

RESEARCH

Judicial Nominating Commissions

An analysis finds that despite varying methods of selecting them, state commissioners are almost uniformly professionally homogeneous.

By Douglas Keith

In a recent report, the Brennan Center proposed reforms to judicial selection methods that would reduce partisan and political pressures on judges.¹ One key element of that proposal is an independent, publicly accountable nominating commission to recruit, evaluate, and recommend judicial candidates for appointment.

Thirty-four states and the District of Columbia already use a commission as part of the selection process for at least some of their high court judges, but not all commissions are alike.² Commissions differ in size, composition, and legal authority, not to mention the backgrounds of the individual commissioners that serve on them.

Building on prior research, this paper assesses who has influence on commissions today, both on paper and in practice, by examining the commissions' members. It first analyzes the relevant provisions of state constitutions, statutes, and executive orders dictating who serves on commissions and who appoints commissioners. Then the paper details the findings of a first-of-its-kind nationwide analysis of the professional background of nearly 340 nominating commissioners in 26 jurisdictions that use commissions to fill all vacancies on their high courts.³

Ultimately, this analysis shows key variations in the

design of nominating commissions that have implications for who has power over, or a voice in, the commission's process of recruiting, vetting, and recommending judicial applicants. It also shows that despite the variety of commission designs, there is a near-uniform lack of professional diversity among commissioners. Among the key findings:

- **Governors appoint a majority of commissioners in less than half of commission states.** Majority control gives governors substantial power to shape a commission's priorities in 15 states, but that power is far from universal. In more jurisdictions — 16 of 35 — no single authority appoints a majority of commissioners.
- **Lawyers predominate, even when the law does not require it.** In 26 of 35 jurisdictions, lawyers filled a majority of commission seats, even though only 15 require lawyer majorities. Lawyers have a unique perspective highly relevant to judges' work, but they are not fully representative of the public whose rights those judges' decisions will affect. Nonlawyer commissioners fill a majority of commission seats in just six states and half of the seats in three states.

- **Many jurisdictions reserve seats for various political, geographic, and professional interests.** Nearly half of jurisdictions either reserve seats for each of the two major political parties or limit the ability of one party to command a supermajority on the commission. Twenty-one also require commissioners from different geographic regions in the state. A few even mandate representation for commissioners with particular professional backgrounds such as prosecutors, defense attorneys, or corporate counsel. While 10 states call for their commissioners to reflect the state's demographic diversity, these provisions are likely not specific enough to ensure this kind of diversity without appointing authorities who independently make it a priority.
- **Corporate and plaintiffs' attorneys are best represented.** Attorney commissioners with those backgrounds had seats on 22 and 20 commissions, respectively, of the 26 for which we analyzed professional background. Meanwhile, other relevant voices including current and former prosecutors, public defenders, and civil legal service providers sat on just eight, five, and two commissions, respectively. By way of comparison, lobbyists sat on nine commissions.
- **Nonlawyer commissioners are also homogeneous.** Nearly two-thirds of those commissioners came from either private industry or the legislative or executive branches of government.

What Are Judicial Nominating Commissions?

Judicial nominating commissions (JNCs) are bodies responsible for vetting and recommending applicants for judicial vacancies.⁴ The power to select nominating commissioners generally belongs to political officials, judges, or the state bar’s leaders or members, though some commissioners serve *ex officio* on the basis of their current position.⁵ No state popularly elects commissioners. The commissions analyzed in this paper range in size from six to seventeen members.

The work of commissioners varies only slightly from state to state.⁶ Typically commissioners solicit applications, review written submissions from applicants, conduct interviews, call references, and discuss candidates as a group.⁷ In some states, commissioners also actively recruit applicants that the commission will later consider as a whole.⁸ After considering those applications, commissions recommend candidates to the official or the body ultimately responsible for making the appointment — most commonly the governor, but sometimes the state legislature.⁹ In most states, that official must appoint a candidate recommended by the commission.¹⁰ In five states, however, the commission’s recommendations are nonbinding, meaning the governor may appoint someone whom the commission did not recommend.¹¹ The number of candidates the commission recommends, and the information it provides the governor or other appointing body, are generally set by law. Most nominating commissions make their decisions by majority vote.¹²

The most common use of nominating commissions is as part of a “merit selection” plan (also called “merit/retention”), which 14 states employ for their high courts.¹³ Under

merit selection, states use commissions when appointing judges to their first term on the bench. Following their appointment, judges must stand for uncontested “retention” elections, in which voters get to choose whether to retain that judge.¹⁴

Even more states use commissions in hybrid or appointment-only systems. In five, governors with the exclusive power to appoint judges voluntarily use nominating commissions to evaluate and recommend candidates for appointment.¹⁵ Seven other states and the District of Columbia use nominating commissions as part of selection systems that vary somewhat from both merit selection and executive appointments; for example, a state may use a commission to reappoint sitting judges in addition to recommending initial appointments.¹⁶ Finally, eight states use commissions to fill only interim vacancies on their high court.¹⁷

Rules Determining Commission Makeup

Each of the state constitutions, statutes, and executive orders establishing a judicial nominating commission contains provisions dictating who can and cannot serve on the commission and who has the power to select commissioners. These rules lay the foundation for how judges are selected in a majority of the country. They dictate which elected and unelected officials have a say in the selection process by appointing commissioners or serving themselves, and which segments of the population can or must be incorporated into that process.

The analysis presented below examines who appoints commissioners; the proportions of lawyer and nonlawyer commission members; and provisions that require representation of particular political, geographic, professional, and demographic interests. Foremost, this analysis shows that there is significant variety in how states structure their nominating commissions. These variations reflect states' choices about whether to empower the governor, the state bar, or legislators to appoint commissioners; whether to incorporate nonlawyers; and whether to reserve seats for interest groups or segments of the state's population otherwise unlikely to have a voice in the selection process.

1. Appointing Authority

A fundamental way officials and others shape commissions is by appointing commissioners, and how a jurisdiction distributes the appointment power will determine who has such influence. States most commonly grant appointment authority to the governor, the state's bar association, and state legislative leaders.¹⁸ Many also provide for certain officials, such as a judge or the dean of the state's largest law school, to serve ex officio without appointment. Several states grant appointing power to other officials, including state high court judges, the state attorney general, and already-sitting members of the nominating commission.¹⁹ Even the president of the United States appoints one commissioner to the District of Columbia's nominating commission.²⁰

One crucial question is who, if anyone, has the power to appoint a controlling block of commissioners. Even though the appointing authorities themselves do not sit on the commission, they wield power in shaping it and are likely to appoint individuals whose judgment they trust and with whom they share values or political preferences. In the first survey of nominating commissioners in 1969, for example, commissioners reported that gubernatorial appointees were often "close friends" of the governor and were more likely to recommend the governor's preferred candidates.²¹ Much more recently, governors in Iowa and Florida have come under fire for appointing political allies and donors to their states' nominating commissions.²² Appointment

power concentrated in the hands of one official makes it more likely that the commission will merely ratify that official's preferences. Conversely, a mix of appointing authorities reduces the chance that a single political agenda will drive the commission's work.²³

States take several different approaches in distributing appointment power. As Figure 1 shows, governors in 15 states — less than half of all states using nominating commissions — have the power to appoint the majority of commissioners.²⁴ Approximately half of those are states in which the governor has voluntarily established a commission through executive order, and included in this group are all five of the commissions whose recommendations are not binding on the governor.

In a plurality of jurisdictions, however, no single authority appoints a majority of commissioners. Among those 16 jurisdictions there is substantial variation as to which authorities have a hand in appointing commissioners. For example, in New York, the executive, legislative, and judicial branches each appoint an equal number of commissioners, while in South Dakota the state bar association appoints a plurality, but not a majority, of commissioners.²⁵

In the four remaining states, attorneys within the state or legislators appoint a majority of commissioners. Appendix II details who appoints commissioners in each jurisdiction.

Figure 1. Who Appoints the Majority of Commissioners in Each State?



2. The Role of Lawyers

Many jurisdictions have provisions dictating the proportions of lawyers and nonlawyers on a commission. Some mandate that a certain number of commissioners be lawyers, others require that certain entities appointing commissioners choose only lawyers or reserve seats for lawyers serving *ex officio*, and in others the bar is not required to appoint only lawyers but does so by custom.²⁶

The proportion of lawyers versus nonlawyers is important because of its potential impact on committee deliberations and outcomes. Lawyers' specialized knowledge and professional networks may give them unique insights into judicial candidates. Yet lawyers are not fully representative of the public at large.²⁷ Moreover, their status as repeat players in the courtroom may lead them to differ from the general public in the attributes they value and the policies they prefer.²⁸

In most jurisdictions that use nominating commissions, the underlying laws and executive orders do not require lawyer majorities on the commissions. Nevertheless, when the law gives the appointing authorities flexibility as to whom to appoint, they overwhelmingly appoint lawyers.

As reflected in Figure 2, 14 states and the District of Columbia require that a majority of nominating commissioners be lawyers.²⁹ In three states, the law requires

that nonlawyers make up exactly half of the nominating commission,³⁰ while in six, the law mandates that nonlawyers make up a majority of the commission.³¹ In the remaining 11 jurisdictions, the appointing authorities have discretion as to whether to appoint a majority of lawyers.

In the 11 states where majority control by lawyers or nonlawyers is not set by law, however, lawyers still dominate. In all 11, lawyers currently make up a majority of the commission, and in two of those states, the commission consists entirely of lawyers.³² Thus a total of 25 states and the District of Columbia currently have nominating commissions with a lawyer majority, even though only 15 jurisdictions require it.

