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Legislative Appointments for Judges: Lessons from South Carolina, Virginia, and Rhode Island

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[Media reports](#) suggest North Carolina’s legislative leaders may soon propose replacing its system of electing judges with a system in which the state legislature selects judges to fill vacancies.¹ The contours of the proposal are not yet public, including whether legislators will grant themselves exclusive authority to appoint judges, or whether they will incorporate a commission to recommend candidates. Whatever the proposal, it will be a marked shift from North Carolina’s current system of electing judges. This brief outlines some significant concerns raised by legislative appointment systems.

The Brennan Center has long [documented](#) the problems surrounding judicial elections – big spending by opaque outside groups, conflicts of interest for judges who decide cases affecting their campaign supporters, and evidence that judges change their behavior on the bench to avoid being the target of big spending or attack ads in future elections.²

There is little evidence that a legislative appointment system would combat those issues. The lack of evidence is in part because legislative appointment is the rarest form of judicial selection in the country. Twenty-one states hold nonpartisan or partisan judicial elections, fourteen states use what is popularly referred to as “merit selection,” in which the governor makes initial appointments from a list recommended by a nominating commission, followed by periodic retention elections, eight states use gubernatorial appointment systems, and five states use hybrid systems. There is extensive [research analyzing](#) judicial elections and merit selection, the most common systems of [judicial selection](#).³ Only two states, South Carolina and Virginia, currently empower their legislatures to appoint state high court judges to their first full term on the bench, and there is little study of those systems. Rhode Island previously used legislative appointments until scandals led to the abandonment of that system in 1994.

However, the evidence that does exist from South Carolina, Virginia, and Rhode Island suggests that legislative appointments are unlikely to alleviate the problems associated with judicial elections, and may further undermine judicial independence and integrity in critical ways. While there are good reasons to be concerned about how judicial elections are operating in North Carolina, legislative appointment systems present unique and understudied problems. Further, the specific details of how a legislative appointment plan is implemented, along with other factors such as a state's political culture, are crucial to understanding the likely impact of a move to legislative appointments. These factors should be seriously considered before adopting a legislative appointment system in North Carolina.

Below we outline several common problems that have arisen in legislative appointment systems, based primarily on news accounts and some scholarly research.

1. Legislators have regularly appointed their former colleagues to the bench.

As recently as 2000, every justice on the South Carolina Supreme Court was a former General Assembly member. A state constitutional amendment around that time [instituted](#) some reforms, including a Judicial Merit Selection Commission (JMSC) to recommend candidates to the General Assembly, but the JMSC is itself comprised exclusively of legislators and citizens appointed by legislators, and legislators have even [appointed](#) their own relatives to the JMSC, raising serious questions as to its independence from the legislature.⁴ Today, [one](#) of South Carolina's five justices is a former member of the General Assembly, where he was a member of the Judiciary Committee.⁵

In Rhode Island, the revolving door from the legislature to the courts bred outright corruption. In 1976, the General Assembly appointed former House Speaker Joseph Bevilacqua to be Chief Justice of the Rhode Island Supreme Court at the same time [questions](#) arose about his connections to organized crime.⁶ Bevilacqua resigned in 1986 after impeachment proceedings began because of those connections. State House Speaker Matthew Smith then [engineered](#) the appointment of Thomas Fay, a former General Assembly member, to replace Bevilacqua as Chief Justice.⁷ Two years later, Fay [appointed](#) Smith to a powerful and lucrative position as court administrator. Both Fay and Smith ultimately [resigned](#) their posts following allegations of misappropriation of funds and the commencement of impeachment proceedings against Fay for using his position to direct more than \$45,000 in arbitration work to his law partner.⁸

2. Legislative appointments generate allegations of nepotism and favoritism.

In South Carolina and Virginia, legislators have appointed their relatives to judgeships, and at times familial relationships appeared to take precedence over candidate qualifications. In South Carolina, for instance, one legislator's spouse [ousted](#) a 16 year incumbent for a seat on the bench, and then-Gov. Nikki Haley took to [Facebook](#) to decry the outcome and admonish individual legislators.⁹ Similarly, when a Virginia legislator held up a judicial appointment for over four years, colleagues [accused](#) him of trying to save the position for his sister, who the legislature had declined to appoint to an earlier vacancy.

