



# BEHIND THE CURTAIN

## of Federal Judicial Nominations



2014

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## Executive Summary

Citizens mostly remember the general rule about how judges in federal courts are selected from civics class: the President nominates someone to be a judge and the U.S. Senate confirms them. Not only is that actual system of nomination and confirmation a complicated, time-consuming process in D.C., there is a lesser known prologue to those stages that occurs at the home state level.

This report goes “behind the curtain” of the federal judicial nominations process to reveal the often non-public initial step of a U.S. Senator submitting recommended names to the President before anyone is formally nominated as a federal judge for public Senate confirmation. This is not a process outlined in the Constitution or any statute, but a personalized practice of our 100 senators. There are no general rules and almost all states are different in how a senator may decide recommendations to the President. The process is often affected by personalities, political loyalties, and popularity.

After outlining the general process of federal judicial nominations, this report explains in some detail how Colorado’s senators screen potential nominees and examines how 10 other states reach their recommendations. This report evaluates the “success” of each state’s approach by how well it produces quality and diverse nominees and the transparency and timeliness of the selection process. These states were chosen as examples of geographically diverse states, some small and large states, mixed delegations and those with two senators from the same party, and home-states of senate leadership.

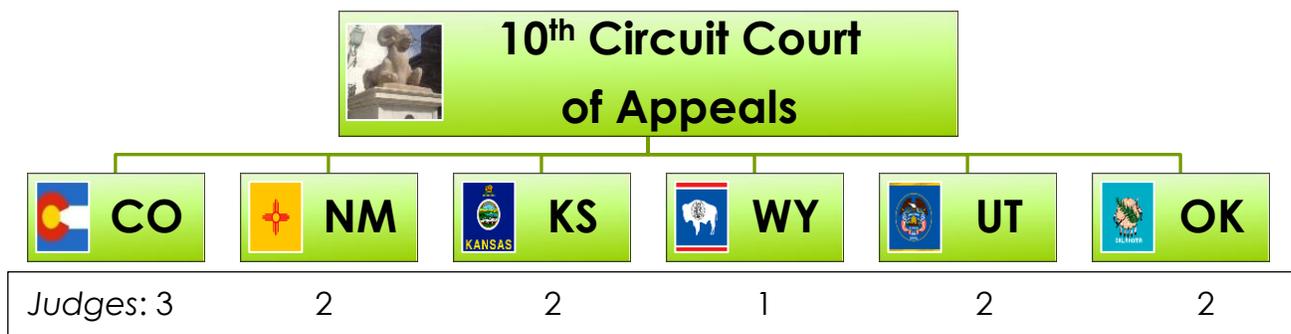
It’s important to pull back the curtain and understand more details about the judicial selection process. Federal courts decide the big questions about our democracy: from healthcare access to marriage equality, workplace safety to copyright protection, police abuses to Presidential power. Citizens should know how the lifetime-appointed judges making these decisions are selected. Transparency in the process of submitting nominees means more public accountability for senators so that qualified and diverse candidates are selected – not just political allies. Every state should have a process that results in a diverse, fair and fully staffed judiciary.

“Pay no attention to the man behind the curtain!”  
— L. Frank Baum, *The Wonderful Wizard of Oz*

## Overview of the federal judicial nomination process

The Constitution of the United States grants the President the power to nominate and, with the advice and consent of the U.S. Senate, appoint federal judges.<sup>1</sup> Media attention usually focuses on this process when a rare vacancy on the nine-seat U.S. Supreme Court occurs. The President nominates a person to be the next Supreme Court Justice and the U.S. Senate Judiciary Committee holds a televised hearing to ask questions of that nominee. After the Committee votes, the full U.S. Senate has a floor debate and votes. If confirmed, a U.S. Supreme Court Justice has a lifetime appointment.

Yet, there are actually 874 federal judges in our country sitting on the U.S. Court of Appeals and District Courts.<sup>2</sup> There are a total of 94 district courts with each state having at least one.<sup>3</sup> These district courts are divided into 12 regional circuits with one court of appeals for each (the Court of Appeals for the Federal Circuit sits in Washington D.C. and has special national jurisdiction over certain cases like patent law). Each of these regional Circuit Courts has at least one judge from each of the states within that circuit. Colorado is part of the 10<sup>th</sup> Circuit together with five other states. The 10<sup>th</sup> Circuit has twelve full-time active judgeships allocated to the states:<sup>4</sup>



There is constant turnover in both the circuit and district courts as seats become vacant due to judges' retirement or death. As of August 13, 2014, there were 84 total vacancies across the country in these two levels of courts.<sup>5</sup> Because these positions originate in particular states, the process of filling these vacancies is a bit more complicated – and time consuming – than the nine national Supreme Court seats. The biggest complication is the increased role of the two home state senators in the selection and confirmation of nominees to federal court vacancies within their state.

The process for filling a district or circuit court vacancy usually starts when a judge announces that they will retire or take “senior status” (reduced workload). Sometimes this announcement occurs a year in advance, which allows time for a new nominee to go through the process before the seat is actually empty (referred to as “future vacancies” in many summaries). However, many times the retirement notices are shorter, or the process takes so long, so that positions are actually unfilled for a period of time causing increased caseload for the other judges on that court and possible court delays. There are two steps in the nomination and confirmation process where home state senators usually exert extra influence:



In most cases, the senators for the state where the vacancy occurs lead the first step in the process to fill that seat. The White House office that processes judicial nominations usually waits to receive a list of potential candidates from the senators before commencing their own vetting process. How the senators develop that list of names is the focus of this report as the method varies from state to state. Then the President officially nominates a candidate and sends that nomination to the U.S. Senate for confirmation. While the full Senate ultimately votes on the question of confirmation, the home state senators still have another chance to steer the process through “blue slips.”

The “blue slip” step in the judicial nominations process is long-standing form of senatorial courtesy and deference to the senators of a given state, allowing those senators to deny a committee hearing to any judicial nominee from their state.<sup>6</sup> After a nominee has been referred to the Senate Judiciary Committee, the home-state senators are contacted and asked to either approve or disapprove of the nominee, using a literal “blue slip” of paper.<sup>7</sup> The current chairman, Senator Patrick Leahy (D-VT), refuses to move forward with a

nominee if either of the senators does not approve of the nominee on the blue slip. If both slips are returned with support, then the committee will hold a hearing and a vote to approve the nominee for a full vote on the Senate Floor.

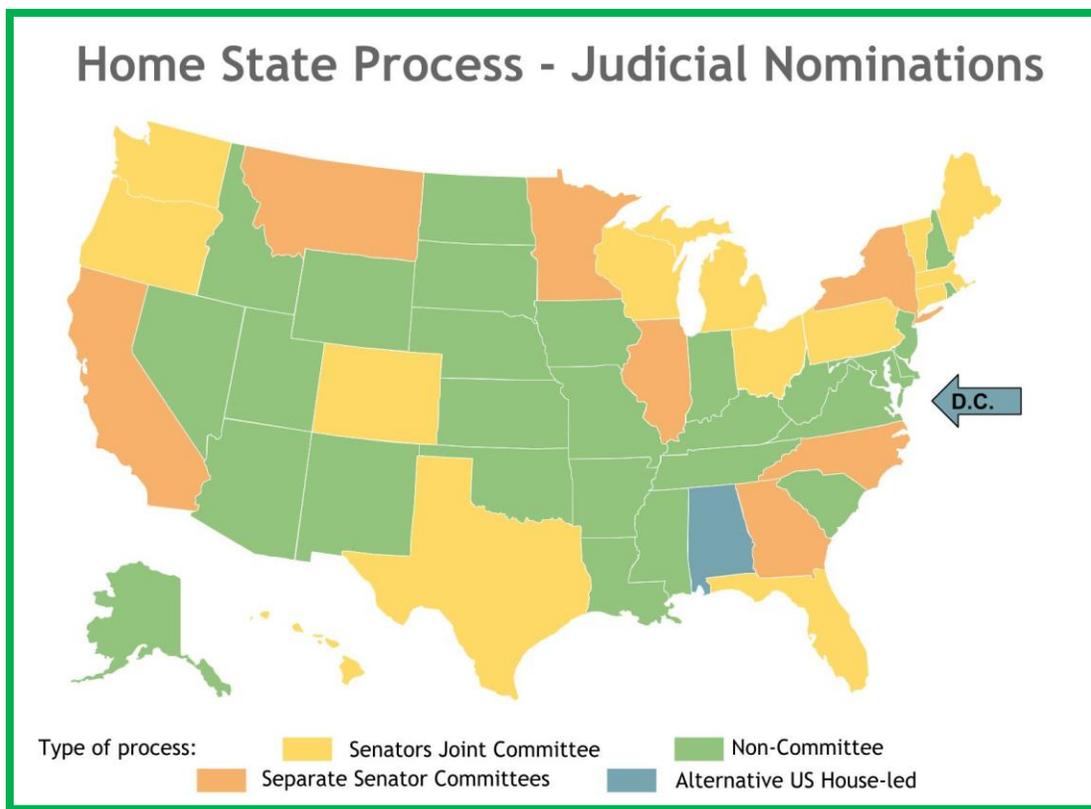
The final step of receiving a majority vote for confirmation from the full Senate can actually be a very lengthy and complicated series of procedural moves by both the majority and minority leaders in the Senate. Majority Leader Harry Reid (D-NV) led the effort to remove one of those procedural hurdles late last year, changing the Senate rules to reduce the number of votes needed to end a filibuster of a nomination vote from 60 to 51.<sup>8</sup> Since then, Senator Reid has accused the minority of using all possible technical rules to delay votes on nominee – most of which end with near-unanimous confirmations.<sup>9</sup>

The constant parade of judicial nominees through this process (especially to district courts) is not carefully followed by the media unless a major controversy erupts over a particular nominee. Even less scrutiny is applied to the early stage of selecting names presented by the senators to the White House. But this step is crucial as the President seeks to avoid confrontations with home state senators after a nomination has been made through the blue slip process.<sup>10</sup> Whether or not the senators have a successful method in their state for selecting potential nominees influences how smoothly (and quickly) all the other steps of the confirmation process can proceed, as well as how that nominee is received by the citizens.

