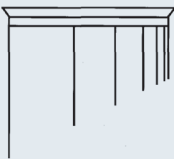




Options for FEDERAL JUDICIAL
SCREENING COMMITTEES
Second Edition

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September 2011 (2d. ed.)

**OPTIONS FOR FEDERAL JUDICIAL SCREENING COMMITTEES:
*Where They Are in Place, How They Operate, and What to Consider in
Establishing and Managing Them***

The Governance Institute, the Institute for the Advancement of the American Legal System at the University of Denver (IAALS), and Governance Studies at the Brookings Institution have revised the June 2010 first edition of this guide, and will continue to issue revisions periodically. It provides United States senators, other federal legislators, and their staffs with information about creating committees to screen potential judicial and law enforcement position nominees; provides them and committee members with information about committee operations; and provides others interested in federal judicial selection with information about an often-overlooked aspect of the process. It is not a “best practices” manual, in part because relatively little is known about how such committees work and even less about what seems to work best. The most current version of the guide is available at:

www.du.edu/legalinstitute and www.brookings.edu/experts/wheelerr.aspx

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EXECUTIVE SUMMARY

Selecting federal judges is a time-consuming and increasingly contentious process. Home-state senators, particularly those of the president's political party, have historically enjoyed the prerogative to propose nominees to the White House. Traditionally, senators have identified potential nominees through relatively informal means. This guide describes senator-appointed committees that screen potential nominees as alternatives to those informal means. Committees can preserve the senators' prerogative while being more open, transparent, and inclusive.

The Governance Institute, the Institute for the Advancement of the American Legal System at the University of Denver (IAALS), and Governance Studies at the Brookings Institution prepared this report to describe, from the admittedly limited information currently available, how such screening committees have been constructed and how they typically work. It outlines factors that senators and their staffs may wish to consider in creating a committee, and highlights issues to consider with respect to committee operations. Our goal is to identify some of the choices that legislators, their staffs, and committee members will face, and to suggest an array of options; our goal is not to prescribe "best practices."

Screening committees have been in use by some senators for more than 30 years. In 1977, President Carter created a national committee to screen potential nominees for the U.S. courts of appeals, and he urged senators to appoint their own committees for district judgeships. Senators in 29 states responded, but by the time of President George W. Bush's administration, committees were in place in only eleven states. 2009 saw an upswing in their use, with the number of committee states increasing to at least 21 (and the District of Columbia) as of September 2011, embracing 420 (62 percent) of the 673 life-tenured district judgeships. Information on their operation—even their existence—is not abundant, however.

The reasons senators may choose to use screening committees include the hope that an individual who has the endorsement of a committee may move to nomination and confirmation more quickly. The record during the Obama administration offers little empirical support for that hope, although differences in confirmation times are affected by many factors other than the work of committees. Other advantages of a committee process may include the ability to screen applicants and catch problems before any ABA or White House involvement; providing a voice to varied constituencies, including non-lawyers and members of both political parties; and inviting applications from individuals who might not otherwise come to the senators' attention.

Below is a decision tree for senators and their staffs regarding the creation of a committee, and for committee members about the operation of a committee: what are the decisions to be made and what are the options from which to choose? The decision tree provides senators, their staffs, and committee members with a roadmap drawn from the experience of other senators.

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REASONS to consider the use of screening committees:

- Ease contention and delay in the nomination-confirmation process
- Anticipate and complement ABA reports
- Provide a voice not from the president's party, without compromising the ultimate choice, to preserve partisan prerogatives in the nomination process
- Open the process to more applicants
- Enhance public trust in the process

STRUCTURE of the committee:

- Creation by one or both senators
- One or more committees: a geographic question
- Bar association collaboration
- Jurisdiction of the committee: district judgeships only, or circuit judgeships and U.S. attorney and marshal positions as well
- Permanent or *ad hoc*
- Committee size
- Formal bylaws or other governing documents, or informal process

APPOINTMENT of the committee members:

- Lawyers only or lawyers and others, and what mix of trial and other lawyers
- Political representation/bipartisanship
- Demographic representation
- Judge participation
- Chair, co-chairs: independence, visibility, experience

OPERATIONS of the committee:

- Guidance from the senator(s)
 - Criteria for evaluating applicants
 - Confidential aspects of the process versus public aspects
 - Roles of the senators' staff
 - Whether the senators will interview the candidates
 - What information the senators want from the committee in addition to names
- Funding of committee operations
- Application process: notice, forms, deadlines
- Developing the list of potential nominees to be vetted: procedures to govern the committee's decisions/process in advance (even if informal)
- Background research: who does it, how much, and what portions are confidential
- Organizing and conducting interviews
- Releasing information: when, how much

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**OPTIONS FOR FEDERAL JUDICIAL SCREENING COMMITTEES:
*Where They Are in Place, How They Operate, and What to Consider in
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I. OVERVIEW OF FEDERAL JUDICIAL SCREENING COMMITTEES

A. Screening committees in a nutshell

Senators (and sometimes other legislators) appoint committees to help them screen applicants for presidentially appointed judicial and law enforcement positions in their states. The committees may conduct much of the research and legwork as to prospective candidates and report their findings and recommendations back to the senators. Despite the similarity of purpose, screening committees vary considerably in size, composition, and operations. Important differences include whether the committees:

- Consider applicants for circuit as well as district judgeships;
- Consider judicial applicants only, or applicants for U.S. attorney and marshal positions as well;
- Include members affiliated with both political parties;
- Include non-lawyers, current or former public officials, and other representatives of potentially interested groups;
- Are the agents of one or of both of the state's senators;
- Vet candidates for positions in all districts of a multi-district state, or have a committee for each district; and
- Operate largely in the open, publicizing lists of applicants and recommendations to senators, or work largely behind the scenes.

Although we refer to them as "screening committees," there is no generic name for these bodies. Extant committees include, for example, a "Judicial Advisory Committee," a "Federal Judicial Nominating Commission," a "Federal Law Enforcement Nominating Commission," and a "Federal Judicial Selection Committee." Some senators' press releases provide no formal title, referring simply to the senators having named "a bipartisan judicial advisory commission." "Judicial nominating committee," a frequently used title, is a misnomer. Committees advise senators, who in turn recommend prospective nominees, but nomination lies with the president.

"Senator," as used here, embraces other legislators who might participate in committee creation. Senators usually appoint screening committees, although some senators not of the president's party share the appointments with House members of the president's party, and some House members have appointed their own committees. Also, while some committees (in Wisconsin, for example) vet potential circuit nominees, our focus in this guide is on district court nominations.

B. The history of screening committees

Screening committees have been in use for almost 40 years. Florida's senators created one in 1974. In 1977, President Carter created by executive order the United States Circuit Judge Nominating Commission, with a panel in each regional circuit, to suggest nominees for the U.S. courts of appeals. He also urged senators to appoint committees in their states to suggest district court nominees.¹ In doing so, he cited his experience with committees he created as the governor of Georgia to recommend interim appointees to state judicial vacancies.²

Senators in 29 states appointed committees in response to Carter's request. President Reagan disbanded the circuit commission, but his attorney general, William French Smith, encouraged senators to continue to use state-level committees to screen potential district judge nominees.³ Nevertheless, the number of committees declined. It appears that during President George W. Bush's administration, senators in eleven states used them.

There has been an upsurge in committee creation during the Obama administration. By September 2011, legislators (almost all Democrats) in at least eleven more states and the District of Columbia had created or reactivated committees, joining those already operating (although one of the eleven no longer functions). They are now sufficiently widespread that Senate Majority Leader Harry Reid told a Las Vegas newspaper in August (with only slight overstatement) that "most senators use a committee to help them select judges" even though he does not.⁴

The reasons for the upsurge are unclear. The Obama administration made no public call for their use, but legislators who had had little involvement for eight years in recommending nominees may have been looking for mechanisms to help them identify candidates. Legislators may also have been responding to an August 2008 American Bar Association resolution urging senators in each state jointly to appoint bipartisan committees of lawyers and non-lawyers to recommend would-be district nominees to the senators.⁵ Some senators have also emphasized that committees will screen U.S. attorney applicants, perhaps reacting to the controversy over U.S. attorney hirings and firings in 2006 and 2007.

Appendix A lists committees that appear to be in place, or ready to go into operation when vacancies occur, as of September 2011. It identifies 21 states and the District of Columbia where committees function, out of 52 jurisdictions with life-tenured district judgeships (50 states, the District of Columbia, and Puerto Rico). These 22 jurisdictions embrace 420 (62 percent) of the 673 life-tenured district judgeships. There are more than 22 committees; in a few states, each senator has a committee, and in others, senators have appointed separate committees or sub-committees for each judicial district.

Information on committee composition and operation—and even their existence—is not abundant, despite the best efforts of the American Judicature Society (AJS) to identify and describe them on its Judicial Selection in the States website.⁶ (When preparing the first edition of this document, we were unaware, for example, of the committee that has evidently functioned for some time in New York.)

In preparing this guide, we have relied on AJS's list as well as information from the Congressional Research Service, legislators' websites, press reports, and conversations with

committee members. (Inquiries to senators' offices have not been a productive source of information.) Cumulatively, this information provides insight into the value that senators perceive screening committees to offer, as well as the factors to consider in structuring, appointing, and operating a committee.

