

## IS VIRGINIA'S JUDICIAL SYSTEM TOO ELITIST? POLITICAL CULTURE, JUDICIAL APPOINTMENT, AND REFORM MEASURES

“It’s almost like, you know, trading horses. And it’s kind of like ‘Well, I’ll give you a judge this year but you give me a judge next year.’ Or ‘I’ll give you two judges for that judge.’”<sup>1</sup>—Bill Bolling, co-chair, Commission on Integrity and Public Confidence in State Government.

### INTRODUCTION

Recently, there has been increased scrutiny of Virginia’s system for selecting judges. Virginia Governor Terence McAuliffe’s recently established Commission on Integrity and Public Confidence in State Government (“Commission”) is tasked with evaluating the way Virginia chooses its judges and recommending reforms to this highly politicized process.<sup>2</sup>

Until a few years ago, Virginia had a good record for integrity in its bureaucracy.<sup>3</sup> Yet in 2012, despite Virginia officials’ perception of themselves as upright and ethical, Virginia received a grade of F and ranked forty-seventh out of the fifty states in the State Integrity Investigation.<sup>4</sup> By 2015, this grade had improved to a D overall, with a C- in the category of “Judicial Accountability.”<sup>5</sup> The state’s record has

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<sup>1</sup> Anne Marie Morgan, *Selecting Virginia’s Judiciary*, WVTF/RADIO IQ (July 28, 2015), <http://wvtf.org/post/selecting-virginias-judiciary#stream/0>. Mr. Bolling was speaking about how Virginia Senators choose candidates for the judiciary.

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

<sup>3</sup> The Government Performance Project awarded Virginia “A-” in 2008 based on Virginia’s score in a range of categories including money management, infrastructure, and information access. Katherine Barrett & Richard Greene, *Grading the States: The Mandate to Measure*, GOVERNING MAGAZINE, March 2008, at 90, [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2008/gradingthestates2008pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2008/gradingthestates2008pdf.pdf).

<sup>4</sup> Laura LaFay, *Virginia Gets F Grade in 2012 State Integrity Investigation*, CTR. FOR PUB. INTEGRITY (Mar. 19, 2012, 12:01 AM), <http://www.publicintegrity.org/2012/03/19/18223/virginia-gets-f-grade-2012-state-integrity-investigation> (quoting then-governor McDonnell as saying, “Virginia has long been a state marked by honest, transparent and ethical governing by both parties,” and House Speaker Bill Howell maintaining that “[n]either ethical lapses nor public corruption are commonplace, let alone tolerated in Virginia,” which has a “reputation for good government.”).

<sup>5</sup> Nancy Madsen, *Virginia Gets D Grade in 2015 State Integrity Investigation: Modest Progress Fueled by Scandal*, CTR. FOR PUB. INTEGRITY (Nov. 9, 2015, 12:01 AM), <http://www.publicintegrity.org/2015/11/09/18547/virginia-gets-d-grade-2015-state-integrity-investigation>. In this category, the Center scrutinizes various aspects of a state’s political infrastructure, such as its judicial processes, oversight measures, financial disclosure requirements, and disciplinary measures, to answer the questions, (1) “Can members of the judiciary be held accountable for their actions?”, (2) “Is the process for selecting state-level judges transparent and accountable?”, (3) “Are there regulations governing conflicts of interest for the state-level judiciary?”, (4) “Are the regulations governing conflicts of

been further marred by political infighting over recent recess appointments to Virginia's judiciary.<sup>6</sup> Nationally, concern and criticism over politics seeping into decisions from the bench have sparked a growing distrust and general dissatisfaction with state judges.<sup>7</sup>

For Virginia, it is not clear where the problem lies: whether in the method of judicial selection or the quality of the judges themselves.<sup>8</sup> Virginia is one of only two states in the union which appoints its judges at all court levels—trial, appellate, and Supreme Court<sup>9</sup>—and the only state in which the selection of trial and appellate judges is left solely to the legislature.<sup>10</sup> Thus, any fundamental reforms to Virginia's appointment method would significantly change the nature of Virginia's judiciary and must be carefully considered. A system that has been in place and worked since Virginia's founding<sup>11</sup> should not be changed on an initiative driven in large part by public opinion.

