South Carolina Law Review

Volume 68
Issue 4 *SURVEY OF SOUTH CAROLINA LAW AND FOURTH CIRCUIT SURVEY*

Article 9

Spring 2017

Judicial Selection in South Carolina: Is the Time Ripe for Systematic Restructuring and Improvement: You Be the Judge

Ronald T. Scott

JUDICIAL SELECTION IN SOUTH CAROLINA: IS THE TIME RIPE FOR SYSTEMATIC RESTRUCTURING AND IMPROVEMENT? YOU BE THE JUDGE.

Ronald T. Scott*

I. INTRODUCTION

The black robe, pounding gavel, and austere judicial ceremonies all combine to make the role of a judge one of the most revered and powerful positions in our democratic society. Judges likely fulfill the highest form of legal public service in the United States. Judges render decisions impacting our family life, our professional careers, our finances, our criminal justice

* 2018 J.D. Candidate at the University of South Carolina School of Law.

system, our overall system of governance, and numerous other important aspects of daily life. Judges are expected to have a level of independence and impartiality regarding the executive branch of government, the legislative branch of government, and politics in general. In consideration of the weighty role judges fulfill in our society, how should we select these individuals who wield considerable control over society in general and our lives in particular? Today, the process of judicial selection differs from state to state, with common criticism for all methods of judicial selection. With various options for judicial selection, questions and criticisms will always remain as to what method renders the best outcome.

South Carolina's present judicial selection process is used by a minority of states, with only Virginia employing a similar system.[1] South Carolina's State Constitution stipulates that a specific segment of state judges are to be selected by the South Carolina General Assembly with the assistance and initial review by a Judicial Merit Selection Commission (JMSC).[2] The JMSC, comprised of ten members, is empowered by state law to evaluate the qualifications and fitness of individuals desiring appointment to various judicial vacancies.[3] The Commission consists of five members appointed by the Speaker of the House of Representatives, three members appointed by the Chairman of the Senate Judiciary Committee, and two members appointed by the President Pro Tempore of the Senate.[4] South Carolina's process has been criticized largely due to concerns regarding diversity among the judiciary, lack of impartiality, separation of powers, and public confidence in the system.[5]

This Note asserts that, in spite of common criticisms, South Carolina's present system and process for judicial selection has improved since the reforms of 1996 and is now structured to better serve the State's needs. South Carolina's process for judicial selection, though not without flaws, has produced a highly-qualified judiciary that is now more diverse and operates effectively and independent of legislative control. Part II of this Note provides a succinct background and history of judicial selection in South Carolina and the events giving rise to the 1990s reforms to the state's process of judicial selection. Part III of this Note briefly examines common

---

1. Carl W. Tobias, *Reconsidering Virginia Judicial Selection*, 43 U. RICH. L. REV. 37 (2008).

2. S.C. CONST. art. V, § 27.

3. S.C. CODE ANN. § 2-19-10(A) (Supp. 2016).

4. § 2-19-10(B).

5. Samantha R. Wilder, *The Road Paved with Gravel: The Encroachment of South Carolina's Judiciary Through Legislative Judicial Elections*, 65 S.C. L. REV. 639, 652–60 (2014).

forms of judicial selection methods throughout the United States, exploring both their strengths and weaknesses. Part IV of this Note will discuss the strengths and weaknesses of South Carolina's current system of judicial selection. Part V of this Note will offer limited recommendations for improvement to South Carolina's present system.

II. BACKGROUND

The South Carolina State Constitution confers upon the South Carolina General Assembly sole authority and responsibility to elect members of the South Carolina Supreme Court, the South Carolina Court of Appeals, South Carolina Circuit Court judges, and South Carolina Family Court judges.[6] Over the years, the process was viewed as inherently partisan, often resulting in a significant number of judicial appointments filled by former members of the General Assembly[7] and those who were perceived to be part of the "good-old-boy system."[8] Many public, and arguably petty, battles were fought over who would win the necessary votes to fill vacancies within the judiciary.[9] After wide criticism concerning the lack of diversity,[10] the number of former legislators selected to fill judicial vacancies,[11] and perceptions of political influence and political corruption overriding qualification and fitness to serve,[12] South Carolina passed a state constitutional amendment in 1996 establishing a Judicial Merit Selection Commission (JMSC) to screen and exclusively nominate qualified individuals from whom the General Assembly may fill judicial vacancies.[13] These changes came on the heels of an especially bitter fight for a South Carolina Supreme Court seat in 1996.[14]

---

6. S.C. CONST. art. V., §§ 3, 78, 13 (Supreme Court, Court of Appeals, Circuit Courts, and "other courts"); S.C. CODE ANN. § 2-19-80(A) (2005) (specifying family court).

