understanding of, and participation in, the process is not limited to the public at large, but is shared by the legal community as well. In a recent poll conducted by the Wyoming Bar Association, 439 active members of the bar reported that 51.7% were only "somewhat familiar" or "not at all familiar" with Wyoming's judicial selection process.¹⁷³ Not surprisingly, 75.3% had never considered seeking a seat on the judicial nominating commission.¹⁷⁴ Little discussion occurs within the bar concerning particular judicial nominating commission candidates' attitudes or opinions regarding judicial selection. It is fair to say the only involvement most attorneys have in the process is voting on the commission candidates or writing a letter of reference for other attorneys who have filed an expression of interest for a particular judgeship. The bottom line is that the bar, like the general public, exhibits little interest in the process. More sharing of information may increase interest in the process and would reduce the rumors about the appointments of judges and the resultant misconceptions that the process prefers one type of attorney over another.

While there has been no objective measurement of the participation of members of the legislative branch in Wyoming's judicial selection process, as a relatively active participant in the process, this author can recall little or no input from that sector. While separation of powers would suggest the legislative branch should not control the process,¹⁷⁵ individual legislators, as members of the public,

172. This author sat on the Wyoming JNC from 1995 through 1999.

173. Justice Marilyn Kite, *Judicial Selection in Wyoming*, WYO. LAW., June 2006, at 10.

174. *Id.* at 11.

175. As Madison noted in FEDERALIST NO. 51, in reference to the importance of separation of power between the three branches of government, "[I]t is evident that each department should have a will of its own; and consequently should be so consti-

should have the opportunity to provide input to the commission and the governor concerning possible nominees. Perhaps it is the lack of such formal opportunity that has motivated some of the legislative efforts to change the system to require senate confirmation of some nominees.

The proposed amendments to Wyoming's judicial selection process seem to evidence a legislative desire for more information about the judicial selection process and for more legislative and executive influence on the process. The efforts of the Wyoming legislature to change the current judicial selection system by broadening the governor's appointment powers and/or providing for senate confirmation of judicial appointments would certainly reduce judicial independence and insert politics back into the judicial selection process.¹⁷⁶ Those efforts are especially troublesome when they follow controversial judicial decisions, like the Wyoming Supreme Court's school finance decisions.¹⁷⁷ The very core of our democratic system of government depends upon the separation and independence of the three branches. It is important the judiciary not be cowed by the selection process in performing its role of protecting constitutionally guaranteed individual rights. So far, Wyoming's commission-based system of judicial selection has accomplished the goals of keeping the judiciary independent and removing politics "as far as humanly possible" from selection of judges.¹⁷⁸

Whether Wyoming's system has resulted in selecting qualified candidates presents a much more difficult question. Subjective opinions about the quality of Wyoming's judiciary are not particularly helpful. It would appear to this author that one indication the system is, in fact, selecting qualified candidates is that the citizens have generally refused to use their ultimate veto over judicial appointments and have, instead, voted to retain the vast majority of judges in office. The fact that only six of the 106 judges selected using the judicial nominating commission process have been rejected by the voters suggests the system is working for Wyoming. Most judges have received healthy support from the electorate,

tuted that the members of each should have as little agency as possible in the appointment of the members of the others." THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 280.

176. The primary author of Wyoming's current judicial selection system, R. Stanley Lowe, strongly objects to broadening the executive and legislative branches influences on the judicial selection process. Interview with R. Stanley Lowe, *supra* note 3.

177. *See id.*

178. Lowe, *Reflections*, *supra* note 4, at 55.

generally garnering nearly seventy-five percent favorable votes.¹⁷⁹ It can be argued, however, and has been demonstrated, that members of the public lack adequate information on judicial performance to make informed decisions about the quality of a particular judge.¹⁸⁰ In addition, the fact that twenty-five percent of the public is apparently dissatisfied with any particular judge may also be a cause for concern. Nevertheless, when so few judges are not retained in office, we must conclude the system has worked as contemplated by its original proponents and the voters at the time the constitutional amendment adopting the system was passed.

Of course, retention elections unavoidably introduce some politics into the judicial selection process. The very purpose of retention elections is to provide a degree of public accountability. To the extent retention votes (whether for or against a particular judge) are cast in a thoughtful and informed manner, retention elections fulfill that purpose. Retention elections have the potential to undermine judicial independence and subject judges, who are performing the difficult task of applying the rule of law as they should, to attacks and possible ouster, as a result of unpopular decisions, without regard to whether the judge's actions were legally sound or not.

