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- Nebraska Judicial Branch, Judicial Nominating Commission Manual: http://www.supremecourt.ne.gov/commissions/jnc-manual.shtml
- Judge John Irwin & Daniel L. Real, *Judicial Independence and Retention Votes*, Neb. Lawyer, Jan. 2011: http://nebar.com/associations/8143/files/TNL-0111b.pdf
- Norman Krivosha, In Celebration of the 50th Anniversary of Merit Selection, 74 Judicature 128 (1990-1991): http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/judica74&div=42&id=&page=

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L. Steven Grasz

According to some observers, the appearance of judges campaigning for office and raising funds from business groups, unions, and attorneys to buy campaign advertising "tend[s] to politicize the judiciary in the eyes of the public and undermine the public's confidence in the courts."[1] This situation, however, has been absent from the state of Nebraska since 1962, when Nebraska voters adopted a constitutional amendment instituting a "merit selection" plan for judges serving on the Nebraska Supreme Court as well as the state district courts.[2] In 1974, this merit plan was statutorily extended to the selection of county court judges, and in 1990, it was extended to the selection of judges for the newly-created Nebraska Court of Appeals.[3]

The Nebraska Constitution provides that vacancies in the Nebraska Supreme Court and state district courts are to be filled "by the Governor from a list of at least two nominees presented to him by the appropriate judicial nominating commission."[4] These "judicial nominating commissions" are the heart of the judicial merit selection plan. In Nebraska, each commission has eight voting members.[5] Of these, the "members of the bar of the state residing in the area from which the nominees are to be selected shall designate four of their number to serve as members of said commission, and the governor shall appoint four citizens . . . ."[6] To minimize partisan influence, the constitution further provides that "[n]ot more than four of such voting members shall be of the same political party."[7]

The Nebraska Constitution specifies little about the workings of the judicial nominating commissions. However, the constitution does require them to conduct a public hearing[8] and, in an effort to provide transparency and accountability, requires that "[m]embers of the nominating commission shall vote for the nominee of their choice by roll call."[9] Additionally, "[e]ach candidate must receive a majority of the voting members of the nominating commission to have his name submitted to the Governor."[10]

The "merit selection plan" was intended to separate judicial selection from the political realm.[11] To that end, Nebraska judges are not nominated or endorsed by political parties, do not run for retention under party labels, and do not participate in contested elections. Pursuant to the process outlined above, they are appointed by the Governor from a list of finalists selected by judicial nominating commissions whose membership cannot include more than half from the same political party.[12]

This merit plan has isolated the Nebraska judiciary from the contested electoral process and the solicitation of campaign funds. However, critics say that despite the measures described above, Nebraska's judicial selection system is still fraught with politics, both partisan and otherwise. This unintended outcome is consistent with the findings of more comprehensive studies and also a comprehensive review of the social scientific literature on this subject.[13] Rather than judicial selection being transparent and public, as under electoral systems, critics say there is evidence the system has devolved into one where the political influence is simply obscured from public view.[14] Instead of the entire electorate participating in and observing the political aspects of the judicial selection process, there is evidence that the system has become one in which the selection of nominating commission members is subject to political manipulation, ideological maneuvering, and undue influence by special interest groups.[15]

Despite this asserted political influence in the current merit selection process, some maintain that the system can be reformed to meet its intended purpose. The following discussion will identify specific reforms that could reduce the amount of political influence and control by special interest groups, and establish a more transparent system with procedural safeguards, checks, and balances. These reforms fall under two broad categories: selection of the nominating commission members and conduct of commission proceedings. The goal of these proposed reforms is to enhance the integrity and accountability of the judicial selection process while increasing public respect for the judicial system and, thereby, the rule of law.

PRESERVING AND REFORMING THE MERIT SELECTION SYSTEM

Most states still select their judges through democratic elections.[16] However, a significant minority of states, like Nebraska, choose their judges through a "merit selection" process rather than by elections or direct appointment.[17] The details of merit selection plans vary widely among these states.[18] In fact, of all fifty states and the District of Columbia, one commentator considers Nebraska among the seven states with the lowest degree of public input in the selection process and the highest level of control by the state bar association.[19] The variations in state judicial merit selection schemes are well-documented and will not be recounted here.[20] Rather, this paper will identify (1) how and where some say Nebraska's judicial selection process has strayed from its promised non-political nature; and (2) specific ways in which the system could be reformed so as to achieve the original purpose—true merit selection of judges and less "politics."

1. Protecting the Integrity of the Judicial Nominating Commission Member Selection Process

In light of the fact that Nebraska voters have delegated the nomination of judicial candidates to judicial nominating commissions, a key to ensuring the integrity of the process is proper oversight of the selection of members on these commissions. While appointments to judicial nominating commissions must conform to requirements limiting the number of members from any one political party, half of the non-attorney commission members are selected by the Governor, and these are viewed by some as political in nature.[21] Perhaps this is to be expected, as the provision for gubernatorial appointments is designed and intended to give the Governor (an elected political figure) a voice in the nominating process. Furthermore, gubernatorial appointments are frequently seen as a counter-balance to the influence of the Nebraska State Bar Association—the group that selects the remaining commission members. The State Bar selects the other half of the commission members from among their own membership.[22] These nominating commission members are chosen by bar members through elections administered by the clerk of the Nebraska Supreme Court. However, some observers say that these elections tend to be influenced heavily by the state bar association, as discussed below.

The current election process for attorney members of nominating commissions raises significant concerns for people who are concerned about the integrity and openness of the current merit system. They maintain that ballot security and the procedural integrity of the election process is just as important in selecting members of the judicial branch as members of the legislative or executive branches. Accordingly, critics say, reforms are needed to address the manner in which elections are conducted for the attorney members of Nebraska's judicial nominating commissions. They do not question the intentions or integrity of the individuals conducting the voting process; however, they say that the process is a burden on court staff, and the system lacks both transparency and the basic controls and safeguards that are considered standard procedure in elections for other positions in Nebraska.

- Ballot security—By law, elections for attorney members of nominating commissions are to be "conducted as to maintain the secrecy of the ballot and the validity of the results."[23] No other details or requirements are specified. The statute does, however, authorize the selection to be conducted by mail.[24] Critics assert that the mail-in ballot system currently utilized has few controls to ensure the integrity of the voting process. Some may argue that there is insufficient evidence of problems resulting from the current process. However, observers say that procedural safeguards that foster public confidence and prevent any appearance of impropriety are essential when the judiciary is involved, and the current system is characterized by informality and the absence of customary electoral safeguards. For example, in one nominating commission election the author observed during the course of research for this paper, it was reported that members of one candidate's entire law firm, including the candidate himself, apparently received no ballots. Given the relatively small number of eligible voters and the number of ballots typically cast, this could have conceivably affected the results.