7. Martin Scott Driggers, Jr., *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. L. REV. 1217, 1227 (1998).

8. Kevin Eberle, *Judicial Selection in South Carolina: Who Gets to Judge?*, S.C. LAW., May/June 2002, at 20, 22 (observing also that legislators who directly elect judges "answer directly to the public").

9. Driggers, *supra* note 7, at 1218.

10. *See* Wilder, *supra* note 5, at 652 (noting that lack of diversity was a major theme underlying the 1996 reforms).

11. Driggers, *supra* note 7, at 1228.

12. Eberle, *supra* note 8, at 22.

13. S.C. CONST. art. V, § 27. *See also* Driggers, *supra* note 7, at 1230 (discussing the circumstances surrounding the creation of the JMSC).

14. *See* Driggers, *supra* note 7, at 1217–18 (referencing the contentious reelection of Justice Jean Toal to the South Carolina Supreme Court by the South Carolina General Assembly).

Among the notable changes adopted in the 1990s, members of the General Assembly were prohibited from being selected to serve in the judiciary while serving in General Assembly and for one year after ceasing to be a member of the General Assembly or failing to file for re-election.[15] Principally, the most significant reform of 1996 came with the establishment of the JMSC to assist the South Carolina General Assembly in selecting judges.[16] The JMSC is responsible for conducting preliminary screening for South Carolina Supreme Court judges, South Carolina Court of Appeals judges, Circuit Court judges, Family Court judges, and Administrative Law Court judges.[17] The South Carolina State Constitution stipulates that judges elected by the General Assembly must be at least thirty-two years of age, be licensed to practice law for at least eight years, and be a resident of South Carolina for at least five years prior to consideration by the JMSC.[18] The JMSC conducts a thorough review, both privately and publicly, of each candidate, during which it evaluates candidates based on the following criteria as mandated by state law: constitutional qualifications, ethical fitness, professional and academic ability, character, reputation, physical health, mental stability, experience, and judicial temperament.[19] In addition to these nine criteria, state law stipulates that the JMSC must consider race, gender, national origin, and other demographic factors to ensure nondiscrimination to the greatest extent possible as to all segments of South Carolina's population.[20] A committee of citizens, reflective of a broad range of professional experience and racial backgrounds, also evaluates judicial candidates as required by South Carolina law.[21]

After the evaluation process is completed, the JMSC prepares a written report to the General Assembly on each candidate as relates to the nine criteria.[22] From there, the JMSC submits to the General Assembly a list of usually three candidates it finds qualified for judicial service.[23] The General Assembly may only elect judges from the individuals nominated as qualified by the JMSC.[24] State law was also modified to limit the ability of candidates to seek support from sitting members of the South Carolina General Assembly until formally nominated as a qualified judicial candidate by the

15. S.C. CODE ANN. § 2-19-70(A) (2005).
16. Driggers, *supra* note 7, at 1230 (citing S.C. CODE ANN. § 2-19-80(B) (2005)).
17. S.C. CODE ANN. § 2-19-80(A) (2005).
18. S.C. CONST. art. V, § 15.
19. S.C. CODE ANN. § 2-19-35(A) (2005).
20. § 2-19-35(B).
21. § 2-19-120(A).
22. § 2-19-80(D).
23. § 2-19-80(A).
24. § 2-19-80(B).

JMSC.[25] Judicial elections are held during the legislative session.[26] In spite of these changes and the establishment of the JMSC to perform official vetting of judicial candidates, criticism still remains that South Carolina's process needs reform.[27]

III. ANALYSIS

A. Criteria for Evaluation of Judicial Candidates

Many evaluation factors can aid states in vetting qualified candidates for judicial selection.[28] Although these factors vary from state to state, there are several common factors in judicial selection processes throughout the country.[29] Some states set forth general qualifications within the state's constitution or through enactment by state law, setting the minimum criteria a candidate must possess for judicial appointment.[30] These characteristics may address a candidate's age, number of years as a licensed attorney, residency requirements, and other requirements deemed appropriate for judicial service.[31] In addition to these constitutional or statutory requirements, judicial candidates are often subjected to an evaluation process involving a comprehensive review of their ethical fitness, professional and academic abilities, character, reputation, and other factors.[32] Candidates for judicial appointment are commonly required to provide details of their general work history, legal experience, memberships in specific organizations or associations, and even their writings that may have been published in journals, books, newspapers, or periodicals.[33] Candidates for judicial appointment are also regularly subjected to comprehensive scrutiny of their past actions and statements, both personally

---

25. § 2-19-70(C).

26. § 2-19-90.

27. *See* Driggers, *supra* note 7, at 1231 (noting that the remaining legislative control over the JMSC creates the potential for abuse even within the current system).