But not all attorney commissioners arrive on their commissions in the same way. Of the 30 jurisdictions that designate "lawyer" slots, 21 either empower multiple authorities to select lawyers to serve as commissioners or have at least one lawyer serving *ex officio*. This distribution of appointment power generally makes it less likely that all lawyers on a commission will represent the same interests. In Florida and Utah, the governor has the authority to reject lawyers nominated to serve on the commission by the state bar, giving the governor the ability to undermine the distribution of appointment authority.³³

Figure 2: Judicial Nominating Commission Membership

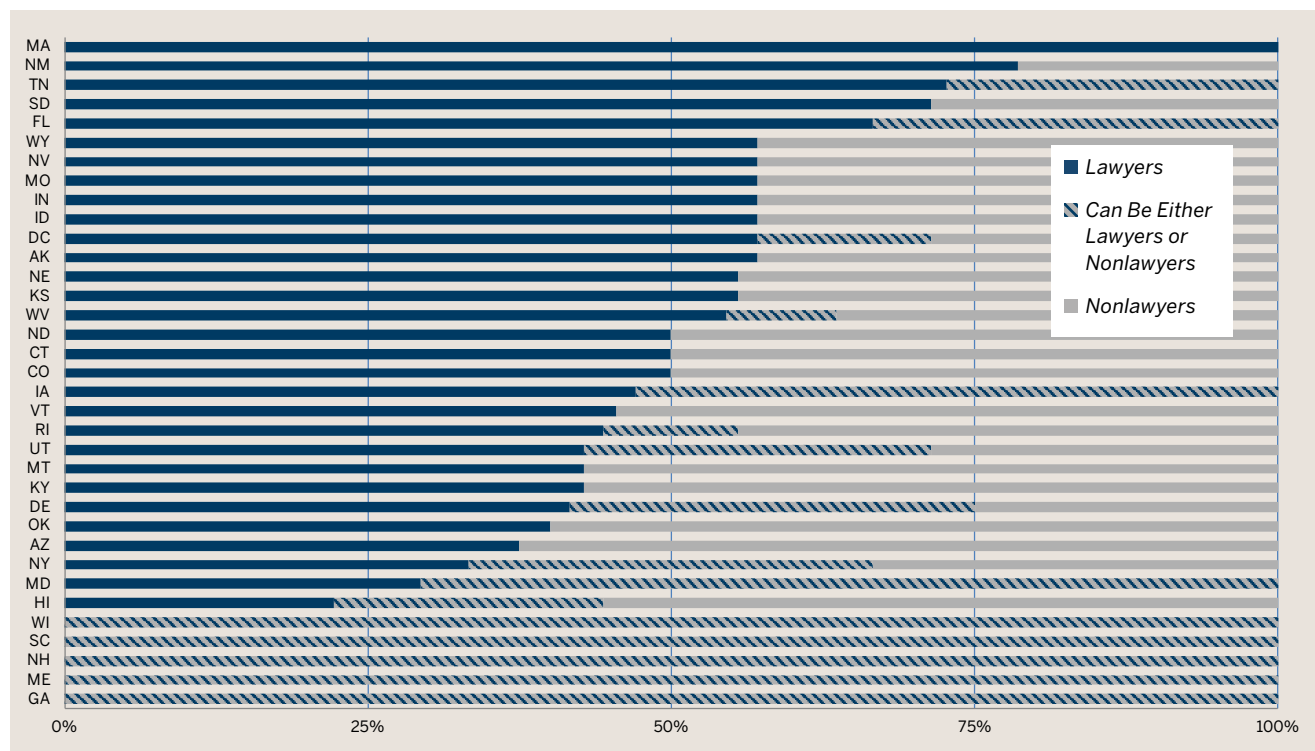
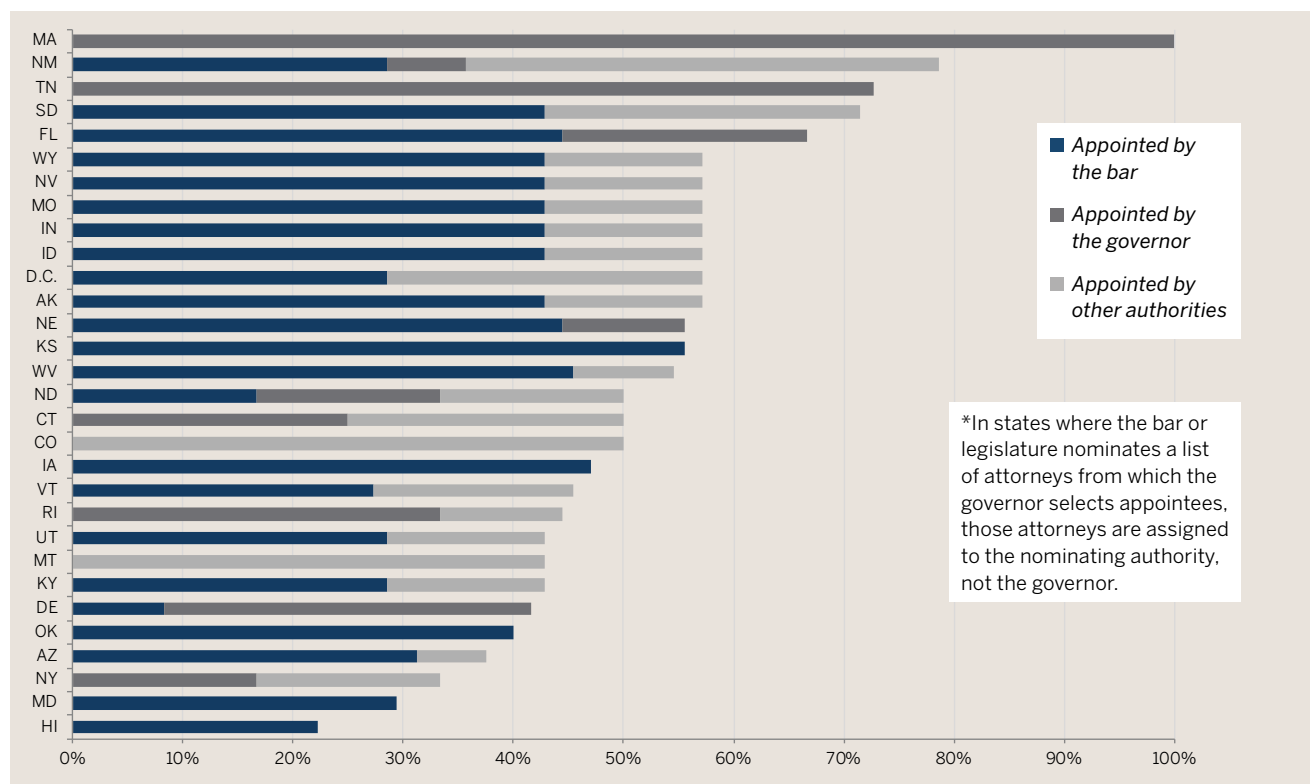


Figure 3: Percentage of Commissioners Who Must Be Lawyers, and Who Appoints Them*



3. Additional Provisions Regulating Membership

Many states have also taken steps to reserve commission seats for particular community interests or to ensure members of one political party do not dominate a commission.

Sixteen states, for example, require at least some partisan balance on their commissions, and they do so in several ways. Some use a numerical cap that limits the number of members that may be from a single party, others require that either the entire commission or certain commissioners be equally distributed between the two largest parties, and still others provide for partisan balance by giving appointment power to both majority and minority leaders of the state legislature. Table 1 shows the greatest possible representation that a single political party may have under the different approaches in these 16 states. New Mexico, New York, and Connecticut guarantee that their commissions will have equal representation of the two largest political parties.³⁴ No state requires representation of third parties or independents.

Other provisions attempt to ensure that nominating commissioners are representative of the state in which they serve. For example, 21 states call for at least some diversity in geographic representation, either by simply

instructing appointers to take geography into account when selecting commissioners or, more concretely, by requiring representation for each congressional district or prohibiting the appointment of multiple commissioners from the same county.³⁵

Fewer states call for commissioners who represent the racial and gender diversity of the state’s population.³⁶ Ten states have provisions that mention diversity among commissioners as a goal to which appointing authori-

Table 1: Partisan Balance Provisions

State	Maximum Single Party Representation	State	Maximum Single Party Representation
CT	50.0%	WV	63.6%
NM	50.0%	KY	71.4%
NY	50.0%	NV	71.4%
NE	55.6%	SD	71.4%
AZ	56.3%	UT	71.4%
CO	56.3%	OK	73.3%
ID	57.1%	RI	77.8%
DE	58.3%	VT	81.8%

ties should aspire, though most of those provisions fail to define diversity and are likely unenforceable.³⁷ In Delaware, for example, the executive order establishing the commission states that members “shall reflect the broad diversity of the citizenry of Delaware.”³⁸ Florida more explicitly calls for the governor to “ensure that, to the extent possible, the membership of each commission reflects the racial, ethnic, and gender diversity and geographic distribution of the relevant jurisdiction.”³⁹

Finally, several jurisdictions have taken steps to ensure commissioners have diverse professional backgrounds, or even that they represent specified areas of expertise. The New Mexico Constitution, for example, requires that the state bar association’s four appointees represent “civil and criminal prosecution and defense.”⁴⁰ Taking professional diversity even further, Tennessee, until 2009, reserved commission seats for representatives of the Tennessee

Trial Lawyers Association, the Tennessee District Attorneys General Conference, and the Tennessee Association of Criminal Defense Lawyers.⁴¹ The executive order establishing Georgia’s nominating commission, while less specific, similarly requires that commissioners have experience “as former judges, former magistrates, trial counsel, government counsel, or corporate counsel.”⁴² These provisions are not limited to attorney commissioners. Montana requires that each of its non-attorney commissioners represents “a different industry, business, or profession.”⁴³

Professional Background of Commissioners

While states' structural choices affect who influences their commissions, those choices often set only the outer bounds of whom authorities can appoint to the commissions. Within those boundaries, appointing authorities have great discretion in selecting the individual commissioners — persons with great power to mold a state's courts. To better grasp how commissions shape judicial appointments, it is necessary to understand who the commissioners are, what knowledge and experiences they bring to their work, and which relevant voices are represented on commissions at the expense of others.