We provide as well quantitative comparisons of the 120 nominees submitted by the Obama administration through September 9, 2011, in states with and without committees. These comparisons come with several important caveats. First, we do not necessarily know whether a nominee sent to the Senate was on the list that the committee sent to the senator. Second, the committees vary greatly in size and operations, limiting the value of a simple committee state/non-committee state dichotomy. Some committees no doubt undertake vigorous investigations, the results of which are welcome by the senators who appointed them. Others are likely little more than rubber stamps for senators' preferred candidates. Thus, our quantitative comparisons of nominees from committee and non-committee states do not compare the products of apples and oranges but instead the products of two fruit salads of varied composition. And third, while we can measure the pace of the process and characteristics of the nominees, it is difficult to assess whether the committee process produces better judges, as we do not have independent, reliable measures of nominees' judicial aptitudes other than their ABA ratings.

(On this measure, there was a small difference among committee and non-committee states with respect to ABA ratings of Obama's 120 nominees. On a three-point scale (3 = unanimous "well qualified"; 2 = mixed "well qualified" and "qualified"; and 1 = unanimous "qualified" or mixed "qualified" and "not qualified"), committee state nominees averaged 2.27 and non-committee state nominees averaged 2.13. Four of the 75 committee state nominees and three of the 45 non-committee state nominees received at least one "not qualified" vote.)

C. Comparisons to state judicial nominating commissions

Federal-level committees bear certain similarities to judicial nominating commissions at the state level. At least two federal-level committees are named "judicial nominating commissions," and observers often analogize their work to that of state judicial nominating commissions.

The goal envisioned for both is to broaden the perspectives that might otherwise be brought to bear on the process of selecting judges. State commission proponents often state a further goal of "depoliticizing" judicial selection in favor of selection on the basis of "merit." Although federal-level committees assume that senators will largely recommend and presidents will largely nominate members of the president's political party, committee proponents believe that committees can reduce some effects of the political polarization that has affected the federal judicial selection process.

However, there are substantial differences between state commissions and federal-level committees. First, the state bodies are authorized by state constitutions or statutes, or occasionally by executive order, but the committees that senators create are products of their own initiative. Second, state bodies formally *nominate* would-be judges for the governor's consideration, while the federal-level committees simply recommend individuals whom

senators may or may not pass on to the White House and whom the White House has no obligation to nominate. Third, state law mandates the composition of the commissions. Finally, state commissions often include, by law, sitting judges, and are often chaired by chief justices. By contrast, it appears that no federal judges, active or senior status, serve on any federal-level committees, although a few former state and federal judges do. Because there are no statutory mandates analogous to those creating state nominating commissions, judicial service on federal committees might run afoul of state or federal judicial conduct codes.

D. Reasons why senators may wish to create screening committees

Committees may enhance the initial stage of filling a vacant district judgeship. We stress “may,” because even if the senators prize the values listed below, none will result automatically from committee use.

To ease contention and delay

Nominees who come with a committee endorsement—especially a bipartisan endorsement—may move to nomination and confirmation more quickly than other nominees. Although district judge nominations and confirmations have not been as contentious as those for would-be circuit judges, contentiousness has been on the rise and the confirmation process clearly takes longer than it once did. The delay may discourage potential nominees, especially those in the private practice of law.

Table 1 provides comparative information about the pace of nominations and confirmations for judgeships in states where committees appear to have operated during the Obama administration.

TABLE 1
PACE OF NOMINATIONS AND CONFIRMATIONS,
JANUARY 21, 2009-SEPTEMBER 9, 2011

	Committee states	Non-committee states
Vacancies (January 21, 2009 through September 1, 2011)	97	53
Nominations (and as a % of vacancies)	75 (77%)	45 (85%)
Nominations within 1 year of vacancy occurring*	36 (49%)	23 (51%)
Average days from vacancy to nomination	383	374
Confirmations (and as a % of nominees)	48 (65%)	26 (59%)
Confirmations for nominees submitted by 4/9/11**	48 of 59 (81%)	26 of 36 (72%)
Average days from nomination to confirmation	218	183

* Specifically, from the date the incumbent publicly announced s/he would leave active service at some future date or, absent such announcement, the date the incumbent left active service, or Inauguration Day 2009 for vacancies in place prior to that date.

** To eliminate from the calculation very recent nominees, who were unrealistic candidates for confirmation in any case by September 9, a week after the Senate returned from a five week adjournment. The roughly four-month delay is an estimate of a reasonable time to confirm a district nominee.

On the face of it, there are no dramatic differences between the pace in states with and without committees—49 percent of committee state vacancies had nominees within a year, as did 51 percent of other nominees. One might expect the committee states to take longer to produce nominations, but that is not the case so far in the Obama administration—383 days on average versus 374. Committee state nominees have been confirmed at a slightly higher rate than other nominees—81 percent to 72 percent—once recent nominees are out of the calculation, but have taken 281 days on average to get confirmed, versus 183.

These numbers represent overall averages, and come with the caveats noted above and the additional caveat that we do not know, for most nominations, how long committees took to submit names to senators, how long senators took to submit names to the White House, and how long the White House took to submit nominations to the Senate.

Table 1 also hides variations among committee states, as seen in Table 2. Some states with two Democratic senators for all or most of the period since 2009—Illinois, California, Ohio—saw nominations comparatively quickly, but less so in New York, Michigan, and, especially, Pennsylvania, where the three nominees so far (for eight vacancies) took an average of 546 days to go to the Senate. In committee states with two Republican senators—Georgia and Texas—average days to nomination were also noticeably higher than the 383 days on average for all committee state nominees.

TABLE 2
OBAMA NOMINATIONS AND TIME TO NOMINATION—SELECTED COMMITTEE STATES
THROUGH SEPTEMBER 9, 2011

State	Nominations/total vacancies	Average days to nomination
Illinois	6/9	275
California	13/14	317
Ohio	3/3	340
Florida	4/6	370
New York	13/15	365
Michigan	1/3	379
D.C.	5/5	412
Georgia	5/5	489
Texas	5/8	531
Pennsylvania	3/8	546
All committee states	75/97	383
Non-committee states	45/51	374

Another way of assessing the possible impact of committees involves “judicial emergencies.” The Judicial Conference of the United States designates a district court vacancy as an emergency based on several criteria, mainly involving the district’s per judge “weighted filings” and the length of the vacancy. At least for vacancies in place in 2009 and 2010, nominations to judicial emergency vacancies in committee states outpaced those to non-emergency vacancies; 27 of the 37 emergencies received nominations (73 percent), as opposed to 21 of the 38 non-

emergency vacancies (55 percent). Emergency vacancies in non-committee states also saw proportionately more nominations, but the difference was smaller (63 percent to 58 percent). Whether those differences reflect committee activity is hard to say, and in any case, *confirmations* to emergency vacancies in non-committee states were actually higher than in committee states (58 percent to 41 percent), discounting the view that the Senate acted more rapidly to fill emergency vacancies whose nominees had committee endorsements.⁷

To anticipate and complement ABA reports to the White House of would-be nominees' professional qualifications

The American Bar Association's Standing Committee on the Federal Judiciary provides the White House with evaluations of prospective judicial nominees under serious presidential consideration. The ABA committee says its evaluation "focuses strictly on professional qualifications: integrity, professional competence and judicial temperament [and] does not take into account a prospective nominee's philosophy, political affiliation or ideology."⁸

The ABA is in a position to identify problems with a nominee only *after* a name gets to the White House. Screening committees may be able to identify any such problems much earlier. Screening committees may also weigh such considerations as demographic diversity and role in the community—considerations as to which non-lawyer views may complement those of lawyers—and factors that the ABA says it does not consider.

As we note later, however, there is a flip side to anticipating the ABA evaluation. The ABA process, as well as other investigations of nominees, may turn up problems that a screening committee missed, calling into question the committee's credibility.

To preserve partisan prerogatives as to nominations

Committees can provide bipartisan or non-partisan evaluations of potential nominees, but they in no way hinder the prerogatives of senators to recommend and of presidents to nominate candidates of their own choosing. In most cases, these candidates will be at least nominal members of the president's political party.

To provide a voice to senators not of the president's party

Senators' joint appointment of bipartisan committees when one or both senators are not of the president's political party may provide those senators a stronger voice in the judicial selection process than they might otherwise have. As described in Section E, during the George W. Bush administration, Democratic Senate delegations in California, Washington, and Wisconsin, in concert with Republican party leaders in each state, forwarded recommendations to the White House, as did the mixed Senate delegation in Florida. In 2009, Ohio Senator Sherrod Brown (D) and then-Senator George Voinovich (R) created a joint committee; at present, there are no actual or announced vacancies in either Ohio district, and Senator Rob Portman (R) has not said publicly to our knowledge whether he will follow his predecessor's practice. Pennsylvania and Wisconsin had unified Democratic senate delegations in (most of) 2009-10. The new Pennsylvania Republican senator, Patrick Toomey, apparently will work with the committee structure in place, but the new Wisconsin Republican, Ron Johnson, has called for a change in the allocation of appointment authority as between the two senators. In Illinois, Democratic

Senator Richard Durbin reactivated a committee in 2009 without involving then-Senator Roland Burris. In 2011, new Republican Senator Mark Kirk appointed his own committee to advise him under an arrangement whereby, for every four vacancies, Durbin forwards nominees for the first three and Kirk forwards nominees for the fourth vacancy. In Massachusetts, Senator John Kerry has delegated to Republican Senator Scott Brown two appointments to the 12-member committee that he and other Democratic senators had established. The Republican Senate delegation in Georgia uses its pre-existing committee to evaluate potential nominees provided by the White House; and the Republican Senate delegation in Texas says it has reconstituted its committee as bipartisan to vet candidates forwarded by the White House (competing with Texas Democratic House members, who have vetted candidates as well).

