

**THE SELECTION OF STATE COURT JUDGES:
REVIEW OF PRIMARY METHODS AND
PRINCIPAL IMPLICATIONS**

REPORT

TO

**THE ALABAMA APPLESEED
CENTER FOR LAW AND JUSTICE**

DECEMBER 12, 2001

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Table of Contents

	<u>Page</u>
I. INTRODUCTION AND EXECUTIVE SUMMARY	3
A. Scope and Methodology	3
B. Summary of Basic Methods.....	4
II. REVIEW OF JUDICIAL SELECTION METHODS.....	7
A. Preliminary Considerations.....	7
B. “Pure” Appointments	8
C. Partisan Elections.....	14
D. Non-Partisan Elections.....	18
E. Merit Selection Plans	22
III. SPECIAL NOMINATING COMMISSION MATTERS	26
A. Illustrative Approaches to Composition	27
B. Illustrative Special Functions.....	28
IV. IMPLICATIONS OF LENGTHS OF TERMS.....	28
V. SUMMARY OF THE SOUTHERN STATES.....	31
VI. LIMITATIONS OF JUDICIAL CAMPAIGN REGULATIONS	32
A. Regulations on Speech and Related Conduct	33
B. Regulations on Campaign Financing Matters.....	34
VII. GUIDEPOSTS FOR CONSIDERING A SELECTION METHOD	37
 APPENDICES:	
Charts Identifying the Selection Methods Used by States for Different Levels of Judges and Different Terms of Office.....	1
Individual State Profiles of Selection Methods and Certain Demographic and Other Illustrative Data	2
Collection of Major Studies and Articles about Judicial Selection Methods (Separately Bound)	

I. INTRODUCTION AND EXECUTIVE SUMMARY

This Report is prepared at the request of the Board of Directors of The Alabama Appleseed Center for Law and Justice (the “Center”) to review and analyze the various methods for selecting judges used by states throughout the United States.

A. Scope and Methodology

In preparing this Report, we researched the constitutional and statutory bases for judicial selection and retention methods in each of the 50 states. We also reviewed extensive written materials on judicial selection methods prepared by legal and political scholars, bar organizations, public interest groups, and other commentators. This Report synthesizes the principal analyses reflected in those materials and, in doing so, seeks to provide the Center a comprehensive discussion of the available methods and the perceived strengths and weaknesses of each.

We were not asked, and accordingly this Report does not undertake, to recommend a preferred judicial selection method. While this Report covers all the principal features of each selection method, we do not provide detailed discussions of the myriad variations that appear among the states. We also did not conduct independent empirical research of the applications by states of their methods.

The Report is structured to highlight the four primary methods used by the states, and the key considerations they raise, in the selection and retention of judges, and to discuss separately other considerations that should inform the proposed work of the Center. In that regard, the discussions after the introduction and summary in this Part I are organized as follows:

- Part II sets forth a detailed and separate description of each of the four basic methods of judicial selection, as well as the primary variations that appear with respect to each of those methods. The section on each method includes a discussion of the reputed strengths or benefits and the perceived weaknesses or detriments of that method, as well as our assessment of practical implications that we believe are confirmed with respect to the use of that method in certain states.
- Part III focuses in more detail on the role and structure of judicial nominating committees, in light of their centrality in the processes of states that use so-called “merit selection plans” to select judges.
- Part IV reviews and discusses certain implications of the length of terms of office of judges in assessing a judicial selection method.
- Part V provides a separate recap of the judicial selection methods used by states in the southern region of the United States in order to highlight that information for the Center.

- Part VI summarizes the major attempts to regulate campaign funding, conduct and related matters in judicial elections, but focuses on the principal issues and practicalities that limit the efficacy of such efforts.
- Finally, Part VII sets forth some guidelines — based on our analyses of the issues raised and factors implicated by the basic methods and their variations — that we believe may be useful to the Center as it considers the relative strengths and weaknesses of judicial selection methods.

Two Appendices are bound with this Report; they are: Appendix 1 — which is a series of three charts that identify all states that use a particular judicial selection method, organized according to (i) the different levels of judges within the state’s judiciary (i.e., trial courts, lower appellate courts, and the supreme or highest level appellate courts) and (ii) the particular term of office being filled (i.e., initial term, renewal or additional term, and mid-term vacancy); and Appendix 2 — which is a series of one-page, individual state profiles that set forth important demographic data about the state as well as a thumbnail summary of how that state selects and retains judges.

A separately bound Appendix to this Report collects several of the major studies and articles relating to judicial selection methods and issues that we considered in preparing this Report.

B. Summary of Basic Methods

There are four basic methods of judicial selection in the United States: Appointment, Partisan Election, Non-Partisan Election and Merit Selection. Most states do not adhere completely to only one method, but rather utilize a combination of methods to handle the range of selection decisions presented by their respective judicial systems. For example, a state may utilize a merit selection plan for selecting judges to an initial full term of office, but provide for executive or legislative appointment of judges to fill mid-term vacancies, and provide for “yes/no” retention elections at the end of a judge’s regular term.

There is inconsistency among scholars and participants with regard to the best method of judicial selection. Each method has its proponents and opponents. Most scholars agree, however, that the fundamental goal of any judicial selection process should be achieving an appropriate balance between judicial accountability and judicial independence, while promoting competence and high quality and maintaining the public’s respect for the judiciary. Each method has strengths and weaknesses for achieving that goal.

The fundamental task posed for the Center in promoting reform of the State of Alabama’s judicial selection processes is to weigh the relative strengths and weaknesses of the available methods in order to determine — in light of important demographic, historical or cultural factors in Alabama — what system is most likely to achieve that fundamental goal. An understanding of the difficulty in achieving the balance that defines this goal is demonstrated by the historical development of the four judicial selection methods and the critics’ responses to each.

1. Appointment Method

The oldest method of judicial selection in the United States is appointment, which developed out of appointment of judges by the King of England. The original 13 states wanted to avoid giving appointment power solely to one individual, however, and thus modified the appointment process to vest the power either in the legislature or the governor with legislative approval. Today, many states still use a version of that appointment method,¹ although very few states use it as their sole method for selecting judges.

Our research identified only five states that use appointment as their primary method for selecting judges, with nine additional states utilizing appointment to fill mid-term vacancies. Each state's appointment method is distinct, ranging from gubernatorial appointment with senate confirmation, to selection by the legislature, to California's "reverse merit plan" (where the governor submits names of appointees to a nominating commission for assessment before the final appointment, but is not necessarily bound to follow the commission's conclusions).²

Proponents of the appointment method tout the benefits of not burdening judges with the demands of an election process, which necessarily include raising money and campaigning. Proponents also contend that appointed judges are more likely to be independent and more qualified than elected judges. On the other hand, opponents of the appointment process claim that it is elitist, compromises the accountability of judges to the public, promotes political favoritism and cronyism, and is less likely to produce a diverse group of judges who reflect the relevant communities.

2. Partisan Election Method

In the early to mid-1800s, as public perception grew that the appointment process was elitist, or at least anti-democratic, a new method of judicial selection rapidly emerged — partisan elections. The emergence of partisan elections is grounded in Andrew Jackson's populist presidency. Every new state after President Jackson's tenure, continuing up to 1958, provided for partisan judicial elections, and the vast majority of the existing states transitioned during that period to some use of that method. Despite the initial popularity of partisan elections, however, it is important to note that only 15 states currently retain any form of partisan election of judges.

Proponents of the partisan election method claim that it makes judges more accountable to the public and, unlike non-partisan elections (which was the next step in the evolutionary development of judicial selection methods), provides cues to voters about a candidate's ideology. Proponents also contend that partisan elections tend to generate higher turn-outs by voters than non-partisan elections, and thus yield results that are more representative of the judicial system's

¹ It is important to note that virtually all current usages deviate from the original appointment model — which we sometimes highlight by referring to it as "pure" appointment — in that they involve some utilization of a nominating commission or other independent body to recommend, review or evaluate prospective appointment candidates. As discussed in Part II.B *infra*, we believe such utilization (if it is binding on the appointer) transforms the process from an appointment method, in the historical pure sense of unilateral action, into a form of merit selection.

² Because of the non-binding nature of that process, this Report does not consider California's process to be a merit selection method. See the discussion in Part II.B *infra*.

constituencies. Despite the resonance of such populist democratic sentiments, no other method engenders as much attack as partisan elections.

Opponents claim that partisan judicial elections erode the public's confidence in and respect for the judiciary, in large part because of problems perceived with campaigning, fundraising, and judges' explicit affiliations with political parties. Opponents contend that, because of these factors, partisan elections do not create accountability by judges to the public at large (as suggested by the proponents), but rather only to narrow constituencies of special interest groups and the leaders of the judge's political party. Opponents also claim that partisan elections are much less likely to produce the highest quality judges, which compromises judicial competence and the public's respect for the judiciary.

3. *Non-Partisan Election Method*

Even as systems using partisan elections were being implemented by more states, many of the above criticisms of that method were emerging, and a third method of judicial selection was evolving — non-partisan elections. Non-partisan election systems attempted to remove, or at least reduce, the perceived control over judges by political party machines and the lack of true accountability of judges to the public at large. A number of states began utilizing non-partisan election methods — the first as early as 1873 — and currently 19 states employ some method of non-partisan elections.

Proponents of non-partisan elections make the same claims summarized above that are made by proponents of partisan elections for superiority over the appointment method; they also add that the elimination of partisanship addresses the criticisms of partisan elections with respect to judges' accountability to special interests. Critics, however, claim that non-partisan elections are not a meaningful improvement on partisan elections, but rather an inferior alternative. Somewhat ironically, critics emphasize the importance of the "voter cues" that in fact had been provided by party affiliation of judicial candidates in partisan elections, claiming that such cues resulted in a more informed electorate. Non-partisan elections do not provide these cues and may result in judges being elected by such arbitrary factors as their position on the ballot or mere name recognition.

As compared to appointment and merit selection methods (the latter being the next method to evolve), critics claim that non-partisan elections face many of the same problems perceived with campaigning and fundraising that are associated with partisan elections. Further, numerous court challenges have also impacted the efficacy of judicial elections and the ability to place constraints on financing practices or candidate conduct that lead to negative campaign problems.

4. *Merit Selection Methods*

The early popularity of judicial elections has given way to merit selection plans, which began to emerge in the early 1900s as the predominant method employed by states to select judges. The defining feature of a merit selection plan is the use of an independent nominating commission (or comparable body) to review and evaluate the qualifications of prospective judges and to submit an approved list of candidates that is binding on the appointer. Today, a form of

merit selection plan is used by 32 states for selecting judges at some level, although the permutations of specific plans vary widely from state to state.

Proponents of merit selection emphasize that it minimizes political considerations in the selection process, eliminates the need for campaigning and fundraising, and results in more qualified applicants who are more likely to exercise independent judgment on the bench. However, the question remains whether merit selection is the panacea for all the problems that have besieged judicial selection processes throughout the years.

There are critics who claim, as some assert with respect to the “pure” appointment method, that merit selection is also elitist and affected by politics, and simply moves those politics behind a different political door. That door is the nominating commissions which effectively determine the persons who can be selected for appointments, and the politics now include the selection of the members of these commissions. Critics claim specifically that the judges selected under merit selection systems most often reflect the political makeup and interests of the nominating commissions, which may compromise important values of inclusiveness as well as popular accountability.

II. REVIEW OF JUDICIAL SELECTION METHODS

Four basic methods are used for the selection of judges in the 50 states of the United States: “Pure” Appointment, Partisan Election, Non-Partisan Election, and Merit Selection. Of the 50 states, five use a Pure Appointment process, nine use Partisan Elections, 12 use Non-Partisan Elections, and 24 use a Merit Selection process as their *primary* method for selecting judges. There are benefits and strengths, and detriments and weaknesses, associated with each method. There are variations among most of the states with respect to how the same method is actually implemented. In addition, different states have experienced certain differences in the practical implications of employing the same methods.

A. Preliminary Considerations

This part of the Report describes each of the above four methods, discusses the reputed strengths and benefits and the perceived weaknesses and detriments of each, and highlights certain practical implications of each that have become manifest over time. These discussions are organized around each method separately, in the order of their emergence in the United States; their order of presentation thus does not indicate our relative assessment of the methods.

As discussed in more detail elsewhere in this Report — and set forth specifically on the charts included as Appendix 1 to this Report — many states use a combination of methods to handle the range of judicial selection decisions they must make. By “primary”, we refer to the method employed to select judges for a full initial term at most levels of the state’s judiciary. Because the number of judges serving on trial courts is much greater than the number of judges on appellate courts, it may be significant if different methods are used for those levels by the same state. Likewise, the different judicial functions involved at those levels within a judicial system may have influenced the selection method adopted by a state for that level. It is important, therefore, to refer to the break-outs in the charts included as Appendix 1 in order to

ascertain which states (and how many) use which particular method to select judges at which level of its judiciary, such as to its highest appellate court as opposed to its trial courts.

The primary focus here is on selection methods for initial or renewal terms of office for judges, and not on processes for filling mid-term vacancies, except where the latter is different in a manner that might be employed to circumvent the purposes of the primary process. There are several instances of such different mid-term vacancy methods being quite important as a practical matter, and these are discussed.

All states have separate levels of judges for trial courts and appellate courts, and most have a two-tiered appellate court system. Some states use different designations for judicial officials at those levels — such as “judge” for trial courts and lower level appellate courts, and “justice” for the supreme or highest level appellate court. Unless otherwise indicated, this Report uses the term “judge” generically to refer to officials on each of these levels. The places where a distinction is made will primarily reflect that a different selection method is being employed for levels in a state judicial system that uses different nomenclature.

Finally, this Report focuses on the selection of judges for major courts of record within a state’s judicial system — that is, courts with substantially plenary jurisdiction to handle matters at a trial or an appellate level, as the case may be — and not courts of highly specialized or limited jurisdiction, such as family courts, municipal courts and magistrate courts, except occasionally as an ancillary matter.

B. “Pure” Appointments

The following 14 states select judges through a gubernatorial or legislative appointment process, without a formal system for binding recommendations from a nominating or review commission, at some level of their judiciary:

- Arkansas
- California
- Maine
- Michigan
- Mississippi
- New Jersey
- Ohio
- Oregon
- Pennsylvania
- South Carolina
- Virginia
- Washington
- West Virginia
- Wisconsin

It is important to note, however, that only five of these states, as identified and discussed below in this section, may fairly be described as using appointments as their primary method for selecting judges.³ Moreover, as discussed below in this section, it is arguable that a “pure” appointment method (which we define for purposes of this Report as not involving the use of any binding input to the appointer from an independent nominating or similar commission) is in fact only employed by the Commonwealth of Virginia.

³ See the discussion in Part II.A *supra* regarding “primary” usages.

1. *Background and Description*

The appointment method for selecting judges has been used for centuries and is the oldest form of judicial selection in the United States.⁴ During the American colonial period, judges in the colonies were appointed by the King of England.⁵ The King's unquestioned power to appoint judges also included the power to control their tenure and compensation.⁶ The American revolutionaries viewed such unilateral and unfettered prerogative as a major deterrent to the development of meaningful judicial independence, which led the framers of the federal Constitution to employ a selection method that diffused the power. Nonetheless, the method they chose for the federal government was appointment of judges by the highest executive official, but significantly, tempered by advice and consent of the highest legislative authority — i.e., the President and the Senate respectively. In addition, judges were granted lifetime appointments without being subject to a reduction in salary.⁷ The framers believed that such a judicial system was an essential component for establishing a republican form of government.⁸

Five of the original thirteen states replicated the federal model of judicial appointment with gubernatorial appointment and legislative confirmation. The other eight states did not, instead giving the appointment power to the legislature. Vesting the power in the legislature was perceived as more democratic, because many viewed delegating such authority to a single executive official such as the president or governor, even though popularly elected, as potentially anti-democratic.⁹

While some scholars advocate steadfastly the superiority of judicial appointment over other selection methods, few states still use it as their primary method for judicial selection. Today, only five states — California, Maine, New Jersey, South Carolina and Virginia — use legislative or gubernatorial appointment¹⁰ as the primary method for selecting judges. The other nine states listed above use appointments only for the purpose of filling mid-term judicial vacancies, and employ another method for their primary selection of judges.¹¹ Of the five states primarily employing appointment, each has distinct procedures that bear little resemblance to the procedures of the other states.

In Maine, the governor appoints all judges for a term of seven years, subject to confirmation by the senate. When the initial term expires, the governor may reappoint the judge,

⁴ Judith L. Maute, *Selecting Justice In State Court: The Ballot Box Or The Backroom?*, 41 S. Tex. L. Rev. 1197 (2000).

⁵ THE FEDERALIST SOCIETY, JUDICIAL SELECTION WHITE PAPERS, available at <http://www.fed-soc.org/Publications/White%20Papers/judicialappointments.htm>.

⁶ *Id.*

⁷ U.S. Const., Art. III.

⁸ JUDICIAL SELECTION WHITE PAPERS, *supra* note 2.

⁹ *Id.*

¹⁰ In discussing appointments in connection with the appointment method in the Report, we refer to the original historical model of an appointer who is not subject to a binding screening or other validation process by an independent non-governmental body. We sometimes refer to it as “pure” appointment in order to clarify or highlight that distinction. Without such a distinction, of course, all non-election methods could technically be viewed as appointment methods.

¹¹ Arkansas, Mississippi, Oregon, Washington and Wisconsin employ non-partisan elections; Michigan, Ohio, Pennsylvania and West Virginia employ partisan elections.

again with senate confirmation. New Jersey takes the opposite approach, with the governor empowered to make initial judicial appointments unilaterally, but required to obtain the advice and consent of the senate to reappoint judges; upon such reappointment, judges serve a quasi-life term until mandatory retirement at age 70.

In Virginia and South Carolina, the legislature appoints the members of the judiciary. All justices and judges in Virginia are chosen by a majority vote of each house of the General Assembly. Supreme Court Justices serve for 12-year terms, while all lower court judges serve eight-year terms. Upon the expiration of the initial term, the judge or justice must be reappointed by the same legislative process in Virginia's bicameral General Assembly. South Carolina has a Judicial Merit Selection Commission that screens candidates for judicial office and reports its findings to South Carolina's bicameral General Assembly. Using these findings,¹² the General Assembly holds a joint session to conduct the vote to appoint the judge by majority vote. Once appointed, the judge serves an initial ten-year term and is then subject to the same legislative process reappointment for additional terms.