This Note argues that Virginia's judicial system is exceptional, and provides political culture as a lens for seeing the value in her method and for scrutinizing potential reforms. The structure of Virginia's system is uniquely and inextricably tied to the political culture of the state and should not be altered on a whim. The appointment system itself is viable. While greater transparency is warranted in how the legislature appoints judges, an overhaul of the judicial selection process is not needed.

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interest for the state-level judiciary effective?," and (5) "Can citizens access the asset disclosure records of members of the state-level judiciary?" *Id.*

<sup>6</sup> See *infra* Part II.C.

<sup>7</sup> See Memorandum from GBA Strategies on Analysis of National Survey of Registered Voters to National Center for State Courts (Dec. 4, 2014), <http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/2014-State-of-State-Courts-Survey-12042014.ashx> (stating that based on its opinion survey, "public doubts about political influence and bias represent the greatest threat to public confidence in the courts."); John Oliver, *Elected Judges: Last Week Tonight with John Oliver*, YOUTUBE (Feb. 23, 2015), <https://www.youtube.com/watch?v=poL71-Uk3I8> (satirizing popular elections of judges as inherently incompatible with the impartiality judges are expected to possess, with more than 4.9 million views as of November, 2016).

<sup>8</sup> See, e.g., *Commission Reviewing Virginia's Judicial Selection Process*, WVIR (July 27, 2015, 3:20 PM), <http://www.nbc29.com/story/29642203/commission-reviewing-virginias-judicial-selection-process> (suggesting a switch to an election-based appointment system or a nominating commission as other states have); Editorial, *A Better Way to Pick Judges in Virginia*, VIRGINIAN PILOT, Mar. 25, 2015, <http://hamptonroads.com/2015/03/better-way-pick-judges-virginia> (advocating for a nominating commission system as a "way for the most qualified candidates to rise").

<sup>9</sup> KEVIN B. SMITH & ALAN GREENBLATT, *GOVERNING STATES AND LOCALITIES* 288 (4th ed. 2014).

<sup>10</sup> Alex B. Long, *An Historical Perspective on Judicial Selection Methods in Virginia and West Virginia*, 18 J. L. & POL. 691, 695–96 (2002).

<sup>11</sup> With the exception of a brief period where Virginia switched to electing its judges, Virginia has used the appointment method, *infra* Part I.C.

Part I of this Note explains the importance of political culture in understanding state judicial selection methods and describes Virginia's traditionalistic culture in the context of both Virginia's historical and modern judicial systems. Part II explores and analyzes the factors leading up to and surrounding current initiatives to change Virginia's way of selecting judges, in part by briefly explaining how other states approach judicial selection. Part III critiques the reforms proposed to date and introduces more effective means of promoting transparency in the legislature's selection process to ameliorate the public's recent lack of confidence in the process.

I. THE HISTORY AND MECHANICS OF VIRGINIA'S JUDICIAL SYSTEM:  
ELITIST RULE

A. *A Primer on Political Culture*

The capstone in the study of political culture is Daniel Elazar's *American Federalism: A View from the States*, which explained diversity among the states' different forms of governance as mainly attributable to each state's political culture.<sup>12</sup> The different political cultures, according to Elazar, are a byproduct of how the United States was settled and the different religious, sociological, and ethnic backgrounds that have developed and characterized the various regions of the United States over time.<sup>13</sup> He classified them into three main types of culture: moralistic, individualistic, and traditionalistic.<sup>14</sup> It would be simplistic to assume these labels can comprehensively explain every intricacy of a state's various sociological and political features. States are often an amalgamation of more than one of these labels.<sup>15</sup> Instead, the broad categories go a long way toward understanding state function on a macro level.<sup>16</sup>

For example, according to Elazar, the Southern states, including Virginia, are predominantly traditionalistic.<sup>17</sup> Traditionalistic political cultures view politics as "the province of elites, something that average citizens should not concern themselves with."<sup>18</sup> Traditionalistic states are conservative, focused on maintaining the status quo.<sup>19</sup> The government's role, then, is seen as primarily to maintain the existing

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<sup>12</sup> DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 112 (3d ed. 1984).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 115.

