

WORKGROUP ON JUDICIAL SELECTIONS

JUDICIAL NOMINATING COMMISSIONS: DISCUSSION POINTS – January 9, 2023

Intro: Based on review of IAALS article – *Judicial Nominating Commissions and the Selection of Supreme Court Justices*, 30 States and DC use JNCs in some way in choosing Supreme Court justices.

Obviously, many states, like Maryland, also use JNCs in the trial court selection process. To facilitate our discussion on what we might recommend regarding JNCs, I reviewed the IAASL article and the Brennan Center for Justice article on JNCs to create a general outline of topics/issues for us to address – it is modeled on the points raised in the articles. This list not exhaustive and is simply meant to start the conversation. Our goal is to submit our recommendations regarding the composition and operation of JNCs in Maryland.

The general theory supporting commission-based gubernatorial appointment systems is that this system is effective in identifying highly qualified, impartial, and trustworthy judges – perhaps more effective than contested judicial elections or pure gubernatorial appointment. As we all know, in 1970, Governor Mandal established the first Judicial Nominating Commission in MD. At our last meeting, Al Brault spoke his participation in the conference that developed the first JNCs in MD. Each Governor since that time has issued Executive Orders establishing JNCs.

COMPOSITION AND PROCEDURES OF THE COMMISSIONS

Authority: Per IAASL Article, Executive Order used to authorize Appellate Court Commissions in MD and 4 other jurisdictions (DE., GA., NH. and TN). In 25 states, it's authorized by the Constitution. One jurisdiction authorizes by statute (W.Va).

Scope: MD currently uses for Appellate and Trial court vacancies. As noted on the chart with the IAASL article, of the 31 jurisdictions with a commission-based gubernatorial process for their Supreme Courts, JNCs are used only for interim vacancies in 8 of the 31. MD uses for all vacancies.

MD Current composition:

1. Appellate Courts Commission: 17 members. 12 appointed by the Governor and 5 members of the MSBA appointed by the Governor from 10 persons submitted by the MSBA. Chair is designated by the Governor. In the event of a vacancy on the Commission, the Governor will appoint a successor.

2. Trial Courts Commission: There are a total of 16 Commission Districts. Each District has a *13-member* Nominating Commission. 9 members appointed by the Governor. 4 members of the Bar Association for the counties for which the Trial Courts Nominating Commission is responsible – appointed by the Governor from seven persons submitted collectively by Presidents of those associations. Chair designated by the Governor. In the event of a vacancy on the Commission, the Governor will appoint a successor.

QUESTION: Should the number of Commissioners at the Appellate or Trial Court level be changed? The numbers have remained constant at least since Glendening.

The Brennan article includes a chart listing the number of commissioners on Appellate Court Commissions anywhere between 7 and 17.

Qualifications/Requirements of Commissioners:

MD Current Executive Order Provides:

1. No more than one lawyer from the same firm or legal office may serve on a Nominating Commission at the same time.
2. No person may serve on the Appellate Nominating Commission while simultaneously servicing on a Trial Courts Nominating Commission and vice versa.
3. No person may serve on a Nominating Commission who:
 - a. Holds an elected office in local, State, or federal government
 - b. Is an employee of the Office of the Governor
 - c. Hears cases as an active or senior member of the State or federal judiciary; or
 - d. Holds an office in a political party.
4. In submitting personas for appointment, the president of the MSBA and the county bar associations shall give “appropriate consideration to the racial, ethnic, gender and geographical (for the Appellate Commission) diversity of MD.
5. For the Trial Courts Nominating Commissions, the Presidents of the Bar Associations shall consult with the presidents of other Bar organizations that may operate in the Commission District.
6. An Appellate Courts Commissioner shall not be appointed to an Appellate Court during the term for which the member was appointed, and a Trial Courts Commissioner shall not be appointed to a Trial Court during the term for which the member was appointed.

Other Issues/Qualifications/Requirements from the Research for Discussion:

