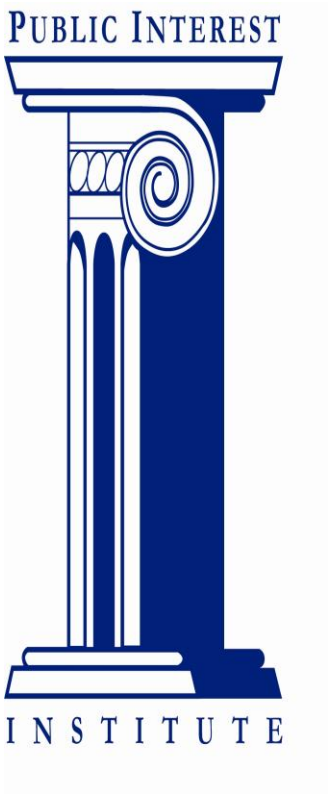

Judicial Nominating Commissions Should be Rejected:

"Merit-Selection" Process Is Poorly Conceived

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[Editor's Note: Former Michigan Chief Justice Clifford W. Taylor was asked to address Judges and lawyers in Michigan reviewing a report prepared by a Task Force headed by former United States Supreme Court Justice Sandra Day O'Connor, and funded by George Soros, to create support for selecting state judges in Michigan by use of Bar-Association-dominated commissions. This is similar to the Iowa use of the so-called "Missouri Plan" for selection of state's judges.[1] This adapted version is presented with his permission.]

I will discuss the election concept in a moment, but first let's look at the idea of "merit selection" of justices, or more accurately, commission selection. This isn't a new idea. It is used in about two dozen states, [including Iowa]. The process entails creating and appointing a commission filled with, the hope is, sound and well intentioned people who -- without axes to grind -- review the applicant credentials and select three or four nominees from whom the Governor ultimately must chose.

While the [O'Connor/Soros sponsored Task Force] report is silent about what happens if the Governor doesn't like any of the nominees, in Missouri -- the oldest and most vaunted of the nominating commission states -- the choice then is made by the chair of the merit panel, the Chief Justice. An impasse process like this is needed of course, because without one, the Governor can refuse to act until he gets his choice.

The report says these reforms are needed to counter "a perception that raw political calculation, rather than qualifications" form the basis for gubernatorial judicial appointments. The qualifications referenced concern academic excellence, practice reputation, community service, and the like, which the Task Force describes as "paper qualifications." There would also be public hearings "on the applicant's merits."

So, paper qualifications are the answer we are told. That is how the short list of nominees will be selected. But will they? Looking at paper qualifications won't get the selectors anywhere, because almost invariably all the applicants will have similar, good credentials. Bums, you see, just don't apply for these high-level posts in state judiciaries.

Further, even if diligent efforts are made to use just these merit criteria, it quickly becomes clear that it is reckless to say that because one applicant, many years ago, had a 3.5

GPA and another a 3.6 GPA in different law schools; or that, later in life, one was a Boy Scout leader and the other a Food Bank volunteer, one is "merit qualified" and the other isn't.[2]

In any case, even assuming none of these imponderable paper qualifications issues arise, commission members themselves, trying to do a good job, but having insufficient information to fairly distinguish between the applicants, can be expected to cast about — for other distinguishing characteristics beyond the barren, unhelpful statistics of a life in the law — for more attributes of the applicants.

The "more" it seems — as found in Vanderbilt University Law Professor Brian Fitzpatrick's 2009 study of the Missouri and Tennessee merit selection systems in the *Missouri Law Review*[3] — will frequently be whether and where the applicant inclines on political and social issues. This may sound like a harsh indictment of these estimable commission members, but it is inescapable. Almost all the other things they could consider, say, race, religion, or gender, to name a few, are all impermissible considerations on civil rights grounds.

What in practice can be expected is that the commission, having found no significant differences in credentials, will focus on where the applicant stands on controversial legal and social issues like tort reform, medical malpractice liability reform, sexual liberty, religious expression in the public square, pornography, and the one issue that has dominated judicial selection matters across the country since 1973 -- abortion, as well as many other similarly edgy, traditionally political issues that are increasingly coming before our courts for resolution.