California's judicial selection system, while appropriately included in the appointment method category by this Report, differs significantly from the other four states and is a bit of a hodge podge. Among other things, the system operates differently for appellate court justices than for trial court judges. In fact, the system for supreme court and court of appeals justices is sometimes referred to as a "reverse merit plan" because it begins with the governor submitting names to a nominating commission. Moreover, California's constitution provides that all judges be "elected" for a 12-year term; but, in practice, the governor effectively appoints supreme court and court of appeals justices for an initial term, at the end of which all justices must participate in uncontested retention elections for additional terms.

The intricacies of the California system are discussed in some detail in The Federalist Society's Judicial Appointment White Paper,¹³ but are not germane to this Report. The relevant points here are the fundamental features that lead us to classify it as an appointment method. For the supreme court and court of appeals justices, the governor initially selects a nominee whom he or she submits to California's Judicial Nomination and Evaluation Committee ("JNEC"); the JNEC investigates, evaluates and then submits a report on the nominee to the governor; and, assuming no problematic revelations, the governor then appoints the nominee and submits the nominee to the Commission on Judicial Appointments for an essentially ceremonial confirmation process.¹⁴ For trial court judges, the governor generally makes the appointments without either the pre-appointment nomination process with the JNEC or the post-appointment confirmation process with the Commission on Judicial Appointments. If the governor does not appoint a trial court judge when there is a vacancy, candidates may run for the open seat in a non-partisan election. If a sitting trial court judge leaves office less than 83 days before his or her term

¹² South Carolina's process is considered here to be an appointment method, rather than a merit selection plan, because historically, the findings of its Judicial Merit Selection Commission did not appear to be binding on the legislature, and persons not recommended favorably by that Commission could be appointed. It now appears (although the matter is not free from doubt) that recent reforms may have made the screening process binding on the legislature, which if correct would move South Carolina from the appointment method column.

¹³ JUDICIAL SELECTION WHITE PAPER, *supra* note 5.

¹⁴ *Id.*

expires, the replacement judge must be selected in a contested non-partisan general election, and not through an appointment process.

This brief summary of the California system, if it were not otherwise apparent, makes clear that the appointment method permits virtually infinite permutations. In fact, as the discussion in Part II.B.4 reveals, it is arguable that only Virginia currently employs a “pure” appointment method, because all the other states that employ appointment processes have introduced some procedure to augment or check the unilateral exercise of the selection power by the erstwhile single appointment authority. Certain permutations — in particular nominating, screening or qualifications validating commissions — can blur distinctions between putative appointment methods and aspects of merit selection methods. For the sake of clarity, this Report occasionally uses the modifier “pure” to describe the appointment method discussed herein and thus distinguish it from the final action in a merit selection process. This is because, in each merit selection process, some authority in the end makes an appointment of the judge.

2. *Reputed Strengths/Benefits*

The most often cited benefits of the appointment method relate to promoting judicial independence, especially in comparison to methods that employ any form of popular election.¹⁵ The analysis is that an election requires some level of fundraising and campaigning in order to inform the electorate and generate support for the judicial candidate’s election. Raising money for a campaign from third parties creates the risk that the judicial candidate may become beholden or favorably disposed to those who contribute, or may become adversely disposed to those who do not. In either such case, the risk and concern is that the judge might not perform his or her judicial duties in a fair and impartial manner where such third parties’ interests are at stake. The potential significance of that point is enhanced by considering that attorneys, who appear as advocates before the judge, will have been contributors or non-contributors.

Beyond such potential influences of money, the analysis continues that the act of campaigning *per se* creates the risk that a judicial candidate may make promises to influence votes that subsequently impair the judge’s impartiality; or, from a different temporal perspective, that it creates the risk that a sitting judge who must seek reelection may decide a matter impartially with a view to its likely impact on voters in the reelection.¹⁶ It is also maintained that campaigning as a process is inherently unjudicial, if not undignified and “crass”, and may both discourage highly qualified and desirable candidates from seeking judicial office, and lessen public respect for judges and the judicial process generally.

The appointment method, it is contended, avoids all such risks.¹⁷

¹⁵ *Id.*

¹⁶ As discussed later in Part VII of this Report, state laws and applicable legal ethical standards seek to regulate aspects of campaign conduct and fundraising by judges and judicial candidates. As a result, the bleakest scenarios for the types of risks discussed above should be deterred by concerns about sanctions for violating laws or legal ethics. However, First Amendment and other constitutional law requirements raise doubts about the efficacy of attempts to regulate all problematic aspects of judicial campaign practices.

¹⁷ JUDICIAL SELECTION WHITE PAPER, *supra* note 5.

Certain proponents and observers also maintain that the appointment method, whether gubernatorial or legislative, may yield more qualified judges, suggesting that a governor’s office or legislature is better situated to evaluate the qualifications of candidates — whether because of greater or more effective investigative resources, more informed perspectives on the relevant requirements, or more time to devote to the decision.¹⁸ Such a contention would appear to be valid, if at all, only with respect to comparison to methods that employ popular elections without any screening or other qualifications validating processes.

3. *Perceived Weaknesses/Detriments*

Critics of the appointment method contend that it is more likely to compromise, rather than promote, judicial independence. They assert that gubernatorial and legislative appointments of judges are inevitably influenced by partisan political considerations, if not outright cronyism and political favoritism. The potential for such influences appear greater with executive rather than legislative appointments, because a governor’s office is monolithic, while a legislature may be sufficiently diverse as to avoid true cronyism. In either case, however, there is the risk that judges will be selected more often because of their political allegiances rather than their judicial qualifications, and that appointments will be used to convey or to curry favors rather than establish and promote a high quality, independent judiciary. If such were to occur, or if large segments of the public were to perceive it to exist, public respect for judges and the judicial process may suffer.

Critics also complain that an executive or legislative appointment process may subject judicial candidates to a politically-charged litmus test as a condition of appointment. For the same reason discussed above, such a risk would be greater with gubernatorial than legislative appointments. In either case, an appointed judge may feel or become pressured to decide cases along political lines, either as political payback for being nominated or as security for obtaining re-appointment.

Critics point to the further risk that a “pure” appointment process may yield a lower quality judiciary because the governor or legislators may not be aware of a large number of highly qualified individuals, even absent the influence of political considerations. In addition, the potential public nature of a legislative appointment processes — with media access to hearings or other deliberative sessions — can lead to political posturing and bickering, media distortions, or sensationalism. Any or all of these developments could adversely affect public perception of the judiciary, taint the tenure of the appointed judge, or discourage certain highly qualified persons from offering themselves for judgeships.¹⁹

4. *Practical Implications*

It is doubtful that a scientifically sound, empirical study can be done on the historical performance of the appointment method. No existing study or analysis even purports to have achieved such status. In the final analysis, all of the commentary is essentially anecdotal — highlighting individual successes or failures — or normative theorizations by legal or political

¹⁸ *Id.*

¹⁹ *See id.*

scholars and commentators. Certain of the individual anecdotes from particular states may be illustrative, however, of the reputed benefits or perceived weaknesses of the appointment method.

In California, for example, concern has recently surfaced over the governor's use of a judicial litmus test. California's current governor, Gray Davis, has been severely criticized for requiring potential judges to personally support the death penalty.²⁰ California's sitting Chief Justice has even expressed concern that judges subject to a litmus test may lose their impartiality by having to consider how a judicial opinion may impact their chances for reelection.²¹

In South Carolina, concerns persist over so-called "vote pledging" despite recent changes in the appointment process.²² Vote pledging is the practice of would-be or actual judicial candidates lining up legislative support for their candidacy, in advance of being proposed for consideration, with the hope of garnering enough "pledged" votes to assure future appointment. Such a practice gives credence to the perceived detriment that an appointment method may elevate factors of political connections over judicial competence and independence. It is important to note, however, that South Carolina has now implemented a procedure that officially prevents judicial candidates from seeking legislative support until after the Report on Judicial Qualifications becomes final. Many critics do not believe this change solves the perceived problem, and they contend that only politically connected individuals have a meaningful chance to receive a judicial appointment.²³

The appointment process in Virginia has also been cited as flawed and riddled with political favoritism. One former Virginia state legislator revealed that appointments were made for incumbent protection and because of party credentials rather than merit.²⁴ Critics have called Virginia's reappointment process a "rubber stamp", asserting that judges are only denied reappointment when there is a tremendous community outcry.²⁵ These perceived problems have prompted Virginia's current Governor, Jim Gilmore, to call for modification of Virginia's current legislative appointment process to a system of gubernatorial appointment subject to legislative confirmation.²⁶

As alluded to above in describing and discussing the background of the appointment method, this method is the least favored among the 50 states, with only five states employing it as the primary method for selecting judges. Moreover, as also revealed above, four of these five states — California, Maine, New Jersey and South Carolina — have deviated from a pure appointment model by having some measure to augment or check and balance the unilateral

²⁰ Harriet Chiang, *Defense Attorneys Accuse Davis of Bias in Handing Out Judgeships*, S.F. CHRON., Feb. 21, 2000, at A1.

²¹ The Constitution Project in January, 2001.

²² Pamela A. Seay, *Selecting South Carolina's Judges*, THE SOUTH CAROLINA FORUM, July-Sept. 1991, at 4.

²³ *Id.*

²⁴ Laurence Hammack, *Lawyer Wins Judgeship On Merits In His Case*, ROANOKE TIMES & WORLD NEWS, May 30, 2000, at B1.

²⁵ Matthew Dolan, *State Looks At Ways To Judge The Judges*, VIRGINIAN-PILOT & LEDGER STAR, Jan. 29, 2001, at A1.

²⁶ Larry O'Dell, *Gilmore Says Governor Should Have More Voice In Choosing Judges*, ASSOCIATED PRESS NEWSWIRE, April 28, 2000.

appointment authority of the executive or legislature. The current governor of Virginia, the fifth such state, has now called for a modification that, if adopted, would leave no state employing a “pure” appointment method.

C. Partisan Elections

The following 15 states employ partisan elections to select judges at some level of their judiciary:

- Alabama
- Illinois
- Indiana
- Kansas
- Louisiana
- Michigan
- Missouri
- New Mexico
- New York
- North Carolina
- Ohio
- Pennsylvania
- Tennessee
- Texas
- West Virginia

It is important to note, however, that only nine of these states, as identified and discussed below in this section, may fairly be described as using partisan elections as their primary method for selecting judges.²⁷

1. Background and Description

The wave of Jacksonian populist democracy in the 1830’s launched the era of an elected judiciary.²⁸ There was a growing public perception that the historical appointment of judges was creating an elitist judiciary that was unaccountable and insensitive to the public.²⁹ The virtue of judicial independence, which underlay the federal Constitution framers’ support of the appointment model, began to be supplanted by the perceived virtue of greater (or at least more direct) public accountability of the judiciary; the latter supported the introduction of “direct democracy” principles into the judicial selection process.³⁰ Regardless of the accuracy of the perception about accountability, the cries for judicial elections became an unstoppable force.

In 1832, Mississippi became the first state to provide for direct election of judges by using the method to elect appellate court judges.³¹ By the Civil War, most states elected both their trial and appellate court judges. While the first 29 states had opted for an appointed judiciary, every new state from 1832 to 1958 adopted a constitutional provision for an elected judiciary.³² Today, however, only seven states — Alabama, Louisiana, Michigan, North Carolina, Ohio, Texas, and West Virginia — select *all* their judges through contested partisan elections and reelections.³³

²⁷ See the discussion in Part II.A *supra* regarding “primary” usages.

²⁸ Maute, *supra* note 4, at 1203.

²⁹ *Id.*

³⁰ JUDICIAL SELECTION WHITE PAPER, *supra* note 5.

³¹ *Id.*

³² *Id.*

³³ New York and Tennessee use partisan elections and reelections only for trial court judges. Indiana, Kansas and Missouri use partisan elections and reelections only for trial court judges in certain counties, and not throughout the state. Illinois and Pennsylvania use partisan elections only for the initial term of trial court judges, and not for

In a partisan election system, judicial candidates and sitting judges who desire an additional term campaign for election or reelection, as the case may be, similar to any other political candidate. There are some differences from non-judicial elections in many states,³⁴ and there are variations among the states that still employ the partisan elections method, but the basic method is popular voting between competing candidates, with party affiliation prominently displayed on the ballot. Some of the variations are described below; numerous others are possible.

In Louisiana, the partisan nature of elections is somewhat tempered because primaries are open to all candidates, so that a candidate may run for a judgeship without nomination from a political party. Also, unopposed judicial candidates are deemed automatically winners, so their names do not appear on the ballot.

In Illinois and Pennsylvania, a candidate must participate in a partisan election to obtain an initial term of office; however, reelections are pursuant to a non-partisan, retention election process. Pennsylvania also has a procedure that permits the governor to make interim judicial appointments subject to the consent of the senate. If the senate fails to make a decision on the governor's interim appointee within 25 days, the governor's appointee takes office but must participate in a subsequent partisan election in order to remain on the bench for his or her initial appointed term. Any subsequent reelection would be pursuant to the Pennsylvania's non-partisan, retention election process.

Political parties play a significant role in Ohio's and Michigan's judicial election process. Ohio judicial candidates must first participate in and emerge victorious from a partisan primary in order to appear as a candidate on the ballot in the subsequent general election; however, the candidate's name appears on the general election ballot without party affiliation. Similarly, in Michigan, despite a constitutional provision for non-partisan elections, judicial candidates are nominated at a party convention and may run with party endorsement, but in the general election the candidate's names appear on the ballot without an indication of party affiliation.

In both Ohio and West Virginia, the governor can appoint an interim judge when a judicial seat becomes vacant. In Ohio, that judge is then subject to a non-partisan, retention election when that interim term expires. In West Virginia, however, the election for a full term at the end of such an interim term is partisan and potentially contested.

2. *Reputed Strengths/Benefits*

Proponents of partisan elections claim three principal benefits or strengths. First, they claim that elections are more democratic than other methods for judicial selection, and assert that greater democracy is a virtue *per se*.³⁵ The analysis is that direct popular election of government

reelections. New Mexico uses partisan elections only for the reelection of judges after their appointment to an initial term pursuant to a merit selection method. See the breakdown in the charts included in Appendix 1 for how states employ combinations of different methods for different selection decisions.

³⁴ In addition to the matters discussed above in this section, see Part VI of this Report for a summary discussion of certain special efforts to regulate aspects of judicial elections.

³⁵ Maute, *supra* note 4, at 1204.

representatives is the hallmark of democracy,³⁶ and that partisan elections are a bedrock of the American electoral process. Therefore, partisan judicial elections are aligned more closely with and reinforce foundational American democratic principles.

Second, they contend that the judiciary should be independent from the other political branches, not from the public it serves, and that an elected judiciary is more accountable to the public.³⁷ They claim that subjecting judges to popular election beneficially pressures judges to behave professionally, focuses public attention and scrutiny on judicial actions, facilitates public debate about the judiciary and judicial behavior, and promotes a perception that the courts are indeed accessible because the campaign process will bring judges out into the community that they will serve.³⁸

Third, proponents contend that making judicial elections partisan by identifying the candidate's party affiliation offers voters an efficient means for predicting a candidate's views on certain issues, and thus leads to a more informed vote.³⁹

3. *Perceived Weaknesses/Detriments*

As might be expected, the principal weaknesses or detriments asserted by opponents of partisan elections resemble the strengths or benefits asserted by proponents of the appointment method, which are discussed above in Part II.B.2 of this Report. The two methods stand as spectral counterpoints to each other.

While unable to deny effectively that a system of popular elections resonates with principles of participatory democracy and public accountability, opponents of the partisan elections method do not sublimate the virtue of judicial independence to the virtue of judicial accountability to the public. Instead, opponents contend that partisan judicial elections actually undermine democratic principles over the long term by eroding the public's confidence in and respect for the judiciary.⁴⁰ The analysis for this point is the same as discussed in Part II.B.2, above, which is that the process of campaigning, raising funds with which to do so, and swaying public opinion to generate votes will lead inevitably to tactics that diminish the integrity and independence of the judicial system. Some critics even contend that contested partisan elections have degenerated into auctions for control of the justice system,⁴¹ creating an appearance that judges can be bought,⁴² and eroding public confidence in the impartiality and fairness of judicial decisions. It is therefore asserted that partisan elections do not foster judicial accountability to the public, but rather to special interest groups, political parties and others who are situated to

³⁶ *To Elect Or Appoint Judges: Difficult Decision For States*, EASTON EXPRESS-TIMES, Oct. 22, 2001.

³⁷ JUDICIAL SELECTION WHITE PAPER, *supra* note 5.

³⁸ http://enquirer.com/editions/2001/03/23/loc_choices_rare_in.html.

³⁹ Maute, *supra* note 4, 1204.

⁴⁰ Editorial, NEWS TRIBUNE (Tacoma, Wash.), Aug. 30, 1998, at B10.

⁴¹ JUDICIAL SELECTION WHITE PAPER, *supra* note 5.

⁴² *Blueprint for the Future of Judicial Selection Reform*, PENNSYLVANIANS FOR MODERN COURTS, July 1999, <http://pmconline.org/blue/text.htm>.

influence unduly successful election campaigns, all of which comes at the expense of judicial independence.⁴³

Opponents also contend, as discussed in Part II.B.2, above, that partisan elections produce less qualified judges than merit selection or appointment methods, including by deterring many qualified candidates who are unwilling to engage in electoral politics, and by subjecting the composition of the judiciary to political adeptness rather than objective qualifications.⁴⁴

4. Practical Implications

It is undisputed that campaign costs, including those of judicial campaigns, have skyrocketed in recent years.⁴⁵ It is not uncommon in highly partisan, vigorously contested judicial elections for candidates to collect hundreds of thousands of dollars in campaign contributions.⁴⁶ The tremendous increase in campaign costs has created some public perception that there may be links between donations and judicial rulings — especially in controversial cases or in cases that oppose the financially powerful against the financially powerless — and that justice may be for sale.

A 1998 poll of Pennsylvanians indicated that 88% of the respondents believed that decisions made by judges in their courtrooms are, at least sometimes, influenced by large contributions made to the judge's campaign.⁴⁷ The potential for such perceptions increases in situations where post-election campaign fundraising is permitted, which occurs when a successful judicial candidate is permitted to continue soliciting funds for a period following the election in order to retire campaign debts. As a result, a judge may be soliciting campaign contributions from the lawyers appearing in his or her courtroom. To some extent, this same aspect of the problem can exist during the period prior to a reelection, especially one that is or can be contested. Regardless of whether a judge is actually influenced in a particular case by past or anticipated future support of his or her election campaign, the possible appearance of impropriety cannot be fairly disputed in a situation where litigants or their lawyers have made (or can make) contributions to the judge's campaign.

