



## Judges Judging Judicial Candidates: Should Currently Serving Judges Participate in Commissions to Screen and Recommend Article III Candidates Below the Supreme Court Level?

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*In the lead-up to the 2008 presidential election, the American Bar Association (ABA), among others, called upon the next president to reform the federal judicial selection process by using bipartisan commissions to screen and recommend Article III candidates for presidential nomination and Senate confirmation below the Supreme Court level. This proposal may well find support in the Obama administration, given the new president's emphasis on bipartisan consensus-building and transparency of government operations. This Article addresses one question that the ABA and others have not: Should currently serving judges participate in bi-partisan commissions to screen and recommend Article III candidates below the Supreme Court level, just as judges commonly do for state court, other federal court, and other nations' court appointments? This Article answers "no."*

*Judges should not serve on Article III screening commissions because the harms of doing so outweigh any potential benefits. More specifically, judicial service on Article III screening commissions raises concerns principally for: (1) undue accretion of power by judges and attendant threats to judicial integrity and impartiality; and (2) negative impacts on bench diversity. These concerns are explored in the discussion that follows.*

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## I. INTRODUCTION

President Obama will have more than a dozen court of appeals vacancies to fill in his first year in office, with many more expected at the district court level.<sup>1</sup> With these vacancies in mind, the American Bar Association (ABA) and others<sup>2</sup> have called for increased use of bipartisan commissions to screen and recommend (for presidential nomination and Senate confirmation) Article III candidates below the Supreme Court level. The proposal was directed at redressing the partisan rancor and confirmation delays infecting recent judicial appointments. Given Obama's emphasis on bipartisan consensus-building and transparency of government operations, the proposal may well receive favorable consideration in the new administration.

One question not addressed in the ABA and other proposals is whether currently serving judges should participate in judicial screening commissions to recruit and recommend candidates for the lower Article III courts.<sup>3</sup> That question is the focus of this Article.<sup>4</sup> Interest in this

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1. See, e.g., <http://www.uscourts.gov>. The U.S. Courts' on-line "newsroom" has an up-to-date list of judicial vacancies (follow "newsroom" hyperlink; then follow "judicial vacancies listing" hyperlink).

2. In addition to the ABA, this reform has been recently advocated by Russell Wheeler of the Brookings Institution. See *infra* Part III.

3. "Judicial screening commissions" are defined as those that recruit, screen, and recommend judicial candidates for consideration by a chief executive, whether a governor or president. These commissions typically forward a short list of recommended names for a given opening, and the chief executive is not bound to accept any of the commission's recommendations. See, e.g., American Judicature Society Web site summary of state judicial appointment practices, available at <http://www.ajs.org> (last visited June 20, 2009). In the case of judicial "nomination," or "selection" commissions, by contrast, the chief executive is typically bound to fill the vacancy at issue with one of the commission's recommended candidates. *Id.* References in this paper are to judicial screening commissions since that is what has been proposed by the ABA and Russell Wheeler of the Brookings Institution.

4. Together with my earlier article, Mary L. Clark, *My Brethren's (Gate) Keeper? Testimony by U.S. Judges at Others' Supreme Court Confirmation Hearings: Its Implications for Judicial Independence and Judicial Ethics*, 40 ARIZ. ST. L.J. 1181

question was prompted by awareness of the substantial reliance on currently serving judges to recruit, screen, recommend, and even appoint new judges at the state, federal, and other national levels.<sup>5</sup> The United Kingdom, for example, recently provided for the creation of a judicial appointments commission for its new supreme court to be chaired by its chief justice. Approximately half the U.S. states rely on judges, including chief judges, to serve on judicial screening commissions, and the federal magistrate and bankruptcy court systems involve currently serving district and circuit judges in naming non-Article III judges. Indeed, the Article III appointments process is relatively anomalous in having no open, formal role for currently serving judges to screen prospective judicial candidates, though judges are notably active in Article III appointment processes behind the scenes.<sup>6</sup>

While the merits of using commissions to screen and recommend judicial candidates (along the lines of the ABA's proposal) have been widely studied in the United States, very little attention has been paid to the question of whether currently serving judges should sit on these commissions (whether at the state or federal level), and even less to whether Article III judges should sit on Article III screening commissions.<sup>7</sup> This Article seeks to fill that gap.

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(2008), this Article seeks to address questions of optimal roles, if any, for currently serving judges in Article III appointments processes.

5. According to Professor Kate Malleson, judicial appointments commissions are "likely to become the most popular selection system of the twenty-first century." Kate Malleson, *Introduction to APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 6-7 (Kate Malleson & Peter H. Russell eds., 2006) [hereinafter *APPOINTING JUDGES*]. See also Vicki C. Jackson, *Fair and Independent Courts: A Conference on the State of the Judiciary: Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 *GEO. L.J.* 965, 998 n. 141 (2007) (observing, "A number of western democracies have in recent years considered or adopted proposals to rely on nonpartisan or bipartisan nominating commissions to improve the judicial selection process.").

6. The terms "formal" and "open" are used here to distinguish express inclusion of judges in the Article III appointments process from informal, confidential consultations between judges and legislative and executive branch officials, on the one hand, and judges' responses to ABA inquiries, on the other.

7. My research has uncovered very few scholarly references to the question of whether judges should participate in Article III selection on an open, official basis, and both are very brief. One is Sanford Levinson, *Identifying 'Independence,'* 86 *B.U. L. REV.* 1297, 1306-08 (2006). There, Levinson explored other countries' practices of judicial self-selection as a type of "maximal" judicial independence model and explored the desirability of this model for the U.S. *Id.* The other is Peter G. Fish, *Query: Should federal appellate judges help select their colleagues?* 63 *JUDICATURE* 6 (1979-80). There, Fish addressed the question whether U.S. Court of Appeals judges should participate in the deliberations of President Carter's U.S. Circuit Judge Nominating Commission, concluding that they should not. *Id.* at 7, 44.

Beyond that, Vicki Jackson and Judith Resnik have addressed the merits of Article III judges' involvement in non-Article III magistrate and bankruptcy judge selection, and

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The Article begins by looking to judicial selection processes at the state, other federal, and other national levels to see what, if any, roles are played by currently serving judges (Part II). Part III highlights the ABA's and other recent calls for increased use of bipartisan Article III screening commissions. In Part IV, the Article weighs the merits of judicial participation in Article III screening commissions, examining concerns for: (1) undue accretion of power by judges and attendant concern for impacts on judicial integrity and impartiality; and (2) negative impacts on bench composition. The Article concludes by recommending against judicial participation in judicial screening commissions at the lower Article III level.

## II. JUDICIAL PARTICIPATION IN JUDICIAL SELECTION PROCESSES AT THE STATE, OTHER FEDERAL, AND OTHER NATIONAL LEVELS

Participation in and/or leadership by currently serving judges is a common feature of judicial selection systems at the state, other federal, and other national levels, typically involving judicial membership on commissions to screen and recommend judicial candidates. This section highlights a number of these systems following a brief discussion of judges' non-participation in Article III nominating commissions, past and present (Parts A & B).

### A. *Judicial Non-Participation in District and Circuit Judge Nominating Commissions under President Carter*

As part of his efforts to ground federal judicial selection on merit principles and to diversify federal court appointments, President Jimmy Carter established a circuit judge nominating commission composed of regional panels charged with screening and recommending court of appeals nominees.<sup>8</sup> Carter also encouraged Senators to establish nominating commissions for district court appointments, going so far as to pledge to nominate a Senator's proposed candidate so long as the candidate was vetted through a merit selection process.<sup>9</sup> Eventually,

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Henry Abraham, Michael Gerhardt, and David O'Brien, among others, have highlighted judges' historic and current behind-the-scenes involvement in Article III appointments. *See infra* part IV(A).

Apart from these references, the question of whether judges should play a formal role in judicial selection processes has been nearly exclusively addressed in the context of other countries' judicial systems. *See infra* parts III(E)-(H).

8. Exec. Order No. 11,972, 1977 WL 23603, *revised by* Exec. Order No. 12,059, 1978 WL 21916. *See also* Larry Berkson and Susan Carbon, *The U.S. Circuit Judge Nominating Commission: Its Members, Procedures, and Candidates* (AJS 1980).

9. *See, e.g.*, Alan Neff, *Breaking with Tradition: A study of the U.S. District Judge Nominating Commissions*, 64 JUDICATURE 256 (1981).

thirty district judge nominating commissions were established by Senators.<sup>10</sup>

Judges did not serve on either the district or circuit judge nominating commissions under Carter.<sup>11</sup> Indeed, an American Judicature Society (“AJS”) study published at the time counseled against judicial involvement in the commissions out of concern for violating separation of powers principles and undermining the fullness of expression of non-judges on the commissions.

*B. Judicial Non-Participation in Judicial Screening Commissions  
Currently Used by U.S. Senators in Nine States*

As of May 2009, U.S. Senators in nine states used bipartisan screening commissions to recruit, review, and recommend candidates for federal district courts located in their states, but none included currently serving judges as commission members.<sup>12</sup> Rather, several of the commissions’ charters specifically prohibit membership by judges, instead drawing on a mix of lawyers and laypersons to constitute the screening panels.<sup>13</sup> Wisconsin’s Federal Nominating Commission charter provides, for example, “No federal or state judge or justice . . . shall be a member of the Commission.”<sup>14</sup> The bylaws for Hawaii’s federal judicial selection commission, like those of some of the other states, go a step further in prohibiting an individual from being eligible for judicial appointment for three years after serving on the screening commission.<sup>15</sup>

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10. Exec. Order 12,097, 1978 WL 21954; *see also* Neff, *supra* note 9, at 257; Russell Wheeler, *Prevent Federal Court Nomination Battles: De-escalating the Conflict over the Judiciary*, available at [http://www.brookings.edu/~media/Files/Projects/Opportunity08/PB\\_JudicialPolicy\\_Wheeler.pdf](http://www.brookings.edu/~media/Files/Projects/Opportunity08/PB_JudicialPolicy_Wheeler.pdf) (last visited June 15, 2009).

11. *See* HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 29 (7th ed. 1998) (observing, “No judges were among the lawyers who had been appointed to any of the set of 1977, 1978, 1979, and 1980 panels.”).

12. According to the AJS, these nine states are California, Colorado, Florida, Georgia, Hawaii, Pennsylvania, Texas, Washington, and Wisconsin. American Judicature Society, <http://www.ajs.org> (follow the links to merit selection commissions at the federal level) (last visited June 17, 2009).

13. Wisconsin Federal Nominating Commission charter, sec. VI, available at [http://www.judicialselection.us/uploads/documents/WI\\_charter\\_D88C3BA6A5469.pdf](http://www.judicialselection.us/uploads/documents/WI_charter_D88C3BA6A5469.pdf) (last visited June 17, 2009). *See also* Florida Federal Judicial Nominating Commission Rules of Procedure 11, available at [http://www.judicialselection.us/uploads/documents/FL\\_FJNC\\_rules\\_69517EF8A0D80.pdf](http://www.judicialselection.us/uploads/documents/FL_FJNC_rules_69517EF8A0D80.pdf) (“A member of the Commission may not hold judicial office. . . .”) (last visited June 17, 2009); Hawaii Federal Judicial Selection Commission Charter sec. III, available at [http://www.judicialselection.us/uploads/documents/HI\\_FJSC\\_charter\\_DFA1FE5BF22BE.pdf](http://www.judicialselection.us/uploads/documents/HI_FJSC_charter_DFA1FE5BF22BE.pdf) (“No federal or state judge or justice . . . shall be a member of the Commission.”) (last visited June 17, 2009).

14. Wisconsin Federal Nominating Commission Charter, sec. VI.

15. Hawaii Federal Judicial Selection Commission Charter sec. III.

C. *Current Appointment of Magistrate and Bankruptcy Judges by District and Circuit Judges*

By contrast with the Article III nominating commissions highlighted in Parts A and B, above, non-Article III judicial appointments processes have involved substantial reliance on currently serving judges. Pursuant to congressional authorization, district judges appoint U.S. magistrate judges for their districts,<sup>16</sup> while circuit judges select U.S. bankruptcy judges for their respective circuits,<sup>17</sup> currently totaling approximately 775 non-Article III judges.<sup>18</sup> As one commentator observed, district and circuit judges “not only shape the law through adjudication; they also shape the law by deciding who will serve as our statutory [non-Article III, non-life tenured] judges.”<sup>19</sup> One question for this Article is whether this system of Article III judges selecting non-Article III judges is a desirable one,<sup>20</sup> and, if so, should Article III judges also weigh in on, though not be charged with, the selection of Article III judges. The answer to the first question is mixed, and to the second, no, as is developed further in the discussion below.

Returning in more detail, district judges wield considerable control over magistrate selection insofar as district judges name members of merit selection panels that are in turn charged with recommending magistrate candidates to the district judges.<sup>21</sup> Currently serving judges

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16. 28 U.S.C. § 631(b)(5) (2009). See Jackson, *supra* note 5, at 1012, 1016, and Appendix; Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 605-06 (2005) (also noting that “the number of magistrate slots is decided by the Judicial Conference of the United States,” the federal judiciary’s policymaking arm).

17. 28 U.S.C. § 152 (2009). See Jackson, *supra* note 5, at 1012, 1017, app.; Resnik, *supra* note 16, at 606.

18. There are 450 magistrate judges and approximately 325 bankruptcy judges. Resnik, *supra* note 16, at 606 (noting that in some districts, magistrate judges outnumber district judges).

19. *Id.*

20. See, e.g., Judith Resnik, *Inter-dependent federal judiciaries: Puzzling about why and how to value the independence of which judges*, 137 DAEDALUS 28, 42 (2008) (recommending amendment of magistrate and bankruptcy judge statutes to provide for life tenure or “different selection mechanisms and non-renewable terms”).

21. 28 U.S.C. § 631(b)(5) (2009); see also Christopher E. Smith, *Merit Selection Committees and the Politics of Appointing U.S. Magistrates*, 12 JUST. SYS. J. 210, 213 (1987) (observing, “Although the merit selection process is intended to upgrade and diversify magistrate appointments by opening the selection procedures to all interested, qualified applicants, the district judges remain the focal point of the magistrate appointment process. . . . [T]he judges both appoint the selection panel and make the ultimate determination of which lawyer will be appointed to the magistrate vacancy. The judges can even reject the entire slate of nominees presented by the merit panel and force the committee to produce a new list of nominees.”) (emphasis in original) (citing ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE SELECTION AND APPOINTMENT OF UNITED STATES MAGISTRATE JUDGES 44-45 (1981)).

are specifically excluded from serving on these merit selection panels, which are instead composed of lawyers and laypersons,<sup>22</sup> but final appointment decisions rest with the district judges in each district.<sup>23</sup> By distinction, circuit judges are permitted, but not required, to use merit selection panels in appointing bankruptcy judges.<sup>24</sup>

Magistrate and bankruptcy judges are reviewed by district and circuit judges for reappointment for fixed, renewable terms (of eight and fourteen years, respectively).<sup>25</sup> As Judith Resnik and Vicki Jackson have underscored,<sup>26</sup> the reappointment review of magistrate and bankruptcy judges by district and circuit judges presents compelling concerns for non-Article III judges' decisional independence, where life-tenured judges review for reappointment non-life tenured judges whose case decisions they also review on the merits.<sup>27</sup>

The appointment and reappointment of non-Article III judges by Article III judges raise concerns paralleling those for Article III judges' participation in Article III candidate screening commissions, including concerns for the undue accretion of power by judges, where district and circuit judges "through the power of judicial appointment . . . now have something to give. Salaries, staff support, courtrooms, chambers, committee assignments, and pensions come with magistrate and bankruptcy judge positions."<sup>28</sup> Resnik notes, "As life-tenured judges become a source of patronage, applicants and their supporters have more to gain by courting those judges."<sup>29</sup>

Nevertheless, there are some advantages to the magistrate and bankruptcy judge appointment model. Some commentators, including

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22. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES; *see also* Resnik, *supra* note 16, at 607.

23. Resnik, *supra* note 16, at 607-08 (also noting that while Congress determines the number of bankruptcy judges (as with district and circuit judgeships), the Judicial Conference of the United States determines the number of magistrate judges).

24. *Id.*; Judith Resnik, *Uncle Sam Modernizes His Justice: Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 672 n.284 (2002) (citing 2001 Bankruptcy Selection Regulations sec. 301).

25. *See* 28 U.S.C. § 631(a), (e) (2008) (appointment of magistrate judges); 28 U.S.C. § 152(a)(1) (2005) (appointment of bankruptcy judges).

26. Resnik, *supra* note 16 at 605-06; Resnik, *supra* note 24 at 661-62; Jackson, *supra* note 5, at 1012, 1016.

27. One way to redress these independence and autonomy concerns would be by employing non-judicial officials in selecting magistrate and bankruptcy judges. These might include individuals with expertise in the types of matters magistrate and bankruptcy judges adjudicate, *e.g.*, legal academics, practitioners, actual and prospective "consumers" of these judicial services, members of local bar associations, and members of other civic or community organizations.

28. Resnik, *supra* note 24, at 672.

29. *Id.* *See infra* part IV(A) for discussion of potential impacts on decisional independence and concerns over the undue accretion of power by judges.

Resnik, have noted that the initial appointment processes for these judges “[have] attracted a pool of many individuals interested in serving as judges, and the result has been bankruptcy and magistrate benches replete with individuals of great ability.”<sup>30</sup> Thus, the practice of Article III judges appointing and reappointing magistrate and bankruptcy judges has garnered mixed reviews.<sup>31</sup>

*D. Judicial Participation in Judicial Candidate Screening in the States*<sup>32</sup>

Nineteen states rely on currently serving judges as members and/or chairs of screening commissions to select state judges at one or more court levels.<sup>33</sup> Another handful of states rely on judges serving in other capacities in the judicial appointments process, bringing the percentage of states recognizing formal roles for currently serving judges in judicial appointments to approximately half.<sup>34</sup>

Of the nineteen states with judges serving on judicial screening commissions, twelve name the state’s chief justice as a member or chair.<sup>35</sup> In these states, the chief justice typically serves *ex officio*, *i.e.*, in a non-voting capacity.<sup>36</sup> Judges often constitute one of seven to nine members of judicial screening commissions.<sup>37</sup> The remaining membership is typically divided between lawyers and non-lawyers.<sup>38</sup> Most of these commissions are charged with forwarding names of three to five candidates to the governor for a given judicial vacancy, and the

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30. Resnik, *supra* note 16, at 607-08 (observing, “[S]ome argue that life-tenured judges have done a better job than the politicians have in designing a selection process that is more substantive and less onerous. For example, Judicial Conference regulations include a commitment to confidentiality of materials submitted when individuals are considered for magistrate judgeships and provide for public solicitation of nominees but not for public hearings vetting those nominated.”); *see also* Resnik, *supra* note 24, at 670 (observing with regard to non-Article III judges, “The [Article III] judiciary has selected a high-quality and relatively nonpolitical corps of judges in a relatively inexpensive fashion.”).

31. Another possible reform is to limit service to a single non-renewable term in order to avoid the reappointment dynamic.

32. *See* Appendix A for details on state use of judicial screening commissions and judges’ service thereon.

33. American Judicature Society, *Judicial Merit Selection: Current Status (2008)* at tbls. 1 & 2, available at <http://www.ajs.org/selection/docs/Judicial%20Merit%20Charts.pdf> (last visited June 17, 2009).

34. This figure is surprisingly high, given that thirty-eight states use elections to select at least some of their judges. *See id.* Variations in state use of judicial nominating commissions are highlighted in Appendix A.

35. *Id.* at tbl. 2.

36. *Id.*

37. *See* Appendix A for information on the composition and operation of state judicial nominating commissions.