## Different methods for selecting potential nominees

Chief Judge Theodore McKee of the U.S. Court of Appeals for the Third Circuit recently told a story during a panel on selection of federal judges.<sup>11</sup> When he was a pending nominee, a U.S. Senator explained the confirmation process by advising him to “forget about con[stitutional] law” because “district court judges are really picked by the senators.”<sup>12</sup> There are no constitutional or statutory guidelines for the senators’ selection method of potential federal nominees, and so each state process is determined largely by the personalities of the senators and their political relationship with the President. But some patterns have emerged and it is useful to identify those trends in order to compare selection methods and identify best practices. Because Presidents usually have a much greater role on the selection of circuit court nominees (although home state senators still hold the blue slip), the discussion in this report is mostly focused on district court nominations unless otherwise noted.

Currently, the main delay in filling judicial vacancies is in this first step in the process. 56 of the 84 total vacancies do not yet have any nominee, and 32 of those vacancies are currently empty seats where the judge has already left.<sup>13</sup> As of August 13, 2014, the longest standing district court vacancy without a nominee is in the Southern District of Texas (1505 days) and the longest circuit court vacancy without a nominee is a Wisconsin seat on the Seventh Circuit (1808 days).<sup>14</sup> The cause of this delay in nominating individuals to long-standing vacancies is a complicated mix of factors in each state, but at least one of those factors is the process used by the Senators to arrive at recommendations to present to the President.



This map represents a general sorting of state-by-state methodology for selection of judicial nominee recommendations to the President. In almost half the states – including Colorado – the senators use some sort of judicial selection committee to screen applicants and recommend individuals to the senators. Some of these are joint committees working for both senators, but in many states the two senators have separate advisory committees and processes. This is not necessarily determined by whether or not the senators are from the same

political party. For example, in California both Senator Barbara Boxer and Senator Diane Feinstein are Democrats, but they each maintain their own selection committees and alternate turns filling vacant seats in California.<sup>15</sup> Conversely, in Wisconsin Senators Ron Johnson (R) and Tammy Baldwin (D) are from different political parties but use a joint committee to screen potential nominees.<sup>16</sup> In the rest of the states, the senators do not use an established selection committee for potential nominees, but appear to consult personally with individuals and groups regarding possible recommendations. It is very difficult to find information about the process used in these non-committee states in public sources.

### Judicial selection committees

The idea of using a commission or committee to aid senators in recommending potential judicial nominees appears to have its roots in a 1974 commission chartered by Florida's then-senators (both Democrats during the Republican administration of Gerald R. Ford) to recruit and recommend candidates for district court vacancies.<sup>17</sup> The use of commissions spread to as many as 30 states by the end of the decade, many prompted by a 1978 Executive Order by President Jimmy Carter which urged senators to create such commissions for district court vacancies and articulated some proposed standards for evaluating candidates.<sup>18</sup> Many new judgeships across the country were created by legislation in 1978 and the President created a commission to advise him on the nominees for the circuit courts.<sup>19</sup> After this initial fervor (and filling of new seats with lifetime appointments), the use of commissions to screen candidates started to wane. By 2001, there were only 11 states that used judicial selection committees for federal court vacancies.<sup>20</sup>

In 2008, the American Bar Association officially recommended that senators establish jointly appointed bipartisan judicial selection committees of both lawyers and non-lawyers to screen and recommend names for federal judicial vacancies.<sup>21</sup> Slowly, the use of committees increased. In 2010 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 built upon those recommendations with a report titled *Options for Federal Judicial Screening Committees: Where They Are in Place, How They Operate, and What to Consider in Establishing and Managing Them*.<sup>22</sup> This report (and the updated Second Edition published in 2011) provides an overview of the use of selection committees by some senators to select potential nominees for federal judgeships.

At least 21 selection committees were in use across the United States to select federal judicial nominees in 2011.<sup>23</sup> The term selection committee is used broadly to refer to any organized group arranged for the purpose of screening potential federal judicial nominees. Despite the importance of these committees there is a lack of readily available information about how many of them work.<sup>24</sup> In practice the selection committees used by different senators vary in size, scope, composition, effectiveness, and even name.<sup>25</sup>

The IAALS report supports judicial selection committees as a way to provide senators a mechanism to ease contention about nominees, catch problems that could arise with a nominee's qualifications, give more "voice to senators from a different party than the president," encourage diversity, and create more transparency in the judicial nomination process.<sup>26</sup> With rare exception, almost all judicial selection committee members are lawyers or former judges. In some states committee members are appointed by the senior senator without external input. In others, committee member appointments are shared between both senators, or even with a third party, like the state bar association. Some states have a single committee for any vacancy that arises; others have regional committees to consider vacancies. Some states rely on standing, chartered committees while some just form selection committees as vacancies arise. Specific details of the Colorado judicial selection committees used by Senators Udall and Bennet are described in a later section of this report.

There appears to have been no drastic change in the use of federal judicial selection committees for federal judicial nominations since the IAALS Report update in 2011. In 2011, there were 21 states (including D.C.) using this selection method (D.C. does not have any senators and the role of recommending nominees to the President has historically been filled by the Delegate to the House<sup>27</sup>). The breakdown of states is largely the same in 2014 with two notable developments. First, in Alabama, the state's only Democratic U.S. House Member, Congresswoman Terri Sewell, established a selection committee in 2013 to help her recommend individuals to Alabama's two Republican senators.<sup>28</sup> One other change since the 2011 report is that the newly elected Senator Mark Kirk (R) in Illinois has formed his own judicial selection committee separate from the committee used by Senator Richard Durbin (D) for many years and the senators appear to trade off nominations to some degree.<sup>29</sup>

Neither the IAALS report nor recent research has been able to explain sufficiently why a particular state or senator chooses to create and use a judicial

selection committee. One theory could be that states which use some sort of judicial selection commission for state supreme court justices would be more likely to use a selection committee for federal judicial nominations. However, a comparison of a 2014 IAALS 50-state survey of selection methods for state supreme court judges indicates that no such tendency exists.<sup>30</sup> Only six states (Colorado, Connecticut, New York, Florida, Hawaii, and Vermont) currently use a judicial selection commission for both state supreme court justices and advising senators on federal judicial nominations. Sixteen states which use commissions for state supreme court justices do not use any type of selection committee for federal judges<sup>31</sup> and 16 other states use federal judge selection committees despite not having a similar process for state supreme court justices.<sup>32</sup> The remaining 12 states do not use any sort of selection commission for either federal judges or state supreme court justices.<sup>33</sup>

### Non-committee methods of selection

The majority of states do not have any kind of formal selection committee process to aid the senators in recommending federal judicial nominees. In these states, the process of how a senator arrives at names given to the President is often opaque. Some senators rely upon local state bar associations to recommend lawyers and judges for consideration. In other states it is a process behind closed doors without much publicity, limited to those with political and personal ties to the senators. In most cases, the only information that is available about how the senators carry out the judicial nomination process is that which the senators choose to share in a press statement or website mentioning when nominations are made in their state.

For many senators the nomination process becomes highly personalized, and some of these senators devote large amounts of time to screening many individuals before supporting a nominee.<sup>34</sup> While the heightened amount of attention that some senators give the nomination process is desirable, there are indications that this highly personalized, and often highly politicized process, works poorly.<sup>35</sup> Senator Thad Cochran (R-MS) has summarized this trend of decisions predicated upon ideology by stating that in recent years, “several qualified nominees...saw their nominations opposed based on their perceived ideology. For better or worse, a new standard for evaluating judicial nominees has emerged.”<sup>36</sup> Others, like Senator Tom Coburn (R-OK), argue against the using of ideology as the sole determiner of whether or not a nominee receives their support; speaking of proposed changes to the filibuster rule, he said: “I will

continue to insist that the judicial nominations from any president—Republican or Democrat—receive the courtesy of an up-or-down vote. A shrill minority should not be allowed to run out the clock on a president who opposes the practice of judicial activism.”<sup>37</sup>

Beyond the common political motivations that are apparent and explicit for many senators, there is little additional in common between the process from state to state and little transparency or accountability. The difficulty of understanding the process in these states is apparent in this report's more detailed discussion of five states where Senators do not use a judicial selection committee.

### Goals to be considered in evaluating a Senator's selection method

How can citizens, activists, organizations and lawyers who are concerned about the federal judicial nominations process in their state evaluate whether their senators are doing a “good job” in their roles? While many metrics could be used, this report focuses on two sets of goals for senators (and citizens) which can be used to evaluate the effectiveness of the selection method used in the state: (1) finding qualified and diverse nominees and (2) using a timely and transparent process for selection of names to present to the President.

Each of these goals will be discussed in this report's explanation of the judicial selection process in Colorado and 10 other states. The states in this report were chosen as examples of geographically diverse states, some small and large states, mixed delegations and those with two senators from the same party, and home-states of senate leadership.