Apart from the influence of money, the election of judges exacerbates a widely perceived problem for judicial impartiality in our system of federalism — the phenomenon of so-called “home cooking”, which is the perceived tendency of state courts to be biased against out-of-state defendants in favor of local plaintiffs. While definitive empirical substantiation is not possible, the problem is not totally theoretical or one of perception, as evidenced by the comments of Judge Richard Neely, a member of the West Virginia Court of Appeals. Judge Neely explained his incentives as an elected judge this way:

As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so. It should

⁴³ JUDICIAL SELECTION WHITE PAPER, *supra* note 5.

⁴⁴ http://www.msba.org/sec_comm/lawscomm/legislativeprogram/contested.htm.

⁴⁵ See the discussion in Part VI *infra*.

⁴⁶ *Id.*

⁴⁷ *Blueprint for the Future of Judicial Selection Reform*, *supra* note 42.

be obvious that the in-state local plaintiff, his witnesses, and his friends, can all vote for the Judge, while the out-of-state defendant can't even be relied upon to send a campaign donation.⁴⁸

A study of 7,000 personal injury tort cases lends some support to Judge Neely's views. The study found that awards against out-of-state defendants were, on average, \$268,180 higher in states with partisan judicial elections than in states with non-partisan elections.⁴⁹

In the final analysis, there is scant evidence to support the position that popular elections of judges promote meaningful public accountability of judges. Despite the amounts spent on judicial campaigns, judicial races rarely draw many voters to the polls, a phenomenon that is exacerbated in situations where the ultimate result is effectively decided in primary elections (which is the most prevalent scenario). While there is little tangible evidence of superior quality of judges selected by non-electoral processes, there is no evidence that voters are well-informed about judicial candidates.⁵⁰ The more persuasive evidence that exists suggests that the overwhelming majority of voters have no idea who is running for judicial office; that most voters have little information about judicial qualifications;⁵¹ and that voters may rely more on party affiliation and political credentials than on objective professional qualifications in casting their votes.⁵² In addition, there is the evidence of partiality reflected in Judge Neely's statements and the apparent support thereof from the above study of tort cases. While such a relatively limited study is far from sufficient to prove the case against partisan elections, it does add measurably to the pile.

D. Non-Partisan Elections

The following 19 states employ non-partisan elections to select judges at some level of their judiciary:

- Arizona
- Arkansas
- California
- Florida
- Georgia
- Idaho
- Indiana
- Kentucky
- Maryland
- Minnesota
- Mississippi
- Montana
- Nevada
- North Dakota
- Oklahoma
- Oregon
- South Dakota
- Washington
- Wisconsin

⁴⁸ Dr. Alexander Tabarrok and Eric Helland, *Opinion: Partisan Judicial Elections and Home Court Advantage* http://independent.org/tii/news/tabarrok_courts.html (visited Nov. 27, 2001).

⁴⁹ *Id.*

⁵⁰ Maute, *supra* note 4 at 1204.

⁵¹ *Id.*

⁵² *Id.*

It is important to note, however, that only 12 of these states, as identified and discussed below in this section, may fairly be described as using non-partisan elections as their primary method for selecting judges.⁵³

1. Background and Description

While strong sentiments favoring the popular election of judges endured long after the initial wave engendered by the populism of the Jacksonian era, perceived problems and criticisms did not take long to emerge. As early as 1853, critics claimed that judges had become enmeshed in politics, and that the partisan election system was an utter failure.⁵⁴ The principal complaint was that judges were inevitably selected by political machines, which then controlled the judges and the judicial system, leading to perceptions of judicial corruption and incompetence.⁵⁵ The populist aspiration for the judiciary to be free from the influence of special interests had not been realized. Such criticisms led to the emergence of non-partisan judicial elections, in an attempt to retain populism's brain-child of involving the public directly in the selection of judges, while discarding the bathwater of undue if not corrupt influences by political parties and special interests.

Judicial candidates first appeared on a ballot without party affiliation in, somewhat ironically, Cook County, Illinois in 1873.⁵⁶ While it was the judicial candidates themselves who decided to run on a non-partisan ballot in that first situation,⁵⁷ the appeal of non-partisan judicial elections steadily gained momentum. By 1927, 12 states officially employed non-partisan elections of judges, and that method continues to be used fairly widely today, with the above 19 states currently using non-partisan elections as a method to select at least some of their judges.⁵⁸

It is important to note that only 12 of those 19 states—Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Dakota, Oregon, Washington and Wisconsin — employ non-partisan elections as the primary method for selecting all judges. Four states — Florida, New York, Oklahoma and South Dakota — limit its use to the selection of trial court judges, while Indiana and Arizona use it to select trial court judges only in certain counties of those states. All 19 of these states (except Montana), however, use a form of non-partisan election for the reelection of judges at some level of their judiciary. The charts contained in Appendix 1 to this Report organize the states according to such varied uses for different purposes.

Even when the method is used by several states to elect judges on the same level within their respective judicial systems, the states often employ different implementing procedures, especially in the context of filling mid-term vacancies and permitting opposition to judges who are completing a full term of office for which they were previously selected.

⁵³ See the discussion in Part II.A *supra* regarding “primary usages.”

⁵⁴ AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (1999), available at <http://www.ajs.org/select9.html>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

- In Georgia and Arkansas, non-partisan elections are conducted with the general primary, while in Kentucky, nominees compete in a primary and then the two candidates receiving the highest number of votes are placed on the ballot in the general election.
- In New York and South Dakota, trial court judges are elected in the districts in which they will serve.
- In Maryland, trial court judges are initially selected by a nominating commission and then appointed by the governor, but then face contested non-partisan elections after their term is completed.
- In California, if the governor does not fill trial court vacancies, opposing candidates may compete for the open seat.
- In Mississippi, Arkansas, Wisconsin and Washington, the governor fills a mid-term vacancy without assistance from a nominating commission. On the other hand, vacancies are filled by the governor with nominating commission recommendations in Georgia, Idaho, Nevada, and Florida.
- In Oregon, when there is a vacancy on the Supreme Court, the remaining Supreme Court justices select the person to fill the vacancy for the remainder of the term, and that person must then run for reelection in a non-partisan election to remain in office.

2. *Reputed Strengths/Benefits*

The strengths and benefits asserted by proponents of the non-partisan elections method are identical to those described in Part II.C.2, above, for the partisan elections method, with the following significant addition: the problematic influences of party affiliation and other forms of overt partisanship by judicial candidates are purported to be eliminated.⁵⁹ Moreover, proponents claim that judges selected through non-partisan elections are more competent and qualified, because they run and are elected on their record and qualifications, not because of party endorsement or affiliation.

3. *Perceived Weaknesses/Detriments*

Critics claim that many of the same problems with partisan elections persist with non-partisan elections. They assert that the cost of campaigns for even non-partisan elections is still so high that the perception and risk of judges being compromised or captured by special interests remains as significant factors that undermine public respect for the judiciary.⁶⁰ In addition, critics charge that non-partisan elections actually provide voters with less information upon which to cast their vote.⁶¹ The analysis is that the public remains largely uninformed about judicial candidates, and that removing party affiliation from a judicial candidate's name on the

⁵⁹ Maute, *supra* note 4, 1206.

⁶⁰ *Id.*; *The Price of Justice: A Study of Los Angeles County Judicial Races From 1976 to 1994*, CALIFORNIA COMMISSION ON CAMPAIGN FINANCING (1995).

⁶¹ *Id.*

ballot strips the public of perhaps its only cue about where the candidate may stand on issues the voters may consider to be important. Voters may rely on arbitrary factors such as ballot position or name recognition to cast votes for judges. Candidates with prior or more political experience who have greater name recognition are more likely to prevail, regardless of their comparative judicial-related qualifications.⁶² Critics further claim that voter apathy is more pervasive in non-partisan elections, which, coupled with low voter turnout, confers a substantial advantage upon incumbents.⁶³

4. *Practical Implications*

As with partisan elections, the costs of judicial campaigns in non-partisan elections have escalated, and they are sufficiently high that many of the same concerns discussed in Part II.C.4, above, about the implications of judicial candidates (especially sitting judges) raising campaign funds are also present with non-partisan elections.

In addition, non-partisan elections do provide incumbents with a substantial advantage. Without party affiliation as a possible counter-measure for an opponent, the incumbent's name recognition becomes the major factor for most voters. As a result, incumbent judges are rarely challenged; and, when challenged, incumbent judges are almost always reelected.⁶⁴ The fact that incumbents appear to be almost invincible raises a legitimate question of whether the democratic principles that judicial elections were primarily intended to promote are actually being realized.

There may be no objective, empirical basis on which to answer that question, or to measure all the germane factors. It is clear, however, that actions in certain states reflect retrenchment from the spirit if not the letter of non-partisan elections, as the following situations illustrate.

In Georgia and Montana, merit selection procedures are being employed to circumvent the non-partisan election system.⁶⁵ Both states require judges to be selected through non-partisan elections, but the governor in each state appoints a judge from a nominating commission's list when there is a vacant judicial position. The circumvention occurs when judges conveniently leave their positions shortly before their terms expire, so that the governor may make an appointment to fill the vacancy and allow that appointee to face election as an incumbent with all the benefits that incumbency affords.⁶⁶

In Minnesota, Nevada and North Dakota, the retrenchment has taken the form of restoring aspects of partisanship to judicial elections. Nevada has recently lifted its ban on judicial candidates revealing party affiliation.⁶⁷ In Minnesota, the Republican Party challenged

⁶² *Id.*

⁶³ *Id.*

⁶⁴ http://enquirer.com/editions/2001/03/23/loc_choices_rare_in.html.

⁶⁵ Editorial, *Election of Judges is a Primary Concern*, ATLANTA J. & CONST., July 26, 1998, at 16A; Jim Wooten, Editorial, *System Lets Judges Stay Seated*, ATLANTA J. & CONST., July 26, 1998, at 5G; Jim Wooten, Editorial, *On a Quest for Integrity in Selection of Judges*, ATLANTA J. & CONST., Sept. 1, 2000, at 19A; Editorial, MONT. STANDARD, Feb. 2, 1999.

⁶⁶ Editorial, MONT. STANDARD, Feb. 2, 1999.

⁶⁷ NEV. CODE OF JUDICIAL CONDUCT §5C(1)(a)(ii)NEV. CODE OF JUDICIAL CONDUCT §5C(1) commentary.

the non-partisan nature of judicial elections by voting at its 2000 convention to endorse candidates for the court of appeals and supreme court.⁶⁸ In North Dakota, candidates have openly campaigned in partisan settings in order to attract political support from one party or the other.⁶⁹ Similar practices are undoubtedly occurring in other states.

Indeed, we believe it is fair to say that the expectation of removing partisanship from a popular electoral process is unrealistic. As a result, even in a putatively non-partisan election system, judicial candidates with a *de facto* political base will eventually squeeze out politically unconnected candidates as viable opponents.

E. Merit Selection Plans

The following 32 states employ merit selection with a nominating commission at some level of their judiciary.

- Alaska
- Alabama
- Arizona
- Colorado
- Connecticut
- Delaware
- Florida
- Georgia
- Hawaii
- Idaho
- Indiana
- Iowa
- Kansas
- Kentucky
- Maryland
- Massachusetts
- Minnesota
- Missouri
- Montana
- Nebraska
- Nevada
- New Hampshire
- New Mexico
- New York
- North Dakota
- Oklahoma
- Rhode Island
- South Dakota
- Tennessee
- Utah
- Vermont
- Wyoming

Twenty-four of these 32 states use a merit selection plan method as their primary method for selecting judges.⁷⁰

1. Background and Description

As the allure of popular elections of judges (both partisan and non-partisan) began to wane — under attack by scholars and concerned citizens as abject failures — reformers in the early 20th century turned to so-called “merit plans” as the solution to the worst problems of elections.⁷¹ Albert Kales, a Northwestern University law professor, is credited with developing the first merit selection plan in 1914.⁷² In 1937, the American Bar Association endorsed a form of merit plan. And, in 1940, Missouri became the first state to adopt a merit selection plan,⁷³ which has led to such a plan being commonly referred to as a “Missouri plan”. Some form of a

⁶⁸ *Republican Party of Minn. v. Kelly*, 247 F.3d 854 (8th Cir. 2001), *cert. granted in part*, 70 U.S.L.W. 3269 (U.S. Dec. 3, 2001) (No. 01-521).

⁶⁹ Lloyd Omdahl, *Appointing Judges Better Than Partisan Elections*, BISMARCK TRIBUNE, Oct. 8, 2000.

⁷⁰ See the discussion in Part II.A *supra* regarding “primary” usages.

⁷¹ *Judicial Selection In The United States: A Special Report (1999)* available at <http://www.ajs.org/select9.html>.

⁷² Maute, *supra* note 4, at 1207.

⁷³ *Judicial Selection In The United States: A Special Report*, *supra* note 71.

merit selection plan is currently the most prevalent method of selecting appellate court judges, with 32 states using such a plan either for selection of judges to initial terms of office or for filling mid-term vacancies.

The defining characteristics of a merit selection plan are two-fold: (a) the preparation of an approved list of judicial candidates by a politically independent body (most commonly designated a judicial nominating or selection commission)⁷⁴ that reviews and evaluates the qualifications of all prospective candidates; and (b) the appointment of judges exclusively from among those on such an approved list. Myriad variations are possible — and many are being used by the different states — starting with who ultimately makes the appointment as a *formal* matter (typically it is the governor rather than the legislature, but not always) and extending to the process for continuing a judge in office after the end of his or her initial appointed term. The most prevalent process for the latter is to have judges participate in an uncontested, so-called “retention” election — that is, a yes or no vote on whether the particular judge will be retained in office. However, a few states’ merit selection plans provide for lifetime tenure, and several states’ plans provide for a form of re-validation of the judge by the nominating commission or a comparable, politically independent, evaluation body.

The charts included as Appendix 1 to this Report list the states that employ a merit selection plan according to the principal variations. The remaining discussion in this section focuses on how some of these variations operate in the states.

In all 32 states that employ merit selection, the governor must select one candidate from the nominating commission’s list, and the governor is bound by that list as initially submitted by the nominating commission in all but four states — Maryland, Massachusetts, New Hampshire and New Mexico. In each of these four states, the governor may request the commission to conduct a further search and submit additional names, although New Mexico limits the governor to one such request per nomination cycle.

Once the governor receives the commission’s list, the governor’s charge is to select the most qualified candidate without regard to political party or any other extraneous factor. In Arizona, the constitution requires the governor to also consider the diversity of the state or county population for which the judge will be selected when choosing among the candidates.

In Delaware, Hawaii, New York, Rhode Island and Utah, the governor’s selection of a candidate for certain levels of judges must be legislatively confirmed, but the states vary as to which level of the judiciary and which house of the legislature.

Three states — Massachusetts, New Hampshire, and Rhode Island — appoint judges for life or quasi-life terms, in Massachusetts and New Hampshire by operation of a mandatory retirement age of 70. Vermont provides that judges are automatically retained in office unless a majority of the state’s general assembly votes against the judge remaining in office. Connecticut’s judges serve for an initial term of eight years and are then subject to nominating commission review and gubernatorial nomination for reappointment. Similarly, judges in

⁷⁴ For convenience purposes, we use “nominating commission” or “commission” generically to refer to all such bodies.

Hawaii serve an initial ten-year term and may then be reappointed by the judicial selection commission for additional ten-year terms.

All the other 15 states that use a merit selection plan subject judges to an election after their initial term, which are generally uncontested retention elections where judges are on a separate ballot without party designation. The sole question presented to the voter is essentially: “Shall Judge ____ be retained in office?”⁷⁵ Arizona and Tennessee, however, require judges to submit a declaration of desire to remain on the bench in order to be eligible to stand in a retention election. If a judge does not submit the declaration, the seat becomes vacant upon the expiration of the judge’s term.

Four of these 15 states — Utah, Tennessee, Colorado, and New Mexico — have established politically independent bodies that evaluate judges in connection with their retention elections. In Utah and Tennessee, a positive evaluation or recommendation from the relevant body is a prerequisite for the judge to stand for retention election. In Colorado and New Mexico, the state commissions evaluate judicial performance and publicize the results in voter guides to educate voters in retention elections, but a positive evaluation is not necessary for the judge to run for election. (Delaware employs a twist on the procedure used by Utah and Tennessee in that a judge applies for reappointment after serving a 12-year term and cannot be denied reappointment unless at least two-thirds of the evaluation commission’s members vote against the reappointment.)

Two states — Maryland and New Mexico — require that certain judges compete in a contested election after completion of an initial term in office. In Maryland, trial court judges may face contested reelections, and challengers to such judges need not be approved by the nominating commission. The winner serves a fifteen year term and is then subject to the same reelection process. (Maryland’s state bar association, however, is supporting legislation to eliminate contested elections, which have become increasingly hard-fought.⁷⁶) In New Mexico, an appointed judge must participate in a partisan election in the next general election following the judge’s appointment. The winner of that election then serves a full term and thereafter is subject to retention elections.

2. Reputed Strengths/Benefits

Proponents contend that merit selection plans minimize political considerations in the judicial selection process because of the central role performed by the nominating commission.⁷⁷ Merit selections also eliminate the need for candidates to campaign and solicit contributions, thereby reducing the appearance of impropriety and conflicts of interest that the proponents associate with popular contested elections, and also enhancing the prestige of and respect for the judiciary. Because judges are chosen through an independent nominating commission, proponents claim that they are less likely to be beholden to special interests or agendas, or to have been subjected to a partisan or other politically-charged litmus test that is often associated with a pure appointment process. As a result, such judges are more likely to be (as well as be

⁷⁵ In all but one of these retention elections, the judge must only garner a simple majority to retain office; in New Mexico, however, a judge must receive at least fifty-seven percent of the votes.

⁷⁶ [http:// www.msba.org/sec_comm/lawscomm/legislativeprogram/contested.htm](http://www.msba.org/sec_comm/lawscomm/legislativeprogram/contested.htm).

⁷⁷ Maute, *supra* note 4 at 1209.

perceived as) independent of undue influence that compromises the integrity of the judicial process.

