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CENTER
FOR JUSTICE

Choosing State Judges: A Plan for Reform

By Alicia Bannon

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Fair and impartial justice is under threat in state supreme courts across the country. Less than a generation ago, state supreme court elections were subdued affairs. No longer. Today, special interests routinely pour large sums into supreme court races. As of January 2017, 20 states had at least one justice on their supreme court who had been involved in a \$1 million election.¹ And during the 2015-16 election cycle, more justices were elected in \$1 million-plus elections than ever before.² Outside spending by special interest groups — most of which do not disclose their donors — also shattered previous records.³ Perhaps unsurprisingly, nearly 90 percent of respondents to a 2013 poll said they believed that campaign cash affects judicial decisions.⁴

While the U.S. Supreme Court usually grabs the headlines, state supreme courts play a powerful role in American life. Ninety-five percent of all cases are filed in state courts, and state supreme courts are typically the final word on state law.⁵ Their decisions can have profound effects on our lives and on states' legal and policy landscapes — from whether an Ohio town can regulate fracking,⁶ to whether Kansas must increase public education spending by hundreds of millions of dollars,⁷ to whether Massachusetts officials can detain people based on a request from federal immigration authorities.⁸ At a time when the broken process for confirming justices to the U.S. Supreme Court is in sharp focus, safeguarding state courts as a backstop to defend our rights should be urgent business.

A judge's job is to apply the law fairly and protect our rights, even when doing so is unpopular or angers the wealthy and powerful. But the reality of competing in costly, highly politicized elections is at odds with this role. If a judge rules against a major donor, will that donor still fund her next campaign? If she angers a powerful political interest, will she face an avalanche of attack ads? These electoral pressures create a morass of conflicts of interest that threaten the appearance, and reality, of fair decision-making. They're also a roadblock for aspiring judges who can't tap million-dollar networks.

Left unchecked, these trends can undermine the integrity of state supreme courts and the public trust that undergirds their legitimacy. The implications for American justice are acute.

That's why the Brennan Center is urging states to reform their systems for choosing judges. We recommend that states do away with state supreme court elections completely. Instead, justices should be appointed through a publicly accountable process conducted by an indepen-

dent nominating commission. Furthermore, to genuinely preserve judicial independence, all justices should serve a single, lengthy term. No matter the mechanism by which they reach the bench, be it an election or an appointment by the governor or legislature, justices should be freed from wondering if their rulings will affect their job security.

We are not the first to consider reforms to state judicial selection. Over the past 20 years, numerous bar associations, academics, judges, advocates, and other experts have offered ideas about how to mitigate special inter-

Nearly 90 percent of voters believe that campaign cash affects judicial decisions.

est influence in judicial elections,⁹ including public financing for judicial races and stronger ethics rules for judges. Many have called for eliminating

contested judicial elections.¹⁰ But states have been slow to act.¹¹ Meanwhile, recent trends — including the increased prevalence of high-cost elections and the growing role of outside interest groups — have created both heightened urgency and new policy challenges.

Our proposals are the result of a three-year project taking a fresh look at judicial selection. We focused on state supreme courts, where the rise of politicized elections has been most pronounced. We studied how each state selects its justices,¹² including individual case studies¹³ and an in-depth examination of judicial nominating commissions.¹⁴ We spoke to dozens of experts and stakeholders,¹⁵ reviewed the extensive legal and social science literature on judicial selection, and considered reform proposals from bar associations, legislatures, and scholars.¹⁶

1. End Supreme Court Elections & Use an Accountable Appointment System

Twenty-two states provide for contested supreme court elections, where multiple candidates can vie for a seat on the bench. These competitions should be replaced by a publicly accountable appointment system that is transparent and minimizes opportunities for political self-dealing. Likewise, the 19 states that use retention elections, where sitting justices must stand for uncontested up-or-down votes to retain their seats, should eliminate them.

One reason recent efforts to eliminate judicial elections have faltered is a lack of public trust in an alternative process. This skepticism is often well-placed. If an appointment system does not allow for public oversight and does not curb opportunities for political influence, it can wind up being vulnerable to many of the same pressures as judicial elections.

We therefore urge states to adopt a “merit selection” appointment process, in which an independent nominating commission vets judicial candidates and issues a short

list. The governor then selects an appointee from the list provided to her.

But the mechanics and procedures underlying such a system are critical — both to promote public trust and to minimize opportunities for abuse. Nominating commissions should be bipartisan, appointed by diverse stakeholders, include non-lawyers, and have clear criteria for vetting candidates. The nominating process should be open and transparent, with publicly available data about the diversity of applicants and nominees. In addition, the governor, not the state legislature, should be empowered to select an appointee from the commission’s short list. Finally, states should not use retention elections, where justices stand for an up-or-down vote, as part of a merit selection process.

Importantly, these recommendations also apply to states that already use appointments. Although 28 states appoint justices for an initial term on the bench, the overwhelming majority lack many of these safeguards.

2. State Supreme Court Justices Should Serve a Lengthy Single Term

Judicial selection debates usually focus on how judges first reach the bench, but far less attention has been paid to judicial retention. If anything, however, it is the process for retaining sitting judges that can have the most pernicious effects on judicial behavior. Extensive evidence suggests that election pressures impact judicial decision-making in a wide array of cases, and that retiring justices rule differently than those seeking to keep their jobs.¹⁷ Similar effects are also seen among justices who don’t face voters but who are subject to a political reappointment process — such as a decision by a governor about whether a justice can remain in office.

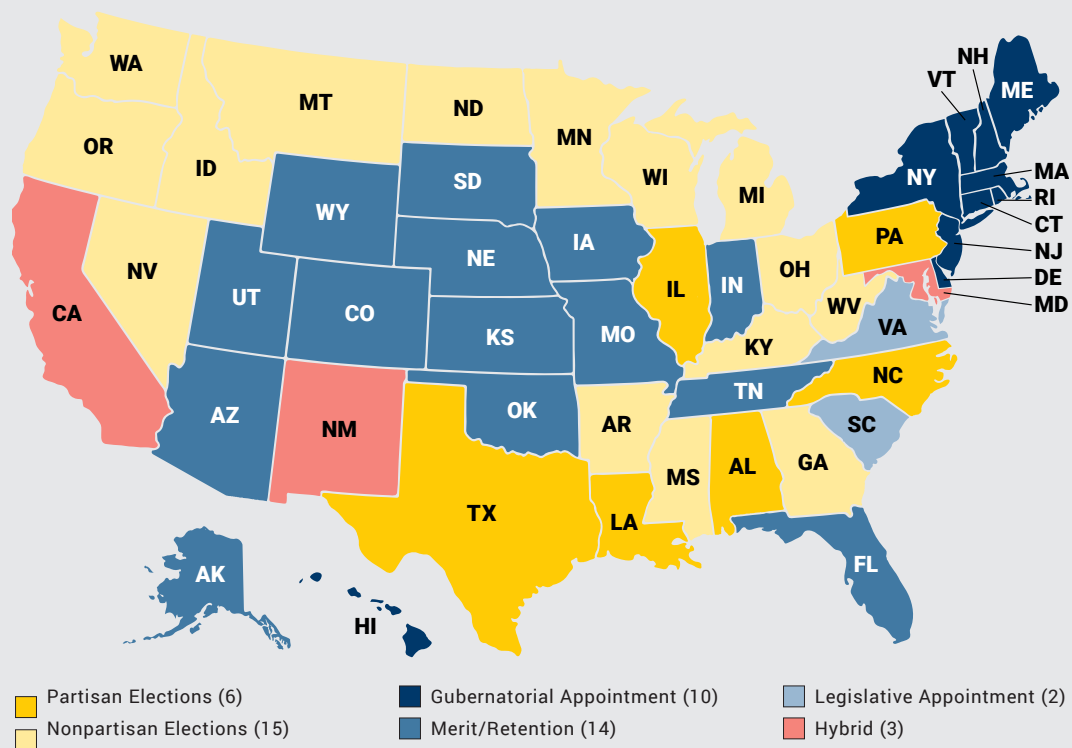
There is a simple solution to this problem: State supreme court justices should serve only a single, lengthy term on the bench so that they can decide cases without worrying that following the law could cost them their job. Alternatively, states can allow supreme court justices to serve indefinitely, with or without a mandatory retirement age, subject to the same “good behavior” rules as federal judge-

es. Three states — Massachusetts, Rhode Island, and New Hampshire — follow this model. Or states can follow the practice of Hawaii and the District of Columbia, and have an independent commission determine whether a sitting justice should be retained.

