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Cover Page Footnote

Rachel Paine Caufield is Research and Program Consultant to the Hunter Center for Judicial Selection at the American Judicature Society (“AJS”). Since joining AJS in November of 2003, her research has focused on issues surrounding judicial selection in the states. She is also Assistant Professor in the Department of Politics and International Relations at Drake University. She received her Ph.D. in Political Science from The George Washington University in 2001, specializing in the study of judicial institutions and decision making. During 2000 and 2001 she served as a Research Fellow at The Brookings Institution in Washington, D.C., conducting research on the interaction between the U.S. Supreme Court and Congress. The author expresses sincere gratitude to research assistants James DeBuse and Taryn Dozark.

HOW THE PICKERS PICK: FINDING A SET OF BEST PRACTICES FOR JUDICIAL NOMINATING COMMISSIONS

*Rachel Paine Caufield, Ph.D.**

States and municipalities still seek to build upon and improve the judicial selection methods used by prior generations. Like most institutional arrangements that are responsive to the needs of society, judicial selection demands an on-going process that borrows and profits from the past, meets the needs of the present and remains flexible to permit future adaptation.¹

At the core of any system of justice is the judge, the arbiter of society's conflicts. While good judges cannot ensure a just society, arguing that the quality of the judiciary is unrelated to the quality of justice proves difficult.² Unqualified or unsuitable judges will lead to capricious justice, where inconsistency, inequality, and arbitrariness undermine the force of law. Arbitrary decisions degrade the meaning and purpose of democratic government and are anathema to the rule of law.³ The debate over methods of judicial selection reflects, at its heart, a debate about the value of law as a governing force. The goal is to produce a judiciary worthy of the respect and obedience of the community, thereby promoting consistency, stability, and fairness. There is a continuing need to reevaluate and assess methods of judicial selection to ensure a qualified bench and advance the cause of justice.

Traditionally, the debate over methods of judicial selection has centered primarily on the competing ideals of judicial indepen-

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1. ALLAN ASHMAN & JAMES J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 2 (1974).

2. *Id.* at 1.

3. ANDREW ALTMAN, *ARGUING ABOUT LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 15-20 (2000).

dence and judicial accountability. An independent judiciary, free from political constraints that impede fair and impartial decision-making, ensures that judges' decisions will reflect the case facts and the law. Every citizen benefits from a judicial system that accurately and effectively addresses conflicts in a neutral forum. Unlike officials in the legislative and executive branches, who are meant to be the representatives of the people, judges occupy a unique position in that they are responsible to the law. A *purely* independent judiciary, subject to no limits or checks on its authority, however, may run afoul of the law without any serious consequences.⁴ Therefore, judicial accountability is both necessary and desirable to provide checks on the powers of the judge.⁵ Finding an appropriate balance is (for obvious reasons) difficult. Judges need decisional independence if they are to be faithful to the law, yet constitutional government demands institutional accountability.⁶ Constitutional government depends on a judiciary populated with judges who not only understand the law, but will apply the law fairly and faithfully.

These conflicting goals form the backdrop for the ongoing debate over how to best select judges. Since the American Revolutionary War, there have been heated debates about the best methods for state judicial selection. In the early 20th century, the "merit selection" plan was proposed.⁷ This method was thought to balance the competing ideals of independence and accountability by combining features of appointment and popular election.⁸ From 1940 until 2000, the "merit selection" plan was adopted in some form by thirty-two states and the District of Columbia,⁹ the most

4. Walter Berns, *The Least Dangerous Branch, But Only If . . .*, in *THE JUDICIARY IN A DEMOCRATIC SOCIETY* 1, 1 (Leonard J. Theberge ed., 1979).

5. *Id.* at 1-3.

6. Thomas R. Phillips, Keynote Address, *Electoral Accountability and Judicial Independence*, 64 *OHIO ST. L.J.* 137, 138 (2003).

7. MARY L. VOLCANSEK & JACQUELINE LUCIENNE LAFON, *JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES* 213 (1988); Susan J. Carbon, *Retention Elections in the United States*, 64 *JUDICATURE* 210, 213 (1980).

8. VOLCANSEK & LAFON, *supra* note 7, at 137-38.

9. See generally AM. JUDICATURE SOC'Y, *JUDICIAL MERIT SELECTION: CURRENT STATUS* (2003), available at <http://www.ajs.org/js/JudicialMeritCharts.pdf> (last visited Feb. 13, 2007) [hereinafter *JUDICIAL MERIT SELECTION*]. On January 29, 2007, Governor Ted Strickland of Ohio formally announced the formation of a nominating commission that will be used to screen applicants for vacancy appointments. Jon Craig & Dan Horn, *Strickland Sets Up Panel to Pick Judges*, *THE ENQUIRER*, Jan. 30, 2007, available at <http://news.cincinnati.com/apps/pbcs.dll/article?AID=/20070130/NEWS01/701300342/-1/CINCI>. The new Ohio nominating commission is not, however, opera-

prominent judicial reform movement since the Jacksonian era. “Merit selection” systems use a bipartisan nominating commission made up of lawyers and laypersons that makes recommendations to the appointing authority.¹⁰ Today, as we reassess appointive methods of selection, a closer examination of existing judicial nominating commissions can provide vital insights to advance our discussion.

To that end, the Article proceeds in five parts. Part I provides a brief history of judicial selection in the states, with particular attention to the development and adoption of appointive methods (including the so-called “merit selection” method). Part II examines the reaction to these merit selection plans and addresses common questions about the role and function of judicial nominating commissions. The third and fourth parts detail the procedures that are used by nominating commissions across the country. Although commissions vary greatly in their structure and operation, these parts review several of the most important operating procedures and examine the extent to which they have been adopted by judicial nominating commissions. Part V seeks to develop a set of “best practices” that can be adopted by nominating commissions.

I. THE HISTORICAL CONTEXT

At the federal level, the Framers of the U.S. Constitution, responding to the abuses of King George under English rule, determined that judges should be selected by the executive, but added the safeguard of Senate confirmation and lifetime tenure to limit the President’s control over the judiciary.¹¹ As Alexander Hamilton wrote in *THE FEDERALIST* NO. 76, “the necessity of [Senate] concurrence would have a powerful though in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appoint-

tional at this time. *Id.* Including Ohio, thirty-three states have set up a nominating commission, but for the purposes of this Article, Ohio is not included. *JUDICIAL MERIT SELECTION*, *supra*, at 3-7.

10. *VOLCANSEK & LAFON*, *supra* note 7, at 137-38.

11. The delegates’ final debate about judicial selection occurred on September 7, 1787, when they voted to approve the appointment by the President, subject to Senate consent. During the debate, Gouverneur Morris defended the proposed plan by saying “as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.” See *SHELDON GOLDMAN*, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 6 (1997).

ment of unfit characters”¹² Once appointed and confirmed, U.S. federal judges were to be exempt from political control with the exception of extreme circumstances that warranted impeachment. The Framers of the Constitution recognized the value of judicial independence and wanted to ensure that judges would never be punished for specific unpopular decisions.¹³ To achieve that goal, federal judges were not only granted terms for “good behavior,”¹⁴ but Article III of the Constitution explicitly forbids Congress and the President from lowering a judge’s salary at any point during the judge’s service on the bench.¹⁵

At the state level, all of the thirteen original states opted to use some form of appointment for the selection of judges.¹⁶ Eight of the thirteen used legislative appointment, two granted the power of judicial appointment to the governor and his council, and three states used gubernatorial appointment, with confirmation by the governor’s council.¹⁷ From 1776 to 1830, each of the states that joined the union used a system of appointment for the selection of judges.¹⁸

12. THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

13. Alexander Hamilton explicitly recognized the danger of judges issuing decisions based upon the popularity of the outcome. He concluded that if the executive or legislative branches had the power to appoint and reappoint judges with fixed tenures, “there would be too great a disposition to consult *popularity*, to justify a reliance that nothing would be consulted but the Constitution and the laws.” THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (emphasis added).

14. Hamilton made the intended connection between judicial independence and terms of “good behavior” clear in FEDERALIST NO. 78, where he wrote that:

[t]he standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws. . . . [i]f then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty.

THE FEDERALIST NO. 78, at 465, 469 (Alexander Hamilton).

15. U.S. CONST. art. III.

16. Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, in JUDICIAL POLITICS: READINGS FROM JUDICATURE 50, 50-52 (Elliot E. Slotnick ed., 2005).

17. ASHMAN & ALFINI, *supra* note 1, at 8; Berkson, *supra* note 16, at 50-52.

18. Of those states that entered the union between 1776 and 1830, five (Alabama, Illinois, Mississippi, Ohio, and Tennessee) used legislative appointment while six (In-

States began to move away from appointive selection methods in the mid-1800s with the rise of Jacksonian democracy and its emphasis on democratic accountability, individual equality, and direct voter participation in governmental decision-making.¹⁹ Judicial appointment had become the subject of considerable scorn, as there was increasing resentment about the role of the upper class in the selection of judges.²⁰ Appointment was seen as a tool to reinforce privilege and deny the common person of her democratic right to popular sovereignty.²¹

Instead, direct elections became the preferred method to choose judges.²² As early as 1812, Georgia passed a constitutional amendment to elect lower state court judges.²³ In 1816, when Indiana became a state, its constitution specified that associate judges of the circuit court were to be elected.²⁴ But the movement toward judicial elections did not make significant progress until the 1830s and 1840s. Mississippi was the first state to elect all of its judges when it adopted the practice in 1832.²⁵ In 1836, Michigan elected its trial court judges for the first time.²⁶ New York's constitutional convention in 1846 amended the state constitution and changed from appointment to popular election for all of its judges, starting a tidal wave of reform.²⁷ By the Civil War, twenty-four of the thirty-

diana, Kentucky, Louisiana, Maine, Missouri, and Vermont) relied on the governor to appoint judges, with either legislative confirmation or approval by a legislative council. See CHARLES SHELDON & LINDA MAULE, *CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES* 3 (1997).

19. ASHMAN & ALFINI, *supra* note 1, at 9-10; SHELDON & MAULE, *supra* note 18, at 4; Berkson, *supra* note 16, at 50.

20. SHELDON & MAULE, *supra* note 18, at 4; Russell D. Niles, *The Popular Election of Judges in Historical Perspective*, in *THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK* 524, 524 (Nov. 1966).

21. SHELDON & MAULE, *supra* note 18, at 4; VOLCANSEK & LAFON, *supra* note 7, at 89; Berkson, *supra* note 16, at 50.

22. Elections were preferred not only by voters who wanted greater levels of control over judges, but by judges who believed that direct popular election would create a separate constituency for the judicial branch, thereby encouraging judicial independence from the legislative and executive branches. See SHELDON & MAULE, *supra* note 18, at 4; Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 *AM. B. FOUND. RES. J.* 345, 347.