### **Quality and diversity of nominees**

Senators and citizens alike are interested in finding judicial nominees who are qualified for the job, but it is also of interest to senators to find out if a nominee has political or other flaws earlier in the process than waiting for a bombshell revelation at the Judiciary Committee hearing. For example, a senator can set up a selection committee to conduct in-depth screening of candidates and catch potentially disqualifying problems instead of having to devote substantial senatorial staff resources to that research.<sup>38</sup> But there is no quantitative analysis that shows a selection committee method is more likely to avoid political scandals or less-than-qualified nominees. For example, the 2011

IAALS Report found that there was little difference between senators that used judicial selection committees for nominees and those that did not when it came to what type of ABA rating those nominees received: “not qualified”, “qualified” or “well qualified.”<sup>39</sup>

Another measure of success is the diversity of candidates who are submitted as nominees for federal judgeships in the areas of race, gender, professional background and geography. A diverse judiciary that reflects the citizens increases the quality of justice and the public trust in the federal judiciary to decide challenging questions. Arguably, a judicial selection committee can open up the process to a broader pool of candidates by application than Senators who rely upon political allies for recommendations.<sup>40</sup> Overall, the IAALS Report found a slight increase in diversity of nominees from Senators who use judicial selection committees compared to states that do not. Committee states had a higher percentage of Hispanic and Asian nominees and a lower percentage of white men, but the report was unclear whether this was because of the overall demographics of committee states (such as California, Texas and Florida) compared to non-committee states.<sup>41</sup> But there was almost no difference in the professional background of nominees from committee and non-committee states: both overwhelmingly resulted in nominees from private law practice or sitting state and federal judges.<sup>42</sup> Another consideration is that a committee process with open applications allows sitting federal judges and magistrates to apply while they might be excluded from a personal political process conducted by Senators alone.<sup>43</sup> These 2011 diversity statistics are a bit dated since President Obama has placed a high priority on racial, gender and professional diversity in federal judicial nominees in the three years since the IAALS comparison.<sup>44</sup>

### **Timeliness and transparency of the selection process**

With a judicial vacancy crisis causing heavy workloads and case-backlogs, the timeliness of a judicial selection method is an important consideration for Senators and citizens. A 1996 bipartisan commission recommended Senators take no more than 90 days to recommend names to the President after a vacancy occurs.<sup>45</sup> Few Senators meet that target with or without a selection committee process. The IAALS Report found no significant difference between the speed of nominations in committee and non-committee states. Committee state nominees are confirmed at a higher rate than other nominees (81% to 72%) but have taken an average of 100 days longer to get confirmed.<sup>46</sup> However, these results only reflect an evaluation of all

states using any form of committee against those which do not, ignoring the differences in committee size, structure, authority and function.<sup>47</sup> As seen in this report's discussion of specific states, these differences and the Senators' attention to committee recommendations can affect the time it takes to get names recommended to the White House.

It is also important for citizens and organizations to have some transparency in the process that results in federal judicial nominations. When names appear "out of thin air" it does not allow for accountability or confidence in the selection process and citizens are left to conclude that judicial posts are given out as political favors. The IAALS Report found the existence of a selection committee can increase transparency for the judicial nomination process and foster greater trust in the system.<sup>48</sup> But the mere existence of a committee is no guarantee of transparency, as the IAALS Report noted regarding the difficulty in obtaining information about the selection committee advising Senator Schumer (D-NY).<sup>49</sup> As discussed below, some non-committee states like Virginia also provide a large amount of public information about the potential nominees, while others provide next to nothing.

## Colorado's selection committee process

Today, Colorado uses a judicial selection committee method of providing recommendations to Senators for judicial vacancies in the state, but that is a relatively new development. From 1995 to 2005 the state had two Republican Senators who did not appear to use any committees when recommending judicial nominations to Presidents Bill Clinton (D) and George W. Bush (R). There was a history of Senator Wayne Allard (R) clashing with President Clinton over nominations and refusing to return blue slips on nominees who were not selected from the list of names submitted by his office.<sup>50</sup> When President Bush took office in 2001, Senators Allard and Ben Nighthorse Campbell (R) submitted a list of names for consideration for two district court vacancies, but it is unclear how those names were selected.<sup>51</sup> The two nominees chosen by the President were from that list and supported by the Senators until they were confirmed in 2002.<sup>52</sup>



In 2005 Colorado became a split delegation when Democratic Senator Ken Salazar took office. Disagreements between the Senators led to a situation

where three new vacancies on the District Court of Colorado were still unfilled in January 2008. The Senators pursued different methods to select names to provide to President Bush. Senator Allard submitted four names not only without public information about how those names were selected, but without Senator Salazar having met many of the suggested individuals.<sup>53</sup> Senator Salazar created a bipartisan selection committee (designed after Colorado's screening committee for state supreme court justices) and encouraged open applications to that committee.<sup>54</sup> President Bush formally nominated three individuals from Senator Allard's list, but Senator Salazar opposed one of those nominees based on the recommendations of his separate selection committee.<sup>55</sup> Eventually, the Senators compromised and agreed to support two of the three nominees for confirmation before the 2008 election.<sup>56</sup>

In 2009, the political dynamics changed again with the election of President Obama and Senator Mark Udall (D) replacing Senator Allard. In April 2009, Senator Udall and newly-appointed Senator Michael Bennet (D) (replacing Salazar who joined the Cabinet) announced the creation of a 10-member selection committee to recommend names for two remaining vacancies on the district court.<sup>57</sup> Continuing the tradition, and many of the same committee members, of the 2008 Salazar committee, open applications were accepted and processed before names were recommended to the Senators. With a few changes, this is the same selection committee process used by these same two Colorado Senators to fill a new vacancy in 2012.

Because Colorado only has one district court with seven judges<sup>58</sup> and vacancies are sporadic, the Senators have chosen to appoint and disband selection committees as needed with new vacancies instead of creating a standing committee as in larger states like Texas and Florida. The basic structure and process for the 2009 and 2012 selection committees were the same, and indeed only two members of the 2012 committee were not members of the earlier body. The Colorado committees were established mostly based upon the ABA recommendations for judicial screening committees.<sup>59</sup> According to discussions with Senate staff, Senators Udall and Bennet worked very cooperatively in creating the committee and giving directions and charge to the committee.

**Makeup of the Committee:** Former Colorado Supreme Court justice and current IAALS Executive Director Rebecca Kourlis participated in all three Colorado committees (2009 & 2012 co-chair). The Senators appointed members to the committees based on considerations of political diversity, representation

from different parts of the state, and demographic diversity. The committee members were all volunteers. Kourlis believes the 2009 and 2012 committees achieved a good balance of political and gender diversity, but was not as successful in racial and ethnic or geographic diversity despite the Senators' best efforts.<sup>60</sup> The Senators also worked hard to have professional diversity representing the different practice areas that arise in federal court, such as criminal law, employment law, and patent law.<sup>61</sup> Although the 2008 Salazar committee included non-lawyers, the two Udall-Bennet committees have been exclusively composed of lawyers based on a desire to make sure committee members understand the federal court process. Kourlis believed the 2008 committee with non-lawyers had perhaps a healthier broad conversation about candidates including their community service and interests outside of work where the lawyer-only committees tended to focus more on work-related qualifications and reputation in the bar.<sup>62</sup> Senate staff commented that they were open to having non-lawyers on the committee, but were not sure what criteria should be used to make sure that committee member would have sufficient knowledge of the federal courts to evaluate candidates. Each commission had 10 or 11 members, which Kourlis believed was the right size: big enough to get the work done in a timely fashion with all volunteers, but not too big that consensus on candidates was impossible.<sup>63</sup>

**Committee and Senator Process:** Both the 2009 and 2012 committees were fortunate enough that IAALS (located at University of Denver) volunteered use of its staff to support the committee.<sup>64</sup> IAALS staff helped set up the process for the committee, coordinated scheduling of meetings and distribution of materials and generally supported the volunteer committee members in their work. This allowed the committee to complete a fairly robust process in a matter of months. The process was similar to the existing judicial nominations recommendation commissions for state court judges to be appointed by the Governor. The Senators met jointly with the committee members to launch the conversation with high-level guidance of what they were looking for in potential nominees. Both Kourlis and Senate staff confirm that there were not specific directions to the committee, but that they were encouraged to look at the current composition of the district court to see if there were "holes" in experience on the bench – such as patent law. Mostly, the Senators asked the committee to find qualified candidates with high integrity and respect. After that initial meeting, the committee proceeded through the following steps:<sup>65</sup>

1. Applications were received through the Senators offices and forwarded to all committee members for review.

2. Committee members jointly agreed to narrow down the number of applicants who made the “first cut” to around 10 names that would proceed to committee interviews.
3. Each of the individuals to be interviewed was assigned to a committee member to conduct due diligence research: reading written materials, calling references, conducting other research on the individual candidate.
4. The full committee interviewed all candidates jointly. Before the interview, the committee member who conducted research would share all information and opinions with the rest of the committee. The committee also deliberately discussed each candidate separately immediately after the interview.
5. After all interviews, the committee narrowed down the list to the number the Senators asked to interview themselves. The committee avoided ranking candidates 1-2-3-4-5, to avoid dissent and argument between committee members of which specific candidate should be first or second, etc. Instead, committee members were able to come to easy consensus as to which individuals deserved to be in the “top 5” for Senate interviews (although the number was not always 5).
6. Both Senators received the recommendations and materials and conducted individual interviews with the final candidates.
7. Senators discussed and decided which names were to be sent to the President. According to Senate staff, this was a full agreement process between the Senators as they both tended to choose the same individuals to put forward. Both Senators agreed to only put forward names to the President that came from the committee recommended list and would support the confirmation of any nominee from that list.