Any of these changes would be transformative. In 46 states, supreme court justices serve for multiple terms and must go through a political process to retain their seats: Thirty-eight use elections for additional terms on the bench, and eight give the governor or legislature the power to renew judicial terms.

In addition, states that continue to elect justices should embrace other safeguards, such as judicial public financing and robust recusal rules governing when a justice should step aside from hearing a case involving a major donor. These policies can help curb the harmful effects of high-cost and politicized judicial elections.¹⁸

How Do States Select Their Justices?



Contested elections are the most common selection method, used by 22 states. In contested elections, multiple candidates vie for a court seat — similar to how candidates run for executive and legislative offices. In 15 states, these elections are **nonpartisan**, meaning that candidates do not have party labels. Six states use **partisan** elections, where candidates are affiliated with a party. In one additional state, New Mexico, partisan elections are part of a hybrid system in which justices are first appointed by the governor through merit selection. Most of these states also use contested elections when justices run for subsequent terms, but in Pennsylvania, Illinois, and New Mexico, once elected, justices face single-candidate **retention elections** where voters decide yea or nay if a judge will stay in office.

Merit/retention systems, also known as “merit selection” and the “Missouri Plan” (named after the first state to adopt the system), are used in 14 states. In merit/retention systems, an independent nominating commission screens and evaluates prospective justices and then presents a slate to the governor, who must choose from that list. Some states also require the governor to submit his or her pick for confirmation by the legislature. Once appointed, justices stand for additional terms in single-candidate retention elections. Two additional states, California and Maryland, use a gubernatorial appointment

process coupled with retention elections but do not require the governor to select candidates based on the recommendations of a nominating commission.

Gubernatorial appointment, used in 10 states, has no electoral component.¹⁹ All but one of these 10 states use some form of a nominating commission. Of the nine that do, seven use a nominating commission that presents a binding list of choices to the governor, akin to a merit selection system. And in the two other states, the nominating commission’s selections are only advisory.

In six of the gubernatorial-appointment states, justices serve fixed terms and may be reappointed to additional terms by the governor or legislature. In one state, Hawaii, the state’s judicial nominating commission determines whether to reappoint sitting justices, without a role for the governor or legislature. In the remaining three states, justices either serve for life or until they reach a mandatory retirement age.

Legislative appointment, where the state legislature appoints justices, is used in Virginia and South Carolina. South Carolina employs a nominating commission as part of the process; however, the majority of its commissioners are required to be members of the General Assembly.

FOR MORE INFORMATION ON JUDICIAL SELECTION IN THE STATES, SEE THE BRENNAN CENTER’S INTERACTIVE MAP: <http://judicialselectionmap.brennancenter.org>

There was a time when state supreme court elections were usually low-cost and relatively tame. Candidates — to the extent they actively campaigned at all — primarily discussed their qualifications and backgrounds.²⁰

That era is over. Today, million-dollar campaigns are increasingly the norm.²¹ Dark money — the sources of which remain anonymous — flows freely.²² National political groups weigh in with heavy spending,²³ as do plaintiffs’ lawyers and business interests.²⁴ As it now stands, one-third of all elected justices currently sitting on the bench have run in at least one \$1 million race, according to a Brennan Center analysis.²⁵

Where does all this money come from? Not surprisingly, when donors can be identified, they are usually businesses, plaintiffs’ lawyers, or groups with close ties to a political party — all regular players in state courts. The perception that a judicial candidate is “business-friendly” or “pro-plaintiff” often drives election spending, as do broader efforts to change a court’s ideological tilt.²⁶

One result is that the race for voters becomes a race for money — and frequently leads to conflicts of interest in the courtroom.²⁷ In Louisiana, for example, a 2016 race for an open seat had plaintiffs’ lawyers who bring environmental litigation backing one candidate and the oil and gas companies they sue backing another.²⁸ And, as is increasingly typical since the U.S. Supreme Court’s decision in *Citizens United v. FEC*, more than half of the \$4.9 million poured into the Louisiana race came from outside groups — and more than \$1 million was “dark,” meaning that the source of the funds was not publicly disclosed.²⁹

Judicial decisions have also become frequent campaign fodder, with complex or nuanced legal and procedural issues often reduced to misleading and provocative attacks. One representative example is an ad from Washington state’s 2016 supreme court election, in which a justice was condemned for “enabl[ing] child predators.” In reality, the justice had ruled that police had not given adequate warning when searching a home without a warrant.³⁰ Both a retired supreme court justice and a former U.S. Attorney publicly criticized the spot, maintaining that it “misrepresent[ed] both the impacts — and motives” of the opinion and “borrow[ed] tactics from some of our country’s ugliest political moments.”³¹ This kind of tone in a campaign spot is not unusual: More than one-third of television ads that ran during the 2015-16 supreme court election cycle were negative — and a majority of them attacked judicial rulings.³²

There is also strong reason to be concerned that election pressures impact how judges decide cases. A 2001 survey of state court judges revealed that nearly half — 46 percent — believed campaign contributions had at least some impact on decisions.³³ As Richard Neely, a retired chief justice of the West Virginia Supreme Court of Appeals, observed in an interview with *The New York Times*, “It’s pretty hard in big-money races not to take care of your friends. It’s very hard not to dance with the one who brung you.”³⁴ Other judges have echoed these sentiments.³⁵

While precise causality is difficult to establish, numerous studies have likewise found strong correlations between donor support and favorable rulings for those donors.³⁶ One such study looked at the relationship between contributions from business interests and business-friendly

One-third of all elected justices currently sitting on the bench have run in at least one \$1 million race.

outcomes. The most profound finding was that when judges were serving their last term before mandatory retirement — and therefore freed from having to curry favor with wealthy supporters to finance

their next election — their favoring of business litigants essentially disappeared.³⁷ Another study found similar dynamics in election law cases. Judges who received more campaign money from political parties and allied groups were more likely to rule in favor of the party that supported them. However, the influence of campaign money largely disappeared when judges were no longer eligible for reelection.³⁸

There is also substantial evidence that election pressures affect criminal cases.³⁹ For example, one study released by the American Constitution Society found that as the number of television ads increased in a state’s supreme court elections, justices were less likely to vote in favor of criminal defendants. The authors suggested that judges were reluctant to rule for a defendant lest they be attacked for being “soft on crime,” an often-used weapon against incumbents.⁴⁰

These dynamics pose a profound challenge to the use of supreme court elections in the current political environment. Judicial elections were first adopted in the 19th century as a reform measure to insulate the judiciary from the political branches of government and avoid what legal historian Jed Shugerman has described as the era’s “partisan patronage politics of appointments.”⁴¹

More recently, elections are more likely to be supported as a form of “public accountability” in which judges are answerable “to the people.” This check, the theory goes, prevents judges from imposing their personal preferences under the guise of law and ensures that judicial philosophies align with the public at large, even at some cost to independence.⁴² (Of course, other accountability mechanisms do not pose such tensions, such as appellate review or disciplinary procedures for inappropriate conduct.)