28. See, for example, Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV. 1197, 1225–26 (2000), for a discussion exploring common criteria used in evaluating potential judges, including, but not limited to, minimum education and experience, moral character, intelligence, impartiality, maturity, emotional stability, courtesy, decisiveness, and administrative ability.

29. *Id.*

30. *Id.* at 1201.

31. *Id.* at 1237.

32. *Id.*

33. *See* Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73, 102–12 (2007) (noting various methods for reviewing a judicial candidate's qualifications).

and professionally, and are often required to provide references attesting to the soundness of their character and reputation in the legal profession and in their community at large.[34] Such comprehensive reviews of one's past can be both daunting and stressful, and may deter otherwise well qualified candidates from seeking appointment to judgeships.[35] Other soft factors may also be used to evaluate judicial candidates, dependent upon the method of selection. In states where there is direct election by the general public, a candidate may be evaluated on the level of accountability he or she will have, first to the law, and secondly to the community pertaining to judicial decisions rendered.[36] Accountability for decisions rendered is often an important factor when reelecting existing judges.[37] Separately, in recent years, diversity in gender and ethnicity has more commonly become a factor of evaluating judicial candidates.[38] A study published by the American Bar Association noted that, "[m]ost Americans would agree that, racial and gender diversity is an important quality for our nation's courts."[39] Discussions about diversity and awareness of the need for diverse judicial candidates who offer differing perspectives, backgrounds and experiences, will likely continue to grow as the country's general population becomes more diverse.

B. Common Methods of Judicial Selection

The specific process of judicial selection differs from state to state and often varies based upon the type of judicial vacancy.[40] The more common forms of judicial selection include selection by direct election of state voters through partisan or non-partisan elections, selection by direct election of the state legislature, selection by gubernatorial appointment, and, in recent years, hybrid forms of the aforementioned methods that involve the use of a

---

34. Maute, *supra* note 28, at 1225–26.

35. See, for example, Colquitt, *supra* note 33, at 102–20, for a discussion regarding the comprehensive and far-reaching nature of evaluating judicial candidates.

36. Maute, *supra* note 28, at 1203–07.

37. See, for example, Colquitt, *supra* note 33, at 113–15, for a discussion of common evaluation processes for the reappointment or reelection of sitting judges.

38. Malia Reddick, Michael Nelson, & Rachel Paine Caufield, *Racial and Gender Diversity on State Courts*, 48 THE JUDGES' J. 3, 28 (2009).

39. *Id.*

40. See, for example, *Methods of Judicial Selection*, NAT'L CTR FOR STATE COURTS, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Jan. 20, 2017), which highlights the various forms of judicial selection throughout the United States.

committee, commission, or board to vet judicial candidates.[41] Each method of judicial selection has its praises and its criticisms. Generally, each state must settle on the process that it deems will best serve its citizens.

1. Judicial Selection by Executive Appointment

Today, several states select judges solely through executive appointment by the governor.[42] By some accounts, executive appointment is the quickest and most efficient process for judicial selection.[43] Arguments in favor of this system reason that the state's highest ranking executive, elected by the citizens of the state, should have the power to appoint state judges.[44] The citizens, by power of their vote on a gubernatorial candidate, can effectuate judicial accountability and changes in judicial philosophy by voting to change the executive with judicial appointment power. This system of judicial selection is commonly understood by citizens in states where it is practiced because it mimics the system of judicial selection for many federal judgeships appointed by the President of the United States.[45] Critics of gubernatorial power to appoint judges often argue that the process is politicized, much like the process of appointing federal judges, rather than simply seeking the most qualified judges.[46] Most governors align themselves with a political party and have openly expressed political opinions on judicial philosophy.[47] These philosophies, which are quite often political, are bound to guide the subjective criteria governors will use to select an individual to fill a judicial vacancy. Flowing from that reasoning, critics argue that judges may lack true judicial independence unless they are appointed to lifetime judgeships, which is less common among the state judiciary.[48] Other criticisms of the gubernatorial appointment process lie in the perception that gubernatorial appointments may lack diversity in gender and ethnicity that would otherwise reflect the population of a state and

---

41. Daniel R. Deja, *How Judges Are Selected: A Survey of the Judicial Selection Process in the United States,* 75 MICH. B.J. 904 (1996).

42. *Id.*

43. Colquitt, *supra* note 33, at 77.

44. *Id.* at 79.

45. See U.S. CONST. art. II, § 2, cl. 2. For example, most Americans are familiar with the constitutional authority granted to the President of the United States to appoint judges to the United States Supreme Court with the advice and consent of the United States Senate.

46. Colquitt, *supra* note 33, at 77–79.

47. *Id.* at 77–78.