Kourlis noted that the Senators requested that staffers be present at committee meetings and interviews in order to be familiar with the process and the candidates. However, any Senate staffers present were quiet observers and did not participate or influence committee interviews or deliberations in any way.<sup>66</sup> Overall both the Senate staff and Kourlis thought the process worked fairly smoothly – especially with the administrative help from IAALS.

**Quality and Diversity of Nominees:** The three nominees selected by President Obama in 2009 and 2012 all came from the recommended list provided by Senators Udall and Bennet. The first committee's nominees were Denver attorney William Martinez and state court judge Brooke Jackson.<sup>67</sup> Both were extremely qualified for the position and approved through the Judiciary

Committee. Martinez was delayed from a Senate floor vote for a number of months due to political posturing regarding his prior work for the American Civil Liberties Union, but he was ultimately confirmed as part of a package of judges in late 2010.<sup>68</sup> Jackson was nominated later in 2010 and confirmed in 2011 without particular political drama.<sup>69</sup> Although both nominees were men, Martinez is a naturalized citizen born in Mexico with experience in plaintiff-side employment law and civil rights.<sup>70</sup> The 2012 committee nominee was Raymond Moore, whose qualifications were not questioned during the confirmation process.<sup>71</sup> Moore was also a diverse nominee as a federal public defender and now sits as the only active-status African-American judge on the district court.

**Timeliness and Transparency of Process:** Both the 2009 and 2012 committees were given specific – and short – deadlines to address the judicial vacancies on the district court. The 2009 committee accepted applications for a number of weeks and then moved forward quickly enough that Senators Udall and Bennet were able to provide names to the President within three months of the announced vacancy.<sup>72</sup> The 2012 committee followed a similar timetable for applications, although it is unclear when the Senators presented names to the President.<sup>73</sup> Moore was officially nominated by the President within six months of the vacancy announcement.<sup>74</sup> Although Kourlis admits that a selection committee perhaps adds time to the beginning of the process as compared to an individual Senator simply selecting a friend or political supporter, she believes the time can be controlled as was done in Colorado.<sup>75</sup> The committees also saved time for Senate staff by presenting packages of information for each individual already assembled to decrease the burden on the Senator's staff.

The transparency of the process is perhaps the biggest flaw in the 2009 and 2012 committees used in Colorado. The specific details of the process were not available to the public at the time of the committee's work. With both committees, the Senators asked that the committee not release any information or names of individuals recommended to the Senators and chose not to release the names of the recommendations given to the White House.<sup>76</sup> In 2009, there was a public statement when the Senators gave names to the President that six candidates had been provided – three for each of the two vacancies – and released the names of those recommendations.<sup>77</sup> However, the 2012 process did not appear to have the same public step of announcing the names or number of recommendations sent to the White House for that vacancy. Senate staff did state that there was an “urgency” to get names to the President as soon as possible for the 2012 vacancy. The Senators did confirm that Moore was

part of the committee process and Senator recommended list when he was nominated.<sup>78</sup>

Overall, Colorado appears to have a successful process for judicial nominees at the present time, and at least one national organization has urged other states to look to Colorado as a model of a process that works.<sup>79</sup> But Colorado has been less successful in the past based on personality of Senators and political considerations. The rest of this report looks at how other states are currently selecting recommended nominees, using five examples of judicial selection committees and five examples of Senators with non-committee methods of judicial selection.

## Other examples of state selection committees

At least 20 other states use either a joint judicial selection committee like Colorado or have separate committees for each Senator (like California). This section examines five such states: Florida, Pennsylvania, Texas, Vermont and Wisconsin. Each section includes a discussion of (1) the makeup of the committee, (2) the committee and Senator process, (3) the quality and diversity of nominees, and (4) the timeliness and transparency of the process. These sections are based upon public information sources and discussions with activists operating in that state.

### Florida

Florida has three district courts with a total of 37 active judgeships.<sup>80</sup> Florida's Senators Bill Nelson (D) and Marco Rubio (R) use a Federal Judicial Nominating Commission (FJNC) divided into three district conferences. The FJNC has been operating under its current rules since 2009, the modern incarnation of the process that has been used since the late 1970s.<sup>81</sup> Florida currently has two district court vacancies after recently confirming nominees to five others in summer 2014.



**Makeup of the Committee:** The FJNC rules (available online) detail the appointment and procedure of the committee.<sup>82</sup> The “Presiding Senator” is the Senator who is the same political party as the President – Senator Nelson – and

Senator Rubio is considered the “Non-Presiding Senator” (if both Senators are from the same party the distinction is based on seniority).<sup>83</sup> The Presiding Senator appoints the Statewide Chair, the Chair for each of the three district conferences and the majority of each district conference. The Non-Presiding Senator appoints the remaining conference members. Each district conference has 16-21 members, most of whom are attorneys- although the rules open up membership to any Florida citizen. All chairs and members of the commission are appointed for 2 year terms, but may be reappointed. Members of the FJNC are barred from seeking appointment to any position reviewed by the committee and may not give preferential treatment to any applicant who they have recruited to apply. There are also recusal rules for members who have preexisting relationships with applicants. According to the current website listing, the vast majority of FJNC members are private law firm lawyers, but there are at least 10 non-lawyer citizens as well as attorneys from nonprofit organizations, business corporations, universities, county attorney offices, and a law school dean.<sup>84</sup>

**Committee and Senator Process:** The FJNC not only screens candidates for federal court vacancies, but also U.S. Attorney and U.S. Marshals positions. It appears to be an ongoing committee which is “called to action” when a new vacancy occurs and a letter from the Senators direct the FJNC to consider applications in that district. Judicial candidates apply directly to the FJNC, which is administratively supported by the Florida Bar.<sup>85</sup> After reviewing the applications, the committee accepts public comment in writing from both the legal community and the general public. The district conference then conducts public interviews and selects at least three finalists per vacancy to present to the Senators. Deliberations on the finalists are in closed session, but the names of the finalists are released. The Senators then have the opportunity to interview these finalists and recommend names to the President, but the Presiding Senator cannot submit a name to the President which is objected to by the Non-Presiding Senator.

Despite having agreed to continue the FJNC as governed by these rules and procedure, the Senators are not necessarily bound by the FJNC’s recommendations. For example, Senator Rubio opposed the nomination of Judge William Thomas to the Southern District of Florida last year by refusing to return the blue slip after initially supporting him through the FJNC process.<sup>86</sup> That nomination did not proceed and was dropped by the White House.

**Quality and Diversity of Nominees:** In September 2013, the FJNC provided numerous finalists to fill district court vacancies then pending in Florida. In total, five nominees were named by the President from these lists in February 2014. It was a very diverse group of nominees, including two women (State Judges Beth Bloom and Robin Rosenberg),<sup>87</sup> Hispanic state Judge Carlos Mendoza, and Judge Darrin Gayles, now the first openly gay African-American federal judge.<sup>88</sup> There was less professional diversity in these nominees, since four of five were sitting state judges, but private attorney Paul Byron had experience prosecuting in international criminal tribunals and is an Army veteran. The most recent list of interviews announced includes a fairly traditional professional background: 12 of 15 are state court judges or federal magistrates.<sup>89</sup> Each one received the majority of a “qualified” rating from the ABA, and all of these nominees were confirmed without any nay votes in June and July of 2014.<sup>90</sup> Both Florida Senators supported this group of nominees. Groups such as the Florida Why Courts Matter coalition advocated strongly for diverse candidates in the last few years commended the Judge Gayles nomination and confirmation.<sup>91</sup>

**Timeliness and Transparency of Process:** The FJNC process appears timely with rules requiring a district conference complete review of applications, interviews and deliberation on candidates within 60 days of the application deadline. However, Judge Rosenberg applied for the vacancy more than two years before her confirmation in July 2014. The FJNC is currently reviewing applications which were due on July 30, 2014 for the vacancy announced last November.<sup>92</sup> The FJNC announced the names of applicants who will be interviewed on August 20, and interviews are set for September 4.<sup>93</sup> Thus, the delay seems to be at the start – the time between when vacancy is announced and when the FJNC starts reviewing applications – and the end of the process when the Senators review the finalists. Many working on judicial nominations in Florida thought the size of the FJNC district committees leads to delay in starting the review process. A second vacancy was created in June 2014 when a district judge announced he will take senior status in 2015. It is unclear when the FJNC will start the process for that vacancy. Groups in Florida have been urging a speedier process to fill the numerous judicial vacancies, including some designated as “judicial emergencies.”<sup>94</sup>

The FJNC is remarkably transparent, starting with a website that includes deadlines, commission rules, and names of commission members online. In addition, all application materials and information are generally available for public review subject to the Chair’s judgment to keep sensitive personal information confidential.<sup>95</sup> The FJNC even accepts and considers public

comment on candidates. According to IAALS, the FJNC is the only federal judicial screening committee in the nation that conducts public interviews. However, the Senators' review of the finalists is much less transparent after the FJNC publicly releases the names of the finalists sent to the Senators.