38. American Judicature Society, *supra* note 33, at tbl. 2.

governor may be constrained by law or voluntary pledge to select a nominee from that list.<sup>39</sup> In Indiana, for example, if the governor does not make an appointment within sixty days of the commission having submitted a list of recommended candidates, the chief justice is obliged to name a judge from the list.<sup>40</sup>

Inclusion of judges as members or chairs of judicial screening commissions is not the only way in which states involve currently serving judges in the judicial appointments process. In Hawaii, the chief justice is charged with making appointments to the state district courts.<sup>41</sup> Likewise, in North Dakota, the chief justice appoints district court judges on a temporary basis.<sup>42</sup> A number of other state court systems empower supreme court justices to select their own chief justices.<sup>43</sup> Informal judicial participation is common as well, *e.g.*, with judges consulted by screening commission members about the merits of prospective judicial candidates, occurring in approximately half the states with commissions.<sup>44</sup>

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39. Once appointed through this process, a judge typically stands for retention by election after completing an initial two-year term. *Id.* In most states, this initial retention election is followed by subsequent retention elections at regular intervals. *Id.*

Also of interest on the question of judges' roles in judicial selection is the fact that a handful of states allow currently serving judges to endorse judicial election candidates. *See, e.g.*, Rebecca Mae Salokar, *Endorsements in Judicial Campaigns: The Ethics of Messaging*, 28 JUST. SYS. J. 342, 346-47 (2007) (noting, "[A] few states, like Wisconsin, North Carolina, and Oregon, permit sitting judges to publicly support candidates in judicial races. Other states, like Florida, expressly prohibit both sitting judges and judicial candidates from lending any public support to candidates for the bench."). By contrast, ABA Informal Op. 1468 opposes judges' public statements of support or opposition for election or re-election of another judge in the same state. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1468 (1981).

40. Ind. Code Ann. §§ 33-38-13-1 *et seq.* (2009); *see also* ALLAN ASHMAN AND JAMES J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 210 (1974) (noting similar process in Kansas).

41. American Judicature Society, *supra* note 33, at tbls. 1 & 2.

42. *Id.*

43. *See* Judith Resnik & Lane Dilg, *The Chief Justice and the Institutional Judiciary: Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PENN. L. REV. 1575, 1642 n.288 (2006) (citing "Alaska Const. art. 4, § 2(b) (providing that the members of the Alaska Supreme Court shall select a new chief justice every three years); Idaho Const. art. V, § 6 (providing that the justices of the Idaho Supreme Court shall serve six-year terms but that the chief justice shall be selected by the other justices of the supreme court to hold office for a term of four years); Wash. Const. art. 4, § 3 (providing that the Washington Supreme Court judges, who serve seven-year terms, shall select a chief justice from among them to serve a four-year term). The state of Colorado authorizes its supreme court to select one of its members to serve as chief justice 'at the pleasure of a majority of the court.' Colo. Const. art. VI, § 5.").

44. *See, e.g.*, KATE MALLESON, *THE NEW JUDICIARY* 138 (1999).

As for other nations' practices, looking first to a handful of common law countries whose judicial systems most closely resemble our own, specifically the United Kingdom, Canada, and Israel, and then to an overview of other mainly civil law countries, we find that currently serving judges play critical roles in many other countries' judicial selection processes.

*E. The U.K.'s Recent Establishment of Judicial Appointments Commissions with Substantial Participation by Currently Serving Judges as Members or Chairs*

The United Kingdom recently revised its judicial selection processes for its high and lower courts by establishing judicial appointments commissions that involve substantial participation by currently serving judges as screeners and recommenders of judicial candidates. Pursuant to the Constitutional Reform Act of 2005 (CRA), authority to recommend justices for the U.K.'s new Supreme Court (to begin operation in October 2009) lies with a five-person commission chaired by the new court's president (its chief justice).<sup>45</sup> Other members of the commission include the Supreme Court's deputy president (its most senior associate justice) and one member each of the judicial appointments commissions for England and Wales, Scotland, and Northern Ireland, where two of these last three members could be currently serving judges.<sup>46</sup> The CRA directs the Supreme Court appointments commission to confer with judges familiar with a candidate's work as a lower court judge, where high court candidates come nearly exclusively from the lower courts.<sup>47</sup> The CRA also specifies that, when the Lord Chancellor receives the commission's single candidate recommendation, he or she must confer with all of the judges consulted by the commission and with other relevant senior

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45. Constitutional Reform Act, 2005, c. 4, §§ 1, 7, sched. 8 (Eng.). Pursuant to the CRA, the final appellate review authority exercised by the Appellate Committee of the Law Lords of the House of Lords is to be transferred to a newly established Supreme Court for England and Wales, to be composed of the former Law Lords, or "Lords of Appeal in Ordinary," known henceforth as "Justices." *Id.* §§ 24-25.

46. *Id.* § 1 (sched. 8). At least one of the non-Supreme Court members of the new Supreme Court appointments commission (the three individuals from the new regional judicial appointments commissions) must be a layperson. *Id.* sec. 6 (sched. 8). The other two non-Supreme Court members may or may not be judges. *Id.* § 6 (sched. 8); *see also* Andrew LeSueur, "From Appellate Committee to Supreme Court: A Narrative," Queen Mary Univ. of London, School of Law Legal Studies Research Paper No. 17/2009 at 24, 28 (2009).

47. Constitutional Reform Act, § 27.

judges on U.K. courts to evaluate the candidate's merits.<sup>48</sup> Thus, there are several avenues of judicial involvement in Supreme Court appointments.

Lower court judges in England and Wales are screened and recommended by a second judicial appointments commission (the "Judicial Appointments Commission for England and Wales" or "JAC"), much larger in size than that for the Supreme Court, and permanent, rather than temporary, in nature (where, by distinction, the Supreme Court appointments commission is constituted anew for each high court vacancy).<sup>49</sup> The JAC is responsible for recommending approximately 600 candidates per year.<sup>50</sup> The lower court appointments commission, like that for the Supreme Court, includes currently serving judges, though only a third of its fifteen members are judges as compared with at least two, and as many as four, judges on the five-person supreme court commission.<sup>51</sup> Unlike the Supreme Court commission, the JAC is not chaired by a judge, but by a layperson. Pursuant to the CRA, the Lord Chancellor must accept, reject, or seek reconsideration of each candidate recommended by the appointments commissions and cannot name candidates independent of the commission process.<sup>52</sup>

Creation of the judicial appointments commissions was motivated in large part by a desire to modernize the U.K.'s judicial system (and constitution, where the latter is still largely unwritten).<sup>53</sup> The commissions replace nearly exclusive reliance on the Lord Chancellor to

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48. *Id.* § 28(5).

49. Kate Malleon, *The New Judicial Appointments Commission in England and Wales*, in *APPOINTING JUDGES*, *supra* note 5, at 39, 48. The lower court judicial appointments commission has fifteen, rather than five, members and operates on a permanent basis, given the large number of posts to be filled, rather than being called into existence on a temporary basis to fill particular vacancies, as with the Supreme Court commission. *Id.*

50. MALLESON, *supra* note 44, at 139.

51. Malleon, *supra* note 49, at 48-49. The other ten members include a mix of lawyers and laypersons, a magistrate and a tribunal member. *Id.*

52. Constitutional Reform Act, § 29.

53. Peter Russell, *Conclusion* to *APPOINTING JUDGES*, *supra* note 5, at 421-22 (observing, "Judicial reform in the U.K. is part of a larger process of modernization. . . . Part of the modernization process is an unmasking of the power of a judicial elite to recreate itself and the social exclusiveness of that elite."); *see also* Malleon, *supra* note 49, at 40 (asserting, "The government's underlying purpose for these changes generally and the creation of the judicial appointments commission specifically is to modernize the constitution and the legal system."); Baroness Usha Prashar, *Judicial Appointments: A Quiet Revolution*, Middle Temple Guest Lecture 4 (Nov. 6, 2006), *available at* [http://www.judicialappointments.gov.uk/docs/Middle\\_Temple\\_Guest\\_Lecture.pdf](http://www.judicialappointments.gov.uk/docs/Middle_Temple_Guest_Lecture.pdf) (last visited June 17, 2009) (current chair of the U.K.'s lower court judicial appointments commission, observing, "[T]he pressure for the changes . . . also arose because of conflicts among the Lord Chancellor's extraordinary range of functions, including the appointment of judges. This was clearly not consistent with modern day expectations.").

name judges and justices to U.K. courts,<sup>54</sup> where the Lord Chancellor's control over judicial appointments and simultaneous membership in all three branches of government (as cabinet official, speaker of the House of Lords, and head of the judiciary) was increasingly viewed as anomalous in comparison with the U.K.'s European partners, especially those participating in the European Court of Human Rights.<sup>55</sup> Reform of the judicial appointments process through expansion of the judiciary's power to select its own members was also thought necessary to counter-balance the growing power of the prime minister, which, under Margaret Thatcher and Tony Blair, was perceived to be taking on presidential-like authority.<sup>56</sup>

In considering the merits of the U.K.'s new judicial appointments commissions, Kate Maleson asserted that the "rationale for the establishment of a commission must be that it will guarantee the independence of the system from inappropriate politicization, strengthen the quality of the appointments made, enhance the fairness of the selection process, promote diversity in the composition of the judiciary, and so rebuild public confidence in the system."<sup>57</sup> The commissions are considered by many a marked improvement over the earlier judicial selection system's heavy reliance on an "old boys' network" of private consultations, or "secret soundings," with unnamed judges and senior bar

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54. Department for Constitutional Affairs, *Constitutional Reform: A New Way of Appointing Judges* (2003), available at <http://www.dca.gov.uk/consult/jacommission/judges.pdf> (last visited June 15, 2009).

55. More specifically, reform of the U.K.'s judicial appointments process is thought to stem in significant part from the recent expansion in use of, and tolerance for, judicial review in Britain, which in turn arises in substantial part from Britain's membership in the European Court of Human Rights, whose charter requires state-member courts to exercise independence in reviewing state-level laws for compliance with human rights principles. As part of these developments, the U.K.'s enactment of the Human Rights Act of 1998 empowered the Appellate Committee of the House of Lords to expand its practice of judicial review. See MALLESON, *supra* note 44, at 1 (also noting importance of expansion in size of judiciary to interest in reform of judicial appointments process).

56. ROBERT STEVENS, *THE ENGLISH JUDGES: THEIR ROLE IN THE CHANGING CONSTITUTION* 147 (2d ed. 2005) (observing, "The more presidential style of Mrs. Thatcher and the declining importance of Parliament and other institutions were factors in making judges, as protectors of the Constitution, more important. While the House of Commons regained some initiatives under John Major's ill-fated administration, the massive Labour landslides in 1997 and 2001 meant that Tony Blair was able to emulate Mrs. Thatcher's presidential style. The judges could be needed again as a counter-weight to the elected dictatorship. . ."); see generally AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 312 (2006) (observing, "There is a myth that strong courts are needed when the other branches of the state are weak. The truth is, democracy needs strong courts especially when it has a strong legislature and a strong executive.") (emphasis in original).

57. Maleson, *supra* note 49, at 40-41.

members.<sup>58</sup> “Whom you knew” and where you went to school mattered greatly in the old appointments process.<sup>59</sup> By contrast, under the CRA, the judicial appointments commissions are charged with making selections “solely on merit” and free of political patronage.<sup>60</sup>

To the extent that the prior appointments process relied on currently serving judges’ opinions of judicial candidates, the reformed processes, with their substantial reliance on candidate screening and recommendation by judges, may not appear to be much of a change. And yet, there is at least a sense that the new system is more meritocratic and transparent than the old. Through increased emphasis on merit, the judicial appointments commissions have the potential to promote greater competence and representativeness on the bench.<sup>61</sup>

Still, some commentators have criticized the U.K.’s new judicial appointments processes as relying too heavily on currently serving judges, expressing concern for negative impacts on bench composition. The concern is that judges charged with recruiting, screening, and recommending new judges will replicate themselves rather than promote bench diversity.<sup>62</sup> There is also a concern that commission-style consideration of judicial appointments, whether for initial selection or promotion, might lead to a “Boggins’ turn next” approach, where candidates are understood as waiting in line for vacancies, rather than being chosen through a competitive, merit-based determination of the best candidate for each opening.<sup>63</sup> An overarching concern expressed by some commentators is that “the new appointments system could end up looking a lot like the existing system,” with a similar favoring of traditional, or “inside,” candidates.<sup>64</sup> In other words, those who succeed under the new system might most closely resemble those serving on the appointments commissions, who in turn were named to the bench under

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58. Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States?*, 34 *FORDHAM URB. L.J.* 387, 397 (2007).

59. *Id.*

60. Constitutional Reform Act of 2005, ch. 4, pt. 4, c. 2, sec. 63(2), *as quoted in* Maute, *supra* note 58, at 390.

61. *See, e.g.*, MALLESON, *supra* note 49, at 51-53.

62. *See generally* STEVENS, *supra* note 56, at 170 (reporting, “The current Commission for Judicial Appointments [a now-defunct appointments oversight body with particular concern for bench diversity] . . . called for the new Commission to be dominated by lay persons rather than judges and lawyers. [Its Chair] saw this as vital in implementing one of Lord Falconer’s main goals—a more diverse bench.”).

63. *Id.*

64. *Id.*

the old selection system.<sup>65</sup> This was certainly the case with the early appointments announced by the JAC.<sup>66</sup>

*F. Judicial Participation in Judicial Selection Processes in Canada*

In Canada, the Office of the Commissioner for Federal Judicial Affairs, operating through seventeen regional advisory committees, evaluates prospective judicial candidates for the lower federal courts.<sup>67</sup> Each advisory committee includes a federal judge among its five members.<sup>68</sup> According to an account by then-Justice Claire L'Heureux-Dube, "The committee reviews the qualifications of each possible appointee and advises the Justice Minister whether the candidate is qualified. The Minister remains the final arbiter and chooses which candidate to recommend to the Cabinet."<sup>69</sup> Malleson notes that "[o]nly initial appointments rather than promotions are sent to the committees since it is thought to be inappropriate for them to scrutinize the performance of sitting judges."<sup>70</sup> With regard to Supreme Court appointments, the justice minister's special advisers on judicial appointments collect information on potential nominees, including input from currently serving judges.<sup>71</sup> As such, currently serving judges play both a formal (committee service) and informal (informational) role in judicial selection in Canada, though their involvement does not appear to be nearly as substantial as in the U.K.

At the provincial level in Ontario, judicial appointments are overseen by the Judicial Appointment Advisory Committee (JAAC), which is composed of thirteen members, including two judges who "are appointed by the Chief Judge of the Provincial Court."<sup>72</sup> The committee has a layperson majority, constituting seven of thirteen members. By contrast with the federal committees, the provincial committee has the

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65. *Id.* at 171 (quoting Sir Colin Campbell, former chair of the now-defunct Commission for Judicial Appointments).

66. Malleson, *supra* note 49, at 51-53.

67. Office of the Commissioner for Federal Judicial Affairs, <http://www.fja-cmf.gc.ca/home-accueil/index-eng.html> (last visited June 17, 2009).

68. Claire L'Heureux-Dube, *Nomination of Supreme Court Judges: Some Issues for Canada*, 20 MAN. L.J. 600, 604 (1991).

69. *Id.*

70. Kate Malleson, *The Use of Judicial Appointment Commissions: A Review of the U.S. and Canadian Models*, in JUDICIAL APPOINTMENTS COMMISSIONS: THE EUROPEAN AND NORTH AMERICAN EXPERIENCE AND THE POSSIBLE IMPLICATIONS FOR THE UNITED KINGDOM, Lord Chancellor's Department, Research Series No. 6/97 (Dec. 1997), at 49, 67.

71. Richard Devlin, *et al.*, *Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a "Triple P" Judiciary*, 38 ALTA. L. REV. 734, 763 (2000).

72. Malleson, *supra* note 70, at 69.

power to recruit judicial candidates in addition to reviewing their qualifications.<sup>73</sup> Also by contrast with the federal judicial appointment system, it is the JAAC, and not the executive, that consults with sitting judges regarding the merits of individual judicial candidates.<sup>74</sup> Malleon observes that “[i]t seems clear from the committee’s most recent report that these inquiries are considered particularly useful.” “Although the report clearly states the committee’s concern about the lack of openness of this aspect of the process,” Malleon notes that the report “concludes that much valuable information is obtained through this channel.”<sup>75</sup>

*G. Judicial Participation in Judicial Selection in Israel*

In Israel, a nine-member judicial selection committee composed of professional and political representatives names judges to the general courts, peace courts, and supreme court.<sup>76</sup> The five professional members include three supreme court justices (the chief justice and two other justices elected by the court) and two members of the bar.<sup>77</sup> Commentators caution that the selection committee is “effectively dominated” by the chief justice.<sup>78</sup> Not only does the chief justice select the two associate justices who serve on the committee, but the two practicing lawyer members have strong incentives not to alienate the chief justice,<sup>79</sup> and so the chief justice’s preferences in judicial selection are regularly given effect. Indeed, no justice has been named to the high court who has not been the preferred candidate of the chief justice.

While some commentators have flagged concern for the chief justice’s dominance of the judicial selection committee, others have underscored the first-class judiciary resulting from this process. As Eli

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73. Devlin, *supra* note 71, at 763.

74. Malleon, *supra* note 70, at 70.

75. *Id.*

76. The Judges Act 1953 (Israel).

77. Eli M. Salzberger, *Judicial Appointments and Promotions in Israel: Constitution, Law, and Politics*, in *APPOINTING JUDGES*, *supra* note 5, at 248-49.

78. *See, e.g.*, Levinson, *supra* note 7, at 1306. Levinson quotes an opinion piece in the *Jerusalem Post* as follows:

At a formal level, then, the sitting justices comprise only one-third of the selection panel. However, the justices in fact “dominate the process even without the ironclad tradition whereby other panel members defer to them: The justices, chosen by the court president, consistently follow his lead; the elected officials are divided, coalition-opposition; and the Bar representatives are reluctant to antagonize justices who will decide their future cases.” Thus, “never has a new justice been chosen over the sitting justices’ objections, and only rarely have the justices’ candidates been rejected.”

*Id.* at 1306 (quoting Evelyn Gordon, Op-Ed., *Judicial Power Grab*, *JERUSALEM POST*, May 18, 2006, at 15).

79. *See id.*

Salzberger observes, involvement of professionals on judicial appointments commissions “enabled Israel to maintain a Supreme Court with a high degree of professionalism, free of party politics, corruption, and the like.”<sup>80</sup> Nevertheless, Salzberger notes that it was the expressly political members of the judicial selection committee, *i.e.*, the members of parliament, and not the judges (or lawyers), “who pushed for a more representative court.”<sup>81</sup>

Recently, commentators have advocated reform of Israel’s judicial selection committee to lessen its dominance by judges. As one step, Salzberger reports that the Knesset has considered legislation requiring judges on the selection committee to issue individual evaluations of judicial candidates rather than announcing composite assessments of each candidate by all of the judges on the committee acting together.<sup>82</sup> This proposal was intended to lessen the influence of the chief justice over the other judges on the committee and thereby over judicial appointments more generally, but the measure has not been enacted. Another area of suggested reform is the committee’s practice of consulting all of the currently serving supreme court justices about candidates in advance of selection committee meetings, a practice that further accentuates the court’s influence over the judicial selection process.<sup>83</sup> This practice has not been changed either.

#### *H. Judicial Participation in Other Countries’ (Principally Civil Law Countries’) Judicial Selection Systems*<sup>84</sup>

In addition to the U.K., Canada, and Israel, a growing number of other countries rely on judges to recruit, screen, recommend, and even appoint judicial candidates through use of judicial screening commissions or other similar bodies composed at least in part by judges.<sup>85</sup> Many, though by no means all, of these countries have civil law judiciaries. At the same time, many have looked to judges to oversee judicial selection as a way of furthering judicial independence

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80. Salzberger, *supra* note 77, at 243.

81. *Id.* at 249.

82. *Id.* at 253-54.