To open up the application process

Critics of the traditional judicial nomination process have often charged that the only individuals considered are allies of the senator, or at least politically visible individuals. With a committee process, individuals can more easily self-select for consideration, which may encourage sitting judges and others who may not have, or who have lost, specific political ties to consider applying. As Table 3 illustrates, however, the professional backgrounds of nominees from committee states and non-committee states are strikingly similarly, and in fact, a slightly higher percentage of sitting judges overall has been nominated in non-committee than in committee states (52 percent versus 44 percent). Of course, we cannot speak to differences among applicants (as opposed to nominees) in committee and non-committee states.

TABLE 3
POSITION HELD AT TIME OF NOMINATION—OBAMA NOMINEES
THROUGH SEPTEMBER 9, 2011

	Committee States	Non-committee States
Nominees	75	45
State judge	20 (27%)	12 (27%)
Federal judge	13 (17%)	11 (25%)
U.S. or state govt.	15 (20%)	7 (16%)
Private practice	26 (35%)	15 (33%)
Professor	1 (1%)	-

(Note the same cautions referenced above. And percentages may not total 100 due to rounding.)

To create more demographic diversity among district judges

The first sentence of the 2008 American Bar Association resolution endorsing senators’ use of screening committees encouraged “the selection as federal judges of men and women of diverse backgrounds and experiences.”⁹ Supporters of committees believe that they may, better than traditional informal methods of recruitment, attract a greater variety of candidates as to gender, sexual orientation, and racial and ethnic background. Table 4 compares Obama’s 120 nominees (through September 9, 2011) as to gender, race, and ethnicity.

TABLE 4
CERTAIN DEMOGRAPHIC VARIABLES—OBAMA NOMINEES
THROUGH SEPTEMBER 9, 2011

	Committee state	Non-committee State
Nominees	75	45
White males	28 (37%)	18 (41%)
White women	19 (25%)	15 (34%)
African American men	6 (8%)	3 (7%)
African American women	7 (9%)	4 (9%)
Hispanic men	5 (7%)	-
Hispanic women	4 (5%)	3 (7%)
Asian American men	2 (3%)	-
Asian American women	4 (5%)	1 (2%)
Native American	-	1 (2%)

(Note the same cautions referenced above. And percentages may not total 100 due to rounding.)

Committee state nominees include a slightly smaller percentage of white males (but also of white females). The committee states' lower percentage of white nominees is explained in part by their higher percentages of Hispanics—12 percent versus seven percent—and the noticeably higher number and percentage of Asian Americans—six (eight percent) versus one (two percent) from non-committee states. It is difficult to say, however, whether these differences may be attributed to the committees, as opposed to population variations that might be reflected in any judicial recruitment process. Of the six committee state Asian-American nominees, five are from California or Hawaii. The one non-committee state Asian-American nominee is from Nevada (one of two Obama Nevada nominees). Four of the seven Hispanic nominees are from California or Texas. Given those states' demographic makeup, one might expect similar figures regardless of the presence of committees. (And again, nominees may not reflect senatorial recommendations, as appears to be the case, for example, regarding the one Native-American nominee, who faces opposition from both Republican senators.¹⁰)

As to sexual orientation, a Senator Barbara Boxer press release noted that a nominee, whom she said she had recommended “after a thorough interview and vetting process by a bipartisan advisory committee,” would become “the first openly gay federal judge confirmed to serve in California.”¹¹ Senator Charles Schumer in press releases also made special note of the sexual orientation of two lawyers nominated for New York district court judgeships, although he did not mention his screening committee.¹²

E. Variations in committee appointment methods and composition

The composition and use of screening committees varies significantly by state. For example:

- California's two Democratic senators alternate recommending nominees for vacancies in the state, and each has appointed what they say is a bipartisan committee of five to seven members (all lawyers) for each of the four judicial districts.¹³ During the George W. Bush

administration, Senators Boxer and Feinstein had appointed some members of a screening committee chaired by a leading California Republican.¹⁴

- Connecticut's two senators in March 2009, then-Senator Christopher Dodd (D) and Senator Joseph Lieberman (I) announced what a news story called a committee of "lawyers, an educator, and a businessman" to "solicit, screen, and comment on candidates" for U.S. marshal and "other federal positions as appropriate."¹⁵ AJS reports that new Senator Richard Blumenthal uses the (or "a") committee, although a search of Blumenthal's press releases and other sources provide no confirmation of that.
- For two recent district court vacancies, Colorado's two Democratic senators appointed a 10-member bipartisan committee, all lawyers,¹⁶ with Democratic and Republican co-chairs.
- Florida's Democratic and Republican senators' rules of procedure for the Federal Judicial Nominating Commission create three district "conferences," each consisting of 22 members, and provide for a "presiding" and "non-presiding" senator. The presiding senator, who appoints 15 members and the chair of each conference, is the senator of the party of the president, unless both are, in which case the presiding senator is the senior senator. If neither senator is of the president's party, "the Senators, in their discretion, may maintain, revise or suspend the operation of these rules."¹⁷ The conferences screen applicants for district judgeships and U.S. attorney and marshal positions. (Newly elected Senator Marco Rubio has continued the Florida Senate delegation's support for the committee process.¹⁸)
- In 2009, Georgia's House Democrats appointed a 12-member committee, almost all lawyers and apparently all Democrats, including several state legislators,¹⁹ but they did not reactivate the committee to deal with more recent vacancies.²⁰ As well, Georgia's two Republican senators maintain a six-member committee (one member told us it is "non-partisan"—he doesn't know the affiliations of the members), which screened applicants during the George W. Bush administration but now evaluates potential nominees referred by the White House.
- Illinois Democratic Senator Richard Durbin in 2009 appointed three bipartisan committees (almost all lawyers)—ten members for the large Northern District and six each for the smaller Central and Southern districts—to screen judicial, U.S. attorney, and U.S. marshal candidates. Senator Durbin said he would consult with then-Senator Roland Burris (D) and Illinois House Republicans before forwarding names to the White House.²¹ In January 2011, Durbin announced he had appointed a single, ten-member committee to suggest district court nominees. In February, newly elected Senator Mark Kirk (R) announced appointment of a 14-member, "bipartisan" committee, including a sitting member of the House of Representatives and a former federal judge, as well as other lawyers.²² Kirk's press release said he would "work closely with Senator Durbin (D-IL), who has formed a similar committee."²³ The practice as to Illinois split delegations allows Durbin to forward nominees for three vacancies and Kirk to forward nominees when a fourth vacancy occurs, although according to news stories, that does not preclude Kirk's submitting prospective nominees in addition to Durbin's.²⁴

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- The late Senator Edward Kennedy of Massachusetts appointed a 12-member committee along with Senator John Kerry, and Kennedy's interim replacement, Democratic Senator Paul Kirk, consulted with the committee as well.²⁵ More recent news reports indicate that Kerry has permitted new Republican Senator Scott Brown to appoint two members to the committee.²⁶
- Committees have apparently been in use in New York for some time, but information on current membership or operations is hard to find, and unlike most other senators who use them, Senator Charles Schumer does not refer to the committee in press releases about judicial nominations or confirmations. Our inquiries to the chair and a member of the committee have so far gone unanswered. A local paper reported in 2009 that the committee advising Senator Schumer then consisted of about 12 members and that Senators Daniel Patrick Moynihan and Alfonse D'Amato had used committees.²⁷ Senator Kirsten Gillibrand's July 2011 announcement of her first district nominee recommendation made no reference to a committee,²⁸ nor did a related news story (by a reporter familiar with the topic of these committees).²⁹
- North Carolina Democratic Senator Kay Hagan appointed a four-member committee, chaired by a former state chief justice and including one lawyer from each of the state's three judicial districts.³⁰ As of this writing, the Eastern District of North Carolina has the longest standing district vacancy without a nominee, dating back to December 2005.
- In 2009, Ohio's Democratic and Republican senators (Sherrod Brown and George Voinivich) jointly appointed two bipartisan committees, one for each of the state's two judicial districts. However, according to an April 2009 press release, "[t]o prevent any conflicts of interest," each committee would screen applicants for vacancies in the other judicial district.³¹ The committee was composed of lawyers and non-lawyers, including former judges and former members of Congress. It is unclear whether newly elected Senator Portman (R) will maintain the practice begun by his Republican predecessor. According to news reports, the most recent Ohio nominee, submitted in May 2011, was nevertheless recommended by Brown and Voinivich in 2010, after review by the committee.³²
- In Pennsylvania, Senator Robert Casey (D) and newly elected Senator Patrick Toomey (R) announced a "bipartisan agreement on judicial vacancies" and the establishment of "judicial nomination advisory panels" in the Eastern and Middle Districts, and the Western District "when necessary," each to consist of approximately 20 members and two co-chairs, half appointed by each senator respectively. The agreement promised a committee interview to "[e]ach applicant who completes and submits the questionnaire" promulgated by the Senate Judiciary Committee.³³
- Texas's two Republican senators used a 31-person committee to screen applicants during the George W. Bush administration, and report having reconstituted it to a bipartisan committee to screen potential nominees sent to them by the Obama administration.³⁴ Texas House Democrats said they will also submit recommendations to the White House. Nominations have been slow in Texas—two in July 2010 and three more in 2011 (see also Table 2, above)—and recent press reports include charges by House Democrats of

senatorial obstructionism and White House foot-dragging, and similar complaints about the White House from the senators.³⁵