The public won't know this of course, and the commissioners themselves, proud of their work, are unlikely to acknowledge they strayed this far from merit, as the public understands merit. Even the Governor, if he learns the commission has departed from merit considerations, is likely to let it pass, because to criticize the commission could be politically damaging. Further, if he challenges the commission, the default selector, whoever that may be, gets to make the appointment propelling the Governor to take the least undesirable nominee on the list.

As you can imagine, in operation, those on the commission will quickly come to understand this is really what they are doing and how they are making their decisions, even if it is not confined to merit criteria, as the commission charge directs. This will be even easier as they reassure themselves that, after all, the decision of who to nominate was made by really good people (people like them, of course), and fine nominees were sent to the Governor: that is, applicants with the majority's preferred judicial outlook.

Reformers dismiss this concern, saying that this analysis is too cynical, and anyway, there really isn't a debate about judicial philosophy in this country. Rather, the real story is that judges are just doing their best deciding hard questions with tough facts and no appellate judges, except maybe the conservative ones, have an agenda.

But when we examine how commission selection has worked in states such as Missouri and Tennessee, it is hard to deny that **commissions have been doing politics, not merit**. Examining the workings on the commissions in those states Professor Fitzpatrick found that judges nominated by these so-called "non-partisan commissions" overwhelmingly leaned Democrat.

His findings, summarized by *The Wall Street Journal* on April 18, 2009, stated that since 1995, 67 percent of Tennessee's appellate nominees voted more often in Democrat primaries, compared to 33 percent who voted more often in Republican primaries. In Missouri, "of the roughly half of the appellate nominees who made campaign contributions, some 88 percent donated to Democrats while only 12 percent donated to Republicans."

By the way, Professor Fitzpatrick's findings are consistent with other such studies. In 1969, Richard Watson and Ronald Downing studied the first 25 years of the Missouri Commission Selection System and published a report titled "The Politics of Bench and Bar: Judicial Selection under The Missouri Nonpartisan Court Plan." Its conclusions also found politics. Attorneys, when selecting the lawyer-members of the nominating commissions, favored lawyers who were protective of their own and their clients' broad socioeconomic interests and who it was anticipated would bring that perspective to selecting judicial nominees.

Now, I don't think it is a surprise that judicial selection by commission is driven by agendas, but it should not be confused with genuine merit selection as most people understand merit. Stated more directly, the politics of self-interest or by political party identification was the constant in who got selected.

Moreover, unlike the open practice of politics with other systems of selection, the **commission system does its politics underground**, escapes accountability to the people as elected selectors such as a Governor cannot, and is **subject to capture by factions** in the state such as the plaintiff's trial lawyers, unions, or even -- although it has proven unlikely -- business interests, all while trumpeting phony claims of "all we are doing is picking on merit."

Perhaps nothing more fully reinforces the truth of the Fitzpatrick Missouri data and the mess that these commissions become than to look at the 2007 controversy concerning replacement of retiring Justice Ronnie White of the Missouri Supreme Court. To those unacquainted with the real workings of the Missouri system, it surely appeared that the vacancy created an opportunity for Gov. Blunt — who incidentally campaigned on a pledge to curb a run-away judiciary — to appoint a conservative justice, committed to letting the political branches set the public policy in areas such as tort reform, workers compensation, environmental matters, and the like. Yet, the commission's list gave him the opposite: three well-credentialed, business-as-usual, "there is no problem with the Supreme Court of Missouri" candidates.

The commission was fully aware that if Blunt didn't appoint one of their three candidates, the panel's chair got to pick the justice. So, Gov. Blunt, the only person in the process who had any claim to having presented his ideas on who should serve as Justices to the people of Missouri; and, having secured a majority of their votes, was blocked in a transparently political move that ultimately compelled his selection of the least disagreeable candidate. When the cry went up that this was just politics masquerading as merit selection, the panelists denied it and scolded their critics by asserting that they were just, well, doing their best and picking on merit.