1. Appointing Authority: Under the current Executive Order, the Governor makes all the appointments, with input from Bar Associations.
 - a. Should the Governor be the sole appointing authority? The IAASL and Brennan Center articles discuss a variety appointing authorities. The Brennan article reports that “in a plurality of jurisdictions, no single authority appoints a majority of commissioners.” See the Appendix to the article. The variety of appointing authorities include the Governor, the Chief Justice, legislative leaders, and members of the Bar.
 - b. Should the Bar Associations have the authority to appoint a specific number of attorneys after using an application process. For instance, the Board of Governors of the MSBA or the executive committee of each county bar association would advertise for the number of openings on the Appellate or Trial Courts Commission. Each candidate would be interviewed by the Board of Governors or the executive committee. The Board of Governors or executive committee by majority vote would then select the members to submit to the Governor for inclusion on the nominating commission.
2. General Qualifications: Under the current Executive Order, there’s no general requirements regarding a commissioner’s knowledge.
 - a. To ensure that each citizen is provided with the highest quality of judges the members of the commission need to understand and have experience with the court system and the role of judges.
 - b. Each county has different needs. The courts handle family, civil, criminal, and juvenile. There can also be specialized courts for example drug, mental health, and technology. Should this be addressed as a required consideration by the Commissions?
 - c. Should there be specific requirements as to ethnicity, race, and gender? Current MD Executive and earlier Executive Orders set as a guideline that the Commissions “shall fairly and appropriately reflect the minority and female population of the area from which they are appointed.”
 - d. Should there be any general qualifications? The Massachusetts Executive Order provides as follows and specifically provides attorney members have 7 years of trial experience:
 - i. Commissioners shall have demonstrated knowledge of the judicial system and experience in the needs and operation of the Massachusetts courts. Commissioners who are member of the bar shall have at least 7 years of relevant experience and shall be members of the Massachusetts bar in good

standing. Commissioners who are not members of the Massachusetts bar shall be familiar with the attributes that best qualify a person for appointment as a judicial officer.

- ii. Should there be a residency requirement in the county/district the Commissioner serves?
 - iii. Should there be specific disqualifications listed? (See Massachusetts Executive Order, Section 1.4 to 1.4.5)
3. Requirement for Particular Professional Backgrounds: Under the current Executive Order, there's no requirement referencing professional backgrounds.
 - a. Should this be a consideration? See the chart in the Brennan article regarding the practice area of most commissioners. What, if any, difficulty exists with prosecutors or public defenders serving on Commissions?
4. Non-lawyer members: Under the current Executive Order, there is no requirement for a specific number of non-lawyers.
 - a. Lawyers and non-lawyers: This issue is discussed in the Brennan Center Article. See Figure 2 on page 5. 14 States and DC require that most nominating commissions be lawyers. MD has a set number of lawyers, and the remainder can either be lawyers or nonlawyers.
 - b. Should there be a requirement for a percentage of non-lawyers to be appointed by the Governor? Al Brault stated that the division was even between lawyers and non-lawyers under the Mandel Executive Order and recommended that this be reinstated.
 - c. How should the non-lawyers be selected? By application to the Governor?
 - d. How can public participation at this point in the process be encouraged?
 - e. Should there be a process to ensure ethnic, race, and gender, race diversity, as well as professional diversity of non-lawyer members? (See Brennan article)
5. Terms: Under the existing Executive Order, Commissioners generally serve a four-year term during the period the Executive Order is operative.
 - a. Should there be staggered terms? This would be a departure for MD to have members carry over from one administration to another.

6. Accommodations for Applicants with Disabilities: No requirement in the existing Executive Order.
 - a. Such a requirement should be included based on the testimony by Kelby Brick at the public hearing on November 28. We should specifically state that accommodations will be provided and will be provided at no cost to the applicant.
7. Political Party: Under the current Executive Order, there's no requirement referencing the political party of commissioners.
 - a. Should this be a consideration? The Brennan article states that nearly have of the jurisdictions either reserve seats for each of the two major political parties or limit the ability of one party to command a supermajority.
8. Lobbyists: No references to lobbyists in the existing Executive Order.
 - a. Should lobbyists be precluded from serving? The Massachusetts Executive Order specifically disqualifies any person registered as a state or federal lobbyist or executive agent, or any person employed by registered lobbyists or executive agents.
9. Code of Conduct: The current Executive Order does not include a Code of Conduct for Commissioners (see Massachusetts Executive Order and IAASL article).
 - a. During her presentation, Brittany Kaufman from IAASL indicated that the Institute has developed a Model Code of Conduct. Ms. Pelz sent a copy to all Workgroup members today and a copy should be in your packet. Should we recommend adoption of a Code of Conduct? The IAASL Model requires new members to complete a training program.
 - b. The Massachusetts Executive Order does include a Code of Conduct and provides that all Commissioners agree to abide by the Code. The Code includes the following:
 - i. No Political Contributions: No Commissioner shall make or solicit other persons to make political contributions on behalf of any candidate for county, state, or federal elected office.
 - ii. Impartiality: No Commissioner shall act in a manner that reflects discredit upon the judicial selection process or discloses partisanship or partiality in the consideration of applicants. A Commissioner shall disclose to the Commission all current or past personal and business relationships with a prospective applicant. In addition to disclosure, a Commissioner shall recuse themselves, refrain from voting, and absent himself/herself from the room during discussions concerning (a) any applicant who is the current

business or law partner of the Commissioner and (b) any applicant whom the Commissioner believes they are incapable of considering impartially.