48. *See* Wilder, *supra* note 5, at 647 (contrasting state systems for judicial selection against the federal system of judicial selection, which provides for lifetime appointment of some judges and a safeguard against salary reduction).

perhaps the will of the voters.[49] This criticism is not singular to gubernatorial appointment of judges and is leveled at many judicial selection processes.[50]

2. Judicial Selection by Popular Vote

A more widely utilized method of judicial selection is by direct vote of the electorate through partisan and non-partisan elections.[51] Some assert that direct election allows the general population to have the greatest level of influence in selecting state judges.[52] Much like electing individuals to political office, voters have the opportunity to consider a judicial candidate's qualifications for a judgeship, professional history, personal history, political affiliations, and judicial philosophy as stated directly by a candidate, thereby allowing voters to make an informed decision on candidates the voter deems best suited to be a judge. For judges running to be reelected to a specific judicial post, voters can directly examine the record of decisions rendered by a judge, a judge's personal life while occupying judicial office, a judge's temperament, and other subjective factors a voter may deem important.

Though direct election may offer voters the greatest level of participation in selecting state judges, this process is not without criticism. Although several states have non-partisan judicial elections, some do have partisan elections.[53] Although enforcement and judicial interpretation of laws should be blind to politics, partisan campaigns for judicial election can serve to cast a negative light on a judicial candidate's ability to render rulings without regard to political affiliation.[54] Additionally, partisan campaigns can become extremely expensive and can result in highlighting party affiliation as a qualification that should supersede a candidate's legal experience and ability to serve as a fair and impartial judge and interpreter of the law.[55] Perhaps most significant is the concern that direct election can

---

49. *See, e.g.*, Reddick et al., *supra* note 38, at 30 (highlighting the influence of politics in gubernatorial appointment of judges and observing that, "[n]ationwide, Democratic governors appointed slightly higher percentages of minority (14.7%) and women (27.9%) judges than did Republican governors (11.0% and 23.6%, respectively). The largest discrepancies between Democratic and Republican governors are found for minorities on courts of last resort (17.4% vs. 8.8%) and women on intermediate appellate courts (31.2% vs. 23.3%)").

50. *See generally id.* (highlighting concerns over diversity among all methods of judicial selection).

51. Driggers, *supra* note 7, at 1223.

52. *See id.* (noting that direct election of judges "enshrines" the fundamental right of citizens to vote).

53. Maute, *supra* note 28, at 1203.

54. *Id.* at 1204–05.

55. *Id.*

have the perception of interference with judicial independence.[56] Judges subjected to reelection may fear that their decisions will be evaluated in the court of public opinion and that their chances for reelection may be determined by their political popularity rather than the merits and legal grounds for decisions rendered.[57] For these reasons, it is possible that many well-qualified judicial candidates will not seek office in states that select judges by popular election.[58]

3. *Judicial Selection by Legislative Election*

Another much less commonly used method of judicial selection is through election by a state's legislature.[59] Only South Carolina and Virginia use this method of judicial selection.[60] Through this method of judicial selection, legislators, as direct representatives of the citizens, indirectly represent the interests of their constituency in selecting judges.[61] For many years in South Carolina, legislative election of judicial candidates was done with each legislator employing his or her own subjective criteria to evaluate candidates vying for judicial appointment.[62] In a 2015 legislative election for judicial candidates in South Carolina, a member of the General Assembly chided his fellow lawmakers that they should not elect judges based on the mere qualification of, "I knew them in kindergarten, or something."[63] Judicial selection by legislative election is widely condemned based on a combination of the criticisms hailed at the other more common forms of judicial selection.[64] Judicial selection by legislative election is deemed as inherently political, perceived as lacking judicial independence, viewed as valuing relationships over qualification for judicial service, and criticized as

---

56. *Id.* at 1204–07.
57. Wilder, *supra* note 5, at 644.
58. Maute, *supra* note 28, at 1205.
59. Driggers, *supra* note 7, at 1222.
60. *Id.*
61. *See* Eberle, *supra* note 8, at 22 (observing that legislators who directly elect judges "answer directly to the public").
62. *See* Wilder, *supra* note 5, at 648–51 (noting that, prior to 1996, the process for selection of state judges was much less formal, allowing members of the General Assembly to select judges under their own subjective criteria).
63. Jamie Self, *S.C. Lawmakers Hear Calls to Change the Way SC Elects Judges*, STATE: THE BUZZ (Feb. 7, 2015), http://www.thestate.com/news/politics-government/politics-columns-blogs/the-buzz/article13948829.html.
64. *See* Wilder, *supra* note 5, at 652–58 (highlighting concerns over judicial selection in South Carolina even after the 1996 reforms).

lacking diversity in gender and ethnicity.[65] This process often is also perceived as creating a disproportionate share of former legislators who, through their well-established relationships with sitting members of the legislature, are able to secure widely coveted judicial appointments.[66] Examples abound of bitterly fought battles by judicial candidates vying to secure the backing of legislators, and the process is sometimes perceived as corrupt.[67] It is likely for these reasons that this method of judicial selection is uncommon throughout the states.