- In 2009-10, Wisconsin's two Democratic senators used an 11-member committee created by charter to screen applicants for district and circuit judgeships, and U.S. attorney and marshal positions.³⁶ The committee structure dates to 1979; the current senators activate the charter each time a vacancy arises. The committee chair is a law school dean from either the Eastern or Western District, depending on the location of the vacancy. The Wisconsin state bar appoints two members, and political leaders appoint the other members: four members each by the two senators of the president's political party, or, with a split delegation, five by the president's party's senator, three by the other. If neither senator is of the president's party, each appoints two members and four are appointed by "the most senior elected official of the President's party" (during the George W. Bush administration, Representative James Sensenbrenner).³⁷ Newly elected Senator Ron Johnson (R) said in early 2011 that the administration should not have resubmitted in the 112th Senate two nominations that expired in the 111th. According to his press secretary, "It is the senator's view that any holdover nominees would need to be renominated through this commission process."³⁸ And Johnson has called for a change in the committee composition, with each senator appointing the same number of members regardless of their, or the president's, political party.³⁹

II. FACTORS TO CONSIDER IN STRUCTURING A SCREENING COMMITTEE

Senators have structured their committees in many different ways. These variations suggest several factors to consider in creating or modifying a committee.

A. Creation by one or both senators

The 2008 ABA resolution (see p. 2, above) and experiences of some committees suggest that committees are more effective when both senators appoint them jointly, regardless of the senators' party affiliation. When the committee serves only one senator, the other senator may give no credence to the recommendations. In 2008, Colorado Democratic Senator Ken Salazar appointed a committee, but Republican Senator Wayne Allard declined to participate. As a result, the committee process was helpful to Senator Salazar, but Senator Allard did not subscribe to it. The 2010 elections increased the number of split Senate delegations, including in three states where senators have used committees. As noted above, the new Republican senator in Pennsylvania plans to continue the committee process, as does the new Republican senator in Florida, who replaced a Republican. The new Republican senators in Illinois and Wisconsin also plan to continue the committee process, albeit with modifications.

B. Non-Senate appointers

As described above, the charter that structures the Wisconsin committee (at least up to now) allocates appointing authority to the senators based in part on the party affiliation of the two senators and the president, and when they are not the same, vests authority to appoint four of eight members in "the most senior elected official of the President's party."⁴⁰

Senators might also consider vesting some appointments outside of political parties or having *ex officio* members on the committee. Again, under the Wisconsin charter the bar appoints two members and makes the dean of the major law school in each judicial district the chair of the committee, *ex officio*, depending on the location of the vacancy.

In states where neither senator is of the president's party, House members of that party sometimes form committees, as in Maine, for one example (see section E, below). Georgia House Democrats created a now-dormant committee (see page 9, above), and former Alabama Democratic Representative Artur Davis appointed a screening committee to recommend candidates that he could forward to the White House, and in doing so appeared to create a conflict with the state Democratic party, which also planned to submit names. The White House nominee for the one vacancy on Alabama's district courts so far during the Obama administration was, according to press reports, on Davis's list but not that of the party.⁴¹ As of this writing, there are no current or announced district court vacancies in Alabama; Davis's successor's website contains no indication of whether she will follow Davis's example when any vacancy occurs. The District of Columbia's non-voting congresswoman, Eleanor Holmes Norton, uses a 17-member "Federal Law Enforcement Nominating Commission" to screen candidates for "United States Attorney for the District of Columbia, U.S. District Court judges, the U.S. Marshall, and similar federal offices for the District of Columbia" whom she might then recommend to the president. She noted that President Obama "has extended this courtesy to her, as had President Clinton."⁴²

C. Bar association collaboration

Federal-level screening committees in Florida and Wisconsin are supported by their respective state bar associations, at least to the extent that the committees occupy a page on the associations' websites, with information about membership and committee operations. Similarly, the state bars of Hawaii, Vermont, and Wisconsin appoint members to screening committees in their respective states. Senators may wish to consider the advantages (possibly logistical support) of that arrangement and any possible disadvantages (such as fueling charges that committees are captives of the bar or segments of the bar). The 2008 ABA resolution encouraged senators to appoint non-lawyer members as well as lawyers who "reflect ... the diversity of the profession."⁴³ Nevertheless, the *Wall Street Journal* editorial board, which has argued for eliminating or revamping state judicial nominating commissions, called the ABA resolution "the latest lawyer-led attempt to strip judicial selection from future Presidents" because, in the board's words, "the chief arbiter of what qualifies as 'merit' soon becomes the lawyers' club, especially the trial bar."⁴⁴

D. Jurisdiction

Senators typically recommend candidates for U.S. attorney and marshal positions as well as for district and possible circuit judgeships, and some federal-level committees screen candidates for all four positions. In fact, one or two committees were apparently created principally to vet law enforcement applicants, although they also consider would-be judges.

Senatorial prerogatives with respect to candidates for circuit judgeships are often more circumscribed than for district judgeships, yet some committees (such as those in Hawaii and

Wisconsin) also make recommendations when circuit judges resident in the state leave active service.

There are also geographic considerations. Senators in some large, multi-district states (such as California, Florida, and Ohio) have appointed committees (or sub-committees) for each district.

Finally, senators not of the president's party may decide to use a committee not to develop recommendations, but rather to review potential nominees that the White House sends to them. This type of committee, used (for example) by Georgia's two Republican senators, may help identify the likelihood of objections strenuous enough to prompt procedural moves to delay or prevent action on the nominee.

F. Permanent or ad hoc committees?

Vacancies occur rarely in states with few judgeships, and legislators in those states seem to prefer constituting committees only when vacancies occur. Since 1990, for example, the District of Maine has had four vacancies to fill in its three authorized judgeships. District Judge D. Brock Hornby announced in July 2009 that he would take senior status in April 2010. In March 2010, Maine's two House members, Mike Michaud and Chellie Pingree (both Democrats), formed a committee to screen applicants for the vacancy,⁴⁵ and reinstated the process after the first candidate they submitted to the White House withdrew, citing health and family reasons prior to any White House announcement.⁴⁶ They earlier formed a committee for a U.S. attorney vacancy,⁴⁷ and in April 2011 announced a separate committee to seek applicants for a court of appeals vacancy.⁴⁸

F. Committee size

The screening committees currently in existence (for entire states or for individual districts within a state) appear to range in size from four members to over 30, but generally consist of six to 12 members. The most appropriate number of members depends on a variety of factors, including the number of judgeships for which recommendations will be needed (which in turn depends on the size of the state or district), and a membership that is small enough to function as a unit but with enough members that the work can get done without overburdening them.

G. Formal bylaws or other governing document

Senators in some states have described basic committee elements—the appointment protocols, basic procedures committees are to use (e.g., seeking applicants), and criteria for assessing candidates—either in charters or in press releases. The Florida charter appears to be the most detailed, describing not only appointment protocols but also procedural specifics, including aspects that are public and otherwise will be made available to the public.⁴⁹ Wisconsin also has a detailed charter.⁵⁰

Senators might consider preparing a charter-type document in the interest of transparency and accountability—to provide interested members of the public with information about selection processes involving important public offices—processes typically steeped in secrecy—and allow public evaluation of adherence to stated processes and criteria.

Similarly, creating a charter helps with comparative analysis. Information about screening committees is difficult to locate. While charters or other official descriptions of structure and

operations may not necessarily convey accurately what committees actually do, they can provide a starting point for senators who are considering creating or modifying a committee.

III. FACTORS TO CONSIDER IN APPOINTING A SCREENING COMMITTEE

The actual membership of a screening committee can be as important as its structure on paper. Accordingly, in appointing screening committees, senators may wish to consider the following factors:

A. Political representation/bipartisanship

The ABA and others recommend bipartisan committees—generally thought to mean members identified with both major political parties as well as political independents. A variation is a non-partisan committee—members chosen without regard to, or perhaps even knowledge of, political affiliation.

Of the committees we know about, operating in 22 jurisdictions, at least ten were described in their charters, press releases, or news stories as “bipartisan”—viz., in California, Colorado, Florida, , Illinois (Durbin’s and Kirk’s), Ohio, Pennsylvania, Texas, Washington, Wisconsin—or “nonpartisan” according to a Georgia committee member. “Bipartisan” is an elastic concept that can embrace an eight member committee with three loyal Democrats, three loyal Republicans, and two confirmed independents—OR an eight member committee with seven loyal Democrats and one independent leaning Republican—and numerous combinations in between.

In any event, an endorsement by a group that includes representatives from both sides of the aisle may provide presidents and senators (and the public) with an indication that individuals from across the political spectrum find the candidate meritorious while still recognizing the realities of federal judicial selection. The small number of vacancies in some of the committee states makes it difficult to draw conclusions about actual effects.