23. Berkson, *supra* note 16, at 50.

24. *Id.*

25. When it joined the union, Mississippi used legislative appointment with tenure for "good behavior." In 1832, the state changed to a system of direct election and limited judges' terms to six years. See SHELDON & MAULE, *supra* note 18, at 4; see also ASHMAN & ALFINI, *supra* note 1, at 9.

26. Berkson, *supra* note 16, at 50.

27. *Id.* at 50; ASHMAN & ALFINI, *supra* note 1, at 9.

four states had elected judiciaries.²⁸ In a single year, 1850, seven states altered their systems of judicial selection to allow for popular election of judges.²⁹ For the next 100 years, every state that entered the union had an elected judiciary.³⁰

Despite the initial concern that appointive selection methods were easily controlled by those with money and power, direct popular elections did not fare much better. By the latter part of the 18th century, the nation underwent significant changes, including massive industrialization and urbanization. In the largest cities, party machines came to dominate political processes, including the election of judges.³¹ In New York City, Tammany Hall was free to hand-pick judicial candidates.³² Combined with the fact that most voters were unfamiliar with judicial candidates, the machine was virtually unfettered in its ability to get those candidates favored by the local political organization elected to the bench.³³ As a result, judges were seen as corrupt, unethical, unqualified, and incompetent.³⁴ As early as 1853, delegates at the Massachusetts Constitutional Convention rejected a proposal to switch to popular elections and one delegate opined that elections had “fallen hopelessly into the great cistern” and that judges were now a part of the “political mill.”³⁵ In 1873, New York considered a proposal to return to appointment—a proposal that gained considerable public support.³⁶

Given widespread dissatisfaction with partisan judicial elections that were controlled by urban party machines and declining public confidence in the judiciary, efforts were made to reform the electoral process and remove political parties from judicial selection processes. The most widely accepted method to achieve this was through the use of nonpartisan elections, whereby judicial candidates’ names would appear on the ballot without any party identification. Nonpartisan elections were first used in Cook County, Illinois (Chicago) in 1873.³⁷ Although no statute dictated the use of nonpartisan ballots, the judges themselves decided to run with-

28. Berkson, *supra* note 16, at 50.

29. *Id.*

30. *Id.*

31. ASHMAN & ALFINI, *supra* note 1, at 9-10.

32. *Id.*

33. *Id.*

34. Berkson, *supra* note 16, at 50; *see also* SHELDON & MAULE, *supra* note 18, at 5.

35. Niles, *supra* note 20, at 528 n.46.

36. *See id.* at 535.

37. Berkson, *supra* note 16, at 50.

out party identification.³⁸ Cook County continued to use nonpartisan elections in 1885 and 1893, although it eventually returned to partisan elections.³⁹ By 1927, twelve states used nonpartisan elections.⁴⁰ Almost as soon as states started adopting nonpartisan elections, however, problems arose. Several states, including Iowa, Kansas, and Pennsylvania, tried nonpartisan elections and quickly rejected them because, absent party labels, voters were unable to make informed decisions.⁴¹

As a result of the states' experiences with elected judiciaries, a "clarion call for a frontal attack on the popular election of judges was sounded" in the early 20th century.⁴² Roscoe Pound, a young law professor at the University of Nebraska, spoke before the newly formed American Bar Association, claiming that "putting courts into politics, and compelling judges to become politicians in many jurisdictions [had] almost destroyed the traditional respect for the bench."⁴³ In 1913, William Howard Taft, the former president and future Chief Justice of the U.S. Supreme Court, spoke before the American Bar Association and continued Pound's attack on judicial elections. Taft found judicial campaigns "disgraceful," because judicial candidates would have to campaign based upon claims that their decisions would favor a particular class of voters.⁴⁴

Also in 1913, the American Judicature Society opened its doors. One of the organization's co-founders and its first Director of Research was Albert M. Kales, a law professor at Northwestern University. Kales was particularly devoted to the problem of judicial selection and sought to find a method of selection that would balance the need for judicial independence and the desire for public control. While appointive systems were better able to ensure informed decisions about who should become a judge, elections were

38. *Id.*

39. *Id.* Formally, Illinois used a system of partisan elections. Judges agreed to not include party affiliation in the elections of 1873-1893. Subsequent candidates did not adhere to this practice, and Illinois returned to partisan elections.

40. *Id.*; see also SHELDON & MAULE, *supra* note 18, at 6.

41. Berkson, *supra* note 16, at 50-51.

42. ASHMAN & ALFINI, *supra* note 1, at 10.

43. Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 20 AM. JUDICATURE SOC'Y 178, 186 (1937) (reprinting Pound's address delivered in 1906 to the American Bar Association).

44. Taft went on to say that the system was "so shocking and so out of keeping with the fixedness of moral principles . . . [that it ought to be] condemned." Berkson, *supra* note 16, at 51 (quoting William Howard Taft, *The Selection and Tenure of Judges*, 38 REP. A.B.A 418 (1913)); see also ASHMAN & ALFINI, *supra* note 1, at 10-11.

best suited to provide safeguards and guarantee accountability.⁴⁵ Kales proposed a new method of selection that would combine appointment and election, but with added elements that he believed would strengthen the process as a whole.⁴⁶

Under his proposed method, the “Kales Plan,” an elected Chief Justice would fill judicial vacancies by appointing someone from a list that was submitted by a judicial nominating commission.⁴⁷ The judicial nominating commission was to be nonpartisan, and was charged with the responsibility of screening applicants and recommending only those who were most qualified for the position.⁴⁸ After the Chief Justice appointed a new judge, the judge would serve for a predetermined amount of time and would then face the voters in regular retention elections. Voters would decide whether the judge would remain on the bench in an uncontested, nonpartisan referendum vote. If a judge was rejected in a retention election, the Chief Justice would then appoint another judge from a list prepared by the judicial nominating commission.⁴⁹ Harold Laski, a political scientist in England, suggested a variation on the Kales Plan in 1926, whereby the governor would be the appointing authority rather than the Chief Justice.⁵⁰ Taken together, this new approach was called the “Kales-Laski Plan.”

The proposal attracted no active support until 1937 when the American Bar Association endorsed a “merit selection” plan similar to the Kales-Laski Plan.⁵¹ Then, in 1940, Missouri became the first state to adopt the Kales-Laski Plan when it amended the state constitution to include a merit selection plan to choose judges for the Missouri Supreme Court, Courts of Appeals, and the Circuit and Probate Courts in the city of St. Louis and Jackson County.⁵² It wasn’t until the 1950s and 1960s that the so-called “Missouri Plan”⁵³ gradually gained popularity. In the 1950s, three states

45. ASHMAN & ALFINI, *supra* note 1, at 11.

46. *Id.*

47. *Id.*

48. SHELDON & MAULE, *supra* note 18, at 6.

49. ASHMAN & ALFINI, *supra* note 1, at 11.

50. *Id.*

51. *Id.*; Berkson, *supra* note 16, at 51.

52. Because the plan was first adopted by Missouri, it is frequently referred to as the “Missouri Plan.” ASHMAN & ALFINI, *supra* note 1, at 11; Berkson, *supra* note 16, at 51; *see also* JACK L. CAMPBELL ET AL., EFFECTIVENESS OF THE MISSOURI NON-PARTISAN COURT PLAN 11-12 (2005), http://www.mobar.org/courts/commission_report.pdf (last visited Feb. 13, 2007).

53. “Merit selection” is generally used to refer to the Kales-Laski Plan, although it has been used to describe any number of variants on that initial proposal. “The Missouri Plan” is typically used to describe merit selection generally, although Missouri is

adopted commission-based appointment systems; in the 1960s, another eight states adopted such systems; and in the 1970s an additional fourteen states and the District of Columbia introduced commission-based appointment.⁵⁴

Today, twenty-four states and the District of Columbia use a “merit selection” process with a nominating commission to choose some or all of their judges.⁵⁵ It is important to note that there is no one merit selection system. Rather, there are nearly as many variations on the merit selection plan as there are states that use a commission-based appointment system.⁵⁶ What they all share, however, is the use of an independent (and usually bipartisan) commission that is established to evaluate applicants for the bench and make recommendations to the appointing authority. The appointing authority (usually the governor) chooses one person from the list of recommended candidates; in some cases, the appointment must be confirmed by the state legislature. Although the Kales Plan initially required the use of regular retention elections where voters would decide whether a judge was retained, several states have opted to use other methods to determine whether a judge will remain on the bench after the initial term of office.⁵⁷

technically a “hybrid system” because some state judges are appointed and some are elected. Here, I use “commission-based appointment system” as a broader conceptual term to refer to any state that has set up a judicial nominating commission to recommend or nominate individuals for appointment by the relevant appointing authority. The remainder of the Article retains the “commission-based appointment system” language because “merit selection” and “Missouri Plan” refer to specific variants of commission-based appointment systems. The fact that “merit selection,” “Missouri Plan,” and “commission-based appointment” are so frequently used interchangeably creates considerable confusion in the debate over judicial selection.

54. See AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE STATES, APPELLATE AND GENERAL JURISDICTION COURTS (2004), <http://www.ajs.org/js/JudicialSelectionCharts.pdf> (last visited Feb. 13, 2007).

55. *Id.*

56. In addition to those states that use commission-based appointment systems for initial appointment, some states use commission-based appointment only to fill vacancies that occur on the bench. *Id.*

57. *Id.* For example, Connecticut uses a process where the sitting judge is evaluated by the commission on a noncompetitive basis, and the governor re-nominates and the legislature re-confirms a judge for subsequent terms on the bench. In Delaware, the incumbent judge reapplies to the nominating commission and must compete with other applicants. The governor re-appoints and the senate re-confirms for subsequent terms. New York’s two highest courts (the Court of Appeals and the Appellate Division of the Supreme Court) use the same process. In Hawaii, judges are reappointed by the Judicial Selection Commission. Once appointed to the bench in Massachusetts, judges serve until age seventy with no retention mechanism. Similarly, in Rhode Island, sitting judges serve for lifetime tenure with no regular retention mechanism. Judges in New Mexico run in the next general election after appointment, in a partisan election process. Thereafter, they run in retention elections. In Vermont,

Commission-based appointment is founded on the premise that a group of people divorced from the political realm can perform the vital function of choosing independent, nonpartisan, and nonpolitical judges better than politically motivated elected officials.⁵⁸ As such, commission-based appointment systems will only serve their function if the commission operates in a way that encourages fair and impartial decision-making rather than self-interest or political objectives. Understanding how commissions go about their work can help us craft effective decision-making processes that will, in turn, promote public confidence in the judiciary and guarantee fair and impartial courts.

II. THE DEBATE OVER COMMISSION-BASED APPOINTMENT

Since Missouri adopted commission-based appointment in 1940, there has been ongoing debate about the implementation of these systems. First, advocates of commission-based appointment claim that these plans produce better judges because they lessen the influence of political factors. But many have questioned the veracity of this claim. Second, there has been considerable concern regarding commissioners' loyalty to those who put them on the commission. Commission-based appointment systems depend on the commissioners' ability to work without being influenced by political considerations. If, in practice, commissioners are influenced by the political preferences of those who put them on the commission, the system fails to achieve its intended goal. Third, the extent to which the composition of the nominating commission represents the diversity of the community and the influence of the organized bar are frequent points of contention. Taken together, these issues have fueled the on-going debate about commission-based appointment. This section briefly considers each in turn and leaves the more nuanced discussion to other contributors.

