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## A Survey of Studies on Judicial Selection

Ryan Fortson and Kristin S. Knudsen

The Alaska legislature is considering a bill—Senate Joint Resolution 3—that would put before voters a state constitutional amendment to change the composition of the Alaska Judicial Council and the way its members are selected. The Alaska Judicial Council (council) functions as a judicial nominating commission (see Figures 1–2 on page 7 for the Alaska Judicial Council composition and selection process). The council plays a constitutionally-mandated role in the selection of Alaska’s judges: the council screens all applicants for judgeships at the district court level and higher. For each vacancy, the council sends the governor a list of at least two applicants that the council deems to be the most qualified of the applicants for the position. The governor must appoint a judge from this list and cannot appoint an applicant who has not been screened and approved by the council process. This type of process is frequently classified as a merit system of judicial selection. The council also makes recommendations to voters concerning retaining or not retaining judges as part of the judicial retention election process.

Currently, the council is composed of seven members—three non-attorney members chosen by the governor and confirmed

by the legislature, three attorney members chosen by the Alaska Bar Association, and the chief justice of the Alaska Supreme Court, who serves as an ex-officio member. (See “A Look at Judicial Selection in Alaska,” *Alaska Justice Forum* 21(3), Fall 2004, for a detailed overview of the selection process. See also the Alaska Judicial Council website for information on judicial performance evaluation in Alaska: <http://www.ajc.state.ak.us/retention/retproced>.) The proposed constitutional amendment would increase the number of non-attorney members on the council from three to six. It would also require the legislature to confirm attorney members, whereas now only the non-attorney members are subject to legislative confirmation.

There are many different ways to evaluate judicial selection and retention using a variety of metrics. This article reviews selected existing studies relevant to the potential effects that might be brought about by this proposed change to the council composition—studies that examined judicial effectiveness, responsiveness of judges to public opinion, and public perception of judges. We are not assessing the different evaluative criteria used by study designers. We also excluded studies of effects of changes in the

law regarding judicial election campaign financing. The studies discussed in this article are not exhaustive of the extensive number of studies conducted on judicial selection and retention; however, we believe these studies are sufficiently relevant and contain sufficient data about the issues raised in discussion of the proposed amendment, and are illustrative of the variety of approaches taken to evaluate the impact of selection methods on the quality of judicial performance.

Table 1 (page 8) outlines the variety of judicial selection processes for appellate and trial courts in the U.S. These processes generally fall under the following types: judicial nominating commission, gubernatorial/legislative/executive appointment, partisan election, and nonpartisan election.

### Studies on Nominating Commissions

A change similar to the proposed Alaska constitutional amendment took place in Florida in July 2001. Florida selects appellate judges and fills interim vacancies on trial courts through the use of a judicial nominating commission that sends a list of at least three nominees to the governor from which to choose. In Florida, instead of one statewide judicial nominating commission, each circuit

*Please see **Judicial selection**, page 7*

## UAA Justice Center 40th Anniversary 1975–2015

*Our vision: Leading Alaska toward a safer, healthier, and more just society.*

In this issue of the *Forum*, you will find a timeline of selected milestones from the Justice Center’s past 40 years (pages 2–3). The Justice Center continues to be a leader in civil and criminal justice education in Alaska, and in research on justice issues in rural and urban Alaska. Over the past four decades, our faculty and research staff have contributed to studies ranging from the revision of the Alaska Criminal Code to the development of the master plan for corrections. More recent research studies and Forum articles have focused on issues such as violence against women, policing, substance abuse, adverse childhood experiences (ACEs), the role of Village Public Safety Officers (VPSOs), corrections, and homelessness in Alaska. The Justice Center is in

the UAA College of Health, and as part of an interdisciplinary effort examines the nexus of crime and public health.

The Justice Center is also a teaching unit and offers courses in Justice and Legal Studies. A high number of our graduates go on to graduate school and law school. Justice and Legal Studies graduates are employed in federal, state, and government agencies; Native corporations; law firms; and nonprofits throughout Alaska and Outside. Many of our alumni have assumed positions of leadership in the justice community.

We appreciate the support over the years of our university and community partners in fulfilling our mission and look forward to continuing our work in the challenging years ahead.

and a number of research organizations (in addition to Pew) are involved in these projects as well. The efforts now underway in Alaska hold the promise of decreasing criminal justice system costs during a time of severe budget constraints—as well as the possibility of reinvesting savings in the most effective programs and supervision strategies for reducing recidivism and improving public safety. These goals promote healthier and safer citizens and communities, and help control correctional population growth and costs.