<sup>15</sup> *Id.* at 112 ("Patterns of political culture frequently overlap several political systems, and two or more political cultures may coexist within the same political system.").

<sup>16</sup> SMITH & GREENBLATT, *supra* note 9, at 12–13.

<sup>17</sup> ELAZAR, *supra* note 12, at 135–36.

<sup>18</sup> SMITH & GREENBLATT, *supra* note 9, at 13.

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

social order.<sup>20</sup> Due to the mainly agrarian culture these states inherited from European settlers implanting a variation on feudal order,<sup>21</sup> Virginia is characterized in American history by its plantation economy and participation in slavery.<sup>22</sup> The state's traditionalistic impulse was observed as far back as the middle of the nineteenth century.<sup>23</sup> This characterization can help explain Virginia's judiciary system (an aspect of political culture's influence which Elazar hinted at without elaboration).<sup>24</sup> As the next section shows, in Virginia this impulse began when she was only a colony and has reverberated in her history since.<sup>25</sup> Her method of judicial selection came from the view that the judiciary, as a sector of the elite, should be raised above, not subject to, popular opinion.

### *B. A Brief History of Virginia's Legal System*

Political culture affects the way states choose their judges and how citizens perceive the judicial selection process.<sup>26</sup> This insight is critical for understanding how to implement reforms that address not only the black letter law, but also the political culture involved in judicial selection.<sup>27</sup> Because political culture begins at a state's inception,<sup>28</sup> it is necessary to examine a state's early history to best understand its political culture.

Virginia was the first permanent English settlement of the New World<sup>29</sup> and began as a business enterprise.<sup>30</sup> The Virginia Company was

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<sup>20</sup> *Id.* Compare and contrast to the moralistic culture's view of politics as "the means used to achieve a good and just society . . . for addressing social problems" and the individualistic culture's view that government is "an extension of the marketplace, something in which people participate for individual reasons and to achieve individual goals." *Id.* at 10–11.

<sup>21</sup> *Id.* at 13.

<sup>22</sup> Joel A. Lieske, *Regional Subcultures of the United States*, 55 J. POL. 888, 902 (1993).

<sup>23</sup> SMITH & GREENBLATT, *supra* note 9, at 13 (quoting Alexis de Tocqueville, writing in regards to the States, noting that "as one goes farther south . . . the population does not exercise such a direct influence on affairs. . . . The power of the elected officials is comparatively greater and that of the voter less." ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 292 (2000)).

<sup>24</sup> ELAZAR, *supra* note 12, at 113–14. Elazar's examination only briefly touched on how political culture may influence a state's judicial system.

<sup>25</sup> *Id.* at 118, 136.

<sup>26</sup> See Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 CAP. U.L. REV. 523, 525 (2002) (discussing the role politics plays with perceptions of lack of judicial independence in states that use the judicial election system).

<sup>27</sup> *Id.*

<sup>28</sup> See ELAZAR, *supra* note 12 and accompanying text (stating that Elazar explained diversity as attributable to a state's political culture).

<sup>29</sup> Long, *supra* note 10, at 715.

tasked by the British Crown with turning a profit from coveted resources in the new world.<sup>31</sup> Cultivation of profit crops, such as tobacco, solidified Virginia's early prominence as an agrarian asset to the English economy.<sup>32</sup> As Virginia grew, she maintained loyalty to the Crown and a social structure similar to that of Britain which emphasized landed gentry and a view of politics as the province of the upper echelon of society.<sup>33</sup> From this viewpoint, it seems natural that Virginia's judicial structure reflects the same selectivist tendencies. As Alex Long describes it, "Virginia, steeped in history and tradition, has, with one brief interruption, always had one of the most conservative methods of selecting its judges."<sup>34</sup> That method is the appointment method.<sup>35</sup>