Previous surveys provide valuable information about the demographic and professional makeup of nominating commissioners. Notably, in 2011, the American Judicature Society (AJS) surveyed nearly 500 nominating commissioners across 31 jurisdictions and found a striking lack of diversity by race, gender, and sexual orientation. According to that survey, 89 percent of nominating commissioners identified as white, 65 percent as men, and 93 percent as heterosexual.⁴⁴ AJS also gathered data on commissioners' professional backgrounds. Among lawyer commissioners, the survey found that 22 percent represented primarily plaintiffs, 26 percent represented primarily defendants, and 48 percent represented both.⁴⁵ Among nonlawyer commissioners, the survey found that approximately 25 percent worked for private, for-profit companies, 20 percent worked for nonprofits, 20 percent held government jobs, and 15 percent responded that they were retired.⁴⁶

This paper adds to this existing research by providing more detailed information regarding commissioners' professional backgrounds, as well as by analyzing these data both nationally and across jurisdictions.

Understanding who actually serves on nominating commissions is important for assessing whether particular interests could unduly influence the selection process.⁴⁷ Importantly, even if interest groups are not using membership on commissions for professional advantage, underrepresentation of certain professional backgrounds can undermine the work of the commissions in other ways. Commissioners may be less capable of recruiting and evaluating candidates with backgrounds in fields they are not a part of, or they may be unintentionally partial to candidates with backgrounds similar to their own.⁴⁸ State high courts also decide a wide array of cases, and homogeneous professional representation may make it more difficult for a commission to evaluate whether a candidate could handle that diverse docket. A criminal defense attorney or a prosecutor, for example, may be less aware of the characteristics necessary to manage and decide civil cases.

The discussion below analyzes the professional background of 324 nominating commissioners in 26 states that use nominating commissions to fill both initial and interim

vacancies on the state's high court. The data are a snapshot of commission membership as of September 2016. The analysis treats the backgrounds of lawyer and nonlawyer commissioners separately, but at the outset it is worth noting that the majority of commissioners — 65 percent of the analyzed group — were lawyers. For a detailed methodology, including definitions for each professional category, see Appendix I.

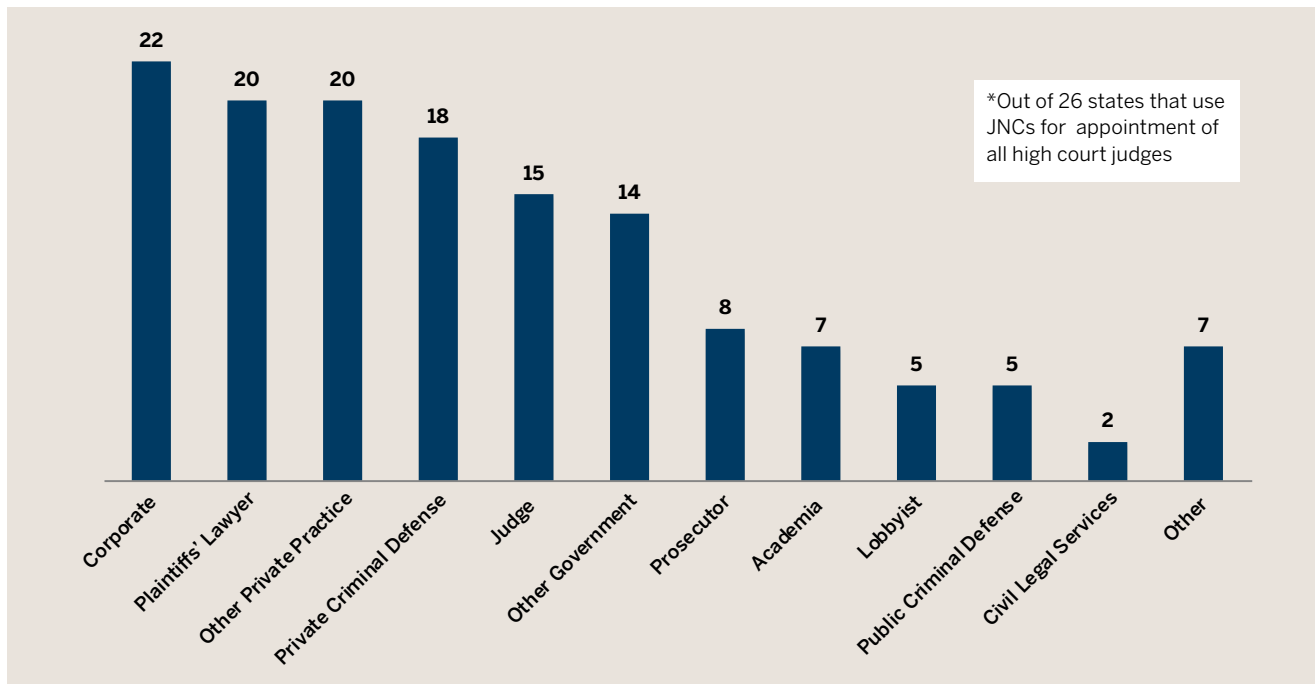
1. Lack of Professional Diversity Among Commissioners

As Figure 4 shows, some categories of lawyers were consistently present on commissions, while others were not. In 22 out of 26 states analyzed, at least one corporate lawyer or a lawyer with a significant history practicing corporate law had a seat on the nominating commission, and on most commissions there were at least two such lawyers. Plaintiffs' lawyers were also well represented, serving on commissions in 20 states. In some states, plaintiffs' attorneys were particularly well represented. For example, three out of the four lawyers serving on commissions in Missouri and Indiana were plaintiffs' attorneys. In total, 41 percent of attorneys on commissions were practicing or had a significant history practicing corporate law, and 23 percent of commissioners were or had been plaintiffs' attorneys.

Meanwhile, many other types of legal practice were not represented on most commissions. Attorneys representing low-income or indigent clients in either criminal or civil cases served on only seven out of the 26 commissions. Current or former prosecutors served on only eight commissions — less than one-third of those analyzed. This underrepresentation of public defenders and prosecutors is particularly striking when one considers the composition of cases heard by state high courts; on average, criminal cases make up about half of state high court dockets.⁴⁹

Nevertheless, lawyers from a single practice area are seldom so well represented that they control a majority of

Figure 4: Number of Commissions with at Least One Lawyer from a Given Professional Background*



the seats on a commission. A majority of lawyer commissioners shared a common practice area in only 4 of the 26 states. In Georgia, Maine, and Tennessee, the governor has unfettered discretion to appoint commissioners, and a majority of all commissioners practiced corporate law.⁵⁰ No professional cohort had a majority of seats on a commission in any other jurisdiction.

Nonlawyer commissioners may bring a distinct perspective to the work of nominating commissions, but as a group they also lack substantial professional diversity. Forty-four percent of nonlawyer commissioners worked for private businesses, and 29 percent either were serving or previously served in government (outside of education and law enforcement). Educators, law enforcement officers, health-care workers, and others had minimal representation on nominating commissions.

Figure 5 (next page) shows that in the case of non-attorneys, commissioners employed by private business were present on 16 of 21 commissions, as were those with significant experience in government. As with attorney commissioners, that representation came at the expense of other cohorts: No other professional background for nonlawyer commissioners was represented on more than one-third of nominating commissions.

In at least five states, nonlawyer commissioners working in government were appointed to the commission by the elected official they serve.⁵¹ In 10 states, commissioners were either current or former members of the state

legislature.⁵² Commissioners with such backgrounds may understand the qualities that are valuable in a public official in their state, but they may also be more likely to bring to their role political considerations that states intended commissions to minimize. Current government employees, for example, may feel pressure to represent the interests of an appointer who is also their employer, and legislators may be swayed by the politics of their constituencies.

Finally, this analysis suggests that the provisions in several states requiring professional diversity among commissioners are effective. In New Mexico, where the constitution requires that the state bar association appoint commissioners with experience in both defense and prosecution of both civil and criminal matters, a commission recently constituted to select judges for the state's intermediate appellate court included attorneys from all four practice areas.⁵³ Only five states' commissions, of the 26 analyzed, have representatives from all four of those fields.⁵⁴ In Georgia, where the executive order identifies five distinct practice areas that should be represented, all five practice areas were represented and nearly all of the 17 attorney commissioners brought one of those experiences with them.⁵⁵ In Montana too, where non-attorney commissioners must each represent "a different industry, business, or profession," the four non-attorney commissioners came with diverse backgrounds; they include a retired adviser to the governor, president of a labor union, a nonprofit accountant, and a legislator-turned-electrician.⁵⁶

Figure 5: Number of Commissions with at Least One Nonlawyer from a Given Professional Background*