*Barbara Armstrong is the editor of the Alaska Justice Forum.*

## Further Information on These Initiatives

Alaska Criminal Justice Commission

<http://www.ajc.state.ak.us/alaska-criminal-justice-commission>

Alaska Criminal Justice Commission Resource List

*Includes PowerPoint presentations on the Alaska Justice Reinvestment Initiative.*  
<http://www.ajc.state.ak.us/alaska-criminal-justice-commission/resource-list-compiled-by-commission-staff>

Alaska Justice Information Center

*Will guide work of Pew-MacArthur Results First Initiative in Alaska.*  
<http://uaajusticecenter.blogspot.com/2015/08/alaska-justice-information-center.html>

The Pew-MacArthur Results First Initiative in Alaska

<http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2015/07/the-pew-macarthur-results-first-initiative-in-alaska>

## Judicial selection

*(continued from page 1)*

and appellate court has its own commission, resulting in 26 total judicial nominating commissions. Each commission has nine commissioners. Before 2001, three commissioners were lawyers appointed by the Florida Bar, three were appointed by the governor (and could be either lawyers or nonlawyers), and the remaining three were nonlawyers selected by the other six commissioners. In 2001, in response to claims that the existing judicial selection process did not reflect the will of the people of Florida, state law was changed to give the governor substantially greater power in appointing members of the judicial nominating commissions. Under the new rules, the governor appoints four members from a list of names submitted by the Florida Bar but can reject the list and ask for a new one; the other five members are appointed entirely at the discretion of the governor, though at least two must be lawyers.

A study was subsequently conducted by Salokar, et al., of judicial appointments in Florida from 1999 to 2003 in an attempt to measure the effect of this change on the type of individuals applying for and appointed to judgeships. Published in 2006 in the *Justice System Journal*, the study also analyzed the composition of the judicial nominating commissions themselves using data from publicly available member applications for the different commissions. After the change in appointment procedures, nominating commissioners overwhelmingly identified with the political party of the governor (Republican at the time of the change in the law) and announced their alliance with, or intent to promote, conservative policies in their applications. This was true both of the applicants for the gubernatorial-appointed positions and of applicants recommended by the Florida Bar, suggesting a selection bias in who applied for the commissions. Indeed, there was a dramatic *decrease* in the number of attorneys willing to serve on the nominating commissions following the change in procedure.

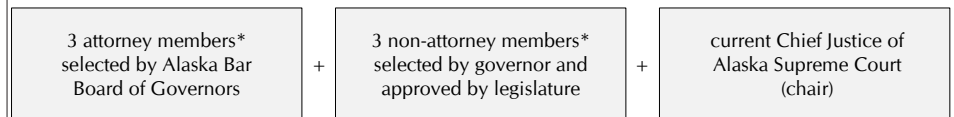
A party affiliation bias carried over to the judges selected as well. Not only did the number of judges registered as Republican (as opposed to Democrat) increase from 61 percent to 77 percent with the change in selection process (about 10% of the judges selected were unaffiliated), but judicial applicants in-

creasingly listed in their application prominent Republican politicians as personal references. Moreover, the change in the selection process brought an increase in the affiliation of judges with conservative and Christian Right social