In addition to these contentions that focus on judicial independence, proponents of merit selection plans insist that the nature and role of the nominating commission generates more qualified applicants and ensures higher quality judicial selections.⁷⁸ The analysis is that nominating commission members generally bring a high degree of expertise to the judicial selection process, and enjoy an information advantage over the general public and any appointing authority acting alone.⁷⁹ They are structured to maximize the focus on objective qualification criteria, and to minimize partisan political considerations, and thus are more likely to lead to highly qualified and competent judges.

3. *Perceived Weaknesses/Detriments*

Critics counter that merit selection plans do not eliminate politics and in fact are replete with it, having simply shifted the politics to the selection of nominating commission members. Various groups vie for positions on such commissions with the hope of selecting judicial candidates whose views are representative of the groups' interests. While nominating commissions can help prevent the judicial selection process from becoming a partisan arena, critics allege that the nomination process remains political and can still result in a partisan judiciary. A former justice of the Kentucky Supreme Court has cautioned that judicial appointment, as opposed to selection by popular election, can lead to justices being beholden to the governor, legislature, bar association, and special interest groups, as judges seek to be appointed or to retain their reappointments.⁸⁰

Perhaps the most common charge is that the commissions nominate persons who are political insiders or who at least have substantial political ties.⁸¹ One critic has written: "Merit selection has its own problems, moving politics to the backroom, with nomination and selection made by highly partisan actors, with the resulting appointments reflecting tradeoffs, paybacks for past support, and a myriad of consideration other than genuine merit."⁸² Others allege that nominating commissions may make it more difficult not just for political outsiders, but also minorities to enter the ranks of the judiciary.⁸³ More generally, some voice concern that the nominating commissions themselves may become captive to special interest groups, such as bar associations or a particular political party, and may fail to reflect the diversity of the state's population.⁸⁴

⁷⁸ *Id.*

⁷⁹ JUDICIAL SELECTION WHITE PAPER, *supra* note 5.

⁸⁰ Donald C. Wintersheimer, *Judicial Independence Through Popular Election*, 20 QLR 791, 804-5 (2001).

⁸¹ <http://www.delawareonline.com/newsjournal/opinion/view/9032000.htm>.

⁸² Maute, *supra* note 4, at 1198.

⁸³ <http://www.washingtonpost.com/up-srv/local/reglex/stories/judges.htm>; JUDICIAL SELECTION WHITE PAPER, *supra* note 5; Maute, *supra* note 4, at 1235.

⁸⁴ JUDICIAL SELECTION WHITE PAPER, *supra* note 5, at 3; Maute at 1200.

Critics also charge, predictably, that merit selection plans usurp popular democracy by allowing an elite, privately constituted group to select all candidates for appointment, thereby disenfranchising the electorate.⁸⁵

4. Practical Implications

States primarily using merit selection plans have been regularly recognized nationally and internationally for selecting the highest quality judges.⁸⁶ On the other hand, it cannot be fairly denied that such plans do not remove completely the influence of political connections (or the lack thereof) from the selection of judges. The composition of a nominating commission is likely to be influenced by political considerations, and some political insiders will almost certainly be appointed to the commissions.⁸⁷ The key factors are how much and how many.

In Maryland, for example, where a Democratic governor has only appointed 13 Republicans out of 144 judges appointed during his two terms in office, there appears to be support for the claim that partisanship is playing a major role in the state's putative merit selection process, with the governor having packed the nominating commission with Democrats.⁸⁸ The complete accuracy of the underlying facts and motives in the Maryland situation is beside the valid critical point, which is that the integrity of nominating commissions is essential to the benefits that merit selection plans claim and promote. It is suggested by some commentators, therefore, that while the merit-based selection of judges should not be scrapped, nominating commissions should be, and the power to appoint judges should be returned solely to governors, with the advice and consent of their legislatures.⁸⁹

If a nominating commission is permitted to become the tool of the executive who ultimately makes appointments from the lists approved by that commission, then such a state's merit selection plan will be little more than a glorified "pure" appointment method. It is paramount, therefore, that a merit selection plan establish an appropriate structure for its nominating commission.

III. SPECIAL NOMINATING COMMISSION MATTERS

By definition, a merit selection method presupposes a nominating or comparable commission that reviews and evaluates the relative qualifications of prospective judicial candidates in order to prepare an approved or recommended list of persons from which the executive or legislature makes appointments. While many variations exist for how such a commission performs its work, the above components are fundamental. If the executive or other appointer is not bound to appoint from the commission's approved list, for example, then the

⁸⁵ Maute, *supra* note 4, 1209.

⁸⁶ JUDICIAL SELECTION WHITE PAPER, *supra* note 5; Editorial, Diminished Bench, *NewCastle-Wilmington News Journal*, July 18, 2000.

⁸⁷ JUDICIAL SELECTION WHITE PAPER, *supra* note 5, at 6.

⁸⁸ Christopher West, Editorial, *Partisan Politicking in the Maryland Judiciary*, *BALTIMORE SUN*, Apr. 4, 2001.

⁸⁹ JUDICIAL SELECTION WHITE PAPER, *supra* note 5.

judicial selection plan is not truly a merit selection plan.⁹⁰ The nominating commission, therefore, effectively determines all the persons who can be appointed, and thus it is the cornerstone for any merit selection plan. As a result, the plan's ability to achieve the fundamental goal of an appropriate balance between judicial independence and judicial accountability, while promoting competence and maintaining the public's respect for the judiciary, will depend substantially on the composition, qualifications and integrity of the members of the nominating commission.

There are almost as many approaches to structuring the composition of nominating commissions as there states that use merit selection plans. The better approaches appear to be those that are designed to limit undue partisanship; to include diverse and representative constituencies; to ensure a highly informed, deliberative process for evaluating the qualifications of prospects based on factors germane to the judicial function; and to promote generally the integrity of the ultimate appointments made by the executive. These model concepts for constituting a nominating commission, however, do not translate directly into a normative set of guidelines.

The remaining discussion in this Part III summarizes a few of the more illustrative approaches taken by states that use a nominating commission as part of a merit selection plan. The individual state profiles in Appendix 2 set forth additional information and resources about these nominating commissions.

A. Illustrative Approaches to Composition

In furtherance of a non-partisan nominating process, many states limit the number of commission members who can belong to a single political party. For example, in Connecticut, no more than six of its 12 commissioners may belong to the same political party. Most states require some minimum number of non-attorneys or, conversely, limit the number of attorneys. Some states have fairly particularized requirements for a portion of their commission's membership. For example, the Chief Justice of the Arizona Supreme Court sits on that state's commission; the dean of the University of New Mexico's law school chairs that state's commission; and in Iowa, in order to ensure regional diversity, the commission's members must be drawn from different judicial districts.

Apart from the above special membership criteria, the selection process for members differs from state to state. In some states, a majority vote of the legislature determines commission members. In others, the governor, either with or without the approval by the state's legislature, appoints commission members. Other states divide the power to select commission members among various individual state officials and other organizations — such as the governor; the legislature or individual members holding specific positions in the legislature (such as the house majority and minority leaders); the attorney general; the chief justice of the state supreme court; and the state bar association.

⁹⁰ In California, for example, where a judicial commission reviews the qualifications of candidates already proposed by the governor and the governor is not bound to follow the commission's assessment in deciding whether to appoint the candidate, we do not believe the selection system is properly characterized as a merit selection plan.

Some states use different nominating commissions for trial court judges than for appellate court judges. Massachusetts has an even more elaborate two-tiered process, consisting of four regional nominating committees that solicit, interview, evaluate and recommend nominees for judges on lower courts to an executive nominating committee, which in turn reviews and then forwards final nominations for such positions to the governor. The executive committee acts alone, however, in reviewing and selecting nominees for judges on the state's higher courts to send to the governor.

B. Illustrative Special Functions

Virtually all nominating commissions receive and review unsolicited applications from interested prospects as well as seek out interest from highly qualified individuals who may not have applied. They also conduct interviews and perform some level of independent investigation of a prospective nominee's personal and professional qualifications. In performing those basic functions, however, nominating commissions can operate internally quite differently from state to state, for example, by taking a more or less active role in generating prospective candidates for consideration, by the nature of their deliberative processes, and the like. The Arizona nominating commission, for example, selects nominees only after holding a public hearing and taking public testimony.

In some states, the nominating commission (or its functional equivalent) performs an evaluative function with respect to sitting judges in the context of them retaining their positions after the expiration of their terms. These commissions assess the actual performance of judges while they are serving on the bench in order to prepare findings that are then disseminated in a manner to reach voters and inform their decisions in retention elections. The nature and scope of these evaluations can vary widely, but typically the commissions seek to assess the judge's fairness, legal knowledge, decision-making abilities, communication skills, preparedness, attentiveness, and ability to control court proceedings. They often base their findings on surveys, interviews with attorneys, other judges, law clerks, court staff, law school professors, and other possible sources.

IV. IMPLICATIONS OF LENGTHS OF TERMS

The length of the term of office prescribed for judicial positions is an important element of a state's judicial system, but the length chosen need not depend upon the method employed to select judges for the positions. A review of the terms prescribed in the 50 states reveals as many, if not more, variations as exist with respect to the specifics of the judicial selection methods the states employ. All of the relevant data indicate that a sitting (or incumbent) judge who seeks to retain his or her position upon expiration of a term is virtually unbeatable, regardless of the selection method the state employs for retention, reelection or reappointment, absent some extraordinary occurrence. As a general matter, we believe such occurrences would probably need to be tantamount to formal charges of misconduct or criminal activity having been brought against the judge, or the judge's involvement in some highly controversial and sensational judicial decision that mobilizes a politically powerful special interest group. Of course, widely held racial or other prejudices can make certain judges more susceptible to challenges.

That said, the theoretical risk of a judge not retaining his or her position for a new term is greater, in descending order, with (a) partisan reelections, (b) non-partisan reelections, (c) retention elections, and (d) a reappointment process (whether or not pursuant to a merit selection plan). As a result, we believe it is possible that a judge's sense of independence and accountability (regardless of the referential constituency for his or her measurement of it) could be compromised or enhanced depending on the length of his or her term. In either case, it could affect the judge's performance on the bench. Some details about the widely varying terms of office used by the states are set forth later in this Part IV. It is difficult to draw useful conclusions from those data, but they are illustrative in the following respect.

The majority of all state court judges serve initial terms that are less than six years, which many commentators seem to agree simply is not long enough to prevent politics from affecting how judges vote or rule while serving on the bench. Some evidence suggests that judges who serve longer terms are less likely to be subject to partisan influences, and therefore are more independent.⁹¹

A study that compared two partisan election states, two non-partisan election states, and two merit selection plan states, found that "long terms tended to decrease the importance of party voting [in judicial decision making] in each kind of selection system."⁹² The logical extension of that observation is life tenure, which has been called the "best built-in protection for judicial independence any constitution or legal system can give."⁹³

It is widely accepted that the federal Constitution's system of appointing judges for life was based upon the framers' "notion that judicial independence would best be obtained by appointing judges for life rather than electing judges for a term of office."⁹⁴ Judges who serve for life are thought to be more independent because they do not have to worry about losing their position on the bench as a result of making a controversial or politically incorrect decision.⁹⁵ Life terms, however, are not without criticism because of the perceived adverse implications for judicial accountability, which is a virtue that should be balanced appropriately with judicial independence.

The length of judicial terms of office was specifically addressed at the December 2000 National Summit on Improving Judicial Selection. In the Summit's "Call to Action", which set forth 20 recommendations for reforming current state systems, the participants recommended that states with relatively short judicial terms of office consider increasing the length of those terms.⁹⁶ The participants also recommended that judges appointed to fill vacancies be permitted

⁹¹ F. Andrew Hanssen, *Independent Court and Administrative Agencies: An Empirical Analysis of the States*, 16 J.L. ECON. & ORG. 534, 549 (2000) (citing Ryan C. Amacher & William J. Boyes, *Cycles in Senatorial Voting Behavior: Implications for Optimal Frequency of Elections*, 33 PUB. CHOICE 5, 14 (1978)).

⁹² *Id.*

⁹³ Shirley S. Abrahamson, Speech, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 989-90 (2001) (noting that judges with life tenure may be more inclined to actively advocate judicial independence because they have less at stake).

⁹⁴ Michael P. Mills & Lee Waddle, *Judicial Independence in Mississippi*, 20 QUINNIPIAC L. REV. 709, 709 (2001).

⁹⁵ Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 669 (2001).

⁹⁶ National Summit on Improving Judicial Selection, Statement, *Call to Action*, 34 LOY. L. REV. 1353, 1355 (2001) (stating also that term limits are not appropriate for judicial office).

to serve a substantial period in office before being subject to an initial election, and that after the initial election, judges should serve full-terms before a second election.⁹⁷

Of the 24 states that utilize some variation of a nominating committee to select judges, 16 of those states provide for initial terms of appointment that are three years or less in length.⁹⁸ Those states are:

- Alaska (3 years)
- Arizona (2 years)
- Colorado (2 years)
- Florida (1 year)
- Indiana (2 years)
- Iowa (1 year)
- Kansas (1 year)
- Maryland (between 1 and 2 years)
- Missouri (1 year)
- Nebraska (3 years)
- New Mexico (approximately 1 year)
- Oklahoma (1 year)
- South Dakota (3 years)
- Tennessee (approximately 2 years)
- Utah (approximately 3 years)
- Wyoming (1 year)

Following these brief initial terms of appointment, most of these states require the judge to stand in a retention election, after which he may serve successive terms of between four and fifteen years depending on the state and the court.⁹⁹

At the other end of the spectrum, three states — Massachusetts, New Hampshire, and Rhode Island — provide for life or quasi-life terms appointments of judges. The remaining five of these 24 states provide for initial terms between five and 15 years, followed by successive terms of the same length of time. These states are Connecticut (eight years), Delaware (12 years), Hawaii (ten years), New York (between five and 14 years, depending on the court), and Vermont (six years).

Of the 32 states that use either partisan or non-partisan elections at some level to select judges for an initial term, 16 states provide for maximum initial terms of six years or less. These states are:

- Alabama (six years)
- Arizona (4 years)
- California (6 years)
- Florida (6 years)
- Georgia (between four and 6 years)
- Idaho (between 4 and 6 years)
- Indiana (6 years)
- Minnesota (6 years)
- Missouri (6 years)
- Nevada (6 years)
- Ohio (6 years)
- Oklahoma (4 years)
- Oregon (6 years)
- Texas (between 4 and 6 years)

⁹⁷ *Id.*

⁹⁸ These include states that select judges through a nominating committee, as well as those that use a combination of a nominating committee and other methods to select judges.

⁹⁹ Typically, the number of years that a judge serves following his initial appointment increases with the judge's level. For example, in Alaska, supreme court justices serve successive ten-year terms, while superior court judges serve only six-year terms. See ALASKA CONST. art. IV, § 6. See Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 669 (2001).

- Kansas (4 years)
- Washington (between 4 and 6 years)

The maximum initial terms of office for judges in the remaining 16 states are between eight and 14 years. In all of the states that use elections, the judges serve successive terms that are equivalent in length to their initial terms.

The maximum initial term of office in the remaining five states — which provide for either gubernatorial or legislative appointment of one or more judges without the use of a nominating commission — are: California (12 years), Maine (seven years), New Jersey (life upon reappointment following an initial appointed term of seven years), South Carolina (10 years), and Virginia (12 years).

V. SUMMARY OF THE SOUTHERN STATES

No single judicial selection method is more or less typical in states in the southern United States. Indeed, each of the judicial selection methods is employed by one or more of the southern states. This part of the Report is essentially a recap of more detailed discussions in Part II, but focused exclusively on the 14 southern states.

Virginia and South Carolina employ the appointment system. In Virginia, all justices and judges are chosen by a majority vote of each house of the bicameral General Assembly and serve for a limited term. Upon the term's expiration, the justice or judge is subject to legislative reappointment. South Carolina has a quasi-merit selection commission that screens judicial candidates. The commission's findings are reported to the bicameral General Assembly, which then holds a joint public session to vote on candidates. After serving an initial term, the judge is then subject to legislative reappointment.

Alabama, Louisiana, North Carolina, Texas and West Virginia select their judges through partisan election and partisan reelection. In Louisiana, the elections are less partisan because primaries are open to all candidates. In addition, unopposed judges in Louisiana are declared automatic winners without appearing on a ballot. While West Virginia uses partisan elections, the governor appoints an interim judge when there is a mid-term vacancy; once that judge's interim term is completed, the judge must compete in a partisan election to continue for a new full term.

Arkansas, Georgia, Kentucky, Maryland, and Mississippi primarily use non-partisan elections to select members of their judiciary. In Georgia and Arkansas, these elections are conducted with the general primary. In Kentucky, nominees compete in a primary, and the two candidates receiving the highest number of votes are then placed on the ballot in the general election. When there is a mid-term vacancy in Arkansas and Mississippi, however, the respective governors fill it without assistance from a nominating commission. In Georgia, the governor fills mid-term vacancies from nominating commission recommendations.

Georgia, Kentucky and Maryland also employ a form of merit plan to select at least some of their judges by appointment. In Georgia and Kentucky, the merit plan is employed only for

certain judicial offices and only when there is a mid-term vacancy. In Maryland, appellate court judges face uncontested retention elections, but trial court judges face contested elections.

Florida and Tennessee employ merit selection with a nominating commission for all appellate judges. These judges must stand for retention election upon expiration of their terms. In Tennessee, appellate judges must submit a declaration of desire to remain on the bench, and must receive a positive recommendation from Tennessee's Judicial Evaluation Commission. Tennessee's trial court judges are selected by partisan election and re-election. Florida selects its trial court judges through non-partisan election and re-election, although for all mid-term vacancies Florida uses merit selection with a nominating commission.

VI. LIMITATIONS OF JUDICIAL CAMPAIGN REGULATIONS

There is a certain unappealing crassness about the election of judges that threatens the reverence for and the legitimacy of the bench. In states with elected judiciaries, judges must hustle votes and they must raise money for campaigns. To do both, they must depend heavily upon lawyers who appear before them, which can create impropriety and appearances of impropriety, and which horribly conflicts with the judicial duties of fairness and impartiality in decision-making.¹⁰⁰

In the above statement, the Federalist Society captures quite accurately the principal concern about electing judges. It reflects both the philosophical and practical dimensions of the concern, and both are indeed present and legitimate as bases to criticize judicial election methods. As discussed in some detail in Parts II.B through II.D, above, there has been a steady retrenchment away from partisan elections and even non-partisan elections of judges, but the resonance of democratic principles and notions of popular accountability run deep in American society. As a result, the concerns evident in the above statement and the other commentaries discussed in Part II have not precipitated a wholesale abandonment of judicial elections. Instead, most states that employ an election method have sought to impose special regulations for judicial elections in an effort to set them on a higher plane than political elections and to address concerns such as the above.

