

Part I: Designing a System to Build Public Confidence

A merit selection system that reduces the role of politics while promoting transparency and ensuring broad, nonpartisan participation will boost public trust, increase the quality of justice, and help deter political attacks on the courts. But designing a merit selection system, or working to improve an existing system, requires important choices on many detailed questions. There are several specific features that can influence how a system works in practice, and how the public perceives that system.

Selecting Judicial Nominating Commissioners

The task of a judicial nominating commission is to solicit applications for judicial vacancies, to screen and interview candidates, and to recommend to the governor the most qualified candidates for appointment to the bench. At its core, the quality of any merit selection process will depend on the quality of its judicial nominating commission. In order to function effectively, the commission should combine professional expertise, representation of the community, and a broad consensus among its members to prioritize legal qualifications over political affiliation or special interest concerns.

In most states, commissions are made up of both lawyers and non-lawyers. Lawyers are elected either by members of the state's bar association or more broadly by all of the licensed attorneys in the state, and non-lawyers are appointed by the governor, by the state legislature, by legislative leaders, or by some combination thereof. This mix of lawyers and non-lawyers seeks to bring the expertise of those most familiar with the law into the process and to guarantee that the voice of the public is represented.

The balance between lawyer and non-lawyer members on a nominating commission, and the role of the state bar in selecting lawyer members, is not an uncommon subject for criticism by detractors of merit selection. This may be a particular concern for some policymakers. However, our research indicated that while voters are keenly interested in who sits on the commission and how they are selected, voters do not have a strong preference for a lawyer or a non-lawyer majority, as long as a diverse array of professional backgrounds is represented. (See more on this topic in Section II). It is noteworthy that the American Judicature Society's recent survey of nominating commissioners demonstrates that lawyer and non-lawyer commissioners alike respect each other's perspectives in this collaborative dynamic.



As of January 2014, merit selection is in use in some two dozen states across the country:

- Alaska
- Arizona
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Florida
- Hawaii
- Indiana
- Iowa
- Kansas
- Maine
- Maryland
- Massachusetts
- Missouri
- Nebraska
- New Hampshire
- Oklahoma
- Rhode Island
- South Dakota
- Tennessee
- Utah
- Vermont
- Wyoming

More important to voters than the ratio of lawyers to non-lawyers is a nominating commission that is professionally, politically, geographically, and demographically diverse. Requiring a mixture of lawyers and non-lawyers, as described above, ensures some professional diversity. To ensure political diversity, some jurisdictions require partisan balance on the commission. For instance, Kentucky's system allows the governor to make four appointments, but requires that two commissioners be appointed from each of the state's two largest political parties. It is more common, however, for merit systems to prohibit the consideration of partisanship in selecting commissioners. To ensure geographic diversity, there may be a requirement that commissioners be appointed from each of the state's judicial or congressional districts. Finally, most states use aspirational language to target demographic diversity, but some require an almost equal mixture of men and women.

Recommendation: Best practices outlined in the American Judicature Society's Model Judicial Selection Provisions recommend four attorneys, who should be selected by all of the licensed attorneys in the state, and three non-attorneys appointed by the governor, with no more than a bare majority from any one political party, plus due consideration for geographic and demographic diversity. Advocates may consider proportionally increasing these numbers to allow for commissioners to be selected from each of the state's judicial or congressional districts.

Promoting Transparency and Accountability in the Process

We know from our research that transparency within the nominating commission process is critical for building public support for a merit system. Sometimes commissions must deliberate away from the public eye. Applications and commission investigations can include a great deal of sensitive information and some argue that highly qualified applicants may be discouraged from applying if they fear that

the process will subject them to excessive public scrutiny. In some states, commission deliberations and voting are confidential in order to promote a frank and candid conversation about the relative strengths and weaknesses of individual applicants. But this confidentiality may also hamper public understanding of the process and could invite mistrust and criticism, particularly among underrepresented communities who fear that their members are not receiving due consideration.