Perhaps they even believed it, and panelists in other commission selection jurisdictions, such as Tennessee and Florida, have said similar things when criticized. But, I believe, what any evaluator of any selection system has to come to grips with is the inescapable reality that **there is a great divide in this country on how powerful judges should be in the making of public**

policy. How one comes down on whether the judiciary should be muscular in remolding statutes that seem poorly drawn or conceived or deferential to the legislature's product will color any decision on the selection of judges including those made by commissions.

It is this split that explains the titanic battles of the last 25 years played out in the U.S. Senate over the confirmation of federal judges, and the fractious state Supreme Court justice campaigns of recent years. Clearly, these are not fights over credentials. They are fights over the direction of public policy and who will make it. We can take the fight out of one arena and put it in another, but it will still be the same fight. To claim to somehow convert this fundamental split over the proper judicial role in a representative democracy into a polite, almost scientific, inquiry as to whether the candidate got an A or B in Torts or volunteered enough at the United Way is an undertaking both foolish and deceptive.

I believe the sophisticated folks who argue for commission selection really know that "merit" is just an appealing ruse, and commission selection gives them the best chance to get judges on the bench who share their political and policy views. If they don't, maybe this report will help them.

Much effort has been expended by the Task Force to portray the notion of nominating commissions as an approach that is new and shiny and making converts. I believe this to be incorrect. It is rather an old idea that hasn't worked as advertised and is in full retreat. Kansas and Tennessee in the last year or so have abandoned their nominating commissions. In Arizona a ballot measure modified their nominating commissions to reduce the influence of the state Bar association. Moreover, in 2010, in Nevada, with Justice O'Connor's active involvement to assist in its passage, Question 1, to replace the state's elections system with nominating commissions, was overwhelmingly defeated.

This is not an idea whose time has come; **but an idea whose time has gone!**

If it has worked poorly, why then is the movement for commissions materializing here in Michigan, in Ohio, and in Pennsylvania simultaneously? A study by attorney Colleen Pero for the American Justice Partnership, points to George Soros and the entities he has funded who in cook-book fashion initiate the movement in various states by using carefully selected polling data, just as they have here, to create faux hysteria about the evils of electing judges. Then amidst the staged hand wringing, they follow that up with the promotion of nominating commissions to rescue us from the very evil of which they have made us aware. That is what we here in Michigan are witnessing, just as they are in Pennsylvania and Ohio.

Let's leave the nominating commissions for a moment as there are other reforms regarding judicial selection that should be discussed as well. The only judges in Michigan who are always challenged for re-election are Justices of the Supreme Court. Every now and again, a trial judge involved in personal or professional scandal is challenged, but rarely is a judge of the Court of Appeals. The point is, that absent something unusual happening, there is practically never an electoral challenge to judges on courts below the Supreme Court.

Why is this? I think it is largely because of the ballot qualification requirement. To run for an open trial court or court of appeals seat, or to challenge an incumbent on those courts, requires collecting petition signatures of registered voters. The number required varies based on

the population of the jurisdiction, but in Wayne and Oakland counties the number is about 4,000 to 6,000, and it is a lot more than that for the Court of Appeals. It is really tough to get these signatures!

Judge Tom Fitzgerald of the Court of Appeals once told me that the hardest part of his running was getting the signatures. The bottom line: of the more than 600 Michigan judges, most effectively have lifetime tenure, and the petition signature requirement along with the incumbent ballot designation, ensures that.

Now, the Task Force wants this system for Supreme Court elections. They want open, nonpartisan, statewide primaries with ballot access requiring 30,000 registered voter signatures. To be on the safe side, a candidate will have to submit about 40,000 to 50,000 signatures. This is a daunting project and no single candidate and spouse and extended family and friends could ever do it.[4]

This means that paid petition circulators will be needed. The going Michigan rate is between $3 and $10 per signature. Do the math. Just to get on the ballot will require an expenditure of between $150,000 and $500,000, and that is just the cost of the signatures, not the incidentals, which will push that figure far higher.

And this is before a single brochure, poster, or bumper-strip is printed. Who can afford this? Only the wealthy or those aligned with expansive, highly-motivated organizations that can give in-kind assistance (talk about creating beholden candidates). Most likely though, this system will mean there is no challenger -- EVER!