But while most discussions about judicial selection focus on the philosophical tension between judicial independence and accountability, the concrete reality is that today’s high-cost and politicized elections undermine both values. When special interests pour millions into state supreme court elections, judges face substantial pressure to support those special interests when deciding cases, or face their wrath in the next election. This financial dependence is a clear threat to judicial independence.

These same dynamics also risk leaving justices more “accountable” to wealthy and powerful interests than to the public — especially since supreme court elections are usually low-information races where voters are unlikely to carefully evaluate a candidate’s record.⁴³ The increasing prevalence of dark money further undermines accountability, denying voters a meaningful opportunity to assess crucial questions about judicial candidates — including who is supporting them and why.

Where to draw the line between judicial independence and public accountability is a hard question, but in today’s political environment, it’s also a false choice. With modern judicial elections not working as designed, states should look to alternative structures that can better forward both values.

So, what should judicial selection reform look like? As discussed in detail in an earlier Brennan Center white paper, *Rethinking Judicial Selection in State Courts*, assessing and comparing judicial selection systems requires normative judgments about what judicial selection is supposed to achieve and how best to take into account diverse values that can sometimes be in tension, including judicial independence, accountability, democratic legitimacy, diversity on the bench, public confidence in the courts, and judicial quality.⁴⁴

These values undergird our recommendations. Thus, in developing our proposals, we asked whether potential reforms would:

- adequately protect judicial independence, so that we can be confident that judges are deciding cases fairly

and not based on inappropriate political, partisan, or special interest pressure

- provide for sufficient input from the public or from democratically accountable actors, so that the judges chosen under the system are more likely to be seen as legitimate
- provide mechanisms to hold judges accountable for legal errors or ethical lapses
- be likely to produce a high-quality and diverse bench and to instill public confidence in the courts

Not surprisingly, we found that choosing a selection system involves tradeoffs. For example, requiring sitting judges to stand for reelection or retention can help advance the value of accountability. But requiring judges to hear cases in the looming shadow of an upcoming election can also threaten the value of judicial independence. In other instances, we found no consistent differences between elective and appointive systems. For example, empirical studies have found little difference in judicial qualifications among justices regardless of how they arrived on the bench — which may mean that all methods are about the same in this respect or that there are deficiencies in measurement.⁴⁵

Nevertheless, as detailed in this report, there is compelling evidence that the judicial selection systems used in most states pose serious threats to many of these core values and that our proposed reforms would better safeguard them.

Replace Supreme Court Elections with an Accountable Appointment System

Whether states should elect or appoint supreme court justices has been hotly debated for decades.⁴⁶ But while the discussion is not new, big money state supreme court contests — and all the problems associated with them — have grown substantially this century. The number of state supreme courts with at least one member who has competed in a \$1 million-plus election nearly tripled between 1999 and 2017 (inflation-adjusted).⁴⁷ And just as the U.S. Supreme Court’s decision in *Citizens United v. FEC* transformed elections for political offices, judicial elections have followed a similar path.⁴⁸

We believe that state supreme court elections in today’s super-charged political environment pose too great a threat to both the appearance and reality of evenhanded justice to be a desirable selection method. The harder question, however, is how to craft an alternative to elections that does not raise a host of its own problems. As Shugerman has observed, “Appointments can be even more vulnerable to cronyism, patronage, and self-dealing than partisan elections.”⁴⁹

Our research indicates that appointment systems can be effective in insulating judges from political and special-interest pressure and influence. But it is essential that the process is structured so that opportunities for political influence are curtailed and there is meaningful public oversight. We therefore urge states to adopt a *publicly accountable* appointment process for supreme court justices — a variant on the so-called “merit selection” appointment process — with the following safeguards:

- Use an independent, bipartisan judicial nominating commission with diverse appointing authorities and membership, including non-lawyers. The commission should vet candidates on qualifications, temperament, ethics, and other nonpolitical considerations and then issue a *binding* short list of nominees to be considered for appointment.
- The application process should be clear and open, with transparent selection criteria, public interviews, and a public vote by the commissioners. Commissioners should be regulated by ethics rules, and public data should be collected about the diversity of candidates at each stage of the process.
- The final appointment decision should rest with the governor, who should be required to select a justice from the nominating commission’s short list.

Even as part of a merit selection system, we recommend against judicial retention elections.

For additional information on best practices, including examples from the states, see Appendix 1.

1. The Mixed History of Judicial Appointments: Contending with the Disadvantages

The history of judicial appointment systems strongly suggests that their *success* often depends on their *structure*. Minimizing opportunities for political self-dealing and special interest influence is vital for promoting fair, independent, and diverse courts — and for public confidence.

Judges — especially state supreme court justices — regularly hear cases involving powerful interests. If a selection system creates even the appearance that judges are beholden to benefactors responsible for their appointment, it can undermine public trust in the appointment process and in the judiciary. Indeed, it was exactly these concerns that prompted many states to abandon appointment systems in favor of judicial elections in the 19th century.⁵⁰

The most common judicial selection tool states have used to mitigate these concerns is judicial nominating commissions, which we support as the first step toward reform. While their size, structure, and appointment processes vary widely, judicial nominating commissions typically are independent bodies charged with evaluating judicial candidates on nonpolitical criteria and producing a short list of names from which the appointing authority (usually the governor) is required to select an appointee.⁵¹

Once a governor receives a short list from a nominating commission, she may consider whatever factors she wishes — judicial philosophy, political party membership, even personal friendship. But because the governor does not control the creation of the short list, ideally a nominating commission constrains the governor’s discretion to appoint judges based on personal loyalty or the influence of partisan or special interests. As Shugerman has argued, because “the governor and the parties do not get the first crack at selecting judges,” a nominating commission adds “a thicker layer of insulation from the political parties with a new set of veto points.”⁵² If the system works as intended, justices appointed through a nominating commission are less likely to be beholden to political or special interests, promoting public confidence in the integrity of the judicial system.

There is strong reason to believe many judicial nominating commissions do indeed avoid politically motivated

candidate evaluations and focus their attention on consideration of matters such as qualifications and temperament. For example, while studies of judicial nominating commission deliberations and processes are limited, a scholarly review by the American Judicature Society concluded that “while no judicial selection process will ever eradicate all traces of politics, the existing literature appears to indicate a significant trend toward reduction in arbitrary or politically motivated decision-making [in judicial nominating commissions].”⁵³

This corresponds with how nominating commissioners describe their work in surveys⁵⁴ and how observers in many states describe judicial nominating commissions’ processes.⁵⁵ Moreover, an analysis of the backgrounds of supreme court justices found that states using nominating commissions are less likely to have justices with ties to major political offices (such as former aides to the governor or state legislators) than states using an appointment system without nominating commissions,⁵⁶ suggesting that nominating commissions do constrain the governor in appointing political allies.

Nominating commissions are particularly important because judicial appointments have often been used as a reward for political insiders and donors. History provides many colorful examples, such as the Kansas “triple play” in 1956, where the governor retired days before the end of his term so he could be appointed by his lieutenant to a vacancy on the state supreme court — a move that prompted the state’s adopting merit selection.⁵⁷

Without a robust nominating commission, appointment systems are likely to remain a playground for patronage politics. A 2014 article by the Center for Public Integrity found, for example, that governors routinely appoint campaign contributors to judgeships, along with friends and political associates.⁵⁸ And the recent history of the federal appointment process, where the president nominates judges subject to Senate confirmation, highlights other avenues for political influence, such as special-interest lobbying, high-cost ad campaigns, and political gamesmanship and obstruction in confirmation.⁵⁹

2. The Importance of Nominating Commission Transparency and Diversity

While adopting a judicial nominating commission is a key element of reform, doing so is only a first step. States’ experiences suggest that a nominating commission’s *structure* and *procedures* can make a substantial difference in how it functions and how it is perceived by the public. Thus, in designing a nominating commission system, states should pay close attention to the composition of the commission

and how its members are selected, as well as the rules governing how the commission does its work.