## Pennsylvania

Pennsylvania is another state with a large number of federal judges (38) across three district courts.<sup>96</sup> Senators Bob Casey (D) and Pat Toomey (R) have helped confirmed 10 federal judges for their state in the last three years, despite their political party differences.<sup>97</sup> However, eight district court vacancies and one seat on the Third Circuit Court of Appeals remain vacant-half of these without nominees.<sup>98</sup>



**Makeup of the Committee:** After Senator Toomey took office in 2011, the Senators started a new process for recommending names for vacancies.<sup>99</sup> The Senators established 20-member panels to recommend judicial nominees in each of the three judicial districts in Pennsylvania where each Senator appoints a co-chair and half of the members of each panel.<sup>100</sup> The co-chairs of the three panels were announced and were all private law firm lawyers, (one was a former state court judge). Only one of the six co-chairs named was a woman.<sup>101</sup> Press releases from the Senators say panels include “respective Pennsylvania citizens” but it is unclear whether that includes non-lawyers.<sup>102</sup>

**Committee and Senator Process:** Applications are available through either Senators' website. The panels are responsible for reviewing applications and interviewing all those who submit an application.<sup>103</sup> The Senators appear to select and submit judicial candidates jointly after reviewing information from the panels. The same process was revived in 2013 to consider nominees for new and continuing vacancies, and individuals who applied during the 2011 panel process were allowed to re-apply by asking to be considered via email without completing a new application.<sup>104</sup>

**Quality and Diversity of Nominees:** Three out of four of the current nominees (Wendy Beetlestone, Mark Kearney, Joseph Leeson, and Gerald Pappert) received “well qualified” ratings from the ABA (the fourth was “qualified”).<sup>105</sup> All four of the nominees are private civil law firm lawyers,

although two of them have previous state and local government experience.<sup>106</sup> Since 2011 the panels' nominees have also included a sitting magistrate judge now confirmed as the first woman of South Asian descent on any federal bench.<sup>107</sup> There was some controversy before this set of nominees about the potential nomination of David Porter, a very conservative lawyer. A statewide campaign organized by Keystone Progress appears to have successfully applied pressure to the Senators to remove Mr. Porter from consideration.<sup>108</sup>

**Timeliness and Transparency of Process:** Activists familiar with the Pennsylvania vacancies have noted that the selection committees are capable of being speedy in their consideration of individuals but the process slows down once it reaches the Senators' offices.<sup>109</sup> Applications were due within a couple weeks from when the panels were announced and interviews commenced thereafter. It is perhaps not surprising that often these Senators from different political parties cannot agree on which names to recommend to the President. It has been noted that these Senators do have a good working relationship in general and judicial nominations is just one part of that working relationship. Valuing that relationship leads these Senators to move slowly on recommendations and to seek agreement.<sup>110</sup> Once the nominations were made in June, both Senators appear to have returned blue slips quickly to allow a Judiciary Committee hearing to go forward in July 2014. The panel process has resulted in many filled vacancies since 2011.

While the co-chairs of the selection panels were publicly announced, they are instructed by Senators to keep all names and information confidential.<sup>111</sup> Names are not officially released except for the Presidential nomination announcements. There has been some critique of Senators Toomey and Casey making "backroom deals" with the White House on nominations after the panel process, such as when the David Porter almost-nomination was not publicly confirmed by either Senator but the opposition mobilized based on a rumor of his inclusion.<sup>112</sup> The fact that two months had passed without the recommendations being announced was accepted as fact that the package deal was being reconsidered. The deal was revealed by anonymous sources: Senator Toomey would get to make a pick – Porter – in exchange for Senator Casey naming the other recommendations.<sup>113</sup> Perhaps more transparency in the process could have avoided such public backlash at the last minute.

## Texas

With four district courts and 52 active judgeships, Texas has one of the largest federal court systems in the nation.<sup>114</sup> It has a large number of current vacancies – nine district court seats and two Fifth Circuit Court of Appeals judgeships.<sup>115</sup> There are also four future district court vacancies expected in 2015.<sup>116</sup> Senators John Cornyn (R) and Ted Cruz (R) both sit on the Judiciary Committee and are in a position to help fill vacancies in Texas through shepherding nominees through the Senate process. However, the lack of cooperation between these Senators and the President has led to the current large number of vacancies-most without any nominees until very recently.<sup>117</sup>



**Makeup of the Committee:** The Federal Judicial Evaluation Committee (FJEC) has been used in the past to select judicial nominees in Texas and appears to be assembled as needed, most recently re-established in 2013. The 35 bipartisan committee members were jointly appointed by the Senators and publicly announced.<sup>118</sup> The FJEC is all attorneys, mostly from the state's largest law firms together with six corporate in-house lawyers, one district attorney, one state court judge, and one state government attorney.<sup>119</sup> About 10 of the members are Democrats or have ties to Democratic candidates.<sup>120</sup> The FJEC is mostly representative of the big cities in Texas and lawyers who specialize in business matters.<sup>121</sup>

**Committee and Senator Process:** Judicial candidates can access the application questionnaire through Senator Cornyn's website.<sup>122</sup> The FJEC started accepting applications in July 2013, but, applications are submitted directly to both Senators' offices who appear to forward the information to the FJEC members.<sup>123</sup> The FJEC members examine the applications and take an informal "vote" on candidates, who are then compiled as a ranked list of candidates sent to the Senators. The Senators send back to the FJEC a list of their top candidates who they want the committee to interview and review further.<sup>124</sup> The FJEC members are all volunteers and there are some scheduling difficulties for interviews and member deliberation to arrive at two to three names per vacancy to recommend to Senators.<sup>125</sup> Once the FJEC recommends names,

both Senators Cornyn and Cruz must agree on any names recommended to the President – yet Senator Cruz is fairly hands off during the process allowing Senator Cornyn the lead.<sup>126</sup>

Another complication in Texas is that the Democratic U.S. House members from Texas have also screened and submitted names since 2009 and the President has an agreement that the Democratic delegation must sign-off on any individuals before the President will nominate them.<sup>127</sup>

**Quality and Diversity of Nominees:** There are three pending nominees for district court seats from the FJEC process: Robert Pitman, Robert Schroeder III, and Judge Amos Mazzant III, all of whom were nominated by President Obama on June 26, 2014.<sup>128</sup> Senator Cornyn was responsible for submitting these names to the President, but all three were screened by the FJEC.<sup>129</sup> All three of these nominees have been rated “well qualified” by the ABA and are awaiting a Judiciary Committee hearing.<sup>130</sup> These nominees are from traditional professions of private attorney, U.S. Attorney and a Magistrate Judge.<sup>131</sup> All three nominees are white males, but if confirmed Mr. Pitman will be the first openly gay federal judge to serve in Texas.<sup>132</sup> Most of the nominees recommended through this process recently are men and Texas citizens are hoping the next group of nominees will have more gender diversity.<sup>133</sup> But the Texans for a Fair Judiciary<sup>134</sup> coalition of groups working on filling judicial vacancies view this latest round of nominees, including Pitman, as a “step in the right direction.”<sup>135</sup>

**Timeliness and Transparency of Process:** The FJEC committee format has been essentially the same for many years; however effectiveness of that process has varied greatly. While six vacancies were filled with recommendations from Senator Cornyn and former Senator Kay Bailey Hutchinson (R) from 2008 to 2012, the Senators from Texas did not make any recommendations for judicial nominations starting with the election of Ted Cruz in November 2012 until mid-2014.<sup>136</sup> The FJEC was established in April 2013, but there were no Presidential nominations until June 26, 2014.<sup>137</sup> The process in Texas cannot be called timely when it is responsible for more than a quarter of the 38 federal judicial vacancies across the country – many of them classified as judicial emergencies.<sup>138</sup>

Texas citizens have been calling for more transparency in the FJEC process, including some indication of how long the process will take and when names are recommended to Senators.<sup>139</sup> Little public information about the workings of the FJEC combined with the high number of vacancies has led to

criticism about the selection process and the appearance that the two Republican senators are attempting to withhold nominations in an effort to keep Texas courts more conservative.<sup>140</sup> In April 2014, after the FJEC had been established for a year and no information was known about progress, Senator Cornyn's office was pressured to comment that three names were forwarded to the White House and that more were "expected soon."<sup>141</sup> No further information has been released since the June 2014 nominations, although Senator Cornyn has said there are possibly five or six more recommendations in the pipeline.<sup>142</sup>

## Vermont

Vermont may be a small state with one district court seating only two judges,<sup>143</sup> but Senator Patrick Leahy (D) is the Chair of the Senate Judiciary Committee. It is reasonable to assume this position gives Senator Leahy great influence over how quickly any nominee for the Vermont district court gets a committee hearing and vote, and some influence with Senate leadership



regarding floor vote scheduling. In choosing the names to offer to the President for Vermont, Senator Leahy and Senator Sanders (Vermont Progressive Party) use a joint bipartisan judicial selection committee. This process has been used both in 2009 and 2014 to find replacements for judges taking senior status.

**Makeup of the Committee:** In both 2009 and 2014 Senators Leahy and Sanders jointly established a Vermont Judicial Selection Commission to screen candidates for the future district court vacancy (the commission disbands after the vacancy is filled).<sup>144</sup> Each time, the commission was composed of nine individuals, three selected by Senator Leahy, three selected by Senator Sanders, and three selected by the Vermont Bar Association. U.S. Representative Peter Welch (D), the only House member from Vermont, has also been reported as having "input" into the process and selections.<sup>145</sup> The 2014 commission included many private law firm attorneys, but also diverse perspectives from one sitting state supreme court justice and a legal aid attorney.<sup>146</sup>

**Committee and Senator Process:** Judicial candidates submit applications directly to the commission.<sup>147</sup> The Executive Director of the Vermont Bar Association provides staffing to the commission during its process. After

reviewing the applications, the commission conducts interviews and provides a small number of candidates for the position- in 2014 the commission recommended two finalists.<sup>148</sup> The Senators then review materials and consult before Senator Leahy (as senior Senator) interviews the finalists.<sup>149</sup> Senator Leahy consults with Senator Sanders and Representative Welch and then recommends one name to the President.<sup>150</sup>

**Quality and Diversity of Nominees:** Both the two recent nominees – Judge Christina Reiss (2009) and Justice Geoffrey Crawford (2014) – were finalists recommended by the commission.<sup>151</sup> Each of these nominees was a sitting state court judge, and did not have their qualifications questioned in the confirmation process.<sup>152</sup> Judge Reiss became the first woman to serve on the Vermont district court.<sup>153</sup>

One indication that Senator Leahy respects the commission's recommendations of finalists is that one applicant the commission did not list as a finalist for the 2014 vacancy was a close friend and former staffer of Senator Leahy. Despite recognition that the Senator could exercise his prerogative and recommend his former staffer for the position, Senator Leahy instead recommended Justice Crawford from the commission's list of finalists.<sup>154</sup> This should inspire confidence in Vermont citizens that the process was not in any way a cover for Senatorial favors.