These regulatory efforts have met with mixed success, at best, for several reasons. First, there is the seemingly innate disposition of persons involved in any type of contested election campaign to seek an advantage by disparaging the opponent, rather than extolling their own qualifications. (Of course, it is fair argument that even the latter would not avoid the concern about "crassness".) Second, the type of regulations that could effectively proscribe negative or other inappropriate campaigning by judicial candidates risk challenges of illegality under state or federal constitutional law, especially the latter's First Amendment principles that protect free speech in the electoral context. Third, even regulations aimed solely at fundraising (rather than pure campaign speech) face constitutionality challenges and risk circumvention because of the

¹⁰⁰ JUDICIAL SELECTION WHITE PAPER, *supra* note 5, at 2.

seemingly unyielding ability of money to create compromising appearances, if not compromised results in fact.

This section of the Report reviews briefly the more significant measures that have been employed by states in efforts to regulate judicial elections – from the standpoints of both campaign conduct and fundraising – and it highlights the significant legal challenges to such regulations. We do not believe a detailed and comprehensive discussion of either the regulatory attempts or the legal challenges would be particularly useful to the Center at this stage of its project. Several of the key issues are quite complex analytically, and their ultimate resolution is beyond the ability of anyone to control, other than the U.S. Supreme Court. It thus seems sufficient here to identify the issues that stand as potentially significant limitations on the efficacy of attempts to regulate judicial elections to achieve meaningfully different standards from political elections.

A. Regulations on Speech and Related Conduct

Most states that use some form of election method for selecting judges have adopted, at least in part, the 1990 version of the American Bar Association’s Model Code of Judicial Conduct (the “Model Code”). Canon 5 of the Model Code states simply: “A judge or judicial candidate shall refrain from inappropriate political activity.”¹⁰¹ Canon 5 then seeks to define inappropriate political activity by outlining several proscribed statements and actions for judicial candidates, including:

- Endorsing or opposing another candidate for public office (other than in a judge’s own race, of course).
- Attending political gatherings or making speeches on behalf of a political organization.
- Soliciting funds for a candidate or political party.
- Promising conduct in office other than the faithful and impartial performance of one’s duties.
- Making statements that appear to commit the candidate with respect to cases, controversies or issues likely to come before the court.
- Knowingly misrepresent a fact concerning the candidate or opponent.

Several states have established specific procedures to help implement the proscriptions of Canon 5 (or its predecessor provisions that are found primarily in old Canon 7B) and otherwise handle situations of campaign conduct disputes. These include creating campaign oversight committees, issuing advisory opinions, or operating hotlines to respond to questions and complaints about campaign conduct. For example, in Georgia, a Special Committee on Judicial Election Campaign Intervention was created to “alleviate unethical and unfair campaign practices [and] deal expeditiously with allegations of ethical misconduct in campaigns for

¹⁰¹ ABA MODEL CODE OF JUDICIAL CONDUCT (August 1990).

judicial office.”¹⁰² Similar judicial campaign monitoring committees have been implemented in Michigan,¹⁰³ Alabama, Ohio and New York.¹⁰⁴ While such committees do not have the power to impose sanctions on an offending candidate, they facilitate surfacing campaign conduct issues, which arguably provides some measure of remedy to the complaining party.

These regulatory measures—aimed directly at speech or speech-related conduct by judicial candidates—directly implicate issues under the First Amendment of the federal Constitution. While there are clearly valid reasons for limiting a judicial candidate’s speech, any restrictions on speech must be tested under the high standards for the rights guaranteed by the First Amendment. First Amendment analysis requires that there be a compelling state interest that supports the need to regulate speech—the need for an impartial judiciary may be sufficient to establish such an interest—and that the regulation must use the least restrictive means possible.

Courts have had a difficult time agreeing on the proper balance between a state’s interest in ensuring the integrity and impartiality of its judges and the First Amendment rights of judicial candidates. Most courts agree with the formulation by U.S. Supreme Court Justice Stewart, in a concurring opinion, that “[t]here could hardly be a higher governmental interest than a State’s interest in the quality of its judiciary.”¹⁰⁵ However, courts cannot seem to define with any consistency what is and is not a permissible regulation on campaign conduct — narrowly tailored to serve the state’s compelling interest in an impartial judiciary. While some states have been successful in such efforts by including phrases like “knowing or reckless” when describing prohibited conduct, other state’s seemingly similar provisions have not withstood First Amendment challenges. Thus, there is no “model” of clearly acceptable regulations. While the Model Code’s Canon 5 provisions are a good start, the ultimate issue of the validity of a state’s application of such provisions is presently tied more closely to a court’s interpretation than any objective factors. The responses of courts around the country have not been uniform, and have left legislators and would-be reformers without a clear picture of the constitutionality of judicial campaign speech regulations.

B. Regulations on Campaign Financing Matters

Campaign financing has emerged as an increasingly serious problem in judicial elections as they have become increasingly expensive, with million dollar judicial campaigns having been waged around the country. For example, the cost of running supreme court races in Ohio rose from \$100,000 in 1980 to over \$2.7 million in 1986.¹⁰⁶ In Pennsylvania, the cost went from

¹⁰² GA. JUDICIAL QUALIFICATIONS COMM’N RULE 27 (2000).

¹⁰³ Michigan’s Judicial Election Campaign Conduct program was begun in 1998, but was not renewed for the 2000 election.

¹⁰⁴ Richard A. Dove, *Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 LOY. L.A. L. REV. 1447 (2001).

¹⁰⁵ *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring).

¹⁰⁶ Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L. REV. 1467, 1468 (2001).

\$523,000 in 1987 to \$2.8 million in 1995.¹⁰⁷ And, in Alabama, the cost increased from \$237,281 in 1986 to \$2,080,000 in 1996.¹⁰⁸

With such amounts involved, concerns increase over the likely public perception that judges are influenced by campaign contributions,¹⁰⁹ and the possibility that judges be influenced in fact. In a 1998 Texas survey, for example, 48% of judges indicated that money had an impact on judicial decisions.¹¹⁰ Most judges and judicial candidates are not typical electoral candidates, and generally they are ill-suited to raising campaign funds in such amounts from broad segments of the public. The very regulations that limit their campaign speech and activities serve to limit their ability to appeal for contributions. These factors increase the potential for undue influence by special interest groups, which increasingly are taking a more active role in judicial elections.

Unlike with campaign speech and related conduct — where most states use a version of the Model Code’s Canon 5 to establish substantive regulations — states have taken widely varying approaches with respect to campaign funding and fundraising regulations. Maine’s public financing law and Washington’s on-line disclosure requirements, however, appear to serve as models for a few fundamental elements in several states.

Most states have imposed limitations on contributions, primarily in two forms: (a) limits on the amount of contributions from individuals, groups, or committees to any single candidate,¹¹¹ and (b) limits on the amount of aggregate contributions from an individual or entity to all candidates in an election. Some states—such as Arkansas, California, Connecticut, and Kansas — limit contributions to committees or political parties by using a combination of approaches, including limits on how much:

- an individual may give to a political party or political action committee (PAC);
- a corporation, union or organization may give to a political party or PAC;
- a political party may give to another political party or PAC; and
- a PAC may give to another PAC or political party.¹¹²

Some states, following the approach of the ABA Model Code of Judicial Conduct, prohibit personal solicitations by judicial candidates and require that all solicitations be conducted by a committee that a candidate may form to conduct the campaign; these committees

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Geyh, *supra* note 120 at 1469 for a discussion of surveys measuring the public perception that judges are influenced by their campaign contributors. For example, a Baton Rouge, Louisiana survey found that 56% of voters thought that judicial decisions are influenced by campaign contributions. A 1998 survey sponsored by the Texas Supreme Court found that 83% of adults, 69% of court personnel and 79% of attorney in Texas believed that campaign contributions influenced judicial decisions.

¹¹⁰ *Id.*

¹¹¹ For example, Alaska limits direct contributions from political parties to non-partisan retention elections to \$5,000. ALASKA STAT. § 13.070 (LEXIS 2000).

¹¹² Richard M. Neustadt Center for Communications in the Public Interest, *National Overview*, at <http://www.benton.org/Neustadt/Reporters/us.html> (last modified Mar. 27, 2000).

are permitted to solicit and accept “reasonable” campaign contributions.¹¹³ However, other than avoiding face-to-face contact between the candidate and a contributor at the time the contribution is made, it is difficult to see the real effect of such prohibitions, unless the candidate is also prohibited from learning the identity of contributors. The potential for influence thus remains, although it is arguable that the “crassness” implications of direct personal solicitations by judges and judicial candidates are reduced.

One reform option may be voluntary spending limits, combined with public financing, which is an approach that supported by the American Bar Association and many commentators see this as a remedy for at least some of the problems of judicial campaign financing. However, Wisconsin is currently the only state that provides significant public financing of judicial elections, and it is only partial funding for supreme court elections. Under the Wisconsin system, a special fund was created with revenues generated by a one dollar state tax return check-off.¹¹⁴ Eight percent of the fund is earmarked for grants to supreme court candidates in years when there is a supreme court election.¹¹⁵ The Wisconsin system has met with only limited success,¹¹⁶ however, a main problem being a lack of funds, because few citizens elect the check-off. North Carolina, Texas and Utah provide limited public funds to political parties that could be, but thus far have not been, used for judicial candidates;¹¹⁷ such partisan usages by partisan political parties, however, would introduce other risks such as those discussed in Part II.C., above. Statewide public financing programs have recently been adopted in Arizona, Maine, Massachusetts and Vermont,¹¹⁸ but their utilization for judicial elections is uncertain.

Retention elections present special problems for public funding, not the least of which are: (i) providing public funds to incumbent judges may further “stack the deck” in the incumbent’s favor; and (ii) whether and, if so, how to provide an equal or fair share amount of public funds to those who may oppose retention of the incumbent judge.

Various forms of funding disclosure requirements are employed by most states that are similar to those applicable to political campaigns. While those requirements have certain salutary effects, no one contends seriously that they are or can be effective to address the concerns raised above about the potential influences of money on increasingly expensive judicial elections.

Other proposals for regulating campaigning funding include disqualification of judges from cases where a lawyer or litigant made a campaign contribution in excess of a certain amount.¹¹⁹ Ohio and Michigan have explicit limits on contributions in judicial campaigns. Texas

¹¹³ *Id.*

¹¹⁴ Wis. Stat. § 71.10(3)(a) (2000).

¹¹⁵ Wis. Stat. § 11.50(3)(a)(2) (2000).

¹¹⁶ Geyh, *supra* note 120 at 1470.

¹¹⁷ *Id.* at 1486.

¹¹⁸ Mary M. Janicki, *Public Financing Update*, OLR RESEARCH REPORT, Nov. 4, 1999, at <http://www.cga.state.ct.us/ps99/rpt/olr/htm/99-r-1102.htm>.

¹¹⁹ Abrahamson *supra* note 106, at 999. The American Bar Association Model Code of Judicial Conduct requires a judge to disqualify herself when her impartiality might reasonably be questioned, including when the judge knows or learns that a party or a party’s lawyer contributed certain amounts to the judge’s campaign. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(e) (1990).

has an aggregate limit of \$3,000 on law firms, and individuals are limited to \$5,000. Limiting the period of contribution solicitation is another suggestion.¹²⁰

While challenges to campaign financing regulations alone (as opposed to in tandem with campaign speech regulations) have been relatively rare, such regulations also raise issues under the First Amendment. The U.S. Supreme Court, in *Buckley v. Valeo*,¹²¹ recognized First Amendment protections in campaign contributions and spending situations in the political context. The Court held that, while campaign contributions may be limited to prevent corruption and the appearance of corruption, campaign expenditures may not be limited because they would represent substantial restraints on the quantity and diversity of political speech.¹²² While the Supreme Court has indicated its willingness to distinguish between judicial elections and other elections for certain regulatory purposes under the First Amendment, there is no indication that it would not follow *Buckley v. Valeo* in considering possible challenges to judicial election campaign financing regulations. As a result, there can only be limited assurances about a state's ability to regulate away certain problems that appear to be endemic to the use of an election method for most judicial election decisions.

VII. GUIDEPOSTS FOR CONSIDERING A SELECTION METHOD

The Center has undertaken a tremendous and challenging project in attempting to promote prompt reform of the State of Alabama's troubled judicial selection process. With great challenges, however, typically come great opportunities.

As revealed in this Report, no single judicial selection method has emerged as perfectly suited — for all judicial selection decision scenarios, at all levels within a state's judicial system — to achieve the fundamental goal of striking the optimum balance between judicial accountability and judicial independence, while promoting competence and high quality and maintaining the public's respect for the judiciary. It appears more likely than not that a combination of methods may be best suited to reform Alabama's process. Based on our review and analyses in preparing this Report, we believe the deliberate and circumspect consideration of the following series of questions would be useful guideposts for the Center in embarking on its great challenge and opportunity:

- What is the optimum or target balance between the competing values of judicial independence and judicial accountability for the State of Alabama, in light of the corollary elements of promoting competence and high quality and the public's respect for the judiciary?
- In light of that goal, what is the most appropriate method for selection of each level of Alabama's judicial system — i.e., trial courts, court of appeals, and supreme court? If the ideal selection method for each of the three levels considered separately is not

¹²⁰ Abrahamson, *supra* note 106, at 1000.

¹²¹ 424 U.S. 1 (1976).

¹²² *Id.* at 19-20. The Court did hold, however, that spending limits may be constitutional if they are a condition on voluntary acceptance of public financing.

the same, are there important overriding benefits to be derived from nonetheless using the same method for judges on all levels? What about the converse?

- How will judges retain their positions, regardless of the method employed for selecting them to an initial term of office?
- What is the optimum term of office for each level of judge?
- Is it possible to overhaul Alabama's system without completely eliminating election of judges? Are there any benefits to avoiding a wholesale overhaul of Alabama's system? If some method of election is retained, what are the appropriate (and constitutional) controls that may be placed on campaign financing and campaign speech?
- If merit selection will be used, what will be the composition criteria and process for membership of the nominating commission? What constituent elements are essential to ensure that the nominating commission will reflect the constituencies of Alabama's judicial system?
- If merit selection will be used, who will make appointments from the lists developed by the nominating committee — e.g., the legislature, the governor, or some joint process involving both?
- By what method will vacancies be filled if a judge leaves mid-term? What other rules are necessary to avoid circumvention of any primary selection method?

Addressing these questions will undoubtedly lead to others, but each such step should bring the goal line closer.

We are pleased to have had the opportunity to prepare this Report, and we hope it contributes to the success of the Center's project.

KILPATRICK STOCKTON LLP

INDEX OF STATES' SELECTION METHODS

Initial Term of Office

	Merit Selections	Non-Partisan Elections	Partisan Elections	Modified (Informed) Appointments	"Pure" Appointments
Trial Court Judges	<i>Nineteen States:</i> AK HI MD MN AZ ² IA MO* UT CO IN* NE VT CT KS* NH WY DE MA NM	<i>Eighteen States:</i> AR ID MT SD AZ ¹ IN* ND WA CA KY NV WI FL MN OK GA MS OR	<i>Fourteen States:</i> AL LA NY TN IL MI OH TX IN* MO* PA WV KS* NY	<i>Two States:</i> SC ME	<i>Two States:</i> NJ VA
Supreme Court Judges	<i>Twenty-Four States:</i> AK HI MO RI AZ IA NE SD CO IN NH TN CT KS MN UT DE MA NY VT FL MD OK WY	<i>Twelve States:</i> AR KY MT OR GA MN ND WA ID	<i>Nine States:</i> AL MI OH TX IL NC PA WV LA	<i>Three States:</i> CA SC ME	<i>Two States:</i> NJ VA
Intermediate Appellate Courts Judges	<i>Twenty States:</i> AK FL MA NY AZ HI MD OK CO IA MO TN CT IN NE UT DE KS NM VT	<i>Nine States:</i> AR KY MS WA GA MN OR WI ID MS NV WI	<i>Eight States:</i> AL LA NC PA IL MI OH TX	<i>Two States:</i> CA SC	<i>Two States:</i> NJ VA

* Judicial selection method varies by county

¹ Nonpartisan Elections used in counties with populations less than 250,000

² Merit Selection used in counties with population greater than 250,000

INDEX OF STATES' SELECTION METHODS

Additional/Renewal Terms

	Retention/Merit Selections	Non-Partisan Elections	Partisan Elections	Modified (Informed) Appointments	"Pure" Appointments
Trial Court Judges	<i>Fifteen States:</i> AK IA MO* PA AZ ⁴ IN* MT ⁵ UT CO KS* NE WY DE*** IL NM**	<i>Nineteen States:</i> AZ ³ ID MS OR AR IN* MT SD CA KY ND WA FL MD NV WI GA MN OK	<i>Thirteen States:</i> AL MI NM** TN IN* MO* NY TX KS* NC OH WV LA	<i>Five States:</i> ME NJ CT VT HI	<i>One State:</i> VA
Supreme Court Judges	<i>Twenty-Two States:</i> AK IA NE PA AZ IL NM** SD CA IN NY*** TN CO KS MT ⁵ UT DE*** MD OK WY FL MO	<i>Twelve States:</i> AR MN ND WA GA MS NV WI ID MT OR KY	<i>Eight States:</i> AL MI NM** TX LA NC OH WV	<i>Five States:</i> ME HI NJ VT CT	<i>One State:</i> VA
Intermediate Appellate Courts Judges	<i>Eighteen States:</i> AK FL MD OK AZ IA MO PA CA IL NE TN CO IN NM** UT DE*** KS	<i>Nine States:</i> AR KY MS WA GA MN OR WI ID	<i>Seven States:</i> AL MI NM** TX LA NC OH	<i>Four States:</i> CT HI NJ VT	<i>One State:</i> VA

* Judicial selection method varies by county

** Partisan Elections at first general election after appointment, then after term expires judge runs in retention election for all subsequent terms

*** Incumbent replies to commission and competes with other applicants for nomination to the Governor. The Governor may reappoint the incumbent or another nominee. The State Senate confirms the appointment.