A commission’s membership and procedures are particularly important because appointment systems are often seen by the public — at least in the beginning — as less legitimate than elections. Research by political scientist James Gibson has found, for example, that all else being equal, judicial elections enhance courts’ legitimacy in the public’s eye, “most likely by reminding citizens that their courts are accountable to their constituents, the people.”⁶⁰ To address this potential legitimacy deficit, it is important that a nominating commission’s review process have multiple opportunities for public input and oversight and that it encourage the consideration of candidates with diverse backgrounds and experience.

APPOINTMENT AND MEMBERSHIP

In order to both limit potential political influence in the vetting process and enhance the likelihood of achieving diversity among nominees, commissioners should be appointed by a variety of sources (not just the governor) and should come from diverse backgrounds.

As it now stands, in nearly half the states that use nominating commissions, governors appoint the majority of commission slots.⁶¹ In six states, governors appoint all members. Gubernatorial control can create the appearance that a commission essentially functions to ratify the governor’s preferences, a concern that has been raised in several states and borne out in at least some.⁶²

In addition, in 16 states, a majority of commissioners must be lawyers — themselves a major special interest — leaving nominating commissions open to questions about potential “capture” by the bar, particularly when state bars are responsible for appointing these commissioners.⁶³ Capture by partisan interests is another concern: Less than half of all states with nominating commissions have any kind of bipartisanship requirement.⁶⁴

There is also often a stunning lack of diversity in commission membership, fostering the impression that judicial selection is controlled by an elite “old-boys” network. In a 2011 survey of nominating commissioners, for example, only 32 percent of respondents identified as women, and only 4 percent identified as African American.⁶⁵ A Brennan Center analysis of the professional background of commissioners found that public defenders and legal services lawyers were also rarely represented.⁶⁶ The Brennan Center also found that if commissions do not reserve seats for non-lawyer members, lawyers typically dominate.⁶⁷

Diversity in all forms — professional, racial, gender, eth-

Best Practices for Selecting Nominating Commissioners

Power to appoint commissioners should be diffuse, with no single source having majority control.

- A majority of commissioners should be appointed by elected officials across the branches of government to ensure democratic input.
- There should also be an open application process allowing members of the public to serve as commissioners.

Commissions should have bipartisan membership, including independents.ⁱ

- Such representation could be achieved by a formal partisan representation requirement or by giving minority leaders of the state legislature the power to appoint commission members (in the case of minority party members) and/or by having an application and screening process for commissioners, a system used for California's redistricting commission.

The system should include concrete measures to encourage diversity among commissioners:

- Require appointing authorities to consider region, race, gender, sexual orientation, and other demographic factors in selecting commissioners.
- Require appointing authorities to ensure that the commission as a whole reflects a state's diversity.
- Reserve slots for underrepresented legal specialties, such as public defenders.
- Reserve slots for non-lawyers, who should comprise a majority of commissioners.
- Consider including ex officio representatives from the judiciary, the state bar, and the legal academy.

Commissioners should serve staggered terms, with term limits, to preserve institutional memory and prevent the formation of voting blocs.

FOR EXAMPLES OF STATE BEST PRACTICES, SEE APPENDIX 1.

nic, sexual orientation, geographic, and other demographic categories — is particularly important because commissioners frequently play a key role in *recruiting* judicial candidates, often through their professional networks. A lack of diversity among commissioners can therefore lead to a narrower field of applicants.⁶⁸ It can also leave the commission without the benefit of diverse perspectives in its own deliberations and open the door to unconscious biases or blind spots.⁶⁹

We therefore recommend that states create a bipartisan nominating commission with diverse membership — including non-lawyer citizen members — that is appointed by multiple stakeholders. Ensuring a mix of appointing authorities and requiring bipartisan representation reduces the likelihood that the commission could be “captured” in support of a special interest or in service of an inappropriate political motive. For example, a commission that is appointed entirely by the governor is likely to find it far easier to function as the governor’s agent, as compared to a commission with internal “checks and balances,” including members from different political parties appointed by diverse interests, such as legislators and the state bar.⁷⁰

Among other benefits, providing for diffuse appointing authorities may also affect the commission’s deliberations and decisions, making “cooperation, consideration, and compromise among commissioners more likely,” in the

words of one former state judge.⁷¹ It may also result in commissioners focusing more intently on judicial qualifications because it is an area of common ground.⁷²

NOMINATING COMMISSION PROCESS

To counter possible behind-the-scenes political influence and build public confidence, the nominating process should also be clear, transparent, and public. Among other things, these attributes enable outsiders to evaluate how well the commission is working.⁷³

The absence of clarity and transparency — including ethics rules for commissioners — can provide an opening for mischief. In Rhode Island, for example, commissioners have reportedly had behind-the-scenes discussions with governors while reviewing candidates⁷⁴ and governors have interviewed candidates even before the nominating commission submitted their list.⁷⁵ In Iowa, the governor recently appointed her father to a nominating commission, raising obvious questions about the commission’s independence.⁷⁶

When the commission process is opaque, meaningful evaluation by the public is also impossible. For example, a 2003 report from the American Judicature Society criticized the lack of transparency in Hawaii’s nominating commission process, observing, “There is, in effect, no way to either validate or criticize the way the [commission] handled matters

Best Practices for Nominating Commission Procedures

A clear and open application process with transparent criteria for selecting nominees.

When there is a vacancy, there should be a public announcement and a formal application process. There should be transparent and public criteria for evaluating applicants and a standardized process.ⁱⁱ Notably, less than half the states with nominating commissions have any formal statutory criteria for assessing candidates.ⁱⁱⁱ

Public disclosure of possible final nominees with public interviews and the chance for public comment.

While the initial pool of applicants may be kept private, commissions should publicly disclose a list of potential finalists, hold public interviews, and offer the public the chance to comment either in person or through written submissions. (States may also want to allow for closed commission meetings to allow for discussions of confidential information, such as a candidate's health status.) Some have expressed concern that a public process may discourage otherwise qualified applicants. However, many states already provide for transparent processes without any apparent difficulty in attracting qualified candidates.^{iv}

Commission votes should be public.

The deliberations can be private to promote candor. However, votes on candidates should be made public so it is clear whether candidates have bipartisan support or if the commission has broken into factions.^v

Commissioners should be bound by ethics rules.

There should be clear guidelines for when and how commissioners can communicate with candidates as well as the governor's office during the vetting and interview process. The Institute for the Advancement of the American Legal System (IAALS) published a model code of conduct for judicial nominating commissions that addresses such issues, as well as disclosure and recusal requirements for conflicts of interest.^{vi}

Commissions should collect and publish diversity data for judges and candidates.

Data should be compiled and published on the diversity of the applicants at each stage of the process. A recent report by the American Constitution Society and Lambda Legal details best practices for collecting and releasing judicial diversity data.^{vii}

because there is no way to know how those matters were, in fact, handled."⁷⁷ These concerns were echoed in a set of focus groups commissioned by the Hawaii judiciary the same year, which found that a lack of public information about judicial selection led the public to "think that the system is 'closed,' and that judges are selected through 'the old-boy system' or some other process that has little to do with the qualifications of the candidate."⁷⁸

States also fall short in collecting diversity data about both sitting judges and applicants. A study by Lambda Legal and the American Constitution Society found that many states do not compile even basic demographic information about their judiciary. And no state collects and reports information across all basic categories, such as race, ethnicity, gender, gender identity, sexual orientation, and disability status, as well as professional background.⁷⁹ Collecting and publishing diversity data would help hold decisionmakers accountable for building a diverse bench as well as aid in identifying possible hurdles to achieving diversity.

3. The Benefits of Gubernatorial Selection

We also recommend that a state's governor, rather than the legislature, be given the authority to appoint justices

from the list that is developed and submitted by the nominating commission.