The Quality of Judges

One of the claims made by advocates of commission-based appointment throughout the 1950s and 1960s was that elections lessened the quality of judges, as voters typically did not have the expertise to effectively evaluate whether a judicial candidate would

judges selected in a merit selection system are re-appointed to six-year terms through a vote by the general assembly. *Id.*

58. AM. JUDICATURE SOC'Y, MERIT SELECTION: THE BEST WAY TO CHOOSE THE BEST JUDGES 1 (2003), http://www.ajs.org/js/ms_descrip.pdf (last visited Feb. 13, 2007).

be a good judge.⁵⁹ Instead, voters were likely to vote based upon personality, political party affiliation, name recognition, or to not vote at all.⁶⁰ By contrast, appointive systems allow those familiar with the law and the legal community greater input in the selection of judges.⁶¹ Commission-based appointive systems have the added advantage of institutionalized bipartisanship.⁶² Therefore, as judicial nominating commissions include lay persons and are bipartisan (or nonpartisan) by design, they are thought to eliminate politically-motivated appointments and uninformed voting by the electorate.⁶³ W. W. Crowdus, one of the leading proponents of Missouri's adoption of commission-based appointment, emphasized the advantages of the proposed system in 1941:

Under the new plan, it makes no difference what a man's politics are before he goes on the bench—the point is that after he once attains the bench, he can and shall be independent of politics in the performance of his judicial duties, and he will be free from political obligations and demands upon his time from

59. As Ashman and Alfini note, former Attorney General Herbert Brownell said “a system based on political rewards tends to produce the ‘gray mice’ of the judicial establishment—ordinary, likeable people of small talent.” ASHMAN & ALFINI, *supra* note 1, at 71.

60. JOANNE MARTIN, MERIT SELECTION COMMISSIONS: WHAT DO THEY DO? HOW EFFECTIVE ARE THEY? 3 (A.B.A. Rep. 1993); *see, e.g.*, Laurance M. Hyde, *The Missouri Non-Partisan Court Plan*, in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 47, 91 (Glenn R. Winters ed., 1967); Jack W. Peltason, *The Merits and Demerits of the Missouri Court Plan*, in SELECTED READINGS: JUDICIAL SELECTION AND TENURE 95, 96 (1973).

61. *See* RESEARCH AND POLICY COMMITTEE OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT, JUSTICE FOR HIRE: IMPROVING JUDICIAL SELECTION 34-35 (2002), <http://www.heartland.org/pdf/10339.pdf> (last visited Feb. 13, 2007) [hereinafter JUSTICE FOR HIRE].

62. Originally, advocates of the Kales-Laski Plan emphasized that the commission was to be nonpartisan. Over time, however, recognizing the difficulty of assembling a group of people who will be truly “nonpartisan,” advocates have relied upon the idea of “bipartisanship” and most commissions have specific provisions that enforce bipartisanship. Commissioners who serve on bipartisan committees are far less likely to report that political influences affect commission decision-making. *See* ASHMAN & ALFINI, *supra* note 1, at 78.

63. Laurance M. Hyde wrote about the Missouri Plan:

We do not claim that our plan has or ever will bring about perfection. That is impossible to achieve with human beings. We do claim, not only that our plan has a higher batting average in selecting able judges than our former political system, but also that it affords every judge an opportunity to be a better judge than he possibly could have been under the old system which required him to put in much of his time campaigning for a party nomination and for election of his party ticket; requiring him to be a politician to remain a judge.

Hyde, *supra* note 60, at 94.

political sources—it will make it unnecessary for a judge to incur political obligation. . . . It will cause the attention of the voters to be focused on a judge's record, thus making it easier to remove incompetent judges from office and to retain those whose records are meritorious.⁶⁴

But the claim that commission-based appointment produces the highest quality judges is notoriously difficult to evaluate because “quality” is so ill-defined. Nonetheless, commissioners themselves are confident of the quality of applicants that they recommend.⁶⁵ Furthermore, given evidence that the public is wary of the influence of money and interest group pressure prevalent in many judicial elections today, appointment can increase public confidence in the quality of the judiciary.⁶⁶ It is also worth noting that highly qualified candidates may prefer commission-based appointment because they are unwilling or unable to raise the money to run an effective campaign in an elective system.⁶⁷

Who Picks the Pickers?

The most frequently voiced concern of opponents of commission-based appointment systems is that commissioners will simply represent the preferences of those who appointed them. In his initial plan, Albert Kales recommended that a nominating commission be made up entirely of sitting judges.⁶⁸ As a proposed change to Kales's initial plan, Harold Laski suggested that the nominating process include the bar association.⁶⁹ In 1931, at the annual meet-

64. Peltason, *supra* note 60, at 98-99 (quoting William W. Crowds, *The Missouri Non-Partisan Court Plan*, 43 PA. B. ASS'N Q. 9, 13-15 (1941)).

65. See MARTIN, *supra* note 60, at 22.

66. A 2004 poll commissioned by the Justice At Stake campaign found that seventy-one percent of Americans believe that campaign contributions from interest groups influence judges' decisions. Eighty-two percent expressed concern that the United States Supreme Court decision in *Republican Party of Minn. v. White*, 536 U.S. 765 (2002), will increase special interest group influence on judicial decisions. Justice At Stake Campaign, March 2004 Survey Highlights: Americans Speak Out on Judicial Elections, available at http://www.justiceatstake.org/files/ZogbyPollFact_Sheet.pdf (last visited Feb. 13, 2007).

67. CAMPBELL ET AL., *supra* note 52, at 14-15. A variation on this reasoning is often found in provisions that allow commissioners to actively recruit applicants for a judicial position. For example, the Rules of the Judicial Nominating Board of the State of Vermont include the following: “Board members may actively seek out and encourage qualified individuals to apply for judicial office. Board members should always keep in mind that often the person with the highest qualifications will not actively seek judicial appointment.” JUDICIAL NOMINATING BD. OF THE STATE OF VT. R. 6.

68. ASHMAN & ALFINI, *supra* note 1, at 24.

69. *Id.*

ing of the American Judicature Society, Walker Spencer proposed that nominating commissions should include judges, lawyers, and laypersons.⁷⁰ In 1940, when Missouri became the first state in the nation to adopt a commission-based appointment system, the plan specified that commissions would include a judge, with an equal number of lawyers and non-lawyers.⁷¹ In 1962, the American Bar Association approved the Model Judicial Article that included a commission-based appointment system, with commissions composed of judicial, lawyer, and non-lawyer members.⁷² Today, most commissions include at least one judge, and nearly all include both lawyers and laypersons.⁷³ In general, lawyers are appointed by the state or local bar association and lay members are appointed by the governor. Of the thirty-two states⁷⁴ that currently use commission-based appointment to select some or all of their judges, fifteen have commissions including at least one judge⁷⁵ and twenty-eight commissions include both lawyers and nonlawyers.⁷⁶

The fact that governors, state legislators, and bar associations have responsibility for choosing some or all of the commissioners⁷⁷ has generated two primary concerns about the membership of judicial nominating commissions. First, how immune are commissioners, appointed by political figures, from political influence?

70. See Glenn R. Winters, *The Merit Plan for Judicial Selection and Tenure—Its Historical Development*, in *SELECTED READINGS ON THE ADMINISTRATION OF JUSTICE AND ITS IMPROVEMENT* 2, 4-5 (Glenn R. Winters & R. Stanley Lowe eds., 1971).

71. ASHMAN & ALFINI, *supra* note 1, at 24.

72. *Id.*

73. JUDICIAL MERIT SELECTION, *supra* note 9, at 3-7.

74. Thirty-two states and the District of Columbia use commission-based appointment. Therefore, although thirty-three jurisdictions use the method, only thirty-two are states. *Id.*

75. Those states that do not include a judge on the commission are: Connecticut, Delaware, Florida, Georgia, Hawaii, Kansas, Maryland, Massachusetts, Minnesota, New York, North Dakota, Oklahoma, Rhode Island, Tennessee, Utah, Vermont, and Wisconsin. It is important to note that in Delaware, Georgia, Maryland, and Massachusetts, commission-based appointment is established by executive order. In these states, therefore, the governor has exclusive control over the makeup of the nominating commission, although the qualifications for membership are often specified in the executive order. *Id.*

76. Those states that do not include both lawyers and nonlawyers are Florida (which provides that the nominating commission for the Florida Supreme Court shall have six lawyers and three additional members that can either be lawyers or nonlawyers), Georgia, Massachusetts, and Wisconsin. Georgia and Massachusetts have both adopted commission-based appointment by executive order, which means that the governor has sole responsibility to fill seats on the commission. *Id.* at 7-9.

77. With few exceptions, these three groups appoint commissioners in nearly all jurisdictions. See generally *id.*

Second, do bar associations exert too much influence in the process?

Political Influence

The proposed advantage of commission-based appointment systems is the existence of the commission—a bipartisan group of people outside of the political environment and therefore able to evaluate the candidates without being influenced by politics. Pure appointive systems, where the governor or legislature is solely responsible for appointment of judges, is unquestionably a political process.⁷⁸ But, is it possible that commissioners are truly removed from politics? During the 1950s and 1960s, considerable concern arose that the adoption of commission-based appointment systems would not eliminate politics, but would move politics from out in the open and shut it behind closed doors where only a few could influence the process. As Jack W. Peltason writes:

The Missouri Court Plan will not ‘take the courts out of politics’ as claimed, but instead it will result in a more insidious type of politics. . . . Under the system of popular election, the task of the political minded and those who wished to dominate the judges was much more difficult because the right to pick judges was not the monopoly of a few. . . . [T]he type of politics that will ensue from the Missouri Court Plan will be of the worst sort. Any politics that existed under the old system of direct popular election was of the out-in-the-open brand. The effect of the Missouri Court Plan is not to take the courts out of politics, but to drive what politics exists underground. Politics will become the secret, backroom type.⁷⁹

Most commissioners are chosen by the governor or the bar association in their state or locality. Therefore, it is at least plausible that they may represent the preferences of those who appointed them as they screen applicants and make recommendations. Richard Watson and Rondal Downing produced one of the most comprehensive studies of political influences on the Missouri system in 1969. They reported incidences of “panel wiring,” when the governor communicated to commissioners her preferred candidate for a judicial position and those commissioners produced a list of recommendations, including the governor’s choice among a list of arbi-

78. See JUSTICE FOR HIRE, *supra* note 61, at 34.

79. Peltason, *supra* note 60, at 102.

trary names—names which would not matter because they would not be chosen.⁸⁰

Despite the assumption that commissioners will be politically loyal to those who appointed them to the commission, commissioners report that political considerations rarely enter commission deliberations. Allan Ashman and James Alfini's 1974 survey of judicial nominating commissioners reveals that political influences and considerations did sometimes enter the deliberations, although only two percent of respondents reported that political influences were "always" included in commission discussions.⁸¹ They reported:

Of the 49% [of commissioners surveyed] who stated that political influences or considerations were introduced (however infrequently) into commission deliberations, only 7% (3% of all respondents) believed that when such considerations actually were introduced they were of decisive importance. Twenty-seven percent of the responding commissioners felt that such influences or considerations were of some importance but not decisive. Forty-two percent (20% of all respondents) felt that such influences were of little importance and the remaining 24% felt that they were of no importance. Thus 36% of the total number of respondents stated that political influences had been interjected into their deliberations at some time and that these influences or considerations had some effect, albeit minor in many instances, in determining the eventual selection made by the commission.⁸²

Similarly, Joanne Martin reports that only one percent of the seventy-six commission chairs from thirty-four states and the District of Columbia that she surveyed in 1993 indicated that political influences were "always" used in commission deliberations, while thirty-one percent responded that they were "infrequently" used, and forty-eight percent indicated that they were "never" part of commission decision-making.⁸³

It is impossible to create a perfectly nonpartisan system for selecting judges.⁸⁴ Nonetheless, provisions that mandate bipartisanship on the nominating commission come closer to that ideal than

80. RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* 108 (1969).

81. ASHMAN & ALFINI, *supra* note 1, at 75-77.

82. *Id.* at 75-76.