The concern is that judges will be dissuaded from following the rule of law by the threat of non-retention. There are examples of judges in other states who have lost retention elections because of just one unpopular decision. Colorado Supreme Court Justice Gregory Hobbs, Jr. provides a provocative account of two state supreme court justices who lost their bids for reelection: Colorado Supreme Court Chief Justice Mortimer Stone in 1954 and Idaho Supreme Court Justice Cathy Silak in 2000.¹⁸¹ In both cases, the justices were considered thoughtful and competent jurists.¹⁸² Nevertheless, they were both soundly defeated at the polls after they authored controversial water law opinions for their respective supreme courts.¹⁸³ Water is the lifeblood of the dry American West

179. See, e.g., Wyoming Secretary of State: Election Results, available at <http://sos.wy.state.wy.us/election/2000/results/g-dcj.htm> (tallying figures from the 2000 judicial elections) (last visited Oct. 11, 2006).

180. See generally Carbon, *supra* note 111; Horan & Griffin, *Ousting the Judge*, *supra* note 66.

181. Hon. Gregory Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. DENV. WATER L. REV. 122 (2001).

182. *Id.* at 123-24.

183. *Id.* at 122-23.

and there is not enough of it to go around.¹⁸⁴ Thus, legal decisions about water rights engender strong emotions and a decision considered “wrong” by the public often leads to passionate reactions—and in the cases of Justices Stone and Silak, defeat at the polls. Although those judges were subject to contested elections, there is no reason to believe a Wyoming judge may not be equally susceptible to defeat in a retention election for making an unpopular decision.

Fortunately, thus far in Wyoming, it does not appear that judges are routinely rejected by the voters in retention elections on the basis of a single or even a few unpopular decisions. Instead, in each case where a judge was not retained, there were, at least arguably, a combination of factors that led to the result.¹⁸⁵ For example, prior to his non-retention, Judge Lamos had made some unpopular sentencing decisions, but he was also criticized for his court management practices and questionable treatment of attorneys, litigants, and jurors.¹⁸⁶ Nevertheless, to the extent the outcomes of the unsuccessful retention elections were the result of particular judicial decisions, they cannot help but influence other judges in the performance of their duties.

For retention elections to be an effective and fair method of making judges accountable for their performance, voters need reliable, objective information about judicial performance. The Colorado system polls numerous groups of people in its judicial evaluation process, including lawyers, jurors, litigants, law enforcement personnel, attorneys within the district attorneys’ and public defenders’ offices, employees of local departments of social services, and victims of crimes. In that manner, Colorado’s system avoids the criticism that the process is overly controlled by the bar. The Wyoming State Bar may want to give some thought to following Colorado’s example and broadening the judicial evaluation poll to include certain groups of non-lawyers or at least adopting some system which would assure that those responding to the poll are truly qualified by experience to do so.

184. John Wesley Powell, a huge figure in the development of western water law, as quoted by Justice Hobbs in his article, prophetically stated: “I tell you, gentlemen, you are piling up a heritage of conflict and litigation over water rights, for there is not sufficient waters to supply these lands.” *Id.* at 131 (quoting JOHN WESLEY POWELL, OFFICIAL REPORT OF THE INTERNATIONAL IRRIGATION CONGRESS 109, 112 (1893), as quoted in DONALD WORSTER, A RIVER RUNNING WEST: THE LIFE OF JOHN WESLEY POWELL 529 (2001)).

185. Horan & Griffin, *Ousting the Judge*, *supra* note 66, at 375.

186. *See id.* at 377-78.

Even if more or better information were available to the public, one must question, given our experience to date, whether the public would care. The high level of voter ignorance and apathy is understandable and is one of the major failings of Wyoming's judicial selection process. While much of the responsibility for this situation belongs to other governmental, educational, and civic institutions, our judicial selection process itself can be held accountable for not involving the public to a greater degree. If we claim that one of the system's advantages is judicial accountability, then the system should be structured to allow actual, informed public involvement.

A higher level of public knowledge about judicial process may help alleviate some of the concerns about voters making the choice to retain or not on the basis of unpopular judicial decisions. If the public had a greater understanding of the importance of an independent judiciary which enforces the rule of law, there would be a lesser chance of public retaliation for unpopular decisions. After all, an informed citizenry will surely understand that the continued existence of our form of government requires that judges make their rulings by applying law rather than upon popular opinion. The very concept of protection of individual rights requires that judges do not follow "majority rule." Every citizen should feel safer knowing the judiciary will stand up for his or her individual rights should the legislative or executive branch decide to trample them. Broader public knowledge of the role of the judiciary in enforcing individual constitutional rights would instill an understanding that, while a person may not agree with the result of any particular judicial decision, he or she can rest assured that the rule of law will always be applied.