The appointment method, though selective, has been observed to generally produce more reputable judges than other selection methods.<sup>36</sup> From its colonial beginnings, the legislature was the traditional source of power in Virginia,<sup>37</sup> which explains why it alone was given the task of appointing judges. Members of the bench were to be pillars of society embodying its fundamental values, and, as such, necessarily cut from a cloth different from and superior to the average citizen.<sup>38</sup> Post-Revolutionary War, Virginia largely kept its "deeply rooted" colonial structure of government and made little changes to it until the late nineteenth century.<sup>39</sup> As part of that deeply rooted tradition, Virginia's 1776 Constitution gave vague parameters for selecting judges and mainly left the task to the legislature without much specification.<sup>40</sup>

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<sup>30</sup> CHARLES M. ANDREWS, *THE COLONIAL BACKGROUND OF THE AMERICAN REVOLUTION: FOUR ESSAYS IN AMERICAN COLONIAL HISTORY* 3 (rev. ed. 1931).

<sup>31</sup> *Id.* at 3, 8–9.

<sup>32</sup> *Id.* at 7–8.

<sup>33</sup> Long, *supra* note 10, at 724–25 (asserting that the House of Burgesses, comprised of planters and slaveholders of English descent, enjoyed the highest concentration of political power and ruled a yielding lower class).

<sup>34</sup> *Id.* at 701.

<sup>35</sup> See *infra* Part I.D. for a description of Virginia's appointment method structure.

<sup>36</sup> Long, *supra* note 10, at 707 (showing that appointed federal judges "have generally, in most parts of the country, a somewhat better reputation with the bar for ability than the state judges. Probably the greatest state courts have been in states which appointed their judges." (quoting Learned Hand, *The Elective and Appointive Methods of Selection of Judges*, 3 PROC. ACAD. POL. SCI. N.Y. 82, 83 (1913))).

<sup>37</sup> *Id.* at 715.

<sup>38</sup> See Michael J. Rozbicki, *The Curse of Provincialism: Negative Perceptions of Colonial American Plantation Gentry*, 63 J. S. HIST. 727, 730, 740 (1997) (discussing Colonial Virginia's strong desire to emulate British gentility, including British notions that judges and law practitioners must be highborn, honorable, exceptionally intelligent, and above the mainstream).

<sup>39</sup> Long, *supra* note 10, at 715.

<sup>40</sup> *Id.* at 715–16.

Thus, Virginia is decidedly slow in warming up to political change, especially the kind motivated by popular opinion or emotion.<sup>41</sup> A history of fixed government structure, strong imprint from the British tradition, and powerful legislature with little oversight in judicial selection prove Virginia to be a state of largely traditionalistic political culture. The advantage of Virginia's system is that this culture has helped maintain its stable judiciary even in the wake of the modern judicial selection theories which have swept through other states with less than ideal results.<sup>42</sup>

*C. The Modern Judicial Reform Movement and Virginia's Judicial System*

A wave of reform washed over notions of proper judicial selection in the late nineteenth century.<sup>43</sup> This critical period is perhaps the best example of how entrenched Virginia's political culture is, and thus is crucial to understanding Virginia's present system.

Coming out of the Jacksonian era, there was widespread discontent in the states over the appointment method, the prevailing system of the day, which was seen as little more than a spoils system.<sup>44</sup> A national pivot towards majoritarianism and emphasis on involving the average citizen in the cloistered political process led to a wave of states, starting with Mississippi, switching to an electoral judicial system.<sup>45</sup> During this period, West Virginia broke away from Virginia.<sup>46</sup> The break was due in large part to unrest in the area of what would become West Virginia over demands for judicial reform, spurred by irreconcilable differences between the demographics and economies of the two regions.<sup>47</sup>

Virginia's first constitutional convention in 1829–1830 was characterized by an “aristocracy versus democracy” conflict over constitutional principles of governmental representation.<sup>48</sup> Concerns of

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<sup>41</sup> See Wythe W. Holt, Jr., *Constitutional Revision in Virginia, 1902 and 1928: Some Lessons on Roadblocks to Institutional Reform*, 54 VA. L. REV. 903, 903 (1968) (“[I]n Virginia, political events occur quietly. . . . The organization (or the machine, as it dislikes to be called) has not believed in change for a variety of reasons, and it has allowed change only when politically inexpedient to do otherwise.”).