Bipartisan or non-partisan committees may be a tactical necessity for senators not of the president’s party who hope to have some influence in the selection process in addition to the threat of a hold or a blue slip. (Authorizing others to appoint some members or providing for *ex officio* members (e.g., bar presidents in either case) takes the partisan composition somewhat out of senators’ hands.)

B. Demographic representation

The ABA resolution calls for committees composed of “lawyers and other leaders, reflecting the diversity of the profession and the community.” A diverse committee might include representatives from each of the following groups:

- Segments of the bar: The reference to the “diversity of the profession” reflects the view that no one or two segments of the bar (including, but hardly limited to, litigators) should have exclusive access to senators concerning judicial applicants. On the other hand, at least for potential district judges and perhaps as well for potential circuit judges, substantial trial experience within the committee membership may be a valuable, or even essential, element to bring to bear on the vetting process.

- Non-lawyers: Including non-lawyers on the committee emphasizes the broader evaluative role of screening committees (as opposed to the more specific focus of the ABA Standing Committee on the Federal Judiciary). Of the committees apparently in place or ready to operate when a vacancy occurs, at least four (Connecticut, D.C., Ohio, and Pennsylvania) appear to include non-lawyers (as did the now-dormant Georgia House Democrats' committee). Some observers caution, however, that non-lawyers with little idea of what judges do, or with ideological axes to grind, may weaken a committee rather than enhance it.
- Diverse community representatives: Just as committee recommendations may carry more weight if committees are not perceived to be controlled by members of the appointers' political party or narrow segments of the bar, those recommendations might also mean more if the committees are not perceived as dominated by one or more demographic groups. A 2009 controversy in Oregon, however, suggests that a demographically diverse committee will still prompt criticism, at least in some states, if it forwards homogeneous applicants. Senator Ron Wyden evidently appointed a committee including women and various minorities, but the committee recommended five white males, creating an uproar within the Oregon Women Lawyers' association and other groups.⁵¹ This may explain why Senator Wyden added a male Hispanic state judge to the list he sent to the White House, which nominated that state judge (whom George W. Bush had also nominated, albeit in July of his final year in office) and one of the lawyers on the committee list, both of whom have been confirmed.

C. Judicial membership

State judicial nominating commissions frequently include sitting judges by law, but it does not appear that any of the federal judicial screening committees have included sitting judges (although some include former state or federal judges, such as those in California, Colorado, Illinois, Montana, North Carolina, and Ohio). Sitting judges could view committee membership as political activity under codes of judicial conduct. Professor Mary Clark of the Washington College of Law has analyzed in some depth the arguments for and against including judges on federal-level committees, and recommends against it.⁵²

That judges do not serve on a committee, however, does not mean that the committee cannot solicit, on a confidential basis, the views of judges who are in a position to comment on the qualifications of a prospective nominee.

D. Other characteristics of committee members

Other considerations in appointing committee members include the ability to keep confidences, avoiding overly domineering personalities, and the costs and benefits of appointing individuals known to be close friends of one or both senators.

E. Chairs or co-chairs

In designating one or chairs, an obvious factor is the ability to lead a small group of accomplished individuals who may have different ideas about the committee's product. Other considerations include:

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- Whether the designation will signal the importance of the committee's work. Ohio's senators in 2009, for example, appointed a former state attorney general and law school dean to chair one committee, and the executive vice president and general counsel of a large Cleveland bank to chair the other committee;
- Whether the chair is sufficiently independent of the senators to avoid the appearance of a set-up. Former Florida Republican Senator Connie Mack appointed a Democrat to chair the already-in-place committee when he entered the Senate in 1989. The Wisconsin charter designates as committee chair the dean of the law school in the area of the vacancy to be filled; and
- Appointing co-chairs may have benefits beyond a shared workload. Colorado Democratic Senators Bennet and Udall, for example, probably enhanced the bipartisanship of their committee by appointing a Democrat and a Republican as co-chairs.

IV. FACTORS TO CONSIDER IN OPERATING A SCREENING COMMITTEE

Screening committees are creatures of the senators who appoint them, and accordingly senators may wish to instruct the committee about how to operate. Operational rules or guidelines can provide important structure to the work of the committee, but rules that are too stringent and leave no room for committee discretion may discourage the service of able lawyers and non-lawyers as committee members.

A. Topics for senatorial guidance

It seems most appropriate for senators to provide guidance to their screening committees in the following areas:

- Criteria for evaluating applicants;
- Aspects of the process to release to the public or keep confidential (e.g., names of applicants, names of finalists, demographic breakdown of applicants or finalists);
- Information the senators want to receive from the committee, such as information on the process (number of applicants, number interviewed, etc.), the number of applicants on the final list sent to the senators, background information on each applicant, and perhaps how and by whom it was gathered; and
- Roles and responsibilities of senators' staffs. Staff members likely will have considerable contact with the committee, serving to one degree or another as senator-committee liaisons (and making decisions that some committee members might think the senators should make). Matters that staff will be involved with may include initial contact with potential committee members, including explaining the committee's anticipated role and specific tasks; publicizing vacancies, application deadlines, etc.; creating application forms and developing protocols for candidate interviews, background checks, etc.; and deciding how many candidates to interview and participating in the interview and selection process.

Senators may also want to establish at the outset their policies as to interviewing applicants forwarded by the committee. Among the considerations:

- Whether the senators will interview the applicants forwarded by the committee, review only the committee's work product, or simply forward the names to the White House;
- Whether they will regard staff summaries of the interviews and other information as sufficient; and
- Whether senators will require criminal background and/or tax return investigations before submitting names to White House.

B. Committee funding

The money a committee needs to operate may be affected by the geographic dispersal of its membership. Decisions regarding funding and reimbursement, however, appear to rest with individual senators. Among the considerations:

- Whether committee members will pay their own travel and subsistence costs, and if so, whether such a requirement will discourage participation by some individuals (e.g., public interest lawyers without institutional affiliations);
- Who else might fund these travel costs, as well as such items as posting vacancy notices and meeting room expenses;
- Whether committee chairs should be selected with an eye to their institutional resources, in order to satisfy some costs;
- Whether public funds available to the senators should meet some or all of these costs. According to the Congressional Research Service, "Senate financial management regulations ... provide, in part, that individuals 'who are not Senate employees selected by Senators to serve on a panel or other body making recommendations for nominees to Federal Judgeships ... may be reimbursed for transportation, per diem, and for certain other expenses incurred in performing duties as a member of such panel or other body.'"⁵³; and
- Whether affiliation with the bar association is an effective way to have costs covered. (The rules of the Florida committee, to which the Florida Bar evidently provides some support, nevertheless state that committee members "perform an important public service in a volunteer capacity and are responsible for all expenses associated with their service on the Commission."⁵⁴)

C. The application process

Advertising vacancies

Senators may wish to instruct the committee to advertise judicial vacancies and information on the application process in a variety of ways, including through state and local bar associations (including specialty and minority bar associations), on senators' websites, through press releases, and, if the district court with the vacancy is amenable, on its website.

The vacancy announcement should include sufficient information on the nature of the vacant position and the requirements expected of ideal candidates. There are almost no formal requirements to be a federal district judge other than the statutory requirement (with a few exceptions) that judges (but not nominees) reside in the respective judicial district.

General statements of integrity, temperament, or ability are probably expected, but senators may wish to include other requirements or preferences as well. This might include the preferred background characteristics of potential nominees (which may in turn depend on characteristics that the president has emphasized).

Although quota requirements are inappropriate, senators might take stock of the current and historic composition of any particular district court, and the mix of cases on its docket, and provide guidance to committees, noting, for example:

- A dearth of women or judges of particular racial or ethnic groups, especially those well represented in the bar and general population of the district; or
- The value of judges with particular types of practice experience (e.g., in complex civil litigation, criminal cases, or technology and intellectual property). Although most district courts assign cases randomly and district judges decide cases individually, judges seek one another's guidance and advice.

Senators may wish to include information on the position's salary and benefits.

It might also be helpful to include a summary of the selection process, including at least:

- The application form (see below);
- Information on the nature and extent of the committee background investigations;
- Other investigations of which applicants should be advised. For example, applicants should be aware that senators may request tax and other investigations before forwarding names to the White House; that names sent to the White House will be subjected to FBI and ABA investigations; that nominees will be subjected to a Senate Judiciary Committee investigation; and that additional inquiries may be made by interest groups. Advising applicants of this information is not only fair but will discourage applications by those unwilling to undergo these investigations.
- State judicial performance evaluation results. For applicants who are or were state judges for whom judicial performance evaluation results are available, the committee might consider requesting those from either the applicant or the applicable commission.

Finally, consider whether the vacancy notice should indicate whether the screening committee will release the names of all applicants, names of interviewed applicants, or names of applicants submitted to the senators.

Application deadlines

Rather than specifying a hard deadline, the committee may wish to state a "to ensure consideration" deadline, providing the flexibility to consider applications submitted late under special circumstances.

Application form

Senators and their staffs, perhaps in conjunction with the committee, will likely decide on the form that applicants must complete. Some committees use, with slight modification, the form that either the White House or Senate Judiciary Committee requires potential or actual nominees to complete. It must also be determined whether applications and auxiliary information may be submitted in electronic form, or must be submitted in hard copy.

Auxiliary information to be provided by applicants

Rather than request tax returns, committees might consider including a “taxes current/any problems” question on the application form and advise applicants of the investigations they may undergo if submitted to the White House—investigations that could reveal embarrassing information.