83. *Id.*

84. Appendix B notes the judicial selection methods and involvement by judges in a range of countries beyond the U.S.

85. An excellent recent comparative study of judicial selection systems is APPOINTING JUDGES, *supra* note 5. Other outstanding sources include John Bell, *European Perspectives on a Judicial Appointments Commission*, in 6 THE CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES, 2003-2004 35 (John Bell and Claire Kilpatrick, eds. 2005); CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY (2002); THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995).

ideals. As Malleson notes, “Throughout common law and civil systems alike the use of commissions is increasingly being explored as a solution to the difficult problem of achieving a balance between independence and accountability in judicial selection.”<sup>86</sup> Malleson attributes the commission’s appeal in part to its “adaptability,” where commission composition, procedures, and responsibilities can be tailored to meet the particular needs of each system.<sup>87</sup>

The European Judges Association and the Council of Europe have advocated substantial reliance on currently serving judges in judicial selection.<sup>88</sup> Most judicial selection bodies for the non-constitutional courts in Europe are composed of a majority of judges. As Bell notes, “there are Latin models that are increasingly oriented towards giving judges the final say in judicial appointments, promotions and discipline,” highlighting Italy as “the most extreme version of this . . . in which the judges control the whole operation.”<sup>89</sup>

By contrast, selection of judges for Europe’s constitutional courts—in France, Germany, Italy, Spain, and elsewhere—is not dominated by judges. Rather, a combination of officials from the executive and legislative branches, and, in some countries, the judiciary, name constitutional court judges.<sup>90</sup>

*I. Why is Judicial Participation in, and/or Control of, Judicial Candidate Screening and Recommendation a Common Feature of Other Countries’ Judicial Selection Processes?*

Why is judicial participation in and/or control of judicial candidate screening and recommendation a common feature of other countries’ judicial selection systems? To begin with, judicial involvement in judicial appointments has been understood as a means of promoting

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86. Malleson, *supra* note 5, at 6-7.

87. *Id.*

88. See Bell, *supra* note 85, at 36, citing: European Judges Charter (1993) at art. 4, which provides:

The selection of Judges must be based exclusively on objective criteria designed to ensure professional competence. Selection must be performed by an independent body that represents the Judges. No outside influence and, in particular, no political influence, must play any part in the appointment of Judges.

Council of Europe Recommendation R(94) 12, which states:

The competent authority for the selection and career of judges should be independent of the government and the administration. To guarantee its independence, there should be provision to ensure, for example, that its members are appointed by the judiciary, and that the authority itself determines it [sic] own rules of procedure.

89. Bell, *supra* note 85, at 46.

90. GUARNIERI & PEDERZOLI, *supra* note 85, at 138-39; see also app. B.

judicial independence, thought especially important in the post-World War II period. Europe's history of dictatorships in the twentieth century contributed to a perceived need, in France, Italy, Portugal, Spain, and elsewhere, to insulate the judiciary from executive control through expanded judicial authority over judicial appointments.<sup>91</sup> A related, though far more modest, concern contributed to the U.K.'s recent judicial appointments reforms, specifically, a perceived need to counterbalance the growing authority of the Prime Minister. Notably, this pattern was not followed in Germany, where the executive continues to exercise considerable influence over judicial appointments.<sup>92</sup>

Increased reliance on judges in judicial selection may also be a natural, or logical, outgrowth of recent expansions in judicial authority accompanying the so-called "judicialization" of politics.<sup>93</sup> The "judicialization" of politics refers to the growing practice of, or reliance on, judges to resolve political and/or policy questions.<sup>94</sup> The "judicialization" of politics is seen, for example, in the U.K. with the recent expansion of judicial review to assess laws' compliance with human rights principles pursuant to the Human Rights Act 1998. As judges exercise greater power to review legislative enactments and their enforcement, the judiciary acquires expanded authority vis-à-vis the legislative and executive branches. It is partially in *recognition* of, and partially a *product* of, this expanded authority that judges have acquired increased influence over judicial appointments. The "judicialization" of politics and accompanying expansion in the role of judges in judicial appointments has been a widespread phenomenon, with relevance not

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91. Bell, *supra* note 85, at 49-50 (observing, "The Italians and the French created judicial councils in their post-dictatorship constitutions of the 1940s. The purpose was to insulate the judiciary from political interference. . . . In both countries, there was an attempt to ensure that one of the major institutions of society was not capable of being manipulated by anti-democratic forces (as it had been in the very recent past)."). According to Bell, "[t]his strongly independent institution has also gained favour in a number of [other] countries emerging from dictatorship, such as Spain and Portugal."

92. GUARNIERI & PEDERZOLI, *supra* note 85, at 52.

93. On the "judicialization of politics," see GUARNIERI & PEDERZOLI, *supra* note 85, at 1 (observing, "The social and political significance of the judiciary has become a common trait of contemporary democracies: a phenomenon described as the 'judicialization of politics.' . . . [T]he increasing political significance of the judiciary has assumed different forms in different countries. While it is not a new phenomenon in the U.S., in recent years it has taken on increasing significance in European democracies, such as Britain and Germany, and especially in Latin European countries, such as France, Portugal, Spain, and Italy.").

94. *Id.*

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only in the U.K. and Europe, but also in Israel, South Africa, Latin America, the Caribbean, and elsewhere.<sup>95</sup>

Most fundamentally, the prevalence of judicial participation in other countries' judicial selection processes can be explained by its correspondence with civil law systems, which themselves predominate around the world. In civil law systems, judicial candidates are recruited and trained directly out of university study by senior judges. Thus, judges serving as judicial candidate screeners, recommenders, and appointers are an integral part of the civil law system.

In considering whether civil law systems' reliance on judges as judicial screeners should be imported into the Article III system, it bears reflecting on the not insignificant differences between civil and common law judiciaries. As noted briefly above, civil law judiciaries involve distinct career tracks, in which individuals take exams for entrance into judicial service directly out of university education. On the basis of these exams, recruits are then trained and acculturated by senior judges, often through a system of apprenticeships. Judges ascend a career ladder through a combination of seniority and merit considerations, involving periodic performance evaluations by other judges. As such, the civil law judiciary is largely a self-regulated system, where judges control access to, as well as progress in, the judicial profession.

Despite greater institutional self-regulation, the civil law judiciary is considered less prestigious, and its individual members less autonomous, than the common law judiciary. There are several reasons for this, including the difference in recruitment patterns, *i.e.*, young university graduates entering the civil law judiciary versus more established practitioners in the common law system. Moreover, the judge's role in the civil law system is more confined in reaching judgments than under the common law—largely one of rule application, drawing on comprehensive codes and involving far less discretion on the part of individual judges. Stated otherwise, the civil law judge's role is more technocratic and far less policy-oriented than that of the common law judge.

Yet another important distinction between civil and common law systems is that judges do not sign their names to appellate court opinions

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95. On this growth in the judicialization of politics and its relation to judges' expanding dominion over judicial selection processes, and the protection of judicial independence, former Israeli Chief Justice Aharon Barak has observed:

I do hope that the judicialization of politics will not increase the politicization of judicial appointments. On the contrary: it should reduce such attempts. If politics is judicialized, what is needed is objective, professional, and independent judges. That calls for less politics in the appointment of judges. It seems to me that the trend is toward more professionalism and less politics.

BARAK, *supra* note 56, at 313.

in civil law systems, and judgments are announced without separate opinions, with the result that appellate courts speak with one anonymous voice, as opposed to the sometimes, or even often, fractured, individually authored opinions in common law appellate courts.

Given these and other important distinctions between civil and common law systems, it is striking that the U.K.'s new judicial appointments system is beginning to resemble civil law systems in its use of sitting judges to recruit, screen, and effectively select other judges. Even the career nature of the U.K. judiciary is beginning to change to resemble more closely a civil law system. Increasingly, there is an understood judicial career trajectory in the U.K.,<sup>96</sup> with judges promoted from part-time magistrate positions into full-time service, with promotion review, in part, by other judges. At the same time, there is a growing phenomenon of lateral judicial appointments (*i.e.*, from practice) in civil law systems. As such, the historic differences between civil and common law judiciaries in Europe and the U.K. are beginning to lessen.

To the extent that the U.S. judiciary begins to look more like a civil law judiciary in its career trajectories<sup>97</sup>—where magistrate judges become district judges,<sup>98</sup> district judges become circuit judges, and circuit judges become Supreme Court Justices—increased reliance on judges to recruit, screen, and recommend Article III candidates might appear to make sense for the same reasons it does in civil law judiciaries and now also in the U.K.<sup>99</sup> These include: promoting greater independence of the judiciary through increased self-control over its composition; recognizing judges' expertise on what the job of judging entails and which attributes make for a successful judge; and enabling the development of what, some would say, is a less overtly political judiciary, by which is meant one less dependent on political patronage and more reliant on merit selection. These perceived benefits of judges' involvement in judicial selection are explored in Part IV, drawing on lessons from judicial selection processes at the state, other federal, and other national levels to consider whether currently serving judges should participate in commissions to screen Article III candidates below the Supreme Court level, where awareness of choices made in other judicial

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96. See GUARNIERI & PEDERZOLI, *supra* note 85, at 45, 47, 195 (noting that U.K. judiciary has increasingly become a long-term career pursuit).

97. This, of course, is a bit of a rhetorical overstatement, where most federal judges have substantial practice backgrounds pre-federal appointment, as distinct from civil law judges who arise nearly exclusively from university education.

98. See Resnik, *supra* note 24, at 671 (“[T]he ranks of Article III judges are increasingly populated by individuals who once served as statutory judges.”).

99. A similar promotion pattern to that seen in the U.S. can be seen in the judiciary for England and Wales. See Bell, *supra* note 85, at 38.

selection systems can help illuminate the desirability of choices made, or to be made, in the Article III system.<sup>100</sup>

### III. RECENT CALLS FOR EXPANDED USE OF BIPARTISAN COMMISSIONS TO SCREEN AND RECOMMEND ARTICLE III CANDIDATES BELOW THE SUPREME COURT LEVEL

In the final lead-up to the 2008 election, the ABA called upon the next president to rely on bipartisan commissions to screen and recommend (for presidential nomination and Senate confirmation) Article III candidates below the Supreme Court level.<sup>101</sup> The ABA

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100. Jackson, *supra* note 5, at 971-72 (examining judicial selection mechanisms in a range of different governance systems, reflecting “a distinctive set of choices”); Resnik, *supra* note 16, at 579; Lee Epstein, Jack Knight & Olga Shvestsova, *The Judicial Appointments Process: Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7 (2001). Naturally, “context matters” when looking at how courts and judges work. Judith Resnik, *Composing a Judiciary: Reflections on proposed reforms in the U.K. on how to change the voices of and the constituencies for judging*, LEGAL STUDIES (2004). With this in mind, recognizing the distinctions between civil and common law systems is critical to evaluating their different judicial selection systems.

101. Press Release, American Bar Association, American Bar Association Weighs in on Access to Courts for Military Personnel, Federal Judicial Nomination Process and International Criminal Court (Aug. 12, 2008) available at [http://www.abanet.org/abanet/media/release/news\\_release.cfm?releaseid=433](http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=433) (last visited June 29, 2009) (reporting ABA House of Delegates adoption of task force recommendation “to counter what incoming ABA President H. Thomas Wells, Jr., says is a confirmation process for federal judges that ‘too often involves lengthy, partisan conflict and delay...’”); Recommendation 118 for discussion and vote at Aug. 11-12, 2008, ABA House of Delegates meeting and accompanying ABA Task Force report (Aug. 2008). In the same task force recommendation, the ABA also called on sitting judges to provide advance notice of their intention to take senior status, on the president to consult with Senate leaders on possible nominees, and for the Senate to consider nominations more expeditiously, especially where the nominee has been endorsed by a bipartisan commission. *Id.*

The *Los Angeles Times* praised the ABA’s proposal as a “common sense idea.” Editorial, *The ABA way to pick judges*, L.A. TIMES, Aug. 24, 2008, at 31. The *L.A. Times* opined that the ABA’s proposal would “improve the quality of the federal judiciary without infringing on the constitutional prerogatives of the president or the Senate.” *Id.* The editorial also stated that the proposal could bring about a “truce in the tiresome partisan tit-for-tat in the Senate that has blocked the confirmation of qualified and moderate judicial nominees.” *Id.* Finally, the editorial board called for “the next president [to] urge senators in every state to join him in adopting a politically sophisticated variation of the ABA proposal.” *Id.* But see Editorial, *Quicksand for Judges*, WALL ST. J., Sept. 8, 2008 (arguing that the ABA’s proposed commissions would usurp executive and legislative branch authority to nominate and confirm judges).

U.S. Senator Charles Schumer proposed a variant on these commissions in a 2003 letter to President Bush:

Both the Administration and the Senate should agree to the creation of nominating commissions in every state, the District of Columbia, and each Circuit Court of Appeals. Every commission will consist of an equal number of Republicans and Democrats, chosen by the President and the opposition party’s Senate leader. Each commission will propose one candidate to fill each

recommendation did not address whether judges should serve as screening commission members.<sup>102</sup> The ABA's recommendation echoed its earlier support for Article III screening commissions, where, beginning in the late 1950s, the ABA called for the establishment of an independent commission to screen and recommend Article III candidates for presidential consideration.<sup>103</sup> Then, again, in 1962, the ABA House

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vacancy. Barring evidence that any candidate proposed by a Commission is unfit for judicial service, the President will nominate the individual and the Senate will confirm her or him.

Letter from U.S. Senator Charles E. Schumer to the Honorable George W. Bush (April 30, 2003) at 1-2, *formerly available at* [http://schumer.senate.gov/SchumerWebsite/pressroom/press\\_releases/PRO1655.pf.html](http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/PRO1655.pf.html). Schumer highlighted the merits of his proposal as follows:

This proposal is our best hope for filling the bench with judges who are appointed based on merit, not ideology or party affiliation. It is also our best hope for breaking the vicious cycle that the judicial nominating and confirmation process has been stuck in for years. . . .

By giving the President and the Senate equal roles in picking the judge-pickers, both retain some control over the process, but neither gets a stranglehold.

By forcing every selection to be bipartisan, we maximize the prospect of achieving balance and moderation on the bench. Very few extremists on either side will get through and, in the rare instance where one does, he or she likely will be offset by an extremist on the other side.

By mutually agreeing to abide by the choices the commissions make, we take politics and patronage out of the process.

*Id.*

An important difference between Schumer's proposal and the ABA's is that Schumer's proposal would bind the President to nominate the candidate agreed upon by the commission, while the ABA's proposal, and that of Wheeler of the Brookings Institution, is for a non-binding screening and recommending commission.

Then-White House Counsel Alberto Gonzales emphasized the binding nature of Schumer's proposed commission in responding to the Senator's letter, asserting that it violated Article II's provision for presidential nomination and Senate confirmation. White House Counsel Alberto Gonzales Letter to U.S. Senator Schumer (May 6, 2003) at 1 *available at* [http://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/judges\\_schumer\\_letter\\_5\\_6\\_03\\_2.pdf](http://georgewbush-whitehouse.archives.gov/infocus/judicialnominees/judges_schumer_letter_5_6_03_2.pdf) (stating, "Your proposal would effectively transfer the nomination power of the President and the confirmation power of the Senate to a group of unelected and unaccountable private citizens.").

At approximately the same time as Schumer's proposal, Senators Daschle and Leahy "urged the [Bush] White House to open a 'bipartisan process of consultation' when a Supreme Court vacancy appeared in order to help the president find a confirmable appointee." RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* 6 (2005). The White House also rejected this suggestion, stating that the "Constitution will be followed." *Id.* (quoting Helen Dawar, *Daschle Urges Bush to Consult on High Court Picks*, WASH. POST, June 18, 2003, at A2).

102. Press Release, American Bar Association, *supra* note 101.

103. *See, e.g.*, SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 140-41 (1997) (recounting history in detail); David M. O'Brien, background paper, *JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION* 96-98 (1988) [hereinafter *JUDICIAL ROULETTE*] (highlighting same history).

of Delegates voted in favor of a Model Judicial Article that included judges, lawyers, and laypersons serving in a commission-based judicial appointments system, and, in 1977, the ABA House of Delegates specifically called for use of non-partisan judicial nominating commissions at the Article III level.<sup>104</sup> Indeed, as early as 1937, the ABA had endorsed the merit selection of judges generally (not specifically at the Article III level) through use of bipartisan nominating commissions composed of *judges* and laypersons.<sup>105</sup>

Several months before the ABA House of Delegates voted in favor of the most recent commission proposal, Russell Wheeler of the Brookings Institution published a nearly identical recommendation for establishment of bipartisan screening commissions for Article III candidates below the Supreme Court level.<sup>106</sup> Wheeler, President of the Governance Institute and a Visiting Fellow at the Brookings Institution, served on the ABA task force developing the commission recommendation and played a central role in crafting that proposal. Noting that “[t]he process of nominating and confirming federal judges has become infected by the polarization that characterizes much of U.S. politics,”<sup>107</sup> Wheeler observed, “The heated selection process harms the courts by creating extended vacancies, scaring off good candidates, and posing a threat to judicial impartiality and independence.”<sup>108</sup> Wheeler recommended that “the next President should:

Create a bipartisan appellate judge nominating commission and give priority consideration to candidates the commission recommends, with the understanding that the President will strongly prefer members of his party;

Urge all senators to appoint bipartisan district judge nominating commissions and give priority consideration to candidates jointly

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The independent judicial screening commission called for by the ABA in the late 1950s is not the same as the ABA Standing Committee on the Federal Judiciary, which began operating in the late 1940s, gaining a more official, formal role in the early 1950s to evaluate prospective judicial nominees by, among other things, interviewing scores of lawyers, judges, and bar association officials familiar with a given judicial candidate. American Bar Association, *An Introduction to the ABA Standing Committee on the Federal Judiciary: What it is and How it works* (a regularly updated pamphlet).

104. Rebecca Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 *FORDHAM URB. L.J.* 163, 175 (2007); see also ASHMAN & ALFINI, *supra* note 40, at 24.

105. 62 *A.B.A. Rep.* 893 (1937) (emphasis added); see also AMERICAN BAR ASSOCIATION, *ROAD MAP: JUDICIAL SELECTION: THE PROCESS OF CHOOSING JUDGES 5* (2008).

106. Wheeler, *supra* note 10.

107. *Id.*

108. *Id.*

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recommended by the home-state senators and their commissions, with the understanding that the President will strongly prefer members of his party.<sup>109</sup>

In Wheeler's view, "These steps [including others omitted for purposes of this discussion] will not compromise the long-standing practice of partisan judicial appointments, but can restore respect and civility to the selection of federal judges."<sup>110</sup> Wheeler's proposal, like that of the ABA, does not suggest or address the desirability of judicial participation in bipartisan screening commissions. Rather, I raise the issue here because of the growing reliance of other governance systems—again, at the state, other federal, and other national levels—on currently serving judges as judicial candidate screeners.

Wheeler's and the ABA's proposals echo the American Judicature Society's (AJS) long-standing advocacy of the use of judicial nominating or screening commissions.<sup>111</sup> Unlike the more recent proposals, however, the AJS has directly addressed the question of whether judges should serve on judicial nominating or screening commissions and has recommended against their participation.<sup>112</sup> In its study of President Carter's circuit judge nominating commission,<sup>113</sup> the AJS advised against judicial involvement in screening commissions because of separation of powers concerns for judges usurping executive and legislative branch functions and out of concern for the potential impact of judges'

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109. *Id.*

110. Wheeler, *supra* note 10, at 2.

111. The AJS strongly endorsed the ABA Task Force's call for bipartisan screening commissions in its July/August 2008 issue of *Judicature*. Editorial, 'Best Practices' for *Federal Judicial Selection*, 92 JUDICATURE 4 (2008).

Yet another good governance group, the Twentieth Century Fund, has supported the use of bipartisan judicial screening commissions, though it, like the ABA and Brookings' proposals, did not address whether currently serving judges should sit as members of these commissions. See JUDICIAL ROULETTE, *supra* note 103, at 7.