³ Nonpartisan Elections used in counties with populations less than 250,000

⁴ Merit Selection used in counties with population greater than 250,000

⁵ Only unopposed judges run in retention elections

INDEX OF STATES' SELECTION METHODS

Mid-Term Vacancies

	Merit Selections	Non-Partisan Elections	Partisan Elections	Modified (Informed) Appointments	"Pure" Appointments
Trial Court Judges	<p align="center"><i>Ten States:</i></p> AL GA MN ND AK ID MT NV FL KY		<p align="center"><i>One State:</i></p> LA	<p align="center"><i>Three States:</i></p> CA ME PA	<p align="center"><i>Eight States:</i></p> AR MS OR WI MI OH WA WV
Supreme Court Judges	<p align="center"><i>Ten States:</i></p> AL GA MN ND AK ID MT NV FL KY		<p align="center"><i>One State:</i></p> LA	<p align="center"><i>Three States:</i></p> CA ME PA	<p align="center"><i>Eight States:</i></p> AR MS OR WI MI OH WA WV
Intermediate Appellate Courts Judges	<p align="center"><i>Nine States:</i></p> AL GA KY MT AK ID MN NV FL		<p align="center"><i>One State:</i></p> LA	<p align="center"><i>Two States:</i></p> CA PA	<p align="center"><i>Six States:</i></p> MI OH WA WI MS OR

**INDIVIDUAL STATE PROFILES OF
SELECTION METHODS AND
CERTAIN DEMOGRAPHIC AND
OTHER ILLUSTRATIVE DATA**

Key To State Profiles

STATE

1. Background

- a. Population is rounded to the nearest ten-thousandth
- b. Primarily urban means that more than fifty percent of the population resides in an urban area; primarily rural means more than fifty percent of the population resides in a rural area
- c. Median household income
- d. Governor's name and party affiliation
- e. U.S. Senators: party affiliation
U.S. Representatives: number of representatives and party affiliation
- f. The party controlling the state legislative houses.
- g. Presidential candidate garnering majority support in 2000 election

2. Methods

- a. Method(s) of judicial selection employed
- b. Any differences in selection method between levels of the judiciary
- c. Constitutional or Statutory authority for judicial selection method.
- d. Year judicial selection method(s) adopted or amended

3. Merit Selection States

- a. Nominating Commission
 - i. Number of Commissions
 - ii. Number of Commission members
 - iii. Whether recommendation is binding on Governor
- b. Frequency of retention elections. This section will be deleted when Merit Selection is used only for mid-term vacancies

4. Election States

- a. Frequency of election
- b. Additional requirements for election

5. Campaign and funding regulations

- a. Statutory citation for any applicable campaign or funding regulations

ALABAMA

1. Background

- a. Population: 4.45 million
- b. Primarily urban
- c. Median household income: \$30,790
- d. Governor: Don Siegelman, Democrat
- e. U.S. Senators: Two Republicans
U.S. Representatives: Five Republicans and Two Democrat
- f. Democrats control both State Houses
- g. Supported George W. Bush in the 2000 Presidential election

2. Methods

- a. Method employed: Partisan Election and in select counties Merit Selection with Nominating Commission is used to fill mid-term vacancies for trial court judges
- b. Same method used for all levels of the judiciary
- c. Ala. Const. pmbl. art. VI. *as amended by* Amendment 328. Code of Alabama Title 12
- d. Amendment 328 to the Alabama Constitution was adopted in 1973; Title 12 of the Code of Alabama was Adopted in 1975.

3. Election States

- a. Partisan Elections every six years

4. Campaign and Funding Regulations

- a. Statutory citation: Section 6.08 of Amendment 328 of the Constitution of the State of Alabama; Code of Alabama Titles 10, 12, 17-22A and 36; Alabama Canons of Judicial Ethics (1999)

ALASKA

1. Background

- a. Population: .63 million
- b. Primarily urban
- c. Median household income: \$51,509
- d. Governor: Tony Knowles, Republican
- e. U.S. Senators: Two Republicans
U.S. Representatives: One Republican at large
- f. Republicans control both State Houses
- g. Supported George W. Bush in the 2000 Presidential election

2. Methods

- a. Method employed: Merit Selection with Nominating Commission for all initial terms and for mid-term vacancies
- b. Same method used for all levels of the judiciary
- c. Alaska Const. art. IV, §§ 5-6
- d. Adopted in 1956

3. Merit Selection States

- a. Nominating Commission
 - i. One Commission for all appointments
 - ii. Commission consists of ten members
 - iii. Recommendations are binding on the Governor
- b. Retention elections every ten years for Supreme Court justices, every eight years for Court of Appeals judges and every six years for Superior Court judges

4. Campaign and Funding Regulations

- a. Statutory citation: Alaska Stat. 15.13.070 (2000)

ARIZONA

1. Background

- a. Population: 5.13 million
- b. Primarily urban
- c. Median household income: \$53,000
- d. Governor: Jane Dee Hull, Republican.
- e. U.S. Senators: Two Republicans
U.S. Representatives: Five Republicans; One Democrat
- f. Republicans control the House; Senate is evenly divided
- g. Supported George W. Bush in the 2000 Presidential election

2. Methods

- a. Method employed: Merit Selection with Nominating Commission and Non-Partisan elections
- b. Merit selection for Appellate judges and Superior Court judges in counties with a population greater than 250,000 for an initial term of two years; Non-Partisan elections for Superior Court judges in counties with a population less than 250,000 for an initial term of two years
- c. Ariz. Const. art. VI, §§ 35–41
- d. Adopted in 1912

3. Merit Selection States

- a. Nominating Commission
 - i. One Commission for all appointments
 - ii. Commission consists of 16 members
 - iii. Recommendations are binding on the Governor
- b. Retention elections every six years for Appellate judges and every four years for Superior Court judges

4. Election States

- a. Retention elections every four years

5. Campaign and Funding Regulations

- a. Statutory citation: Ariz. Rev. Stat. Ann. §§16-901 - 925

ARKANSAS

1. Background

- a. Population: 2.7 million
- b. Primarily urban
- c. Median household income: \$30,293
- d. Governor: Mike Huckabee, Republican
- e. U.S. Senators: One Democrat; One Republican
U.S. Representatives: Three Democrats; One vacancy
- f. Democrats control both State Houses
- g. Supported George W. Bush in the 2000 Presidential election

2. Methods

- a. Method employed: Non-Partisan Elections and Gubernatorial Appointment for mid-term vacancies
- b. Same method used for levels of the judiciary
- c. Ark. Const. amend. 80, §§ 17-18
- d. Adopted in 2001

3. Election States

- a. Non-Partisan Elections every eight years for Supreme Court justices and Court of Appeals judges, every six years for Circuit Court judges, and every four years for District Court judges

4. Campaign and Funding Regulations

- a. Statutory citation: Ark. Code Ann. §§7-6-101 to –225 (2000) and Code of Judicial Conduct Canon 5

CALIFORNIA

1. Background

- a. Population: 35 million
- b. Primarily urban
- c. Median household income: \$39,595
- d. Governor: Gray Davis, Jr., Democrat
- e. U.S. Senators: Two Democrats
U.S. Representatives: 32 Democrats; 20 Republicans
- f. Republicans control both State Houses
- g. Supported Al Gore in 2000 Presidential election

2. Methods

- a. Method employed: Non-Partisan Elections and Gubernatorial Appointments for mid-term vacancies
- b. Judicial candidates are nominated to vacancies in the bench by the Governor; all gubernatorial nominations must then be submitted to the Commission on Judicial Appointments for confirmation; Commission on Judicial Appointment then approves a nomination by having at least two of the three members affirm the nomination; newly appointed justices must then face an initial retention vote at the next gubernatorial election; all judicial elections are non-partisan; term of appointment is 12 years for Supreme Court and Appellate judges; term of appointment is six years for Superior Court judges
- c. Cal. Const. art. IV, § 16
- d. Adopted in 1934

3. Election States

- a. Retention elections every 12 years for Supreme Court and Appellate judges and every six years for Superior Court judges

4. Campaign and Funding Regulations

- a. Statutory citation: Cal. Code. Regs. tit. 2, § 6 (Fair Political Practices Commission); Cal. Elec. Code § 1-22,000 et seq.

COLORADO

1. Background

- a. Population: 4.30 million
- b. Primarily urban
- c. Median household income: \$40,853
- d. Governor: Bill Owens, Republican
- e. U.S. Senators: Two Republicans
U.S. Representatives: Two Democrats; Four Republicans
- f. Republicans control the House; Democrats control the Senate
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Method employed: Merit Selection with Nominating Committee
- b. Same method used for all levels of the judiciary
- c. Colo. Const. art. VI, § 20
- d. Amended in 1966

3. Merit Selection States

- a. Nominating Committee
 - i. Two Committees: Supreme Court Nominating Commission and Judicial District Court Nominating Commission
 - ii. Seven Members on each Committee
 - iii. Recommendations are binding on the Governor
- b. Retention elections held every
 - i. Four years for County Court judges;
 - ii. Six years for District Court judges;
 - iii. Eight years for Court of Appeals judges; and
 - iv. Ten years for Supreme Court justices.

4. Campaign and Funding Regulations

- a. Statutory citation: Colo. Rev. Stat. Ann. §§ 1-45-101 to 1-45-118

CONNECTICUT

1. Background

- a. Population: 3.3 million
- b. Primarily urban
- c. Median household income: \$53,108
- d. Governor: John G. Rowland, Republican
- e. U.S. Senators: Two Democrats
U.S. Representatives: Three Democrats; Three Republicans
- f. Democrats control both State Houses
- g. Supported Al Gore in the 2000 Presidential election

2. Methods

- a. Method employed: Merit Selection with Nominating Commission
- b. Same method used for all levels of the judiciary
- c. Conn. Const. art. V (Judicial Selection Method); Conn. Gen. Stat. Ann. § 51-44a (2001); Conn. Gen. Stat. Ann § 51-44a(b) (2001)
- d. Adopted in 1965

3. Merit Selection States

- a. Nominating Commission
 - i. One Commission
 - ii. Commission consists of 12 Members
 - iii. Recommendations are binding on the Governor
- b. Commission review and reappointment for judges every eight years

DELAWARE

1. Background

- a. Population: .78 million
- b. Primarily urban
- c. Median household income: \$41,315
- d. Governor: Ruth Ann Minner, Democrat
- e. U.S. Senators: Two Democrats
U.S. Representatives: One Republican
- f. Democrats control the State Senate; Republicans control the State House
- g. Supported Al Gore in the 2000 Presidential election

2. Methods

- a. Method employed: Merit Selection with Nominating Commission
- b. Same method used for all levels of judiciary
- c. Del. Const. art. IV, § 3; Del. Code Ann. tit. 10, § 1303 (1999); Executive Order No. 4 (Jan. 5, 2001)
- d. Adopted in 1897

3. Merit Selection States

- a. Nominating Commission
 - i. One Commission
 - ii. Nine members
 - iii. The Governor chooses one nominee from a list of at least three candidates provided by the Commission, although the Governor may request a supplemental list
- b. Judges serve a 12 year term after which judge applies for reappointment. Sitting judges who apply to be reappointed may not be denied recommendation by the Commission except upon the affirmative vote of at least two-thirds of the members

DISTRICT OF COLUMBIA

1. Background

- a. Population: .57 million
- b. Primarily urban
- c. Median household income: \$38,686
- d. Mayor: Anthony Williams, Democrat
- e. U.S. Senators: Not applicable
U.S. Representatives: One Democrat
- f. Democrats control city council
- g. Supported Al Gore in the 2000 Presidential election

2. Methods

- a. Method employed: Merit Selection with Nominating Commission; the President selects with advice from Congress.
- b. Same method used for all levels of the judiciary
- c. D.C. Code Ann. § 11-1501 (1995)
- d. Adopted in 1970

3. Merit Selection States

- a. Nominating Commission
 - i. One Commission
 - ii. Five members
 - iii. Commission recommendations are binding
- b. All judges serve a 15 year term. Retention is by approval of a tenure commission which advises the President on re-appointment

FLORIDA

1. Background

- a. Population: 15.98 million
- b. Primarily urban
- c. Median household income: \$28,550
- d. Governor: Jeb Bush, Republican
- e. U.S. Senators: Two Democrats
U.S. Representatives: 15 Republicans; Eight Democrats
- f. Republicans control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Methods Employed: Merit Selection with Nominating Committee and Non-Partisan Elections. Merit Selection with Nominating Commission used for all mid-term vacancies
- b. Merit Selection for Appellate Courts; Non-Partisan Election for trial courts
- c. Florida Const. art. V, §§ 10 & 20; Fla. Stat. Ann., Chapter 105 (1992)
- d. Adopted in 1976 and amended in 1998

3. Merit Selection States

- a. Nominating Committee
 - i. Trial courts: 20 Committees
Courts of Appeals: Five Committees
Supreme Court: One Committee
 - ii. Nine members
 - iii. Recommendation are binding on the Governor
- b. Retention elections after a judge's first year on the court and every six years thereafter

4. Election States

- a. Non-Partisan Elections every six years for trial courts

5. Campaign and Funding Regulations

- a. Fla. Stat. Ann., Chapter 106 (1992) (Campaign Financing); Florida Code of Judicial Conduct, Cannon 7

GEORGIA

1. Background

- a. Population: 8.2 million
- b. Primarily urban
- c. Median household income: \$42,887
- d. Governor: Roy Barnes, Democrat
- e. U.S. Senators: 2 Democrats
U.S. Representatives: Eight Republicans, Three Democrats
- f. Democrats control both State Houses
- g. Supported George W. Bush in the 2000 Presidential election

2. Methods

- a. Methods employed: Non-Partisan Elections and Merit Selection with Nominating Commission for mid-term vacancies
- b. Same method used for all levels of the judiciary.
- c. Ga Const. art. VI, § 7, ¶ 1 and Executive Order
- d. Adopted in 1983

3. Election States

- a. Non-Partisan Elections every six years for Supreme Court justices and Court of Appeals judges; every four years for Superior and State Court judges

4. Merit Selection States

- a. Nominating Commission
 - i. One Commission
 - ii. 18 members
 - iii. Recommendation are not binding on the Governor

5. Campaign and Funding Regulations

- a. Statutory citation: O.C.G.A. §§ 21-5-1 to -73 (1999) and Code of Judicial Conduct Canon 7

HAWAII

1. Background

- a. Population: 1.21 million
- b. Primarily urban
- c. Median household income: \$44,373
- d. Governor: Benjamin J. Cayetano, Democrat
- e. U.S. Senators: Two Democrats
U.S. Representatives: Two Republicans
- f. Democrats control both State Houses
- g. Supported Al Gore in the 2000 Presidential election

2. Methods

- a. Method employed: Merit Selection with Nominating Commission
- b. Same method used for all levels of the judiciary
- c. Haw. Const. art. VI, § 3
- d. Adopted in 1997

3. Merit Selection States

- a. Nominating Commission
 - i. One Commission
 - ii. Nine members
 - iii. Recommendations are binding on the Governor
- b. The term for each judge is ten years and retention is by recommendation of the Judicial Commission

IDAHO

1. Background

- a. Population: 1.3 million
- b. Primarily urban
- c. Median household income: \$37,462
- d. Governor: Dirk Kempthorne, Republican
- e. U.S. Senators: Two Republicans
U.S. Representatives: Two Republicans
- f. Republicans control both State Houses
- g. Supported George W. Bush in the 2000 Presidential election

2. Methods

- a. Methods employed: Non-Partisan Elections and Merit Selection with Nominating Council for mid-term vacancies
- b. Same method used for all levels of the judiciary.
- c. Idaho Const. art. VI, § 7 and Idaho Code § 1-2404 (1998)
- d. Adopted in 1932

3. Merit Selection States

- a. Nominating Council
 - i. One Nominating Council
 - ii. Eight members
 - iii. Recommendations are binding on the Governor

4. Election States

- a. Non-Partisan elections every six years for Supreme Court justices and Court of Appeals judges, and every four years for District Court judges

5. Campaign and Funding Regulations

- a. Statutory citation: Idaho Code §§ 67-6601 to –6629 (1995) and Code of Judicial Conduct Canon 7

ILLINOIS

1. Background

- a. Population: 12.4 million
- b. Primarily urban
- c. Median household income: \$41,179
- d. Governor: George Ryan, Republican
- e. U.S. Senators: One Republican; One Democrat
U.S. Representatives: Ten Democrats; Ten Republicans
- f. Republicans control the State Senate; Democrats control the State House
- g. Supported Al Gore in the 2000 Presidential election

2. Method

- a. Method employed: Partisan Elections
- b. Same method used for all levels of the judiciary
- c. Illinois Const. art. IV, § 12
- d. Adopted in 1970

3. Election States

- a. Partisan Elections every ten years for Supreme and Appellate Court judges, every six for Circuit judges; and every four years for Associate judges

4. Campaign and Funding Regulations

- a. Statutory citation: 10 Ill. Comp. Stat. Ann. (1993) 5/9-1

INDIANA

1. Background

- a. Population: 6.08 million
- b. Primarily rural
- c. Median household income: \$37,909
- d. Governor: Frank O'Bannon, Democrat
- e. U.S. Senators: One Democrat; One Republican
U.S. Representatives: Four Democrats; Six Republicans
- f. Republicans control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Methods employed: Merit Selection with Nominating Committees, Partisan Elections and Non-Partisan Elections
- b. Merit Selection for Supreme Court justices, Appellate judges, Tax Court judges, judges in Lake and St. Joseph Counties, and interim vacancies for judges in Allen County; Partisan Elections for most Circuit Court and Superior Court judges; and Non-Partisan Elections for Circuit Court and Superior Court judges in Vanderburgh County and Superior Court judges in Allen County
- c. Ind. Const. art. 7, §§ 9-11; Ind. Code tit. 33, articles 2 – 5; Ind. Code Ann. § X (1997)
- d. Adopted in 1970; and codified between 1972-1985

3. Merit Selection States

- a. Nominating Committee
 - i. One Committee for Supreme Court, Appellate Courts and Tax Court; one Committee for each of the counties using a Nominating Committee: Lake, St. Joseph, and Allen Counties
 - ii. Seven members of Committee for Supreme Court, Appellate Court, Tax Court; seven members of the Committees for St. Joseph and Allen Counties; nine members of the Committee for Lake County
 - iii. Recommendations are binding on the Governor

4. Election States

- a. Retention elections for Supreme Court, Appellate Courts and Tax Court after initial two years, and then every ten years ; retention elections for Superior Court in Lake and St. Joseph Counties after initial two years, and then every six years

5. Campaign and Funding Regulations

- a. Statutory Citation: Ind. Code Ann. § 33-5-5.1-29 (1996) (Allen County); Ind. Code Ann. § 3-9-1 et seq. (1997) (general election campaign law)

IOWA

1. Background

- a. Population: 2.93 million
- b. Primarily rural
- c. Median household income: \$ 42,993
- d. Governor: Tom Vilsack, Democrat
- e. U.S. Senators: One Democrat, One Republican
U.S. Representatives: One Democrat, Four Republicans
- f. Republicans control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Method employed: Merit selection with Nominating Commission
- b. Same method used for all levels of the judiciary
- c. Iowa Const. art. V, § 15; § 16; § 17; Iowa Code Ann. §§ 46.1-46.15 (1999); § 6.16
- d. Adopted in 1962 and 1987

3. Merit Selection

- a. Nominating Commissions
 - i. Two Commissions: One Nominating Commission for Supreme Court and Court of Appeal, and another for District Courts
 - ii. 11 members in each Commission
 - iii. Recommendations are binding on the Governor
- b. Retention elections in year following appointment, then every eight years for Supreme Court, every six years for Court of Appeals and District Courts

4. Campaign and Funding Regulations

- a. Iowa Code Ann. § 56.2 (1999); Iowa Code Ann. § 56.5A (1999); Iowa Code of Judicial Conduct EC 7

KANSAS

1. Background

- a. Population: 2.61 million
- b. Primarily rural
- c. Median household income: \$57,195
- d. Governor: Bill Graves, Republican
- e. U.S. Senators: Two Republicans
U.S. Representatives: Three Republicans, One Democrat
- f. Republicans control both State Houses
- g. Supported George W. Bush in the 2000 Presidential election

2. Methods

- a. Methods employed: Merit Selection with Nominating Commission and Partisan Elections
- b. Merit Selection for Supreme Court justices, appellate judges, and trial court level for 17 districts. 14 districts retain partisan elections of trial level judges
- c. Kan. Const. art. III, § 5; Kan. Stat. Ann. §§ 20-119 to –131 (1995); Kan. Const. art. III, § 6; Kan. Stat. Ann. § 20-2901 (1995); Kan. Stat. Ann. § 20-3004 (1995)
- d. Adopted in 1959 and 1975; amended in 1986 and 1989

3. Merit Selection States

- a. Nominating Commission
 - i. One Commission
 - ii. 9 members
 - iii. Recommendations are binding on the Governor
- b. Retention election every six years for Supreme Court and every four years for Court of Appeals and the 17 districts using merit selection.