When the author made inquiries, officials did not provide any explanation for how or why the ballots were not distributed, or how or why attorneys from one particular firm seemed to be omitted. Furthermore, it did not appear that any investigation or review was undertaken.

• Election transparency and oversight—No system is in place to allow members of the public, the attorneys voting in the elections, or the candidates themselves to obtain basic information regarding the number of ballots mailed out, the number of ballots returned, or the vote totals. Instead, the candidates determined to be the winners are placed on the roster for the respective nominating commission without notifying the public or the bar membership of the results, and without any release of details regarding the election.

These deficiencies in the current system, some say, undermine the integrity of the judicial nominating commission member selection process and need to be addressed through specific reform measures.

2. Hidden Partisan Political Influence

The reduction of political influences is frequently cited as a justification for elimination of judicial elections and for substitution of the "merit" selection system in place of a public vote.[25] Attempts to remove or diminish partisan political influence in the selection of Nebraska judges began over 100 years ago. In 1909, the Nebraska Legislature passed the Nonpartisan Judiciary Act,[26] which provided that candidates for chief justice, judge of the supreme court, and judges of the district and county courts

> shall not be nominated, indorsed, recommended, censured, criticized or referred to in any manner by any political party, or any political convention or primary, or at any primary election; and no party name or designation shall be given upon any ballot to any candidate, for any of said offices, and hereafter all candidates for all of said offices shall be nominated only by petition, and no candidate for any of said offices shall appear on any party ticket.[27]

The state supreme court, however, held that the Act violated Nebraska's Bill of Rights as an abridgement of the freedom of speech and freedom of assembly.[28] Consequently, the court declared void the Act's provisions concerning both judicial selection and criticism of judicial candidates.[29]

As with the Nonpartisan Judiciary Act of 1909, the goal of reducing or eliminating partisan political influence also precipitated the merit selection plan. However, while reduction of partisan political influence may seem a noble goal to many, the elimination of such political influence is difficult. Even in the birthplace of the "Missouri Plan," as the merit selection plan is often called,[30] some say that this goal has been elusive. For instance, *The Wall Street Journal* noted,

> The "Missouri Plan," as it is known, was created to make sure the courts are nonpartisan and impartial. Behind the sugar plum language, however, there's nothing impartial about a process in which a single interest group—the state bar association—appoints three members of the seven-member commission.
>
> . . .
>
> However nobly the Missouri plan began, the current process is doing no favors to fairness, or to justice. . . . Missouri's Courts are every bit as hung up in politics as they are in other states. The difference is that in Missouri the process happens behind closed doors. A democratic system of choosing judges requires a transparent process—and accountability for those who make the choice.[31]

Some say that a number of recent members of the nominating commission have been partisan,[32] which, if true, could undermine the intellectual basis and the policy justification for removal of the public's right to select judges and the transfer of much of this power to a handful of members of the bar association.

The current system is, on its face, designed to ensure that political parties are evenly represented on nominating commissions. In a state like Nebraska where one party's voters outnumber those of the other party by a wide margin,[33] this requirement would appear to counteract partisan influence on the commission's selection process. However, critics point to additional factors impacting the partisanship of

the nominating commission members as well: First, they argue, the most politically active and interested members within the bar tend to be heavily invested in a single political party.[34] Second, they say, the system's design allows manipulation of the election results. Their reasoning is as follows: Unlike most elections in Nebraska, bar association members who are registered as members of one political party can vote to select nominating commission members who assertedly represent the other party. In other words, the Republican commission members can be selected based on the votes of Democrats and vice versa. This design allows the dominant (or best organized) voting block to select highly partisan members to represent their own party and nominally partisan or apolitical members to represent the other party. Such a process is in tension with Nebraska election statutes, including the Nebraska primary, which is currently a closed contest.[35] The Nebraska Supreme Court noted that an experiment with an open primary was repealed in Nebraska after trying it out because all parties believed it was "wrong in principle."[36] Observers point out that even in states with open primaries, independents can vote in only one party's primary—not both.

Under the current election scheme, Nebraska attorneys are in fact required to vote in some nominating commission elections for candidates from other parties. For example, in a 2009 election for the Fourth Judicial Circuit County Court, voters were instructed to "Vote for 5. Of those 5, not more than 3 may be from the Republican category and more than 2 may be from the Democrat category."[37]

Compounding this situation, critics say, is a second system design flaw that allows further political manipulation of the voting process. The dominant voting block is also allowed under the current system to intentionally substitute "independent" nominees in place of members of a party. By law, nominating commissions may not have more than two attorney members from any party. However, independents are treated as a third party. Although comprising just 18% of registered voters in the state,[38] they are given equal footing on the nominating commissions with the two major parties.[39] Under the current system, nominating commissions may be comprised, for example, of two attorney members of minority Party A, two independents, and zero members of majority Party B. This system, some say, opens the voting to manipulation and skews the political make-up of the nominating commissions.[40] And this problem is compounded when one considers the research that has indicated that independent voters tend to lean toward one party or another, and thus are usually not really independent.[41]

Finally, critics assert that the current rules concerning political affiliation are inconsistently applied. The service of nominating commission members is automatically terminated if they change their party registration.[42] Yet, the rules allow for the selection of attorney members by open elections in which members of one party can select the representatives of the other party. These design issues, according to observers, facilitate and foster hidden political influence and manipulation.

3. Influence of Special Interest Groups in the Selection Process

Some who have studied the commission have pointed to evidence from reviews of recent nominating commission membership rosters, interviews with judicial applicants, and interviews with nominating commission members that there is a significant level of influence by special interest groups on the commission members. This influence, they say, is facilitated by procedural and structural flaws in the system, fostered by many of the same factors discussed in the section on partisan political influence, though special interest group influence often may go beyond partisan labels. Observers state that there are a number of interest groups with potentially disproportionate influence, including the ACLU, Planned Parenthood, the Nebraska Association of Trial Attorneys, the Nebraska Defense Counsel Association, and the Nebraska State Bar Association itself. As with the political influence discussed above, they say, the current system appears to foster disproportionate influence from special interest groups on one side of the political spectrum, and, according to critics, the system has significant institutional bias in favor of judicial candidates

associated with the trial bar and against the candidates associated with other segments of the legal profession.

Is the Judicial Selection System Influenced by Organizations with Strong Philosophical Leanings?

Proponents of a non-partisan "merit" selection system would say that it is important for the organization empowered to control the judicial selection process to be beyond reproach in terms of political and philosophical bias. In Nebraska, however, critics assert that this is not the case.