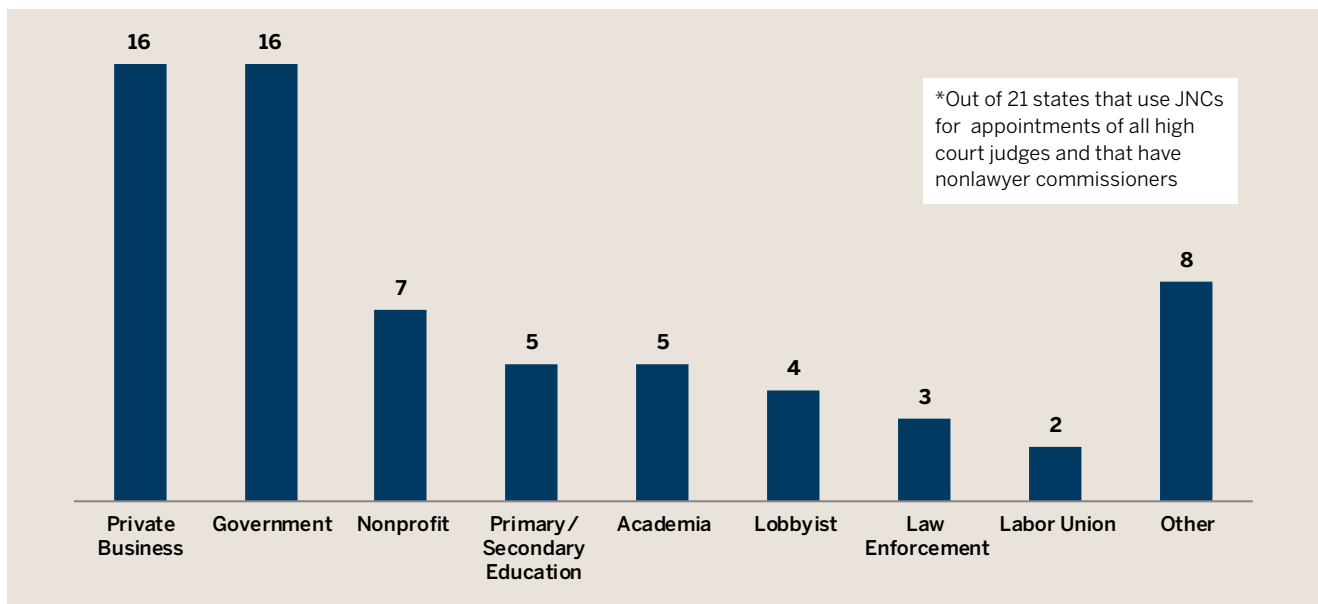
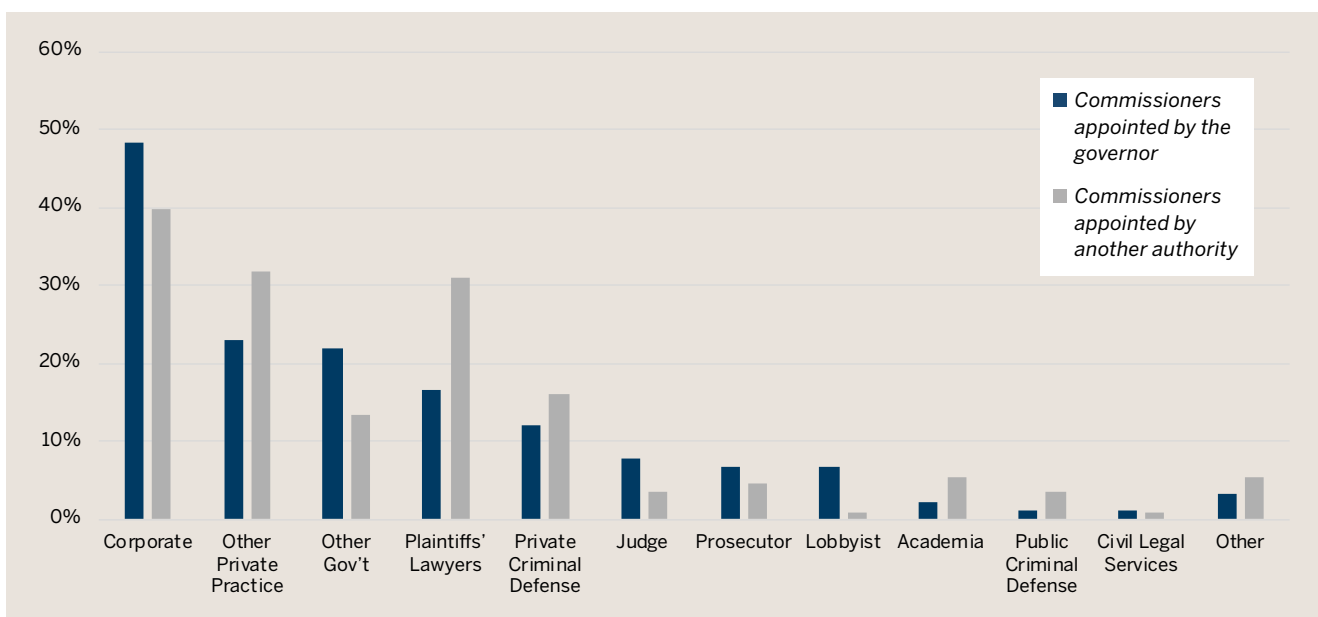


Figure 6: Percentage of Lawyer Commissioners with a Given Background



2. Commissioners' Backgrounds Differ Depending on Who Appoints Them

Attorneys who were appointed by a governor were also in some ways substantially different from their fellow commissioners.⁵⁷ A greater share of the gubernatorial appointees analyzed had a corporate background, and a smaller share had experience as plaintiffs' lawyers, than did attorney commissioners appointed by other authorities. Forty-eight percent of lawyer commissioners appointed by governors had a background in corporate law, as compared to 40 percent of lawyers appointed by any other entity. Meanwhile, 16 percent of gubernatorial appointees were plaintiffs' lawyers, as compared to 31 percent of all other appointees.

Some of the distinct characteristics of gubernatorial appointees were likely attributable to the politics of the governors doing the appointing. Two-thirds of the analyzed

states had Republican governors and one-third Democratic.⁵⁸ Because plaintiffs' lawyers traditionally have closer ties to the Democratic Party, and because governors are likely to appoint commissioners who share their political views, it may be that a different political makeup of governors would lead to nominating commissioners that more closely resembled non-gubernatorial appointees.⁵⁹

In other categories less commonly tied to political ideology, however, gubernatorial appointees were still different from other commissioners. Though the numbers are small, governors appear more likely than other appointers to place both lobbyists and current and former judges on nominating commissions. Seven attorney commissioners, across five states, were lobbyists or specialized in government affairs, and governors appointed all but one of them.⁶⁰ Finally, gubernatorial appointees were twice as likely to have judicial experience as other appointees are.

Some of the conspicuous gaps in the backgrounds of attorney commissioners remained no matter the appointing authority. Civil and criminal legal services and prosecutors had little representation across all appointing authorities.

Conclusion

Nominating commissions across the country are designed in a great variety of ways, and any discussion of their strengths and weakness must be grounded in that understanding. From the ability, or inability, of governors to appoint a majority of commissioners, to the proportions of lawyer and nonlawyer members, to provisions guaranteeing certain representation on the basis of professional, political, and geographic diversity, states have empowered different stakeholders through the design of the commissions.

What is nearly universal across commissions today is a lack of professional diversity. Corporate and plaintiffs' lawyers consistently have a seat at the commission table, while prosecutors, public defenders, and civil legal service providers are mostly left out of the process along with the interests of those they represent. Similarly, non-attorney commissioners are drawn from private, for-profit businesses or government, and few others have a voice on commissions.

But if states want to diversify their commissions or avoid giving undue influence to any political body or category of lawyer, existing designs also provide models for change. Across the country, there are examples of commissions that effectively mandate representation for nonlawyers, reserve seats for certain types of lawyers that would otherwise be unlikely to find their way onto commissions, or prohibit gubernatorial appointees from having majority control of a commission.

This research also suggests areas for further investigation. For example, while the paper highlights a lack of professional diversity, any discussion of nominating commissions would also benefit from greater information

about demographic diversity. For data on the race, ethnicity, gender, and sexual orientation of current nominating commissioners to be comprehensive enough to determine what communities are disproportionately included or excluded from the commission process, states will need to improve how they collect this information and make it public.⁶¹ Additionally, while the information about appointment power provides insights into who can influence commissions through their memberships, it is equally important to know whether officials or interest groups are influencing commissions in other ways. Governors may use informal channels to communicate their goals and preferences directly to a commission or individual members.⁶² And members of the public may influence commissioners by submitting public comments to them, providing recommendations for candidates, or conducting more informal outreach to commissioners when not prohibited.

For now, this research creates a clearer picture of a group of people who have a large hand in selecting judges, how they arrived in this position, and the concrete steps states can take to improve their commissions.

Methodology for Coding of Nominating Commissioners

For each state that uses a nominating commission to fill all vacancies on its high court, we compiled a list of nominating commissioners as of September 2016. The names of current commissioners are publicly available in 26 of the 27 states that use nominating commissions to fill regular high court vacancies.⁶³ We then attempted to determine the professional background of as many commissioners as possible, both lawyers and nonlawyers, by conducting internet searches for each individual.

We relied primarily on information from law firm and company websites. If those resources did not exist for a given commissioner, we searched recent news articles, professional directories such as Martindale-Hubbell for attorneys, and government agency directories. For individuals who had a potentially common name, we did our best to corroborate their identity by looking for references to their service on a commission or on another public body that would be likely to share membership with a nominating commission.

The varied professional backgrounds of some lawyer commissioners required us to assign them to more than one category. We did this if the person was an attorney who actively practiced law in more than one of our categories. We also did this for commissioners who had spent a significant portion of their career in a field other than the one that currently occupied them. If it was apparent from our research, for example, that a personal injury lawyer had recently joined a law firm but had spent the previous 10 years serving as a legislator, then that commissioner would be identified as both a “plaintiffs’ lawyer” and “other government.” Both of these backgrounds are relevant to the questions being investigated, and to leave out one or the other would paint an incomplete picture.

The categories we created are imperfect, but they enable us to identify generally the professions currently represented on nominating commissions and to draw comparisons across states. For lawyers, our categories and definitions are:

- **Academia:** Those who serve as professors, administrators, and deans of private and public universities and law schools.
- **Corporate:** As part of a law firm or as in-house counsel, those who represent for-profit organizations in a wide range of matters including, but not limited

to, business transactions and litigation, bankruptcy, defense against insurance claims, intellectual property, and securities litigation.