*Please see Judicial selection, page 9*

**Figure 1. Selection of Alaska Judicial Council**

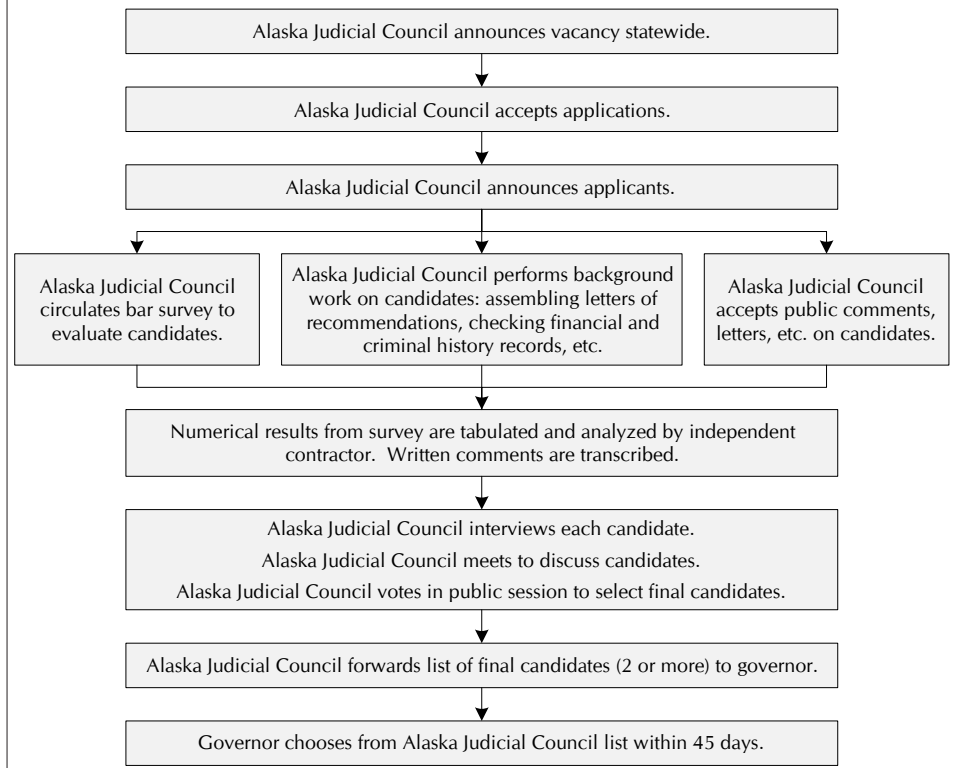
*Alaska Constitution, Article IV, Sections 8*



\* "Appointments shall be made with due consideration to area representation and without regard to political affiliation."

**Figure 2. Alaska Judicial Selection Process**

*Alaska Constitution, Article IV, Sections 5 and 8*



**Table 1. Judicial Selection in U.S. States and the District of Columbia, by Method of Selection**

Methods of judicial selection for *full terms*. (Methods used to fill interim vacancies may differ.)

Methods include: Judicial nominating commission (JNC), gubernatorial or legislative appointment, nonpartisan election, or partisan election.