When Nebraska voters relinquished the right to select their judges and accepted the "merit system" system, the Nebraska State Bar Association was effectively given the responsibility of selecting attorneys who would fill half of the slots on the judicial nominating commissions. The role of the bar association is arguably greater in its influence than the Governor, who can only choose judges from among a few names presented to him by the nominating commissions. While the Nebraska bar is comprised of attorneys from all philosophical and political stripes, some say that the state bar association, as an institution, has a philosophical tilt that is not currently insulated from the judicial selection process, as evidenced by its publications, political activity, and leadership.

The arm of the state bar association with by far the most influence over judicial nominating commission membership is the Executive Council.[43] The NSBA, in its publications and websites, lists "ABA State Delegates" and "ABA Association Delegates" under its Executive Council members. In addition to the presence of ABA representatives on the Executive Council, a supreme court rule requires that each nominating commission member must be provided a copy of the "American Bar Association's Guidelines for Reviewing Qualifications of Candidates for State Judicial Office."[44]

The ABA is regarded by some as a left-leaning organization. Of the approximately 5,200 attorneys practicing in Nebraska, only about 1,800 are members of the ABA.[45] There is little question that the ABA does not attempt to maintain a politically neutral stance. For example, in 2008 the ABA filed an amicus curiae brief in the United States Supreme Court seeking to reverse the D.C. Circuit Court of Appeals' decision holding that the Second Amendment protects the individual right to bear arms.[46] The ABA also took up a resolution at its annual meeting which, if implemented, would effectively overturn the U.S. Supreme Court's decision in *Gonzales v. Carhart* upholding a federal ban on partial-birth abortion.[47] In addition, the ABA has recently taken an active role in pushing for habeas corpus rights and judicial review for those accused of being terrorist enemy combatants.[48] Given this situation, critics say that it may create the perception of bias to have the ABA involved in judicial selection.

Some argue that the presence of ABA representatives on the NSBA Executive Council is inconsequential since they are officially non-voting members and that the ABA judicial qualification guidelines are largely unobjectionable. Critics respond that they find it difficult to imagine the presence of representatives of politically active conservative legal organizations being tolerated, let alone given institutionalized roles, on the NSBA governing council or in developing qualifications for judges.

During the course of research for this paper, the author noticed an overlap between Bar Association Executive Council members and Planned Parenthood officers and published donors.[49] This phenomenon may have been an anomaly limited to a particular time period. However, the finding is more significant if taken together with other arguments from the commission's critics highlighted in this paper. The NSBA Annual Meeting award recipient list has, at times, contained a large number of what many deem to be liberal activists.[50]

In 2008, the NSBA's Executive Council—the group that fills many vacancies on judicial nominating commissions—became politically involved in a controversial social issue. The council voted to oppose Initiative Measure 424, a voter-initiated ballot proposal to ban government entities from engaging in racial preferences.[51] In addition, the official NSBA Magazine *The Nebraska Lawyer* published a seven-page feature article on the topic that some say contained thinly-veiled opposition to the ballot measure.[52]

Adding to critics' concerns is that legal issues related to the measure could end up in Nebraska courts before judges the executive council helped select.

Finally, observers point out that the NSBA Executive Council, which has the most direct influence on judicial nominating committee membership, does not necessarily reflect the Nebraska electorate either geographically or politically. Half of its membership consists of persons chosen by something other than population-based geographic areas. Furthermore, there is no requirement for political balance on the executive council.[53]

Two "snap shots" of the political make-up of the NSBA Executive Council were taken for this paper. In 2006, the council was 83% Democrat and 17% Republican. In 2010, the council was 67% Republican and 33% Democrat by party registration.[54] While the council was comprised of 83% from one party, it was called upon to nominate a number of individuals to be placed on a special election ballot for the chief justice nominating commission. Among the independents chosen was the dean of the University of Nebraska College of Law. Among the Democrats chosen was a former nominee for statewide public office. The Republicans chosen were political unknowns and included a candidate from a sparsely-populated rural area. No attorney members represented Nebraska's Third Congressional District on the chief justice nominating commission.

As a result of the political composition of the council, some assert that it is not necessarily representative of the state in terms of legal philosophy. An example they point to is the ballot issue on racial preferences, which the executive council voted to oppose (see preceding section). Nebraska's voters spoke on the issue in contrast to the position of the executive council.[55]

To resolve these issues, all actions of the NSBA Executive Council concerning the filling of commission vacancies and ballot slots could be conducted in public meetings with recorded minutes. Any role in the process, formal or informal, by non-voting Executive Council members could be prohibited. Candidates nominated by the NSBA Executive Council might be identified as such on a public website. Furthermore, NSBA Executive Council votes on filling commission vacancies or ballot slots could be required to comply with proportional representation standards.

More generally, to make the nominating commission more transparent, commission members could be required to disclose current and past positions with political parties, political candidates and public officials as well as all associations with special interest groups, and the information would be then disclosed publicly and to all judicial applicants.

4. Transparency and Openness in the Judicial Nominee Selection Process

According to critics, due to hidden influence by special interest groups, factions of the bar association, and individual attorneys with business or personal agendas, reform is also needed in the areas of transparency and openness issues in the judicial nominating process. Although this system is promoted as a means to ensure that judicial selection is based on merit, some say that the degree of secrecy is so pervasive that it results in a process with little or no accountability, thereby facilitating influence that is hidden and behind-the-scenes.

Some note that despite the constitutional language providing for "merit selection," the judicial selection process takes place behind closed doors and the constitutionally-required roll-call vote is not only secret and unreported, but often a formality carried out following a series of secret "straw votes" by commission members who are encouraged to identify and promote candidates of their own choosing for a limited number of slots forwarded to the Governor.[56]

Few details are set forth in the constitution regarding the process for selecting these judicial nominees. However, the constitution requires the nominating commission to conduct a public hearing for each judgeship,[57] and, following the public hearing requirement, the constitution provides that "[m]embers of the nominating commission shall vote for the nominee of their choice by roll call."[58]

When this aspect of the process was litigated, the Nebraska Supreme Court relied on statutory provisions enacted to govern the judicial selection process and did not analyze the meaning of the constitutionally-

mandated "public hearing." The court stated that "neither the Constitution nor the statute provides that the vote shall be public or be taken at a public hearing."[59] The court did not discuss the purpose or utility of a constitutionally-mandated "roll call" vote that is conducted entirely in secret following a largely perfunctory "public hearing." According to critics, the state constitution requires that nominating commission proceedings afford greater public scrutiny and that roll call votes be made in public session.