Overall, there is a trend toward transparency in judicial nominating commission procedures. By far, the most open process is in Arizona, where every stage of the commission's work is open to the public. A number of other states, including Iowa, Kansas, and Missouri, have recently opened up their nominating process. There, commissions make portions of the applications public and open commission interviews of candidates for the bench to the public. Finding the appropriate balance between accountability and confidentiality is a difficult process, and all efforts should be made to ensure clear standards and expectations about what will be public and what will not.

Recommendation: To maximize public support for your system, nominating commissions should publish written procedures—ideally, on an open web site—for how they will operate. This will help demystify the process for applicants, the legal community, and the general public. Commissions should make public their criteria for evaluating the qualifications of potential judges. Written ethics provisions dictating the process for dealing with conflicts of interest, guaranteeing diversity, and prohibiting discriminatory behavior can similarly guard against ad hoc practices or political influences that would undermine the commission's nonpartisan role. To maximize public trust, commissions should also make public the names of applicants and should open the interview process to public viewing, whether holding open meetings or broadcasting interviews online.

Focus on Diversity

Diversity is a key value for the public when it comes to a merit selection system. To inspire public trust, a merit selection system should actively marshal resources and tailor the judicial selection processes in order to attract a diverse pool of applicants to the state bench. In some places, the perception exists that merit selection works against people of color and others from diverse communities. Include leadership and key stakeholders in designing reforms and planning campaigns to help build support for merit selection. You may be able to bolster support by tailoring your proposal to ensure a more diverse nominating commission and a more transparent process.

Here are some considerations:

- Establish policies for increasing diversity among nominating commissioners themselves. For instance, New Mexico provides that commissioners “shall be appointed such that the diverse interests of the state bar are represented” and charges the Dean of the University of New Mexico Law School with deciding if those diverse interests are represented. California specifies that the nominating commission “shall be broadly representative of the ethnic, gender, and racial diversity of the population of California,” while Iowa clarifies that “no more than a simple majority of the members may be of the same gender.
- Make judicial diversity a stated value for the commission and clarify how diversity should be considered during the nominating process.
- Build in accountability mechanisms that are appropriate and feasible within the local context. Accountability mechanisms can include annual reporting, robust record keeping, and/or identifying a person, such as the chair of the commission or an appointed ombudsman, who is accountable for reviewing diversity efforts.
- Reach out to local minority bar associations early in the process of either defending or advancing a merit selection system.
- Once a merit selection system is established, rules, procedures, and practices of the nominating commissions will be instrumental in ensuring a diverse applicant pool. As a matter of best practices, it is important for nominating commissions to:
 - Add systematic recruitment to their repertoires. This may include training commissioners to think and function as “headhunters” as well as simply background-checkers.
 - Ensure that current and future judicial vacancies are announced promptly, publicized widely, and actively promoted among underrepresented communities.
 - Engage local minority bar associations in the judicial selection process.
 - Grapple fully with implicit bias and seek to mitigate its effects.

Evaluating Judicial Performance

Most voters know little about those who are elected or appointed to the bench, so it is vitally important to create mechanisms that provide voters and the general public with reliable and unbiased information about a judge's performance. These mechanisms avert politically motivated attacks on the judiciary by focusing attention on the professional responsibilities of a judge, while also serving to inform the public about the work of the courts more generally. They can also encourage professional reflection and self-improvement among judges.

Evaluation criteria often include efficiency in managing a caseload, how often the judge is overturned on appeal, and the degree to which the judge exhibits professional knowledge, as well as temperament and demeanor, fair and

impartial decision-making, communication skills, and respect for those who appear before her or him in court.

Several states have implemented judicial performance evaluation (JPE) programs that rely on surveys of court personnel, jurors, social service providers who appear in court, attorneys, and the parties who appear before the judge. The administering body should be nonpartisan and composed of both attorneys and non-attorneys who compile the information and disseminate it to the public. Although judges may resist performance reviews, the process can yield greater public confidence, make for a more informed electorate (provided the system includes retention elections), and minimize the worst effects of politicization due to unpopular decisions.