	Appellate courts		Trial courts of general jurisdiction		Notes
	Supreme	Intermediate			
Alaska	JNC	JNC	JNC		Gubernatorial appointment from nominating commission.
Colorado	JNC	JNC	JNC		Gubernatorial appointment from nominating commission.
Connecticut	JNC	JNC	JNC		Gubernatorial nomination from judicial selection commission; legislative appointment.
Delaware	JNC	JNC	JNC		Gubernatorial appointment from judicial nominating commission with senate consent.
District of Columbia	JNC	—	JNC		Presidential appointment from judicial nomination commission with senate confirmation.
Hawaii	JNC	JNC	JNC		Gubernatorial appointment from nominating commission with senate confirmation.
Iowa	JNC	JNC	JNC		Gubernatorial appointment through nominating commission.
Maryland	JNC	JNC	JNC		<i>Appellate</i> : Gubernatorial appointment from nominating commission.
Nebraska	JNC	JNC	JNC		<i>Circuit</i> : Gubernatorial appointment from nominating commission and/or nonpartisan election.
New Hampshire	JNC	—	JNC		Gubernatorial appointment from nominating commission.
Rhode Island	JNC	—	JNC		Gubernatorial nomination from selection commission recommendation; appointment by the executive council.
South Carolina	JNC	JNC	JNC		<i>Supreme</i> : Gubernatorial appointment from nominating commission with house and senate confirmation.
Utah	JNC	JNC	JNC		<i>Superior</i> : Gubernatorial appointment from nominating commission with senate confirmation.
Vermont	JNC	JNC	JNC		Legislative election from judicial merit selection commission (per <a href="http://www.judicialselection.us/judicial_selection/index.cfm?state=SC">http://www.judicialselection.us/judicial_selection/index.cfm?state=SC</a> ).
Wyoming	JNC	—	JNC		Gubernatorial appointment from nominating commission with senate confirmation.
Arizona	JNC	JNC	JNC	[depends on county] partisan primary, nonpartisan general election	<i>Appellate</i> : Gubernatorial appointment from nominating commission.
Florida	JNC	JNC	nonpartisan election		<i>Trial courts</i> : The Arizona Constitution provides for merit selection and retention of judges in counties with populations of 250,000 or greater. Currently, this includes Maricopa, Pima and Pinal Counties. Counties with populations less than 250,000 may adopt merit selection through ballot initiative. Otherwise, selection is by partisan primary/nonpartisan general election.
Indiana	JNC	JNC	partisan election		<i>Appellate</i> : Gubernatorial appointment from nominating commission.
Kansas	JNC	gubernatorial appointment	JNC	[depends on district] partisan election	<i>Appellate</i> : Gubernatorial appointment from nominating commission.
Massachusetts	gubernatorial appointment	JNC	JNC		<i>Supreme Court</i> : Gubernatorial appointment from nominating commission.
Missouri	JNC	JNC	JNC	[depends on county] partisan election	<i>Court of Appeals</i> : Gubernatorial appointment with senate confirmation.
New York	JNC	JNC	partisan election		<i>Trial courts</i> : Gubernatorial appointment from nominating commission (17 districts); partisan election (14 districts).
Oklahoma	JNC	JNC	nonpartisan election		<i>Supreme Judicial Court</i> : Gubernatorial appointment with approval of governor's council.
South Dakota	JNC	—	nonpartisan election		<i>Intermediate appellate and trial</i> : Gubernatorial appointment from nominating commission with approval of governor's council.
Tennessee	JNC	JNC	partisan election		<i>Appellate</i> : Gubernatorial appointment from nominating commission.
California	gubernatorial appointment	gubernatorial appointment	nonpartisan election		<i>Trial</i> : Partisan election for most circuit courts, except merit in St. Louis, Jackson County (Kansas City), Greene County (Springfield), Clay County, Platte County, and St. Louis County.
Maine	gubernatorial appointment	—	gubernatorial appointment		<i>Appellate</i> : Gubernatorial appointment; confirmation by commission on judicial appointments.
New Jersey	gubernatorial appointment	chief justice appoints	gubernatorial appointment		Gubernatorial appointment with senate confirmation.
Virginia	legislative election	legislative election	legislative election		<i>Intermediate appellate</i> : The chief justice of the supreme court assigns superior court judges to the appellate division. Such assignments are for fixed terms.
Arkansas	nonpartisan election	nonpartisan election	nonpartisan election		
Georgia	nonpartisan election	nonpartisan election	nonpartisan election	*	
Idaho	nonpartisan election	nonpartisan election	nonpartisan election	*	
Kentucky	nonpartisan election	nonpartisan election	nonpartisan election	*	
Michigan	nonpartisan election	nonpartisan election	nonpartisan election		<i>Supreme</i> : Partisan nomination; nonpartisan election.
Minnesota	nonpartisan election	nonpartisan election	nonpartisan election	*	
Mississippi	nonpartisan election	nonpartisan election	nonpartisan election		
Montana	nonpartisan election	—	nonpartisan election	*	
Nevada	nonpartisan election	—	nonpartisan election	*	
North Carolina	nonpartisan election	nonpartisan election	nonpartisan election		
North Dakota	nonpartisan election	3-judge panels by case	nonpartisan election	*	<i>Intermediate appellate</i> : Cases assigned to the court of appeals by the supreme court are heard by three-judge panels; chosen from among active and retired district judges, retired supreme court justices, and attorneys.
Oregon	nonpartisan election	nonpartisan election	nonpartisan election		
Washington	nonpartisan election	nonpartisan election	nonpartisan election		
Wisconsin	nonpartisan election	nonpartisan election	nonpartisan election		
Alabama	partisan election	partisan election	partisan election	*	
Illinois	partisan election	partisan election	partisan election		
Louisiana	partisan election	partisan election	partisan election		
New Mexico	partisan election	partisan election	partisan election	*	
Ohio	partisan primary; nonpartisan general election	partisan primary; nonpartisan general election	partisan primary; nonpartisan general election		
Pennsylvania	partisan election	partisan election	partisan election		
Texas	partisan election	partisan election	partisan election		
West Virginia	partisan election	—	partisan election	*	

\* Ten states use judicial nominating commissions (JNCs) to fill midterm vacancies only on some or all levels of court: Alabama, Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, New Mexico, North Dakota, and West Virginia.

Source of data: Judicial Selection in the States (<http://www.judicialselection.us/>), National Center for State Courts (accessed 27 Oct 2015)

## Judicial selection (continued from page 7)

organizations and a decrease in appointees with liberal affiliations. Although the authors of the study noted that more than half of post-reform applicants included unsolicited comments on their religious beliefs and activities, there was not a statistically significant change in the governor's appointees based on gender, race, or religion as between Catholic, Protestant, and Jewish appointees. The Florida change, the authors conclude, gave the executive branch greater latitude in selecting those who will nominate potential jurists, effectively redefining merit selection into a system closer to a direct gubernatorial selection system. If a hand-picked screening committee assists the governor, it is reasonable to conclude that it will select nominees first for compatibility with the administration's political, ideological, and religious views, then will narrow the pool based on merit and experience.