As a matter of democratic practice, there are important reasons to give the final selection authority to an elected, politically accountable actor. Doing so furnishes the public with the means to register satisfaction or dissatisfaction with appointment decisions through the electoral process.⁸⁰

The overwhelming majority of states that provide for appointments already vest final selection power with the governor. Only two states, Virginia and South Carolina, provide for legislative appointments. States' experiences suggest that gubernatorial appointments are preferable to appointments by state legislatures because concentrating power in one decision maker promotes greater accountability. While legislative appointments have not been subject to extensive study, the two states that currently use them exhibit signs of a politicized selection process, manifested by accounts of backroom dealing and logrolling of judicial appointees with other legislative business. In addition, there have been charges of nepotism and cronyism, as well as failure to fill vacancies due to legislative gridlock.⁸¹

We do not make a general recommendation as to wheth-

er the state legislature should confirm the governor's appointment. We believe the answer is context-specific. The advantage — and disadvantage — of a confirmation process is that it provides an additional veto point. Legislative confirmation can serve as another safeguard against cronyism or the appointment of unqualified nominees, and there are examples of the confirmation process playing this role.⁸² On the other hand, legislative confirmation also can be (and has been) abused to stonewall a governor's agenda⁸³ or to wrest concessions on unrelated issues.⁸⁴ Moreover, a properly functioning nominating commission should already perform the oversight one would expect of a legislature.

If a state does adopt some form of legislative confirmation, there should be a rule that a nominee will be considered confirmed unless the legislature acts within a set time.⁸⁵ Such a provision helps prevent legislative obstruction that can leave courts understaffed.⁸⁶

We also do not make a general recommendation about whether the governor should have the option of rejecting an entire list submitted by a judicial nominating commission and requesting a second one, which is permitted in some states.⁸⁷ In making such a choice, states may want to consider how many qualified candidates are likely to apply for supreme court positions and whether allowing for a second slate would preserve a meaningful vetting role for the nominating commission.⁸⁸ At the least, governors should only be permitted to request one additional list and should be subject to strict time limits for considering nominating commission recommendations.

4. The Politicization of Retention Elections

Finally, we recommend against retention elections, in which justices stand for an up-or-down vote, even as part of a merit/retention system. While intended to be nonpartisan, these elections increasingly mirror the politicization seen in head-to-head judicial contests.

Nineteen states provide for retention elections, including 14 states that initially appoint justices via merit selection.⁸⁹ Nine states with judicial nominating commissions do not hold retention elections, either providing for indefinite good behavior tenure or reappointment by the governor, legislature, or commission.⁹⁰

Until recently, retention elections had generally attracted far less attention — and money — than contested elections.⁹¹ But in 2010, three Iowa Supreme Court justices lost their seats following a million-dollar anti-retention campaign, backed by the National Organization for Marriage and other socially conservative groups — the fallout

from a ruling holding that the state constitution provided a right to marriage for same-sex couples.⁹²

It's now clear that 2010 marked a shift. While retention elections on average still attract less money than contested ones, they are increasingly showing similar patterns. Not a single retention election attracted more than \$1 million in spending between 1999 and 2009. Since then, however, 16 justices in five states have had retention elections costing more than \$1 million — and there's been at least one of these races in every election cycle.⁹³ (A California retention election in 1986 also attracted millions in spending, but it remained an outlier until 2010.)

Many proponents of retention elections as part of a “merit selection” model assumed that these elections would usually be noncompetitive and thus leave judges insulated from electoral pressure.⁹⁴ Now that retention elections increasingly mirror “standard” judicial elections, however, they pose similar threats to fair and evenhanded justice. And, while retention elections are often supported as an accountability mechanism, states have other tools to promote public accountability, such as the previously detailed safeguards for nominating commissions coupled with robust and public judicial evaluation and disciplinary processes, which are discussed in Appendix 2.

Eliminate Political Reselection

Most debates over state judicial selection focus on how justices should be selected for the bench. But one crucial element is often overlooked: the mechanism by which they keep their jobs. When sitting justices go through a political process to retain their position — while also hearing cases — the threat to judicial independence is substantial.

We urge states to take the politics out of judicial *reselection*, either by having justices serve a single fixed “one and done” term, providing for good behavior tenure, or vesting an independent commission with the power to make reappointments.

1. Pressures on Sitting Justices

In 1985, the late California Supreme Court Justice Otto Kaus famously said that deciding controversial cases under the shadow of a future election is like “finding a crocodile in your bathtub when you go in to shave in the morning: You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving.”⁹⁵ The next year, three California justices lost their seats in what was at the time the most expensive judicial election

in history, targeted in a campaign that attacked their record of overturning death penalty decisions.⁹⁶

The politicization of judicial selection poses unique issues for sitting justices because they must hear cases with the knowledge that an unpopular decision — even if required by law — could cost them their job. And there is substantial evidence that judges respond, perhaps unconsciously, to electoral incentives. For example, as discussed above, there is a large body of research suggesting that elected judges take into account voter and donor preferences when deciding cases.⁹⁷ As retired Alabama Supreme Court Chief Justice Sue Bell Cobb observed, “Judges would have to be saints to ignore the political reality. And judges aren’t saints.”⁹⁸ Importantly, as we’ve noted, when judges face a mandatory retirement age and no longer face reelection, there is evidence their behavior changes.⁹⁹

And while elections are the most common mechanism for judicial reselection, similar pressures exist in systems where judges are reappointed by a governor or legislature.

The number of state supreme courts with at least one member who has competed in a \$1 million-plus election nearly tripled between 1999 and 2017.

For example, in 2006, New York Republican Gov. George Pataki declined to renew Judge George Smith for another term on the state’s highest court, a decision that many observers attributed to Smith’s opinion striking down the state’s death penalty law.¹⁰⁰ In Connecticut, State

Supreme Court Justice Richard Palmer was criticized by legislators during his 2017 reappointment process for writing majority opinions that eliminated the last vestiges of the state’s capital punishment law and legalized same-sex marriage. He was ultimately reappointed, with a largely party-line vote in the state Senate.¹⁰¹ While the impact of reappointment processes is less frequently studied, one analysis found that judges are more likely to rule in favor of the government litigants responsible for reappointing them to the bench.¹⁰²

Remarkably, while federal judges enjoy life tenure, nearly every state provides for multiple terms for supreme court justices and uses a political process (most commonly elections) to determine whether a sitting justice should serve an additional term. Because reselection pressures pose such a clear and direct threat to judicial independence,

reform should be a priority. In particular, in states where the complete elimination of supreme court elections lacks public support, focusing on the *reelection* of judges offers a path to address many of the most harmful elements of electoral systems.

2. “One and Done” Term and Other Reforms

There are three principal options for states seeking to reduce reselection pressures. They can be applied in either an elective or an appointive system, and they should be coupled with robust judicial performance evaluation and discipline systems:

- **Justices serve only one lengthy term:** Justices serve a single fixed term in office, in the range of 14-18 years. As with good behavior tenure, during a “one and done” term, justices remain subject to removal by impeachment or through state disciplinary processes.

No state currently utilizes such a system, but a Wisconsin Bar task force recently proposed adopting a single 16-year term for the state’s (elected) supreme court,¹⁰³ while an Arkansas Bar task force proposed replacing the state’s nonpartisan elections with a merit-selection appointment process, coupled with a single 14-year term.¹⁰⁴ There has also been growing scholarship¹⁰⁵ and public commentary¹⁰⁶ encouraging the adoption of an 18-year fixed term for the U.S. Supreme Court. The use of a lengthy single term is also a common feature of many European constitutional courts.¹⁰⁷

- **Adopt good behavior tenure:** Justices serve indefinite terms, subject to removal by impeachment or through state disciplinary processes. Good behavior tenure systems are used for the federal courts, as well as in Rhode Island. Two additional states, Massachusetts and New Hampshire, provide for good behavior tenure for their justices, subject to a mandatory retirement age. No states with elected justices currently provide for good behavior tenure.