4. Election States

- a. Partisan re-election every four years for 14 districts with elections

5. Campaign and Funding Regulations

- a. Statutory Citation: Kan. Stat. Ann. § 25-4153 (2000)

KENTUCKY

1. Background

- a. Population: 4 million
- b. Equally urban and rural
- c. Median household income: \$31,730
- d. Governor: Paul Patton, Democrat
- e. U.S. Senate: Two Republican
U.S. Representatives: Five Republicans; One Democrat
- f. Democrats control the State House, Republicans control the State Senate
- g. Supported George W. Bush in the 2000 Presidential election

2. Methods

- a. Method employed: Non-Partisan Elections and Merit Selection with Nominating Commission for mid-term vacancies
- b. Same method used for all levels of the judiciary
- c. Ky. Rev. Stat. Ann. § 1184.060 (2001)
- d. Adopted in 1976, amended in 1982

3. Merit Selection States

- a. Nominating Commission
 - i. Commissions: the Supreme Court, Court of Appeals, and each judicial circuit and district have its own Nominating Commission
 - ii. Each Commission is comprised of seven members
 - iii. Recommendations are binding by the Governor

4. Election States

- a. Judicial nominees compete in a primary and the two candidates receiving the highest number of votes for nomination for justice or judge are then placed on the ballot in the regular election. The candidate receiving the highest number of votes cast at the regular election for a district or circuit is elected
- b. Elections are every eight years

5. Campaign and Funding Regulations

- a. Kentucky Code of Judicial Conduct, in Kentucky Supreme Court Rules

LOUISIANA

1. Background

- a. Population: 4.5 million
- b. Primarily urban
- c. Median household income: \$31,034
- d. Governor: M. J. Foster, Jr., Republican
- e. U.S. Senators: Two Democrats
U.S. Representatives: Three Democrats; Four Republicans
- f. Democrats control the State Senate; Republicans control the State House
- g. Supported George W. Bush in the 2000 Presidential election

2. Methods

- a. Method employed: Partisan Elections and mid-term vacancies filled by special election called by the Governor
- b. Same method used for all levels of the judiciary. Primary elections are open to all candidates regardless of endorsement by political party
- c. La. Const. art. V, 22(a)
- d. Amended in 1983

3. Election States

- a. Partisan Elections every ten years for Supreme Court and Court of Appeals, and every six years for District Court

4. Campaign and Funding Regulations

- a. Statutory citation: Code of Judicial Conduct; La. Rev. Stat. Ann. § 18:1481 (1979)

MAINE

1. Background

- a. Population: 1.2 million
- b. Primarily rural
- c. Median household income: \$33,140
- d. Governor: Angus King, Jr., Independent
- e. U.S. Senators: Two Republicans
U.S. Representatives: Two Democrats
- f. State Senate is split evenly between Democrats and Republicans;
Democrats control the State House
- g. Supported Al Gore in the 2000 Presidential election

2. Methods

- a. Method employed: Gubernatorial Appointment with Legislative Confirmation.
- b. Governor nominates and appoints all judges to the Supreme Court and the various superior and other inferior courts; Maine Senate confirms all such gubernatorial appointments. Term of appointment is seven years for all State Court judges
- c. Me. Const. art. VI, § VI; Me. Rev. Stat. Ann. tit. 4, Chapter 1 (1989)
- d. Adopted in 1983

MARYLAND

1. Background

- a. Population: 5.3 million
- b. Primarily urban
- c. Median household income: \$45,289
- d. Governor: Parris Glendening, Democrat
- e. U.S. Senators: Two Democrats
U.S. Representatives: Four Democrats, Four Republicans
- f. Democrats control both State Houses
- g. Supported Al Gore in the 2000 Presidential election

2. Methods

- a. Methods employed: Merit Selection with Nominating Commission and Non-Partisan Elections
- b. Merit Selection for Appellate judges with retention elections; Merit Selection for Circuit judges with contested retention elections; Merit Selection with reconfirmation procedure for District Court judges
- c. Md. Const. art. IV, §§ 5, 5A; Executive Order 01.01.1999.08
- d. Adopted in 1880; amended in 1944, 1970.

3. Merit Selection States

- a. Nominating Commission
 - i. One Appellate Court Judicial Nominating Commission ; 16 Trial Court Judicial Nominating Commissions for District and Circuit Court judges
 - ii. Appellate Court Commission has 17 members; Trial Court Commissions each have 13 members
 - iii. The Governor is bound by Commission's list, but may ask for additional names to be included on the list
- b. Retention elections every ten years for judges on Court of Appeals or Court of Special Appeals

4. Election States

- a. Contested election for 15 year term for Circuit Court judges(Md. Const, art. IV, §§ 5, 5A)

5. Campaign and Funding Regulations

- a. Statutory citation: Rule 16-813 (Md. Code of Judicial Conduct), Canon 5

MASSACHUSETTS

1. Background

- a. Population: 6.13 million
- b. Primarily urban
- c. Median household income: \$49,505
- d. Governor: Paul Cellucci, Republican
- e. U.S. Senators: Two Democrats
U.S. Representatives: Ten Democrats
- f. Democrats control both State Houses
- g. Supported Al Gore in 2000 Presidential election

2. Methods

- a. Methods employed: Merit Selection through Nominating Committee.
- b. Same method used for all levels of the judiciary
- c. Mass. Executive Order No. 420 (April 26, 2000); Mass. Regs. Code tit. 895, §1-17. (Nominating Committee)
- d. First Adopted in 1970

3. Merit Selection States

- a. Nominating Committee
 - i. Two-tiered committee; Regional committee – 11 to 15 members (District, Probate, Juvenile, Housing courts); Executive Committee – 25 members (Land, Superior, Appeals courts)
 - ii. Special Committee (nine members) for Superior Court
 - iii. All recommendations reviewed by Executive Committee before going to the Governor; and recommendations are binding on the Governor
- b. Judges serve until age 70

MICHIGAN

1. Background

- a. Population: 10 million
- b. Primarily urban
- c. Median household income: \$38,883
- d. Governor: John Engler, Republican
- e. U.S. Senators: Two Democrats
U.S. Representatives: Nine Democrats; Seven Republicans
- f. Supported Al Gore in the 2000 Presidential election

2. Method

- a. Method employed: Non-Partisan Election that is partisan in practice because candidates are nominated at party convention, run with party endorsement and campaigns are coordinated through parties.
Gubernatorial Appointment for mid-term vacancies
- b. Same method for all levels of judiciary
- c. Mich. Const. art. VI, § 2
- d. Adopted in 1964

3. Election States

- a. Election every eight years for all levels of judiciary

4. Campaigning and Funding Regulations

- a. Statutory citation: 1976 Mich. Pub. Acts 388; P.A. 388, 1976, as Amended (Mich. Comp. Laws Ann. §§ 169.201 to 169.282 (1989))

MINNESOTA

1. Background

- a. Population: 4.92 million
- b. Primarily urban
- c. Median household income: \$41,591
- d. Governor: Jesse Ventura, Independent
- e. U.S. Senators: Two Democrats
U.S. Representatives: Three Republicans, Five Democrats
- f. Republicans control both State Houses
- g. Majority supported Al Gore in 2000 Presidential election

2. Method of Judicial Selection

- a. Method employed: Non-Partisan Election and Merit Selection with Nominating Commission for mid-term vacancies
- b. Same method used for all levels of the judiciary
- c. Minn. Const. art. 6, § 7
- d. Adopted in 1857

3. Merit Selection States

- a. Nominating Commission
 - i. One Commission
 - ii. 49 members
 - iii. Recommendations are not binding on the Governor

4. Election States

- a. All state judges must stand for a general retention election at large at the expiration of their appointed terms and for each subsequent elected term thereafter. Elections every six years

5. Campaign and Funding Regulations

- a. Statutory citation: Minn. Stat. Ann. § X(1992) or Chapters 200-212

MISSISSIPPI

1. Background

- a. Population: 2.8 million
- b. Primarily rural
- c. Median household income: \$31,528
- d. Governor: Ronnie Musgrove, Democrat
- e. U.S. Senators: Two Republicans
U.S. Representatives: Three Democrats; Two Republicans
- f. Democrats control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Method employed: Non-Partisan Elections and Gubernatorial Appointment for mid-term vacancies
- b. Same method used for all levels of the judiciary
- c. Miss. Code Ann. §§ 23-16-974 to -985 (1999)
- d. Adopted in 1994

3. Election States

- a. Non-Partisan Elections every eight years for Supreme Court justices and Court of Appeals judges, and every four years for Circuit and Chancery Court judges

4. Campaign and Funding Regulations

- a. Statutory citation: Miss. Code Ann. §§ 23-15-1021 to -1025 (1999) and Code of Judicial Conduct Canon 7

MISSOURI

1. Background

- a. Population: 5.6 million
- b. Primarily rural
- c. Median household income: \$34,502
- d. Governor: Bob Holden, Democrat
- e. U.S. Senators: One Democrat; One Republican
U.S. Representatives: Four Democrats; Five Republican
- f. Republicans control the State Senate; Democrats control the State House
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Methods employed: Merit Selection with Nominating Commission and Partisan Elections
- b. Merit Selection for judges of the Supreme Court, Appellate Courts, Circuit Courts in Jackson, Clay, Platte, and Saint Louis Counties, and the Kansas City Municipal Court; Partisan Elections for the remaining Circuit Courts
- c. Mo. Const. art. V, § 25a-d
- d. Adopted in 1976

3. Merit selection states

- a. Nominating Committee
 - i. One Committee for Supreme Court and Appellate Courts; one Committee for counties that use a Nominating Committee
 - ii. Seven members of Committee for Supreme Court and Appellate Courts; five members of the Committees for Jackson, Clay, Platte, and Saint Louis Counties
 - iii. Recommendations are binding on the Governor
- b. Retention elections after initial 12 months, and then every 12 years (every six years for Jackson, Clay, Platte, and Saint Louis Counties)

4. Election States

- a. Retention elections every six years

5. Campaign and Funding Regulations

- a. Statutory Citation: Mo. Rev. Stat. § 130 (1997)

MONTANA

1. Background

- a. Population: .90 million
- b. Primarily urban
- c. Median household income: \$32,896
- d. Governor: Judy Martz, Republican
- e. U.S. Senators: One Republican; One Democrat
U.S. Representatives: One Republican
- f. Republicans control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Methods employed: Non-Partisan Elections with retention elections for unopposed judges; Merit Selection with Nominating Commission and State Senate confirmation for mid-term vacancies
- b. Same method for all levels of the judiciary
- c. Mont. Const. art. VII, § 8; Mont. Code Ann. § 3-1-1011 (1999); Mont. Code Ann. § 3-1-1001 (1999); Mont. Code Ann. § 3-1-1013 (1999); Mont. Code Ann. § 3-1-1014 (1999)
- d. Adopted in 1972

3. Merit selection for Mid-term Vacancies

- a. Nominating Committee
 - i. One Committee
 - ii. Seven members
 - iii. Recommendations are binding on the Governor but appointments are subject to State Senate confirmation
- b. Judges must run for election or retention at the first general election after confirmation

4. Elections

- a. Elections every eight years for Supreme Court; every six years for District Court; unopposed candidates are subject to retention elections

5. Campaign and Funding Regulations

- a. Statutory citation: Mont. Code Ann. § 13-37-216 (1999)

NEBRASKA

1. Background

- a. Population: 1.71 million
- b. Primarily rural
- c. Median household income: \$ 38,787
- d. Governor: Mike Johanns, Republican
- e. U.S. Senators: One Democrat; One Republican
U.S. Representatives: Three Republicans
- f. Unicameral, 49 members elected on non-partisan basis
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Method employed: Merit selection with Nominating Commission
- b. No differences among systems, except that Supreme Court justice is appointed from a statewide list of candidates, while all other justices and judges represent one of six state districts.
- c. Neb. Const. art. V, § 21; Neb. Const. art. V, § 21(1)
- d. Adopted in 1972 and 1994

3. Merit Selection

- a. Nominating Commissions
 - i. One Commission
 - ii. Nine members
 - iii. Recommendations are binding on the Governor
- b. Retention elections in first general election that occurs more than three years after appointment, then every six years

4. Campaign and Funding Regulations

- a. Statutory citation: Neb. Rev. Stat. § 32-1601 to –1614 (2000)

NEVADA

1. Background

- a. Population: 2.0 million
- b. Primarily urban
- c. Median household income: \$42,177
- d. Governor: Kenny Guinn, Republican
- e. U.S. Senators: One Republican; One Democrat
U.S. Representatives: 1 Republican; 1 Democrat
- f. Republicans control State Senate; Democrats control State House
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Methods employed: Non-Partisan Elections and Merit Selection with Nominating Commission for mid-term vacancies
- b. Same method used for all levels of the judiciary
- c. Nev. Const. art. VI, § 3; Nev. Const. art. VI, § 5; Nev. Rev. Stat. § 293.195 (1997); Nev. Const. art. VI, § 20(3); Nev. Const. art. VI, § 20(7)
- d. Adopted in 1979

3. Merit selection for Mid-term Vacancies

- a. Nominating Committee
 - i. Two Committees
 - 1) Permanent Committee nominates Supreme Court justices
 - 2) Temporary Committee nominates District Court judges
 - ii. Size of Committees: seven and nine respectively
 - iii. Recommendations are binding on the Governor
- b. The term of office for a judge appointed to fill a mid-term vacancy expires at the first general election following appointment

4. Election States

- a. Elections every six years for all judges.

5. Campaign and Funding Regulations

- a. Statutory citation: Nev. Rev. Stat. § 294A.100 (1997)

NEW HAMPSHIRE

1. Background

- a. Population: 1.24 million
- b. Primarily rural
- c. Median household income: \$42,023
- d. Governor: Jeanne Shaheen, Democrat
- e. U.S. Senators: Two Republicans
U.S. Representatives: Two Republicans
- f. Republicans control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Method employed: Appointment by Governor from nonbinding Judicial Selection Commission
- b. Same method used for all levels of the judiciary
- c. N.H. Const., part II, article 46; Exe. Order 000-9
- d. Most recent update in 2000, through Executive Order 2000-9

3. Merit Selection States

- a. Nominating Commission
 - i. One Judicial Selection Commission
 - ii. Commission comprised of 11 members:
 - iii. The Governor must select appointee from list of candidates provided by the Commission; however, the Governor may reject all candidates provided by the Commission and request that a new list of nominees be produced
- b. Appointments are lifetime, expiring at age 70

NEW JERSEY

1. Background

- a. Population: 8.4 million
- b. Primarily urban
- c. Median household income: \$47,903
- d. Governor (interim): Donald T. DiFrancesco; Democrat
- e. U.S. Senators: Two Democrats
U.S. Representatives: Seven Democrats, Six Republicans
- f. Republicans control both State Houses
- g. Supported Al Gore in the 2000 Presidential election

2. Methods

- a. Method employed: Gubernatorial Appointment
- b. Same method is used for all levels of the judiciary. Initial term of appointment is seven years for all state court judges after which judges must be reappointed by the Governor and then confirmed by the State Senate. Reappointment is for a quasi-life term expiring at the age of 70.
- c. N.J. Const. art. VI, § VI, ¶ 1
- d. Adopted in 1947

NEW MEXICO

1. Background

- a. Population: 1.82 million
- b. Primarily urban
- c. Median household income: \$30,836
- d. Governor: Gary E. Johnson, Republican
- e. U.S. Senators: One Democrat; One Republican
U.S. Representatives: One Democrat; Two Republicans
- f. Democrats control both State Houses
- g. Supported Al Gore in 2000 Presidential election

2. Methods

- a. Methods employed: Merit Selection with Nominating Commission; Partisan Elections
- b. Same method for all levels of the judiciary
- c. N.M. Const. art. VI, § 35
- d. Amended in 1988

3. Merit selection states

- a. Nominating Committee
 - i. Three Committees
 - ii. Appellate Nominating Commission: 14 members
District Court Nominating Committee: 13 members
Metropolitan Court Nominating Committee: 12 members
 - iii. Recommendations are binding on the Governor
- b. Appointed judges participate in a partisan election at the first general election after appointment. Winner of the partisan election participates in retention election every eight years if an Appellate judge; six years if a District Court judge; and four years if a Metropolitan Court judge