Some say that commission procedures also currently conceal behind-the-scenes campaigns to discredit candidates and influence commission members. It is currently unlawful and a breach of ethics for any lawyer, person, or organization to attempt to influence a judicial nominating commission in any manner and on any basis except by presenting facts and opinions relevant to the judicial qualifications of the applicants.[60] However, all communications to the commission are secret. Observers argue that without some meaningful process for allowing an applicant to rebut malicious, defamatory, or other unfounded allegations this provision is meaningless.[61]

To deal with these issues, proponents of reform have suggested that rules for Nebraska attorneys could be revised to include more specific provisions regarding communications to nominating commissions. These rules might prohibit malicious disparagement of candidates and require disclosure of conflicts, past adverse representation, and party affiliation in communications to nominating commissions. Furthermore, a meaningful and confidential process could be afforded whereby judicial candidates may respond to or rebut communications to commission members containing accusations or disparaging information or statements.

Some say that reform could unmask hidden influence and help nominating commissions comply with the Nebraska Constitution. These reforms might include administering the judicial nominating commission election process under rules and procedures similar to those used for other elections. The current process is already a large burden on Nebraska Supreme Court staff, and this duty could be transferred to the Lancaster County Election Commissioner's Office, which is specifically created and staffed to administer elections.

Information on the number of ballots mailed, returned, and counted could be made a matter of public record. The names of all attorneys participating in each election could also be made a matter of public record, as they are for all other Nebraska elections. In addition to promoting integrity in the election process, this would allow the public to determine whether an election represents a broad section of the bar or just a handful of attorneys. Furthermore, the vote total for each candidate could be made a matter of public record. The rules could also be changed to restrict bar members who belong to one political party from casting votes for candidates intended to represent another party on nominating commissions. Finally, registered independents could be required to designate the party's election in which they wish to participate. This designation could last until the attorney changes his or her registration or until they formally change the designation.

5. Conflicts of Interest on Judicial Nominating Commissions

Current rules frequently disqualify nominating commission attorney members based on past associations with candidates.[62] A commission member must recuse himself if he or she has had any arrangement involving the practice of law or an employment relationship or office-sharing arrangement with a judicial candidate within the past five years.[63] Because the legal community in Nebraska is so small, attorney members frequently know some or even most of the applicants. This is not considered a conflict. However, if the commission member actually observed a candidate's work while at a large firm or office four years ago, this is considered a conflict. Some say that the conflict rules disqualifying commission members based on past professional associations with candidates should be fine-tuned, and commission members should be required to publicly disclose all conflicts and current or past relationships with candidates.

Another significant issue is that all nominating commission members are required to personally recruit candidates they feel are worthy of selection.[64]

These members then vote on these same candidates. Critics assert that this scheme, which is codified in statute, stands conflict rules and normal ethical considerations on their head. The statutory official oath for nominating commission members requires them to "encourage qualified candidates to accept judicial office or nomination for such judicial office."[65] Since nominating commissions may receive applications from a significant number of qualified applicants, but typically forward only three names to the Governor, some argue that this requirement creates a conflict of interest for commission members who have solicited applicants. One way to avoid these conflicts would be to prohibit nominating commission members from recruiting or soliciting applicants for judicial positions that may come before them for a vote.

Another area of concern is hidden conflicts related to professional or business associations. A review of commission rosters indicates the presence of members with potential professional conflicts.[66] Judicial candidates are, theoretically, permitted to seek recusal of commission members who may have conflicts from prior adversary proceedings and other sources.[67] However, without public disclosure (or at least disclosure to the candidates) of business associations, lobbying interests, past adversary legal relationships to candidates, and political offices or positions, some who have studied the system state that this provision is more illusory than real. Commission members must disclose conflicts of interest they have with regard to any applicants. However, this disclosure is made only to other commission members, and candidates have no way to confirm whether known conflicts are actually disclosed.[68]

Some say that registered lobbyists and the principals or associates of lobbyists who are members of a nominating commission should disclose this information, and this information should be publicly available.

6. Broadening the Base of Candidates for Nominating Commission Membership

The selection of attorneys who appear on special election ballots to fill nominating commission vacancies is a matter of great consequence. The Nebraska Supreme Court has stated, "The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen . . . ."[69]

Some observers argue that there are several problems in the method of selecting candidates in special elections for judicial nominating commissions and also in the selection of replacements for vacancies on the commissions. Currently, they say, candidates for nominating commission positions, as well as replacements to fill commission vacancies, are frequently selected by a small handful of people with little or no accountability, public disclosure, transparency, or political or geographic balance.[70] This, critics say, runs contrary to the notion that "[t]he process of declaring an interest in serving on the judicial nominating commission should be open and accessible"[71] and tends to discourage candidacies by a broad cross-section of attorneys, thereby decreasing opportunities for women and minorities.[72]

Regular elections for attorney members occur in even-numbered years.[73] Nominations of lawyer members are solicited by the Clerk of the Supreme Court "from all the lawyers of the district or area served on or before September 1 of each even-numbered year."[74] The governing statute provides that "[n]ot more than two lawyer members of each commission shall be registered members of the same political party . . . ."[75] The same is true for alternates.[76] Furthermore, "[t]he nominations shall be solicited and distributed on the ballot by the Clerk of the Supreme Court from the legally recognized political parties and in such a manner as will permit the final selection to be made within the required political party."[77] Although not specified in the statute, the actual practice is to hold an open election in which members of any party can select commission members to represent each party, as well as independents, who are treated by statute as a third party.

In the event nominations do not provide sufficient candidates from each political party:

> the Executive Council of the Nebraska State Bar Association, within ten days after the last day for filing nominations, shall nominate additional

> candidates for the position so that there shall be a qualified candidate for each position. *Such candidates need not reside in the judicial district or area served by such judicial nominating commission*.[78]

In such instances, critics say, the election would appear to be a mere ratification of the hand-picked candidates of the Executive Council.

In addition to shortages of nominees for ballot spots in certain commission elections, actual vacancies on nominating commissions occur frequently.[79] When an attorney position needs to be filled, law requires that the chairperson of the nominating commission "shall inform the Executive Director of the Nebraska State Bar Association of the number of lawyer members which need to be elected."[80] The statute further provides, "The Executive Council of the Nebraska State Bar Association shall nominate at least one lawyer candidate for each vacancy on the nominating commission which needs to be filled."[81] If the Executive Council "is unable, with reasonable effort, to obtain a sufficient number of candidates for each vacancy, it may nominate candidates who do not reside in the judicial district or area served by such nominating commission."[82]

The nominations are then sent to the Clerk of the Supreme Court, "and the lawyer vacancies shall be filled by election as provided in section 24-806."[83] Again, some say that such an "election" would appear to constitute little more than a rubber stamp of the hand-picked candidate of the Executive Council.