112. In proposing model terms for the establishment of judicial nominating commissions, the AJS provides, "No member of [the] [a] nominating commission may hold any other office under the U.S., the State, or other governmental entity for which monetary compensation is received. No member shall be eligible for appointment to a state judicial office so long as he or she is a commission member and for [four] [three] years thereafter." American Judicature Society, Chapter One, MERIT SELECTION: ESTABLISHING A COMMISSION PLAN FOR APPOINTMENT TO OFFICE 2 (alternative language in the original). In the commentary following the model language, the AJS observes, "No member of a commission should seek judicial office until a sufficient amount of time has passed to ensure a commission's objectivity and preserve public confidence," and "If a judge is a commission member, s/he should have limited power so as to avoid exercising undue influence over other commission members." *Id.* at 2-3.

113. See *supra* part II(A).

participation on the candor, ease, and fullness of expression of lawyers and laypersons serving alongside judges on these commissions.<sup>114</sup>

Nevertheless, when the AJS first proposed use of merit selection processes for judges (in a 1914 report by the AJS' research director, Northwestern Law Professor Albert Kales),<sup>115</sup> the candidate screening commissions were to be composed entirely of judges.<sup>116</sup> Kales' merit selection proposal changed over time to involve substantially less reliance on judges as candidate screeners and more on lawyers and laypersons.<sup>117</sup> Kales also substituted the governor for the chief justice as the state official responsible for naming judges.<sup>118</sup> These changes were reflected in the so-called "Missouri plan," named after the state in which Kales' reform was first adopted in 1940.<sup>119</sup>

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114. The study recommended against any current or senior judge serving on the commission. Recommendation 9 provided as follows:

NO ACTIVE OR SENIOR JUDGE SHOULD BE APPOINTED TO A PANEL.

Commentary

To observe the constitutional separation of powers, judges should not officially participate in the selection of their colleagues. The responsibility for the selection of circuit judges has been constitutionally assigned to the executive and legislative branches.

Moreover, judges' preferences may be given undue weight by other panelists. Laypersons may feel compelled to defer to real or imagined judicial expertise about the bench. A lawyer may defer to a judge who may subsequently preside over his or her cases, to avoid antagonizing him. Alternatively, a lawyer commissioner may exaggerate his opposition to a judge commissioner in order to preserve a sense of independence and integrity. In any event, the performance of lawyer and lay members is likely to be disrupted by the presence of judges on a panel.

Larry Berkson, Susan Carbon, Alan Neff, A STUDY OF THE U.S. CIRCUIT JUDGE NOMINATING COMMISSION 65 (1979).

The study also recommended against anyone serving on the Commission who was currently in public office (elective or appointive) (Recommendation 8). *Id.*

115. In brief, interest in the merit selection of judges was prompted in large part by the nineteenth century rise of judicial election in the states, which was in turn prompted in part by the rise of Jacksonian democracy responding to the perceived "elitism" of government officials appointing judges. *See, e.g.*, GUARNIERI & PEDERZOLI, *supra* note 85, at 31-33.

116. *See, e.g.*, Caufield, *supra* note 104, at 174; Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 148-49 (2007) ("Kales first proposed that judges be appointed by a popularly-elected chief justice from a list drawn up by the presiding justices of all divisions of the court. This judge-centered selection idea was based on a set of expectations regarding the fitness of judges. Kales felt that judges, especially appellate judges, were the logical persons to select judicial candidates, because they had 'stronger motives to appoint those who will carry out the interests of justice' and 'a better opportunity for determining the character and ability of lawyers, since they examine the work of lawyers continually and with the most minute care.'").

117. Jackson, *supra* note 116, at 150.

118. ASHMAN & ALFINI, *supra* note 40, at 11.

119. GUARNIERI AND PEDERZOLI, *supra* note 85, at 33.

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Given significant support for the judicial screening commission model, the question for this Article is whether currently serving judges should serve on Article III screening commissions for lower court judges, to which we turn in greater detail now.

#### IV. WHETHER CURRENTLY SERVING JUDGES SHOULD PARTICIPATE IN ARTICLE III SCREENING COMMISSIONS

Two main questions are raised by the possibility of judicial participation in Article III screening commissions: (1) how best to weigh the potential for increased institutional comity and parity that might result (including the possibility of increased judicial independence) against concerns for undue accretion of power by judges and attendant threats to judicial integrity and impartiality; and (2) how best to understand potential impacts on bench composition. These questions are addressed in turn below.

##### A. *Weighing the Potential for Increased Institutional Comity and Parity vs. Concern for Undue Accretion of Power by Judges and Attendant Threats to Judicial Integrity and Impartiality*

Judicial participation in Article III screening commissions holds the potential for increased comity and parity among the branches because it provides opportunities for increased inter-branch interaction and communication. Increased institutional comity and parity may also result from the judiciary gaining greater input into its own composition. At the same time, judicial participation in these commissions risks an undue accretion of power by judges outside of the Article III case and controversy-resolving realm.<sup>120</sup> This, in turn, raises concerns for potential impacts on judicial integrity and impartiality. In the end, these concerns outweigh any potential benefits to institutional relations gained from judges' service on these commissions and instead counsel against judges' participation in Article III screening commissions.

##### 1. Potential for Increased Institutional Comity and Parity

Judicial participation in Article III screening commissions would likely provide opportunities for increased contact among the three branches, thereby creating the possibility of greater institutional comity, or understanding and respect.<sup>121</sup> Judicial participation in judicial

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120. See, e.g., Resnik, *supra* note 24 (expressing concern about undue accumulation of judicial power).

121. See generally, JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY (Robert A. Katzmann ed., 1988).

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candidate screening processes would also provide the judiciary with an opportunity for increased input into its own composition, thereby creating the possibility of greater (though not equal) parity with the executive and legislative branches when it comes to shaping the courts through judicial appointments. These potentials for increased comity and parity might in turn strengthen judicial independence as an institutional matter. Just as European and British systems understood the expansion of judicial authority over judicial appointments as a means of promoting the judiciary's institutional independence and concomitant ability to check the other branches' exercises of power, so too might judicial service on Article III screening commissions foster increased judicial independence and the ability to check the other branches' efforts to control the courts through the appointments process. More specifically, where in the U.K. expanded judicial authority over judicial appointments was thought desirable in part to counter-balance a perceived expansion of executive power under Thatcher and Blair, in the U.S., it is not so much a question of counter-balancing expanded executive authority, as it is a question of counter-balancing perceived Senate overreaching in the realm of judicial appointments.<sup>122</sup>

Judicial participation in Article III screening commissions might also enable the judiciary to better inform the executive and legislative branches about the judiciary's needs and challenges with respect to judicial appointments, thereby creating an opportunity for increased institutional understanding and respect. More specifically, judges might be able to use screening commission service to educate judicial appointments officials in the executive and legislative branches about what the job of judging entails, what qualities best enable individuals to be effective judges, what types of backgrounds provide the best preparation for the bench, etc. Just as judges testify before Congress on the particular needs and concerns of the judiciary in other respects, *e.g.*, on the need for new judgeships or pay increases or on the effects of proposed legislation on court operations, judges could share their perspectives on the judicial appointments process with relevant executive and legislative branch officials through their service on Article III screening commissions. Increased inter-branch communication could be a two (or three) -way street, of course, with each branch informing the others of its needs and challenges with regard to judicial appointments. As such, these exchanges could hold the potential for real growth in inter-branch relations. They could, of course, hold the opposite potential

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122. See, *e.g.*, BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006).

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instead—for increased tension between and among the branches—where familiarity can sometimes breed contempt rather than respect.

Even assuming the possibility of increased institutional parity and comity, the most that judges could achieve through screening commission service is greater input into the candidate deliberation process and education of executive and legislative branch appointments officials on judicial perspectives on appointments. Judges could not, of course, gain actual control over judicial selection processes or outcomes. This is so because judges cannot constitutionally invade the boundaries of presidential nomination and Senate confirmation. Rather, the executive and legislative branch appointments officials would remain free to accept or reject the judges' views and recommendations. As a result, the impact, if any, of judicial participation in the judicial screening process would be modest.

## 2. Concern for Undue Accretion of Power by Judges

At the same time, judicial participation in Article III screening commissions presents concerns for undue accretion of power by judges and should, ultimately, be rejected on that basis. To be clear, the concern is for undue accretion of power by judges and *not* for violation of separation of powers principles, where there is no serious risk that, if judges served on judicial screening commissions, the judiciary would encroach upon the constitutional authority of the President to nominate and the Senate to confirm judges. This is so because any commissions that have been used or recommended at the Article III level are simply recruiting, screening, and recommending bodies, and *not* selecting or nominating bodies, as in other governance systems, *e.g.*, Europe and the U.K. Contrary to claims of the *Wall Street Journal's* editorial page, the ABA's (and other's) proposed commissions would not usurp the executive and legislative branches' authority, and thereby present separation of powers problems, because executive and legislative branch officials would be free to ignore or reject the commissions' views and recommendations.<sup>123</sup>

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123. See Editorial, *The ABA Plots a Judicial Coup*, WALL ST. J., Aug. 14, 2008, at A12. Cf. MICHAEL GERHARDT, FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 232-33 (2000) (stating, "No doubt, formalizing consultation with the federal judiciary would be unconstitutional because it would require the federal judiciary to perform a clearly non-judicial function or would unduly interfere with its exercise of its basic authority."). Distinguishing formal from informal consultation, Gerhardt goes on to observe:

Yet, informally consulting federal judges (particularly Supreme Court justices) about judicial appointments does not necessarily pose a constitutional problem, because the consultation given does not bind the appointing authorities in any way. . . . To be sure, formal authorities might take informal input quite

Likewise, the concern here is *not* for the undue accretion of *judicial* power, but for the undue accretion of power *by judges*, where judges would not be exercising Article III case or controversy-resolving authority in their commission service. Rather, judges' commission service would involve exercising power outside of the case and controversy-resolving realm.

a. Does Judicial Screening Commission Service Constitute an Undue Accretion of Power by Judges?

The Constitution does not provide for judicial involvement in Article III appointments.<sup>124</sup> Rather, the judicial appointments authority is specifically allocated between the executive and legislative branches. Article II, Section Two of the Constitution provides that the President "by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States."<sup>125</sup> Thus, one answer to the question "should judges serve as members of Article III screening commissions?" is simply "no" because the Constitution does not provide for judicial involvement in judicial appointments.

A problem with this response, of course, is that the Constitution is silent on the role of judges in judicial appointments, rather than explicitly prohibiting it. Nowhere does the Constitution bar judicial involvement in Article III appointments.<sup>126</sup> Reasoning by analogy, the Constitution is also silent on the use of Article III screening commissions, but they have not been considered unconstitutional, even though Carter's circuit judge nominating commission involved (and the current commission proposals anticipate) participation by individuals outside of the executive and legislative branches, indeed outside of the federal government altogether.

While the constitutional text is arguably neutral because of its silence on the question of whether judges can participate in Article III appointments, actual practice is more conflicted. A look at actual

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seriously; however, as long as the consultation is informal, it has no binding force.

*Id.*

124. See, e.g., Jackson, *supra* note 5, at 971 (noting, "The selection mechanisms contemplated by the Constitution represent a distinctive set of choices. The Constitution does not, for example, mandate any self-replicating or professionally controlled selection process. Article III judges do not select, nominate, confirm, or appoint other Article III judges and have no formal consultative or advisory role. Rather, the process of judicial nomination and confirmation is allocated to two other branches of government.").

125. U.S. CONST. art. II, § 2.

126. As Judith Resnik observed specifically in the context of the Chief Justice's appointive powers, "[C]onstitutional silence . . . makes difficult the claim of a constitutional breach. . . ." Resnik and Dilg, *supra* note 43, at 1643.

practice reveals that judges have no open or formal role in the appointment process, but that judges have long been involved in judicial appointments behind the scenes. This has taken the form of consultations by and with executive and legislative branch officials, which have occurred since at least the early part of the twentieth century,<sup>127</sup> and responses to inquiries by the ABA Standing Committee on the Federal Judiciary, which has been vetting prospective judicial candidates with currently serving judges since at least the early 1950s.<sup>128</sup>

Given judges' not insignificant behind-the-scenes involvement in Article III appointments matters, a critical question for this Article is whether recognizing an open and formal role for judges through service on Article III screening commissions would represent an *actual accretion* of power, or merely a formalization, with attendant public awareness, of an already well-established role. The answer is that

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127. Henry Abraham and others have documented the active role played by some judges, including Supreme Court justices, in suggesting names of prospective judicial candidates to appointment officials, including the president, and "campaigning" for particular candidates since at least the early part of the twentieth century. HENRY ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS 18-19 (2008). Chief Justice Warren Burger, for example, was notoriously active in lobbying the president and other appointments officials for Supreme Court and circuit court candidates, as were Chief Justice William Howard Taft and Justice Abe Fortas. *Id.* See also GERHARDT, *supra* note 123 at 194-95; DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 87-88 (2005); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 210 (2000) (reporting that President Kennedy did not nominate Judge William Hastie to the Supreme Court as a result of statements by Chief Justice Warren and Justice Douglas); DAVID YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 11-12, 123, 138 (1999); DAVID J. DANIELSKI, A SUPREME COURT JUSTICE IS APPOINTED 54-55 (1964).

128. The ABA has interviewed currently serving judges about the professional qualifications of prospective and actual judicial nominees since at least the early 1950s. Established in 1948, and gaining a formal role early in the Eisenhower administration's judicial vetting process in 1952-53, the ABA Standing Committee on the Federal Judiciary played a central role in the investigation and evaluation of federal judicial candidates through the end of the Clinton presidency. ABA Standing Committee on the Federal Judiciary, "Frequently Asked Questions About the ABA Standing Committee on the Federal Judiciary" (March 2009), *available at* <http://www.abanet.org/scfedjud/fjcfaq.pdf> (last visited July 29, 2009); *see generally* O'Brien, *supra* note 103, at 84-85. Upon entry into office, President George W. Bush announced that he would end the practice of forwarding names of prospective nominees pre-nomination to the ABA Standing Committee. LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 74 (2005). During the Bush Administration, the ABA investigated judicial nominees following their public announcement and reported its findings to the Senate Judiciary Committee. The Obama Administration has returned the ABA to its historic role of investigating potential candidates pre-nomination. *See, e.g.*, Statement of H. Thomas Wells, Jr., President, ABA, Re: The ABA Standing Committee on the Federal Judiciary (March 17, 2009), *available at* [http://www.abanet.org/abanet/media/statement/statement.cfm?release\\_id=574](http://www.abanet.org/abanet/media/statement/statement.cfm?release_id=574) (last visited June 16, 2009).

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judicial membership in Article III screening commissions would constitute both an apparent and an actual accretion of power by judges. It would constitute an *apparent* increase because most members of the public are not aware of judges' current (and historic) behind-the-scenes involvement. It would constitute an *actual* increase because screening commission service would be more active and affirmative, more direct, official, regularized, and systematized and less ad hoc than that which currently occurs through more informal channels.

For example, even though the ABA Standing Committee confers with currently serving judges on a systematic basis as part of its judicial candidate evaluation process,<sup>129</sup> judges' participation in the ABA process represents less of an active, or affirmative, exercise of influence and authority than would commission service. This is so because judges are merely passive responders to ABA inquiries rather than proactive recruiters, screeners, and recommenders of judicial candidates, as they would be on screening commissions.

There would also be a distinction in the status and directness of judges' input in the appointments process insofar as the ABA is a non-governmental organization, while a screening commission would be a governmental body. Judicial participation in governmental bodies like screening commissions would constitute a direct exercise of influence and authority over appointments (more precisely, over appointment deliberations), while answering questions from a non-governmental body, albeit one that reports its findings to the President, is a more indirect exercise of power. Also relevant to this question of direct versus indirect influence is the fact that information gleaned from the ABA's inquiries of judges is reported, if at all, on an anonymous and composite basis, *i.e.*, with no attribution to individual judges. By distinction, judges' input as screening commission members would be individually rendered and directly attributable. This is so even if presumptions of confidentiality were to attach to judicial members' input on the commissions, where leaks to the administration, the candidate, the press, and the public are readily anticipable. Judges serving on the screening commissions would be known sources of information, rather than unidentified sources filtered through another body, as with the ABA process. The direct rather than indirect transmission of judges' views on prospective candidates is suggestive that judges' screening commission service would constitute an actual increase in exercise of authority over that which currently occurs.

There are other distinctions between what currently happens and what might likely happen if judges were to serve on Article III screening

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129. See Clark, *supra* note 4, at Part III.

commissions that are also suggestive of an actual accretion of power by judges through commission service. Judicial membership in Article III screening commissions would involve a more regularized, systematized, and less ad hoc means of influencing judicial appointments than do present-day consultations between judges and executive and legislative branch officials. Again, judicial membership in Article III screening commissions would likely involve an actual, as well as apparent, accretion of power by judges.

b. Concerns Raised by the Undue Accretion of Power by Judges

Why should we be concerned about the accretion of power by judges? There is an important and growing literature on this question. Resnik, for example, has written of concerns raised by the expansion of power by Article III judges in non-Article III contexts, including district and circuit judges appointing magistrate and bankruptcy judges, highlighted earlier, and judicial lobbying for and against pending legislation.<sup>130</sup> With co-author Lane Dilg, Resnik has also written of concerns presented by the Chief Justice's expansion of power in non-Article III realms, including the Chief Justice's vast appointment powers with respect to specialized courts, Judicial Conference committees, and blue ribbon commissions.<sup>131</sup> As Resnik and Dilg make clear, the Chief Justice's appointment powers give him the ability, whether exercised or not, to reward some judges and marginalize others.<sup>132</sup>

Theodore Ruger's article on "The Judicial Appointment Power of the Chief Justice" likewise calls attention to accretions of power in the office of the Chief Justice, principally arising from the Chief Justice's authority to name judges to specialized courts.<sup>133</sup> As Ruger explains, the Chief Justice's authority to name currently serving judges to specialized courts draws by analogy on the Chief's authority to name currently serving judges to temporary service on Article III courts experiencing judicial emergencies.<sup>134</sup> Ruger makes the important point that temporarily assigning a judge to another court of general jurisdiction, where there is little chance of knowing what types of cases the reassigned judge will hear, is different in kind, and far less concerning, than assigning a judge to a specialized court that hears only one type of case.<sup>135</sup> The potential for "matching," or "manipulation" of, judges and

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130. See, e.g., Resnik, *supra* note 24; Resnik, *supra* note 16.

131. Resnik and Dilg, *supra* note 43, at 1615-19.

132. *Id.*

133. Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341 (2004).

134. *Id.* at 343-44.

135. *Id.* at 344.

subject matters in this latter circumstance is much greater than in the former.<sup>136</sup> Admittedly, this distinction, standing on its own, could be an argument for why judicial membership on Article III screening commissions is less vulnerable to ideological or other strategic influence<sup>137</sup> than are specialized court appointments insofar as the commission's candidate recommendations would be for courts of general jurisdiction with little predictability of the type of cases that the new judge would hear. That said, there are recognized differences in subject matter distribution among Article III courts, and so it is not entirely impossible that some smaller-scale "matching" of prospective judges and case-types could occur. That, however, is by no means a primary objection to judges' service on Article III screening commissions.

Rather, the principal concerns raised by the undue accretion of power by judges are for potential impacts on: (i) judicial independence (individual and institutional); (ii) judicial accountability; and (iii) the efficient exercise of Article III power.<sup>138</sup>

- i. Concern for potential impacts on judicial independence, individual and institutional

A central concern raised by the accretion of power by judges is that judicial participation in extra-judicial activities, specifically in the realm of judicial appointments, might jeopardize, or make more vulnerable, judicial independence.<sup>139</sup> As judges enter into the "fray" of judicial appointments—including through service on blue ribbon screening commissions—they render their individual independence susceptible to attack along with that of the judiciary as a whole. Both the fact and the substance of judges' screening commission service could be the subject of criticism. Thus, any claim that judicial participation in judicial selection processes furthers the interests of judicial independence (as seen above in the context of arguments regarding the potential for increased institutional comity and parity) should be approached skeptically. With concerns for negative impacts on judicial independence in part in mind, Resnik and Dilg recommend that judges desist from exercising extra-judicial powers and instead focus on the core tasks of judging, *i.e.*, on the resolution of actual cases and controversies.<sup>140</sup>

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136. *Id.*

137. *See infra* part IV(A)(3)(c).