In addition to retention elections, the other method in Wyoming for ensuring quality in the judiciary is the Commission on Judicial Conduct and Ethics. It is difficult to evaluate whether it is having a significant impact on judicial performance, however, because of the confidential nature of its deliberations. While confidentiality is certainly important in that process, there may be some way in which the commission can provide reliable information to the public concerning judicial performance. Obviously, that would require amendment of the constitution.

Nevertheless, it is worth noting that the Wyoming Code of Judicial Conduct requires judges to perform their duties diligently and

in a competent and dignified manner.¹⁸⁷ At least some of the judges rejected by the Wyoming electorate had been criticized for court management and judicial temperament issues. Perhaps if members of the public were more aware of the operation of the judicial conduct commission and knew they could file a complaint concerning judicial performance and have legitimate concerns addressed, they would be less likely to undertake the more drastic step of opposing retention of the judge in office.

The efficiency of a judicial selection process, meaning promptness in filling open positions with minimal administrative and social costs, is also a measure of its success or failure. The only administrative costs of operating the judicial nominating commission are the travel expenses of the commission members.¹⁸⁸ Openings are filled within ninety days of the announcement of the vacancy and the new judge is typically in place when the sitting judge leaves office.¹⁸⁹ For the most part, retention elections are low-key events with the expenditure of no additional public funds. Only when opposition to retention develops are members of the public involved in funding election “campaigns.”¹⁹⁰

On the basis of these three measures, avoiding politics, assuring quality candidates, and efficiency, it is fair to conclude Wyoming’s judicial selection system has worked well and precisely as it was intended. That is not to say the system has no problems and cannot be improved, however. We should not be complacent and believe it will continue to work well without the active support and involvement of the citizens of Wyoming. The weaknesses of the system outlined above can be addressed fairly easily without any drastic change to the system.

187. WYO. CODE OF JUDICIAL CONDUCT Canon 3.

188. WYO. CONST. art. V, § 4(e).

189. The constitution provides that the governor must make the appointment within thirty days of being informed of the names of the three candidates selected by the commission or the appointment will be made by the Supreme Court. *Id.* § 4(b). To date, no governor has failed to meet that deadline.

190. So far, Wyoming has not seen an increase in special interest group involvement in retention election campaigns. The same cannot be said, however, of other areas of the country. See generally Rachel Caufield, *The Foreboding National Trends in Judicial Elections*, in *Judges Under Attack: Ethically Appropriate Activity in Retention Elections* Iowa Judges Conference (June 24, 2005), available at <http://www.keepmnjusticeimpartial.org> (follow “Readings” hyperlink; then follow “The Foreboding National Trends in Judicial Elections” hyperlink).

RECOMMENDATIONS

In this author's opinion, most of the problems with our judicial selection system stem from a lack of public knowledge about the selection process and judicial performance. We have failed to foster public education of, and participation in, the judicial selection process and to provide the public with meaningful information about the performance of judges for purposes of the retention vote. Accordingly, the first step that must be taken is to improve public knowledge of the system. Members of the bar and the judiciary should take an active role in explaining the role of the judiciary in our democratic government and the process of judicial selection in schools, civic groups, and similar fora. Our supreme court performs this service when it hears cases in schools around the state. In that context, discussions about how judges are selected usually demonstrate how little familiarity even our educators have with Wyoming's process of judicial selection. The organized bar has a unique obligation to undertake efforts to educate its own members as well as the public. Public discussions which contrast our system with that of states where judges are elected in partisan elections would serve to recommit our citizenry to preserve and enhance our model of judicial selection.

The operation of the judicial nominating commission should be more open to the public. While this author recognizes there may be substantial disagreement with this recommendation, we should not, either as judges, attorneys, or judicial nominating commission members, fear sunshine in the process of selection of judges.¹⁹¹ If we want to guarantee the commission and the governor have the best possible information on potential nominees, we must allow the public to know who those nominees are and invite their input. Attorneys who express an interest in serving as a judge should not resist public scrutiny. This change would reduce wide-spread misconceptions about outside influences and biases in the selection of judges. Moreover, publicizing the names of the potential nominees could begin immediately as it is authorized by the commission's existing rules. When the entire pool of nominees is publicly

191. Mr. Lowe is firmly opposed to the idea, believing it will dissuade good candidates from seeking a judgeship for fear they might lose clients if they are not appointed. See sources cited *supra* note 4. Ms. Hunt and Ms. Mori believe, however, that publication of the names (at least the three who are presented to the governor) would help put aside claims the judicial nominating commission is subject to political influence. See Interview with Celeste Mori, *supra* note 39; Interview with Kathleen Hunt, *supra* note 48.

known, the commission's work can be evaluated based upon accurate information.