Both state legislatures' anti-nepotism safeguards have proven ineffective at curbing the practice. In one high-profile incident in Virginia, State Senator Philip Puckett [resigned](#) his seat in the heat of a legislative battle over Medicaid expansion in order to allow the Senate to appoint his daughter to a juvenile court judgeship.¹⁰ Before his resignation, state and national officials had tried to convince

Puckett to keep his seat, with U.S. Sen. Mark Warner (D-VA) ultimately facing ethics complaints for helping Puckett “brainstorm” alternative jobs for his daughter—including, allegedly, a federal judgeship. In South Carolina, while legislators cannot vote on a family member’s nomination, they need not resign their seats and they may [lobby](#) their colleagues on their kin’s behalf.¹¹

And favoritism in legislative appointments has extended beyond family members. Following a recent set of appointments, South Carolina House Majority Leader Bruce Bannister [told](#) his caucus that, if asked why they supported a candidate, members should give “serious, thoughtful answers,” and not simply say, “Well, I knew them in kindergarten.”¹²

3. Legislative appointments may push judicial selection decisions behind closed doors.

In South Carolina, the selection process is particularly opaque. One Representative [detailed](#) a process which begins with prospective judges calling legislators individually to introduce themselves and express their interest in the appointment, without asking for support.¹³ Candidates are then evaluated and recommended by the legislator-controlled JMISC. Once evaluated, candidates again privately contact legislators before they vote to ask for their formal support. At that time, candidates wait on the capitol steps or in the parking garage to shake hands with arriving legislators. Legislators themselves [insist](#) that they “get to know” judicial nominees before they vote for them.¹⁴ Generally, viable candidates secure their “commitments” long before legislators cast their votes, and candidates without enough commitments drop out before the vote takes place, shielding from public view any deal making among legislators. Similarly, in Virginia, the majority party selects judges in closed-door caucus [meetings](#), historically the legislature has not [maintained](#) records of these proceedings, and the ultimate public floor vote is usually a [formality](#).¹⁵

4. Legislative appointments risk subjecting courts to legislative dysfunction.

Virginia has seen legislative standoffs leading to unfilled judgeships and temporary appointments. (While similar dynamics may occur in states that require legislative confirmation of gubernatorial appointments, most states with gubernatorial appointments do not provide for legislative confirmation.) A 2011 deadlock between the Republican-controlled Virginia Senate and Democratic-controlled House of Delegates left two seats on the Virginia Supreme Court vacant for months, and the understaffed court [responded](#) by taking fewer cases, taking longer than usual to resolve the cases on its docket, and failing at times to put together the three-judge panels required to determine which cases the court would hear.¹⁶ Standoffs such as this are most likely when there is split party control of the legislature, like in 2008 when Gov. Tim Kaine [made](#) several temporary appointments after Virginia’s legislature failed to fill four judgeships.¹⁷ Similarly, in 1996, the Virginia Senate, divided evenly between the parties, left thirty percent of vacant judgeships unfilled when the General Assembly [adjourned](#).¹⁸ Some vacancies have [lasted](#) for years even during times of unified party control, due to intra-party politicking.

5. Legislative appointment systems may undermine judicial independence.

Particularly if legislators have the power to appoint judges to multiple terms, legislative appointment systems may lead judges to feel beholden to legislative interests and individual legislators who hold that power, raising concerns about judicial independence. For example, one [political science study](#) found that judges facing legislative reappointment were more likely to rule in favor of the legislature in legal challenges, indicating that judges facing reappointment may alter their decisions to fit

legislative preferences.¹⁹ Judges may reasonably worry that if their decisions offend the legislature, they will lose their job.

Another potential source of conflicts of interest can come from legislators who are also lawyers, who, in many part-time legislatures, often [appear](#) as attorneys in front of the judges they appointed. Judges therefore face an uncomfortable choice: ruling against the lawyer-legislator who appointed them may endanger their job.²⁰ Stronger recusal rules may help solve this problem, but, in rural counties, where there are fewer lawyers and judges, this may be [impossible](#) to prevent.²¹ One [study](#) by the Daily Press in Virginia found that legislators only performed marginally better before judges they appointed than other attorneys did, but some legislators also reported anecdotally that, in front of legislators, judges would be “on their best behavior” or provide additional explanation for rulings against their clients.²²

Even when decisions do not directly affect legislators, it is likely that they will impose political ideology during the reappointment process. In Virginia, legislators have explicitly challenged judges’ reappointments on ideological grounds. [In one instance](#), questioning during a judge’s reappointment hearing focused on whether the judge’s dissent in a child custody case reflected support for same-sex couples.²³ In another, legislators focused intently on a judge’s gun rights decision even though it had been upheld by a higher court.