- iii. Advocacy: After the Commission certifies the names of qualified applicants to the Governor, no Commissioner shall directly or indirectly attempt to further influence the Governor.
- iv. Confidentiality: Except as otherwise provided, information shall be kept confidential.
- v. Ex parte Communications: Not permitted except as set forth.
- vi. Commission Letterhead: Use limited to official communication for the Commission.
- vii. Conflict of Interest: All commissioners avoid self-promotion, etc. (see Mass. Executive Order.
- viii. Civility: All Commissioners shall display courtesy and respect to all applicants as well as to other Commissioners. Questioning of applicants that resembles techniques appropriate for cross-examination of a hostile witness is inappropriate for interview of applicants.

10. Rules of Procedure for Commissions on Appellate & Trial Court Appointments:

- a. Should there be specific rules for the process. Each Bar Association and Commission certainly has a set of rules and procedures, as discussed in prior meetings. For reference, here are some points and references.
- b. Per our discussion at our last meeting, we discussed the following to improve transparency:
 - i. The process should be open to the public, except for the Commissions deliberations and voting on each applicant. The interviews should be open to the public but, the Commission would have the discretion to go into Executive Session for sensitive matters.
 - ii. The applications, with redactions of personal and sensitive information, should be available to the public.
 - iii. Recruitment of candidates should be included as a responsibility of Commissioners.
 - iv. The IAASL article on JNCs notes that the extent the work of a JNC is open to the public varies. In MD, the names of those who apply for judicial

vacancies are public. Per IAASL, interviews *may* be open to the public in 15 states and commissions conduct at least some deliberations in open session in 6 states.

NOTE: All of the above are included in the Arizona Uniform Rules of Procedure for Commissions on Appellate and Trial Court Appointments.

- c. The commissions need to investigate and have a strong sense of the experience, quality, and character of each judicial candidate. The process should include the following: each applicant should be vetted by at least one member of the commission. The applicant's references should be contacted, as well as others in the legal community who are familiar with the candidate. A second member of the commission should meet separately with the applicant. If a person does not make the commission list and they request a meeting, then three members of the commission shall meet with them to provide constructive comments/suggestions/thoughts.
- d. Arizona Uniform Rules of Procedures. In packets for the meeting, there's a copy of these Rules, which are excellent, and we should review together.
- e. Here are comments received from a few members of the Workgroup regarding this screening process. Some of the below is covered in the Arizona Uniform Rules.
 - i. Without any assurance of success, each member of the commission shall encourage qualified candidates to seek judgeships.
 - ii. Commission members shall consider experience, intellect, demeanor, temperament, work ethic, professional involvement, and character for candidate.
 - iii. No negative information shall be considered by the commission without the candidate being advised of the information and source of the information and provide an opportunity to address.

APPOINTMENT PROCESS

Here's the reference from the IAASL article (page 13) regarding the filling of a vacancy on the Arizona Supreme Court in 2012 that I referenced at the end of our last meeting. It is described as a "functioning merit selection process in action." This is the description:

The commission's nominating process has been transparent for nearly two decades. In June 2012, the commission gave public notice of a vacancy on the high court and invited applications. Following the application deadline, the nominating commission had 60 days in which to screen applicants and identify the best suited for the vacancy, for which 14 individuals applied. The applicant pool included appellate judges, trial judges, practicing attorneys, and senior officials in the attorney general's office. The commission selected 9

of the 14 applicants for interviews, posted their application materials online, and invited public comment. Following the applicant interviews, deliberations, and voting --- all of which were conducted in open session -- the commission sent 3 nominees to the Governor. Upon receipt of the nominees, the Governor had 60 days in which to make the appointment. By October, the supreme court had a new justice, appointed from the commission's 3 nominees. She had been a sitting intermediate appellate judge and a finalist for a previous supreme court vacancy. The screening process that all applicants undergo is straightforward and routinized, and both applicants and the public know what to expect.

Based on the above, should we consider the following:

1. Number of Nominees to Submit to the Governor: Should there be a minimum?
2. Mandate or Option: Should Governor be obligated to appoint from the list provided by the Commission.
3. Deadlines for Appointment: Should there be specific timeframes for appointments? If so, what should be recommended?