**Timeliness and Transparency of Process:** Vermont may not have many judicial seats, but when one becomes vacant Senator Leahy moves at “light speed” to fill it.<sup>155</sup> For example, the 2014 vacancy was announced in mid-January and the commission was already formed and announced by January 24.<sup>156</sup> Applications were due on February 21<sup>157</sup> and the commission interviewed seven candidates in early March.<sup>158</sup> Two finalists were sent to the Senators on March 12,<sup>159</sup> and Senator Leahy recommended Justice Crawford on March 24.<sup>160</sup> Justice Crawford was officially nominated on May 19. Having a Senator committed to a timely process means the entire commission process can occur and still have recommendations to the President quickly. As expected with Senator Leahy's role as chair, the confirmation process moved quickly with final approval on June 24, 2014.<sup>161</sup>

Vermont's process is also fairly transparent. Not only does Senator Leahy send press releases regarding recommendations to the President and the commission makeup and process, but the commission itself was very public about posting its deadlines and recommendations using the Vermont Bar

Association website.<sup>162</sup> The commission released the names and current positions of the individuals interviewed as well as the two finalists. This disclosure is what allows the public to ask questions if the Senator does not recommend one of the commission finalists – or applaud the fact that the Senator did choose a finalists over a former staffer.

## Wisconsin

Wisconsin is divided into two district courts with seven total active judges.<sup>163</sup> The current Senators Tammy Baldwin (D) and Ron Johnson (R) have decided to continue to use the Wisconsin Federal Nominating Commission (WFNC) which has been operating in various forms since 1979.<sup>164</sup> The WFNC is activated whenever a vacancy needs to be filled.



**Makeup of the Committee:** When Senator Johnson was elected in 2010 he requested changes to the allocation of appointment authority for the WFNC.<sup>165</sup> The prior rules allowed the Senator from the President's political party to appoint five members while the other Senator appointed three and the Wisconsin Bar and law schools filled the remaining slots, with a law school dean as chair.<sup>166</sup> As re-activated by Senators Johnson and Baldwin in 2013, the WFNC has only six members.<sup>167</sup> Each Senator appoints three members for a two year term (with no limit on additional terms), and the co-chairs are attorneys one of each Senator's appointments. All WFNC members are required to be members of the State Bar, and no federal or state judges or any federal law enforcement officials may be appointed. The current members include law firm commercial lawyers, a public interest organization attorney, a district attorney, and an employment lawyer.<sup>168</sup>

**Committee and Senator Process:** The WFNC has a charter that includes rules of procedure for the commission and it receives administrative support from the Wisconsin Bar.<sup>169</sup> It is the duty of the WFNC to seek out and screen applicants in the event of a judicial vacancy.<sup>170</sup> Within 75 days of the application deadline, the WFNC must evaluate the candidates and provide between four and six names to the Senators for each vacancy. The Senators then interview and evaluate the names further before agreeing to which recommendations are to be made to the President. WFNC members are barred from applying for any federal vacancy considered by the Commission during

the same two-year period. Both Senators have endorsed all three names sent to the President for each district court vacancy and have not withheld blue slips for the eventual nominee.<sup>171</sup>

**Quality and Diversity of Nominees:** Two nominees were named in 2014 from the WFJNC recommendations: James Peterson and Judge Pamela Pepper. Peterson was a private intellectual property attorney and Judge Pepper is a sitting federal bankruptcy judge and both received “well qualified” ABA ratings.<sup>172</sup> If confirmed, Judge Pepper will be the first woman to serve as a U.S. District Judge in the Eastern District.<sup>173</sup> Peterson was confirmed in May 2014 and Judge Pepper has been approved by the Judiciary Committee without objection.

**Timeliness and Transparency of Process:** The vacancies to be filled by the 2014 nominees have been empty on the district court since 2009 and 2012.<sup>174</sup> Some speculate that the reason the process takes too long is because the WFNC only acts when it is told to seek applications by the Senators and is only allowed to proceed with filling one vacancy at a time.<sup>175</sup> There is also a long delay process between when the WFNC gives names to the Senators and when recommendations are sent to the President. The delays have only been exacerbated by the change in Senators in the last two cycles.

The WFNC seems to have the most trouble when it comes to reaching beyond the district court and recommending individuals for the Seventh Circuit vacancy allocated to Wisconsin; a judicial emergency which has been empty for almost five years. The nominee last recommended from the WJNC was withdrawn in 2011 after Senator Johnson refused to return a blue slip for nominees recommended before he was elected.<sup>176</sup> Now the WJNC is starting the process all over again for possible Seventh Circuit candidates with applications due September 8, 2014.<sup>177</sup> While some citizens in Wisconsin have been happy with the final nominees chosen, the frustration has been with the delay.<sup>178</sup>

The WFNC does have a public website with information about the process and publicly releases the names of commissioners. Votes of the commission are required to be kept confidential along with all materials used in consideration. Names of applicants may be made public with permission of the applicants – usually these are released. The process is less transparent once the Senators are considering which names to recommend to the President. The names of the

recommendations to the President are released once transmitted to the White House.

## Examples of non-committee selection states

As discussed above, the majority of states still do not use any sort of appointed judicial selection committee process to advise Senators on potential judicial nominees. This section examines five such states: Arizona, Iowa, Kentucky, Nevada and Virginia. One similarity is that states with non-committee selection methods tend to have less information available in the public record regarding the process of how Senators select the names recommended to the President – or indeed any public record that Senators have recommended names at all. Each section includes a discussion of (1) the Senator’s process of selecting potential nominees, (2) the quality and diversity of nominees, and (3) the timeliness and transparency of the process. These sections are also based upon public information sources and discussions with activists operating in that state.

### Arizona

Arizona has one District Court with 14 permanent judges.<sup>179</sup> The current Senators are John McCain (R) and Jeff Flake (R). Between 2010 and 2013, seven of these seats became vacant, with six still empty in September 2013. On January 6, 2014, President Obama re-nominated the six prior nominees for the District of Arizona – the longest had been waiting since June 2011.<sup>180</sup> All have recently been confirmed, leaving Arizona with no current vacancies.



**Senator Process:** Not much information is available about how these nominees were recommended to President Obama from Arizona’s Senators. Through 2012, Senator McCain deferred on judicial nominations to then-Senator Kyl (R) because he sat on the judiciary committee.<sup>181</sup> Senator Kyl had a history of opposing and not moving along President Obama’s nominees for the vacancies in Arizona – including Rosemary Marquez first nominated in June 2011 (re-nominated in January 2013).<sup>182</sup> However, when Senator Flake took office in 2013 after Senator Kyl’s retirement, Senator McCain took more leadership of the

nominations and sought to fill the seats.<sup>183</sup> During the 2014 Judiciary Committee hearing for all six nominees, Senator McCain stated that he “considered the views of a non-partisan judiciary evaluation commission”<sup>184</sup> which appeared to be a small search committee advising Senator McCain alone.<sup>185</sup> In September 2013, President Obama nominated four additional individuals and the final fifth nominee was named in December 2013 with “consultation” of both Senators.<sup>186</sup>

**Quality and Diversity of Nominees:** All six nominees were well qualified as sitting magistrate and state court judges, U.S. Attorneys, and a former federal public defender.<sup>187</sup> Four of the six were rated “well qualified” by the ABA.<sup>188</sup> Four of the six were confirmed almost unanimously by the Senate when they finally received a floor vote.<sup>189</sup> One advisor to Senator McCain called this group of nominees the “most diverse crop in recent history” both for professional diversity and racial diversity.<sup>190</sup> For example, Diane Humetewa is now the first Native American woman to ever serve as a U.S. District Court judge and the only sitting federal judge who is a member of a tribe.<sup>191</sup>

**Timeliness and Transparency of Process:** Looking at the last step of the Arizona nominees’ saga, it might appear the process was very timely: six nominees submitted by the President in January 2014 and confirmed in May 2014. But five of the six vacancies did not even have nominees until late 2013 and there is not much information available as to the reason for this delay. Nor did Senator McCain provide public information about his advisors or names that were submitted to the President. The lack of transparency left Arizona attorneys to wonder whether the delay was just politics between Republican Senators and a Democratic President.<sup>192</sup>

Once nominations were officially made, both Senators used the blue slip process to stop the process so that these nominees did not even have Judiciary Committee hearings until 2014. In 2013, Senator Flake stalled the nominations in order to make a more “deliberate and thorough” investigation into the nominees.<sup>193</sup> Once fully satisfied, Senator Flake lifted the block of the nominees and returned his blue slips.<sup>194</sup> Senator McCain returned blue slips for the 2013 nominees quickly and seemed to understand the toll the delay in filling vacancies was taking on the district court: “This is a court that has been under great strain recently. While it has been consistently ranked as one of the top 10 busiest courts in the country, it has been strained by a series of recent vacancies.”<sup>195</sup>

## Iowa

The current Senators of Iowa are Chuck Grassley (R) and Tom Harkin (D). Senator Grassley is the Ranking Member on the Judiciary Committee and can use that position to address Iowa vacancies quickly. Of Iowa's five active judges across two district courts,<sup>196</sup> two have recently stated plans to retire.<sup>197</sup>



**Senator Process:** Iowa's Senators do not work jointly to recommend potential nominees, but appear to alternate picks.<sup>198</sup> Neither Senator uses a committee to review applicants. Senator Harkin has recommended three names to President Obama for the current two openings.<sup>199</sup> Senator Harkin stated that he “carefully reviewed the records and qualifications of many outstanding judges and attorneys in Iowa,” and that “after assessing the character, experiences, and expertise of these candidates,” he was confident that those he recommended were qualified.<sup>200</sup> He also stated that these decisions followed a careful vetting process, and that he consulted with members of the Iowa bar.<sup>201</sup> A Grassley spokeswoman stated that Senator Grassley “was not consulted.”<sup>202</sup> Despite their different political parties, Senators Grassley and Harkin are considered to have a cooperative and productive relationship on nominations and traditionally defer to each other's recommendations.<sup>203</sup> While Senator Grassley is not shy about voting against nominees from other states, he does not cause delays or appear to oppose nominees for Iowa seats through the blue slip process.