4. Campaign and Funding Regulations

- a. Statutory citation: N.M. Stat. Ann. §§21-800 and 21-700(D)(2001)
Campaign Reporting Act §§1-19-25 to 1-19-37

NEW YORK

1. Background

- a. Population: 18.98 million
- b. Primarily urban
- c. Median household income: \$36,369
- d. Governor: George E. Pataki, Republican
- e. U.S. Senators: Two Democrats
U.S. Representatives: 19 Democrats, 12 Republicans
- f. Republicans control the Senate; Democrats control the House
- g. Supported Al Gore in the 2000 Presidential election

2. Methods

- a. Methods employed: Merit Selection with Nominating Commission; Gubernatorial Appointment; appointment by other elected officials, and local elections
- b. Court of Appeals: judges to the Court of Appeals are nominated by the Governor from candidates proposed by the Commission on Judicial Nomination. State Senate then confirms gubernatorial appointments
Other inferior State Courts: justices to the Supreme Courts are elected by electors of the judicial district in which the judge is to serve; Governor appoints justices to the Appellate divisions of the Supreme Court judges to the Court of Claims are appointed by Governor and confirmed by State Senate; judges of the Country Court and Surrogate Court are chosen by electors of the county; judges for NYC Family Court are chosen by the Mayor of New York City and judges to Family Courts outside of New York City are chosen by local electors; judges to city-wide Civil Courts for New York City are chosen by local electors for New York City and judges to city-wide Criminal Courts are chosen by Mayor of New York City
- c. Article VI of the New York Constitution; (Commission on Judicial Nomination)
- d. Adopted in 1976

3. Merit Selection States

- a. Commission on Judicial Nomination
 - i. One Commission
 - ii. 12 members
 - iii. Recommendations are binding on the Governor
- b. Court of Appeals and Supreme Court serve 14 year terms; Appellate Divisions of Supreme Court serve five years; terms vary from four to 14 years for judges to other inferior courts

NORTH CAROLINA

1. Background

- a. Population: 8.05 million
- b. Equally rural and urban
- c. Median household income: \$35,320
- d. Governor: Mike Easley, Democrat
- e. U.S. Senators: One Democrat; One Republican
U.S. Representatives: Five Democrats; Seven Republicans
- f. Democrats control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Methods employed: Partisan Elections
- b. Same method used for all levels of the judiciary
- c. NC Const. art. IV, § 16
- d. Adopted in 1868

4. Election states

- a. Election for eight year terms

5. Campaign and Funding Regulations

- a. Statutory citation: Canon 7, Code of Judicial Conduct; N.C. Gen. Stat. § 163-278 (1999) (“Limitation on contributions”)

NORTH DAKOTA

1. Background

- a. Population: .64 million
- b. Primarily rural
- c. Median household income: \$31,764
- d. Governor: John Hoeven, Republican
- e. U.S. Senate: Two Democrats
U.S. Representatives: One Democrat
- f. Republicans control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Methods employed: Non-Partisan Elections and Merit Selection with Nominating Committee for mid-term vacancies
- b. Same method employed for all levels of the judiciary
- c. Article VI of the State Constitution
- d. Judicial Article of State Constitution adopted in 1976

3. Merit Selection States

- a. Nominating Commission
 - i. One Commission
 - ii. Information not available
 - iii. Recommendations are binding on the Governor

4. Election States

- a. Non-Partisan Elections are held every ten years for Supreme Court; every six years for District Court; every four years for Municipal Court

5. Campaign and Funding Regulations

- a. Statutory citation: Chapter 16.1-08.1 North Dakota Century Code

OHIO

1. Background

- a. Population: 11.35 million
- b. Primarily urban
- c. Median household income: \$36,029
- d. Governor: Bob Taft II, Republican
- e. U.S. Senators: Two Republicans
U.S. Representatives: 11 Republicans, Eight Democrats
- f. Republicans control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Method employed: Non-Partisan Elections and Gubernatorial Appointment with Nominating Commission for mid-term vacancies
- b. Same method used for all levels of the judiciary
- c. Ohio Const. art. IV, § 6; Ohio Rev. Code Ann. § 2301.01; Ohio Rev. Code Ann. § 2501.02 (1994); Ohio Rev. Stat. Ann. § 2503.03 (1994)
- d. Adopted in 1851

4. Election States

- a. Election for six-year term

5. Campaign and Funding Regulations

- a. Statutory citation: Canon 7, Code of Judicial Conduct

OKLAHOMA

1. Background

- a. Population: 3.45 million
- b. Primarily rural
- c. Median household income: \$52,261
- d. Governor: Frank Keating, Republican
- e. U.S. Senators: Two Republicans
U.S. Representatives: Six Republicans
- f. Democrats control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Methods employed: Merit Selection with Nominating Commission and Non-Partisan Elections
- b. Merit Selection for Supreme Court justices and Appellate judges; the trial court judges are determined by Non-Partisan Election
- c. Okla. Const. art. 7-B, §§ 3,4, Okla. Stat. Ann. tit. 20, §§ 33-35; Okla. Stat. Ann. tit. 51, § 10 (2000); Okla. Stat. Ann. tit. 20, § 30.17 (1991)
- d. Adopted in 1967, 1968 and 1987

3. Merit Selection States

- a. Nominating Committee
 - i. One Committee
 - ii. 13 members
 - iii. Recommendations are binding on the Governor; Legislative confirmation is required
- b. Retention elections every six years for Supreme Court justices and Appellate Court judges after initial one year term

4. Election States

- a. Non-Partisan election every four years for trial level

5. Campaign and Funding Regulations

- a. Statutory Citation: Okla. Stat. Ann. tit. 21, § 187.1 (1983)

OREGON

1. Background

- a. Population: 3.42 million
- b. Primarily urban
- c. Median household income: \$39,305
- d. Governor: John Kitzhaber, Democrat
- e. U.S. Senators: One Republican; One Democrat
U.S. Representatives: One Republican; Four Democrats
- f. Republicans control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Methods employed: Non-Partisan Elections and Appointment by Supreme Court to fill vacancies
- b. Same method used for all levels of judiciary
- c. Or. Const. art. VII §§ 1, 2; Or. Rev. Stat. § 249 (1999)
- d. Adopted in 1958

3. Election States

- a. Elections every six years for all judicial positions

4. Campaign and Funding Regulations

- a. Campaign Regulations: Or. Rev. Stat. §§ 260.005 to 260.995

PENNSYLVANIA

1. Background

- a. Population: 12 million
- b. Primarily urban
- c. Median household income: \$38,562
- d. Governor: Mark Schweiker, Republican
- e. U.S. Senators: Two Republicans
U.S. Representatives: Ten Democrats; 11 Republicans
- f. Republicans control both State Houses
- g. Supported Al Gore in 2000 Presidential election

2. Methods

- a. Methods employed: Partisan Elections and Gubernatorial Appointment with State Senate consent for mid-vacancies
- b. Same method used for all levels of the judiciary
- c. Pa. Const. art. V, 13(a), 15(a)
- d. Amended in 1975, 1978, and 1979

3. Election States

- a. Retention elections every ten years for Supreme Court justices and Superior Court, Commonwealth Court, and Court of Common Pleas judges. District justices and judges of Philadelphia's Municipal and Traffic Courts are elected to terms of six years

4. Campaign and Funding Regulations

- a. Statutory citation: 25 Pa. Cons. Stat. Ann. §§ Title 25, Art. XVI

RHODE ISLAND

1. Background

- a. Population: 1.01 million
- b. Primarily urban
- c. Median household income: \$43,185
- d. Governor: Lincoln C. Almond, Republican
- e. U.S. Senators: One Democrat, One Republican
U.S. Representatives: Two Democrats
- f. Democrats control both State Houses
- g. Supported Al Gore in 2000 Presidential election

2. Methods

- a. Methods employed: Merit Selection with Nominating Committee and Legislative Confirmation
- b. Same method used for all levels of the judiciary
- c. R.I. Const. art. X, § 4.; R.I. Gen. Laws § 8-16.1 (1997); R.I. Gen. Laws § 8-1-1 et seq. (1997)
- d. Adopted in 1994

3. Merit Selection States

- a. Nominating Committee
 - i. One Committee
 - ii. Nine members
 - iii. Recommendations are binding on the Governor. However, the Governor needs approval of State Senate (House and Senate for Supreme Court)
- b. All judges hold office for life

SOUTH CAROLINA

1. Background

- a. Population: 4.01
- b. Primarily urban
- c. Median household income: \$ 36,563
- d. Governor: Jim Hodges, Democrat
- e. U.S. senators: One Democrat; One Republican
U.S. Representatives: Two Democrats, Four Republicans
- f. Republicans control both State Houses
- h. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Method employed: Legislative Appointment with Nominating Commission who are selected by majority party leadership of both houses of the General Assembly
- b. Same method used for all levels of the judiciary.
- c. S.C. Const. art. V, §§ 3, 8 and 13 (Judicial Selection Method; S.C. Code Ann. § 2-19-10 to –120 (1986) (Merit Selection Commission)
- d. Adopted in 1973; amended 1996

3. Legislative Appointment

- a. Nominating Commissions
 - i. One Commission
 - ii. Ten members
 - iii. Recommendations are binding on the General Assembly
- b. Reappointment after initial term of ten years

4. Campaign and Funding Regulations

- a. Statutory citation: S.C. Code of Judicial Conduct EC 5

SOUTH DAKOTA

1. Background

- a. Population: .75 million
- b. Primarily rural
- c. Median household income: \$33,000
- d. Governor: William Janklow, Republican
- e. U.S. Senators: Two Democrats
U.S. Representatives: One Republican
- f. Republicans control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Methods employed: Merit Selection with Nominating Commission and Non-Partisan Elections
- b. Merit Selection for Supreme Court justices; Non-Partisan Elections for Circuit Court judges
- c. S.D. Const. art. V, § 7; S.D. Codified Laws §§ 16-1-2 (1995) and 16-6-3
- d. Adopted in 1972

3. Merit Selection States

- a. Commission on Judicial Qualifications
 - i. One Commission
 - ii. Seven members
 - iii. Recommendations are binding by the Governor
- b. Retention elections for Supreme Court justices every eight years

4. Election States

- a. Non-Partisan Election for Circuit Court judges every eight years

5. Campaign and Funding Regulations

- a. Statutory citation: S.D. Codified Laws 12-25-1 to 12-25-34

TENNESSEE

1. Background

- a. Population: 5.69 million
- b. Primarily urban
- c. Median household income: \$51,000
- d. Governor: Don Sundquist, Republican
- e. U.S. Senators: Two Republicans
U.S. Representatives: Five Republicans; Four Democrats
- f. Democrats control both State Houses
- g. Supported George W. Bush in the 2000 Presidential election

2. Methods

- a. Methods employed: Merit Selection with Nominating Commission and Partisan Elections
- b. Merit Selection is used for Supreme Court, Court of Appeals, and Court of Criminal; Partisan Elections are used for Chancery Court, Criminal Court, and Circuit Court Appeals
- c. Tenn. Code. Ann. §§ 17-4-101 to -118 and 201 (1994-95)
- d. Adopted 1994

3. Merit Selection

- a. Nominating Committee
 - i. One Committee
 - ii. 15 Members
 - iii. Recommendations are binding on the Governor
- b. Retention elections every eight years for Appellate Courts
 - i. Incumbent is unopposed in the election if he or she files a Written Declaration of Candidacy and is recommended by the Judicial Evaluation Committee.
 - ii. Incumbent is opposed if he or she is NOT recommended by the Judicial Evaluation Committee.

4. Partisan Elections

- a. Elections every eight years for trial courts

5. Campaign and Funding Regulations

- a. Statutory citation: Tenn. Code Ann. §§2-10-301-310

TEXAS

1. Background

- a. Population: 20.85 million
- b. Primarily urban
- c. Median household income: \$34,478
- d. Governor: Rick Perry, Republican
- e. U.S. Senators: Two Republicans
U.S. Representatives: Eight Republicans, Seven Democrats
- f. Democrats control the State House; Republicans control the State Senate
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Method employed: Partisan Elections
- b. Same method used for all levels of the judiciary
- c. Tex. Elec. Code Ann. §§ 253.151 – 253.176 (1986)
- d. Amended in 1999

3. Election States

- a. Partisan Elections every six years for all judges, except District Court judges where election is every four years

4. Campaign and Funding Regulations

- a. Statutory citation: Tex. Elec. Code Ann. §§ 253.151-253.176 (1986)

UTAH

1. Background

- a. Population: 2.23 million
- b. Primarily urban
- c. Median household income: \$38,884
- d. Governor: Mike Leavitt, Republican
- e. U.S. Senators: Two Republicans
U.S. Representatives: One Democrat; Two Republicans
- f. Republicans control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Method employed: Merit Selection with Nominating Commission and confirmation by the State Senate
- b. Same method used for all levels of the judiciary
- c. Utah Const. art. VIII, § 8
- d. Amended in 1997

3. Merit Selection States

- a. Nominating Commission
 - i. Two Commissions: Appellate Court Nominating Commission and Trial Court Nominating Commission
 - ii. Seven members on each Commission
 - iii. Recommendations are binding on the Governor but Governor's appointee must be confirmed by State Senate
- b. Retention election held every: ten years for Supreme Court justices; and six years for Court of Appeals, District Court or Juvenile Court judges
- c. To qualify for retention election a judge must be evaluated by the Judicial Council and certified as qualified

4. Campaign and Funding Regulations

- a. Statutory citation: Utah Code Ann. §§ 20A-12-302 to 306 (2000)

VERMONT

1. Background

- a. Population: .59 million
- b. Primarily rural
- c. Median household income: \$39, 317
- d. Governor: Howard Dean, Democrat
- e. U.S. Senators: One Democrat; One Independent
U.S. Representatives: One Independent
- f. Republicans control the State House; Democrats control the State Senate
- g. Supported Al Gore in 2000 Presidential election

2. Methods

- a. Methods employed: Merit Selection with Nominating Committee
- b. Same method used for all levels of the judiciary
- c. Vt. Const. art. 2, § 32; Vt. Stat. Ann. tit. 4, § 601 (1999); Vt. Const. art. 2, § 32
- d. Adopted in 1967

3. Merit Selection States

- a. Nominating Committee
 - i. One Committee
 - ii. 11 members
 - iii. Recommendations are binding on the Governor
- b. Six-year term with automatic retention unless a majority of the General Assembly vote against the judge

VIRGINIA

1. Background

- a. Population: 7.08 million
- b. Primarily urban
- c. Median household income: \$ 45,750
- d. Governor: James S. Gilmore III, Republican
- e. U.S. Senators: Two Republicans
U.S. Representatives: Four Democrats, Six Republicans, One Independent
- f. Republicans control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Method employed: Legislative Appointment without Nominating Commission
- b. Same method used for all levels of the judiciary
- c. Va. Const. art. VI, § 7
- d. Adopted in 1971

3. Legislative Appointment

- a. Reappointment after term of 12 years for Supreme Court, reappointment after eight years for all other courts

4. Campaign and Funding Regulations

- a. Statutory citation: Va. Canons of Judicial Conduct EC 5

WASHINGTON

1. Background

- a. Population: 5.89 million
- b. Primarily urban
- c. Median household income: \$45,310
- d. Governor: Gary Locke, Democrat
- e. U.S. Senators: Two Democrats
U.S. Representatives: Three Republicans, Six Democrats
- f. Democrats control both State Houses
- g. Supported Al Gore in 2000 Presidential election

2. Methods

- a. Method employed: Non-Partisan Elections and Gubernatorial Appointment for mid-term vacancies
- b. Same method used for all levels of judiciary
- c. Wash. Const. art. IV, § 3; Wash. Const. art. IV, § 5; Wash. Rev. Code § 2.06.080 (1988); Wash. Rev. Code § 29.21.070 (1993)
- d. Adopted in 1912

3. Elections

- a. Non-Partisan Elections every six years for Supreme Court justices and Court of Appeals judges; every four years for Superior Court judges

5. Campaign and Funding Regulations

- a. Statutory citation: Wash. Rev. Code § 42.17.640 (2000)

WEST VIRGINIA

1. Background

- a. Population: 1.8 million
- b. Primarily rural
- c. Median household income: \$27,432
- d. Governor: Bob Wise, Democrat
- e. U.S. Senators: Two Democrats
U.S. Representatives: Two Democrats; One Republican
- f. Democrats control both State Houses
- g. Supported George W. Bush in the 2000 Presidential election

2. Method

- a. Method employed: Partisan Elections and Gubernatorial Appointment for mid-term vacancies
- b. Same method used for all levels of the judiciary
- c. W.Va. Const. art. VIII, § 2
- d. Adopted in 1872

3. Election State

- a. Partisan Elections every 12-year for Supreme Court and every eight years for Circuit Court

4. Campaign and Funding Regulations

- a. Statutory citation: W. Va. Code Ann. §§ 3-8-1 to -13 (1999)

WISCONSIN

1. Background

- a. Population: 5.36 million
- b. Primarily urban
- c. Median household income: 39,800
- d. Governor: Scott McCallum, Republican
- e. U.S. Senate: Two Democrats
U.S. Representatives: One Democrat
- f. Republicans control the State House; Democrats control the State Senate
- g. Supported Al Gore in 2000 Presidential election

2. Methods

- a. Methods employed: Non-Partisan Elections and Gubernatorial Appointment for mid-term vacancies
- b. Same method used for all levels of the judiciary
- c. Article VII of the Wisconsin State Constitution
- d. Adopted in 1977

3. Election States

- a. Supreme Court elected every ten years; Court of Appeals and Circuit Court elected every six years

4. Campaign and Funding Regulations

- a. Chapter 11 of the Wisconsin Statutes

WYOMING

1. Background

- a. Population: .48 million
- b. Primarily urban
- c. Median household income: \$33,197
- d. Governor: Jim Geringer, Republican
- e. U.S. Senators: Two Republicans
U.S. Representatives: One Republican
- f. Republicans control both State Houses
- g. Supported George W. Bush in 2000 Presidential election

2. Methods

- a. Methods employed: Merit Selection through Nominating Committee
- b. Same method used for all levels of the judiciary
- c. Wyo. Const. art. V, § 4
- d. Adopted in 1971

3. Merit Selection States

- a. Nominating Committee
 - i. One Committee
 - ii. Seven members
 - iii. Recommendations are binding on the Governor
- b. Retention elections held every eight years for Supreme Court justices and every six years for District Court judges

4. Campaign and Funding Regulations

- a. Statutory citation: Wyo. Stat. Ann. §§ 22-25-101 to 22-25-115