

BRENNAN  
CENTER  
FOR JUSTICE  
TWENTY  
YEARS

*at New York University School of Law*

## Appointing State Court Judges: Best Practices and State Examples

*Dec. 6, 2017*

---

Twenty-nine states use some form of an appointment process to select supreme court justices for an initial term on the bench, and nearly every state uses appointments to fill interim vacancies. These processes, however, vary dramatically. States' experiences suggest that absent safeguards, appointment processes pose risks that political officials will appoint cronies to the bench, that special interests will operate behind closed doors, and that the decisionmaking process will lack public accountability – potentially undermining public confidence in the courts.

To address these concerns, states should focus on who has a voice in the selection process – and prioritize developing a system that provides multiple points for public input and oversight. Such an “accountable” appointment system should have three key attributes:

1. A nominating commission with diverse membership and appointing authorities, which will vet judicial candidates and create a shortlist of nominees;
2. Appointment by the governor from the commission's shortlist; and
3. A transparent process, including data collection and ethics rules for commissioners.

While most states couple gubernatorial appointments with either retention elections or a reappointment process, these reselection processes are often politicized and can threaten judicial independence – making it harder for judges to put aside personal and political preferences to decide cases based on their understanding of the law. As an alternative, states should consider either a lengthy fixed term for judges, or empowering an independent and bipartisan nominating commission to make retention determinations.

### Nominating Commission Structure

A well-designed nominating commission can promote public confidence in the selection process, reduce the risk of cronyism or special interest capture, and create a level of insulation between the courts and the political branches of government. However, structure matters. Commissions should be

designed to provide for diversity among both members and appointing authorities, to reduce the risk of capture and enrich deliberations.

In structuring a nominating commission, states should consider adopting the following elements:

1. **Diffuse power** to appoint commissioners, with no single source with majority control. A majority of members should be appointed by elected officials across the branches of government, as a way to ensure democratic input into the process.
  - a. In **New York**, for example, four commissioner each are appointed by the Governor and Chief Judge, while the Assembly Speaker, the Assembly Minority Leader, the Senate President, and the Senate Minority Leader each appoint one commissioner.
  - b. In **Hawaii**, the Governor, the President of the State Senate, and the Speaker of the state House of Representatives each appoint two commissioners, the chief justice of the state Supreme Court appoints one, and the Hawaii State Bar Association elects two.
  - c. In **New Mexico**, the Governor, Speaker of the House, Senate President, and Chief Court of Appeals Judge each appoint two commissioners, the State Bar appoints four commissioners, and the Chief Justice and Dean of the University of New Mexico School of Law serve ex officio.
2. **Broad partisan input** on the committee, including members not affiliated with either of the two major political parties. This could be achieved by a formal partisan representation requirement, or by giving minority leaders of the state legislature the power to appoint commission members (in the case of minority party members), and/or by implementing an application and screening process for commissioners.
  - a. In **New Mexico**, for example, the two major political parties are required to be equally represented on the state's judicial nominating commission.
  - b. In **Colorado**, not more than half the commissioners plus one, exclusive of the chief justice, shall be members of the same political party.
  - c. In **New York**, the majority and minority leaders of the state senate and assembly have the power to appoint commissioners.
  - d. Notably, no states currently require representation by independents or members of third parties on judicial nominating commissions. States should consider adopting a provision holding seats for commissioners who are not members of the two major parties.
3. **Staggered terms** for commission members. Staggered terms can help prevent the creation of "vote blocks," while ensuring that institutional memory is preserved when commissioners' terms end.
  - a. In **Hawaii**, commissioners serve for a single six-year term, with terms staggered among commissioners.
  - b. In **Nebraska**, commissioners serve for four-year staggered terms, with a maximum of eight consecutive years as a commissioner.
4. **A mix of attorneys and non-attorneys**, including **a process for members of the public** to apply to be commissioners. Surveys and interviews of nominating commissioners suggest that both attorneys and non-attorneys offer important, and different, perspectives in vetting judicial candidates, and that having non-attorney representation is valuable. However, if commissions do not require a fixed number of non-lawyer members, experience shows that lawyers are likely to dominate. In order to achieve meaningful non-lawyer representation, commissions should

mandate the number of lawyer and non-lawyer members, and there should be a process for members of the public to apply to serve on the commission.

- a. In **Indiana**, the governor appoints 3 non-lawyers, the State Bar Association Membership elects 3 lawyers, and the Chief Justice serves ex officio.
  - b. **Colorado** makes public announcements of nominating commission vacancies and has a formal application process to serve as a commissioner.
5. Reserve seats to **encourage professional diversity**. Professional diversity on nominating commissions is important, both to promote a pipeline for legal professions underrepresented on the bench, and to enhance the commission's deliberations. However, a 2016 survey by the Brennan Center of nominating commission membership in 26 states found that many legal professions were underrepresented. In order to encourage broader professional representation, states should consider reserving seats for underrepresented professions.
  - a. In **New Mexico**, the Bar's four appointees must represent "civil and criminal prosecution and defense."
  - b. In **Montana**, non-attorney commissioners must each represent "a different industry, business, or profession."
  - c. A recently repealed **Tennessee** law designated seats for the Tennessee Trial Lawyers Association, the Tennessee District Attorneys General Conference and the Tennessee Association of Criminal Defense Lawyers.
6. Require appointing authorities to **consider regional, racial, and gender diversity in identifying commissioners**. Just as state benches do not reflect the diversity of the communities they represent, surveys indicate that the nominating commissions involved in recruiting and vetting judicial candidates lack diversity as well. Appointing authorities should be instructed to identify commissioners that represent the diversity of the state's community.
  - a. In **Florida**, the Governor must "seek to ensure that... the membership of the commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population."
  - b. In **Colorado**, commissioners must represent each of the state's congressional districts.