**Quality and Diversity of Nominees:** Senator Harkin recommended David O'Brien to replace Judge Bennett, and either Nicholas Klinefeldt or Judge Karen Romano to replace Judge Gritzner.<sup>204</sup> O'Brien is a private attorney and a “Democratic party activist.”<sup>205</sup> Klinefeldt is a current U.S. Attorney, and Judge Romano has been a district judge since 1996, formerly a state prosecutor.<sup>206</sup> These nominees would not bring any particular professional diversity to the bench in Iowa, but they appear to be qualified. (ABA ratings occur after Presidential nomination). The most recent confirmation was Jane Kelley, a former public defender, as the second female judge in history on the Eighth Circuit Court of Appeals.<sup>207</sup>

**Timeliness and Transparency of Process:** Senator Harkin is pushing for the nominees to go through quickly in large part because he is leaving office in

January 2015 after thirty years in the Senate.<sup>208</sup> Senator Harkin's recommendation of names to the President in late June 2014 comes less than six months after the announced retirements at the beginning of the year.<sup>209</sup> It is unclear when the President might name the nominees for these two vacancies. The last vacancy filled – an Iowa seat on the Eighth Circuit – moved quickly from recommendation of names to the President in late 2012 to an April 2013 confirmation (by vote of 96-0).<sup>210</sup> A group involved with the Iowa Fair Courts Coalition<sup>211</sup> appreciates that Iowa's Senators do not cause delay in filling Iowa vacancies: "One Iowa is proud of our Senators' cordial and civil relationship on judicial nominations. Senators Grassley and Harkin have continued an intentional and respectful rapport in judicial nominations specific to Iowa. As Senator Harkin retires, we hope that continues with the next junior senator."<sup>212</sup>

The current Senator screening process may be amicable between the Senators, but it is not very transparent to Iowa citizens. However, the Senator does announce the names recommended to the President, which is more transparent than those states where no information is provided except the President's eventual nominee when officially announced. Senator Harkin's retirement provides an opportunity to examine this process and perhaps the new Senator will be open to some type of selection committee. Some community leaders in Iowa hope a committee process might open up the development of candidates and diversify the pool of applicants and eventual nominees.<sup>213</sup>

## Kentucky

Senate Minority Leader Mitch McConnell (R) represents Kentucky with Senator Rand Paul (R). Minority Leader McConnell could use his rank and leverage in the Senate to ensure vacancies are not left unfilled, like Senator Grassley in Iowa, but he does not appear to take that approach. Kentucky has two district courts with a total of 11 permanent judgeships.<sup>214</sup> In addition to four district court vacancies, Kentucky currently has a vacant seat on the Sixth Circuit Court of Appeals without a nominee.<sup>215</sup>



**Senator Process:** In June 2014, private lawyer Gregory N. Stivers and U.S. Attorney David J. Hale were nominated for two of the vacant district court

seats.<sup>216</sup> The statement issued by Senator McConnell did not explain how these names were selected, but said the Senator had “consultations with the White House” where he emphasized the need for “mainstream Kentucky lawyers” as nominees.<sup>217</sup> Senator McConnell said that he worked with the President and Senator Paul on these two nominations without further elaboration. Senator Paul also issued a statement calling the nominations an example of the Senators working together with the President.<sup>218</sup> Senator Rand is especially close to Stivers, the two being personal friends and neighbors as well as political allies after Stivers switched to the Republican Party in order to support Senator Rand’s campaign.<sup>219</sup> The process and timing of the Senators recommendations are unclear. Some news reports actually reported that Stivers and Hale would be nominated a full year earlier than their actual nomination based on sources revealing vetting interviews were occurring.<sup>220</sup>

**Quality and Diversity of Nominees:** Both Stivers and Hale received unanimous qualified ratings from the ABA.<sup>221</sup> Questioning by the Judiciary Committee hearing did not appear to question their qualifications for the position. Neither nominee appears to bring any particular racial, gender or professional diversity to the bench as a US Attorney and private civil law firm partner. Early reports are that a woman who currently serves as commonwealth’s attorney is being vetted for one of the remaining vacancies and would be one of only two female judges on the district court if nominated and confirmed.<sup>222</sup> It is unclear what, if any, role the Senators have had in recommending this individual.

**Timeliness and Transparency of Process:** Four seats on the five-seat Western District of Kentucky have become vacant since 2010. The two nominees this year are to fill seats vacated by judges taking senior status in November 2011 and February 2013.<sup>223</sup> The nominations of both Stivers and Hale are still pending with the Senate Judiciary Committee; the hearing was conducted right before the Senate’s August recess.<sup>224</sup> Both Senators have returned blue slips for the committee process to go forward, but there is no particular indication that these Senators are pushing for a speedy confirmation. There is also little indication that there will be nominations soon for the remaining two district court vacancies, including one seat whose vacancy was announced in February of 2012.<sup>225</sup> Nor is there any visible movement on a nominee to the Kentucky seat on the Sixth Circuit vacant since August 2013.<sup>226</sup> Thus, the Kentucky Senators do not appear to place a priority on speedy nominations.

The process in Kentucky is also lacking in transparency. Vague statements issued by the Senators about consultation with the President on nominees does not provide Kentucky citizens with information or assurances that the process is seeking the most qualified and appropriate nominees. Sporadic news reports cover rumors of individuals being vetted, but without particular confirmation from the Senators. Without transparency, questions inevitably arise when political supporters and personal friends of the senators are nominated.

## Nevada

Nevada has one District Court with seven active judgeships<sup>227</sup> and is the home state of Senate Majority Leader Harry Reid (D). Senator Reid serves currently with Senator Dean Heller (R). The state currently has no vacancies after confirmation of three new district court judges in the last 12 months.



**Senator Process:** Potential nominees are recommended to the President by Senator Reid as senior senator.<sup>228</sup> After more contentious nominee selections in earlier years,<sup>229</sup> both Senators Reid and Heller now appear to be working together to find a candidate that they can both support. Both Senators have informally sought feedback from community groups –not just the state bar association – on potential nominees before recommendations. The most recent recommendation was Richard Boulware, whom Senator Reid called “the epitome of what a federal judge should be”<sup>230</sup> and Senator Heller supported as “extremely impressive.”<sup>231</sup>

**Quality and Diversity of Nominees:** Richard Boulware, was nominated in January 2014.<sup>232</sup> Senator Reid gave Boulware his “highest recommendation,” and he was endorsed by the National Bar Association.<sup>233</sup> He also received a substantial majority rating of “qualified” by the ABA.<sup>234</sup> Boulware encountered “surprise opposition” from Republicans on the Judiciary Committee, who questioned whether he had sufficient experience, and his ability to be impartial due to prior advocacy work.<sup>235</sup> All of the Republican Senators on the committee voted against him except Senator Orrin Hatch (R-UT), but his nomination still advanced to the Senate floor.<sup>236</sup> His final confirmation vote of 58-35 included some Republicans, including Senator Heller.<sup>237</sup> Boulware brings needed diversity

to the district court both as a federal public defender and the first African-American man to sit on Nevada's federal bench.<sup>238</sup>

**Timeliness and Transparency of Process:** The seat filled in June 2014 by Boulware had been empty since 2011.<sup>239</sup> This delay was not a result of the timeliness of Senators Reid and Heller recommending nominees to the President, but because prior nominations in 2012 and 2013 were delayed in the Senate. The prior nominee for the seat eventually filled by Boulware was withdrawn in 2013 based on political opposition.<sup>240</sup> Once Boulware was nominated by the President, the process moved quickly and smoothly since the Senators had worked together to present a candidate they both supported.