- **Have retention determined by an independent and bipartisan commission:** In this system, justices can continue to serve multiple terms, but at the end of each term an independent commission determines whether a justice retains her seat. Just like the proposal for nominating commissions, these bodies should be diverse in all respects and governed by clear, transparent, and apolitical guidelines for determining retention. Hawaii is the only state that uses a version of this system,¹⁰⁸ although it was also proposed in a recent judicial reform bill in Oregon.¹⁰⁹ The District of Columbia also uses a variant of this approach, where

judges rated “well-qualified” by a tenure commission are automatically granted new terms.¹¹⁰

While any of the above methods would be an improvement over the status quo, we favor a lengthy single term for state supreme court justices.

Adopting either a lengthy single term or good behavior tenure has the advantage of providing judges time to develop expertise. Several U.S. Supreme Court justices have said it took them three to five years to fully learn the job.¹¹¹ Both approaches also provide long-term job security, which can help in attracting high-quality applicants.

A lengthy single term also has several advantages compared to life tenure. First, it avoids entrenching power for generations at a time, providing regular opportunities for new justices to populate the bench and lowering the stakes for any given vacancy.¹¹² It also allows a court’s membership to evolve so that it can reflect changing community values and makes it easier to achieve a more diverse bench over time.

In fact, a lengthy single fixed term may actually result in more turnover on a court — creating more opportunities for diversity — than an electoral retention system with unlimited shorter terms, given the advantages that usually attach to incumbents.¹¹³ In 39 states, at least one supreme court justice during the past decade served for 20 or more years. Eleven states had at least one justice who served for 30 years or more.¹¹⁴

Some have raised the concern that a lengthy single term could discourage mid-career lawyers from seeking supreme court seats due to the prospect of finishing their term before retirement age. However, we believe it is unlikely that states will find it difficult to attract strong mid-career candidates, especially because many state supreme court justices move on to federal judgeships or political office, or find lucrative employment in the private sector.¹¹⁵ Nevertheless, states can mitigate these concerns by allowing justices who have completed their terms to become a “senior judge” and preside over cases in the lower courts.¹¹⁶ States may also need to amend their pension systems so justices’ pensions can vest once they complete their term.

Finally, if a state chooses to use a commission-based reappointment system, the same cautions and recommendations about judicial nominating commissions apply. The main advantage of a commission-based system is that it provides an additional avenue for removing low-performing justices. However, absent a strong political will to create a depoliticized commission process, a com-

mission-based retention scheme may not be sufficient to insulate judges from political pressure.

For a more detailed discussion about how to structure a “one and done” lengthy single term, see Appendix 2.

Adopt Additional Safeguards in States with Judicial Elections

States also have many additional tools to protect their courts from the appearance, and reality, of inappropriate political and special interest influence. These improvements have been underutilized, even as judicial elections have become increasingly politicized. And, while states implementing an accountable appointment system or single fixed term will in many instances need to amend their constitutions, the following reforms can generally be adopted within existing systems.

- **Adopt a publicly accountable process for interim appointments.** Nearly every state empowers the governor to make an interim appointment when a justice does not complete a full term. In states that use contested elections for their supreme courts, an astonishing 45 percent of justices first ascended to the bench via an interim appointment.¹¹⁷ Yet at the interim appointment stage, only 30 states provide for any kind of nominating commission that makes binding recommendations to the governor.¹¹⁸ Introducing safeguards in the interim appointment process would be a valuable first step for reform and an opportunity to experiment with a more accountable process.
- **Strengthen recusal rules to recognize the realities of high-cost elections,** including outside spending. Justices are generally required to step aside from a matter when “the judge’s impartiality might be reasonably questioned.”¹¹⁹ However, only a minority of states have laws or rules that address when judicial campaign spending warrants recusal. In addition, most of the rules involving campaign spending concern direct contributions, even though independent expenditures are increasingly how major interests engage in supreme court races.¹²⁰ Only six states have rules clarifying when independent expenditures require that a judge step aside from hearing a case. Even fewer address how to treat the underlying donors to such groups.¹²¹

The lack of clear recusal rules tied to campaign finance is far out of line with the public’s views. A poll for the Brennan Center and Justice at Stake in 2013 found that more than 90 percent of voters believe judges should step aside from cases involving

major campaign supporters regardless of whether they contributed directly to judicial campaigns or made independent expenditures.¹²² Many states also lack procedural safeguards for resolving recusal motions filed by litigants. Most often, it is the judges themselves who assess their own biases without any independent review.

The Brennan Center has previously published detailed recommendations about judicial recusal.¹²³ Key features include:

- Clear standards on when and how independent campaign expenditures require recusal, including factors such as whether the expenditures exceeded the maximum amount that may be contributed to a candidate directly.
- Requiring litigants to file a disclosure affidavit at the commencement of a proceeding. This affidavit should detail any campaign contributions or expenditures that parties or their attorneys have made in favor of (or against) the judge hearing the case or state that no such contributions or expenditures have been made. It should also include contributions to third-party entities, including outside groups and political parties.
- Determinations of recusal motions should be made by an independent judge, who should issue a public, written decision.
- **Adopt public financing for judicial elections:** A well-funded public financing system, particularly one that matches (and multiplies) small-donor contributions, can deepen the pool of judicial candidates and mitigate the conflicts posed by special interest spending. For example, a study of North Carolina’s (recently eliminated) judicial public financing program found that justices who opted into the system were 60 percent less likely to vote in favor of donors who contributed to their campaigns, as compared to their colleagues who continued to rely exclusively on private donors.¹²⁴ Yet only two states, New Mexico and West Virginia, currently provide for judicial public financing.
- **Provide voter guides and judicial performance evaluations.** Most voters have little information about judicial candidates, and what information they do have is often the product of fevered, distorted campaign rhetoric. States should adopt, and make public, judicial performance evaluations and publish voter guides to encourage informed voting.

Conclusion

Courts are an essential bulwark of democracy. At a time when many of our institutions are under strain, we need strong and independent courts to protect fundamental rights and ensure that all are equal under the law. Yet it is increasingly apparent that most states’ systems for choosing supreme court justices can subject them to pressures that undermine this crucial role.

Judicial selection is complex and sometimes requires tradeoffs between important values. Nonetheless, there is strong evidence that there are better alternatives to the status quo. States should replace supreme court elections with a publicly accountable appointment system and — regardless of whether a state uses elections or appointments — eliminate reselection pressures by adopting a one and done lengthy single term. And, even before a state undertakes a wholesale shift in its method for selecting and retaining justices, there are also several reforms most states can adopt immediately that can reduce the damage from highly politicized elections, from public financing to stronger judicial recusal rules.

The history of judicial selection in the states has featured long periods of stasis followed by waves of reform. The move to judicial elections in the 19th century followed this pattern. Later reforms, such as the adoption of nonpartisan elections in many states in the early 20th century, and the move to merit selection in the 1940s through the 1970s, did as well.¹²⁵ Just as past judicial selection reform movements responded to the needs of the time, states must act to address today’s threats to fair and impartial justice.