- **Lobbyist:** Lawyers who specialize in government relations, serve as lobbyists, or work for trade associations.
- **Plaintiffs’ Lawyers:** People who represent plaintiffs with claims related to personal injury, workers compensation, product liability, medical and legal malpractice, and wrongful death.
- **Private Criminal Defense:** Lawyers who represent defendants in criminal cases of any kind, including white collar defense.
- **Other Private Practice:** Those who represent clients in cases that fall outside of the other categories, including matrimonial law, real estate transactions, and wills and estates.
- **Public Criminal Defense:** Lawyers who are employed by a state, local, or federal public defender’s office.
- **Civil Legal Services:** Those who provide subsidized legal services to low-income and indigent clients in noncriminal matters.
- **Prosecutor:** People who prosecute criminal cases for a local, state, or federal government office.
- **Judge:** Those of any level; civil, criminal, or administrative; federal, state, or local.
- **Other Government:** Government employees who are not a judge or a prosecutor. Examples include legislators or heads of state agencies.

For nonlawyers, our categories are similar and more self-explanatory. The four unique categories for non-lawyer commissioners are those employed by private for-profit entities, private nonprofit entities, or labor unions, and those serving as law enforcement officers, by which we mean police officers, not district attorneys or others involved in prosecuting criminal defendants.

Appendix II

Jurisdiction	Type of Vacancy	# of Commissioners	Appointing Authority and Commissioner Profession	Requirements for Commissioner Diversity						Citation(s)
				Non-specific	Gender	Racial	Party	Geographic	Professional	
Alaska	Initial and Interim	7	Governor: Appoints 3 nonlawyers State Bar Association Board of Governors: Appoints 3 lawyers Chief Justice: Serves ex officio	No	No	No	No	Yes	No	Alaska Const. art. IV, §§ 5, 8
Arizona	Initial and Interim	16	Governor: Appoints 10 nonlawyers State Bar Association Board of Governors: Nominates 5 lawyers, appointed by Governor Chief Justice: Serves ex officio	Yes	No	No	Yes	Yes	No	Ariz. Const. art. VI, §§ 36, 37
Colorado	Initial and Interim	16	Governor: Appoints 8 nonlawyers Governor, Attorney General, and Chief Justice: Appoint 7 lawyers by majority action Chief Justice or Acting Chief Justice: Serves ex officio	No	No	No	Yes	Yes	No	Colo. Const. art. VI, §§ 20(1), 24
Connecticut	Initial and Interim	12	Governor: Appoints 3 lawyers and 3 nonlawyers Speaker of the House: Appoints 1 nonlawyer House Majority Leader: Appoints 1 lawyer House Minority Leader: Appoints 1 lawyer President Pro Tempore of the Senate: Appoints 1 lawyer Senate Majority Leader: Appoints 1 nonlawyer Senate Minority Leader: Appoints 1 nonlawyer	No	No	No	Yes	Yes	No	Conn. Const. art. V, § 2 Conn. Gen. Stat. § 51-44a
Delaware*	Initial and Interim	12	Governor: Appoints 11 members, including at least 4 lawyers and 3 nonlawyers President of Delaware State Bar Association: Nominates 1 lawyer, appointed by the Governor	Yes	No	No	Yes	No	No	Exec. Order No. 7, 246 Del Gov't Reg. 12 (LexisNexis May 2017), http://governor.delaware.gov/executive-orders/eo07/

Appendix II contd.

Jurisdiction (contd.)	Type of Vacancy	# of Commissioners	Appointing Authority and Commissioner Profession	Requirements for Commissioner Diversity						Citation(s)
				Non-specific	Gender	Racial	Party	Geographic	Professional	
District of Columbia	Initial and Interim	7	President of the United States: Appoints 1 member of any profession Mayor: Appoints 1 nonlawyer and 1 member of any profession Council: Appoints 1 nonlawyer District Bar Association Board of Governors: Appoints 2 lawyers Chief Judge for the United States District Court for D.C.: Appoints 1 active or retired federal judge serving in the District	No	No	No	No	No	No	D.C. Code § 1-204.34
Florida*	Initial and Interim	9	Governor: Appoints 5 members, including at least 2 lawyers State Bar Association Board of Governors: Nominates 4 members appointed by the Governor	No	Yes	Yes	No	Yes	No	Fla. Const. art. V, § 11(a) Fla. Stat. § 43.291
Georgia	Interim	Unfixed	Governor: Appoints all members of any profession	Yes	No	No	No	Yes	Yes	Exec. Order (Feb. 7, 2019), https://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/document/02.07.19.01.pdf
Hawaii*	Initial and Interim	9	Governor: Appoints 2 members, including at least 1 nonlawyer President of the Senate: Appoints 2 members of any profession Speaker of the House: Appoints 2 members of any profession Chief Justice: Appoints 1 member of any profession Members of the State Bar: Elect 2 lawyers	No	No	No	No	Yes	No	Haw. Const. art. VI, § 4
Idaho	Interim	7	Governor: Appoints 3 nonlawyers State Bar Association Board of Commissioners: Appoints 3 lawyers, including one district judge Chief Justice: Serves ex officio	No	No	No	Yes	Yes	No	Idaho Code §1-2101

Appendix II contd.

Jurisdiction (contd.)	Type of Vacancy	# of Commissioners	Appointing Authority and Commissioner Profession	Requirements for Commissioner Diversity						Citation(s)
				Non-specific	Gender	Racial	Party	Geographic	Professional	
Indiana	Initial and Interim	7	Governor: Appoints 3 nonlawyers Members of the State Bar: Elect 3 lawyers Chief Justice: Serves ex officio, or designates another justice to do so	No	No	No	No	Yes	No	Ind. Const. art. VII, § 9 Ind. Code § 33-27-2 et seq.
Iowa*	Initial and Interim	17	Governor: Appoints 9 members of any profession Members of the State Bar: Elect 8 lawyers	No	Yes	No	No	Yes	No	"Iowa Const. art. V, §§ 15, 16 Iowa Code § 46.1 et seq."
Kansas	Initial and Interim	9	Governor: Appoints 4 nonlawyers Members of the State Bar: Elect 5 lawyers	No	No	No	No	Yes	No	Kan. Const. art. III, § 5(d)-(g) Kan. Stat. Ann. § 20-119 et seq.
Kentucky	Interim	7	Governor: Appoints 4 nonlawyers Members of the State Bar: Elect 2 lawyers Chief Justice: Serves ex officio	No	No	No	Yes	No	No	KY. Const. § 118 Ky. Sup. Ct. R. 6.000, et seq.
Maine	Initial and Interim	5 or more	Governor: Appoints all members of any profession	No	No	No	No	No	No	Exec. Order No. 2015-003, 291 Me. Gov't Reg. 1 (LexisNexis April 2015) http://www.maine.gov/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=639063&v=article2011 (incorporating Exec. Order 9 FY 94/95, Exec. Order 12 FY 02/03, Exec. Order 39 FY 04/05, and Exec. Order 20 FY 06/07)
Maryland*	Initial and Interim	17	Governor: Appoints 12 members of any profession State Bar Association President: Appoints 5 lawyers	No	No	No	No	No	No	Exec. Order No. 01.01.2015.09, 42-4 Md. Reg. 416 (Feb. 20, 2015), http://www.dsd.state.md.us/comar/comarhtml/01/01.01.2015.09.htm
Massachusetts	Initial and Interim	12	Governor: Appoints 12 lawyers	Yes	No	No	No	No	No	Exec. Order No. 566, 1307 Mass. Reg. 3 (Feb. 26, 2016), http://www.mass.gov/courts/docs/lawlib/eo500-599/eo566.pdf

Appendix II contd.

Jurisdiction (contd.)	Type of Vacancy	# of Commissioners	Appointing Authority and Commissioner Profession	Requirements for Commissioner Diversity						Citation(s)
				Non-specific	Gender	Racial	Party	Geographic	Professional	
Missouri	Initial and Interim	7	Governor: Appoints 3 nonlawyers Members of the State Bar: Elect 3 lawyers Supreme Court: Selects 1 of its members	No	No	No	No	Yes	No	Mo. Const. art. V, § 25(a),(d)
Montana	Interim	7	Governor: Appoints 4 nonlawyers Supreme Court: Appoints 2 lawyers Judges of the District Courts: Elect 1 district court judge	No	No	No	No	Yes	Yes	Mont. Const. art. VII, § 8 Mont. Code Ann. § 3-1-1001 et seq.
Nebraska*	Initial and Interim	9	Governor: Appoints 1 justice of the Supreme Court and appoints 4 non-lawyers Members of the State Bar: Elect 4 lawyers	No	No	No	Yes	Yes	No	Neb. Const. art. V, § 21(4) Neb. Rev. Stat. § 24-801.01 et seq.
Nevada	Interim	7	Governor: Appoints 3 nonlawyers State Bar Association Board of Governors: Appoints 3 lawyers Chief Justice: Serves ex officio, or designates another justice to do so	No	No	No	Yes	Yes	No	Nev. Const. art. VI, § 20 Nev. Rev. Stat. §§ 1.380-1.410
New Hampshire	Initial and Interim	9-11	Governor: Appoints all members of any profession	No	No	No	No	Yes	No	Exec. Order No. 2017-01, 249 N.H. Gov't Reg. 8 (LexisNexis Feb. 2017), http://sos.nh.gov/nhsos_content.aspx?id=8589967037
New Mexico*	Initial and Interim	14	Governor: Appoints 1 lawyer and 1 nonlawyer Speaker of the House: Appoints 1 lawyer and 1 nonlawyer President Pro Tempore of the Senate: Appoints 1 lawyer and 1 nonlawyer Dean of the University of New Mexico School of Law: Serves ex officio Chief Justice: Serves ex officio, or designates another justice to do so Chief Judge of the Court of Appeals: Appoints 2 Court of Appeals judges State Bar Association President & judges on the commission: Appoint 4 lawyers	Yes	No	No	Yes	No	Yes	N.M. Const. art. VI, § 35

Appendix II contd.