Thus, if just these two recommendations came into effect the so-called merit selected justice, who you will recall probably got picked for reasons having little to do with relative merit, will serve for as long as he or she wants, without opposition. Yes, as long as they want, because the age 70 limit for election or appointment, may be destined for the trash heap as well, if the Task Force gets its way.

A final point needs to be made, although perhaps it is obvious. If Michigan goes to nominating commissions, all the efforts — political or otherwise — now being expended to elect candidates to the Supreme Court, will be re-directed to capturing seats on the commission. It is unclear who will triumph, but my bet would be on the plaintiff's trial bar, as they have demonstrated great success in virtually all the commission states of which I am aware, in controlling these commissions.

The system-altering revisions that I have discussed seem poorly considered to me and perhaps to you. How did this happen? First, I think the Task Force suffered from insufficient ideological and political diversity. There were no evident opponents of the predetermined "merit selection" proposal on the Task Force and none of the Task Force readings presented the "other view." Consistent with this approach, the report itself doesn't reflect the level of support for or dissent from the Task Force recommendations. This information has been requested from Justice Kelly, but not provided.

The Task Force Honorary Chairman, former U.S. Justice Sandra Day O'Connor, would never have served (I believe) if her signature issue — nominating commissions — had been in jeopardy. Making her Chairman is akin to making the President of the NRA the Chairman of a

commission considering gun control. In both cases, absent assurances, unspoken to be sure, that the report will, so to speak, "turn out right" they just wouldn't serve.

Given all this, I think the Task Force conclusions were pre-ordained. To both these points, you might find interesting the 2010 *Wayne Law Review* article by Matthew Schneider[5] that discusses the very partisan kick-off event of the Task Force and how it was clearly -- as to nominating commissions, at least -- a locomotive coming down the tracks rather than an unbiased "look at methods of selection" as the final report of the Task Force asserts.

Further, the bona fides of the commission were compromised. The Task Force was just willed into being rather like Judy Garland and Mickey Rooney deciding in one of their 1930s movies to "let's have a show." It seems no one else was buying that we had a crisis. No organ of government — not the Governor, nor the Legislature, and certainly not the Supreme Court — created or endorsed the Task Force.

In addition, none of these government entities which, unlike Judge Ryan and Justice Kelly, can claim to have presented themselves to the people and gotten their authority to speak on issues of this sort, were allowed to appoint members, create an agenda, or control or direct this "Mickey and Judy created body" in any way.

This is deeply compromising as can be seen when one compares this with the only comparable body in the last several decades which was the Michigan Commission on the Courts in the 21st Century[6] where there was buy-in and participation by the elected branches in both defining the problem and selecting the panel members. This is no small thing and, come to think of it, may explain the lukewarm reaction this report has received.

So, let me conclude, this is a **flawed product, with a strange, not to say odd, genesis that can't bear scrutiny** and you shouldn't use your standing in your communities to support it.

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[1] [For more information on the various methods of judge selection, including the so-called "merit" or Missouri Plans, see Judicial Politics by Donald P. Racheter: BRIEF #29, volume 19, October 2012 published by Public Interest Institute, accessed on 13 December 2013 at: http://www.limitedgovernment.org/brief19-29.html.]

[2] Not to make things unduly complicated, but how does one assign merit to choosing between a Right-to-Life applicant and a Planned Parenthood applicant, or an active religious candidate and a non-believing candidate?

[3] *Missouri Law Review*, Volume 74, page 675.

[4] In fact, although the Task Force members seem unaware of this, this method of getting on the ballot is now available, but has never been utilized reflecting how really difficult it is. To put this in perspective, this is twice the number of signatures required for ballot access for Governor or U.S. Senate candidates with statewide political organizations and million–dollar campaign war chests!

[5] *Wayne Law Review*, Volume 56, page 609.

[6] <http://books.google.com/books?id=kHybAAAAMAAJ&q=inauthor:%22Michigan.+Commission+on+the+Courts+in+the+21st+Century%22&dq=inauthor:%22Michigan.+Commission+on+the+Courts+in+the+21st

+Century%22&hl=en&sa=X&ei=5BymUsUEg_urAbLqgfgG&ved=0CDoQ6AEwAAm> accessed on 9 December 2013.

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