The committee should give guidance to applicants on the number of reference letters to provide, and when, to whom, and in what form the committee wishes to receive them. The committee may also consider a warning that it will look unfavorably on applicants who orchestrate campaigns to produce letters beyond those the committee requests, and that clear evidence of such campaigns may produce disqualification.

D. Developing the list to present to the senator(s)

The committee’s most demanding task is to winnow initial applications down to a relatively small number to submit to the senators.

Developing a process and criteria

The committee will need to winnow the initial pool of applicants down to those who will receive committee background investigations. This process typically begins by determining the number of applicants to undergo background research and committee interviews. The committee may then identify factors that cause non-discretionary exclusion (such as failure to meet certain qualifications specified in the application process, or clearly having instigated a letter-writing campaign). Once non-discretionary culling is completed, various methods are available for winnowing the applicant pool down to those who will be the object of background research, such as:

- In-person, by mail, by telephone conference;
- Initial screening by chair(s) or a subcommittee to a reduced list for further committee action;
- Straight votes on candidates or aggregation of committee members’ rank order voting;
or
- Iterative in-person processing to identify the final list.

At this stage, the committee might also determine whether, how, when, and by whom to inform applicants who did not make the initial cut.

Background research on candidates

Committees should understand that both the White House or Senate and the ABA will require a potential or actual nominee to give a waiver allowing them to make direct inquiries of the relevant bar or judicial disciplinary authorities about past or pending disciplinary matters. S/he will also be subject to an FBI investigation. The nominee will complete a lengthy questionnaire that the Senate Judiciary Committee will post on its public website. Past and pending disciplinary actions, tax (including “nanny tax”) issues, and criminal problems will surface in these investigations. A screening committee that does not explore these matters before forwarding its recommendations risks damaging its own credibility with the senators, or the senators’ credibility with the public, if a flawed would-be nominee goes forward. In other words, a screening committee’s credibility, and hence its effectiveness, will depend on how thoroughly it plows the ground privately that the ABA will also plow privately and the Senate publicly. Anything the committee misses may rise up to bite it and the senators who appointed it.

In reviewing each candidate’s background, the committee should consider from whom it will seek additional information about the candidates, and whether it will establish a minimum, maximum, or set number of background inquiries for each applicant. Talking to the same or roughly the same number of individuals for each applicant may be the fairest approach, but it may limit the committee’s ability to learn what it needs to know about individuals with different backgrounds and qualifications, or to unearth any possible problems. Individuals whom the committee might contact include:

- References listed by the applicant;
- Opposing counsel in cases;
- For former or sitting judges, losing counsel in prominent cases; and
- Others recommended by initial interviewees.

Background investigations are often conducted by specific committee members. Factors to consider in assigning committee members to conduct background interviews on specific candidates include:

- Ensuring a roughly equal distribution of the work of interviewing to each committee member;
- Whether there should be a common set of questions for all interviews and if so, whether there should be any leeway to depart from those questions. Without a common set of questions, there will be no consistent metric by which to evaluate the interview data. But allowing no exceptions may deprive the committee of special facts about individual qualifications;
- The degree to which interviewers should be familiar with the applicant, his or her respective practice areas, the judge-applicant’s court, etc. Is it better that interviewers have fewer preconceived (and perhaps unrecognized) ideas about the applicants? (Ohio Senator Brown and then-Senator Voinovich said that members of the committee they

established in the Northern District would screen applicants for Southern District vacancies, and vice versa, “[t]o prevent any conflicts of interest”⁵⁵); and

- For committee members with lawyer and non-lawyer members, whether the committee should differentiate interview assignments—for example, lawyers speak to other lawyers about professional background, while lay members seek information about applicants’ other activities.

The committee, or the senators, may establish a confidentiality policy with respect to background interviews. If so, interviewers should explain the confidentiality policy when arranging the interview. In framing a confidentiality policy, committees should consider:

- Whether interviewers will report comments orally or in writing;
- Whether interviewers will divulge the identities of interviewees in their report or just the substance of the comments;
- Whether promises of confidentiality to interviewees cover reports and information released by the committee or reports within the committee as well. If the policy covers reports and information by the committee, does that include senators and staffs? What background interview information—including identities of interviewers and interviewees—should be shared with senators and staff?; and
- Whether *interviewees* may waive confidentiality. If not, what policy will the committee follow if a member says the value of a statement depends on the credibility of the interviewee? Should the policy be to identify interviewees orally but nowhere in writing?

Committees may receive unsolicited comments about finalists. Accordingly, before the process begins the committee should consider:

- Whether committee members should accept unsolicited calls or letters on behalf of a nominee. The Florida committee rules provide that the committee and conference chairs “will accept *written* comments from interested members of the legal community and the general public”⁵⁶ (emphasis added);
- Whether the committee should explain the confidentiality policy to unsolicited callers, and whether that policy should be the same as for solicited interviews; and
- What details about the unsolicited information the receiver should provide to the committee (such as the number of callers, names of callers, and/or a summary of information).

Committee interviews

After members conduct background research on finalists, the committee will probably want to conduct in-person interviews with the finalists *or* with a smaller subset of them, based on the background research.

If the committee narrows the field of candidates after completion of the background research, it should determine whether to advise applicants who did not make the cut or wait until it has

formulated the final list for the senators. Advising those whom the committee will not interview is a courtesy, but it may spawn rumors about who may be on the final list.

Factors to consider in organizing the interviews include:

- Who should organize the interviews and set up the logistics (i.e., contacting interviewees, determining the location for the interviews)? Senate staff? Staff available to committee chairs? Bar association staff?
- Should the interviews be open or closed to public and the media? At least one commission, Florida's, holds public interviews with finalists, although it prohibits any finalist from attending interviews with other finalists.
- Should Senate staff participate in the interviews, or perhaps observe interviews but not participate?

The wisest approach may be to construct a schedule of common questions for each interviewee rather than permit a free-for-all session, with members asking whatever questions occur to them. The American Judicature Society's *HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS*, 2d ed. (2004)⁵⁷ contains helpful guidance on this matter. Although it is for state nominating commissions, not federal-level screening committees, committee members should consult it.

The *HANDBOOK* describes four types of questions that committees might pose to interviewees:

- Closed-ended, which call for "yes/no" answers (the *HANDBOOK* points out that these will be little needed, assuming well-designed application forms);
- Open-ended (e.g., "What are the specific aspects of this position that moved you to apply for it?"), which, if clear and precise, can provide valuable information;
- Situational, which ask how the interviewee believes a judge should respond to specific factual situations, such as requests for continuances posed by both parties; and
- Behavioral, which ask interviewees to describe specific events in their lives and how they handled them.

In developing interview questions, the committee should determine whether to construct a basic set of questions and, if so, who will ask each question. The committee should also consider who will develop questions, how they will be finalized, and whether pre-determined interview questions will be distributed beforehand to interviewees.

Will the committee permit follow-up questions (i.e., questions that are not predetermined and are in addition to those on the interview schedule)? If so, it should provide guidance to committee members about unacceptable questions (e.g., about marital status or whether a candidate is "too old to be a judge").

Certain interview protocols and logistics also warrant consideration:

- Whether the committee will require in-person interviews and require all committee members to attend, and if not, what alternatives it will permit (such as participating by telephone or video);

- How long interviews will last and how much time will be allowed between interviews; and
- The order of interviews. It is probably wisest to schedule interviews randomly to avoid any appearance of favoritism or consigning those with down-alphabet last names automatically to appear at the end of the interview period. The committee should also have a policy to govern legitimate scheduling conflicts that disrupt the random sequence.

Identifying the list of applicants to submit to senators

The committee should establish a protocol for making final determinations—e.g., those receiving the highest number of votes, or an iterative process if no candidate receives a pre-determined minimum number of votes.

The size of the list that the committee sends may depend on whether the senators specify the number of names they wish to receive. The Florida Commission rules, for example, provide that unless the presiding senator directs otherwise, the commission will submit “no less than three names . . . in unranked, alphabetical order.”⁵⁸ Without such guidance, the committee will have to determine a reasonable number on its own.

In addition to the list of finalists, the committee may wish to submit any or all of the following to the senators:

- Applicants’ application forms and letters of recommendation;
- Personal data summary—e.g., abbreviated, committee-prepared summary paragraph;
- Summary of background information;
- Individual committee members’ opinions, if requested; and
- Separate committee narrative explaining recommendations.

Releasing information

The committee should determine when to advise finalists that they are not on the submitted list, keeping in mind the possibility that senators may reject all submitted names and ask for more.

Information that the committee or senators might choose to release to the public might include:

- Number of applications received and number of applicants interviewed;
- Names of applicants interviewed;
- Names of applicants submitted to senators; and
- Comparative demographic information on all applicants and applicants interviewed (e.g., number of women, vocational breakdown of applicants, etc).

Information gathered in interviews, letters of recommendation, and other sources may be sensitive, and committees may want to keep such information confidential. However, at least

one committee, Florida's, operates under rules that (1) permit the committee to "seek, receive, and review pertinent information, in addition to the written applications," and (2) provide that "all materials received in connection with an application for appointment will be disseminated to the full Commission and made available to the general public for review"—subject to the chair's discretion to "exclude highly sensitive personal information" and "government information provided under terms of limited review."⁵⁹

Considerations as to what information to release include:

- Whether release of a specific type of information may foster trust in, and acceptance of, the process;
- Whether such release may create unfair inferences about unsuccessful applicants;
- Whether such release may discourage some qualified individuals from applying for future vacancies, fearing negative impact on their professional practice; and
- Who (the committee or the senators) should release the information.