138. *See* Resnik and Dilg, *supra* note 43, at 1584-87; Ruger, *supra* note 133, at 344-47.

139. *See* Ruger, *supra* note 133, at 384-87.

140. Resnik and Dilg, *supra* note 43, at 1649 ("Corporate theorists might not expect a leader with such an unstructured and generous grant of power to relinquish any of it

Another concern that arises with regard to judicial independence questions is who would name the judges to Article III screening commissions. A number of commentators, in examining the operations of state judicial nominating commissions, have cautioned that the individuals or entities charged with appointing commission members should not be the same as those to whom the commission reports its candidate recommendations. This is so because of concern for the commission's independence of judgment in evaluating candidates.<sup>141</sup> If the screening commission is named by the same person or entity to whom the commission reports its findings, then the concern is that the commission might simply be doing the bidding of the appointing individual or entity and not be exercising independent decision-making authority. With this in mind, a practical question arises as to who should name the members of an Article III screening commission,<sup>142</sup> where the fact that the President nominates and Senate confirms judicial candidates would appear to rule out representatives of both of those bodies from naming screening commission members. One solution that has been adopted by some states and other nations in constituting their judicial screening commissions is for the President and Senate (the executive and legislature in states' and other nations' systems) to name commission members in equal numbers so that neither branch appears to have, or actually has, disproportionate control over the commission's composition and recommendations.<sup>143</sup> To the extent that the ABA's and others' recommendations encourage increased reliance on individual Senators'

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voluntarily. The burden of this contribution (*i.e.*, Resnik and Dilg's article), however, is to make plain the need for the federal judiciary to be as peculiar a bureaucracy as possible, regularly violating Weberian expectations of organizational behavior because of judges' deeper commitments to the task of adjudication.”)

141. See, *e.g.*, ASHMAN & ALFINI, *supra* note 40, at 25 (“Since merit selection is intended to deprive the executive of the opportunity to make judicial appointments solely on the basis of his political motivations (and to remove the political pressures on him to do so), it is thought to be self-defeating to permit the executive to have a direct say in the appointment of the nominating commissioners.”); see also Donald L. Burnett, Jr., *A Cancer on the Republic: The Assault upon Impartiality of State Courts and the Challenge to Judicial Selection*, 34 *FORDHAM URB. L.J.* 265, 265 (2007) (“A nominating commission can be independent and perceived as independent . . . only if a majority of its membership is not determined by the judicial appointing authority or by any other single source.”); see also ABA Standing Committee on Judicial Independence, *Standards on State Judicial Selection: Report of the Commission on State Judicial Selection Standards*, available at <http://www.abanet.org> (last visited June 19, 2009).

142. This question applies to the lay, lawyer, and judicial members.

143. Because the ABA and Brookings' proposals are for commissions that would screen and recommend candidates, and not for commissions whose recommendations would bind the appointing authority (as is often the case at the state level), concern for who would name the screening commission members is less pressing here than elsewhere, though not inconsequential.

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commissions to generate names of district court candidates,<sup>144</sup> judicial service on those commissions would clearly threaten judicial independence principles because those commissions are widely understood as operating in furtherance of the individual Senator's judicial candidate preferences. Currently serving judges should refuse to participate in these particular types of commissions on judicial independence grounds (where the bylaws of many of these commissions already prohibit such service).

The particular relevance of this question of who will "pick the pickers"<sup>145</sup> to concerns for the undue accretion of power by judges is that, if it is determined that neither the executive nor the legislature can name commission members out of concern for the commission's independence of judgment, then it might fall to the judiciary, as the branch not given a constitutional role in Article III appointments, to name screening commission members. More specifically, it might fall to the Chief Justice to name judges to screening commission service, consistent with his other appointment powers as head of the federal judiciary (particularly to name members of blue ribbon judicial commissions). If that were to occur, then judicial service on judicial screening commissions would raise compelling concerns for judicial self-selection,<sup>146</sup> where the judiciary would be naming commission members who in turn would be recommending judicial candidates. This would be unacceptable for the Article III system, though it is largely descriptive of what happens in the appointment of magistrate and bankruptcy judges today.

Other questions for potential impacts of judges' screening commission service on individual independence interests are highlighted in Part (3), below, noting possible impacts on judicial integrity and impartiality attendant to undue accretion of power by judges.

ii. Concern for accountability of judges' screening commission service

Another concern presented by the accretion of power by judges outside the case-or-controversy resolving realm is whether judges can be held sufficiently accountable for their extra-judicial activity.<sup>147</sup> More

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144. See *supra* part II(B).

145. See Caufield, *supra* note 104, at 163.

146. See *infra* part IV(B).

147. Peter Russell, *Toward a General Theory of Judicial Independence*, in PETER H. RUSSELL AND DAVID M. O'BRIEN, EDs., *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY* 2 (2001) ("... the growth of judicial power within long-established liberal democracies . . . raise the very opposite question of how independent a powerful judiciary

specifically, any influence or authority exercised by judges on a judicial screening commission would be hard to check through normal means of the inter-branch system. This is so because any judicial influence that was brought to bear would have operated outside of constitutionally designated realms or channels. Such exercises of power by judges could be checked only through judicial conduct proceedings, which are intra-judicial in nature, or through the comparatively rarely-used mechanism of judicial impeachment.<sup>148</sup>

Admittedly, judges can be held more accountable for service on judicial screening commissions than for behind-the-scenes consultations with appointments officials or the ABA because commission service constitutes a more open, transparent exercise of power than does informal consultation. Executive and legislative branch officials, organized interests, and the press could criticize the judges for their screening commission conduct, statements, and/or recommendations, to the extent they are disclosed. If judges are going to exercise influence and authority over judicial appointments by weighing in on the desirability of particular judicial candidates, it is preferable, as a democracy-enhancing matter,<sup>149</sup> that this power be exercised publicly so that it is subject to whatever accountability mechanisms are available.<sup>150</sup>

If judges' influence over judicial appointments is exercised privately, as currently, then that power can be used arbitrarily or abusively, or simply mistakenly, and remain wholly unchecked. As it stands, judges are not held accountable for their behind-the-scenes comments regarding judicial candidates, and those individuals who are the subject of judges' comments have no means to redress inaccurate information because the source of the information is unknown to them. Where something as significant as an Article III judgeship is at stake, it is important that candidates' merits be considered in an accountable, transparent process. Despite the potential for greater candor in informal, off-the-record consultations, behind-the-scenes inquiries of, or lobbying

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can be without undermining democracy? Here the liberal principle of judicial independence runs up against the democratic principle of accountability.”).

148. There have been thirteen judicial impeachments at the federal level to date. See Federal Judicial Center, *Impeachments of Federal Judges*, available at [http://www.fjc.gov/history/home.nsf/page/topics\\_ji\\_bdy?OpenDocument](http://www.fjc.gov/history/home.nsf/page/topics_ji_bdy?OpenDocument), (last visited June 19, 2009).

149. See, e.g., Resnik and Dilg, *supra* note 43, at 1631 (observing, “[T]he concentration of power undermines democratic governance that is committed to distributing and accounting for power.”).

150. One commentator, in responding to a draft of this Article, suggested that if judges' recommendation power had to be exercised publicly, it probably would not be exercised at all.

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by, sitting judges are too fraught with potential for unchecked bias or mistake to be an accepted part of the Article III appointments process.

Malleson reached much the same conclusion with regard to recent reforms to the U.K.'s judicial screening process, where the historic practice of secret soundings with unnamed judges was akin to Article III judges' behind-the-scenes consultations. Noting that, "[a]bandoning the consultation process will, inevitably, lead to the loss of a source of potentially useful information about some candidates," Malleson nevertheless concluded that "the advantages in terms of equity and public confidence are likely to outweigh that cost."<sup>151</sup>

A final concern for judges' participation in Article III screening commissions relevant to accountability principles is that judges' commission service might constitute a counter-majoritarian, rather than democracy-reinforcing, force. This is so not only because Article III judges, as unelected officials with life-tenure and salary non-diminution protections, are largely unanswerable to the public, but because judicial participation in judicial screening commissions could interfere with, or be contrary to, the popular will, which is arguably better reflected in the President's and Senate's involvement in judicial appointments. This counter-majoritarian potential would bear out to the extent that judges' evaluations of judicial candidates are grounded in professional values and preferences that depart from, or are even at odds with, public values or preferences for judges. With this in mind, some commentators have opined that "[i]n a democratic society, politically unaccountable judges should not be selected by those who are similarly unaccountable to the political process."<sup>152</sup> Concern for the counter-majoritarian potential of judges' involvement in Article III screening commissions is explored further in Part IV(B), below, in considering how best to weigh the importance of public versus professional input in judicial selection.

iii. Concern for potential impacts of extra-judicial activity on efficient exercise of Article III power

At a lesser, though not inconsequential, level of importance is concern that, as judges take on more non-Article III tasks, they have less time and energy for resolving Article III cases and controversies, with the result that their extra-judicial service might compromise their ability to fulfill their Article III responsibilities. At a minimum, there might be impacts on the participating judges' efficiency of decision-making with resulting delays in case resolutions. More significantly, there could be

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151. Malleson, *supra* note 49, at 50-51.

152. 1981 Bench and Bar Conference, *The Selection of Federal Judges and U.S. Attorneys*.

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an actual diminution in the participating judges' ability to resolve cases, necessitating docket re-allocations away from commission-serving judges. As such, non-Article III activities could impact satisfaction of Article III duties.

c. Counter-Arguments to Concern for Undue Accretion of Power by Judges

An obvious counter-argument to concern for the undue accretion of power by judges arising from judges' screening commission service is, in effect, "what's the big deal" if judges serve on Article III screening commissions at the invitation of executive and legislative branch appointments officials. Why can't the executive and/or legislature ask for and obtain judges' assistance in considering Article III appointments, by gathering judges' insights on what the "job" of judging entails and what attributes and experiences best qualify a person for the job? At bottom, how can judicial participation in Article III appointments processes be considered an undue accretion of power if it is not specifically prohibited by the Constitution and is affirmatively invited by the other branches? Couldn't, or shouldn't, judicial screening commission service instead be thought of as useful cooperation?<sup>153</sup>

The answer to these questions is that, whether or not expanded judicial activity is welcomed by the other branches, the executive and legislature are not constitutionally authorized to invite an undue expansion of power by judges. This principle is well-established in the court's separation of powers jurisprudence, where constitutional violations have been found when one branch seeks to authorize the expansion of power by another branch.<sup>154</sup>

A more persuasive counter-argument to concern for the undue accretion of power by judges might be to note that, even if judges were to serve on judicial screening commissions, they would necessarily play a relatively marginal role as compared with executive and legislative branch officials because of the constitutional allocation of Article III appointment authority. As a result, any concern for the undue accretion of power by judges is limited. The response to this, of course, is that, even if limited, undue accretion of power by judges should not be tolerated.

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153. See generally ROBERT A. KATZMANN, *COURTS AND CONGRESS* (1997).

154. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988).

### 3. Potential Threats to Judicial Integrity and Impartiality Arising from Undue Accretion of Power by Judges

The undue accretion of power by judges involved in judges' screening commission service raises related concerns for judicial integrity and impartiality. Potential threats to judicial integrity and impartiality include: (a) undermining of elevation candidates' decisional autonomy; (b) judges' undue involvement in the overtly political (indeed overtly partisan) activity of judicial appointments; and (c) judges' engagement in ideological and/or other strategic behavior as commission members.

#### a. Potential Impacts on Decisional Autonomy of Elevation Candidates

Including judges on judicial screening commissions raises questions for potential impacts on the decisional autonomy, or individual independence, of currently serving judges who are interested in elevation and whose candidacies would be reviewed by judicial colleagues on the commission.<sup>155</sup> At bottom, the question is whether judges interested in elevation could be affected by, including being motivated to curry favor with, judges known, or anticipated, to be serving on judicial screening commissions. This dynamic has the potential to influence elevation-aspirants' judicial conduct, including case reasoning and/or judicial outcomes.<sup>156</sup>

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155. Resnik, for example, has observed, "To the extent we value independent judges, unafraid of encountering popular disapproval and free from needing collegial approval, the possibility of promotion may undercut the ability of judges to feel unfettered by personal interest when rendering judgments." Resnik, *supra* note 16, at 609.

156. See, e.g., LAURENCE BAUM, JUDGES AND THEIR AUDIENCES 81-82 (2006) (discussing potential impacts of career considerations on judicial behavior). In comparing federal judges' promotion prospects with state court judges' re-election concerns in terms of potential impact on judicial decisionmaking, Baum notes that "[a]dministration officials are far more cognizant of judges' decisional records than are the voters. This is especially true in the current era. Judges can expect their records to be scrutinized closely by the presidential staff members and Justice Department officials who work on appellate nominations. As one federal judge said about those who want promotions, 'they know their votes are being watched, their decisions are being analyzed' (*Judicature* (1996) at 81). Thus, ambitious judges have reason to think about the relationship between their choices in cases and their prospects for promotion." *Id.* at 81. Nevertheless, Baum observes, "the impact of judges' decisional behavior on their prospects for promotion is both small and uncertain," and concludes, "In light of the importance of promotion to some judges, its impact on judicial behavior merits further inquiry." *Id.* at 82. See also Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 545 (1999) (observing, "Judges who want to be 'promoted'—either to the courts of appeal or the Supreme Court—have to toe the popular line or at least a line acceptable to the Senate Judiciary Committee."); Jonathan Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, n. 83 (2006) (noting, "The degree to which the

Daniel Klerman has written of threats to judicial independence posed by the possibility of judicial promotion, specifically of elevation candidates' perceived need to curry favor with judicial appointments officials.<sup>157</sup> Klerman did not, however, write in the specific context of the possibility of judicial service on judicial screening commissions. Rather, Klerman was concerned with appointments officials residing in the legislative and executive branches.<sup>158</sup> While expressing concern for the possibility of elevation candidates seeking to curry favor with executive and legislative branch officials, Klerman nevertheless acknowledged that "the typical judge's chance of promotion is so low that it is unlikely that desire for promotion affects the decisions of more than a handful of judges."<sup>159</sup>

Still, concern for sitting judges currying favor with other judges for promotion purposes has long been expressed in the literature on European civil law judiciaries, where senior judges evaluate the promotion merits of more junior judges. As Peter Russell observes, "[J]udicial independence may be threatened . . . by senior judges [*i.e.*, those higher on the judicial hierarchy] using administrative and personnel controls to direct the decision making of individual judges lower in the judicial hierarchy."<sup>160</sup> According to Russell, "[T]he danger point for judicial independence may be more in the process of promotion and career advancement than initial appointment."<sup>161</sup> He warns, "[I]f those who control career advancement within the judiciary are perceived to reward or punish a particular ideological orientation in judicial decision making, judicial independence can be seriously compromised."<sup>162</sup>

Some countries prohibit judges from serving on judicial promotion commissions specifically because of concern for potential impacts on the decisional autonomy of elevation candidates. In Canada, for example, "only initial appointments are sent to the federal committees [which are composed in part by currently serving judges] since it is thought to be inappropriate for them to scrutinize the performance of sitting judges."<sup>163</sup>

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possibility of promotion may pose a threat to judicial independence under the federal judicial system is the subject of some debate. Empirical evidence indicates that the possibility of promotion has had some influence on judicial decision-making.") (citations omitted).

157. Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 S. CAL. L. REV. 455 (1999).

158. *Id.*

159. *Id.* at 456.

160. Russell, *supra* note 147, at 7.

161. *Id.* at 16-17.

162. *Id.* at 17.

163. MALLESON, *supra* note 44, at 132.

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By contrast, in South Africa, “the Judicial Service Commission [upon which currently serving judges likewise sit] is used to promote judges to the higher ranks.”<sup>164</sup>

To avoid potential impacts on decisional autonomy, one possibility would be to have retired, rather than currently serving judges sit on judicial screening commissions to advise on desirable attributes in judges. Retired judges serving on the commissions would present less of a concern for negative impacts on the judicial independence of elevation candidates. Nevertheless, service by retired judges does nothing to redress concerns for the dominance of professional values over the recruitment and recommendation processes or for the likelihood of judicial self-replication<sup>165</sup> highlighted in Part IV(B), below.

The most significant counter-argument to concern for negative effects of judges’ screening commission service on the decisional autonomy of elevation candidates is that autonomy concerns are present for all judicial elevation candidates, no matter where the screening or selecting officials reside. So long as a currently serving judge interested in promotion is aware that he or she needs to make a favorable impression on appointments officials, whether in the executive, legislative, or judicial branch, there is potential for this awareness to affect judicial behavior. This is especially true where magistrate judges are increasingly frequently promoted to district judges, and district judges to circuit judges.

Another counter-argument to the decisional autonomy concern is that, even if judges do not play a formal role in the Article III appointments process through screening commission service, elevation candidates are well aware of the need to make favorable impressions on judicial colleagues because candidates know that judges talk with appointments officials and ABA representatives about judges’ qualifications and reputations. Thus, even absent formal participation by judges in Article III screening commissions, there are reasons for elevation candidates to be circumspect in their interactions with judicial colleagues. One response to this argument, of course, is that there is no reason to increase this circumspection through judicial service on screening commissions.

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164. *Id.*

165. *See infra* part IV(B).

b. Concern for Judges' Undue Involvement in the Overtly Political (Indeed, Highly Partisan) Activity of Judicial Appointments

Judicial participation in Article III screening commissions also raises concern for judges' undue involvement in overtly political, indeed highly partisan,<sup>166</sup> activity, in turn threatening the integrity, legitimacy, and impartiality of the federal bench (actual as well as perceived).<sup>167</sup> Critics of the use of judicial screening commissions decry the political nature of these bodies, asserting that they are no less political than the elective system; the politics have simply gone underground.<sup>168</sup> While the ABA's and other proposals seek to ameliorate the partisanship infecting judicial appointments by employing a self-consciously bipartisan model, their proposals do not eliminate the partisanship. After all, "bi-partisan rarely means nonpartisan."<sup>169</sup> No doubt, political considerations—indeed, partisan considerations—will continue to influence judicial candidate deliberations. Thus, for example, Carter's circuit judge nominating commissions, while ostensibly bi-partisan, were notoriously partisan. Even if efforts were made to more evenly balance the commissions than was true under Carter, they would still be partisan. In the absence of a reduction in partisan rancor surrounding judicial appointments, judges should not serve on Article III screening commissions.<sup>170</sup>

Moving from partisanship concerns to concerns for the role of politics in judicial appointments more generally, an important question is

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166. See, e.g., Herbert Jacob, *Conclusion to COURTS, LAW AND POLITICS IN COMPARATIVE PERSPECTIVE* 390-91 (Herbert Jacob, Doris Marie Provine, et al., eds. 1996) ("The United States arguably utilizes the most partisan selection process. Much political maneuvering surrounds the selection of both trial and appellate judges.")

167. See Resnik, *supra* note 16, at 593 ("Democracies need adjudication to be legitimate, which in turn requires that mechanisms for selecting judges be understood to be legitimate.")

168. See, e.g., Malleon, *supra* note 70, at 63 (quoting Howard Glick, *The Promise and Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 519 (1978) as observing, "The Missouri Plan has produced a selection system that is much less visible than judicial elections. Yet the insulation seems only to obscure, not remove, many important partisan features and influences in judicial selection.")