6. Money may still play a role in legislative appointments.

Even without the need to run statewide campaign ads, special interest groups can spend money to secure favorable judicial appointments by legislatures. In South Carolina in 2007, Conservatives in Action and South Carolinians for Responsible Government opposed Judge Don Beatty’s appointment to the South Carolina Supreme Court. The two groups spent extensively on mailings and ads asking viewers to call on their elected officials to oppose Beatty’s appointment. On the federal level, too, independent groups are now [spending](#) to support both Supreme Court and lower court nominees.²⁴

Legislative appointment systems may also [enable](#) special interest organizations to directly lobby key legislators. These organizations spend money to support particular candidates indirectly, by lobbying legislators, and the process occurs behind closed doors, raising additional transparency concerns.²⁵ An apt parallel exists at the federal level: groups [regularly](#) lobby members of Congress regarding federal judicial nominees, although members of Congress have less control over judicial appointments than do legislators in a legislative appointment system.²⁶

Conclusion

North Carolina’s legislators may hope to shield judges from undue outside influence and conflicts of interest, but the limited evidence that exists suggests that a legislative appointment system is unlikely to alleviate these problems. In fact, legislative appointments can introduce significant new complications: they can enable favoritism towards legislators and those close to them, breed corruption, produce and suffer from governmental dysfunction, and undermine judicial independence – all while continuing to provide a path for special interests to unduly influence nominations.

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- ¹ Anne Blythe, “Are NC Lawmakers Moving Toward Abandoning Election of Judges and Overhauling the Courts?,” *The News & Observer*, September 12, 2017, <http://www.newsobserver.com/news/politics-government/state-politics/article172953856.html>; Gary D. Robertson, *Associated Press*, “With Legislative Maps Done, GOP Looks at Judicial Districts,” *U.S. News*, September 12, 2017, <https://www.usnews.com/news/best-states/north-carolina/articles/2017-09-12/north-carolina-house-panel-revisiting-judicial-redistricting>.
- ² Scott Greytak, Alicia Bannon and Allyse Falce, *Bankrolling the Bench: The New Politics of Judicial Elections 2013-2014*, Brennan Center for Justice, Justice at Stake, and the National Institute on Money in State Politics, 2015, 1-4.
- ³ Alicia Bannon, *Rethinking Judicial Selection in State Courts*, Brennan Center for Justice, 2016; Malia Reddick and Rebecca Kourlis, *Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices*, Institute for the Advancement of the American Legal System, 2014; Rachel Paine Caufield, *Inside Merit Selection: A National Survey of Judicial Nominating Commissioners*, American Judicature Society, 2012; Kate Berry, *How Judicial Elections Impact Criminal Cases*, Brennan Center for Justice, 2015.
- ⁴ John L.S. Simpkins, *A Good Idea Poorly Executed: Judicial Selection and Diversity in South Carolina*, The League of Women Voters of South Carolina, n.d.; Meg Kinnard, *Associated Press*, “Harrell Raises SC Judicial Independence Questions,” *The State*, June 22, 2014, <http://www.thestate.com/news/politics-government/article13862633.html>.
- ⁵ South Carolina Supreme Court, “Chief Justice Donald W. Beatty,” accessed September 25, 2017, <http://www.sccourts.org/supreme/displayJustice.cfm?judgeID=1134>.
- ⁶ *Associated Press*, “Joseph A. Bevilacqua Dies at 70; Rhode Island Judge Linked to Mob,” *The New York Times*, June 22, 1989, <http://www.nytimes.com/1989/06/22/obituaries/joseph-a-bevilacqua-dies-at-70-rhode-island-judge-linked-to-mob.html>.
- ⁷ Christopher B. Daly, “Scandal-Weary State Gears for Next Drama,” *The Washington Post*, September 5, 1993, https://www.washingtonpost.com/archive/politics/1993/09/05/scandal-weary-state-gears-for-next-drama/a697f264-d7d-4614-8bb8-d8900a58aa95/?utm_term=.c6609fb647c2.
- ⁸ “Top Rhode Island Justice Quits Amid Accusations,” *The New York Times*, October 9, 1993, <http://www.nytimes.com/1993/10/09/us/top-rhode-island-justice-quits-amid-accusations.html?mcubz=1>.
- ⁹ Jamie Self, “S.C. Lawmakers Hear Calls to Change the Way SC Elects Judges,” *The State*, February 7, 2015, <http://www.thestate.com/news/politics-government/politics-columns-blogs/the-buzz/article13948829.html>; Jamie Self, “Then-Rep. Nikki Haley’s House Vote Helped Another Lawmaker’s Spouse Become Judge,” *The Herald*, February 5, 2015, <http://www.heraldonline.com/news/local/article12349049.html>.
- ¹⁰ Laura Vozzella, “Virginia GOP Seeks Senate Ethics Probe of Warner in Puckett Case,” *The Washington Post*, January 16, 2015, https://www.washingtonpost.com/local/virginia-politics/va-gop-seeks-us-senate-ethics-probe-of-warner-in-puckett-case/2015/01/16/d9d27bc6-9db5-11e4-a7ee-526210d665b4_story.html?utm_term=.e2d87797acb9.
- ¹¹ Jamie Self, “S.C. Lawmaker’s Husband Ousts 16-year Incumbent in Court Race,” *The State*, February 4, 2015, <http://www.thestate.com/news/politics-government/politics-columns-blogs/the-buzz/article13946738.html>.
- ¹² Jamie Self, “S.C. Lawmakers Hear Calls to Change the Way SC Elects Judges,” *The State*, February 7, 2015, <http://www.thestate.com/news/politics-government/politics-columns-blogs/the-buzz/article13948829.html>.
- ¹³ Jonathon Hill S.C. House District 8, “How the Legislature Dodges Conservative Judges,” May 25, 2016, <http://votehill.com/blog/how-the-legislature-dodges-conservative-judges>.
- ¹⁴ South Carolina Policy Council, “S.C. Supreme Court Elections – Quick and Quiet,” February 3, 2017, <http://www.scpolicycouncil.org/research/who-picks-judges-in-south-carolina>.
- ¹⁵ *Associated Press*, “Roanoke Lawyer Among 10 Backed by Bar for Va. Supreme Court Vacancy,” *The Roanoke Times*, January 2, 2011, http://www.roanoke.com/webmin/news/roanoke-lawyer-among-backed-by-state-bar-for-va-supreme/article_79f20c41-0820-5373-a1fe-ac8b68e5aee7.html; J. Amy Dillard, “Separate and