The conclusion that giving more power in the judicial selection process to politically elected actors results in an increasingly politicized judiciary is not by itself surprising. While on a theoretical level this undermines the ideas of separation of powers and an independent judiciary, it is also not necessarily a negative outcome unless one can point to an undesirable secondary effect from a more politicized judiciary. For this, one could look to measures of success of current judicial selection processes.

### Measures of Voter Satisfaction

As noted above, each state handles its judicial selection differently. This underscores the need to compare the different selection methods. One possible measure of the success of the judicial selection process is through voter satisfaction with judges as reflected in the vote in judicial retention elections. In the

2014 election, 14 Alaska judges were up for retention (a yes/no vote on whether the judge should stay in office)—all 14 were retained. In nearly every instance, with one exception, the percent voting to retain ranged from 62.3 percent to 74.0 percent. (As a point of comparison, 26 Alaska judges were up for retention in 2012—all were retained with at least 61.6% (and often much higher) of the vote with the exception of one judge retained with 55.1% of the vote and against whom a campaign opposing his retention had been directed.) These results are consistent with retention elections from other states—a 2007 study by Aspin of retention elections in ten states from 1964 to 2006, published in *Judicature*, showed the mean percentage of affirmative votes for retention is consistently in the high 60s to mid-70s. Alaska had the lowest mean affirmative percentage in the study in 2006 at 64.1 percent, and in general most states had a higher affirmative percentage than Alaska over the course of the study period. Nonetheless, the fact that over 60 percent of the electorate in Alaska consistently votes to retain judges suggests satisfaction with the current judicial selection process.

The one exception to the range discussed above for the 2014 judicial retention election was for a judge the Alaska Judicial Council recommended not be retained, and even that judge received 54.3 percent of the votes to retain. This result was unusual. Judicial nominating commissions that make recommendations in retention elections tend to have a significant effect on the outcome of those elections. Since 1982, Alaska voters have voted against retaining four out of the seven judges who have received a negative recommendation from the Alaska Judicial Council, though the three that were retained in spite of the non-retention recommendation all did so with measurably reduced affirma-

tive votes. In a 2007 study published by the National Center for State Courts, Aspin found comparable results for Arizona and Colorado, which have similar state commissions making recommendations on judicial retention elections. Perhaps more interestingly, of the many judges recommended by the commissions in these three states, only one judge was defeated in a retention election (and that by a count of 520 to 510 votes). Either voters were satisfied with the existing judiciary, or were heeding the recommendations of the commissions. If the former, then there may be no need to change the judicial selection process. If voters were heeding the commission recommendations, then changing the composition of a nominating commission to increase political influence would likely result in the politicization of the selection process and retention elections.

### Objective Measures of Judicial Performance

#### Complexity of Judicial Decisions

A comparison of elected and appointed judges in state supreme courts suggests that abandoning the nonpartisan appointment model would have consequences for the court's judicial decisions as measured by mathematical modeling. In a 2013 study in the *Journal of Public Economics*, Iaryczower, et al., used data from 5,958 criminal case decisions by 520 state supreme court justices sitting en banc (all members) to make a comparison between four groups of justices, where the group was defined by the judicial selection methods of their courts. The study authors found that differences in the method of selection and retention were associated with differences in voting patterns on decisions. In particular, they noted that elected justices, or those that

Please see *Judicial selection*, page 10

## Resources on Judicial Selection

The Alaska Judicial Council's website ([www.ajc.state.ak.us](http://www.ajc.state.ak.us)) provides information about judicial selection and retention in Alaska, including announcements of current judicial vacancies and a historical log of judicial appointments since Alaska statehood in 1959. The website also makes available reports on Judicial Council research on justice administration in Alaska.

The National Center for State Courts (NCSC) collects statistics, conducts research and provides assistance to state courts, particularly in the area of administration. Its website ([www.ncsc.org](http://www.ncsc.org)) provides an extensive overview of its work and access to its research, publications and other projects and services. NCSC also maintains a website at [www.judicialselection.us](http://www.judicialselection.us) providing information on judicial selection processes throughout the nation.

The State Justice Institute (SJI), a federally-funded granting institute, conducts studies on a wide range of court-related issues. Its website ([www.sji.gov](http://www.sji.gov)) provides access to funded projects. The Alaska Court System has received funding from SJI for projects.

In addition, the following publications focus on judicial selection in Alaska:

"A Look at Judicial Selection in Alaska" by Antonia Moras. *Alaska Justice Forum* 21(3): 1, 7–9 (Fall 2004). ([http://justice.uua.alaska.edu/forum/21/3fall2004/a\\_akjudicial.html](http://justice.uua.alaska.edu/forum/21/3fall2004/a_akjudicial.html)).