When a vacancy occurs outside the context of a nominating commission attempting to seat a full contingent of qualified members for an actual court vacancy, it is filled in accordance with Neb. Rev. Stat. § 24-808. Under this statute, the Clerk of the Supreme Court determines, by September 1 of each year, what vacancies exist on any judicial nominating commission. The Governor fills those that are subject to his appointment.[84] Vacancies of lawyer members or alternate lawyer members are then filled by a "special election for the unexpired term, conducted by the Clerk of the Supreme Court in the manner applicable to the regular election of lawyer members of the commission."[85]

The role of the Executive Council in filling vacancies raises compliance questions concerning whether the constitutional requirement of proportional representation is met. Some observers maintain that Nebraskans from certain geographical areas (i.e., the Third Congressional District) have less influence than other areas. Judicial nominating commissions would not appear to possess associational freedoms under the First Amendment so as to insulate the selection of their members from scrutiny.[86] Although the NSBA Executive Council has representatives from six districts (established in compliance with 14th Amendment requirements related to retention votes for Supreme Court judges), it also encompasses a president, president-elect, president-elect designate, a House of Delegates Chair, Chair-elect past-president.[87] In one "snap-shot" review of a recent Executive Council roster, no non-district representative was from Nebraska's Third Congressional District.[88] Given the Executive Council's large and influential role in the judicial selection process, this situation may be problematic under the 14th Amendment.[89] Some suggest that Nebraska lawmakers consider mandating, in a way similar to jury service, that attorneys serve on judicial nominating commissions for the purpose of filling commission vacancies where elections using normal nomination procedures are not practical. They hope this would have the result of pulling attorneys from all areas of the state to join the commissions.

Some say that reform is also needed to prevent a small group of attorneys from having too large a role in the process. Nominating commission members serve for terms of four years.[90] Members may serve a total of eight consecutive years.[91] Although attorneys cannot serve on more than one commission at a time, attorney candidates have appeared on as many as seven commission ballots, simultaneously, in the same election.[92] Critics say that members can avoid term limits by moving from one commission to another.

Another area that some say requires reform pertains to the asserted institutional bias against judicial candidates who are not members of the "trial bar." Unlike the federal judiciary, including the U.S. Supreme Court, some observers argue that Nebraska's system discourages and penalizes attorneys who have

pursued areas of the legal profession other than trial work. These observers say that while trial experience might seem to be an important qualification for being a judge, examples of well-respected federal jurists from government, corporate, or other legal backgrounds indicate that intellect, temperament, and the ability to fairly apply the law may be larger factors in determining a good judicial candidate. Furthermore, very few cases today actually go to trial. Limiting the Nebraska judiciary to lawyers with extensive trial experience, critics say, also limits the pool of candidates. They assert that non-trial-attorney candidates are placed at a systematic disadvantage in Nebraska.

Some argue that one of the biggest factors in discouraging women and minority applicants is the alleged institutional bias against non-trial bar members.[93] For example, a female corporate or government attorney must, when applying for a judicial vacancy, provide the names of five opposing counsel who are in a position to comment on her abilities.[94] Likewise, she must provide a list of up to five judges who would be in a position to comment on her qualifications to be a judge including her "courtroom demeanor."[95] Such requirements, critics argue, institutionally disadvantage the vast majority of Nebraska lawyers, including most female and minority lawyers.[96] To promote greater diversity of applicants, some suggest judicial application forms might be revised to eliminate questions that unduly prejudice non-trial attorneys. Such requirements do not exist with regard to federal judgeships.

The influence of the trial bar on the selection of candidates for judicial nominating commissions is perceived, by at least some judicial candidates, to be pervasive and longstanding, though this influence is impossible to quantify due to the secrecy behind, and absence of, electoral participation records. The active trial bar represents a small fraction of Nebraska's lawyers, but some observe that they tend to be the most active in all aspects of the judicial selection process. This is only natural, given that they must deal with the judiciary on a regular basis. But some analysts say that this is another source of hidden influence, as the most active participant group in the process is politically unrepresentative of Nebraska's electorate.[97]

In addition to bias against non-trial attorneys, some assert that careful examination should be made of the materials provided to judicial nominating commission members, as they may inject philosophical bias into the process. They note that the "Qualifications Checklist" that is provided to each member of the nominating commissions contains a section entitled "Social Awareness." This "qualification" states that the "candidate should have awareness of and sensitivity to social issues which often confront the courts."[98] The same section of this document poses the following question/criteria: "Has this person demonstrated an ability to balance competing interests of stare decisis/adherence to precedent and social change?"[99]

While it is unlikely a judicial candidate who is "socially unaware" would be nominated, critics say that there is no constitutional or statutory basis for this qualification. Furthermore, they assert, promoting the use of legal rulings to bring about "social change" (and making this a "qualification" for judicial nomination) tramples the line between objective qualifications and those with a philosophical bias.

Some observers also maintain that reforms are needed to prevent bias against attorneys with traditional religious affiliations. The Judicial Nominating Commission Personal Data Sheet requires judicial applicants to disclose whether they have "ever belonged to any club or organization that in practice or policy prohibits (or during the time of your membership) membership on the basis of . . . religion . . . or sex?"[100] The form then requires applicants responding in the affirmative to "detail the name and nature of the . . . organization, relevant policies and practices, and whether you intend to continue as a member if you are selected to serve on the bench."[101]

Some say that the use of this question in the judicial selection process may violate the Nebraska Constitution, which expressly provides that "[n]o religious test shall be required as a qualification for office . . . ."[102] The question would, by its terms, require disclosure of membership in most churches and religious organizations, and the question may cast such membership in a negative light. In fact, they argue, it requires judicial applicants to state, in writing, whether they intend to remain a member of

their church, synagogue, mosque, or other institution if selected to the bench.

Some may express doubts about the impact of requiring a response to this question. However, recent events show it is by no means a trivial or inconsequential matter.[103] Ultimately, to promote greater diversity of applicants and to adhere to constitutional protections in the Bill of Rights, some argue that these judicial application forms should be screened to ensure that questions that tend to impose a philosophical or religious test are eliminated.