Although Senators Reid and Heller do not have a formal committee process with public proceedings like some other states, there does appear to be an effort to consult with community leaders and get input on potential nominees before they are recommended. It is especially heartening that this consultation extends outside the state bar and legal community so that other Nevada citizens' perspectives are considered. ProgressNow Nevada, working with the Nevadans for Judicial Progress group, stated: "We have a strong working relationship with Senator Reid and his staff as a part of our Why Courts Matter work. His office will often reach out to us and other community partners when they are looking to fill vacancies which we always appreciate. Senator Reid and his office have been instrumental in making the courts issue a top priority in the Senate."<sup>241</sup>

## Virginia

Virginia has two district courts with a total of 15 judges.<sup>242</sup> There have been two district court vacancies in the last two years.<sup>243</sup> The current Senators of Virginia are Mark Warner (D) and Tim Kaine (D). As a state which has not set up a specific judicial selection committee, Virginia has been commended for having a transparent and timely process for recommending potential nominees.<sup>244</sup>



**Senator Process:** Recommendations to the President are made by Senator Warner and Kaine jointly. As the first step, the Senators request the Virginia State

Bar to evaluate applicants and rate their qualifications.<sup>245</sup> The Bar appears to hold an open application period using a set questionnaire. The Bar committee evaluates applications and then holds private interviews. The Bar committee sends a letter to both Senators with the names of all candidates evaluated and ratings for each as “qualified” or “highly qualified;” and publicly releases that letter.<sup>246</sup> The next step is a little more unclear, but it appears that the Senators staff evaluate all the materials sent by the Bar committee and schedule personal interviews between each of the Senators and the top candidates. After the names are publicly released from the Bar committee, it appears several voluntary bar groups also score individuals being considered for open judicial positions and offer those unofficial recommendations to the Senators.<sup>247</sup> The Senators then recommended two names to the President.

**Quality and Diversity of Nominees:** In December 2013, Magistrate Judge Hannah Lauck was nominated for the Eastern District of Virginia using this process.<sup>248</sup> Due to political holdups with a large group of nominees before the end of the year, she did not have a confirmation hearing until February 2014.<sup>249</sup> Judge Lauck received the highest qualifications ratings from both the Virginia Bar committee and the ABA.<sup>250</sup> She was finally confirmed on June 10, 2014, without particular dissent on her qualifications.<sup>251</sup> In addition to her experience as a federal magistrate judge, Judge Lauck brought diversity to the district as the first woman district judge in the Richmond Division.<sup>252</sup>

In the 2014 vacancy process, the Senators have sent two names of private attorneys, Ward Armstrong and Elizabeth Dillon, to the President for consideration, but there has not yet been an official nomination by the President for this vacancy.<sup>253</sup> Like Lauck, Armstrong and Dillon were recommended by the Bar committee, with Dillon rated “highly qualified,” but Armstrong’s recommendation was divided on that level of rating.<sup>254</sup> There was also mixed rating from the Virginia Trial Lawyers Association, which named Armstrong but excluded Dillon among its top three picks for the judicial vacancy.<sup>255</sup> Questions were also raised regarding the magistrate judges on the Bar committee’s list who were not selected. There is a possible political explanation for the Armstrong nomination: he is a top Democratic leader in the state legislature.<sup>256</sup> Both potential nominees would bring private law firm experience to the bench and neither one would enhance the racial or ethnic diversity of the court.

**Timeliness and Transparency of Process:** The fast timing of the Virginia process is set by the Senators’ desire to fill vacancies quickly. In the most recent

2014 process, the future vacancy was announced January 26, 2014 and the Bar committee already had a charge from the Senators with a questionnaire online by February 3. Applications were due March 3 and interviews were conducted starting March 26. The committee released its letter and recommendations on March 31 to the Senators. The Senators announcement of the two names given to the President was a few months later on June 9. Thus, the Bar committee recommendation process was shorter than the Senators own process to narrow down the recommendations from 10 to two. It is not known when the President will announce the final nominee for the seat.

The transparency of the first step of this process is phenomenal, with the full release of Bar committee ratings, qualifications information, and more. This allows accountability when the Senators actually recommend individuals and makes it possible for other interest groups to weigh in on potential nominees during the Senators' final screening. The Senators do not say much about the process in their offices, but they do choose to announce the names of the potential nominees sent to the President.

Virginia might be the best example of a non-committee state that provides a transparent and timely process resulting in diverse and qualified nominees. It cannot be ignored that there is a Virginia Bar committee that serves much of the functions for the Senators of a Senatorially-created judicial selection committee in other states, so Virginia is almost a hybrid-state. Although, a committee made only of Virginia Bar leaders most likely represents a smaller slice of the community and might be more likely to recommend establishment candidates instead of more diverse options. The open application process does allow sitting judges – like Judge Lauck – to apply and might serve to open the field.

## Conclusion

Legal commentator Andrew Cohen characterized Senators who refuse to cooperate in filling empty federal judicial posts (including some Democrats) as supporting “secession by attrition”:

The absence of these judges, in one district after another around the country, has created a continuing vacuum of federal authority that is a kind of secession,

because federal law without judges to impose it in a timely way is no federal law at all.<sup>257</sup>

As seen in Colorado and other states, many Senators of both parties take seriously their responsibility to help fill judicial vacancies in their states. Other Senators have a greater tendency to use judicial nominations as political pawns to the detriment of citizens in their state left with overworked and understaffed courts. However, researching the states in this report illustrated how difficult it is to even find information about how most Senators select names to recommend to the President. Citizens need transparency to be able to determine the cause for the delays and mounting vacancies in their own district courts. Citizens also deserve a diverse and representative federal judiciary and it is difficult to keep Senators accountable for the types of individuals selected if there is no transparency in the process.

## About Colorado Ethics Watch

Founded in 2006, Colorado Ethics Watch is a state-based project of Citizens for Responsibility and Ethics in Washington (CREW), a nonpartisan, nonprofit 501(c)(3) watchdog group that holds public officials and organizations legally accountable for unethical activities that undermine the integrity of government in Colorado. We accomplish our goals using the following tactics:

- Litigation and ethics complaints
- Colorado Open Records Act requests (CORAs)
- Requests for government audits and criminal investigations
- Research and policy reports
- Educating the public

In tandem with legal actions, Ethics Watch executes a comprehensive communications strategy to bring attention to the misbehavior of public officials while also educating the public about ethics, transparency and election administration issues, thereby deterring misbehavior and mobilizing support for reform.

Ethics Watch also issues extensively researched reports to promote fresh, nonpartisan solutions to recurring challenges in state and local government in Colorado. Based on our experience using existing legal tools to promote clean government, Ethics Watch is uniquely positioned to hold public officials accountable and to encourage reform.

Luis Toro, *Director*

Peg Perl, *Staff Counsel*

Doug Staggs, *Research Director*

Allison McGee Johnson, *Communications Director*

### **Colorado Ethics Watch**

1630 Welton Street, Suite 415

Denver, CO 80202

303-626-2100

[www.coloradoforethics.org](http://www.coloradoforethics.org)

Twitter: [@COEthicsWatch](https://twitter.com/COEthicsWatch)

Facebook: [Colorado Ethics Watch](https://www.facebook.com/ColoradoEthicsWatch)

## About Courts Matter Colorado

Courts Matter Colorado is a coalition of organizations united to educate the public about the importance of federal courts and to advocate for a fair, diverse, and fully staffed federal judiciary. The Courts Matter Colorado website provides information about how federal judicial nominations work, how federal court decisions affect public policy in Colorado, and how the public can help pressure the President and the Senate to solve the vacancy crisis.

### **COALITION MEMBERS**

ACLU of Colorado

Colorado Latino Leadership, Advocacy & Research Organization (CLLARO)

Citizens Project

Colorado Center on Law and Policy

Colorado Common Cause

Colorado Consumer Health Initiative

Colorado Ethics Watch

Colorado Fair Share

Colorado Organization for Latina Opportunity and Reproductive Rights (COLOR)

Conservation Colorado

Food & Water Watch

The GLBT Community Center of Colorado

Hispanic Affairs Project

Interfaith Alliance of Colorado

NAACP Colorado Montana Wyoming State Area Conference

NARAL Pro-Choice Colorado

One Colorado

Planned Parenthood of the Rocky Mountains

ProgressNow Colorado

Membership in the Courts Matter Colorado coalition does not imply endorsement of any particular content in this report.

[www.courtsmattercolorado.org](http://www.courtsmattercolorado.org)

## Endnotes

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<sup>5</sup> Alliance for Justice, *Judicial Selection Snapshot*, available at <http://www.afj.org/our-work/issues/judicial-selection-2> (Aug. 13, 2014).

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<sup>12</sup> *Id.*

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<sup>15</sup> Diane Feinstein, *Senator Feinstein Announces Judicial Nomination Process*, available at

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<sup>18</sup> *Id.* at 261.

<sup>19</sup> *Id.*

<sup>20</sup> RUSSELL WHEELER, THE GOVERNANCE INST. & REBECCA L. KOURLIS, THE INST. FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYS., *OPTIONS FOR FEDERAL JUDICIAL SCREENING COMMITTEES: WHERE THEY ARE IN PLACE, HOW THEY OPERATE, AND WHAT TO CONSIDER IN ESTABLISHING AND MANAGING THEM* at i (2d ed. Sept. 2011), available at <http://iaals.du.edu/library/publications/options-for-federal-judicial-screening-committees-second-edition> (hereafter "IAALS Report").

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<sup>23</sup> *Id.* at 2.

<sup>24</sup> *Id.*

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<sup>26</sup> *Id.* at 4-7.

<sup>27</sup> Norton Federal Law Enforcement Nominating Commission Accepting Applications for New Opening on U.S. District Court for the District of Columbia, available at <http://norton.house.gov/media-center/press-releases/norton-federal-law-enforcement-nominating-commission-accepting-1> (Jun. 17, 2013).

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<sup>36</sup> Thad Cochran, *Cochran to Oppose Sotomayor to be U.S. Supreme Court Justice*, <http://www.cochran.senate.gov/public/index.cfm/2009/7/pr072209.html> (Jul. 22, 2009).

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<sup>39</sup> *Id.* at 3.

<sup>40</sup> *Id.* at 7.

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<sup>42</sup> *Id.* at 7.

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<sup>46</sup> IAALS Report at 5.

<sup>47</sup> *Id.*

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<sup>49</sup> *Id.* at 10.

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

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