V. CONCLUDING THOUGHTS

Vetting committees themselves obviously have not eliminated the contentiousness and polarization that has affected federal judicial selection for the last two decades. The evidence that the use of such committees provides speedier confirmations or demographically different nominees is mixed at best. The evidence is difficult to assess because of the confidentiality that often surrounds the names that committees forward to senators and that senators forward to the White House. The empirical evidence presented above may provide a bleaker picture of committee impact than is justified, and, of course, the evidence is in for only slightly more than half of Obama's first term.

At the same time, screening committees do have the potential to improve public confidence in the nominating process and in the candidates who emerge from that process. Furthermore, many reasonable people have concluded that committees are likely to benefit the selection process by exposing potential nominees to broader scrutiny than they might otherwise receive. In this manner, strong candidates may benefit from the committee's stamp of approval, and weak or problematic candidates are vetted sufficiently early in the process to increase the possibility of uncovering potential problems that would otherwise come out during White House or ABA review, Senate Judiciary Committee investigations and confirmation hearings, or press and interest group inquiries.

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² Gary W. Fowler, *Judicial Selection Under Reagan and Carter: A Comparison of Their Initial Recommendation Procedures*, 67 JUDICATURE 266-67 (1984).

³ Denis Steven Rutkus, *Role of Home State Senators in the Selection of Lower Federal Court Judges* CRS-37, n. 107 (Congressional Research Service 2008).

⁴ Carri Geer Thevenot, *Reid Selects Las Vegas Lawyer for U.S. District Court*, LAS VEGAS REVIEW JOURNAL, Aug. 12, 2011 available at <http://www.lvrj.com/news/reid-selects-las-vegas-lawyer-for-u-s-district-court-127612203.html>

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¹⁴ Press Release, May 22, 2001, Senators Boxer and Feinstein Announce Bipartisan Judicial Nomination Panel, available at http://feinstein.senate.gov/releases01/judicial_nomination_panel.html.

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⁵⁸ See Florida Federal Judicial Nominating Commission Rules of Procedure, *supra* note 17, Rule 27.

⁵⁹ See *id.*, Rule 21.

APPENDIX A

This table lists the federal judicial screening committees that appear to be in operation as of September 2011, or that stand ready to operate in the event of a vacancy. The table amplifies information in the Federal Judicial Nominating Commissions section¹ of the American Judicature Society’s Judicial Selection in the States site with information from legislators’ websites, press reports, and conversations with committee members.

“POSITIONS CONSIDERED” indicates the positions for which the committee screens candidates: DJ=district court; CA=court of appeals seats traditionally filled from the state; USA=U.S. attorney; USM=U.S. marshal.

The final column indicates individuals nominated from the state in question for district judgeships (and circuit judgeships if the committee screens would-be circuit nominees) from January 20, 2009 through September 1, 2011, along with the district if a multi-district state (or circuit, where applicable) and the nominee’s gender, ethnicity/race, and position held at the time of nomination. We do not have, in most cases, certain information that the nominees listed were necessarily recommended by the committee.

STATE (# of district judgeships)	YEAR CREATED	COMMENTS	COMPOSITION	POSITIONS CONSIDERED	NOMINEES
California (60)	2001; reconstituted 2009	Senators Boxer and Feinstein (both D) used 6-member Judicial Advisory Committees during the Bush administration; 3 members were selected by the senators and 3 by the administration’s state chair for judicial appointments. In late 2008 and early 2009, each senator announced the creation of a bipartisan “Judicial Advisory Committee” in each of California’s four judicial districts to alternate recommending nominees for vacancies.	From 5 to 7 members (all lawyers) in 8 committees (2 for each of the 4 judicial districts)	DJ, USA, USM	Jacqueline H. Nguyen, CD, F, As-Am., st. j.; Edward Chen, ND, M, As-Am., U.S. Mag. J.; Dolly M. Gee, CD, F, As-Am., priv. prac.; Richard G. Seeborg, ND, M, Cauc., U.S. Mag. J.; Lucy Koh, ND, F, As-Am., st. j.; Josephine Tucker, CD, F, Cauc., st. j.; Kimberly Mueller, ED, F, Cauc., U.S. Mag. J.; Edward Davila, ND, M,

¹ http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FD.

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STATE (# of district judgeships)	YEAR CREATED	COMMENTS	COMPOSITION	POSITIONS CONSIDERED	NOMINEES
					Hisp., st. j.; Anthony Battaglia, SD, M, Cauc., st. j.; John Kronstadt, CD, M, Cauc., priv. prac.; Yvonne Rogers, ND, F, Hisp., st. j.; Cathy Bencivengo, SD, F, Cauc., U.S. Mag. J.; Michael Fitzgerald, CD, M, Cauc., priv. prac.
Colorado (7)	2008; reconstituted 2009	Then-Senator Salazar (D) appointed a committee in 2008. In 2009, Senators Udall and Bennet (both D) appointed what their press release called a "Judicial Selection Advisory Panel."	10 lawyers, Democratic and Republican co-chairs	DJ	William Martinez, M, Hisp., priv. prac.; R. Brooke Jackson, M, Cauc., st. j.
Connecticut (8)	2009	Senators Dodd (D) and Lieberman (I) created a committee in 2009. Confirmation of district judge Christopher Droney to the Second Circuit's court of appeals will create the first Connecticut district court vacancy in the Obama administration.	5 lawyers, 1 educator, 1 businessman	USA and "other federal positions"	
D.C. (15)	1993; reconstituted 2009	D.C. delegate Norton (D) created a committee during the Clinton administration and appointed a reconstituted "Federal Law Enforcement Nominating Commission" in early 2009.	17 members, lawyers and non-lawyers	DJ	Robert Wilkins, M, Af-Amer., priv. prac.; James Boasberg, M., Cauc., st. j.; Amy Jackson, F, Cauc., priv. prac.; Rudolph Contreras, M, Hisp., fed. atty.

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STATE (# of district judgeships)	YEAR CREATED	COMMENTS	COMPOSITION	POSITIONS CONSIDERED	NOMINEES
Florida (36)	1974, and revised occasionally	Florida’s senators have used what is currently called a “Federal Judicial Nominating Commission” since 1974, under varying procedures that have shifted based on the party makeup of the state’s Senate delegation and control of the White House.	66 members serving in three “conferences” corresponding to the state’s three judicial districts	DJ, USA, USM	Charlene Honeywell, MD, F, Af-Am., st. j.; Roy Dalton, MD, M, Cauc., priv. prac.; Robert Scola, SD, M, Cauc., st. j.; Kathleen Williams, SD, F, Cauc., fed. def.
Georgia (18)	2005	Georgia’s two Republican senators used a screening panel during the Bush administration; that committee is still in place to review potential nominees that the White House refers to the senators. The state’s Democratic representatives created a committee in 2009, but a spokesperson for one of the representatives said that they have not reactivated it for more recent vacancies (see Appendix B).	4 members: all attorneys, non-partisan	Reviews candidates for DJ, CA;	Beverly Martin, CA-11, F, Cauc., U.S. Dist. J.; Mark Treadwell, ND, M, Cauc., priv. prac.; Amy Totenberg, ND, F, Cauc., priv. prac.; Steve Jones, ND, M, Af-Am., st. j.; Natasha Silas, ND, F, Cauc., fed. def.; Linda Walker, ND, F, Af-Am., U.S. Mag. J.
Hawaii (3)	2006	On June 1, 2009, upon a district judge’s taking senior status, Senators Inouye and Akaka (both D) announced that they were “standing up” the Hawaii Federal Judicial Selection Commission that was created in 2006 but that had no vacancies to consider until 2009.	9 members: 4 appointed by Sen. Inouye, 3 by Sen. Akaka, 2 by the state bar	DC, CA	Leslie Kobayashi, F, As-Am., U.S. Mag. J.
Illinois (30)	Screening committees used during the Clinton administration; reconstituted in 2009; revamped in 2011	In 2009, Senator Durbin (D), alone, created what his press release called “three bipartisan screening committees” to screen candidates for vacancies in the three federal districts. Similar committees reportedly operated during the Clinton administration. In 2011, Durbin announced instead a single 10-member committee. In February 2011, newly elected Senator Kirk (R)	Durbin: Initially, 3 committees - 10 members for the Northern District and 6 each for the 2 smaller districts. Now, a single ten member committee (all lawyers)	DJ, USA, USM, now evidently DJs only	Gary Feineman, ND, M, Cauc., priv. prac.; Sharon Coleman, ND, F, Af-Am., st. j.; Edmond Chang, ND, M, As-Am., fed; pros.; James Shadid, CD, M, Cauc., st. j.; Sue Myerscough, CD, F, Cauc., st. j.; Sara