<sup>42</sup> See *infra* notes 107–12.

<sup>43</sup> Long, *supra* note 10, at 748.

<sup>44</sup> *Id.* at 714.

<sup>45</sup> *Id.* at 718–19.

<sup>46</sup> Vasani Kesavan & Michael Stokes Paulsen, *Is West Virginia Constitutional?*, 90 CALIF. L. REV. 291, 300–01 (2002).

<sup>47</sup> Long, *supra* note 10, at 691, 725–26 (noting that what became West Virginia was largely inhabited by those of non-English descent with a manufacturing economy, versus east Virginia's mainly English-descended agrarian make up); see also Kesavan, *supra* note 46, at 297–98 (noting that one-fourth of Virginia's free population inhabited the soon-to-be West Virginia, and that the landed “tidewater aristocrats” of eastern Virginia held a monopoly on state politics and the franchise).

<sup>48</sup> Long, *supra* note 10, at 730–31.

Virginia's western-most inhabitants over the power of the legislature and needed reforms to the judiciary featured prominently, but ultimately went largely unresolved.<sup>49</sup> At her second constitutional convention of 1850–1851, fomenting differences between the political cultures of western and eastern Virginia reached a breaking point with reformers finally succeeding in changing Virginia's judicial system to popular election instead of legislative appointment.<sup>50</sup> The bench was democratized, meaning judges at all court levels were to be elected.<sup>51</sup> This drastic change reflected a national trend that had gained footing in a couple of states which had already switched to popular election of their judges.<sup>52</sup>

Opponents of this change voiced concerns that are echoed today: that elected judges will be more concerned with obtaining reelection and more reluctant to leave their practices to take on the risk of campaigning for a seat on the bench.<sup>53</sup> However, true to Virginia's adherence to tradition, this change did not last long. The Civil War split Virginia along its cultural fault lines, breaking off West Virginia and allowing Virginia proper to return to its pre-1850 structure of judicial appointment rather than election.<sup>54</sup>

This timeline of constitutional changes demonstrates the interplay of political culture and theories on judicial selection. Two important points emerge. One is that Virginia's brief experiment with an elective judicial system was mainly attributable to the cultural, economic, and political differences brought on by what would become the more progressive and democratic West Virginia political culture. After this break away, Virginia's traditionalistic political impulses were so strong that in the Constitutional Convention of 1867 she reverted to the appointment system in place since her inception with little explanation for the switch given.<sup>55</sup> Perhaps it was presumed that none was needed.

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<sup>49</sup> *Id.* at 742.

<sup>50</sup> *Id.* at 744; see also JOHN DINAN, *THE VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE* 7 (2006) (stating that Virginia held a Constitutional Convention in 1850–1851).

<sup>51</sup> Long, *supra* note 10, at 748.

<sup>52</sup> *Id.* at 744.

<sup>53</sup> *Id.*; see also *Republican Party v. White*, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring) (in finding a state clause prohibiting judicial election candidates from voicing their personal views on legal and political issues to violate the First Amendment, the court said "[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."); Marie A. Failing, *Can a Good Judge Be a Good Politician? Judicial Elections from a Virtue Ethics Approach*, 70 MO. L. REV. 433, 465–66 (2005) (discussing concerns over partiality, partisanship, and free speech in popular election of judges).

<sup>54</sup> Long, *supra* note 10, at 749–51.

<sup>55</sup> *Id.* at 752.