83. MARTIN, *supra* note 60, at 20.

84. ASHMAN & ALFINI, *supra* note 1, at 78.

commissions that allow partisanship.⁸⁵ Currently, sixteen states require commissions to be bipartisan.⁸⁶ Furthermore, the statutory language may limit the political activities of nominating commissioners, which lessens the potential risk that commissioners will have immediate political loyalties during their term of service. As of now, thirteen of the thirty-three jurisdictions that use a nominating commission include a provision that prohibits commissioners from engaging in political activities.⁸⁷

The Influence of the Organized Bar

Some have suggested that the push for “merit selection” in the 1950s and 1960s was a thinly-veiled effort to increase the role of the legal profession in the recruitment and selection of judges.⁸⁸ Because bar associations and the legal community within state and local jurisdictions often play specific roles in recommending or appointing members of judicial nominating commissions, the legal profession certainly influences the selection of judges.

Of all the activities in which bar associations engage during selection processes,⁸⁹ bar leaders report that the ability to select commission members is the single most efficacious way to influence the

85. *Id.* at 78-79.

86. Most often, this institutionalized bipartisanship is expressed in the states’ constitutional language and requires that no more than half of the commissioners plus one can be from the same political party. The Am. Judicature Soc’y, *Judicial Selection in the States*, <http://www.ajs.org/js> (last visited Feb. 13, 2007). Ashman and Alfini note one possible negative consequence of bipartisanship: provisions that require bipartisanship may decrease the likelihood that individuals who have no clear identification with a political party will be appointed to a nominating commission. See ASHMAN & ALFINI, *supra* note 1, at 78-79.

87. Currently, these provisions are used in Alabama, Connecticut, Hawaii, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Missouri, New York, Oklahoma, Tennessee, and Wyoming. JUDICIAL MERIT SELECTION, *supra* note 9, at 18.

88. Charles Sheldon and Linda Maule write:

Fear of party politics led to nonpartisan elections which were designed to encourage the citizen-voter to be involved but rather brought interest groups, especially bar associations, into recruitment. Next, but not finally, some of the voters’ influence was sacrificed and the legal profession’s role increased through the Missouri plan. The upshot is that in states today there is a mix of methods and often even within a single state. Nonetheless, it is most likely that the same traditional groups are involved to varying degrees in recruiting judges along with a collection of newer groups. All are attempting to exert some influence over who finally dons the robes of judicial office.

SHELDON & MAULE, *supra* note 18, at 7-8.

89. “Selection processes” includes judicial elections as well as appointment systems.

makeup of the bench.⁹⁰ Charles Sheldon surveyed 435 bar leaders and reported that:

Even bar leaders in states [where bar associations] only nominate or recommend attorneys to be appointed to commissions by governors regard the results of this official activity as fairly effective (7.6 rating [on a scale of 1-10]). A Mississippi respondent wrote that the nine attorneys who had been recommended to the governor for appointment to three-year terms on the commission are ‘very effective’ and ‘have a strong voice in the committee’s decisions.’⁹¹

Is it true that bar associations and the representatives of bar associations who serve as judicial nominating commissioners have a “strong voice” in commission deliberations? One might suspect that this is the case because lawyers have existing connections to the legal world, understand the courtroom environment, and can draw on their legal expertise to discuss complicated areas of law during deliberations, including interviews with applicants.⁹² But laypersons who serve on judicial nominating commissions report that they do not feel as though lawyer members dominate the discussion. Ashman and Alfini indicate that “responses to our questionnaires reveal that very few lay members felt dominated by the lawyers and . . . equally few lawyer members felt the lay members to be superfluous.”⁹³ A 1973 report in Massachusetts concluded that:

The interaction between lawyers and laymen on the Committee is of some interest. Except in one or two cases, most of the laymen have scant knowledge of the courts, the judiciary, or their recent problems. The laymen, however, soon realized that they were as perceptive as the lawyers about people, and equally adept in evaluating available information. While laymen had to defer to lawyer opinions about legal experience, they had strong, independent views and were by no means dominated or manipulated by the lawyers. Lawyer perceptions of the lay members confirm the capacity and desirability of lay participa-

90. Charles H. Sheldon, *The Role of State Bar Associations in Judicial Selection*, 77 JUDICATURE 300, 301 (1994).

91. *Id.* at 302.

92. Martin’s 1993 study of judicial nominating commissions indicates that every commission reported having interviews with the applicants and the overwhelming majority reported that one of the topics of the candidate questionnaire is the applicant’s “views and attitudes concerning law.” While this could be very broad on a candidate’s questionnaire, interpreting the applicants may require substantial understanding of legal precedent and legal procedure. See MARTIN, *supra* note 60, at 52-60.

93. ASHMAN & ALFINI, *supra* note 1, at 25.

tion. Most felt that lay people provided a more detached view of the system, bringing a consumer citizen perspective to bear, and counteracting the 'chumminess' that tends to exist among lawyers.⁹⁴

The role of the bar is sometimes cited as a reason for distrust of commission-based appointment systems as they are currently implemented. Nonetheless, there is no evidence that the bar or lawyer members of judicial nominating commissions have inappropriate control over commission procedures or decisions.

Are Commissions Representative?

In addition to concerns about the role of the bar, some have questioned the extent to which commissions are representative of the community in making recommendations to the governor. Typically, two separate issues dominate: the lack of geographic representation on nominating commissions and the over-representation of privileged segments of society.

In several cases, judicial nominating commissioners may not reside in the area or district for which a judicial vacancy exists. For example, in Alaska, one nominating commission is charged with reviewing applications and making recommendations for the supreme court, the superior court, the court of appeals, and all district courts throughout the state.⁹⁵ Connecticut, Delaware, Georgia, Hawaii, Idaho, Massachusetts, Minnesota, Montana, Oklahoma, Rhode Island, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming have similar systems.⁹⁶ When one commission is charged with filling vacancies on all state courts, it is entirely possible that the commission making recommendations to fill a seat will not include a single person who lives in the area over which the judge will preside.⁹⁷ It is difficult to justify the creation of additional commissions for each district, particularly for lesser populated states using commission-based appointment only to fill

94. Robertson & Gordon, *Merit Screening of Judges in Massachusetts: The Experience of the Ad Hoc Committee*, 58 MASS. L.Q. 131, 138 (1973), quoted in ASHMAN & ALFINI, *supra* note 1, at 26.

95. JUDICIAL MERIT SELECTION, *supra* note 9, at 3.

96. *Id.* at 3-7.

97. This point was raised by Ellison A. Neel during Missouri's Constitutional Convention in 1943, which considered eliminating the commission-based appointment system. See Peltason, *supra* note 60, at 95, 100-01.

interim vacancies,⁹⁸ especially once the existing commission has acquired experience. Nonetheless, the issue remains significant in some jurisdictions and deserves greater attention.

The extent to which commissions are dominated by privileged populations within the state is a more common question and there have been extensive inquiries into the demographic characteristics and background experiences of commissioners. Generally, commissioners are white and male. In 1974, Ashman and Alfini reported that 97.8% of commissioners were white and 89.6% were male.⁹⁹ By 1990, Beth Henschen, Robert Moog, and Steven Davis found that commissioners were still overwhelmingly white (ninety-three percent), but that Hispanic Americans had made significant gains. While Ashman and Alfini found that only 0.2% of commissioners were Hispanic, Henschen, et al. found that Hispanic membership had increased to two percent.¹⁰⁰ Similarly, by 1990, women made up twenty-five percent of commissioners, up from ten percent in 1974.¹⁰¹ Lawyer members, however, remain predominantly male (ninety percent).¹⁰² Overall, those who serve on nominating commissions are considerably more educated than the general public and many have served in a party office (twenty-six percent), are elected office holders (thirty-one percent), or are members of civic organizations (sixty-seven percent).¹⁰³ Clearly, commission members' characteristics do not reflect the characteristics of the American citizenry. Whether the disproportionate number of white, male, politically-minded individuals serving on nominating commissions affects the decision-making of nominating commissions is difficult to determine.

III. COMMISSION PROCEDURES

Although there is extensive literature that considers the composition of nominating commissions and the potential role of politics in commission deliberations, there is only nascent literature on the procedures that nominating commissioners use to make decisions.

98. Of these states, Georgia, Idaho, Minnesota, and Wisconsin only use commissions to recommend candidates for interim vacancies. JUDICIAL MERIT SELECTION, *supra* note 9, at 3-4, 6.

99. ASHMAN & ALFINI, *supra* note 1, at 38.

100. *Id.*; Beth M. Henschen et al., *Judicial Nominating Commissioners: A National Profile*, 73 JUDICATURE 328, 329 (1990).

101. Henschen et al., *supra* note 100, at 329; *see also* ASHMAN & ALFINI, *supra* note 1, at 38.

102. Henschen et al., *supra* note 100, at 330.

103. *Id.* at 330-32.

It is often said that the rules of the game determine the outcome; here, understanding the rules and procedures that govern commission work can certainly help us assess the efficacy of these commissions. While the “who picks the pickers” question has been asked repeatedly (here and elsewhere), I devote the remainder of this Article to another equally important but often overlooked question: “How do the pickers pick?”