An overview of the judicial selection and retention process in Alaska, the balance of interests in the formal structure of the appointment process, and opportunities provided for participation by all three branches of government as well as the public.

*Selecting and Evaluating Alaska's Judges: 1984–2012* by Teresa White Carns, Larry Cohn, and Susan McKelvie. Anchorage, AK: Alaska Judicial Council, Jul 2013. (<http://www.ajc.state.ak.us/reports/jgprofile13.pdf>). This report analyzes the characteristics of judicial applicants and the factors most closely associated with their nomination and appointment to the bench. It also examines the relationships between these characteristics and the performance of judges. It assists in assessing the Council's performance by providing information about the consistency and effectiveness with which the Council has applied its criteria for evaluating applicants' qualifications.

*Fostering Judicial Excellence: A Profile of Alaska's Judicial Applicants and Judges*. Anchorage, AK: Alaska Judicial Council, May 1999. (<http://www.ajc.state.ak.us/reports/jgprofile.pdf>). Results of the Judicial Council's study of the characteristics of attorneys who apply for and are appointed to the state court bench in Alaska.

## Judicial selection (continued from page 9)

are subject to retention elections, were more inclined to overturn a lower court decision than those who do not face retention election after gubernatorial appointment, although the effect is modest.

Measures of performance other than alignment with public sentiment or dominant legal reasoning were difficult to use in broad empirical studies until relatively new improvements in software applications. Studies based on anonymous surveys generally indicated that judges who have greater political accountability receive lower performance ratings from judges themselves and from attorneys, but such studies have their own limitations. Two recent studies based on written judicial decisions attempt to develop empirical evidence for the effect of selection methods on quality indicators of judicial work. A 2014 study by Goelzhauser and Cann in *State Politics & Policy Quarterly* examined the opinion clarity in judicial writing as an indicator of performance quality. Those authors chose opinion clarity because a number of state judicial performance commissions include it in evaluations and the National Center for State Courts urges state supreme courts to focus on producing clear opinions so

they can be understood by the parties, public, and policymakers. Drawing from a three-year period in appellate courts in all 50 states, the study included 400 salient cases (decisions that received front page coverage in the state's newspaper of greatest circulation) and a 5 percent random sample of other decisions in each state, for a total sample of 1,797 state supreme court majority decisions. The study authors coded each opinion for reading ease, grade level, and the percentage of passive sentences (as a measure of complexity).

The study authors found no statistically significant substantive variation in clarity measures across groups based on methods of retention. However, in high profile cases that received front page coverage, where elected judges might be expected to write most clearly in order to communicate to the electorate, an analysis of the opinions revealed no substantive increase in opinion clarity by elected judges, notwithstanding enhanced public scrutiny. The study authors pointed out that their study sample was limited to decisions written from 1995 to 1998; it is possible, they suggested, that incentives to produce clear opinions may have changed in light of recent increases in the political competitiveness of judicial elections following *Republican Party of Minnesota v. White*—a U.S. Supreme Court case from 2002 holding that candidates for judicial office could not be prohibited from publicly announcing their position on contentious political and legal issues. It is worth noting that this case does not apply to judicial retention elections such as exist in Alaska.

### *Judicial Productivity and Independence*

A different measure of output quality was used by Choi, et al., in a 2010 study in the *Journal of Laws, Economics, & Organization* of 408 state supreme court justices' opinions (totaling 27,596 majority opinion observations) from 50 states from 1998 to 2000. Judges, the study authors pointed out, expend unobservable effort to decide cases. The observable product of their efforts, at least of appellate justices, is opinions. Using written opinions, the study authors sought to measure judicial quality by productivity (the number of opinions written, including dissenting and concurring opinions), legal reasoning by citations (the frequency of citations of the opinion by other courts and law reviews), and independence of the opinion authors (writing opinions against judges of the same political party, either as a dissenter or authoring the majority opinion against dissenters of the same party). Findings were reported related to these categories as means across selection method groups, and not on a state-by-state level.

This study found that the mean number of opinions written was highest for judges selected in partisan election systems, but that the frequency of citations was higher for judges who were either directly appointed or selected via judicial nominating committees.

The results of the analysis were mixed.