169. ASHMAN & ALFINI, *supra* note 40, at 25.

170. As referenced earlier in the text, though one of Carter's stated goals for the commission "was to remove the more blatant aspects of political patronage from the judicial selection process," MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE POLITICS OF SUPREME COURT CONFIRMATIONS* n. 29 (2d ed. 2007), the commission was criticized as too partisan, with 80 to 85 percent participation by Democrats. See, e.g., Berkson, et al., *supra* note 114; see also O'Brien, *supra* note 103, at 58-59; 1981 Bench and Bar Conference, *supra* note 152. As such, Carter's appellate judge nominating commission was neither a non-partisan nor truly bipartisan commission as called for in the current proposals. See, e.g., GOLDMAN, *supra* note 103, at 238-39.

whether judges are necessarily being unduly, or improperly, political when they participate in Article III appointments processes, specifically through judicial screening commission service. The inquiry is framed here as one of undue or improper political involvement, rather than political involvement *per se*, because it would be misguided to think of judges as removed from politics,<sup>171</sup> where a host of political science and other literature demonstrates the often political nature of judicial behavior.<sup>172</sup> Indeed, the Constitution arguably anticipates political behavior by judges, where the judicial appointments process is structured in an overtly political manner, with presidential nomination and Senate confirmation. Prospective judges often come to the attention of appointments officials through political and/or party activity.<sup>173</sup> Thus, the question is not whether it is appropriate for judges to engage in political behavior, but, rather, whether commission service constitutes undue political activity by judges. This Article concludes that it does.

Questions arise, for example, as to how judges would be integrated into the work of bipartisan screening commissions as a practical matter? This is not a question of by whom they would be appointed (addressed in Part IV(A)(2), above). Rather, hypothesizing a ten-person commission, evenly divided between Republicans and Democrats (unlike the Carter commissions, which were deservedly criticized for their partisan bias), might there be two judges serving on the commission, one who had been appointed to the bench by a Republican president and one by a Democrat? If so, then the commission's judicial members might be cast, or understood, in an overtly political, indeed overtly partisan, light, *i.e.*,

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171. See, e.g., Malleon, *supra* note 5, at 4-5:

One reason why judges have been keen to stress the apolitical nature of their work is that political activity has traditionally been associated with the partisan support for the policies of political parties. If politics is broadened beyond this narrow definition, then the political activity of the judges can be distinguished from the party system and understood in more general terms as the exercise of power by those in authority. Although judges still shun the word politics, they are increasingly willing to acknowledge that they exercise power both over individuals and the process of government. . . .

172. See, e.g., WALTER MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964); TERRI PERETTI, *IN DEFENSE OF A POLITICAL COURT* (1999); see also Barry Friedman, *The Politics of Judicial Review*, 84 *TEX. L. REV.* 257, 264 (2005) (noting, "There clearly is a longstanding and central societal belief that law and politics are not the same and should not be considered as such. At the same time, however, history suggests that a strict separation of law and politics is and always has been implausible."); GUARNIERI & PEDERZOLI, *supra* note 85, at 4 ("The attention scholars have increasingly paid to the actual operation of the judicial process has helped to shed light on the inherent political character of the role judges perform, and opened the way to recognize courts as policy makers.").

173. See Herbert Jacob, *Courts and Politics in the U.S.*, in *COURTS, LAW AND POLITICS IN COMPARATIVE PERSPECTIVE*, *supra* note 166, at 19; see also Russell and O'Brien, *supra* note 147.

Judge A is the Republican and Judge B is the Democrat, with ideological and candidate preferences anticipated accordingly. This possibility underscores the potentially, and even likely, undue political nature of judges' participation in bi-partisan judicial screening commissions, again counseling against such service.

c. Potential for Judges' Ideological and/or Other Strategic Behavior as Commission Members

Related to this last concern for judges' undue political and/or partisan involvement in judicial appointments is concern for judges' potentially ideological and/or other strategic behavior in evaluating judicial candidates while serving on judicial screening commissions, whether consciously done or not. Might it be natural for judges serving on a screening commission to more highly evaluate prospective colleagues with whom they share judicial philosophies, again whether conscious or not? Concern for this potential could be addressed in part by a rule prohibiting judges from participating in the screening of candidates for judgeships within their own circuit. Even so, there would remain a larger concern for ideological evaluation of Article III candidates, with implications for the judiciary's overall composition.<sup>174</sup>

Closely related to the potential for judges' ideological evaluation of judicial candidates is the question of to what extent judges serving on Article III commissions might act strategically,<sup>175</sup> or otherwise indirectly, in order to further the selection of judges sympathetic to their particular judicial philosophies.<sup>176</sup> This could be a factor, for example, in judges' assessments of candidate references and writing samples.

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174. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (positing, in the context of case decisions, that judges are primarily motivated by their values and policy preferences (or "attitudes")). There is no reason to think that this attitudinal model of judicial behavior is limited to case decisions and would not also apply to judges' service on judicial screening commissions and attendant evaluation of judicial candidates.

175. See, e.g., LEE EPSTEIN & JACK KNIGHT, *CHOICES JUSTICES MAKE* (1998) (articulating a strategic behavior analysis of judicial conduct as a challenge to a perceived over-emphasis on the attitudinal model); see also Micah Schwartzman, Essay, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008). While Schwartzman's work is focused on judges' case decision-making and legal opinion writing, one question for this project is how ideas about judicial sincerity might apply to judicial behavior on judicial screening commissions.

176. In an analogous fashion, commentators have noted the potential for political or other strategic behavior in district judge appointment of magistrate judges. See, e.g., Smith, *supra* note 21, at 229-30 (reasoning, "Because the district judges are the locus of power in the magistrate selection process, political battles occur when the judges establish the committees and oversee the panelists' deliberations. The evident influence of district judges over every stage of the appointment process indicates that merit

Short of actual strategic behavior by judges, to what extent might the public (and other interested parties) perceive judges serving on these commissions as acting strategically, or be concerned about the potential for their doing so, with consequences for the public's trust and confidence in the judges who are appointed through this process and in the larger judiciary? Answers to these questions of judges' actual and perceived strategic behavior on the commissions are not known, where the most significant study of judicial behavior on judicial screening commissions was conducted nearly forty years ago and did not address these particular concerns.<sup>177</sup>

For some scholars, too much emphasis has been given to the potential for ideological and/or strategic behavior by judges. These commentators understand judges as taking very seriously their obligation to act as neutral arbiters, applying law to facts, and not as engaged in strategic behavior.<sup>178</sup> In the end, the most accurate model is likely one in which judges act both genuinely and strategically. Vicki Jackson integrated these potentials for ideological and non-ideological behavior in the case decision context when she observed,

To think that ideological predisposition is irrelevant in deciding cases that involve hotly contested constitutional or statutory questions is to ignore what we know about judicial decisionmaking; to think that judging is only about a judge's political or policy attitudes is to miss the constraining force of law and of the judicial role.<sup>179</sup>

In so stating, Jackson offers a properly nuanced understanding of the nature of judicial behavior.

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A final question on potential impacts on judicial integrity and impartiality of judges serving on Article III screening commissions relates to compliance with the governing judicial conduct code. While a close examination of the ethics code seems misguided, where the code

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selection for magistrates involves the kind of power conflicts and maneuvering beyond public scrutiny that are characteristic of political interactions within the judiciary.”).

177. *But see* RICHARD A. WATSON & RANDAL G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* (1969) (undertaking first comprehensive analysis of actual workings of state judicial selection commissions, including question of whether judicial participation on the commissions intimidates non-judicial commission members).

178. There is certainly the possibility that the creation of an open forum for judicial participation in Article III candidate screening might exacerbate the public's perception of judges' strategic behavior far disproportionate to reality. This might then counsel in favor of keeping judges' input behind the scenes. *Id.*

179. *See* Jackson, *supra* note 5, at 981.

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could be amended to reflect new norms of judicial involvement in judicial appointments processes, what is relevant are the larger principles animating the conduct code—for judicial independence, integrity, impartiality, and non-involvement in political activity. All of these principles are implicated by judges' screening commission service and counsel against judicial involvement in Article III screening commissions.

*B. Concern for Potential Negative Impacts on Bench Composition*

The question of judicial participation in Article III screening commissions also raises concerns for: (1) how best to weigh the importance of public versus professional input in the evaluation of judicial candidates; and (2) whether judicial involvement in the candidate screening process might undermine bench diversity by inviting the possibility of judicial self-replication.

1. How Best to Weigh the Importance of Public Versus Professional Input in Judicial Candidate Evaluation

The question of how best to weigh the importance of public versus professional input in evaluating judicial candidates raises questions of who is best able to define what the job of judging entails, and who is best able to identify desirable attributes in prospective judges. Is it the public and publicly-elected and accountable officials on the one hand, or currently serving judges on the other?

One response, of course, is that judges know best what the job of judging entails, what qualities and experiences make for the best judges, and how best to evaluate individuals' likely success as judges because judges have performed the very job at issue and have observed other judges in their job performance.<sup>180</sup> Currently available evidence has not

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180. See Jackson, *supra* note 116, at 152 (“[L]awyers and judges often have better access to a network of information regarding individual candidates than would lay persons and a better understanding of how to interpret that information. Although they may not themselves know the qualifications of individual candidates, they are often connected, either through law school, practice, or bar association ties, to colleagues who do. They also have a ‘frame of reference’ about how these various qualifications play out in the real world. For these reasons, their mandated presence on the committee is justified.”); see also *id.* at 151-52 (“I believe there are good reasons . . . for mandated inclusion of lawyers and judges on the committee. First, . . . they do have specialized knowledge that is important: an understanding of the role that judges play and of the attributes necessary for a judge to fulfill that role. While they may not know the individual candidates, even those lawyers who do not generally practice before courts have an understanding of what they would like to see in a judge and an appreciation for the damage that a biased judge can do to a political system.”). Accord Beth M. Henschen, Robert Moog & Steven Davis, *Judicial Nominating Commissioners: A*

borne this out, however. Rather, as Malleeson observes in synthesizing the literature, “[T]he research seems to suggest that the appointment process makes little difference to the competence of the judges appointed.”<sup>181</sup>

Despite the absence of empirical evidence demonstrating that higher caliber appointments result from judges’ participation in the judicial selection process, there remains a perception that judges may have unique knowledge of a particular candidate’s temperament, intellectual ability, and work ethic if, for example, the candidate appeared before the judge, served alongside the judge as a judge, or worked with the judge as a lawyer. If the candidate has already served as a judge, then other judges might be able to speak knowledgably of the candidate’s judicial demeanor, fairness, open-mindedness, and/or collegiality, even of his or her approach to deciding cases. Indeed, there might be a class of information known only to a candidate’s judicial colleagues if the candidate has already served as a judge that would be important in considering the candidacy’s merits.<sup>182</sup> Thus, for example, whether a candidate delegated a disproportionate amount of work to his or her law clerks might be apparent only to his or her colleagues (and law clerks) and not to outside observers. Absent judicial participation in the candidate screening process, this information might go undiscovered.<sup>183</sup> (This type of information is currently conveyed, if at all, through judges’ behind-the-scenes communications with executive, legislative, and/or ABA representatives.)

Still other commentators dispute whether there is a class of information known only to judges about other judges.<sup>184</sup> These commentators assert that anything of significance about a candidate’s

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*National Profile*, 73 JUDICATURE 328, 329 (1990) (merit selection commission proponents commonly emphasize professionals’ expertise in evaluating and selecting judicial candidates).

181. MALLEESON, *supra* note 44, at 141 (“One of the main justifications in the U.S. for adopting a commission over an electoral system is that the use of informed lay people, lawyers and judges would improve the legal skill and intellectual calibre of the bench. However, there does not appear to be any strong evidence to support this contention.”); *id.* (quoting M. VOLCANSEK & J. LAFON, JUDICIAL SELECTION: THE CROSS-EVALUATION OF FRENCH AND AMERICAN PRACTICES 139 (1988), as likewise noting, “There is no evidence to support the proposition that any one of these systems produces a ‘better judge’ than do the others. Academic background and prior judicial experience tend to be approximately the same for judges selected under each system.”). Malleeson also cites a 1995 study to the same effect, *i.e.*, selection method does not affect judicial quality. *Id.* (quoting Peter D. Webster, *Selection and Retention of Judges: Is there one ‘Best Method’?*, 23 FLA. ST. UNIV. L. REV. 1, 13 (1995) (“[E]mpirical work suggests that the method of selection has little if any overall effect on the quality of judges.”)).

182. Clark, *supra* note 4, at 1195.

183. *Id.*

184. *Id.*

qualifications, including past judicial performance, will likely “out” through means other than the formal screening process, including through the press, interest groups, or other appointments officials.<sup>185</sup> As a result, they argue, the appointments process is not dependent on judges’ participation.<sup>186</sup>

On this very question of the transmission of sensitive information by judges to judicial appointments officials, some have suggested that judges’ behind-the-scenes communications regarding judicial candidates are preferable to open, formal commission participation because the former can be more candid and less subject to politicization than the latter.<sup>187</sup> It is the very private, confidential, and informal nature of the behind-the-scenes communication that enables the disclosure of valuable information, including unvarnished candidate assessments, especially vis-à-vis elevation candidates.<sup>188</sup> If judges’ assessments of candidates, especially elevation candidates, had to be conveyed through a formal, rather than informal, process, even if the judges’ input was deemed confidential, it is anticipable that concern for leaks to the press, public, and/or to the candidates themselves would result in less candor and increased potential for falsely positive, circumspect, or otherwise unhelpful candidate assessments.

Returning directly to the question of how best to weigh the importance of professional versus public input on judicial candidates, judges do not necessarily know what attributes are most important in judicial candidates because the public, and not judges, are the ultimate consumers of judges’ work. Indeed, technical and professional knowledge, about which judges serving on the commissions might be thought the best assessors, might not be the most significant qualities in a judge. Rather, it may be personal qualities, including those related to strength of character and compassion, that the public deems most important in judicial candidates.<sup>189</sup> Surely, judges are not uniquely

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185. *Id.*

186. *Id.* at 1233-34.

187. *See, e.g.,* Alan Morrison, *Judges and Politics: What to Do and Not to Do About Some Inevitable Problems*, 28 JUST. SYS. J. 283, 297 (2007) (“Judges are also frequently consulted by judicial nominating commissions . . . about whether an individual should be considered for a judicial appointment.”). Morrison concludes, “Assuming the judge has relevant information, it would disserve the ends of justice for the judge to be precluded from answering. . . .” *Id.*

188. *But see* MALLESON, *supra* note 44, at 138. There, Malleeson notes that once a judicial appointments commission was established in Ontario to replace the previous secret soundings with unnamed judges, candid information about judicial candidates was shared by sitting judges regarding judicial candidates as soon as the commissions had assured participants of the complete confidentiality of the process.

189. *See, e.g.,* Bell, *supra* note 85, at 41.

positioned to evaluate judicial candidates according to these latter criteria.<sup>190</sup>

Survey findings on desirable judicial attributes emphasize strength of character and compassion. Ashman and Alfini's 1974 study reported state judicial nominating commissioners' rankings of most desirable judicial candidate attributes as follows: (1) integrity; (2) experience, trial experience, legal experience; (3) legal ability; (4) good reputation among fellow lawyers; (5) judicial temperament; (6) good general reputation in community; (7) fairness; (8) compassion, patience, humility; (9) honesty; and (10) moral character.<sup>191</sup> The top ten disqualifying attributes were found to be: (1) dishonesty; (2) lack of integrity, not trustworthy; (3) immorality, lack of moral character, bad reputation; (4) history of alcoholism; (5) emotional or mental instability; (6) poor health; (7) poor reputation as a lawyer; (8) breach of ethics; (9) arrogance, conceit, superiority complex, lack of compassion, egomaniac, pomposity, overbearing, doctrinaire rigidity, dictatorial attitude; and (10) lack of fairness, arbitrariness, narrow-mindedness.<sup>192</sup> While these findings include both personal and professional attributes, they are all well within the ability of non-judges to evaluate. The combination of lawyer and layperson membership on a judicial screening commission would suffice to evaluate judicial candidates according to these qualities.

Another way to think about the question of how best to weigh the importance of professional versus public input in judicial candidate evaluation is to understand the question as presenting another type of concern for the counter-majoritarian nature of judges' participation as unelected, unaccountable officials.<sup>193</sup> How publicly or politically accountable do we as a society want the Article III appointments process to be?<sup>194</sup> To the extent that a publicly or politically accountable appointments process is desired, that suggests limiting or eliminating judges' input. To the extent that a more insulated, less accountable appointments process is desired, that might suggest less concern about giving judges a role in screening judicial candidates. The more that

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190. John Bell makes this point in the context of the U.K. judiciary, *i.e.*, that laypeople "can take an informed view." *Id.* at 40.

191. ASHMAN & ALFINI, *supra* note 40, at 247, app. 2-B.

192. ASHMAN & ALFINI, *supra* note 40, at 248-49, app. 2-C.

193. Accord Henschen, Moog & Davis, *supra* note 180, at 329 (opponents of merit selection argue that commissions enable politics to go underground). These concerns were addressed in part in the earlier section on accountability concerns arising from the undue accretion of judicial power. *See supra* Part IV(A)(2)(b)(ii).

194. Jackson, *supra* note 116, at 150 ("While allowing one unelected group of individuals to choose their own successors with minimal input from a political authority may actually be a good idea from the standpoint of ensuring that qualified judges ascend to the bench, it is not a system that the public is likely to regard as legitimate.").

currently serving judges are involved in judicial candidate screening, the more akin the process becomes to a professional hiring or promotion review than a publicly participatory, publicly responsive process.

A final question to be considered in weighing the importance of professional versus public input in judicial screening commissions is whether judges might dominate the opinions and/or votes of non-judges serving on the commissions. This was one of the concerns animating the AJS's recommendation against judges' service on judicial screening commissions in its study of Carter's circuit judge nominating commissions.<sup>195</sup> The concern articulated there was that non-judicial, including lay and lawyer, commission members might be unduly deferential to the opinions expressed by judicial members, thereby squelching the airing of diverse opinions, considered one of the central benefits of the judicial screening commission model.<sup>196</sup> To the extent that judicial members dominate commission deliberations, lay and lawyer insights might be lost.<sup>197</sup>

It is specifically with concern for judges' potential dominance over other screening commission members that judges serving on Scotland's judicial appointments commission are not given primacy in interviews with judicial candidates.<sup>198</sup> Another step taken to minimize judges' potential dominance over other commission members in Scotland, and to encourage lay members' input, is the sequencing of lay members' candidate assessments prior to those of the judges and lawyers on the commission.<sup>199</sup> This arrangement is thought to promote lay members' comfort in expressing themselves in commission deliberations.<sup>200</sup>

In the U.S., one study (albeit from 1969) considered this question of judicial dominance on judicial screening commissions and found that judges' presence on screening commissions tended to overshadow, or otherwise marginalize, the participation by non-judicial members.<sup>201</sup> This is Watson and Downing's study of Missouri's judicial nominating

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195. See Berkson, *et al.*, *supra* note 114.

196. Malleon, *supra* note 49, at 48-49 (observing that lay members "are the conduit through which new approaches and fresh ideas in appointments are brought into the commission," and that, "as outsiders to the legal establishment, the lay members may defer inappropriately to the legal insiders, particularly senior judges.").

197. *Id.* at 48-49.

198. See Alan Patterson, *The Scottish Judicial Appointments Board*, in *APPOINTING JUDGES*, *supra* note 5, at 21-22.

199. *Id.* at 22.

200. *Id.*

201. WATSON & DOWNING, *supra* note 177, at 318-26.

commissions.<sup>202</sup> A more recent study found anecdotal evidence echoing this earlier finding.<sup>203</sup>

By contrast, Ashman and Alfini's 1974 study of state judicial nominating commissions did not find undue deference to, and/or domination by, judges.<sup>204</sup> Noting "[t]here is much concern expressed by the commentators that the lay members are either particularly susceptible to undue influence or all are mere ciphers who meekly defer to the political demands of the executive, the authoritative tone of the judicial members, or the glibness and legal expertise of the lawyer members," Ashman and Alfini concluded, "The open-ended responses to our questionnaires reveal that very few lay members felt dominated by the lawyers and that equally few lawyer members felt the lay members to be superfluous." Ashman and Alfini nevertheless acknowledged that judicial dominance could be a problem, where one Missouri commissioner complained that there was a "tendency for the Supreme Court member [on the commission] to stifle the arguments for or against a particular candidate." This commissioner went on to note, "Most attorneys on the commission have been trial attorneys, and the awe, respect or dominance of judges tends to become built in."<sup>205</sup> Still, Ashman and Alfini reported that they had "received generally favorable comment[s] about the role of" judges in another state's judicial nominating commission (Colorado).<sup>206</sup> Given the dated nature of these studies, I echo Malleson's call for more research on this question of judicial domination should judicial participation on Article III screening commissions ever be seriously considered.