It is important to understand what nominating commissions do. For the most part, all nominating commissions serve similar functions. First, commissioners are responsible for soliciting applications when a vacancy occurs on the bench. This often takes the form of advertising in legal publications, but may also include active recruitment of talented legal minds.¹⁰⁴ Second, commissioners are charged with screening each of the applicants to determine whether minimum legal requirements for a judgeship are met and whether the applicants are qualified for a seat on the bench.¹⁰⁵ Third, each commission engages in an evaluation process, whereby they assess the relative merits of each of the applicants.¹⁰⁶ The evaluation of applicants is usually based on a questionnaire that is completed by every applicant, but commissioners may also investigate each applicant by collecting information from their financial records, contacting law enforcement agencies and disciplinary bodies, or even surveying local members of the bar.¹⁰⁷ In addition, commissioners conduct interviews with the applicants during the evaluation process.¹⁰⁸ After collecting information to evaluate each applicant, commissioners must come to a decision about whom to recommend to the governor. How this decision is made varies by commission.¹⁰⁹ Each of these tasks may seem simple, but the manner in which a commission goes about completing the tasks (and the extent to which they have established procedures that can be applied consistently to do so) has a significant impact on their final recommendations.

104. See MARTIN, *supra* note 60, at 9-10.

105. *Id.* at 8-9.

106. *Id.* at 10-12.

107. MARLA N. GREENSTEIN & KATHLEEN M. SAMPSON, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS 108-110 (2d ed. 2004).

108. See *generally id.* at 131-52. Martin reports that every commission represented by her survey conducts interviews with applicants. MARTIN, *supra* note 60, at 52-56.

109. The American Judicature Society recommends a written voting rule that requires a successive majority voting system. This system is used in Rhode Island and Nevada and is recommended in Iowa. See GREENSTEIN & SAMPSON, *supra* note 107, at 156-57, 161-66.

Because they serve such a fundamental role in any commission-based appointment system, nominating commissions should ideally establish procedures that encourage fair and independent assessments of applicants. The most common conclusion about nominating commission procedures, however, is that they are often informal and vary considerably from one jurisdiction to the next.¹¹⁰ In 1974, when Ashman and Alfini produced the first major study of nominating commissions, they concluded that:

Because most merit selection plans do not contain provisions which dictate the procedures to be followed by the nominating commissions, the commissions generally have broad discretion in their recruiting, screening, evaluating, and nominating procedures. In fact, most plans explicitly grant to the nominating commission full authority to adopt any and all rules of procedure which it deems appropriate.¹¹¹

In 1984, Marla Greenstein authored the first edition of *The American Judicature Society's HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS*, in which she reported that nearly all of the nominating commissions she examined in 1984 were authorized to establish rules for their own operation.¹¹² Given that most nominating commissioners are unpaid volunteers who have little experience or training,¹¹³ delegating the authority to establish operating procedures and rules for decision-making to commissioners may lead to inconsistent, unorganized, or ad hoc processes. Inconsistent, unorganized, and ad hoc decision-making undermines the critical function of the commission, as it can easily lead to bias (intended or unintended) and can undermine public confidence in the process. As Ashman and Alfini note, “[i]f the commission conducts its business in a careless, disorganized fashion it is almost certain that the plan will not exhibit the attributes of a good judicial selection process.”¹¹⁴

Many commissions do have specific rules governing their interactions with the appointing authority, the applicants, and the pub-

110. *See, e.g.*, MARTIN, *supra* note 60, at 21-22.

111. ASHMAN & ALFINI, *supra* note 1, at 42.

112. There were some exceptions, including nominating commissions in Georgia, Maryland, Minnesota, Nebraska, South Dakota, Tennessee, and Vermont. In some of these jurisdictions, the state supreme court or court of appeals promulgated rules governing the operation of the commission. MARLA N. GREENSTEIN, *HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS* 16-20 (1st ed. 1984).

113. *Id.* at 2; *see, e.g.*, MARTIN, *supra* note 60, at 6 (reporting that, of the commission chairs surveyed, fifty-six percent had served as chair for one year or less, while only twenty-eight percent had served for three years or more).

114. ASHMAN & ALFINI, *supra* note 1, at 41.

lic. Nearly all commissions are governed by confidentiality requirements, for example. In eighteen of the thirty-two states that use nominating commissions, the records of the commission must be kept confidential, while in seven states, commissioners are not required to keep these records confidential.¹¹⁵ In eighteen states, the interviews conducted by the commission are confidential, while in seven, they are not.¹¹⁶ What is particularly remarkable, however, is that seven states have no formal provisions whatsoever to indicate whether records will be kept confidential or not, and seven states have no formal provision governing whether interviews will be confidential or not.¹¹⁷ In fact, five states have no written rules about whether or not commission *deliberations* will be confidential, and seven states have no written rules that govern whether commission *voting* will be confidential.¹¹⁸ When there are no rules specifically governing something as fundamental as whether information will be kept confidential, the commission itself is responsible for determining whether information will be released or not.¹¹⁹ It is entirely possible that these decisions are made on a case-by-case basis.¹²⁰

115. Those states that require confidentiality for commission records are: Alabama, Arizona, Colorado, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kentucky, Maryland, Massachusetts, Missouri, Nevada, New York, Oklahoma, South Dakota, Utah, and Vermont. Those that specifically do not designate commission records as confidential are: Alaska, Florida, Indiana, Montana, Nebraska, North Dakota, and Tennessee. See JUDICIAL MERIT SELECTION, *supra* note 9, at 16-17.

116. In Alabama, Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maryland, Massachusetts, Missouri, Nebraska, New York, Oklahoma, South Dakota, Tennessee, Utah, and Vermont, interviews are confidential. In Arizona, Florida, Idaho, Indiana, Montana, New Mexico, and Rhode Island, they are not. See *id.* In those states that have enacted Open Meeting Laws, nominating commissions are usually required by law to hold open meetings or to provide information to the public about their deliberations. *Ristau v. Casey*, 64 A.2d 642, 647-48 (Pa. 1994); Barton P. Jenks, *Rhode Island's New Judicial Merit Selection Law*, 1 ROGER WILLIAMS U. L. REV. 63, 80-81 (1996).

117. Georgia, Kansas, Minnesota, New Mexico, Rhode Island, Wisconsin, and Wyoming have no rules regarding commission records and Georgia, Kansas, Minnesota, Nevada, North Dakota, Wisconsin, and Wyoming have no rules regarding commission interviews. See JUDICIAL MERIT SELECTION, *supra* note 9, at 16-17.

118. The five states that have no provision governing deliberations are: Georgia, Kansas, Minnesota, Wisconsin, and Wyoming. The seven states that have no provision governing voting are: Connecticut, Georgia, Kansas, Minnesota, Nebraska, Wisconsin, and Wyoming. See *id.*

119. In many cases, the commissions themselves establish rules governing such important topics. Absent well-written guidelines, this will lead to the inconsistency discussed above.

120. I do not mean to imply that commissioners themselves are purposefully or intentionally being irresponsible in their behavior, merely that the lack of written rules can easily lead to situations where there is no guidance and decisions must be

Commissions also must have internal rules to govern how they will go about their work. Are commissioners responsible for soliciting applications or recruiting qualified applicants? Are commissioners required to disclose personal connections with applicants? What happens if a commissioner is faced with a conflict of interest and fails to disclose that information to the chair and/or other commissioners? Should commissioners consider diversity as one criterion that may shape their choice? If so, how important is it relative to other evaluative criteria? What if a commissioner's neighbor communicates information about one of the applicants that is unfavorable? Is the commissioner required or even encouraged to share that information with others? Can commissioners actively participate in partisan or political activities? If a commissioner has not participated in all interviews, can she still vote on the final recommendations? Does the commission have written voting rules to determine who will be recommended to the appointing authority? What criteria will be used to evaluate each candidate?

After surveying nominating commissioners, Ashman and Alfini reported "that most of the commissions either have not exercised their authority to adopt procedural rules, or, if they have adopted such rules, have neglected to commit them to written form."¹²¹ Many of the surveyed commissioners indicated that adopting written procedural rules would improve the nominating process, as the lack of written rules has caused confusion among commission members.¹²²

In the *HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS*, Marla Greenstein concluded that "judicial nominating commissioners often express frustration with the unstructured decision making within their commissions,"¹²³ and recommended that "detailed rules should structure the discretion of the commissions and have the salutary effect of ensuring a more ordered consideration of

made on the spot. In the case of Georgia, the lack of established rules is most likely the result of the fact that commission-based appointment is set up by executive order. Therefore, the governor has complete responsibility for governing the operation of the nominating commission. *JUDICIAL MERIT SELECTION*, *supra* note 9, at 9. It is interesting to note, however, that in other jurisdictions where commission-based appointment has been established by executive order, there are rules that govern confidentiality. *See id.* at 8-12, 16-17.

121. *ASHMAN & ALFINI*, *supra* note 1, at 42.

122. *Id.* The responses to the questionnaire indicated that, in at least seven jurisdictions, members of the same commission disagreed as to whether their commission had compiled written procedural rules. *Id.* at 42-43.

123. *GREENSTEIN*, *supra* note 112, at 21-22.

each applicant, while minimizing the possibility that commissioners will be guided by vague standards and improper influences.”¹²⁴

In 2004, when the second edition of the HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS was published, Kathleen Sampson noted that since the publication of the first edition in 1984, commissions had refined their procedural rules and some state and local jurisdictions published their own handbooks for commissioners.¹²⁵ She also noted that “national developments, such as passage of the Americans with Disabilities Act, increased concern about applicants’ privacy and commissions’ confidentiality procedures, the changing role of the trial judge, newer interviewing techniques, and the ever-present importance of ethical conduct by commissioners have indicated the need for an updated edition. . . .”¹²⁶

If we recognize that rules structure decision-making, then the rules and procedures of judicial nominating commissions structure the nomination and appointment of judges throughout the country. Yet little attention is paid to these rules and procedures, not only in academic studies of commissions, but also in the statutory and constitutional language that creates commissions. For the most part, commissioners make up the rules as they go. Some commissions have remarkably sophisticated rules, while others operate largely on an ad hoc basis with little to guide decision making processes. If we seek to design an appointive method of selection that produces the best possible judiciary, we need to spend considerable time thinking about how nominating commissions can and should choose judges.

IV. EXISTING PRACTICES AND PROCEDURES

At each stage of decision-making, commission procedures determine how applicants will be evaluated and who will be recommended to the governor.

124. *Id.* This recommendation was taken directly from Ashman and Alfini’s 1974 work. The fact that the recommendation was repeated ten years after its initial publication in the HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS indicates that there was little improvement in the development of commission rules and procedures. See ASHMAN & ALFINI, *supra* note 1, at 229.