Appointed judges were not, overall, more independent than those selected through partisan elected systems; but none of the differences in mean independence indicator levels were statistically significant. The authors found that judges selected in partisan elections dissent most frequently, judges selected via nominating commissions fall in the middle, and directly appointed judges write the fewest dissenting opinions. Dissent from fellow members of a political party, though, is not the only measure of independence, especially as dissents may occur for reasons unrelated to political alignment. However, further analysis indicated that elected judges are more likely to dissent when one party dominates state electoral politics, while appointed judges are more willing to dissent when there is no clear dominance by one party. And, while judges who write more dissents generally received a higher overall independence score, this relationship does not hold true for judges in partisan election states. Contrary to expectations, elected judges tend to write fewer opinions when there is no one dominant party in state politics.

The authors of this study suggest that the different selection systems attract different types of people to judgeships; politicians are attracted to overtly political election systems and professionals are attracted to appointment systems. Compared with appointed judges, partisan elected judges tend to make more campaign contributions, tend to attend an in-state law school, and tend to have attended lower-ranked law schools. Compared with nominating commission judges, appointed judges have less courtroom experience, are less likely to attend an in-state law school, are closer to retirement at appointment, and are more likely to have attended a higher-ranked law school. And, while partisan elected judges make significantly more political contributions to other campaigns than appointed or commission-nominated judges, they also make more political contributions than those chosen in nonpartisan elections. In short, the greater the role electoral politics plays in selection, the more likely that the people attracted to judicial vacancies will be locally connected, politically savvy people who will deliver adequate rather than great opinions (as determined by the frequency with which the opinion is cited), without much concern for their long-term reputation among other jurists.

Of course, most judges are not appellate court judges and justices, but trial court judges. The literature and most of the political debate has focused on appellate court judges and justices. Unfortunately, there have been few empirical studies of selection method effects on trial judges, who are usually selected to serve a small unit of a state's judicial system. Trial judges may produce few written opinions, or at least few published opinions. Depending on the size of their district, they may conduct only a few trials each year and few of their rulings may reach the appellate courts. Addressing the



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lack of empirical studies on selection method effects at the trial judge level is one step that may help resolve the debate on selection.

### Politicization of Judicial Elections

One common critique of changing the judicial selection process to put more power over selection in the hands of elected officials is that this change will make the judicial selection process more politicized. Nonpartisan retention elections and selection processes represent an effort to balance the political aim of public accountability with the desire for judicial independence, which is associated with protection of civil liberties and economic opportunity. Partisan elections and selection, in comparison to nonpartisan retention elections and nominating commission selection, are assumed to lead to a judiciary whose decisions are responsive to the ideological leanings of a majority of the voters in the election. Voters select or retain judges whose ideological and philosophical leanings align with the majority because voters correlate the judge's ideology with the judge's partisan affiliation. However, as the role of interest groups in judicial selection has increased, even nonpartisan retention elections have seen an increase in informational activity by organized groups, increased campaign spending, political advertising, and media awareness of the importance of judicial decisions. So, would greater partisanship in the selection or retention process yield a judiciary more in line with the political majority?

A 2009 study by Canes-Wrone and Clark in the *Wisconsin Law Review* of the impact of nonpartisan elections on judicial decisions found that nonpartisan elections place unique political pressures on appellate judges and challenges the conventional wisdom that nonpartisan elections result in greater independence from majority ideology than partisan

elections. After the decision in *Republican Party of Minnesota v. White*, judicial elections of all kinds have seen a rise in issue-based judicial election campaigns, typically focusing voters' attention on a specific substantive issue and criticizing the judge's record. Related to this trend, judges face increased pressure to state their positions on issues of importance to interest groups. While the issues vary from social policies like abortion and criminal sentencing to economic issues like tax policy and eminent domain, the pressure on judicial candidates to "announce" their views on such disputed legal or political issues has markedly increased. The study authors proposed that, in the context of the "new-style" of judicial campaigns, judges in nonpartisan elections would be *more* responsive to majority opinion than those in partisan elections.

To test this proposition, the study examined abortion cases decided by state appellate courts of last resort (supreme courts) between 1980 and 2006 in a set of states that had partisan or nonpartisan statewide judicial elections. Within their dataset of cases, they identified each judge who sat and how each voted, yielding a total of 597 judicial votes across eighty-five cases in sixteen states. To test public opinion in each state, the authors used the responses to the CBS–*New York Times* poll's questions about abortion, which have been asked regularly since 1985. They controlled for factors such as the judge's partisan affiliation, proximity of the decision to a judicial election, and the type of case in which the issue of abortion was raised. A clear pattern emerged from the data. There was no strong relationship between a pro-life majority public opinion in a state and the probability of a pro-life court decision where that state has a partisan election system. However, perhaps contrary to expectations, there was a strong, positive relationship between public opinion and pro-life decisions in states with

nonpartisan elections. The raw data suggested that as public opinion in states with nonpartisan elections became increasingly pro-life, judges cast more votes in that direction, even among Democratic Party-affiliated judges.

