Creating the Best Appointment System for Judges

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Systems of judicial appointment--like systems of judicial selection more generally--are means to an end, namely, the elevation to the bench of good judges. Thus, the fundamental criterion for judging a selection system is the results it produces, and the best system of judicial appointment is the one that produces the best judges. If a system of choosing judges by lot produced the best judges, we would--or should--all favor such a system.

In designing a system of judicial selection, one must acknowledge at the outset that there are no immaculate conceptions. No system of judicial selection likely to be adopted in the United States can hope to eliminate politics, and the effort to do so will merely distract from the task of ensuring that good judges are selected. The most concerted effort to eliminate politics from judicial selection is found in European countries that use a system of schools and exams to train and select judges and produce a judiciary that resembles a judicial civil service. Such a system is not compatible with American traditions or understandings of judging. And even in Europe, the recognition that constitutional courts have a political role has led to a more political process for selecting the members of those courts.

If politics is inevitably a part of the selection process, then it is inaccurate to defend an approach to selection as “non-political.” This is true for appointive systems, even appointive systems with commissions. The seven justices of the Florida Supreme Court who decided *Bush v. Gore* were all Democrats, even though there was a "merit selection" system in place in Florida, because they were all appointed by a Democratic governor. Today there are Republicans on the Florida Supreme Court, because Governor Jeb Bush has had the opportunity to make appointments. I don't find this partisan dimension either surprising or distressing.

Although there was a lot of talk at the symposium about "picking the pickers" in referring to selecting the members of judicial commissions, that was in fact inaccurate and misleading. The commission members are not the "pickers." Rather, the commission's role is distinctly subsidiary--it merely nominates a slate from which the selecting authority (the governor or whoever else is making the selection) chooses. To say that the commission's role is subsidiary is not to demean it, because it is important. The commission's job is quality control. It should ensure that no unqualified candidates for the bench are put forward and that the selecting authority chooses from only qualified candidates.

In making his/her selection, the appointing authority is likely to consider factors beyond which candidate on the commission's slate has the most legal expertise. For one thing, the appointing authority is unlikely to have either the time or expertise to engage in a detailed comparison of the legal expertise of the various candidates. For another, if the commission has done its job well, the differences in competency among the candidates will probably not be substantial. Most importantly, there are a variety of valid additional considerations--political,

demographic, regional, ideological, etc.--that will (and should) inform the appointing authority's choice.

The commission's role is subsidiary in another important respect. Its job is to assist the appointing authority. It should therefore take into account the needs and predilections of the appointing authority. For example, if the appointing authority is likely to choose primarily members of his/her own party as judges, the commission should not be sending slates of potential candidates that include no members of the appointing authority's party. Giving the appointing authority the opportunity to name some members of the judicial commission is a good way of ensuring that the appointing authority's perspective will be taken into account in the commission's deliberations.

If the commission plays only a subsidiary role, then the primary focus in designing an appointive system should be on the appointing authority. There are two considerations here. First, who should have the authority to appoint judges? Second, what constraints--if any--should be placed on the discretion exercised by the appointing authority? I begin with the identity of the appointing authority.

Most commission-based appointive systems in the American states lodge the appointing authority in the governor acting alone. Those appointive systems that dispense with a commission typically lodge the appointing authority in the governor with the advice and consent of the senate, drawing on the Federal model. There are advantages to each approach. Those who favor gubernatorial appointment with a commission note that the commission performs the same function as the senate in providing a check on one-person appointment. They also believe that a purportedly non-partisan body like a commission will be more attuned to the professional considerations that make a good judge than will a political body like a senate. It is even possible to argue that the governor-with-commission model provides both political and professional input into the process and thus represents an improvement on the governor-and-senate model.

I have real reservations about that last claim. Moreover, I think that even if there is a commission, serious consideration should be given to requiring senatorial confirmation of judicial nominees. For one thing, checks and balances are a desirable feature of any selection system. The commission is not an adequate substitute for the senate in this regard, because it is not a coequal partner in the process and because commissioners are likely to take the views of the governor into account in making their nominations. For another thing, the state senate will represent the diversity of perspectives in the state better than will the governor, a single individual. The commission itself can make no claim to be a representative body: even if its members reflect the diversity of the population, they have no constituency, and they cannot be held accountable by the public for their actions. Finally, one measure of a good state judiciary is that it includes judges from more than one political party (more about this later). If so, then senatorial confirmation is desirable, because it may help to ensure partisan diversity, particularly when the party controlling the governorship does not control the senate.

There is another model from beyond our borders worth considering. My understanding is that after the appointing authority in Japan chooses judges,

perhaps judges for the supreme court, the ratification of those choices is by popular vote rather than by the legislature. This has certain advantages, in that the people are not giving up their right to vote, and assuming the commission does its job well, whoever is chosen and confirmed will be qualified to sit on the bench. The arguments against transferring the Japanese model to the United States are the usual arguments against judicial elections--e.g., campaign financing, interest group involvement, and judges being called upon to announce their views in an effort to attract support.