4. Judicial Selection through a Merit Commission

In the wake of criticisms of each of the aforementioned processes, many states have established a hybrid form of judicial selection through which a separate body of individuals is impaneled to evaluate candidates for judicial appointment by the governor or for judicial election by a state legislature or by voters.[68] Though the process differs in each state, most merit selection commissions are composed of attorneys and non-attorneys who evaluate candidates and provide recommendations or nominations from a general pool of candidates seeking judicial office.[69] Merit selection commissions do not have the final authority to select judges, but rather should exist to provide a conceivably apolitical and thorough vetting process.[70] Merit selection commissions, when paired with selection by executive appointment, public election, or legislative election, offer an effective method to legitimize the judicial selection process by limiting political interference and by creating a more objective process to evaluate judicial candidates.[71] Critics of merit selection commissions argue that these review panels often exclusively consist of gubernatorial or legislative appointees and are neither directly accountable to the public nor representative of the public.[72] Other critics argue that individuals appointed to merit selection

65. *See id.* at 652–58 (highlighting concerns over judicial selection in South Carolina even after the 1996 reforms).

66. Driggers, *supra* note 7, at 1227–28.

67. *See id.* at 1227–28 (highlighting perceived corruption associated with judicial selection by legislative election).

68. *Id.* at 1224–25.

69. *Id.* at 1225.

70. *See* Deja, *supra* note 41, at 907 (discussing purpose of nominating commission).

71. *See* Colquitt, *supra* note 33, at 81 (noting the opinion that properly crafted merit selection commissions enhance the judicial selection processes because they can be somewhat independent of the political process and can adhere to democratic ideals).

72. *See* Driggers, *supra* note 7, at 1226 (discussing how committees are sometimes controlled by elected officials appointed members).

commissions often represent the "educational and occupational elite" of society and do not adequately represent the public.[73] Conversely, it can be argued that the capability to evaluate and recommend qualified candidates for judicial selection requires a developed and experienced skill set that inherently is not possessed by the general public.

IV. AN ASSESSMENT OF SOUTH CAROLINA'S CURRENT PROCESS OF JUDICIAL SELECTION

Like many other states, South Carolina's process for judicial selection can be described as a hybrid system even though it ultimately is driven by legislative election.[74] After nearly twenty years of operation, South Carolina's JMSC provides a meaningful safeguard to constrain the General Assembly to select only candidates who are actually fit and qualified to serve in the state judiciary. Additionally, data shows that South Carolina has made some progress in either maintaining or improving the racial and gender diversity of the state.[75] For example, in 2007, three of the nine members of the South Carolina Court of Appeals were female and one was African-American, which is identical to the racial and gender make-up of the court in 2017.[76] In 2007, of the forty-nine state circuit court judges, four were African-American and seven were female.[77] In 2017, of the forty-nine state circuit court judges, six are African-American and eleven are female.[78] In 2007, eight of the fifty-nine South Carolina Family Court judges were African-American and nineteen were female.[79] In 2017, nine of the fifty-nine South Carolina Family Court judges are African-American and twenty-five are female.[80] In 2007, one of the six South Carolina Administrative Law Court judges was African-American and two were female, which is also identical to the racial and gender make-up of the court today.[81]

Most notably, in 2016, the General Assembly elected South Carolina Supreme Court Associate Justice Donald Beatty to become the second African-American since Reconstruction to serve as Chief Justice of the

---

73. *Id.*
74. Wilder, *supra* note 5, at 648.
75. E-mail from Y. Elizabeth Wellman, Staff Attorney, S.C. Court Administration, to author (Oct. 25, 2016, 11:27 AM) (on file with author).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*

South Carolina Supreme Court.[82] Arguably African-Americans and females, in particular, may not have experienced the same level of representation within the state judiciary without the process of judicial merit screening prior to legislative elections. In spite of these positive strides, arguments remain that the current process in South Carolina does not create enough opportunities for expanded diversity in the judiciary.[83] Critics assert that changes to the current process are necessary to invite and encourage more minority candidates to seek judicial office in South Carolina.[84]