This study's findings provided strong evidence for the counter-intuitive claim that judges in *nonpartisan selection systems are more responsive to public opinion* than judges in partisan systems, even after controlling for other factors that may affect judicial decisions. The study authors suggest that, even in nonpartisan, unopposed, retention elections, "new-style" issue-based campaigns attacking judges' decisions may produce similar paradoxical effects. Their study demonstrates that a system originally designed to insulate judges from direct partisan political pressure has its own set of political pressures; judges selected in nonpartisan elections do take majority sentiment into account. Not surprisingly, the authors urge further research on nonpartisan, unopposed, retention elections, where public opinion may also play an unexpected but significant role in judicial decisions.

### Conclusion

Many American believe that judges should be unbiased and nonpartisan, and not influenced by other branches of government in reaching legal decisions. This, though, can be in conflict with the desire that judges be publicly accountable and render decisions more in line with the values of the average citizen. How we choose our judges reflects this conflict. In other words, the debate about judicial selection is, as Professor Michael Gilbert recently said in a *Michigan Law Review* article, "largely a proxy for the independence debate." At least one study has shown that independence from partisanship in selection and retention tends

*Please see Judicial selection, page 12*

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### **Judicial selection** *(continued from page 11)*

to increase congruency in policy cases with the views of the average citizen. Selection methods also have an impact on performance.

What that impact would be under the proposed change to the membership of the Alaska Judicial Council cannot be confidently predicted with the information available. However, the studies to date suggest that the questions raised in the selection debate require a nu-

anced consideration of the evidence for and against change.

*Ryan Fortson, J.D., Ph.D., and Kristin Knudsen, J.D., M.J.S., are members of the Justice Center Legal Studies faculty.*

## **Faculty Notes**

Dr. Brad Myrstol and Prof. Kristin Knudsen, J.D., M.J.S., have been recognized for their outstanding contributions and exceptional service to the university and have received 2015 Chancellor's Awards for Excellence.

Dr. Myrstol, Justice faculty, Director of the Alaska Justice Statistical Analysis Center (AJSAC), and Director of the Alaska Justice Information Center (AJIC), received the Chancellor's Award for Excellence in Academic Research and Creative Activity.

Prof. Kristin Knudsen, J.D., M.J.S., Legal Studies faculty in the Justice Center, received the Chancellor's Award for Excellence in Teaching.

Prof. Deb Periman, J.D., Legal Studies Program Coordinator in the Justice Center, was recently promoted to Professor of Justice. Professor Periman is also the Legal Studies Program Coordinator. Her areas of focus are legal writing, regulation of nonlawyer professionals and unauthorized practice of law, and collateral consequences of criminal convictions/offender reentry.

Prof. Jason Brandeis, J.D., Legal Studies faculty in the Justice Center, recently received promotion to Associate Professor of Justice with tenure. His areas of focus are civil liberties, constitutional law, legal education, and marijuana law and policy.

## **Alaska Justice Information Center Welcomes Staff**

Araceli Valle, Ph.D., and Karin Thomas, M.S., have joined the staff of the Alaska Justice Information Center (AJIC) as Research Professionals.

Dr. Araceli Valle received her Ph.D. from the University of California, Santa Cruz in Developmental Psychology and her M.S. in E.E. Computer Engineering from Stanford University. She is a former faculty member of the UAF School of Education and is an adjunct faculty member of the UAA College Preparatory & Developmental Studies Department.

Karin Thomas received her M.S. in Criminology from the University of Pennsylvania and formerly worked for the New Mexico Statistical Analysis Center in the University of New Mexico Institute for Social Research. She has an intermediate proficiency in Russian, and has taught English as a second language (ESL) in Russia.

AJIC is jointly funded by the state of Alaska and the Alaska Mental Health Trust Authority and is housed within the Justice Center.

### **Early Online Copy of Forum**

To receive an early online copy of the *Alaska Justice Forum*, please email editor@uaa.alaska.edu and put "Forum online" in the subject line. Visit our website to view all issues of the Forum (<http://justice.uaa.alaska.edu/forum/index.html>) or see our Facebook page (<https://www.facebook.com/uaajusticecenter>).