CONCLUSION

Supporters of the current judicial selection process in Nebraska might say that no system of selecting members of the judiciary is perfect, and political influence cannot be entirely removed from the process. However, the futility of seeking perfection does not excuse the lack of pursuit of excellence. Given the importance of the courts in our society, observers argue that Nebraska should implement much-needed reforms in its judicial selection system.[104]

Findings regarding the presence of political influence in the merit selection system are not isolated or unique. A prominent current writer on the subject concluded:

> [A] review of social scientific research on merit selection systems does not lend much credence to proponents' claims that merit selection insulates judicial selection from political forces, makes judges accountable to the public, and identifies judges who are substantially different from judges chosen through other systems. Evidence shows that many nominating commissioners have held political and public offices and that political considerations figure into at least some of their deliberations. Bar associations are able to influence the process through identifying commission members and evaluating judges.[105]

The same author concluded her review of the social scientific literature on merit selection by noting the lack of evidence for the effectiveness of the merit selection system in removing politics from the process or even in selecting judges who are different (i.e., better) than judges selected by other means. However, she then posited that the true importance of the merit selection system was not removing political influence, but rather in fostering "the *appearance* of an independent and impartial judiciary" in order to impact the "public's trust and confidence in the courts."[106]

While maintenance of public respect and confidence in the courts is a worthy goal, advocates of reform point out this confidence must ultimately be based on truth and reality, not on outward "appearance," if it is to endure. To equate the merit selection process with symbolic gestures of respect for the rule of law, such as black robes or elevated benches, is to cheapen the value of the merit system. It also fails, critics say, to provide adequate justification for elimination of the democratic electoral process, and, at worst, indicates a cynical view toward the electorate, who have surrendered their right to vote in order to maintain the "appearance" of an independent and impartial judiciary.

Some worry that reforming the current merit system along the lines analyzed here might cause the public to perceive the plan as too deeply flawed to keep. Others counter that such fear should not deter meaningful reform, including those actions which may tread upon powerful special interests, including factions of the bar itself.[107] They argue that the judiciary is far too important to settle for less, and that neither the problems with Nebraska's current judicial merit selection system nor the reforms needed to address them are difficult to identify. Once reforms are implemented, the information and data made available as a result of these reforms could be monitored and evaluated to observe whether the reforms are effective or whether further checks and balances are needed to achieve the goal of minimizing political influence in the judicial selection process.

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Endnotes

1 Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 Dick. L. Rev. 729, 744 (2002); *see also* Judicial Selection in the States,, http://www.judicialselection.us/ (last visited Feb. 25, 2010) ("In recent years, proposals have been introduced by legislators, governors, courts, and citizen's groups in nearly every state to limit the role of politics in the selection of state judges.").

2 Neb. Const. art. V, § 21; History of Reform Efforts: Nebraska, http://www.judicialselection.us/judicial_selection/reform_efforts (last visited Feb. 25, 2010).

3 *Id.*

4 Neb. Const. art. V, § 21(1).

5 Neb. Const. art. V, § 21(4).

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.* § 5.

10 *Id.* This avoids party-line votes. However, it also allows member of either party to block any nominee they dislike from reaching the governor.

11 Reddick, *supra* note 1, at 732 ("Nominating commissions represent an attempt to reduce or eliminate the influence of parties on politics in the selection of judges.").

12 Neb. Const. art. V, 21(4).

13 Reddick, *supra* note 1. The author, Malia Reddick is the Director of Research for the American Judicature Society, a national organization dedicated to maintaining the independence of the judiciary. *Id.* at 745 n.a1. She was also chosen to update the American Bar Association's publication on Judicial Selection in 2008. *Judicial Selection: The Process of Choosing Judges*, A.B.A. Road Map Series, June 2008, at 2.

Reddick, herself a prominent researcher and author on judicial selection, noted, "A substantial body of research exists on the extent to which politics plays a role in the selection of members of nominating commissions and the decisions that they make. The most comprehensive study in this regard is the Richard A. Watson and Randal C. Downing study of the Missouri Non-Partisan Court Plan. According to this study, political influences were present in the selection of both lawyer and lay commissioners. . . . The Henschen study discovered extensive political activity among nominating commissioners prior to their selection. . . . According to Henschen, the extent of political involvement among commissioners 'raise[d] the somewhat troubling spectre of political favoritism.'" Reddick, *supra* note 1, at 732.

14 One member of a Nebraska Supreme Court nominating commission reported, "I never knew how political it was . . . . Attorneys don't know about the politicking that goes on."

15 These groups make up a small fraction of the 5,215 Nebraska attorneys, out of 1.7 million Nebraskans.

16 *Judicial Selection: The Process of Choosing Judges*, A.B.A. Road Map Series, June 2008, at 7 ("The majority of states continue to use some form of elective system to select and/or retain their judges.").

17 *Id.*

18 *Id.* at 6 ("There is significant variation in the composition of judicial nominating commissions.").

19 Only Kansas is considered to have a merit system that gives the state bar association more power and control than in Nebraska. Joshua Ney, *Does the Kansas Supreme Court Selection Process Violate the One Person, One Vote Doctrine?* 49 Washburn L.J. 143, 144 (2009) ("Unlike any other state, the Kansas version of the Missouri Plan gives the bar . . . the power to elect a majority of the Nominating Commission.").

20 Reddick, *supra* note 1, at 729 (quoting Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 S.W.L.J. 31, 31 (1986) ("It is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past 50 years as the subject of judicial selection.")).

21 A member of a Nebraska Supreme Court Nominating Commission reported his perception that the lay members were "more political" than the attorney members.

22 The Nebraska State Bar Association consists of all attorneys licensed in Nebraska. This includes about 5,215 lawyers. American Bar Association National Lawyer Population by State, http://www.ABAnet.org/market research/resource.html (last visited Jan. 17, 2012). The number of attorneys actively involved in the bar association, however, is much smaller. Nebraska lawyers comprise less than 5/1,000ths (.0046) of the state's registered voters. Nebraska Secretary of State, VR Statistics Count Report of Registrants Eligible to Vote (Feb. 19, 2010).

23 Neb. Rev. Stat. § 24-806(3).

24 *Id.*

25 *Judicial Selection: The Process of Choosing Judges*, A.B.A. Road Map Series, June 2008, at 7.

26 *See* State *ex rel.* Ragan v. Junkin, 122 N.W. 473, 474 (Neb. 1909) (citing Neb. Sess. Laws 1909, p. 256, c. 53)).

27 *Id.* at 474 (quoting Neb. Sess. Laws 1909, p. 256, c. 53 § 1).

28 *Id.* ("Published criticisms of candidates, officers, and policies are potent factors in the struggle for civic virtue and cannot be suppressed by legislative enactment.").

29 *Id.*

30 *Judicial Selection: The Process of Choosing Judges*, A.B.A. Road Map Series, June 2008, at 7 ("This method is often also referred to as the "Missouri Plan.").

31 Editorial, *Missouri Compromised,* Wall St. J., Dec. 22, 2007, at A10.

32 Unlike a number of states, Nebraska has no political activity prohibition applicable to judicial nominating commissions. Am. Judicature Soc'y, Judicial Merit Selection: Current Status, Table 5 (2009), *available at* http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf.