Appendix 1

Elements of a Publicly Accountable Appointment System: State Examples

Provide for Diffuse Power to Appoint Commissioners

- In Hawaii, the governor, the president of the state Senate, and the speaker of the state House of Representatives each appoint two commissioners, the chief justice of the state Supreme Court appoints one, and the Hawaii State Bar Association elects two.¹²⁶
- In New York, four commissioners each are appointed by the governor and chief judge, while the Assembly speaker, the Assembly minority leader, the Senate president, and the Senate minority leader each appoint one commissioner.¹²⁷
- In New Mexico, the governor, speaker of the House, Senate president, and chief court of appeals judge each appoint two commissioners, the state bar appoints four commissioners, and the chief justice and dean of the University of New Mexico School of Law serve ex officio.¹²⁸

Ensure Broad Partisan Input

- In New Mexico, the two major political parties are required to be represented equally on the state's judicial nominating commission.¹²⁹
- In Colorado, not more than half the commissioners plus one, exclusive of the chief justice, shall be members of the same political party.¹³⁰
- In New York, the majority and minority leaders of the state Senate and Assembly each have the power to appoint commissioners.¹³¹

Notably, no states currently require representation of independents or members of third parties on nominating commissions. States should consider adopting a provision holding seats for commissioners who are not members of the state's two largest parties. For example, the California Citizens Redistricting Commission, which is responsible for drawing federal and state legislative districts, is composed of five registered Democrats, five registered Republicans, and four persons not registered with either of those two parties.¹³²

Implement a Public Application Process

- Colorado makes public announcements of nominating

commission vacancies and has a formal application process to serve as a commissioner.¹³³

- In New Mexico, the judicial nominating commission is required to advertise judicial vacancies broadly, including to state, county, and local bar associations, including women's, minority, and specialty bar groups. The commission holds public meetings, including an opportunity for public comment on applicants. Interviews are held in public, but confidential matters can be discussed in closed session. There are also rules setting out the criteria for assessing candidates.¹³⁴ Commission deliberations are closed, but final votes are cast in a public session.¹³⁵
- In Arizona, the judicial nominating commission gives public notice of vacancies. The commission screens candidates and identifies a subset for interviews. Their materials are posted online, and the commission invites public comment on the candidates.¹³⁶

Reserve Seats to Encourage Professional Diversity

- In New Mexico, the bar's four appointees must represent "civil and criminal prosecution and defense." The state constitution also requires the president of the state bar, in consultation with the judges on the commission, to appoint additional members of the bar to achieve political balance and ensure that "the diverse interests of the state bar are represented." The dean of the University of New Mexico School of Law (an ex officio member) is the final arbiter of whether diverse interests are represented.¹³⁷
- In Montana, non-attorney commissioners are required to each represent "a different industry, business, or profession."¹³⁸
- A recently repealed Tennessee law designated seats for the Tennessee Trial Lawyers Association, the Tennessee District Attorneys General Conference, and the Tennessee Association of Criminal Defense Lawyers.¹³⁹

Require Non-Lawyer Commission Members

- In Indiana, the governor appoints three non-lawyers, the state bar association membership elects three lawyers, and the chief justice serves ex officio.¹⁴⁰
- In New York, the governor appoints two lawyers and two non-lawyers, the chief judge appoints two lawyers and two non-lawyers, and the majority and minority leaders of the Assembly and Senate each appoint one member from any profession.¹⁴¹

- In Utah, the governor appoints four members, including at least two non-lawyers. The state bar association selects two members, generally lawyers, and the chief justice selects one member from the state’s judicial council.¹⁴²

Require Appointing Authorities to Consider Diversity When Selecting Commissioners

- In Rhode Island, the governor and other appointing authorities “shall exercise reasonable efforts to encourage racial, ethnic, and gender diversity within the commission.”¹⁴³
- In South Carolina, “race, gender, national origin, and other demographic factors should be considered to ensure nondiscrimination to the greatest extent possible as to all segments of the population of the State.”¹⁴⁴
- In Colorado, commissioners must represent each of the state’s congressional districts.¹⁴⁵

Appendix 2

Implementing a “One and Done” Lengthy Single Term

A lengthy single term for state supreme court justices should have the following elements:

- **Staggered terms:** States should structure vacancies so that there is a single open seat every two or four years, instead of replacing an entire court’s membership at once or allowing a new justice to start a full term whenever a vacancy opens. A staggered appointment system is preferable because it introduces regularity into the selection process and discourages strategic retirement. It also reduces the likelihood of clustered vacancies, which may skew a court’s membership. To preserve staggered terms, if a vacancy opens in the middle of a justice’s term, his or her replacement should finish the existing term, rather than start a new full term.

The adoption of staggered terms also has implications for the preferred length of a judicial term, depending on the number of justices on any given state’s supreme court. For example, if a state has seven judges on its supreme court, staggered 14-year terms would mean that one vacancy would open every two years. For states that do not already have regularly staggered terms, it would be preferable to have a transition period with short terms for new justices, which would create room to implement a system of staggered lengthy terms.

- **A fixed, single term of at least 14 years:** In addition to considering the size of a state’s supreme court bench, states should adopt a term sufficiently long to attract quality candidates. The ideal length may vary depending on a state’s traditions and the realities of its legal market, including how long justices typically stay on the bench now. Excluding sitting justices, supreme court justices have sat on the bench for a median of 11 years since the 1970s, but figures vary substantially by state.
- **Provide for judicial performance evaluations and other accountability mechanisms:** Just because justices will serve only one term should not mean that they escape regular oversight. There should be robust mechanisms to hold judges accountable for misconduct or ethical lapses, as well as for deficits in temperament and skill. Regular performance evaluations can serve this purpose.

Evaluations can identify deficiencies that may require justices to undergo additional training or even face disciplinary action. According to research by IAALS, only 17 states (plus the District of Columbia) have any kind of formal judicial performance evaluation,¹⁴⁶ and not all of these states make even summaries of the evaluations public.

Another source of accountability is judicial discipline, including, in extreme cases, a process for removal of justices.¹⁴⁷ Judicial discipline processes should provide an opportunity for public comment, and at the very least, summary findings should be publicly disclosed. Public participation builds public confidence in the result. Thirty-four states now have public disciplinary hearings.¹⁴⁸

- **Consider justices’ options after the bench:** States may need to alter their pension systems so justices’ pensions vest at the end of their term. States may also wish to consider creating a “senior judge” system, where supreme court justices whose terms have expired can preside over cases in lower courts. Because a single term system may increase the likelihood that former justices will reenter private practice, there should also be clear rules governing how justices and former justices can avoid conflicts.

Endnotes

- 1 Alicia Bannon et al., *Who Pays for Judicial Races? The Politics of Judicial Elections*, 2015-16, Brennan Center for Justice, 2017, 15-17, <https://www.brennancenter.org/publication/politics-judicial-elections>. The \$1 million milestone is notable because such races are likely to require major infusions of campaign cash by donors or a substantial investment by outside spenders, and to have many of the trappings of campaigns for political offices.
- 2 Twenty-seven justices were elected in million-dollar races, compared to the previous high of 19. *Ibid.*, 4-6 (all figures inflation-adjusted).
- 3 *Ibid.*, 7-10.
- 4 *Justice at Stake/Brennan Center National Poll*, 2013, <http://www.brennancenter.org/sites/default/files/press-releases/JAS%20Brennan%20NPJE%20Poll%20Topline.pdf>.
- 5 Alicia Bannon, *Rethinking Judicial Selection in State Courts*, Brennan Center for Justice, 2016, 1, <https://www.brennancenter.org/publication/rethinking-judicial-selection-state-courts>.
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- 10 The most frequent proposed alternative to contested elections has been a “merit selection” system where judicial candidates are vetted by an independent nominating commission and then appointed by the governor, followed by periodic up-or-down retention elections.
- 11 Bannon, *Rethinking Judicial Selection in State Courts*, 16-17.