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STATE (# of district judgeships)	YEAR CREATED	COMMENTS	COMPOSITION	POSITIONS CONSIDERED	NOMINEES
	Kirk committee created in 2011	announced appointment of a 14-member committee to advise him. Currently, the Democratic senator submits candidates to the White House for three vacancies, and the Republican senator submits candidates for the fourth vacancy.	Kirk: 14 members, one House member, a retired federal judge, a law professor, and practicing lawyers.		Darrow, CD, F, Cauc., fed. atty.
Maine (3)	2010	Maine's two House members, Mike Michaud and Chellie Pingree (both D), formed a screening panel to recommend candidates for the vacancy created when District Judge D. Brock Hornsby took senior status. (Michaud and Pingree formed a separate, eight member panel of attorneys to recommend candidates for a recent First Circuit vacancy.)	10 members, all lawyers	DJ, CA	Nancy Torresen, F, Cauc., fed. atty.
Massachusetts (13)	2009	Senators Kennedy and Kerry (both D) announced in February 2009 creation of a 12-lawyer Advisory Committee for prosecutor vacancies, and announced in June that it would also screen district judge candidates. In January 2010, Kerry and Senator Kirk forwarded a potential nominee to the White House, which nominated her in April. Senator Brown (R) appoints two members of the committee.	12 members, all lawyers	DJ, USA, USM	Denise Casper, F, Af-Am., st. pros.
Michigan (19)	2009	Senators Levin and Stabenow (both D) created "Judicial Vetting Committees" for the state's two federal judicial districts.	Eastern District: 25 members, Western District: 22 members	DJ, USA, USM	Mark Goldsmith, ED, M, Cauc., st. j.
Minnesota (7)	2009	Senator Klobuchar (D) formed a "Judicial Selection Committee" in August 2009 to assist her in making recommendations to fill an upcoming vacancy.	8 members, all lawyers and current or former judges	DJ	Susan Nelson, F, Cauc., U.S. Mag. J.
Montana (3)	2011	Senator Baucus announced in December 2010 the creation of a 5-person committee to recommend a replacement for Judge Donald Malloy, who announced that month that he would take senior status in August 2011.	5 members, all lawyers	DJ	Dana Christensen, M, Cauc., priv. prac.

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STATE (# of district judgeships)	YEAR CREATED	COMMENTS	COMPOSITION	POSITIONS CONSIDERED	NOMINEES
New York (52)	At least since Senators D'Amato and Moynihan	Google searches and other sources indicate that Senator Schumer uses a judicial screening panel. Schumer's website makes no mention of it. Senator Gillibrand apparently does not use a committee.	Approx. 12, apparently all lawyers	DJ and, according to one committee member's website, USA	Mae D'Agostino, ND, F, Cauc., priv. prac.; Vincent Briccetti, SD, M, Cauc., priv. prac.; Alison Nathan, SD, F, Cauc., state atty.; Paul Oetken, SD, M, Cauc., priv. prac.; Paul Engelmayer, SD, M, Cauc., priv. prac.; Michael Green, WD, M, Cauc., st. atty.; Margo Brodie, ED, F, Cauc., fed. atty.; Jessee Furman, SD, M, Cauc., fed. atty.; Kathleen Forrest, F, Cauc., fed. atty.; Andrew Carter, M, Af-Amer., U.S. Mag. J.; Edgardo Ramos, SD, M, His.-Amer., priv. prac.; William Kuntz, ED, M, Cauc., priv. prac.; Ronnie Abrams, SD, F, Cauc., fed. atty.
North Carolina (12)	2009	Senator Hagen (D) announced the creation a committee in March 2009.	4 members: all lawyers, the former state chief justice plus one member each from the three geographic regions of the state	DJ, USA	Catherine Eagles, MD, F, Cauc., st. j.; Max Cogburn, M, Cauc., priv. prac.

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STATE (# of district judgeships)	YEAR CREATED	COMMENTS	COMPOSITION	POSITIONS CONSIDERED	NOMINEES
Ohio (19)	2009	<p>Senators Brown (D) and then-Senator Voinovich (R) in 2009 created two “Bipartisan Judicial Advisory Commissions” for the state’s two federal judicial districts. They said that to avoid conflicts of interest, the Northern District committee will vet candidates for Southern District positions and vice versa.</p> <p>Ohio currently has no actual or announced district court vacancies, and thus it is not clear what role if any new Senator Portman (R) will play with respect to the committee.</p>	Each committee has 17 members, most of whom are lawyers	DJ, USA	Benita Pearson, ND, F, Af-Am., U.S. Mag. J.; Timothy Black, SD, M, Cauc., U.S. Mag. J.; Jeffrey Helmick, ND, M, Cauc., priv. prac.
Oregon (6)	2009, apparently reconstituted from earlier committee	A July 2009 press release from Senator Wyden (D) announced that in April he and Senator Merkley (D) had appointed “a 13-member selection committee to find replacements” for two retiring district judges. A separate panel was named in August 2009 to recommend USA candidates.	13 members: Wyden - 9 (6 of whom were women or from minority groups); Merkley - 4	DJ, USA, USM	Marco Hernandez, M, Hisp-Amer, state j.; Michael Simon, M, Cauc., priv. prac.
Pennsylvania (38)	1981, revised 2011	Senators Casey (D) and Toomey (R) revamped and revised the long-standing commission arrangement in Pennsylvania, with committee members and co-chairs appointed equally by each senator.	3 committees of 20 members each, including (according to a joint May 31 news release) “leading members of the bar and other respected Pennsylvania [<i>sic</i>]”	DJ only (?)	Cathy Bissoon, WD, F, Af-Amer, state j.; Robert Mariani, MD, M, Cauc., priv. prac.; Mark Hornak, WD, M, Cauc., priv. prac.

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STATE (# of district judgeships)	YEAR CREATED	COMMENTS	COMPOSITION	POSITIONS CONSIDERED	NOMINEES
Texas (51)	1986, reconstituted 2009	Senators Cornyn and Hutchison (both R) used a Federal Judicial Evaluation Committee originally created in 1986 during the George W. Bush administration. After the 2008 presidential election, and following statements by Texas House Democrats that they would forward prospective nominees to the White House, the press reported that the senators released the names of a newly constituted committee that was, unlike the previous committee, bipartisan, and that would continue to screen candidates for the senators' recommendations to the White House.	Over 30 members, apparently all lawyers	DJ, USA	James Gilstrap, ED, M, Cauc., priv. prac.; Diana Saldana, SD, F, His-Amer., U.S. Mag., J.; Nelva Ramos, SD, F, His-Amer., priv. prac.; Marina Marnolejo, SD, F, His.-Amer., priv. prac., Gregg Costa, SD, M, Cauc., gov't atty.
Vermont (2)	2009	Senators Leahy (D) and Sanders (I) appointed a "Vermont Judicial Selection Commission." A Leahy news release said that House member-at-large Welch will also have a role in the process.	9 attorneys: Leahy - 3, Sanders - 3, Vermont Bar Association - 3	DJ	Christina Reiss, F, Cauc., st. j.
Washington (11)	2002	Following a nomination in early 2002 of a candidate vetted by a committee established by Rep. Jennifer Dunn (R), the state's Democratic Senators worked with the Bush administration to establish a bipartisan committee to make future recommendations. In 2003, Senator Murray (D) referred to a "bi-partisan commission process to forward names to the White House" originally developed in 1997, that she and Senator Cantwell (D) were continuing and through which "[b]oth sides have equal representation on the commission."	6 members	DJ	Rosanna Peterson, ED, F, Cauc., law prof.; Thomas Rice, WD, M, Cauc., fed. atty.

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STATE (# of district judgeships)	YEAR CREATED	COMMENTS	COMPOSITION	POSITIONS CONSIDERED	NOMINEES
Wisconsin (7)	1979	In 1979, the state's two senators created a "Wisconsin Judicial Nominating Commission," with a charter that provides for shifting appointing authority between the two senators and senior House members depending on the composition of the Senate delegation and party control of the White House; the state bar also appoints members, and one or both of the deans of the state's two law schools serve, depending on the vacancy to be filled. Newly elected Senator Johnson (R) has endorsed continued use of the committee but has objected to the allocation of appointment authority between the state's senators.	11 members: 8 appointed by elected officials, 2 appointed by the state bar, and a law school dean (for CA vacancies both of the state's law school deans are appointed)	DJ, CA, USA, USM	Louis Butler, WD, M, Af-Am., law prof.; William Conley, WD, M, Cauc., priv. prac.; Victoria Nourse, CA-7, F, Cauc., law prof.

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APPENDIX B

This table lists screening committees that operated recently but that apparently no longer function.

STATE	YEAR CREATED	COMMENTS	COMPOSITION	POSITIONS CONSIDERED	NOMINEES
Alabama	2008	Alabama senators do not use a committee, but former Rep. Artur Davis (D) created a committee in 2008, as did the state Democratic Party. Davis ran unsuccessfully for governor in 2010 and left the House when the 111 th Congress adjourned. There are currently no vacancies in any of Alabama's federal district courts and Davis's successor, Terri Sewell, also a Democrat, has evidently not said publicly if she will follow Davis's lead when a vacancy occurs.	7 members: 5 current or former judges and 2 law school deans	DJ, USA, USM	Abdul K. Kallon, ND, M, Af-Am., priv. prac.
Georgia	2009	The state's Democratic representatives created what a press release refers to as an informal "Judicial Advisory Panel," but a spokesperson for one of the representatives said that they have not reactivated it for more recent vacancies.	12 Democrats, nearly all attorneys, including some state legislators	DJ, USA, USM	See Georgia entry in Appendix A.