Jurisdiction (contd.)	Type of Vacancy	# of Commissioners	Appointing Authority and Commissioner Profession	Requirements for Commissioner Diversity						Citation(s)
				Non-specific	Gender	Racial	Party	Geographic	Professional	
New York	Initial and Interim	12	<p>Governor: Appoints 2 lawyers and 2 non-lawyers</p> <p>Chief Judge: Appoints 2 lawyers and 2 nonlawyers</p> <p>Speaker of the Assembly: Appoints 1 member of any profession</p> <p>Temporary President of the Senate: Appoints 1 member of any profession</p> <p>Assembly Minority Leader: Appoints 1 member of any profession</p> <p>Senate Minority Leader: Appoints 1 member of any profession</p>	No	No	No	Yes	No	No	N.Y. Const. art. VI, § 2 N.Y. Jud. Ct. Acts. Law § 61 et seq.
North Dakota	Interim	6	<p>Governor: Appoints 1 lawyer and 1 nonlawyer</p> <p>Chief Justice: Appoints 1 lawyer and 1 nonlawyer</p> <p>State Bar Association President: Appoints 1 lawyer and 1 nonlawyer</p>	No	No	No	No	No	No	N.D. Const. art. VI, § 13(1) N.D. Cent. Code § 27-25-02 et seq.
Oklahoma	Initial and interim	15	<p>Governor: Appoints 6 nonlawyers</p> <p>Members of the State Bar: Elect 6 lawyers</p> <p>Commission: Appoints 1 nonlawyer by agreement of at least 8 commission members</p> <p>Speaker of the House: Appoints 1 nonlawyer</p> <p>President Pro Tempore of the Senate: Appoints 1 nonlawyer</p>	No	No	No	Yes	Yes	No	Okla. Const. art. VII-B, § 3.

Appendix II contd.

Jurisdiction (contd.)	Type of Vacancy	# of Commissioners	Appointing Authority and Commissioner Profession	Requirements for Commissioner Diversity						Citation(s)
				Non-specific	Gender	Racial	Party	Geographic	Professional	
Rhode Island*	Initial and Interim	9	<p>Governor: Appoints 4 commissioners, including 3 lawyers and 1 nonlawyer</p> <p>Speaker of the House: Nominates 1 lawyer appointed by Governor</p> <p>President of the Senate: Nominates 1 member of any profession appointed by Governor</p> <p>Speaker of the House and President of the Senate: Nominate 1 non-lawyer appointed by Governor</p> <p>House Minority Leader: Nominates 1 non-lawyer appointed by Governor</p> <p>Senate Minority Leader: Nominates 1 nonlawyer appointed by Governor</p>	No	Yes	Yes	Yes	No	No	R.I. Const. art. X, § 4 R.I. Gen. Laws § 8-16.1-2 et seq.
South Carolina	Initial and Interim	10	<p>Speaker of the House: Appoints 5 members, including 3 members of the General Assembly and 2 members of the general public of any profession</p> <p>Chairman of the Senate Judiciary Committee and President Pro Tempore of the Senate: Appoint 3 and 2 members respectively, which together must include 3 members of the General Assembly and 2 members of the general public of any profession</p>	No	Yes	Yes	No	No	No	S.C. Const. art. V, § 27 S.C. Code Ann. § 2-19-10
South Dakota	Initial and Interim	7	<p>Governor: Appoints 2 members of any profession</p> <p>Judicial Conference: Elects 2 circuit court judges</p> <p>State Bar Association Commissioners: Appoint 3 lawyers</p>	No	No	No	Yes	No	No	S.D. Const. art. V, § 7 S.D. Codified Laws § 16-1A-2 et seq.
Tennessee	Initial and Interim	11	<p>Governor: Appoints all 11 members, including at least 8 lawyers</p>	Yes	No	No	No	Yes	No	Exec. Order No. 54 (May 17, 2016), http://share.tn.gov/sos/pub/execorders/exec-orders-haslam54.pdf

Appendix II contd.

Jurisdiction (contd.)	Type of Vacancy	# of Commissioners	Appointing Authority and Commissioner Profession	Requirements for Commissioner Diversity						Citation(s)
				Non-specific	Gender	Racial	Party	Geographic	Professional	
Utah*	Initial and Interim	7	Governor: Appoints 4 members including at least 2 nonlawyers State Bar Association: Nominates 2 lawyers appointed by Governor Chief Justice: Appoints 1 member of the Judicial Council	No	No	No	Yes	No	No	Utah Const. art. VIII, § 8 Utah Code Ann. § 78A-10-201 et seq.
Vermont	Initial and Interim	11	Governor: Appoints 2 nonlawyers Senate: Elects 3 of its own members, including at least 2 nonlawyers House: Elects 3 of its own members, including at least 2 nonlawyers Members of the State Bar: Elect 3 lawyers	No	No	No	Yes	Yes	No	Vt. Const. ch. II, §§ 32-33 Vt. Stat. Ann. tit. 4, § 601 Vt. Sup. Ct. Admin. Order 1
West Virginia*	Interim	11	Governor: Appoints 4 nonlawyers, and Governor (or designee) serves ex officio State Bar Association Board of Governors: Nominates 4 lawyers appointed by Governor State Bar Association President: Serves ex officio Dean of West Virginia University College of Law: Serves ex officio	No	No	No	Yes	Yes	No	W. Va. Code § 3-10-3a
Wisconsin	Interim	Unfixed	Governor: Appoints all members of any profession	No	No	No	No	No	No	Exec. Order No. 29, 665 Wis. Admin. Reg. 26 (May 31, 2011), https://walker.wi.gov/sites/default/files/executive-orders/EO_2011_29.pdf (reestablished by Exec. Order No. 6 (2019))
Wyoming	Initial and Interim	7	Governor: Appoints 3 nonlawyers Members of the State Bar: Elect 3 lawyers Chief Justice: Serves ex officio or designates another Justice to do so	No	No	No	No	Yes	No	Wyo. Const. art. V, § 4 Wyo. Stat. Ann. § 5-1-102

Appendix II contd.

Notes:	
Delaware	Bar appointees need not be lawyers by law, but the bar traditionally appoints lawyer commissioners.
Florida	Governor appoints the bar's nominees from 4 separate lists of 3 nominees provided by the bar. The governor may reject the bar's nominees and request new lists.
Hawaii	Overall no more than 4 members may be lawyers.
Iowa	Bar appointees need not be lawyers by law, but the bar traditionally appoints lawyer commissioners. Governors formerly appointed nonlawyers by tradition, but Iowa's current governor has departed from that practice.
Maryland	Bar appointees need not be lawyers by law, but the bar traditionally appoints lawyer commissioners.
Nebraska	There is a different commission for each of the seven seats on the Nebraska Supreme Court. There are 9 commissioners on each commission, but 63 commissioners total.
New Mexico	If the first 14 members are not balanced by political party, the State Bar Association President and judges on the commission will appoint additional lawyer members as necessary to achieve partisan balance.
Rhode Island	Governor appoints the Speaker of the House's nominee from a list of 3 lawyers, the President of the Senate's nominee from a list of 3 people of any profession, the Speaker of the House and President of the Senate's joint nominee from a list of 4 nonlawyers, the House Minority Leader's nominee from a list of 3 nonlawyers, and the Senate Minority Leader's nominee from a list of 3 nonlawyers.
Utah	Governor appoints the bar's nominees from a list of 6 nominees provided by the bar. Bar appointees need not be lawyers by law, but the bar traditionally appoints lawyer commissioners. The governor may reject the bar's nominees and request a new list.
West Virginia	Governor appoints the bar's nominees from a list of 10-20 nominees provided by the bar.