“States should look to reforms that take the political pressure out of the judicial selection process. I have advocated the system used in my home state of Arizona, where a bipartisan nominating committee recommends a pool of qualified candidates from which the governor appoints judges to fill vacancies.”

- Retired U.S. Supreme Court Justice and Justice at Stake Honorary Chair, Sandra Day O'Connor

Recommendation: Merit selection should be paired with a robust JPE program to reassure the public that judges vetted and selected under the system are meeting high standards of quality, fairness, and impartiality and are continuing to do their job in an ethical and trustworthy manner. In one state, Arizona, a requirement for judicial performance evaluation is written into the state constitution along with its merit selection system for judges. Groups such as the American Judicature Society and the O'Connor Quality Judges Initiative at the Institute for the Advancement of the American Legal System (IAALS), at the University of Denver, can help design quality JPE programs.

Advancing Merit Without Retention Elections

Conventional wisdom has traditionally suggested that retention elections are a critical component of a successful effort to advance merit selection, particularly in a state where voters currently elect judges. In order to persuade voters to give up their ability to select judges in head-to-head races, the argument goes, retention elections must be provided to assure voters that judges will be held accountable and they will have a meaningful say in the process.

Unfortunately, recent history shows that retention elections, like contested judicial elections, are not immune to the spread of special interest spending. In Iowa in 2010 and in both Iowa and Florida in 2012, retention races were the targets of significant partisan political campaigning expenditures. In these cases, special interests actively campaigned to unseat judges for issuing state constitutional rulings that had outcomes they opposed. Because of these political fights, fair courts advocates have become increasingly interested in finding a solution for advancing merit selection without retention elections.

The good news is that our polling shows that there is a realistic path to victory to advance merit selection without retention elections (see Figure 1), as long as voters can be confident

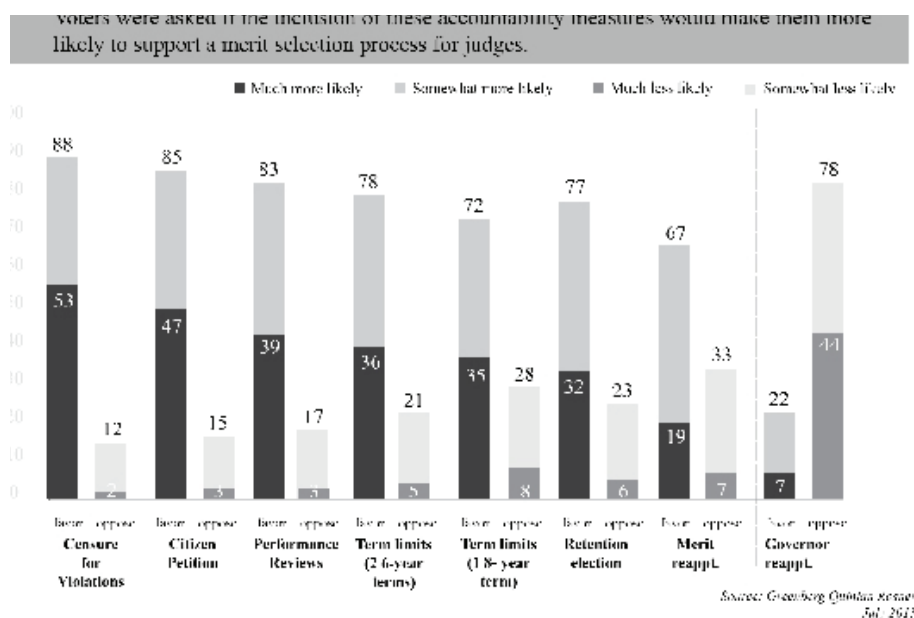
that the merit selection process results in the most qualified judges, and that there are safeguards in place to ensure that judges remain ethical and trustworthy. In short, what is critical is to have policies in place that reassure voters that the highest-quality judges are being appointed and kept on the bench, while weeding out those who have not performed well.