In the end, the question of which is preferable—professional or public involvement in the judicial screening process—is admittedly an artificial one, where it need not be an either/or proposition, but, rather, both types of participation could be integrated into the Article III screening process. Nevertheless, judicial participation raises concerns for negative impacts on bench composition, specifically, bench diversity, to which I turn in the following section.

## 2. Potential Undermining of Bench Diversity

Judges' participation in judicial appointments processes raises concerns for the possibility of judicial self-replication, undermining the

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202. *Id.*

203. Henschen, Moog & Davis, *supra* note 180, at 334 ("Additional dissatisfaction was occasionally aimed at the judge-chairpersons (of those commission where this is applicable) who are often thought to be overbearing and dictatorial.").

204. ASHMAN & ALFINI, *supra* note 40, at 25.

205. *Id.* at 26.

206. *Id.*

goal of bench diversity. The concern is that judges could, intentionally or unintentionally, reproduce themselves by recruiting and recommending similarly experienced, similarly credentialed, and/or similarly able candidates as themselves, thereby compromising the diversification of the bench. To the extent that the lower Article III bench remains disproportionately white and male—where 84.1 and 87.7 percent of sitting district and circuit judges are white, and 81.3 and 79.2 percent of sitting district and circuit judges are male—judicial self-replication has serious implications for the diversification of the bench by race and sex.<sup>207</sup>

To explore the question of whether judicial participation in judicial screening commissions might undermine bench diversity, we might look to how the race and sex of magistrate and bankruptcy judges compare with that of the Article III judges who appointed them. Absent specific information on who appointed whom, I use aggregate statistics for active judges to compare the race and sex distribution of magistrate, district, bankruptcy, and circuit judges. Current data on percent composition by race and sex for active magistrate judges are as follows: 13.3 percent non-white and 27.7 percent female.<sup>208</sup> Comparative percentages for active district judges are: 20.8 percent non-white and 26.0 percent female. Percent composition by race and sex for bankruptcy judges and circuit judges are as follows: 5 percent non-white and 23.9 percent female for bankruptcy judges,<sup>209</sup> and 15.8 percent non-white and 28.6 percent female for circuit judges.<sup>210</sup> With both magistrate and bankruptcy judges, the percent non-white is substantially less than that of their appointers, though the same is not true for sex. This data may be suggestive of a potential undermining of racial diversity through reliance on appointment by Article III judges.<sup>211</sup> Of course, we would need to

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207. Federal Judicial Center, The Federal Judges Biographical Database, *available at* <http://www.fjc.gov/public/home.nsf/hisj> (last visited June 22, 2009). According to the FJC, of the 1004 sitting district court judges, 845 are white and 817 are male. Of the 270 sitting circuit judges, 237 are white and 214 are male. *Id.*

208. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *The Judiciary Fair Employment Practices Annual Report* (2007).

209. *Id.*

210. The source for the district and circuit judges is the Federal Judicial Center. Judges of the United States Courts, <http://www.fjc.gov/public/home.nsf/hisj> (last visited June 13, 2009). As noted in the text, the percentages are stated in terms of active district and circuit judges, and not senior judges, nor a combination of active and senior judges. Reliance on active judge data is based on an understanding that the district and circuit judges who select magistrate and bankruptcy judges are on active, and not senior, status.

211. Lastly, on the potential for judicial membership on Article III screening commissions to undermine bench diversity, it is important to bear in mind that judicial screening or nominating commissions to date have themselves been overwhelmingly white. Henschen, Moog & Davis, *supra* note 180, at 330 (observing, “While there have been slight increases in the numbers of minority commissioners, as a group, judicial

know much more about the relevant applicant pools, including their race, sex, and qualifications, and the particular judges involved in their selection, to draw any valuable conclusions about the effects on bench diversity of judges serving as judicial screeners.

Nevertheless, concern for judicial self-replication has prompted the German government to reject the idea of judicial appointments commissions composed predominantly of judges.<sup>212</sup> These concerns have played out elsewhere as well, where there has been less than promising experience at the state and other national levels with judicial participation in judicial screening bodies leading to diversification of the bench by race, sex, class, and/or professional background.<sup>213</sup> Indeed, one of the central lessons to be taken from Carter's circuit judge nominating commission was its near-total failure to promote bench diversity until the commission itself became more diverse in membership (bearing in mind, of course, that Carter's commissions did not include judges).<sup>214</sup> Again, Malleon questions whether these concerns are supported by empirical evidence or whether it is simply the case that commissions produce no more or less representative judiciaries than other selection methods.<sup>215</sup>

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nominating commissioners remain overwhelmingly white." The same authors found the percentage of minorities among lawyer commission members to be lower than that among lay members.). If this pattern were to repeat at the Article III screening commission level, the effects of participation by sitting judges might not be markedly different from that of the disproportionately white non-judicial, but professional, *i.e.*, lawyer, commission members. That said, where the percentage of minorities among non-professional members of state judicial screening commissions is typically higher than that among professional members, it is not an insignificant concern that including judges as well as lawyers on the Article III commissions might dilute the racial diversity of the commissions themselves and undermine progress made in the last several decades to diversify the federal judiciary.

212. See Bell, *supra* note 85, at 47.

213. See, e.g., Malleon, *supra* note 49, at 43.

214. See, e.g., Resnik, *supra* note 100, at 231-32; see also Mary L. Clark, *Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other 'Human Rights' Record*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1131 (2003). Accord ASHMAN & ALFINI, *supra* note 40 at 227-28 (underscoring importance of representativeness of commission membership).

215. MALLEON, *supra* note 44, at 142-43 (noting, "The most that can be said from the U.S. evidence, therefore, is that the make-up of the commissions probably has some effect on the make-up of the bench, but how much and in what way is not yet known. Indeed, since more representative commissions are themselves a relatively new phenomenon, it may be some years before there is sufficient data on their judicial appointment patterns for this evidence to emerge."); see also Malleon, *supra* note 70, at 61-62. Malleon observes:

There is similarly no clear consensus amongst commentators as to the effect of the commissions in terms of the representativeness of the bench. Some suggest that the selection method has no effect, some conclude that women and minority groups do better under a system of exclusive executive appointment and some suggest that commissions provide a better representative balance. The AJS argues that: 'women and minorities will do as well or better under

Comparative experience suggests that success in diversifying the bench depends not only on *who* is defining the evaluation criteria, but *how* the criteria are defined.<sup>216</sup> In the U.K., where judges retain strong connections with their former law offices, judges' participation in the judicial screening process has led to a high degree of self-replication, where a narrow band of attributes and experiences have been thought to qualify a candidate for the bench.<sup>217</sup> As Malleon observes in reflecting on U.K. judicial appointments processes, "The notion that selection processes unfairly advantage candidates who are most similar to past appointees and the selectors themselves is not a novel one."<sup>218</sup>

One element in the definition of evaluation criteria that might become distorted through judges' participation on judicial screening commissions is the valuation of traditional litigation experience, where judges are likely to emphasize that factor. At the same time, judges serving on judicial screening commissions might undervalue other types of practice experiences that are not courtroom- and litigation-oriented, such as client counseling and transactional work. An obvious counter-argument to concern for over-emphasis on courtroom experience and litigation skills is that federal judges supervise courts and litigation, and so it is desirable that these skills be emphasized in candidate assessments. A further argument is that judges would be joined on the

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merit selection than under party selection.' A study carried out by the Fund for Modern Courts in New York City went further and concluded that more women and minorities were selected using merit commissions than any elective system. Those who suggest that commissions make a difference to the type of judges appointed, or at least potentially do so, argue that an important variable is the make-up of the commission. They claim that ensuring a representative balance of commission members is the way to encourage greater representativeness amongst the judiciary. Others have concluded that the composition of the nominating commission is only one variable amongst many which may affect who is ultimately appointed.

*Id.*

Malleon notes, "Once again, there is little empirical evidence which seeks to isolate this one variable and determine what effect, if any, it has on the make-up of the bench." *Id.* Malleon goes on to conclude, "the very fact that there can be such a range of views suggests that the overall effect is not very great one way or the other." Rather, "it is likely that if the use of commissions had produced a very significant change in the make-up of the bench, there would be less scope for such a diverse range of opinions about their effects." *Id.*

216. See generally Kate Malleon, *Rethinking the Merit Principle in Judicial Selection*, 33 J.L. SOC'Y 126, 137-38 (2006) (asking, "On what basis do selectors determine that certain types of candidate are likely to demonstrate merit? The crude answer is that it is those who are most similar to people who are already judged to be successfully fulfilling the functions of the post. In selection systems such as for the judiciary, where those doing the job are part of the selection process, the preference constitutes both replication and self-replication.").

217. *Id.*

218. *Id.* at 137.

screening commissions by non-judicial actors, who might value different candidate attributes, and so judges' likely emphasis on litigation skills would be one of several factors brought to bear in candidate evaluations. That said, to the extent that judges dominate the screening bodies' deliberations, their emphasis on litigation skills might well be given disproportionate effect.

Related to these concerns for judicial self-replication and over-emphasis on litigation experience, judicial participation in the judicial screening process presents the potential for, and for some, the distinct threat of, the over-professionalization of the bench. The concern here is that professional identity, values, concerns, and connections might be emphasized at the expense of public values and concerns. Some have gone so far as to raise the specter of a "self-perpetuating oligarchy" if judges were to serve as judicial screeners.<sup>219</sup>

Significant attention has recently been given to this question of the over-professionalization of the bench, where commentators express concern that every one of the currently serving U.S. Supreme Court justices had been serving on the U.S. Courts of Appeal at the time of nomination to the Supreme Court.<sup>220</sup> The concern, in essence, is for the lack of diversity of background of those on the bench and for the decisional autonomy of those interested in promotion.<sup>221</sup> While there has been some diversification of the Article III bench by race and sex in recent decades, beginning most significantly with the Carter administration, the practice of drawing Supreme Court candidates exclusively from the courts of appeal has resulted in there being no currently serving Supreme Court justice with substantial political, business, or other non-judicial background, apart from academic and government service. This narrowing of backgrounds raises concerns in turn for judges' appreciation of the public's experiences and concerns. If judges come from an increasingly narrow band of experience and exert a degree of influence over screening deliberations disproportionate to their membership, as Watson and Downing's study suggests, then judges serving on Article III screening commissions might contribute to an even further narrowing of the backgrounds of those joining the bench.

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219. STEVENS, *supra* note 56, at 177 (observing, "There is a danger that judges, with their influence on what is effectively an appointing committee, will be seen by their critics as representing a self-perpetuating oligarchy.").

220. Indeed, Chief Justice John Roberts spoke to this issue just recently, embracing the phenomenon as a good one. Adam Liptak, *Judging a Court with Ex-Judges Only*, N.Y. TIMES, Feb. 17, 2009. Lee Epstein has expressed concern for this phenomenon, Lee Epstein, *et al.*, *Circuit Effects*, PENN. L. REV. (forthcoming 2009), as have Vicki Jackson, Jackson, *supra* note 5, and Terri Peretti, Peretti, "Where Have All the Politicians Gone? Recruiting for the Modern Supreme Court," 91 JUDICATURE 112-22 (2007).

221. See *supra* part IV(A)(3)(a).

In addition to these self-replication and over-professionalization dangers, Bell adds that judges in the U.K. and European judicial appointments systems tend to make conservative, or cautious, candidate recommendations based largely on seniority.<sup>222</sup> None of these tendencies—toward self-replication, professionalization, or seniority—promote the diversification of the bench by race or sex (or otherwise). Rather, they counsel further against judicial service on judicial screening commissions.

## V. CONCLUSION

Despite the prevalence of other governance systems' reliance on currently serving judges to recruit, screen, recommend, and even name judicial candidates, this Article concludes that judges should not serve on Article III screening commissions. Judicial service on these commissions presents a range of concerns, including those for undue accretion of power by judges and negative impacts on bench composition, that outweigh any potential benefits, which might involve increased institutional comity and parity and more professional input on desirable attributes and experiences in judges.

This recommendation against judges serving on Article III screening commissions might seem to tilt at windmills, not only because no one has suggested that judges be included in the Article III screening commissions, but also because judges already participate actively in Article III appointments, albeit through behind-the-scenes consultations that are unlikely to cease. Nevertheless, given growing reliance on judges' participation in judicial appointments processes in other governance systems, the time is ripe to consider whether judges should be given a formal role in the Article III appointment process. The answer is no.

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222. Bell, *supra* note 85, at 37.

### Appendix A

#### Judges' service on judicial screening commissions in the states<sup>223</sup>

Approximately thirty-four states use judicial screening commissions at one or more court levels. Of these, nineteen states rely on judges' service as members of these commissions:

Alabama	One judge among five to nine members (depending on county court system)
Alaska	One judge among seven members
Arizona	One judge among sixteen members
Colorado	One judge among eight to fourteen members (depending on court level)
D.C.	One judge among seven members
Idaho	Two judges among seven members
Indiana	One judge among seven to nine members (depending on court level and county)
Iowa	One judge among six to fifteen members (depending on court level)
Kansas	One judge on district court nominating commission, but no judges on supreme court nominating commission
Kentucky	One judge among seven members
Missouri	One judge among five to seven members (depending on court level)
Montana	One judge among seven members
Nebraska	One judge among nine members
Nevada	One judge among seven to nine members (depending on court level)
New Mexico	Three judges among fourteen members
North Dakota	Three judges and/or lawyers among six to nine members (depending on court level)
South Dakota	Two judges among seven members
Utah	One judge among seven members
Wyoming	One judge among seven members

Source: American Judicature Society, *Judicial Merit Selection: Current Status* (2008), at Tables 1 & 2. The judicial nominating commission for the District of Columbia is currently chaired by a U.S. District Judge, but has been led by non-judges in the past.<sup>224</sup>

223. Current as of July, 2009.

224. See, e.g., *Kathryn Oberly named to District of Columbia Court of Appeals*, LEGAL TIMES, Jan. 2009, at A6.

Of these nineteen states, thirteen name their chief justice to the commission. The Chief Justice typically serves as an *ex officio*, or non-voting, member.

Alaska	Chief Justice serves <i>ex officio</i>
Arizona	Chief Justice serves <i>ex officio</i> as chair of commission and votes in case of tie
Colorado	Chief Justice serves <i>ex officio</i> <sup>225</sup>
Idaho	Chief Justice serves as member of commission
Indiana	Chief Justice chairs <i>ex officio</i>
Kansas	Chief Justice or district judge appointed by Chief Justice chairs <i>ex officio</i>
Kentucky	Chief Justice serves <i>ex officio</i>
Missouri	Chief Justice serves <i>ex officio</i>
Nevada	Chief Justice serves <i>ex officio</i>
New Mexico	Chief Justice serves as member of commission
North Dakota	Chief Justice serves as member of commission
Utah	Chief Justice serves <i>ex officio</i>
Wyoming	Chief Justice chairs <i>ex officio</i> and votes in case of a tie

Source: *Id.* at Table 2. In at least three of the nineteen states, a judge other than the chief justice serves as an *ex officio* member of the screening commission:

Alabama	a judge serves <i>ex officio</i>
Iowa	a senior supreme court member serves <i>ex officio</i>
Nebraska	a supreme court justice serves <i>ex officio</i>

Source: *Id.* at Table 2.

Fifteen states have judicial screening or nominating commissions with no judges serving as members:

Connecticut	
Delaware	
Florida	(explicitly bans judges from membership on judicial nominating commissions) <sup>226</sup>
Georgia	
Hawaii	
Kansas	(no judges on supreme court nominating commission, though Chief Justice (or a district judge appointed by the Chief Justice) chairs district judge nominating commission)

225. In Colorado, the chief justice also appoints the lay members of the judicial nominating commission. Colorado State Judicial Branch, Judicial Nominating Commissions, [http://www.courts.state.co.us/Courts/Supreme\\_Court/Nominating.cfm](http://www.courts.state.co.us/Courts/Supreme_Court/Nominating.cfm) (last visited June 19, 2009).

226. Fla. App. Stat. § 43.291(b)(2) (2009).

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Maryland  
Massachusetts  
Minnesota (no judges on supreme court nominating commission)  
New Hampshire  
New York (nominating commission operates only for the New York  
Court of Appeals)<sup>227</sup>  
Oklahoma  
Rhode Island  
Tennessee  
Vermont

Source: *Id.* at Tables 1 & 2.

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227. Although judges do not sit on the judicial screening commission in New York, the chief judge of that state's highest court names four of the commission's twelve members. The Task Force on Judicial Selection, *Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York*, 58 THE RECORD 374, 380 n.29 (2003).

## Appendix B

### Judges' roles in a sampling of other leading countries' judicial selection processes<sup>228</sup>

Set forth below are highlights of judges' roles in judicial selection processes in a sampling of other leading countries.

#### Argentina

The judicial appointments process for Argentina's highest court resembles that for the Article III judiciary insofar as the president nominates a candidate, who must then receive senate consent, albeit by a two-thirds majority.<sup>229</sup>

Unlike the appointments process for the highest court, the president is limited with respect to lower court nominees to selecting from "a list of three candidates submitted by the Council of the Magistracy, with the consent of the Senate."<sup>230</sup> The council originally had twenty members, including the president of the supreme court and four national judges, but was reformed in 2006 to include thirteen members, with three judges and no supreme court justices.<sup>231</sup>

#### Australia

Judicial appointments are made by the Governor-General in Council, the federal cabinet, in accordance with the recommendations of the attorney general. "[T]here is no public canvassing of the names officially being considered until an appointment is made."<sup>232</sup> Indeed, the

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228. Current as of July, 2009. For an exhaustive survey of judicial selection systems around the world, see Kelly J. Varsho, *Symposium: Emerging Issues in Election Law: Comment: In the Global Market for Justice: Who is Paying the Highest Price for Judicial Independence?* 27 N. ILL. U. L. REV. 445, 492-518 (2007). Nuno Garoupa and Tom Ginsburg recently published two pieces looking at the roles of judges in judicial selection, promotion, and discipline processes, specifically through their service on judicial councils. These pieces also include highlights of different countries' judicial selection systems. Nuno Garoupa and Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103 (2009); Nuno Garoupa and Tom Ginsburg, *The Comparative Law and Economics of Judicial Councils*, 27 BERKELEY J. INT'L L. 53 (2009).

229. CONST. ARG. § 99(4).

230. *Id.*

231. Law No. 24937, Jan. 6, 1998, B.O. 2; Law No. 26080, Feb. 22, 2006, B.O. 2; see Alejandro M. Garro, *Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions*, 45 DUQ. L. REV. 409, 416-20 (2007).

232. A. R. Blackshield, *The Appointment and Removal of Federal Judges*, in THE AUSTRALIAN FEDERAL JUDICIAL SYSTEM 62, 426 (Brian Opeskin & Fiona Wheeler eds., 2000).

only consultation that is statutorily required is by the attorney general with the state attorneys general in the event of a high court vacancy.<sup>233</sup>

In 1993, the Attorney General's Office published a discussion paper that appeared to support the adoption of some type of judicial appointments commission, if only as an advisory body.<sup>234</sup> No action has been taken on this proposed reform.<sup>235</sup>

### **Brazil**

Appointments to Brazil's two highest federal courts—the *Supremo Tribunal Federal* (Supreme Federal Tribunal), which hears constitutional questions, and the *Superior Tribunal de Justica* (Superior Court of Justice), which is the court of last resort for non-constitutional questions—operate in much the same way as in the U.S., with the president nominating a candidate for approval by a majority of the senate.<sup>236</sup> Judges for these two highest courts are “chosen from the ranks of the Justice Ministry, the *Ministerio Publico*, private practice, or lower courts.”<sup>237</sup> The president and vice president of the *Supremo Tribunal Federal* are elected by their peers and serve in their respective office for two years.<sup>238</sup>

Apart from those serving on the two highest courts, federal judges in Brazil are “selected via a rigorous entrance examination, usually after several years as a lawyer or court staffer.”<sup>239</sup> Judges for the lower federal courts are selected from a list of three names submitted to the executive,

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233. ENID CAMPBELL & H.P. LEE, *THE AUSTRALIAN JUDICIARY* 76 (2001).