Endnotes

- 1 Alicia Bannon, *Choosing State Judges: A Plan for Reform*, Brennan Center for Justice, 2018, <https://www.brennancenter.org/publication/choosing-state-judges-plan-reform>.
- 2 See “Judicial Selection: An Interactive Map,” Brennan Center for Justice, accessed June 27, 2017, <http://judicialselectionmap.brennancenter.org>. This figure includes states that use commissions to make interim appointments when an otherwise-elected seat becomes vacant in the middle of a judge’s term. Interim appointments are very common. One recent study by the Brennan Center found that, in the 22 states that elect high court judges, nearly half of the sitting justices had been initially appointed. Kate Berry and Cathleen Lisk, *Appointed and Advantaged: How Interim Appointments Shape State Courts*, Brennan Center for Justice, 2017, https://www.brennancenter.org/sites/default/files/analysis/Appointed_and_Advantaged_How_Interim_Appointments_Shape_State_Courts_0.pdf.
- 3 New Mexico uses a commission to fill all vacancies but appoints a commission only when a vacancy arises. For this reason, we were unable to analyze a Judicial Nominating Commission for New Mexico’s Supreme Court. E-mail from New Mexico Judicial Selection Office (August 12, 2016) (on file with author). All nominating commissioners analyzed were serving in September 2016.
- 4 See Malia Reddick and Rebecca Love Kourlis, *Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices*, Institute for the Advancement of the American Legal System, 2014, http://iaals.du.edu/sites/default/files/documents/publications/choosing_judges_jnc_report.pdf. Several states do not mandate the size of their commissions. See Appendix II.
- 5 See Reddick and Kourlis, *Choosing Judges*, 7.
- 6 See Reddick and Kourlis, *Choosing Judges*, 6.
- 7 See, e.g., Executive Office of the Governor, “Florida Judicial Nominating Commissioner 2015 Manual,” http://www.flgov.com/wp-content/uploads/pdfs/2015_JNC_Manual.pdf.
- 8 See Rachel Paine Caufield, *Inside Merit Selection*, American Judicature Society, 2011, 21-24, http://www.judicialselection.com/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pdf#JS.
- 9 See Reddick and Kourlis, *Choosing Judges*, 6; S.C. Const. art. V, § 27.
- 10 See Reddick and Kourlis, *Choosing Judges*, 6.
- 11 Georgia, Maine, Maryland, Massachusetts, and Wisconsin. In other states, the governor can request that the commission provide additional names not on the initial list. See, e.g., State of New Mexico, Rules Governing Judicial Nominating Commissions, § 11, <http://law-school.unm.edu/judsel/process/rulesgoverningjudicialnominating-commissions0711.pdf>.
- 12 Several states take action by something other than a majority vote. See, e.g., CONN. GEN. STAT. § 51-44A(i) (Connecticut requires a majority plus one to recommend a candidate to the governor); Executive Office of the Governor, “Florida Judicial Nominating Commissioner 2015 Manual,” Florida Supreme Court Judicial Nominating Commission Rules of Procedure, § 7, http://www.flgov.com/wp-content/uploads/pdfs/2015_JNC_Manual.pdf (giving commissioners multiple votes and recommending the applicants receiving the greatest number of votes).
- 13 Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming. For citations, see Appendix II. While Tennessee voters recently removed the nominating commission from the state constitution, the governor has since readopted it via executive order. See Tenn. Exec. Order No. 54 (May 17, 2016). State officials and advocates have given a handful of explanations for the adoption of nominating commissions, with the three most common being to insulate courts from politics, to make them more independent from other branches of government, and to improve the legal and administrative abilities of judges. See Jed Handelsman Shugerman, *The People’s Courts* (Cambridge: Harvard University Press, 2012), 200, 211, 216, 232; see also Reddick and Kourlis, *Choosing Judges*, 4-5. Still, many governors adopting nominating commissions voluntarily by executive order have stated that the commission’s task is merely to assist the governor in identifying qualified candidates. See, e.g., Wisc. Exec. Order No. 29, 665 Wis. Admin. Reg. 26 (May 11, 2011) (“the Governor will benefit from the advice of a Committee composed of distinguished members of Wisconsin’s legal community who are committed to finding and recommending only the highest caliber individuals who share a commitment to the rule of law.”). For a thorough history of the adoption of merit selection in particular, including the less public goals of stemming the electoral power of organized labor and communities of color, see generally Shugerman, *The People’s Courts*, 208-240.
- 14 See Alicia Bannon, *Rethinking Judicial Selection in State Courts*, Brennan Center for Justice, 2016, 4, https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf.
- 15 Delaware, Maine, Maryland, Massachusetts, and New Hampshire.
- 16 Connecticut, District of Columbia, Hawaii, New Mexico, New York, Rhode Island, South Carolina, and Vermont.
- 17 Georgia, Idaho, Kentucky, Montana, Nevada, North Dakota, West Virginia, and Wisconsin.
- 18 State bars select commissioners in different ways. In some cases, attorneys in the state elect commissioners, while in others the bar association’s leadership selects commissioners directly. Compare S.D. Codified Laws § 16-1A-2 (the state bar’s commissioners appoint three lawyers) with MO. CONST. ART. V, § 25(d) (attorneys admitted to the state bar elect a lawyer from each of the state’s court of appeals districts).
- 19 See, e.g., COLO. CONST. ART. VI, § 24(4); OKLA. CONST. ART. VII-B, § 3.
- 20 D.C. Code § 1-204.34(b)(4)(A).
- 21 Richard A. Watson and Rondal G. Downing, *The Politics of the Bench and the Bar* (New York: John Wiley and Sons, Inc., 1969), 48, 186-87.
- 22 Mike Wiser, “Iowa Gov. Branstad Taps Big Donors for Judicial Nominating Slots,” *Sioux City Journal*, January 27, 2013, http://sioux-cityjournal.com/news/state-and-regional/iowa/iowa-gov-branstad-taps-big-donors-for-judicial-nominating-slots/article_e4bf4d59-a4de-5933-a9ac-e76a06859864.html; Erin Jordan, “Branstad Names No Democrats to Pick Iowa Judges,” *The Gazette*, November 27, 2016, <http://www.thegazette.com/subject/news/politics/election/iowa-statehouse/branstad-names-no-democrats-to-pick-iowa-judges-20161127>; David Pitt, “Reynolds Appoints Campaign Donor to Judicial Commission,” *Associated Press*, May 10, 2019, <https://www.apnews.com/80b8faf3e7ac432181cc611fe6ba7798>; Marc Caputo and Jay Weaver, “Mystery Man in Rick Scott Attack Ad Unveiled, Misleads About Charlie Crist and Ponzi Scheme,” *Miami Herald*, September 16, 2014, <http://www.miamiherald.com/news/politics-government/state-politics/article2128861.html>.
- 23 American Judicature Society, Hawai’i Chapter, Special Committee on Judicial Independence and Accountability, *Report to the Board of Directors of the Hawai’i Chapter of the American Judicature Society*, 2008, 10, http://www.ajshawaii.org/assets/judicial_independence_accountability.pdf (“the composition of the JSC is one of its greatest strengths, with appointees from each branch of government and the bar, acting as checks and balances to any real or perceived bias that might result from lesser diversity.”).
- 24 In one of those 14 states, Nebraska, the Supreme Court justice

is a nonvoting member, and thus the governor appoints a majority of commissioners, but not a voting majority. NEB. CONST. ART. V, § 21(4). This loss, however, is balanced out by Colorado, where, because the chief justice of the Supreme Court is also a nonvoting member, the governor appoints a voting majority of commissioners despite not appointing an absolute majority. COLO. CONST. ART. VI, § 24.

25 See Appendix II.

26 Ibid.

27 See Brian T. Fitzpatrick, "The Politics of Merit Selection," *Missouri Law Review* 74 (2009): 690.

28 Indeed, surveys of nominating commissioners suggest that, for better or worse, the proportion of lay and attorney members on a commission may alter a commission's determinations. Surveys have repeatedly found that attorney and lay commissioners place different weight on particular applicant characteristics, including political views, prior judicial experience, and the applicants' "common sense." See Watson and Downing, *The Politics of the Bench and the Bar*, 186 (some respondents reported that lay members placed increased value on "common sense," while others reported that lay members were too focused on politics); Caufield, *Inside Merit Selection*, 24, 30 (finding that non-attorney commissioners had different views regarding the importance of prior judicial experience and the value of input from the public and attorney colleagues). And, according to a 2011 survey, nonlawyer commissioners were less likely to view the commission as a check on the governor's power and more likely to report that the commission nominates judges "that represent the governor's (or other appointing authority's) views." Ibid., 39-41. See also Watson and Downing, *The Politics of the Bench and the Bar*, 187 (some respondents reporting that lay commissioners' lack of legal knowledge makes them more likely to adhere to the wishes of the official who appointed them to the commission).

29 See Appendix I; see also Fitzpatrick, "The Politics of Merit Selection," 680. Moreover, in one of those states, Nebraska, the lawyer commissioner providing lawyers a simple majority is a nonvoting chairperson. NEB. CONST. ART. V, § 21(4).

30 Connecticut, Colorado, and North Dakota. In Colorado, nonlawyers hold a voting majority because the chief justice of the Supreme Court is a nonvoting member. COLO. CONST. ART. VI, § 24.

31 Arizona, Hawaii, Kentucky, Montana, Oklahoma, and Vermont.

32 Data on file with authors for nine states. For Wisconsin, see Eric Litke, "Party Politics Color Governor's Judicial Picks," *Green Bay Press-Gazette*, January 29, 2016, <http://www.greenbaypress-gazette.com/story/news/2016/01/29/wisconsin-judicial-appointments--partisanship-walker-doyle/79509122/>. The two states in which commissioners are exclusively lawyers despite the governor's discretion are Maine and Georgia.

33 See Steve Bousquet, "Gov. Rick Scott Often Rejects Florida Bar's Lists of Lawyers to Nominate Judges," *Tampa Bay Times*, October 29, 2013, <https://www.tampabay.com/news/politics/gubernatorial/gov-rick-scott-often-rejects-florida-bars-lists-of-lawyers-to-nominate/2149521>.

34 Twelve states also prohibit political party officials from serving on a nominating commission. See COLO. CONST. art. VI, § 24(4); CONN. GEN. STAT. § 51-44A(A); HAW. CONST. art. VI, § 4; IND. CONST. art. VII, § 9; KAN. CONST. art. III, § 5(G); KY. CONST. § 118(2); MD. EXEC. ORDER NO. 01.01.2015.09(B)(1)(E), 42-4 MD. REG. 416 (FEB. 20, 2015); MO. CONST. art. V, § 25(d); N.Y. CONST. art. VI, § 2(D)(1); OKLA. CONST. art. VII-B, § 3(f); R.I. GEN. LAWS § 8-16.1-2; Tenn. Exec. Order No. 54(2)(n) (May 17, 2016).

35 See, e.g., ALASKA CONST. art. IV, § 8 ("Appointments shall be made with due consideration to area representation"); CONN. GEN. STAT. § 51-44A(B) ("The Governor shall appoint six members, one from each congressional district and one at-large member"); ARIZ. CONST. art. VI, § 36 ("not more than two attorney members shall be residents of any one county").

36 See also Leo M. Romero, "Enhancing Diversity in an Appointive System of Selecting Judges," *Fordham Urban Law Journal* 34 (2007):

487-490.