- 12 “Judicial Selection: An Interactive Map,” *Brennan Center for Justice*, <http://judicialselectionmap.brennancenter.org/?court=Supreme>.
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- 16 Our research can be found at “Rethinking Judicial Selection,” *Brennan Center for Justice*, <https://www.brennancenter.org/rethinking-judicial-selection>.
- 17 See *infra* 4, 10-11.
- 18 See *infra* 12-13.
- 19 Each of these states also provides for the “confirmation” of justices by the legislature or another elected body.
- 20 Jed Handelsman Shugerman, *The People’s Courts* (Cambridge: Harvard University Press, 2012), 247-248.
- 21 Bannon et al., *Who Pays for Judicial Races?*, 11 (figure is as of January 2017).
- 22 *Ibid*, 22-25.
- 23 *Ibid*, 21, 27-30.
- 24 *Ibid*, 11.
- 25 *Ibid*, 2 (figure is of January 2017).
- 26 *Ibid*, 27.
- 27 For example, a study of the Nevada Supreme Court found that in 2008-09, in 60 percent of civil cases at least one of the litigants, attorneys, or firms involved in the case had contributed to the campaign of at least one justice. *Campaign Contributors and the Nevada Supreme Court*, American Judicature Society, 2010, 2, available at http://www.judicialselection.us/uploads/documents/AJS_NV_study_FINAL_A3A7D42494729.pdf.
- 28 Bannon et al., *Who Pays for Judicial Races?*, 12.
- 29 *Ibid*, 22.

- 30 Ibid, 35.
- 31 Ibid, 35.
- 32 Ibid, 33-36.
- 33 *Justice at Stake — State Judges Frequency Questionnaire*, Nov. 5, 2001-Jan. 2, 2002, <https://www.brennancenter.org/sites/default/files/2001%20National%20Bipartisan%20Survey%20of%20Almost%20%2C500%20Judges.pdf>.
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- 37 Michael S. Kang & Joanna M. Shepherd, “The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions,” *New York University Law Review* 86, (2011): 104.
- 38 Joanna Shepherd and Michael S. Kang, *Partisan Justice: How Campaign Money Politicizes Judicial Decisionmaking in Election Cases*, American Constitution Society, 2016, <https://partisanjustice.org/>.
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- 41 Shugerman, *The People’s Courts*, 6.
- 42 Brandon Bartels, “Bright Ideas: Political Scientists Chris W. Bonneau and Melinda Gann Hall on the Judicial Elections Controversy,” *Concurring Opinions*, June 17, 2010, <https://concurringopinions.com/archives/2010/06/bright-ideas-political-scientists-chris-w-bonneau-and-melinda-gann-hall-on-the-judicial-elections-controversy.html>.
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- 44 Bannon, *Rethinking Judicial Selection in State Courts*.
- 45 See, e.g., Greg Goelzhauser, *Choosing State Supreme Court Justices: Merit Selection and the Consequences of Institutional Reform* (Temple University Press, 2016), 80 (“[S]tate supreme court justices seated across selection systems have more similarities than differences in their judicial qualifications.”).
- 46 John F. Kowal, *Judicial Selection for the 21st Century*, Brennan Center for Justice, 2016, 13-16, <https://www.brennancenter.org/publication/judicial-selection-21st-century>.
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- 49 Shugerman, *The People's Courts*, 259.
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- 51 Short lists are typically 3-5 candidates. Reddick and Kourlis, *Choosing Judges*, 15-16.
- 52 Shugerman, *The People's Courts*, 259.
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- 54 Ibid, 42-45.
- 55 See, e.g., Cutting, *Judicial Retention in Hawaii*, 5; Day O'Connor and Andersen Jones, "Reflections on Arizona's Judicial Selection Process," 20; Marilyn S. Kite, "Wyoming's Judicial Selection Process: Is it Getting the Job Done?," *Fordham Urban Law Journal* 34 (2007): 226. However, assessing judicial appointment processes is challenging because key elements often occur behind closed doors. The governor's (or president's) decision-making process is typically opaque, and, in approximately 90 percent of states that use judicial nominating commissions, their meetings and deliberations are also private. Reddick and Kourlis, *Choosing Judges*, 21-22.
- 56 Goelzhauser, *Choosing State Supreme Court Justices*, 57-58.
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- 60 James L. Gibson, *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy* (Chicago: University of Chicago Press, 2012), 68, 130. Gibson also found that high-cost elections, and the resulting conflicts of interest for judges, reduce legitimacy.
- 61 This statistic includes election states that use nominating commissions for making interim appointments. Analysis on file at the Brennan Center.
- 62 See, e.g., Joseph A. Colquitt, "Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support," *Fordham Urban Law Journal* 34 (2007): 87, <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1938&context=ulj>; Rebecca Mae Salokar et al., "The New Politics of Judicial Selection in Florida: Merit Selection Redefined," *The Justice System Journal* 27(2006): 133-38, <https://ncsc.contentdm.oclc.org/digital/collection/judicial/id/171/> (after a legislative change gave the governor more control over nominating commission membership, the state's Republican governor appointed more Republicans to appellate court seats; before the change, only 54 percent of the governor's 11 appointments were registered Republicans; all of the governor's appointments following the change were Republicans).
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- [rials/index.ssf/2012/06/merit_selection_of_judges_can.html](https://www.brennancenter.org/our-work/reports-publications/merit-selection-of-judges-can) (alleging that trial lawyers altered the outcome of a judicial nomination in Missouri).
- 64 Sixteen out of 34 states have some requirement of party diversity on their nominating commissions.
- 65 Caufield, *Inside Merit Selection*, 17.
- 66 Analysis on file at the Brennan Center.
- 67 Analysis on file at the Brennan Center. Surveys and interviews of nominating commissioners suggest that both attorneys and non-attorneys offer important, and different, perspectives in vetting judicial candidates, and that having non-attorney representation is valuable. Caufield, *Inside Merit Selection*.
- 68 See Kevin M. Esterling & Seth S. Andersen, *Diversity and the Judicial Merit Selection Process: A Statistical Report*, American Judicature Society, 1999, 24-29, http://www.judicialselection.us/uploads/documents/Diversity_and_the_Judicial_Merit_Se_9C4863118945B.pdf (“We found relatively clear evidence in all states where data are available that diverse commissions tend to propose more diverse nominees and attract more diverse applicants.”).
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- 70 Colquitt, “Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support,” 87.
- 71 *Ibid*, 91.
- 72 *Ibid*, 90.
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- 79 Yuvraj Joshi, *Diversity Counts: Why States Should Measure the Diversity of Their Judges and How They Can Do It*,

Lambda Legal and the American Constitution Society for Law and Policy, 2017, 23, https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/20170607_diversity-counts.pdf.

- 80 For a discussion of democratic legitimacy, see Steven G. Calabresi & James Lindgren, “Term Limits for the Supreme Court: Life Tenure Reconsidered,” *Harvard Journal of Law & Public Policy* 29 (2006): 811. While many other democracies view judicial service as a civil service track, where judges are appointed and elevated based on their performance in exams and on the bench, in the U.S. the power to appoint state supreme court justices has historically rested with elected officials. See, e.g., Mary L. Volcansek, “Appointing Judges the European Way,” *Fordham Urban Law Journal* 34 (2007): 374; Jacqueline Lucienne Lafon, “The Judicial Career in France: Theory and Practice Under the Fifth Republic,” *Judicature* 75 (1991): 101.
- 81 Keith and Robbins, “Legislative Appointments for Judges: Lessons from South Carolina, Virginia, and Rhode Island,” 3.
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- 83 See, e.g., Brent Johnson, “Sweeney slaps down Christie over N.J. Supreme Court nominee,” *NJ.com*, March 2, 2016, https://www.nj.com/politics/index.ssf/2016/03/sweeney_slaps_christie_over_nj_supreme_court_nomin.html (New Jersey Senate President, Stephen Sweeney, a Democrat, “led efforts to block four of [Gov. Chris Christie (R)]’s nominees,” arguing “As Senate president, I don’t get to select the governor I am going to work with, but I do get to choose who and what I fight for,” and that he would consider a Christie nominee “if the governor preserves judicial independence by submitting a Democrat for the court.”); see also Joseph De Avila, “Connecticut Supreme Court Nominee Is Blocked by State Republicans,” *The Wall Street Journal*, March 27, 2018, <https://www.wsj.com/articles/connecticut-supreme-court-nominee-is-blocked-by-state-republicans-1522186710>.
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Endnotes for Boxes on Pages 8 and 9

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