125. GREENSTEIN & SAMPSON, *supra* note 107, at vii.

126. *Id.*

Conflicts of interest and political activity

Commission-based appointment is only successful insofar as the nominating commission is removed from political pressure. Furthermore, in order to maintain public confidence in the judiciary, commissioners must recognize that they serve in a representative capacity and the choices they make will have a profound effect on the state's citizenry.¹²⁷ To promote public confidence and ensure that decision-making remains untainted by favoritism or impropriety,¹²⁸ commissions can develop formal rules that govern the political activities of commissioners and require disqualification in any commission deliberations that may pose a conflict of interest.¹²⁹

Conflicts of interest are particularly problematic because they undermine commissioners' ability to assess all applicants impartially, a critical responsibility of the commission. Commissioners may encounter situations where personal or professional relationships impair their ability to be impartial, or they may be influenced by their affiliation with a political party.¹³⁰ A majority of states have rules regarding disqualification of a nominating commissioner in situations that present a conflict of interest.¹³¹ Rhode Island includes the following in Section VII of the *Uniform Rules of Procedure of the Judicial Nominating Commission*: "A Commissioner shall disclose to other Commissioners all personal and business relationships with an applicant for judicial vacancy that may directly or indirectly influence the commissioner's decision. If a substantial conflict of interest is apparent, the Commissioner shall disqualify

127. MARTIN, *supra* note 60, at 3.

128. GREENSTEIN & SAMPSON, *supra* note 107, at 3.

129. The American Judicature Society recommends formal rules governing commission ethics:

A formal ethics provision emphasizes the importance of ethical behavior, establishes minimum standards for commissioner behavior, provides aspirational goals for commissioners, and promotes public trust by emphasizing propriety and the appearance of propriety in all the commission's activities. Such a provision also gives consistent and explicit guidance over time as commissioners' terms expire and new members join.

Id. at 4.

130. *Id.* at 5-7.

131. Disqualification provisions exist in Alaska, Arizona, Delaware, Florida, Hawaii, Indiana, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, and Vermont. In Iowa, such a provision is part of the sample procedures for nominating commissions. These sample procedures have been adopted by some commissions, but even those commissions that have not formally adopted these provisions use them as informal guidelines. See generally JUDICIAL MERIT SELECTION, *supra* note 9.

himself from voting on further consideration of any affected applicant.”¹³²

State provisions may explicitly define business, professional, or personal relationships that would present a conflict of interest, but often do not do so.¹³³ In addition, there is still considerable flexibility about enforcement of conflict of interest restrictions. Despite having fairly well-structured rules that require commissioners to recuse themselves from discussions or deliberations that present a conflict of interest, the decision of whether to notify other commissioners and whether a relationship is one that may present a conflict of interest are questions that are usually left to the commissioner. Few states include rules that provide mechanisms to *force* commissioners to refrain from participating in commission decision-making when a conflict of interest exists. New York City’s provisions include the following language:

If a member of the Committee has *any* relationship to a candidate that may unduly influence, or appear to unduly influence, the member’s decision as to the candidate, the member *will* disclose the same to the Committee. In such case, if the member does not voluntarily abstain from voting upon the candidate, a majority of a quorum of the Committee present and voting at any meeting may determine that *the member shall abstain*. The abstention will be recorded in the minutes of the meeting. However, no member shall in any event be precluded from presenting his/her views of the candidate to the Committee after disclosing any such relationship.¹³⁴

Indiana, Vermont, and Utah are among the states that do enforce conflict of interest rules, allowing a majority of the commission to determine whether the conflict will impair the commissioner’s impartiality.¹³⁵ Nebraska’s rules allow any person to challenge the impartiality of a commissioner.¹³⁶ Rhode Island’s rules allow any commissioner who faces a potential conflict of in-

132. GREENSTEIN & SAMPSON, *supra* note 107, at 5 (quoting UNIF. R.P. FOR THE JUDICIAL NOMINATING COMM’N § 7).

133. For definitions of business or professional relationships, see, for example, Maryland and Rhode Island provisions which explicitly include “any relationship where the commissioner has a substantial and direct pecuniary or monetary interest.” *Id.* at 7. For definitions of personal relationships, see, for example, Nebraska and Alaska provisions. *Id.* Nebraska’s rules also include “any relationship where the commissioner shared a residence with the applicant during the previous five years.” *Id.*

134. New York City Mayor’s Committee on the Judiciary: Procedures and Policy 17(b) (emphasis added).

135. GREENSTEIN & SAMPSON, *supra* note 107, at 7-8.

136. *Id.*

terest to submit a statement, in writing, that explains the nature of the conflict and either formally requests to be recused or explains why the conflict will not impair the commissioner's objective evaluation of the applicants.¹³⁷

Although these provisions certainly go a long way toward eliminating conflicts of interest, it largely remains the commissioner's responsibility to assess whether a relationship presents a conflict. States should work to develop enforcement mechanisms that can hold commissioners accountable should they fail to disclose a conflict of interest or recuse themselves in cases where there would be any impropriety or appearance of impropriety.¹³⁸ Similarly, establishing a review process that regularly investigates any complaints or questions the commission's implementation of conflict of interest provisions will ensure that commissioners take these provisions seriously, and honestly assess whether they can perform their role.

Beyond personal or professional relationships, commissioners may be active in partisan politics,¹³⁹ which may compromise their ability to evaluate applicants fairly and impartially. Only thirteen states, however, have formal provisions restricting the political activity of commissioners.¹⁴⁰

Furthermore, commissioners should be governed by general rules of ethical behavior similar to those applied to other public officials. Only eight states currently have formal ethics provisions that govern nominating commissioners.¹⁴¹ For example, Rhode Island's *Uniform Rules of Procedure of the Judicial Nominating Commission* includes the following ethics provision:

Judicial Nominating Commissioners hold positions of public trust. Public confidence in Commission members and the composition of the Commission itself is paramount. Any factors which might erode such public confidence, or be perceived to do

137. *Id.*

138. Any number of state actors might enact these provisions to hold commissioners accountable. These provisions may be included in the statutory language that authorizes the commission, may be codified into an executive order, could be promulgated by the state Supreme Court, or may be formally adopted in the commission's own rules of procedure.

139. In fact, many commissioners have not only been party activists, but have also served as elected officials. Henschen et. al., *supra* note 100, at 332.

140. Commissioners are restricted from participating in political activity in Alabama, Connecticut, Hawaii, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Missouri, New York, Oklahoma, Tennessee, and Wyoming. See JUDICIAL MERIT SELECTION, *supra* note 9, at 18-19.

141. The seven states with ethical provisions are: Florida, Hawaii, Massachusetts, Oklahoma, Rhode Island, South Dakota, and Tennessee. *Id.* at 18-19.

so, shall be avoided. No Commissioner shall conduct himself in a manner which reflects discredit upon the judicial selection process. Consideration of the applicants shall be made impartially, discreetly, and objectively.¹⁴²

Adopting specific codes of ethics and ensuring that all nominating commissioners understand those rules will help guide decision-making and increase public trust in the commission's recommendations.¹⁴³

Evaluative Criteria

The set of criteria used to evaluate applicants is arguably the most fundamental component of nominating commission procedures. The function of every nominating commission is to evaluate applicants and determine which applicants are best qualified for the bench. Therefore, determining the criteria to be used in this process and applying those criteria consistently across all applicants is essential to the integrity of the process. Not only do commissioners determine whether the minimum legal qualifications to become a judge have been met, but they determine whether an individual is well-suited to judicial service.¹⁴⁴ Commissions are therefore asked to weigh multiple criteria as they consider the strengths and weaknesses of each applicant. These criteria may include, but are not limited to, the applicant's legal training, professional skills, interpersonal skills, writing ability, knowledge of and experience with alternative dispute resolution, and ability to manage a courtroom environment.¹⁴⁵

It is notoriously difficult to determine exactly what qualities, or combination of qualities, will produce the "best" judge. And, given the fallibility of humans, forecasting with any certainty an individual applicant's behavior as a judge is impossible. As Maurice Rosenberg notes:

An inquiry such as this probes so deeply into imponderables that it may be rash to enter upon it even with the greatest diffi-

142. GREENSTEIN & SAMPSON, *supra* note 107, at 5 (quoting UNIF. R.P. FOR THE JUDICIAL NOMINATING COMM'N § 7).

143. *Id.* at 13.

144. *Id.* at 70-78.

145. The specific evaluative criteria that are used to consider applicants for any judgeship will depend upon the nature of the vacancy. For example, trial court judges will have sole responsibility for managing the courtroom environment while appellate-level judges work in a more structured setting with multiple judges overseeing the proceedings. Similarly, appellate judgeships require a greater ability to work in a collaborative atmosphere. The criteria should, therefore, be tailored to the position.

dence. Obviously, the custodians of every sector of human activity are eager to compile a list of qualities that ‘best equip’ a man to perform the chosen work with excellence, but everywhere the composition of the list is notoriously elusive. It is particularly obscure when the qualities sought are personal, subjective, and human. Yet, as hard as the task may be, there is a special urgency for finding the human qualities in a judge that are most promising and the flaws that are most damaging. More than the teacher, the engineer, or the lawyer, the judge acts directly upon the property, liberty, even life, of his fellows.¹⁴⁶

Commissioners have a responsibility to consider the full range of characteristics that each individual will bring to the bench. Of the characteristics considered, polled commissioners report that mental and physical health are the most important personal background factors taken into account.¹⁴⁷ In evaluating professional skills, commissioners report that they are most concerned about the applicant’s reputation for fairness, integrity, and preparedness.¹⁴⁸ Commissioners must also evaluate an applicant’s personality. In doing so, commissioners tend to emphasize moral courage, open-mindedness, objectivity, and emotional stability.¹⁴⁹ Particularly noteworthy is commissioners’ reliance on subjective criteria rather than quantifiable, objective measures of performance in all aspects of evaluation.¹⁵⁰

146. Maurice Rosenberg, *The Qualities of Justices—Are They Strainable?*, 44 TEX. L. REV. 1063, 1064 (1966).

147. These characteristics were far and away the most important that were mentioned (97.2% of commissioners surveyed reported that mental health was among the “most relevant” characteristics, and 80.8% reported that physical health was among the “most relevant”), whereas the law school that the applicant attended (5.0%), active involvement in professional activities (13.7%), previous service as a judge (22.4%), and the applicant’s law school record (26.0%) were consistently rated as far less important. ASHMAN & ALFINI, *supra* note 1, at 62.

148. Of the commissioners that Ashman and Alfini surveyed, 86.6% rated professional reputation as among the “most relevant” skills an applicant can have, 91.4% rated a reputation for fairness as “most relevant,” 95.0% reported that a reputation for propriety and integrity in legal matters was “most relevant,” and 79.9% reported that it was important that an applicant be well-prepared and thorough. *Id.* at 64.

149. The survey also indicated that 92.4% of commissioners report that moral courage is among the “most relevant” characteristics, 91.7% designate open mindedness and objectivity as “most relevant,” and 85.9% report that emotional stability is among the “most relevant” characteristics an applicant can possess. *Id.* at 66.