Obedient: The Judicial Qualification Missing from the Job Description,” *Cumberland Law Review* 38 (2007): 3.

¹⁶ Larry O’Dell, *Associated Press*, “Partisan Deadlock Affecting Va. Supreme Court,” *The Washington Times*, June 23, 2011, <http://www.washingtontimes.com/news/2011/jun/23/partisan-deadlock-affecting-va-supreme-court/>.

¹⁷ Julian Walker and Michelle Washington, “Kaine Looks to Interim Appointments in Local Judicial Posts,” *The Virginian-Pilot*, September 17, 2008, https://pilotonline.com/news/kaine-looks-to-interim-appointments-in-local-judicial-posts/article_abb73d34-673b-5e00-899f-22918d06576f.html.

¹⁸ Carl W. Tobias, “Reconsidering Virginia Judicial Selection,” *University of Richmond Law Review* 43 (2008): 41.

¹⁹ Joanna M. Shepherd, “Are Appointed Judges Strategic Too?,” *Duke Law Journal* 58 (2009).

²⁰ Editorial, “SC Should Check How Judges Are Selected,” *The Island Packet*, December 2, 2013, <http://www.islandpacket.com/opinion/editorials/article33548277.html>.

²¹ Editorial, “SC Should Check How Judges Are Selected,” *The Island Packet*, December 2, 2013, <http://www.islandpacket.com/opinion/editorials/article33548277.html>.

²² Dave Ress, “Do Virginia Legislators Have an Edge in Court?,” *Daily Press*, April 10, 2016, <http://www.dailypress.com/news/crime/dp-nws-legislator-lawyers-20160410-story.html>.

²³ J. Amy Dillard, “Separate and Obedient: The Judicial Qualification Missing from the Job Description,” *Cumberland Law Review* 38 (2007): 24-26.

²⁴ Lesley Clark, “Conservative Group Launches Big Push to Get Trump Court Picks Okayed,” *Miami Herald*, August 28, 2017, <http://www.miamiherald.com/news/politics-government/article169426722.html>.

²⁵ Austin Graham, “Legislative Appointment of South Carolina’s Judiciary: Somethin’ Could be Finer,” William & Mary Law School Election Law Society Blog, January 8, 2014, <http://electls.blogs.wm.edu/2014/01/08/legislative-appointment-of-south-carolinas-judiciary-somethin-could-be-finer/>.

²⁶ Philip Elliot, “Influence Game: NRA Lobbying Targets Courthouses,” *The Associated Press*, January 3, 2013.