More public notice should be given of the identity of the members of the judicial nominating commission and the status of their efforts in a particular community when a judicial vacancy occurs. Participation by the public should be encouraged and welcomed and should include members of the legislature representing the area. In that fashion, the members of the public would be more invested in the process and could rest assured the selection of the final nominees occurred with their input.

Furthermore, the effectiveness of the nominating commission could be increased by requiring formal training of new commission members. Although recent members of the commission indicate new members are provided with informal training and materials prepared by the American Judicature Society about the means of conducting interviews and the qualities to look for in a good judge, it would engender more confidence in the system if the training were more formalized.

The commission form of judicial selection has the potential to result in a more geographically, racially, and gender diverse judiciary than other forms of selection. There is nothing in the structure of Wyoming's judicial selection process, however, to guarantee diversity is achieved. While the current make-up of Wyoming's judiciary may not be as diverse with regard to gender, race, and professional experience as it could be, that condition, to date, largely has been driven by the nature of the applicant pool. Statistics suggest that our judiciary does not fairly represent the female membership of the bar. This author believes, however, these statistics simply reflect the relatively recent influx of women into the legal field.¹⁹² While it is important to foster gender diversity in the judiciary, it is more important to make certain the most qualified candidates are appointed. More women judges will certainly be appointed as more women attorneys gain the necessary experience to be considered. Although no objective information exists concerning the racial make-up of the members of the Wyoming bar, simple observation indicates it is not racially diverse. Until that changes, neither will be the judiciary. That condition must be addressed by the legal institutions and other societal processes which go far beyond the reaches of our method of judicial selection.

192. This author is, in fact, the first woman appointed to the Wyoming Supreme Court.

If the public, including the practicing bar and the legislature, were more informed about the judicial selection process in general, and specifically about the pool of candidates for any particular judgeship, they would be less inclined to make erroneous assumptions about who influences the process. This could also help put aside false perceptions, such as preferences for prosecutors over criminal defense lawyers, civil plaintiffs' attorneys over civil defense attorneys, and those in private practice over government lawyers.

In addition, the judiciary and the bar should discuss and investigate better methods of providing the public with objective information concerning judicial performance to allow voters to become more informed in the exercise of their right to vote on the retention of judges. While the judicial evaluation poll provides some service in that regard, much could be done to improve its effectiveness. Perhaps expanding the groups of persons surveyed would increase the validity of the judicial evaluation poll. Developing some system for making sure respondents are qualified to respond is essential to fair results. Whether or not organized opposition to a particular judge develops, the bar and the judiciary should work toward bringing *objective* information about the issues raised into the public discussion.

Finally, the Commission on Judicial Conduct and Ethics could play a more public role in assuring a quality judiciary and thereby increase public confidence in the system. The judicial conduct commission could more widely publicize the nature of its duties and the means of registering a complaint about a judge. In that way, the commission would provide the public with an alternative to opposing retention of a judge for problems of temperament and administration of the courts.

CONCLUSION

If we can agree the process of judicial selection should be different from the selection of members of the other two branches of government, and that the goal of such a process should be to achieve a well-qualified and diverse judiciary, then we can also agree that the judicial nominating commission form of judicial selection enjoyed by Wyoming was a wise choice by the citizens of the state. Over the years, it has performed efficiently and fairly. As more and more demands are placed upon the judicial branch of government, however, we must be willing to objectively consider whether improvements to the system can be made and to involve

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all aspects of society in the process. A more open process will result in greater public confidence in the system and an enhanced ability of the system to survive, improve, and adjust to new and different societal demands.

Hopefully, the experience in Wyoming will be useful for those states considering adoption of a nominating commission form of judicial selection. Widespread public involvement is needed to achieve the adoption of the system in the first place. The task of public education does not end with legislative and voter adoption of the system, however. Careful thought must be given to structuring a system that encourages continued public involvement to guarantee the long-term stability and health of the process.