Whatever the appointing authority might be, there are questions as to whether any constitutional or other constraints should be placed on its discretion in selecting judges. Many state constitutions do limit that discretion by prescribing qualifications to serve as a judge. Often these qualifications vary depending on the court on which the judge serves--the constitution imposes more stringent qualifications for serving on appellate courts than on trial courts and on trial courts of general jurisdiction than on trial courts of limited jurisdiction. One would expect that a properly operating commission would use such criteria in deciding whom to nominate, but redundancy may not be a bad thing.

Beyond that, Delaware by constitutional provision and New Jersey by long-standing practice require that governors appoint an equal number of Democrats and Republicans to the bench. European countries in staffing their constitutional courts likewise seek partisan balance, either by requiring super-majorities in the legislature for appointment or by ensuring that certain judgeships belong to particular parties. There is good reason to seek a politically balanced bench. A large body of social science literature has documented connections between judges' political affiliations and their decisional tendencies.[1] Therefore, one may well wish to stock the bench with a variety of different approaches to the law.

If a bipartisan bench is valuable, that can be mandated, and in a good appointive system perhaps it should be. Such a requirement, however, is in tension with the commission system. If a commission puts forth a slate on which only a single Republican is listed, and the appointing power is obliged to pick a Republican, then the commission is effectively exercising the appointment power, which is inappropriate. This need not be an insuperable obstacle, in that Delaware requires partisan balance on the bench, but also has a commission.[2] Either the commissioners will be required to put forth only Republican candidates for Republican “slots,” or they will have to put forward not three but five or seven names to the appointing authority, in order that a sufficient number of candidates from both parties are listed.

Thus far, we have only addressed initial appointment. Some of the same issues arise with regard to reselection, but additional issues also emerge. The first issue is whether they will be reselection process at all. One possibility is to appoint state judges, like federal judges, to serve during "good behavior" or at

[1] This likely does not indicate a lack of good faith on the part of judges. Rather, it suggests that Republicans and Democrats often bring different perspectives to the bench and that those perspectives affect the way they read and interpret the law.

[2] New Jersey has gubernatorial appointment and Senate confirmation but no commission.

least until a mandatory retirement age specified in the state constitution. States that adopt this approach would be emulating the Federal model. To my knowledge, only three states, all in New England, grant tenure during good behavior, and no state has instituted such a system for over a century. And even at the Federal level, there is some question about the model's continued desirability, as recent discussions of whether to institute terms of office for Supreme Court justices suggest.

Another way of avoiding reselection is by having judges serve a single, non-renewable term of office. Such a term limitation serves the aim of judicial independence, because judges will not be pressured or tempted to decide cases in a particular way in order to curry favor with those who control their continuation in office. European countries employ such a system for the members of their constitutional courts, and the American Bar Association endorsed the concept recently in *Justice in Jeopardy.*[3] However, there may be costs associated with judicial turnover, and it may be difficult to attract qualified candidates if one's judicial career ends after a single term. An alternative worth considering is to term limit only members of the state supreme court, because these are the judges whose rulings have the broadest policy consequences. If the European experience with constitutional courts is transferable to the United States, there should be no difficulty attracting qualified candidates, although prospective justices may postpone seeking a seat on the court until they are older, as a capstone to their careers.

Assuming that there will be a reselection process, the question then becomes how frequently a judge should be up for reselection. New York is currently on the upper end in term length for judges. Most states provide for shorter terms for trial judges than appellate judges and shorter terms for judges in courts of limited jurisdiction than for those in courts of general jurisdiction. Obviously, the longer the term, the less frequent the retention election or reappointment. There is a trade-off here, in that long terms provide less structured opportunities for judicial accountability. If one wishes to extend judicial terms, one should consider conducting performance evaluations even when reselection is not imminent, to detect problems and to give sitting judges a chance to change problematic behavior.

In deciding whether an incumbent should or should not remain in office, most commission-based systems in the United States use retention elections. The reformers who introduced commission-based selection included retention elections as a concession to those who believed that the populace should retain a direct role in judicial selection, but at least some reform leaders hoped that over time the retention elections would be eliminated. In states that appoint without a commission, often the same mechanism of gubernatorial appointment and senate confirmation is used for reselection. In New Jersey, for example, judges are appointed for an initial seven-year term, and if reappointed by the governor with the consent of the senate, serve to the mandatory retirement age of seventy.

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[3] American Bar Association, *Justice in Jeopardy: Report of the Commission on the 21st Century Judiciary* (2003).

There is not doubt that retention elections can be politicized and exhibit the worst features of partisan elections. Nonetheless, the experience of the states is that the vast majority of incumbents are retained and that even at the state supreme court level, defeat of incumbent justices is infrequent, and politicization episodic. Moreover, as the conflict over reappointing Chief Justice Wilentz in New Jersey in the 1980s showed, reappointment can likewise be a highly political process. Whichever system of reselection is employed, there may be an advantage in having a commission evaluate the performance in office of incumbents and recommend for or against retention. This commission should be as independent as possible, and its verdict on judges should be widely publicized.