33 Nebraska Secretary of State, VR Statistics Count Report, Count of Registrants Eligible to Vote (Feb. 19, 2010) (showing that Republican voters outnumber Democratic voters by 14%).

34 The American Association for Justice (formerly the Association of Trial Lawyers of America) gave 95% of its contributions to Democrats in the 2008 election cycle. www.opensecrets.org/orgs/summary (last visited April 2, 2010). In the 2008 election cycle, lawyers/law firms ranked number 2 of all "industries" in total campaign giving in federal races. Lawyers/Law Firms: Long-Term Contribution Trends, http://www.opensecrets.org/industries (last visited March 21, 2010) In 2008, lawyers contributed over $233 million dollars in federal races. Of this amount, 76% went to Democrats. For the 2010 election cycle, as of March 21, 2010, the percentage given to Democrats had increased to 79%. Filings by the Nebraska Association of Trial Attorneys with the Nebraska Accountability and Disclosure Commission for 2009 and 2010 show similar imbalance.

35 Republican State Cent. Comm. v. Wait, 138 N.W. 159, 160 (Neb. 1912) ("In 1909 the Legislature conceived the idea of having an open primary, and amended the then existing laws, so that the members of one party might, without restraint, vote for the nomination of candidates for office in any other party. *One trial of that law satisfied all parties that it was wrong in principle*, and the Legislature of 1911 returned to the closed primary . . . .") (emphasis added).

36 *Id.*

37 Fourth Judicial Circuit County Court ballot.

38 Nebraska Secretary of State, VR Statistics Count Report, Count of Registrants Eligible to Vote (Feb. 19, 2010).

39 Neb. Rev. Stat. § 24-810.01 (1) provides that all independent voters shall be considered as members of the same political party.

40 For example, in April 2010 the Supreme Court Judicial Nominating Commission for the Fourth District (Omaha) had only one Republican attorney member. Some evidence was seen indicating that Republican members selected in urban areas tended to be affiliated with the trial bar, were not politically active, or both.

41 *See* Bruce Keith, David Magleby, Candice Nelson, Elizabeth Orr & Mark Westlye, The Myth of the Independent Voter (1992); Tom Jacobs, *"Independent" Voters Are Generally Not*, Miller-McCune, July 28, 2009, http://www.miller-mccune.com (reporting on study showing that "most 'independents' . . . are in fact committed to one party or the other").

42 Neb. Rev. Stat. § 24-810.01 requires automatic termination of the tenure of any commission member upon their change in party registration.

43 *See* section six, *infra*.

44 Neb. Ct. R. Jud. Nom. Comm. § 1-603 (B).

45 American Bar Association, membership data for January 2010.

46 District of Columbia v. Heller, 2008 WL 136349 (Jan. 11, 2008).

47 *Recommendations on Racial Profiling, International Criminal Court, and Medical Care to Be Considered at ABA Annual Meeting*. ABA Watch, Aug. 2008, at 1 (discussing Recommendation 117B).

48 *Id.* at 4.

49 Nebraska Lawyer, Nov.-Dec. 2007, at 2; Planned Parenthood of Nebraska and Council Bluffs 2005 Annual Report.

50 *See*, e.g., Nebraska Lawyer, Nov.-Dec. 2007, at 50.

51 Nebraska Lawyer, Aug. 2008, at 12.

52 *Discussing Affirmative Action: Past, Present & Future Considerations,* Nebraska Lawyer, Aug. 2008, at 7. ("We must either zealously support affirmative action . . . or we must dispense with the empty rhetoric of social justice . . . .").

53 Nebraska's Third Congressional District is routinely underrepresented on the Executive Council. Although each congressional district is equal in population, relatively few attorneys reside in the largely rural Third District. Electoral data shows this district is substantially more conservative than the other two congressional districts.

54 Nebraska State Bar Association, http://nebar.com (last visited Jan. 17, 2012) (NSBA Executive Council page).

55 Measure 424 was approved by Nebraska voters in 2008 by a margin of 404,766 to 298,401. (Nebraska Secretary of State, election data, 2008). It was approved by voters in 89 of Nebraska's 93 counties. The measure carried Douglas County (which voted for Barrack Obama in the same election) by 31,529 votes, as well as Sarpy County (by 16,998 votes) and Lancaster County (by 14,668 votes) for a combined margin of 63,295 votes in Nebraska's three largest and most urban counties.

56 One Supreme Court Commission member reported that the selection was made following a series of such "straw votes." The American Judicature Society's *Model Judicial Selection Provisions*

recommend that "[a]ll organizational meetings of the judicial nominating commission shall be open to the public." Am. Judicature Soc'y, Model Judicial Selection Provisions 7 (2008). These guidelines note:

> Finding the appropriate balance between preserving the privacy of judicial applicants and providing transparency in the screening process is one of the greatest challenges that nominating commissions face. Applicants should be protected from public scrutiny regarding their private lives and from public embarrassment that could result from failure to receive a nomination. At the same time, the public should have sufficient knowledge of the nominating process to maintain confidence in that process. Commission proceedings should be as open as possible. However, the final deliberations and selection of nominees should remain confidential to encourage free and open discussion of the candidates' qualifications.

Id. at 7-8. Some argue that the Model Judicial Selection Provisions appear to reflect, overall, an undue acceptance of domination of the process by bar associations. One example of this, critics say, is that they recommend the bar be charged with selection of 4 of the 7 members of nominating commissions, and thus would give bar associations more control than currently possessed in 49 of the 50 states. Judicial Selection in the States, http://www.judicialselection.us/ (last visited Feb. 25, 2010).

57 Neb. Const. art. V, 21(4).

58 Neb. Const. art. V, 21(5).

59 Marks v. Judicial Nominating Comm'n for Judge of the County Court, 20th Judicial Dist., 461 N.W.2d 551, 553 (1990).

60 Neb. Rev. Stat. § 24-811.

61 *See* Interview with judicial applicant regarding allegedly defamatory communication to nominating commission by a political party official.

62 *See, e.g.*, 2006 Special election ballot to fill two vacancies created by disqualification.

63 Neb. S. Ct. R. § 1-602 (2).

64 *Id.*

65 Neb. Rev. Stat. § 24-801.01.

66 A member of the Chief Justice Judicial Nominating Committee who helped select nominees during the last vacancy was a prominent government affairs professional who has actively worked to promote candidates, legislation and policies favoring fetal tissue research. (www.abortionclinics.org/ politicsrole) (3-3-2010); (www.supremecourt.ne.gov/commissions). Another member was a former political party nominee for statewide elective office. *Id.* Yet another was an employee of the Supreme Court. *Id.* A recent roster of the Supreme Court Judicial Nominating Commission for the Court of Appeals, First District (Lincoln) included two of its four attorney members from the same small law firm.