150. Rosenberg notes that: “[a] striking feature of these highest ranking attributes is that they tend to focus upon the personality or person of the candidate—what he is rather than what he has done, his innate or intrinsic qualities rather than his ‘external’ attainments.” Rosenberg, *supra* note 146, at 1067. Similarly, Ashman and Alfini note that:

Given the primacy of evaluative criteria, it is particularly striking that fewer than half of the states that use nominating commissions have any formal statutory language that specifies the criteria to be used to evaluate candidates. In many states, the authorizing language includes vague reference to the criteria that shall be used. This is the case in Vermont, where the state's code, as well as the Rules of the Judicial Nominating Board, require that:

[The] criteria and standards for nomination . . . includ[e] but [are] not limited to such factors as integrity, legal knowledge and ability, judicial temperament, impartiality, health, experience, diligence, administrative and communicative skills, social consciousness and public service. . . . [W]ith respect to a candidate for superior or district judge particular consideration shall be given to the nature and extent of his trial practice.¹⁵¹

New York has used a set of fourteen questions that commissioners should consider as they evaluate applicants, including:

Does the applicant inspire your confidence in his (her) personal honesty, integrity, and moral courage?

Does the applicant have a good reputation (in the community and in the profession) for character and integrity?

Is the applicant open-minded, impartial, and fair?

Will the applicant abstain from politics in the performance of his (her) judicial duties?

Will the applicant be courteous, considerate, and patient when dealing with counsel, litigants, and witnesses?

Will the applicant be prompt and industrious in the performance of his (her) judicial duties?

Does the applicant have wide-ranging analytical powers?

Does the applicant have sufficient actual expertise in the practice of law?

Is the applicant well-educated and well-informed generally?

Regardless of the applicant's particular strengths or weaknesses (whether or not reflected in the above ratings), do you

[w]hat stands out in these results is that subjective considerations such as reputation, knowledge, skill in communication, all clearly outrank the more easily ascertainable and measurable qualifications such as amount of experience, number of honors, type of practice and degree of success. When confronted with this question directly, 70.3% of the respondents replied that they themselves placed greater emphasis on the more subjective attributes and 37.6% felt that their commission emphasized the more objectively ascertainable information.

ASHMAN & ALFINI, *supra* note 1, at 65.

151. VT. STAT. ANN. tit. 4, §§ 601(d), 602(b) (2006).

think that he (she) has an overall potential to become a highly capable judge?¹⁵²

Likewise, Connecticut's commission regulations specify twenty-three questions to be considered,¹⁵³ including the following:

Does the candidate possess the statutory qualifications for office?

Does the prospect possess legal ability that is exemplified by professional excellence, a degree of intellect and a technical proficiency equal to that required by the highest standards of the practicing bar?

Is the candidate generally intelligent and knowledgeable?

Is the candidate courteous and considerate?

Is the candidate patient, attentive, and temperate?

Is the candidate free of tendencies which would indicate the possibility of abuse of the power or prestige of office?

Is the candidate free from activities or relationships which might tend to interfere with the candidate's performance as a judge?

Given the essential functions of being a judge are the ability to preside over a court, to analyze cases, and to render decisions based on the law and facts, can the candidate perform these essential functions with or without reasonable accommodation?¹⁵⁴

Even in these states that provide an extensive list of questions to guide commission deliberations, finding the means to actually determine how any single applicant would behave as a judge, particularly given the limited amount of personal interaction commissioners have with applicants,¹⁵⁵ is exceptionally difficult work. Commissioners are asked to perform a nearly impossible

152. The American Judicature Society, *Judicial Selection in the States*, MAYOR'S ADVISORY COMMITTEE ON THE JUDICIARY, *EVALUATION SCALE OF JUDICIAL APPLICANTS* (2001) (unpublished, on file with The American Judicature Society).

153. In addition to the twenty-three questions for judicial applicants generally, the regulations provide an additional thirty-one separate questions that should guide consideration of incumbent judges who seek reappointment to the same court or elevation to a higher court. THE CONNECTICUT GENERAL ASSEMBLY, LEGISLATIVE PROGRAMS REVIEW AND INVESTIGATIONS COMMITTEE, *JUDICIAL SELECTION—FINAL REPORT*, Ch. 3, (2000) available at http://www.cga.ct.gov/pri/archives/2000jsreport_chap3.htm (last visited Feb. 13, 2007).

154. *Id.*

155. All commissions solicit information on a questionnaire that is common to all applicants. In addition, commissions conduct personal interviews with applicants. Martin reports that seventy percent of commissions interview all applicants, eight percent interview only those who meet the minimum legal requirements, twenty percent only interview applicants who are selected for final review, and three percent of commissions do not interview any candidates. MARTIN, *supra* note 60, at 11-12.

task in evaluating candidates. Finding ways to do this effectively is of the utmost importance.

Diversity and Nondiscrimination

One frequent concern, often expressed by those who worry about commission composition, is the extent to which nominating commissioners advance the cause of diversity on the bench.¹⁵⁶ Commissions, although not representative of the community as a whole, need to represent the citizens of the state when making appointments to the bench and may want to explicitly consider diversity in doing so. Seven of the thirty-two states using nominating commissions have statutory provisions that promote diversity in the composition of the nominating commission.¹⁵⁷ In addition, only eight states include rules that encourage commissioners to consider a diverse applicant pool by engaging in active recruitment of applicants from under-represented groups.¹⁵⁸ Diversity should not eclipse merit in commission recommendations, but it can be easily included in commission rules. For example, the Utah Judicial Council distributes an instructional packet to all applicants, which explicitly outlines evaluative criteria and explains the role of diversity in commission decision-making:

When deciding among applicants whose qualifications appear in all other respects to be equal, it is relevant to consider the background and experience of the applicants in relation to the current composition of the bench for which the appointment is being made. The idea is to promote a judiciary of sufficient diversity that it can most effectively serve the needs of the community.¹⁵⁹

Perhaps most important when considering the question of diversity is whether commissioners are required to behave in a non-discriminatory manner. Any discrimination by commissioners clearly

156. Kevin M. Esterling & Seth S. Andersen, *Diversity and the Judicial Merit Selection Process: A Statistical Report*, in RESEARCH ON JUDICIAL SELECTION 7, 7 (1999).

157. These seven states are: Arizona, Georgia, Indiana, Maryland, Massachusetts, Rhode Island, and Tennessee. In addition, Indiana's Lake County Commission includes a provision that dictates diversity among commissioners. See JUDICIAL MERIT SELECTION, *supra* note 9, at 18.

158. The seven states are: Arizona, Iowa, Maryland, Minnesota, Missouri, Rhode Island, and Utah. In addition, Indiana's Lake County Commission includes a diversity provision for applicants. *Id.* at 18-19.

159. UTAH JUDICIAL COUNCIL, APPLICATION FOR JUDICIAL OFFICE: INSTRUCTIONS FOR THE APPLICANT AND SUMMARY OF THE NOMINATION PROCESS 11, available at <https://www.utcourts.gov/resources/forms/apps/judapp/judapp062504.doc> (last visited Feb. 13, 2007).

harms the process, as it indicates a lack of respect for applicants. Nonetheless, only ten jurisdictions include any rule against discrimination.¹⁶⁰

Although many commissions may informally weigh the value of diversity as they consider the applicants, efforts to address the role of diversity and to ensure that all applicants are treated with courtesy and respect are valuable not only insofar as they help commissioners understand the importance of diversity in decision-making, but also because they promote public trust and confidence in the process.

Voting Procedures

Once commissioners have reviewed the applicants' qualifications and background, they must determine the list of final recommendations that will be sent to the appointing authority. Although this may be accomplished informally and commissioners may reach consensus, many commissioners find this final step of the commission's work a source of frustration and confusion.¹⁶¹ This is particularly true for new commissioners or those who serve on commissions with few opportunities to fill vacancies. Confusion and frustration can be avoided if the commission has explicit voting procedures. Generally, commissions do not have pre-determined written voting procedures in place. Procedures vary widely from commission to commission and, in some cases, a single commission will use different balloting techniques at different times.¹⁶² One Missouri commissioner described commission voting procedures in this way:

In reducing the list to the three persons to be submitted to the Governor, no standard procedure is followed. Sometimes the commissioners rank the entire list of names according to their preferences, using a preferential ballot type of procedure. At other times the commissioners each vote for three persons of their choice.¹⁶³

Furthermore, although most commissions use a secret ballot, commissioners, rather than the constitutional or statutory lan-

160. Jurisdictions that include a rule prohibiting discrimination in commission deliberations are: Colorado, Delaware, Hawaii, Iowa (for the magistrate nominating commission only), Nebraska, Nevada, New York (for most New York nominating commissions, but not all), Oklahoma, Utah, and Vermont. JUDICIAL MERIT SELECTION, *supra* note 9, at 18-19.

161. See GREENSTEIN & SAMPSON, *supra* note 107, at 155.

162. ASHMAN & ALFINI, *supra* note 1, at 57.

163. WATSON & DOWNING, *supra* note 80, at 103-04.

guage, usually determine this practice.¹⁶⁴ In a few cases, commissioners are required to vote publicly. In Nebraska, commissioners are required to take an oral vote as a result of a constitutional amendment adopted in 1972 following allegations of so-called “panel-stacking.”¹⁶⁵ Alaska adopted open voting in 1967 after all seven commissioners expressed support for a candidate, but the secret balloting process resulted in only three members voting in favor of that candidate.¹⁶⁶

The degree to which commission voting procedures are specified in writing varies widely. In at least eleven of the thirty-two states that use commission-based appointment, there are no written voting procedures and commissions have complete discretion to determine how they ultimately come to a decision about which applicants will be recommended to the appointing authority.¹⁶⁷ Among those states that have written voting procedures, Iowa,¹⁶⁸ Nebraska, and Rhode Island have developed the most extensive provisions.¹⁶⁹

V. FINDING A SET OF BEST PRACTICES

If commission-based appointment is to be successful, considerable attention needs to be paid to developing the procedures that govern commission deliberations and decision-making at every stage of the process. Standardized operating procedures can enhance public confidence in the process and ensure that commission recommendations are based on consistent, fair, and responsible evaluation of applicants. Understanding commission procedures and fostering good decision-making practices can help guarantee

164. ASHMAN & ALFINI, *supra* note 1, at 58.

165. “Panel-stacking” is described by Watson and Downing as “any form of panel selection wherein the nominating commission, through the choice of a particular combination of nominees, seeks to preempt the appointing function, or where the commission accedes to the governor’s express wishes by nominating the person he desires to appoint.” WATSON & DOWNING, *supra* note 80, at 103.

166. ASHMAN & ALFINI, *supra* note 1, at 157.

167. This is based upon a review of commission voting procedures collected as part of the Judicial Selection in the States Project. *See generally* THE AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE STATES (unpublished, on file with The American Judicature Society).

168. Individual commissions develop their procedures, based in large part upon the HANDBOOK FOR IOWA JUDICIAL NOMINATING COMMISSIONERS developed by the Supreme Court Council on Judicial Selection. The Iowa recommendations include a detailed explanation of voting procedures that are effective. *See* GREENSTEIN & SAMPSON, *supra* note 107, at 154-55.

169. These provisions are not included here, but are available in GREENSTEIN & SAMPSON, *supra* note 107, at 163-66.

that the goals of commission-based appointment are achieved. To that end, this final part is devoted to recommendations for what a set of best practices might look like.¹⁷⁰

First, it is of paramount importance that the rules and procedures for nominating commissions be committed to written language, outlining not only the membership and the ultimate goals of the commission, but indicating the process by which commissioners will evaluate applicants, including conflict of interest provisions, ethical guidelines, deliberative procedures, voting methods, and confidentiality provisions—in short, how the pickers will pick. Written provisions specifying procedural rules will not only help the public understand the process, but will guarantee that applicants understand how the commission makes decisions.