Critics will contend that in spite of the JMSC's independent role in the screening process, the South Carolina General Assembly maintains heavy influence and control in the process because the JMSC is solely appointed by the General Assembly.[85] For example, in *Segars-Andrews v. Judicial Merit Selection Commission*, a South Carolina Family Court Judge challenged the JMSC's decision not to nominate her for reelection by the General Assembly.[86] In its ruling to dismiss the judge's complaint against the JMSC, the South Carolina Supreme Court agreed with an assertion by the JMSC in its brief to the Court that "the Court is being asked to delve into the subjective decision making process of the JMSC which is political in nature."[87] In rendering the decision, the Supreme Court essentially acknowledged the political nature of the JMSC.[88]

Perceptions remain that former legislators and family members of sitting legislators have an advantage over other candidates in the judicial selection process.[89] In 2015, many individuals, including the sitting governor, publicly questioned the candidacy of Bill Funderburk for a seat on the State Administrative Law Court because his wife was a sitting member of the South Carolina General Assembly.[90] Although Mr. Funderburk's legal

---

82. John Monk, *Beatty Wins S.C. Supreme Court Justice Post*, STATE (Columbia, S.C.) (May 25, 2016), http://www.thestate.com/news/local/crime/article79793222.html.

83. Wilder, *supra* note 5, at 652.

84. *See* Kathryn M. Cook, *Judicial Selection: Lack of Women in Judiciary is Disturbing*, HERALD-JOURNAL (Aug. 29, 2004), http://www.groupstate.com/news/20040829/judicial-selection-lack-of-women-in-judiciary-is-disturbing (observing that in spite of reforms to the judicial selection process, more female and minority appointments are needed).

85. S.C. CODE ANN. § 2-19-10(A) (2005); *see also* Self, *supra* note 63 (noting concerns over the South Carolina General Assembly's control over the nomination and election process for state judges).

86. Segars-Andrews v. Judicial Merit Selection Comm'n, 387 S.C. 109, 115–16, 691 S.E.2d 453, 456–57 (S.C. 2010).

87. *Id.* at 459.

88. *Id.*

89. Self, *supra* note 63.

90. *Id.*

credentials and experience arguably rendered him well-qualified and fit for judicial office, his marriage to a sitting legislator cast a negative cloud upon his candidacy and subsequent election. [91] Moreover, some reasoned that the party affiliation and political positions taken by his wife would, on its own merits, impact the success of his candidacy.[92]

More notably, arguments about legislative encroachment into judicial authority surfaced during hearings in 2016 for a vacancy on the South Carolina Supreme Court.[93] A decades old court battle between South Carolina school districts and the State of South Carolina ended in a ruling by the Supreme Court concluding that the State had not fulfilled its role of providing a minimally adequate education for students in some rural and poor areas of South Carolina.[94] A split Supreme Court ordered the General Assembly to take proactive measures by developing a plan of action to improve public education in compliance with its ruling.[95] In a rare act of defiance, the South Carolina General Assembly flexed it muscles against the timing requirements stipulated in the Supreme Court's ruling.[96] In a public show of the General Assembly's displeasure with the Supreme Court's ruling, the issue became a key point of questioning regarding judicial philosophy in the selection for a Supreme Court vacancy during hearings conducted by the South Carolina General Assembly.[97] Some contended that the line of questioning for a judicial candidate posed by members of the General Assembly reflected clear legislative control of the judicial selection process and the potential for encroachment into the judicial decision making process.[98]

---

91. *Id.*

92. *See id.* (noting concerns by a state representative that the political affiliation of Mr. Funderburk's wife was the source of opposition against his candidacy).

93. *See* John Monk, *SC Supreme Court Race: Lawmakers Fishing for Anti-Abbeville Sentiment*, STATE (Columbia, S.C.) (Jan. 29, 2016), http://www.thestate.com/news/local/article57431843.html (observing that members of the General Assembly specifically questioned justice candidates for the South Carolina Supreme Court about their opinion on the recent *Abbeville* case ruling).

94. Abbeville Cty. Sch. Dist. v. State, 410 S.C. 619, 662, 767 S.E.2d 157, 180 (2014).

95. *See* Carolyn Click & Dawn Hinshaw, *SC Supreme Court Finds for Poor Districts in 20-Year-Old School Equity Suit*, STATE (Columbia, S.C.) (Nov. 12, 2014), http://www.thestate.com/news/politics-government/article13911206.html (discussing the historic nature of the South Carolina Supreme Court's ruling in the *Abbeville* case).

96. *Id.*

97. *See* Monk, *supra* note 93 (noting how some members of the General Assembly sought judicial candidates who would not have agreed with the South Carolina Supreme Court's ruling in the *Abbeville* case).