37 There may be obstacles to states going much further in requiring diversity on their commissions. Florida previously required that one-third of commissioners be women or racial or ethnic minorities, but a federal district court found those rigid quotas violated the equal protection clause of the Fourteenth Amendment. *Mallory v. Harkness*, 895 F. Supp. 1556 (S.D. Fla. 1995); see also *Back v. Carter*, 933 F. Supp. 738, 746 (N.D. Ind. 1996) (enjoining Indiana's race and gender quotas for commissioners). Iowa is the only state that currently provides a numerical requirement with respect to commissioner diversity. See Iowa Code § 46.1. ("No more than a simple majority of the members appointed shall be of the same gender"). Florida originally adopted its quota to improve commissions' abilities to recruit minority applicants, recommend minority judges to the governor, and improve the administration of justice in the state. See Deborah Hardin Wagner, ed., *Where the Injured Fly for Justice: Reforming Practices Which Impede the Dispensation of Justice to Minorities in Florida*, Florida Supreme Court, 1990, Executive Summary 4, http://www.flcourts.org/core/fileparse.php/243/urlt/bias_study-part2.pdf.

38 Del. Exec. Order No. 7, 246 Del Gov't Reg. 12 (March 9, 2017).

39 FLA. STAT. ANN. § 43.291(4).

40 N.M. CONST. ART. VI, § 35.

41 TENN. CODE ANN. § 17-4-102 (2008); TENN. CODE ANN. § 17-4-102 (2009).

42 Ga. Exec. Order (Feb. 7 2019).

43 MONT. CODE ANN. § 3-1-1001(A).

44 See Caufield, *Inside Merit Selection*, 17. That was a modest increase in diversity from a 1990 survey that found 93 percent of commissioners identified as white and 75 percent as men. Ibid.

45 Caufield, *Inside Merit Selection*, 15. Commissioners did not respond in sufficient numbers to that survey's questions seeking greater detail about their practice. Ibid., 15 n. 30.

46 Caufield, *Inside Merit Selection*, 15. Of those nonlawyer commissioners employed at the time, 18 percent reported that they worked in education, and the remainder reported employment distributed across 10 broad categories. Ibid., 16.

47 Plaintiffs' lawyers — attorneys that represent plaintiffs in personal injury, workers compensation, medical malpractice, and similar civil lawsuits — are the subset of lawyers that have attracted the most attention in academic critiques of nominating commissions as having undue influence over, and a significant economic stake in, commission decisions. See, e.g., Fitzpatrick, "The Politics of Merit Selection," 686; see also Dan Pero, "Merit Selection of Judges Can Be Political, Too," *PennLive*, June 25, 2012, http://www.pennlive.com/editorials/index.ssf/2012/06/merit_selection_of_judges_can.html (alleging that trial lawyers altered the outcome of a judicial nomination in Missouri). But other groups of both lawyers and nonlawyers may also have self-interested preferences — prosecutors, defense attorneys, corporate lawyers, and others may associate certain qualities in a judicial applicant with better outcomes for them or their clients. See Michael R. Dimino, Sr., "The Worst Way of Selecting Judges Except All the Others That Have Been Tried," *Northern Kentucky Law Review* 32 (2005): 299.

48 See Iona M. Latu, Marianne Schmid Mast, and Tracie L. Stewart, "Gender Biases in (Inter) Action," *Psychology of Women Quarterly* 39 (2015) (finding implicit stereotypes, held by both the interviewer and the applicant, negatively affect outcomes for women applicants in mixed-gender job interviews).

49 "Court Statistics Project Introduction," National Center for State Courts, http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro, accessed June 27, 2017 (select "Total Appeals," "Appeals by Case Category by Court Type," and "Court of Last Resort").

50 The fourth state, South Carolina, requires legislators to serve on the commission; thus a majority of South Carolina's lawyer commissioners also share the profession of legislator.

- 51** Arizona, Connecticut, Kansas, Maryland, and New York.
- 52** Arizona, Connecticut, Hawaii, Maryland, New York, Oklahoma, South Carolina, Iowa, Vermont, and Nebraska.
- 53** N.M. CONST. ART. VI, § 35. Data regarding the lower court nominating commissioners on file with author.
- 54** Colorado, Maine, Utah, Nebraska, and Massachusetts.
- 55** Ga. Exec. Order (Feb. 7, 2019).
- 56** Mont. Code Ann. § 3-1-1001(1)(a).
- 57** Because only a small number of non-attorney commissioners are appointed by an entity other than the governor, any comparisons between gubernatorial appointees and others would not yield reliable findings.
- 58** Data on file with author.
- 59** See “American Association for Justice: Summary,” Open Secrets, Center for Responsive Politics, accessed July 27, 2017, <https://www.opensecrets.org/orgs/summary.php?id=D000000065&cycle=2016>. For the last six election cycles, the American Association for Justice, formerly the Association of Trial Lawyers of America, has contributed more than 10 times as much to Democrats as it has to Republicans. See also Mike Wiser, “Iowa Gov. Branstad Taps Big Donors For Judicial Nominating Slots,” *Sioux City Journal*, January 27, 2013, http://sioux-cityjournal.com/news/state-and-regional/iowa/iowa-gov-branstad-taps-big-donors-for-judicial-nominating-slots/article_e4bf4d59-a4de-5933-a9ac-e76a06859864.html; Erin Jordan, “Branstad Names No Democrats to Pick Iowa Judges,” *The Gazette*, November 27, 2016, <http://www.thegazette.com/subject/news/politics/election/iowa-statehouse/branstad-names-no-democrats-to-pick-iowa-judges-20161127>.
- 60** Five nonlawyer commissioners are also lobbyists, and governors appointed four of those commissioners, though governors appoint far more nonlawyer commissioners than any other authority.
- 61** See Ciara Torres-Spelliscy, Monique Chase, and Emma Greenman, *Improving Judicial Diversity*, Brennan Center for Justice, 2010, 30-31, http://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf; see also Yuvraj Joshi, *Diversity Courts, Lambda Legal and American Constitution Society*, 2017, 24-33, <https://www.lambdalegal.org/diversity-counts> (describing best practices for collecting data on judicial diversity).
- 62** See Watson and Downing, *The Politics of the Bench and the Bar*, 108 (explaining that governors will make their preferred candidates known to commissioners).
- 63** New Mexico names commissioners only when a vacancy arises. E-mail from New Mexico Judicial Selection Office (August 12, 2016) (on file with author).

ABOUT THE AUTHOR

► **Douglas Keith** is counsel in the Brennan Center's Democracy Program where he focuses on promoting a fair, diverse, and impartial judiciary. He has co-authored several reports on judicial selection, money in politics, and voting rights, including *Elected Officials, Secret Cash* (2018), *Who Pays for Judicial Races?* (2017), *Noncitizen Voting: The Missing Millions* (2017), and *Secret Spending in the States* (2016). Prior to joining the Brennan Center, he worked on voting rights litigation as a Ford Foundation Public Interest Law Fellow at Advancement Project, trained poll workers for the New York City Board of Elections, and organized New York election reform advocates. He has also observed and analyzed democratic systems abroad for International IDEA, the National Democratic Institute, and the OSCE Office for Democratic Institutions and Human Rights. He received his J.D. from New York University School of Law.

ACKNOWLEDGMENTS

The Brennan Center gratefully acknowledges Laura and John Arnold, Carnegie Corporation of New York, Democracy Alliance Partners, The JPB Foundation, Martin and Ruth Krall, Open Society Foundations, Piper Fund, a Proteus Fund initiative, and Rockefeller Brothers Fund for their generous support of our fair courts work.

Many people assisted with the development of this research. The author is especially grateful to Alicia Bannon for her vision, guidance and editorial support throughout, and to Katy Naples-Mitchell and Connor Mealey whose research forms the foundation of this analysis. The author is also grateful to André Smith, Michael Taintor, Maureen Edobor, and Rebecca Mears for their critical research assistance. The Brennan Center's communications team, especially Lorraine Cademartori and Yuliya Bas, as well as Elise Marton, provided critical support in readying this research for publication.

The author also thanks the many judicial nominating commissioners, commission administrators, and experts who provided critical insights and feedback.

STAY CONNECTED TO THE BRENNAN CENTER

Visit our website at www.brennancenter.org

Sign up for our electronic newsletters at
www.brennancenter.org/signup

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that works to reform, revitalize—and when necessary defend—our country's systems of democracy and justice. The Brennan Center is dedicated to protecting the rule of law and the values of constitutional democracy. We focus on voting rights, campaign finance reform, ending mass incarceration, and preserving our liberties while also maintaining our national security. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them—in Congress and the states, in the courts, and in the court of public opinion.

ABOUT THE BRENNAN CENTER'S DEMOCRACY PROGRAM

The Brennan Center's Democracy Program encourages broad citizen participation by promoting voting and campaign finance reform. We work to secure fair courts and to advance a First Amendment jurisprudence that puts the rights of citizens—not special interests—at the center of our democracy. We collaborate with grassroots groups, advocacy organizations, and government officials to eliminate the obstacles to an effective democracy.

© 2019. This paper is covered by the [Creative Commons Attribution-NonCommercial-NoDerivs](https://creativecommons.org/licenses/by-nc-nd/4.0/) license. It may be reproduced in its entirety as long as the Brennan Center for Justice at NYU School of Law is credited, a link to the Center's web pages is provided, and no charge is imposed. The paper may not be reproduced in part or in altered form, or if a fee is charged, without the Center's permission. Please let the Center know if you reprint.

**BRENNAN
CENTER**

FOR JUSTICE

Brennan Center for Justice at New York University School of Law
120 Broadway | 17th Floor | New York, NY 10271
www.brennancenter.org