234. Elizabeth Handsley, *Appointment of Judicial Officers in Australia*, in *APPOINTING JUDGES*, *supra* note 5, at 132-33.

235. *Id.* Shortly thereafter, in 1994, the Senate's standing committee on legal and constitutional affairs recommended the establishment of a judicial appointments commission that would include judges as members and that would advise the Attorney General. *Id.* at 133-34. One commentator has cautioned with regard to a judicial appointments commission for federal judges in Australia as follows:

[I]t would be unconstitutional, at the federal level at least, for the government to delegate the whole selection process to a commission. However, there could be no objection to the establishment of a body to advise the government on its short list or even to create the short list itself.

*Id.* at 136.

236. Brazilian Const., Section II Federal Supreme Court, Article 101; Brazilian Const., Section III Superior Court of Justice, Article 104; MATTHEW TAYLOR, *JUDGING POLICY: COURTS AND POLICY REFORM IN DEMOCRATIC BRAZIL* 23 (2008); Keith S. Rosenn, *Brazil*, in *LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA* 192 (Herbert M. Kritzer ed., 2002); *see also* Brazilian Supreme Court homepage, available at <http://www.stf.gov.br/portal/cms/verTexto.asp?servico=sobreStfConhecaStfInstitucional> (last visited July 24, 2009).

237. TAYLOR, *supra* note 236, at 36.

238. Joaquim Barbosa, *Speech: Reflections on Brazilian Constitutionalism*, in 12 *U.C.L.A. J. INT'L L. & FOREIGN AFF.* 181, 184 (2007).

239. TAYLOR, *supra* note 236, at 36.

typically by the constitutional court.<sup>240</sup> The judiciary “has control over internal promotion decisions.”<sup>241</sup>

### **Canada**

The Office of the Commissioner for Federal Judicial Affairs (FJA), an office of the federal government, operating through seventeen regional advisory committees, evaluates prospective judicial candidates for the lower federal courts in Canada.<sup>242</sup> With respect to the superior and appeal courts, these advisory committees are composed of five members, including a federal judge.<sup>243</sup> “The committee reviews the qualifications of each possible appointee [forwarded to them by the executive], and advises the Justice Minister whether the candidate is qualified. The Minister remains the final arbiter and chooses the nominee to recommend to the Cabinet.”<sup>244</sup> “Only initial appointments rather than promotions are sent to the committees since it is thought to be inappropriate for them to scrutinize the performance of sitting judges.”<sup>245</sup> There is no formal advisory committee for Canadian supreme court appointments but “the Minister of Justice normally has one or two special advisors on judicial appointments who accumulate information on potential candidates.”<sup>246</sup> The justice minister’s special advisers on judicial appointments collect information on potential nominees from a “wide variety of sources,” including input from currently serving judges.<sup>247</sup> As such, currently serving judges play both a formal (committee service) and informal (informational) role in judicial selection in Canada.

At the provincial level in Ontario, judicial appointments are overseen by the Judicial Appointment Advisory Committee (JAAC), composed of thirteen members, including two judges, who “are appointed by the Chief Judge of the Provincial Court.”<sup>248</sup> The committee has a layperson majority, constituting seven of thirteen members.<sup>249</sup> By contrast with the federal committees, the provincial committee has the power to recruit judicial candidates, and not simply to pass judgment on

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240. Brazilian Const., Chapter III Judicial Branch, Art. 94.

241. TAYLOR, *supra* note 236, at 30.

242. Office of the Commissioner for Federal Judicial Affairs, <http://www.fja.gc.ca/fja-cmf/fja-cmf/role-eng.html> (last visited July 24, 2009).

243. L’Heureux-Dube, *supra* note 68, at 604.

244. *Id.*

245. Malleson, *supra* note 70, at 67.

246. Devlin, *supra* note 71, at 763.

247. Devlin, *supra* note 71, at 763.

248. Malleson, *supra* note 70 at 69; Devlin *supra* note 71, at 771-73.

249. Devlin, *supra* note 71, at 771-73; Malleson, *supra* note 70, at 69.

the qualifications of candidates presented to it by the executive.<sup>250</sup> Also distinct from the federal judicial appointment system, it is the JAAC, and not the executive, that consults with sitting judges regarding the merits of individual judicial candidates.

Recently, Canada's justice minister announced a change to the supreme court appointment process whereby the prime minister and justice minister would be provided an "unranked short list of three qualified candidates" prepared for their consideration by a supreme court selection panel.<sup>251</sup> The panel is to be composed of five members of parliament, whose responsibility it is to assess and rank the candidates.<sup>252</sup> The Prime Minister did not follow this process, however, for his most recent supreme court nomination, of Thomas Cromwell, in December 2008.<sup>253</sup>

### **Chile**

The appointment process for the Chilean high court, *Corte Suprema de Justicia*, requires the president to nominate an individual for Senate approval. In selecting his or her nominee, the president must choose from a list of five candidates prepared by the supreme court itself.<sup>254</sup> Finally, the president of the Supreme Court is elected by his or her colleagues.<sup>255</sup>

### **China**

The 1982 Constitution provides that the National People's Congress elects the president of the Supreme People's Court and the president of the Supreme People's Procuracy.<sup>256</sup> The vice presidents and remaining judges are nominated by the presidents of the courts and confirmed by the National People's Congress.<sup>257</sup> An equivalent system is established at the local level.<sup>258</sup> In practice, it appears that the Chinese Communist

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250. Devlin, *supra* note 71, at 771-73.

251. Press release, Department of Justice, *Minister of Justice Announces Selection Process for the Supreme Court of Canada* (May 28, 2008), available at [http://canada.justice.gc.ca/eng/news-nouv/nr-cp/2008/doc\\_32258.html](http://canada.justice.gc.ca/eng/news-nouv/nr-cp/2008/doc_32258.html) (last visited June 19, 2009).

252. *Id.*

253. Jay Brecher, *Let's Rethink the Way We Select Canada's Top Judges*, <http://www.the-star.com> (Jan. 12, 2009).

254. [http://www.poderjudicial.cl/index.php?pagina1=lateral/lateral\\_jud.php&pagina2=poder\\_jud.php](http://www.poderjudicial.cl/index.php?pagina1=lateral/lateral_jud.php&pagina2=poder_jud.php) (last visited June 13, 2009).

255. Central Intelligence Agency, *WORLD FACTBOOK* 113 (2005), *cited in* Levinson, *supra* note 7, at 1305.

256. WEI LUO, *CHINESE LAW AND LEGAL RESEARCH* 97 (2005).

257. *Id.*

258. *Id.*

Party reviews and nominates candidates for relatively perfunctory confirmation by the relevant congress.<sup>259</sup>

### France

In France, judicial candidates are recruited directly out of university study. The *Conseil Supérieur de la Magistrature* (“CSM”) (Supreme Judicial Council), composed of judges, prosecutors, and individuals nominated by the president, senate, and National Assembly, proposes candidates for the “ordinary judiciary,” including the *Cour de Cassation* (Supreme Court of Appeals) and the principal trial and appellate courts.<sup>260</sup> The President of the Republic formally appoints candidates for the senior judiciary on the basis of CSM recommendations.<sup>261</sup> The CSM must also give periodic “advice,” or evaluations, of lower court judges who are candidates for elevation.<sup>262</sup> Nominations for lower judicial posts are made by the Ministry of Justice.<sup>263</sup> The president of the *Cour de Cassation* chairs the promotion process for lower court judges.<sup>264</sup>

Members of the French constitutional court are nominated by the President of the Republic and the presidents of each chamber of parliament.<sup>265</sup> Limited to pre-enactment review of the constitutionality of proposed legislation, the French constitutional court includes a number of previously-serving judges as members.

### Germany

As with France, German judges are recruited for the judiciary directly out of specialized university training programs and pursue careers in the judiciary.<sup>266</sup> Judges for the regional administrative, civil, criminal and tax courts are selected by one of two methods depending on the region: either the *Richterwahlausschuß* (judicial selection committee for ordinary courts composed of eleven to fifteen members drawn from

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259. *Id.*

260. John Bell, *Judicial Appointments: Some European Experiences* (Oct. 4, 2003 paper), at app. 1 p.7, <http://www.law.cam.ac.uk/faculty-resources/download/judicial-appointments-some-european-experiences-by-professor-john-bell/865>; French National judges college (“Ecole Nationale de la Magistrature”), <http://www.enm.justice.fr>.

261. Bell, *supra* note 260, at app. 1 p.7.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* The French constitutional council reviews draft legislation pre-enactment for constitutional defects. It does not resolve cases or controversies, and thus operates quite distinctively from traditional courts. See Doris Marie Provine & Antoine Garpon, *The Selection of Judges in France: Searching for a New Legitimacy*, in *APPOINTING JUDGES*, *supra* note 5, at 180-81.

266. Bell, *supra* note 260, at app. 1 p.8.

the parliament and judiciary<sup>267</sup>) in conjunction with the minister of justice for the region makes the selection, or the minister of justice makes the selection standing alone.<sup>268</sup> In either case, the *Präsidualrat* (representative group of local judges) provides an opinion on the prospective candidate's competence prior to final selection.<sup>269</sup> Each *Präsidualrat* is composed of the president of the court and other judges.<sup>270</sup>

Appointments to the *Bundesverfassungsgerichtshof* (Constitutional Court) are made by each chamber of parliament from a list provided by the federal minister of justice or from recommendations provided by the Constitutional Court itself.<sup>271</sup>

In the early 1950s, report Guarnieri and Pederzoli, "some judges argued in favor of concentrating all decisions affecting the status of judges . . . in the hands of the judiciary itself to remove any political influence from the process," but this was rejected.<sup>272</sup>

### India

India's constitution requires the president to consult on supreme court appointments with the chief justice of the supreme court.<sup>273</sup> If the president deems it necessary, he or she may also consult with associate justices of the supreme court and judges from the state high courts.<sup>274</sup> None of the supreme court appointments require parliamentary concurrence.<sup>275</sup>

The chief justice exercises substantial influence over the president in his judicial selection with the result that India's judicial appointment system has been criticized as lacking actual separation of powers and instead constituting a judicial "self-selection" system.<sup>276</sup>

### Israel

In Israel, a nine-member judicial selection committee composed of both professional and political representatives names judges to the

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267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. Bell, *supra* note 260, at app. 1 pp.8-9.

272. GUARNIERI AND PEDERZOLA, *supra* note 85, at 38, 52.

273. INDIA CONST. part V, art. 124(2).

274. *Id.*

275. John Echeverri-Gent, *Chapter 8: Government and Politics*, in A COUNTRY STUDY: INDIA (1995), available at <http://lcweb2.loc.gov/frd/cs/intoc.html#in0154> (last visited July 24, 2009).

276. Levinson, *supra* note 7, at 1304-05 (citing email correspondence with Professor C. Neal Tate of Vanderbilt University law school and political science department).

general courts, peace courts, and supreme court.<sup>277</sup> The five professional members of the commission include three supreme court justices (“the President of the Court and two judges elected by all the Court’s members for a period of three years”) and two members of the bar.<sup>278</sup> Commentators have cautioned that this selection committee is “effectively dominated by the President of the Israeli Supreme Court.”<sup>279</sup>

### **Italy**

As in other civil law countries, Italy has both a court of last resort, *Corte Suprema di Cassazione*, and a constitutional court, *Corte Costituzionale*. Within the ordinary court system, including the *Corte Suprema di Cassazione*, judges are promoted automatically on the basis of seniority.<sup>280</sup> By contrast, the fifteen justices of the *Corte Costituzionale* are named in equal part by the president, parliament, and members of the ordinary and administrative supreme courts.<sup>281</sup>

Unlike many civil law countries, Italy has no specialized judicial school; instead, judicial training consists of a two-phase apprenticeship during which the *Consiglio Superiore della Magistratura* (“CSM”) (Higher Council of the Judiciary) reviews the performance of these apprentices.<sup>282</sup> The primary means of selection is a national examination for judicial candidates.<sup>283</sup> The CSM is composed of thirty-three members, twenty of whom are magistrates elected by the overall judiciary.<sup>284</sup> Of the remaining thirteen members, ten are lawyers or law professors named by the parliament, and three serve *ex officio*, including the president of the *Corte Suprema di Cassazione*.<sup>285</sup>

### **Japan**

Japan recruits judges from those enrolled in specialized university programs. These individuals undergo judicial apprentice training before being sworn in as judges.<sup>286</sup> The chief justice and the general secretariat “control entry to and promotion within the Japanese judiciary.”<sup>287</sup>

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277. The Judges Act 1953 (Isr.). See, e.g., Eli Salzberger, *Judicial Appointments and Promotions in Israel: Constitution, Law, and Politics*, in APPOINTING JUDGES, *supra* note 77, at 243 *et seq.*

278. Salzberger, *supra* note 77, at 248-49.

279. Levinson, *supra* note 7 at 1306.

280. Russell, *supra* note 53, at 430.

281. COST. art. 135; see also GUARNIERI & PEDERZOLI, *supra* note 85, at 139.

282. GUARNIERI & PEDERZOLI, *supra* note 85, at 41-42.

283. *Id.* at 42.

284. *Id.* at 53.

285. *Id.* at 55.

286. Jacob, *supra* note 166, at 391.

287. Russell, *supra* note 53, at 423.

Supreme Court justices are appointed by the Emperor on the recommendation of the Cabinet and are to be chosen, not just from the career judiciary, but from the larger legal profession, though approximately one-third were lower court judges at the time of their high court appointment.<sup>288</sup>

### **The Netherlands**

Appointment to the Netherlands supreme court is by royal decree from a list of three candidates drawn up by the Second Chamber of the States General.<sup>289</sup> The Second Chamber, in turn, draws its candidate recommendations from a list provided by the supreme court,<sup>290</sup> whose judicial selection committee is composed of three judges and two non-judges (including a member of the Ministry of Justice and a lawyer or law professor).

### **Portugal**

Judges are appointed by the *Conselho Superior da Magistratura* (“CSM”) (Supreme Judicial Council), which is chaired *ex officio* by the president of the supreme court and composed by seven judges elected by their peers, two members appointed by the president (one judge and one non-judge), and seven members elected by parliament (non-judges).<sup>291</sup>

### **Russia**

The Russian court system is split into three parts: the supreme court of general jurisdiction, the Supreme *Arbitrazh* Court (Supreme Commercial Arbitration Court), and the constitutional court.<sup>292</sup> For each court, the Federation Council must approve the president’s nominees, taking into account the opinion of the chairman of the relevant court.<sup>293</sup> For lower federal courts, the constitution requires the president to

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288. Japan Court Organizational Law 1947, Article 41; Meryll Dean, *Japanese Legal System*, 2d ed. 353-54 (2002).

289. CONSTANTIJN A.J.M. KORTMAN & PAUL P.T. BOVEND’EERT, CONSTITUTIONAL LAW OF THE NETHERLANDS: AN INTRODUCTION 122-23 (Kluwer Law Int’l 2007).

290. *Id.* at 123.

291. See European Commission, European Judicial Network, [http://ec.europa.eu/civiljustice/index\\_en.htm](http://ec.europa.eu/civiljustice/index_en.htm) (last visited July 24, 2009); The Portuguese Supreme Court of Justice, History of the STJ, <http://www.stj.pt/?idm=40> (last visited July 24, 2009); PROF. DR. GÜNTER HIRSCH, APPOINTING OF SUPREME COURT JUDGES IN THE MEMBER STATES OF THE EUROPEAN UNION (2006), available at [http://www.network-presidents.eu/IMG/pdf/Report\\_Hirsch\\_eng.pdf](http://www.network-presidents.eu/IMG/pdf/Report_Hirsch_eng.pdf) (last visited July 24, 2009).

292. ALEXANDER VERESHCHAGIN, JUDICIAL LAW-MAKING IN POST-SOVIET RUSSIA 10 (Routledge-Cavendish 2007).

293. WILLIAM BURNHAM, PETER MAGGS, & GENNADY M. DANILENKO, LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION, 3D ED., 163 (Juris Publ. 2004).

appoint judges.<sup>294</sup> The system recently changed such that judicial candidates first go through a judicial qualifications commission, the legislature of the region, and the supreme court, or the Supreme *Arbitrazh* Court, before nomination by the president.<sup>295</sup>

### **South Africa**

South Africa uses a Judicial Services Commission to recommend judges for presidential appointment.<sup>296</sup> The commission consists of “three senior judges, eight lawyers, eleven politicians (three of whom must be members of opposition parties), and four persons chosen by the President in consultation with the leaders of all of the parties represented in the National Assembly”<sup>297</sup> (this last group includes laypersons, as well as academics). Among the factors taken into account in selecting judges are the opinion of the chief justice and the need to maintain diversity.<sup>298</sup> Individual members of the South African judicial screening commission confer with sitting judges to learn more about the merits of prospective judicial candidates.<sup>299</sup>

### **Spain**

In Spain, initial entrance into the judiciary occurs after completion of a specialized university program.<sup>300</sup> The *Consejo General del Poder Judicial* (“CGPJ”) (Judicial Advisory Council) is responsible for judicial appointments, but has limited discretion, given the system’s emphasis on seniority.<sup>301</sup> For regional high court positions, lower courts can suggest three names from which the CGPJ selects one.<sup>302</sup> The CGPJ consists of twelve judges, eight lawyers with extensive professional experience, and the president of the supreme court, who serves *ex officio*.<sup>303</sup> Nominations to the constitutional court are made by both chambers of the parliament together with the CGPJ.<sup>304</sup> “The President of the Constitutional Court is

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294. PETER H. SOLOMON, JR. & TODD S. FOGLESONG, COURTS AND TRANSITION IN RUSSIA: THE CHALLENGE OF JUDICIAL REFORM 30 (2000).

295. *Id.* at 30-31.

296. S. AFR. CONST. 1996 § 174; Russell, *supra* note 53, at 423-24.

297. *Id.* at 424.

298. Devlin, *supra* note 71, at 823-33.

299. MALLESON, *supra* note 44, at 139.

300. Bell, *supra* note 260, at app. 1 p. 9.

301. *Id.*

302. *Id.*

303. *Id.*; see also GUARNIERI & PEDERZOLI, *supra* note 85, at 53, 59-60.

304. Bell, *supra* note 260, at app. 1 p.9; see also GUARNIERI & PEDERZOLI, *supra* note 85, at 139-40.

appointed for a three-year term by the King from among the Court's existing members and on the recommendation of the Court.<sup>305</sup>

### **United Kingdom**

The Constitutional Reform Act of 2005 established a new Supreme Court of England and Wales and provided for judicial appointments commissions at both the Supreme Court and lower court levels.<sup>306</sup> The Supreme Court appointment commission is chaired by the chief justice, who is joined by the senior associate justice along with representatives from the judicial appointments commissions of England and Wales, Scotland, and Northern Ireland.<sup>307</sup> Five of the fifteen members of the lower court appointments commission for England and Wales are currently serving judges, though the commission itself is chaired by a layperson.<sup>308</sup>

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305. Cheryl Thomas, *Judicial Appointment Commissions: The European and North American Experience and the Possible Implications for the U.K.* No. 6/97 (12/97) at 46 n.19.

306. See Constitutional Reform Act, 2005, c. 4, §§ 1, 7, sched. 8 (Eng.)

307. *Id.* §§ 1, 6, sched. 8.

308. Malleon, *supra* note 49, at 48-49.