98. *Id.*

On the other hand, there are clear examples of the independence of South Carolina's judiciary even in the face of legislative control over the judicial selection process. In 2014, the South Carolina Supreme Court issued a ruling against the Speaker of the South Carolina House of Representatives in an ongoing battle against the South Carolina Attorney General over an investigation into alleged ethics violations by the Speaker.[99] The Speaker has authority to personally appoint half of the JMSC members and therefore has considerable authority and influence in the judicial selection process, including the selection of South Carolina Supreme Court Justices.[100] In spite of the Speaker's considerable power to influence the nomination and election process, the South Carolina Supreme Court demonstrated its independence and a dedication to the rule of law when it ruled against the Speaker and essentially allowed the ethics investigation to proceed.[101] The case represented a significant display of the judicial branch's authority and independence from the legislative branch. Moreover, within the past year, the South Carolina Supreme Court issued a sharp rebuke in its ruling against the sitting South Carolina Attorney General in a case involving the authority of a special prosecutor to investigate allegations of ethics violations and misconduct among members of the South Carolina General Assembly.[102] When the Attorney General attempted to intervene in the investigation and remove the special prosecutor, the South Carolina Supreme Court ruled that the Attorney General could not interfere with the ongoing investigation and allowed the investigation or certain members of the General Assembly to proceed.[103] After the South Carolina Supreme Court's ruling, the ethics investigation continued and has resulted in criminal charges brought against a powerful member of the General Assembly.[104] The aforementioned two

---

99. *See generally* Harrell v. Attorney Gen. of State, 409 S.C. 60, 70, 760 S.E.2d 808, 813 (2014) (opining that the South Carolina Attorney General's Office did not have authority to proceed with an investigation of the Speaker of the South Carolina House of Representative).

100. S.C. CODE ANN. § 2-19-10(B)(1) (2005).

101. *See generally Harrell*, 409 S.C. at 71, 760 S.E.2d at 814 (reversing a lower court's ruling to end an ethics investigation into actions by the Speaker of the House of Representatives by the South Carolina Attorney General, the South Carolina Supreme Court's decision ultimately allowed the case to be remanded to the lower court and the investigation continued, resulting in criminal charges and the subsequent resignation of the Speaker).

102. *See* Pascoe v. Wilson, 416 S.C. 628, 647, 788 S.E.2d 686, 696 (2016) ("[T]he Attorney General's purported termination of Pascoe after the initiation of the state grand jury was ineffective.").

103. *Id.*

104. *See* Clif LeBlanc, Cassie Cope & Avery G. Wilks, *Lowcountry Legislator Accused of Misconduct in Office Violating Ethics Law*, STATE (Columbia, S.C.) (Dec. 14, 2016), http://www.thestate.com/news/politics-government/article120875808.html (providing

cases represent a strong argument for effective judicial independence under the current method of judicial selection in spite of the role that the South Carolina General Assembly plays in electing many state judges.

V. RECOMMENDATIONS

A. Increase the Number of Nominees the JMSC May Submit to the South Carolina General Assembly for Election

One area that offers potential for improvement is increasing the number of nominations allowed after screening by the JMSC. Although state law limits the JMSC to three nominations for a judicial vacancy, the process through which the JMSC arrives at its three nominees remains subjective.[105] Several candidates may be found "qualified" and "fit" to serve, yet the JMSC can exercise its authority to choose which of those qualified and fit candidates are nominated.[106] This process leaves open the possibility for criticism that outside influence, including undue legislative influence, may be brought to bear in determining which candidates are nominated. The process also leaves many unanswered questions about why certain judicial candidates who are deemed qualified and fit are not nominated. Arguably, an unlimited number of judicial nominees would present an unmanageable challenge for the General Assembly to consider. However, a modest increase to allow up to five nominees could create greater opportunities for diversity among the state's judiciary and may give rise to a more thorough review and deliberate consideration of a larger group of candidates by members of the General Assembly.

B. Establish Statutory Authority for the Governor to Have Formal Participation in the Judicial Selection Process

One glaring absence from South Carolina's process is the participation of the state's chief elected officer, the governor. South Carolina's governor is elected by the majority of voters in the state and arguably represents the political and philosophical beliefs of the majority of the state's voters. Yet, the governor currently has no constitutional or statutory authority to appoint

---

overview of the ongoing investigation of a state special prosecutor and criminal charges brought against South Carolina State Representative Jim Merrill for various violations of state laws).