In total, there are 11 states plus the District of Columbia that select judges through merit selection and use methods other than retention elections to determine whether sitting judges will remain on the bench. The alternatives are varied:

- In Rhode Island, judges are appointed for life.
- In Massachusetts, judges are appointed to serve until mandatory retirement age of 70.
- Judges appointed to the New York Court of Appeals (the state's high court) may reapply to the nominating commission and compete with other applicants. The governor may reappoint the incumbent or may choose a different nominee, subject to confirmation by the state senate.
- Hawaii allows for reappointment by the nominating commission.

Figure 1
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Figure 2
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Voters we polled expressed a strong preference for reappointment either through the nominating commission, by the appointing authority (typically a governor) or by a judicial performance evaluation commission based on review of the judge’s record in office. They found this option far preferable to granting judges a single, long term.

If you hope to advance merit selection without retention elections, the first step toward reassuring voters that merit selection is the right alternative is to continue to use messages like those outlined in this guide — messages that explain to voters that judges chosen through merit selection are indeed ethical and trustworthy, and that their decision-making will remain fair and impartial.

Also, absent retention elections, voters must be confident that there are effective accountability measures within the system, such as judicial performance evaluations and a clear process for removing judges for misconduct and ethical violations, to ensure judges are held to high standards of ethics and trustworthiness (see Figure 2).

“My goal is transparency. That is so important in the process that the government operates under. We are left with no comparisons, no way of knowing the quality of the applicants.”

-Dolores Furtado, president of the Kansas chapter of the League of Women Voters, criticizing Gov. Sam Brownback for eliminating a transparent merit selection process for his state’s Court of Appeals

Part II: Speaking to Voters about Merit Selection

As an advocate for fair courts reading this guide, you likely fall into one of two categories: you are either fighting against efforts by politicians and special interests to weaken or dismantle merit selection, or you are attempting to convince voters to adopt merit selection as an alternative to the status quo.

In either of these scenarios, it will be critical for you and your campaign to use effective, tested messages when educating voters about why merit selection is the best system for securing fair and impartial courts. The good news is that our research findings are clear: when people hear both sides, they find our messaging in support of merit selection far more persuasive than messages used to promote other forms of judicial selection.

Low Level of Public Engagement: A Challenge and an Opportunity

Across the board, we find that judicial selection is simply not a top-of-mind issue for the vast majority of Americans. In our research, most voters expressed satisfaction with how their state court judges are selected. Voters also expressed overall general approval for their state supreme courts. But voters had little passion for either subject: support was soft, with most saying they “somewhat approve” of the job the court is doing and most saying they are “somewhat satisfied” with how their judges are selected.

The challenge for advocates encountering this low level of public excitement about the courts and judicial selection is to use education to fill any knowledge and enthusiasm gaps that exist. Positive messages regarding the merit system will arm advocates with many of the tools they need. Examples of harms and abuse under election or gubernatorial appointment systems, culled from current events, are critical. Most importantly, when confronted with messages on both sides, voters overwhelmingly support merit selection.

Describing Merit Selection

Given the lack of voter engagement and knowledge, advocates need a clear, simple way to describe merit selection to voters who may be unclear about the process. Here is what emerged from our research as the best option:

Merit selection is a process where potential judges apply to a nonpartisan nominating commission that conducts interviews, reviews candidates’ records, and sends a list of the most qualified finalists to the governor, who then appoints one of them to the bench.

If retention elections are also part of the system, add:

- After each term, a judge faces a retention election, where voters have the opportunity to vote yes or no on whether to keep him or her for another term.

One message that was well-received describes merit selection in this familiar way:

- “Merit selection is like a rigorous job interview. Judges apply to a commission that interviews