Furthermore, new members should be introduced to the rules and procedures upon joining the commission. Although commission work may appear to be straightforward, new commissioners will be unfamiliar with the practices (both formal and informal) used by the commission. New lay members may also feel intimidated by the legal community and can benefit from the opportunity to learn about the process from existing commissioners who can explain the responsibilities and operation of the commission. This can be accomplished in two ways. First, commissioners may be required to attend regular training workshops where they are encouraged to get to know other commissioners and spend time thinking about and developing commission procedures. Arizona currently holds workshops for judicial nominating commissioners, as required by state statute:

The Chair shall call at least one meeting each year of all Commissioners for the following purposes:

Orienting Commissioners about Commission procedures and purposes as stated in Rule 1 and a Commissioner's role in accomplishing that purpose.

Reviewing commission action during the preceding year including information about nominees and appointees and statistical information about applications, nominations and appointments relative to the constitutional goal of diversity and such other matters as the Commission deems appropriate. Such statistics shall be compiled from information obtained in the applications.

170. The best resource for those who hope to improve commission decision-making is Greenstein and Sampson's *HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS*. See generally GREENSTEIN & SAMPSON, *supra* note 107.

Educating Commissioners about means of improving the judicial nominating process through presentations by knowledgeable individuals and representatives of community organizations.¹⁷¹

To better educate commissioners and the public about the nominating process, commissions can also hold an organizational meeting that is open to the public.¹⁷² This meeting can serve as a means to educate commissioners about their ethical responsibilities, to establish uniform procedures that will guide the commission's work, and to anticipate some of the problems that may lie ahead.¹⁷³ During this organizational meeting, the chair may outline the legal obligations of the commission, the ethical standards that will govern the commissioners, the procedures that will be used, the method of record-keeping that will be used, the rules of confidentiality that are in place, the evaluative criteria that will be applied during commission decision-making, the methods that will be employed for investigating applicants' backgrounds, the interview process, and commission voting procedures.¹⁷⁴ Provided this meeting is open to the public, it can also serve as a way for the public to gain insight into the process and learn about the commissioners and the role they play in the judicial system.

Although most commissions do not have explicit rules governing confidentiality of information collected about the applicants, each commission should have specific written policies that will determine what information will be used during the evaluation process and the extent to which applicants' files are available to the public. The state may opt to include these provisions in the statutory or constitutional language, but may also require each commission to establish these rules at their own discretion. If commissions are allowed discretion to adopt their own rules of confidentiality, there is a tendency to craft broad waivers that applicants must sign, thus allowing the commission a nearly unlimited right to obtain information about the applicants.¹⁷⁵ Similarly, commissions with the discretion to craft their own rules will often opt to keep commission proceedings entirely confidential, thereby limiting public knowledge of the process and the applicants. This limits accounta-

171. AZ. UNIF. R. P. FOR COMM'NS ON APP. & T. CT. APPOINTMENTS Rule 5.

172. GREENSTEIN & SAMPSON, *supra* note 107, at 32-33.

173. *Id.* at 33-34.

174. *Id.* at 35-37.

175. Narrowly crafted waivers, however, will generally be more acceptable to potential applicants and therefore will increase the pool of applicants. *Id.* at 19.

bility and can undermine the public's confidence in the process. Finally, if commissions are allowed to create their own rules, there is a risk that standards for confidentiality may differ dramatically among commissions, even within a single state. For all of these reasons, it is beneficial to include confidentiality rules in state law both to ensure effective implementation and guarantee uniformity of confidentiality rules. Uniform provisions established by state law provide the added benefit of creating systematic accountability insofar as they codify the commissioners' responsibility to act in a way that is consistent with legislative intentions.

Just as confidentiality provisions should be committed to writing and every effort should be made to guarantee that commissioners are applying them consistently across the state, rules governing ethical conduct and conflicts of interest should be adopted on a statewide basis and codified into law.¹⁷⁶ To encourage commission ethics, states can require commissioners to take an oath of office.¹⁷⁷ Although oaths of office are rarely employed for nominating commissioners,¹⁷⁸ they emphasize the importance of professional conduct and help create a culture of responsibility and accountability. Similarly, states should develop a code of ethical conduct that governs the behavior of commissioners and promotes public accountability. The code of ethical conduct should also explicitly include provisions governing conflicts of interest and how commissioners are expected to act when conflicts arise.

Conflict of interest rules should be comprehensive, and should include unambiguous definitions of what constitutes a conflict of interest, the responsibility of the commissioner to disclose a conflict when it occurs (and to whom the commissioner shall disclose the information), and the ramifications of a conflict of interest (i.e. if a conflict exists, will a commissioner still be allowed to participate in interviews with other applicants for the same position?). In addition, conflict of interest provisions should include mechanisms to force a commissioner to recuse herself if other commissioners perceive a conflict of interest and methods to provide accountability should a commissioner fail to report a conflict of interest or recuse herself in a situation where a conflict exists. This accounta-

176. *Id.* at 4-5.

177. *Id.* at 5.

178. Currently nine states and one jurisdiction in Colorado require commissioners to take an oath of office upon joining the nominating commission. JUDICIAL MERIT SELECTION, *supra* note 9, at 18.

bility could take many forms, but would most likely include a separate board that would review allegations or complaints.¹⁷⁹

As commissioners receive applications and proceed to collect background information on each candidate, written rules regarding the applicant questionnaire, the scope and methods of investigation, and the procedure to determine which applicants will be interviewed will help promote effective and fair deliberations.¹⁸⁰ Applicants need to be aware of the process, and commissioners need to establish norms of procedure that will be used for all applicants. Although nearly all commissions currently solicit information from standardized candidate questionnaires,¹⁸¹ investigation techniques and sources of information used in the evaluation of applicants vary widely.¹⁸² Applicants will generally feel more comfortable participating in a screening process that is narrow in focus; this will also require commissioners to think carefully about the relative value of information gleaned from tax records, law enforcement records, bar association polls, judicial disciplinary bodies or bar disciplinary bodies, professional colleagues, and individuals within the community, among other sources of information, to determine what information is most useful in assessing the applicant's suitability for judicial service.¹⁸³ To facilitate fair and efficient consideration of applicants, commissioners should establish a standard set of sources and a standard set of questions that will be used in the investigation stage, while still recognizing that they may encounter unusual circumstances that will necessitate the collection of additional information.¹⁸⁴ Furthermore, commissioners should set up uniform methods of obtaining information that will be used for all applicants and should set up a timeline for the investigatory process.¹⁸⁵

Once the investigation is complete, commissioners need to screen applicants to determine who will be interviewed. In some

179. Just as states have a body that reviews ethical complaints against judges under the state Code of Judicial Conduct or have state bar associations that assess ethical complaints against lawyers in their jurisdiction, this board would be responsible for implementing the ethical rules established for commissioners. In addition, states could create an advisory board that offers advice to commissioners unsure about whether a conflict exists in a certain situation, analogous to state judicial campaign conduct commissions for judicial candidates.

180. GREENSTEIN & SAMPSON, *supra* note 107, at 105-10.

181. MARTIN, *supra* note 60, at 52-56.

182. *Id.* at 61-62.

183. GREENSTEIN & SAMPSON, *supra* note 107, at 108.

184. *Id.* at 109.

185. *Id.*

cases, the commission is required to interview all “qualified applicants,” but most states give the commission discretion to determine how many interviews to conduct.¹⁸⁶ For obvious reasons, a greater number of interviews usually means that each interview will be shorter and therefore will offer less opportunity to get to know the applicant. Previous commission experience can assist in finding a balance in selecting applicants to interview and help facilitate a process that allows commissioners enough time to make the interview useful.¹⁸⁷ To avoid the appearance of impropriety, the interview schedule should be random and each interview should be conducted by the full commission.¹⁸⁸ Questions should be composed in advance and every applicant should be asked the same questions by designated commissioners.¹⁸⁹ In writing interview questions, care needs to be taken to avoid issue-based or politically charged questions, to give the applicant an adequate opportunity to volunteer information,¹⁹⁰ and to phrase questions in a way that will generate meaningful responses.¹⁹¹ Finally, thorough preparation for the interview process will include discussion among commissioners to determine how they will deal with difficult interviews, inappropriate questions, or comments. Preparation also includes developing individually tailored questions to address any concerns that have arisen during the screening and investigation stages.¹⁹²

Once the interviews have been completed, commissioners need to determine which applicants will be recommended to the appointing authority. During these final deliberations, commissioners should be free to speak candidly and openly about their

186. MARTIN, *supra* note 60, at 12. Despite this discretion, conversations with commissioners indicate that many commissions have established a norm of interviewing all candidates who apply. In an extreme example, this has led to fifteen minute interviews with each applicant in one state. *Id.*

187. GREENSTEIN & SAMPSON, *supra* note 107, at 110.

188. *Id.* at 132.

189. *Id.* at 133.

190. Open-ended questions give applicants a better chance to explain their approach to legal questions and will yield more useful information. Commissioners report that a common frustration is the interview where the interviewer talks too much. One commissioner advises that “if you talk more than 15% of the time you are not conducting a competent interview. The interviewee, the candidate, should talk 85% of the time.” The American Judicature Society recommends that commissioners also include a question that allows the applicant to add any additional relevant information. *Id.*

191. *Id.* at 133-34.

192. *Id.* at 133-36.

assessments, both positive and negative.¹⁹³ To facilitate a frank exchange of ideas, most commissions meet in closed session.¹⁹⁴ The chair of the commission, while overseeing this discussion, should make sure that all commissioners have an opportunity to speak and that no one commissioner dominates the conversation. Following deliberations, the commission's vote should be conducted according to pre-established procedures. The American Judicature Society recommends a successive majority voting method because it increases the chances that the result will be decisive.¹⁹⁵

Nominating commissions should be governed by well-designed and well-documented processes as they play a fundamental role in creating and maintaining a fair and impartial judiciary that inspires public trust and confidence. At the very least, state policy-makers should carefully consider not only the membership of nominating commissions, but the procedures that are used to make commission decisions. Taken as a whole, a well-structured process will not only make the commissioners' job more efficient and more effective, but will ensure that commission-based appointment systems are able to fulfill their role with a minimum of confusion, frustration, distrust, or impropriety. If we seek to develop a commission-based appointment system that will achieve the lofty goals we have set, we must recognize the importance of institutional operating procedures and the ways that they can structure decision-making. Good processes will yield good decision-making, and working to implement the best set of procedures will serve us well as an investment in the future of our state judiciaries.

193. *Id.* at 154.

194. *Id.*

195. Iowa recommends a successive majority method, and Nevada and Rhode Island have both adopted the practice. *Id.* at 156-57.