105. S.C. CODE ANN. § 2-19-80(A) (2005).

106. *Id.*

judges, fill judicial vacancies, or appoint members of the JMSC.[107] In South Carolina, the absence of gubernatorial participation in the judicial selection process is by design and not by mistake.[108] South Carolina has a long history of power struggles between the executive and legislative branches of government.[109] Consequently, the South Carolina General Assembly likely has little appetite for expanding gubernatorial power. South Carolina's executive and legislative branches would be well served to consider amending the current judicial selection process to, at a minimum, provide the governor with authority to appoint some members of the JMSC. Similar proposals by members of the General Assembly have gone unheeded.[110] Such an amendment to the current process would allow the state's chief elected officer to ensure that the philosophical qualifications expressed by a majority of the state's voters are represented when evaluating judicial candidates. Additionally, in realization that the General Assembly would likely be unwilling to completely transfer its power to elect judges, consideration should be given to empowering the governor with authority to fill any mid-term judicial vacancies rather than requiring a new election by the General Assembly. Allowing the governor to fill interim judicial vacancies, as is the process in some other states, provides a balanced approach to power sharing between the executive and legislative branches of state government.[111]

C. *Establish a Statutory or Regulatory Requirement for a Creation of a Historical Demographic Data Collection System on All Candidates Seeking Judicial Office in South Carolina*

Increasing diversity in the state judiciary, particularly among women and minorities, was impliedly a goal of the 1996 reforms to judicial selection

---

107. *See* Self, *supra* note 63 (discussing legislative control over the judicial selection process in South Carolina and the absence of gubernatorial involvement in the process).

108. *See id.* (highlighting numerous failed legislative proposals seeking to formally include the governor in South Carolina's judicial selection process).

109. See, for example, Gina Smith, *High Court Rules Against Haley*, STATE (Columbia, S.C.) (June 6, 2011), http://www.thestate.com/news/local/article14393663.html, which notes the history of public court battles and power struggles between the South Carolina Governor and the South Carolina General Assembly.

110. *See* Self, *supra* note 63 (discussing proposals by various members of the General Assembly to consider changes to the judicial selection process).

111. Maute, *supra* note 28, at 1203.

in South Carolina.[112] Arguably, there is no single effective method to assure improved diversity among a state's judiciary. For example, the American Bar Association released a study on diversity among state courts throughout the nation and found that, "on intermediate appellate courts, more minority judges attained their seats through merit selection, but partisan elections placed slightly more women on these courts.[113] Without clear reasoning, different selection methods can produce different outcomes. However, each method of judicial selection brings its strengths and weaknesses in relation to improving judicial diversity. In general, the study released by the American Bar Association noted that "several studies have found no link whatsoever between selection systems and diversity on the bench."[114]

Although South Carolina's current process for judicial selection requires the consideration of factors relating to diversity, state officials do not maintain a formal database containing diversity statistics on unsuccessful candidates for judicial office. In researching data for this Note, there was an obvious void in the availability of prepared historical data on unsuccessful candidates for judicial office in South Carolina. The absence of this type of historical demographic data likely impedes the ability of the South Carolina General Assembly and citizens to fully assess the state's progress in diversifying the state judiciary since the 1996 reforms. At a minimum, the South Carolina Court Administration, functioning under the auspices of the Chief Justice of the South Carolina Supreme Court, should be tasked with developing and maintaining a formal historical demographic database that is regularly updated and made available to the public. Historical demographic data, especially pertaining to unsuccessful judicial candidates, is particularly helpful in identifying patterns of failure to obtain nomination and subsequent election within a particular demographic group.[115]

VI. CONCLUSION

Today, little publicity surrounds the process for judicial selection in South Carolina. By contrast to the period of contentious judicial elections

112. *See* S.C. CODE ANN. § 2-19-35(B) (2005) (although not a requirement or quota for judicial selection, the 1996 reforms established specific evaluation criteria relating to race, gender, national origin, and other demographic factors).

113. Reddick et al., *supra* note 38, at 29.

114. *Id.* at 28.

115. See, for example, § 2-19-35(B) on the diversity criteria to be reviewed by the JMSC. Maintaining a formal system of historical data, particularly for unsuccessful candidates, should be established in South Carolina based on the metrics of evaluation used by the JMSC under the current state law.

preceding the reforms of 1996, today's judicial elections are much less contentious and rarely garner significant public attention. With exception to the infrequent elections to fill seats on the South Carolina Supreme Court, the media even gives limited coverage to judicial elections. With the recent election and swearing in of the second African-American Chief Justice of the South Carolina Supreme Court since reconstruction, even arguments that minorities are underrepresented are less persuasive.[116] In the absence of a public outcry over the present judicial selection process, it is unlikely that the recommendations contained in this Note would receive immediate and formal consideration by the State of South Carolina. Nevertheless, as South Carolina's process remains uncommon and regularly criticized in comparison to states across the nation, the time will hopefully come for additional process reforms that will allow South Carolina's process of judicial selection to continue improvement and further build upon the 1996 reforms.

116. *See* Monk, *supra* note 82 (noting the election of Justice Donald Betty as the second African-American Chief Justice of the South Carolina Supreme Court since Reconstruction).