67 Pursuant to Nebraska Supreme Court Rule 1-602 (C), "[a]ny person may challenge the impartiality of a member or chairperson of a judicial nominating commission."

68 Neb. Ct. R. Jud. Nom. Comm. § 1-603(A).

69 State *ex rel.* Ragan v. Junkin, 122 N.W. 473, 475 (1909).

70 *See* Reddick, *supra* note 1, at 734 ("Ashman and Alfini examined a variety of ways in which bar associations may influence the composition and deliberations of judicial nominating commissions and suggested that this was a fruitful avenue for further research.") (citing a "major study" by Allan Ashman & James J. Alfini, The Key to Judicial Merit Selection: The Nominating Process *22* (1974)).

71 Am. Judicature Soc'y, Model Judicial Selection Provisions 9 (2008).

72 The Nebraska State Bar Association has attempted to encourage diversity in judicial applicants and even held a CLE session for potential applicants at the 2009 Annual Meeting. However, some say that such efforts do not address a root cause of the problem. See discussion, *infra* at 12-13.

73 Neb. Rev. Stat. § 24-806 (1).

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 Neb. Rev. Stat. § 24-806 (2) (emphasis added). Some would say that the constitutionality of this provision, at least with regard to Supreme Court and district court vacancies, is questionable given the language of Neb. Const. art. V, § 21(4) (requiring commission member to be "members of the bar . . . residing in the area from which the nominees are to be selected . . . .").

79 A representative of the office of the Clerk of the Supreme Court reported that it was "very hard" to get attorneys to serve and that they "never have enough" nominations. Consequently, they are forced to get "*a lot*" of nominations from the NSBA Executive Council.

80 Neb. Rev. Stat. § 24-809.

81 *Id.*

82 *Id.* As to the constitutionality of this provision, see the discussion in *supra note* 78.

83 *Id.*

84 Neb. Rev. Stat. § 24-808.

85 *Id.*

86 *See* Democratic Party of U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981) (holding a political party had the ability

to determine the method of selecting its delegation to the party's national convention and the appropriate standards for participation in the party's candidate selection process).

87 Nebraska State Bar Association, http://nebar.com (last visited Jan. 17, 2012) (NSBA Executive Council page).

88 *Id.*

89 *See* Joshua Ney, *Does the Kansas Supreme Court Selection Process Violate the One Person, One Vote Doctrine?* 49 Washburn L.J. 143 (2009) (concluding that the system violates the Equal Protection Clause). Under the "one person, one vote" doctrine "each qualified voter must be given an equal opportunity to participate in [an] election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will ensure, as far as practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo., 397 U.S. 50, 56 (1970); *see also* Blackmoon v. Charles Mix County, 505 F. Supp. 2d 585, 591 (D.S.D. 2007) (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), for the proposition that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise").

90 Neb. Rev. Stat. § 24-103 (1).

91 *Id.*

92 Spring 2009 judicial nominating commission election ballots.

93 Nebraska's judiciary has very few women or minority judges. Diversity of the Bench: Nebraska, http://www.judicialselection.us/judicialselection/benchdiversity (Feb. 25, 2010). The impact of nominating commissions on minorities has been the subject of numerous published articles, which will not be discussed here.

94 Nebraska Judicial Nominating Commission, Personal Data Sheet, Question 27 (2003), *available at* www.supremecourt.ne.gov/forms/person-datasheet.

95 *Id.* at Question 25.

96 The number of trial lawyers in Nebraska is small, and the number of minority or female trial attorneys is smaller. *Diversity in the Legal Profession,* Nebraska Lawyer, June 2004, at 17 (Reportedly, there were only 115 minority attorneys in Nebraska in 2000) (2.4%).).

97 The Association for Justice (formerly the Association of Trial Lawyers of America) gave 95% of its contributions to one party in 2008. www.opensecrets.org/orgs/summary (last visited April 2, 2010).

98 www.supremecourt.ne.gov/commissions/jnc-manual-checklist at question 8.

99 *Id.*

100 www.supremecourt.ne.gov/forms/person-datasheet at question 18.

101 *Id.*

102 Neb. Const. art. 1, § 4.

103 Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Kane, 130 S. Ct. 2971 (2010). It is notable, for purposes of the present discussion, that both the American Bar Association and the Association of American Law Schools supported the law school's policy denying recognition to the faith-based student group. In contrast, the State of Nebraska joined a coalition of fourteen states in support of the petitioner. *Id.*

104 For a contrary view, see Janice D. Russell, *The Merits of Merit Selection*, 17 Kan. J.L. & Pub. Pol'y 437, 438 (2008) (assertion by a Kansas judge that the Kansas merit selection system needs no reform because "the Kansas merit selection plan satisfies all of the areas that led the Founding Fathers to adopt the plan of presidential appointment with Senate confirmation").

105 Reddick, *supra* note 1, at 744 (emphasis added). Just as important as the content of the above-quoted material is the identity of its source. This writer/researcher has no ax to grind on this subject, and no philosophical bias against the merit selection system. Quite the opposite is true. The above-quoted author works for the American Judicature Society, which is dedicated to the independence of the judiciary and to promotion of the merit selection system.

106 *Id.* at 744-745 (emphasis added).

107 A new web page entitled "Voter's Guide to Nebraska's Judicial Retention Elections" is available on the official Judicial Branch Web Site of the State of Nebraska. Voters' Guide to Nebraska's Judicial Retention Elections, http://supremecourt.ne.gov/press/voters-guide-retention-election.shtml (last visited Jan. 17, 2012). The guide informs Nebraska voters that "[a]lthough no judicial selection system is completely free of politics, a process using merit selection and retention elections more often results in: Judges who are highly qualified . . . Fair and Impartial Courts . . . Diversity . . . [and] Accountability to the Public . . . ." *Id.* No authority or source is cited for any of these claims, and some are contradicted by published research. However, most would say that the assertions reasonably represent common aspirations for the judiciary. As such, critics of the current system would say, the judiciary and its leading advocates should be on the front line in the battle to reform the current system. Given the issues discussed in this paper and similar research, some argue that it is misleading to persuade voters that the current system is acceptably free from political manipulation and that "every qualified judicial applicant has an equal opportunity to be selected through a Judicial Nominating Commission—unlike popular election . . . ." *Id.*

The official taxpayer-funded web page states that "Merit Selection . . . is the most effective way to ensure that Nebraska has fair and impartial courts." *Id.* Thus, critics say, advocates of the merit selection system should enthusiastically lead the effort to implement the reforms needed to minimize political influence, make the system live up to its promises, and realize its full potential as a means to protect and promote the rule of law.

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