Second, Virginia, ever the traditionalist, has made no significant effort to reconsider anything other than the appointment system since her brief trial with it in the nineteenth century, until now.<sup>56</sup>

*D. Virginia's Constitutional Framework for the Judiciary*

A basic overview of Virginia's constitutional framework for appointing judges is essential for understanding the proposed reforms to its judicial appointment system. Article VI, Section 7 provides that judges be chosen by a majority vote of the General Assembly.<sup>57</sup> When the General Assembly is not in session, the Governor may fill vacancies in the court until thirty days after the General Assembly reconvenes.<sup>58</sup> Article VI, Section 10 establishes the Judicial Inquiry and Review Commission ("JIRC"), the main screening element for the appointment process.<sup>59</sup> Proceedings before the JIRC "may be confidential as provided by the General Assembly in general law."<sup>60</sup>

During the selection process, individual legislators take informal recommendations from local bar associations,<sup>61</sup> and personal or business contacts.<sup>62</sup> These individual legislators then present their nominations to the General Assembly for election.<sup>63</sup> Once the nominations are made, the Virginia State Bar Judicial Candidate Evaluation Committee ("JCEC") reviews candidates—but only for the Supreme Court, Court of Appeals, State Corporation Commission, Federal District Court, and Fourth Circuit Court of Appeals.<sup>64</sup> The JCEC recommends candidates based on whether their credentials and experience render them not qualified, qualified, or highly qualified.<sup>65</sup>

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<sup>56</sup> *Id.* at 751, 753; Memorandum from GBA Strategies, *supra* note 7 (stating that there is great public doubt throughout the nation about political influence and bias).

<sup>57</sup> VA. CONST. art. VI, § 7.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at § 10.

<sup>60</sup> *Id.* (emphasis added).

<sup>61</sup> J. Amy Dillard, *Separate and Obedient: The Judicial Qualification Missing from the Job Description*, 38 CUMB. L. REV. 1, 5 (2007).

<sup>62</sup> See *Commission Reviewing Virginia's Judicial Selection Process*, *supra* note 8 (claiming that legislators give appointments as awards to "friends and allies").

<sup>63</sup> *Judicial Selection Report*, CONN. GEN. ASSEMBLY OFFICE OF PROGRAM REVIEW & INVESTIGATIONS, Chap. IV (2000), <https://www.cga.ct.gov/pri/archives/2000jsreportchap4.htm> (last visited Sept. 2, 2016).

<sup>64</sup> *Nominations Committee Name Change, Policies Approved*, VA. STATE BAR, <http://www.vsb.org/site/news/preview/nominations-committee-changes-2012> (last visited Sept. 2, 2016).

<sup>65</sup> *Id.* The JCEC describes the credential evaluation process thus:

1. Investigation and Evaluation Process:

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Following investigation and personal interviews of the candidates, the Committee shall vote on the qualifications of all candidates. Any candidate who



A comparison to the process for vetting and nominating Virginia's federal judges is appropriate. While Virginia legislators also put forward nominations for federal court judges, their nominations go through evaluation first by the President, and then for interview by the Senate Judiciary Committee, and, finally, the Senate votes on their confirmation to the bench.<sup>66</sup> Sometimes recommendations come from members of Congress.<sup>67</sup> Because federal judges in Virginia must pass a more rigorous confirmation process through federal channels, their appointment is not subject to the same concerns about "horse trading" as Virginia's state judges.

For appointing state judges, there is no requirement, constitutional or otherwise, for the legislature to keep a record of the vetting process.<sup>68</sup> Legislators question judicial candidates in closed sessions, providing no transcripts and maintaining no legislative history or record of the proceedings.<sup>69</sup> The closed-door nature of these interviews as noted by the media casts doubt on the impartiality of the process.<sup>70</sup> Thus, there are distinct advantages and drawbacks to Virginia's legislative appointment

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fails to receive an affirmative vote from a simple majority of those voting shall not be reported by the Committee. All candidates who receive an affirmative vote from a simple majority of those voting shall be deemed and reported as "Qualified." The Committee shall thereafter conduct a second vote to determine, by simple majority of those voting, whether any of the candidates deemed qualified possesses a level of qualification and distinction sufficient to merit the designation "Highly Qualified."

At the conclusion of the Committee's deliberations and voting, the Committee shall prepare an executive summary of the Committee's reasons for its actions with respect to each candidate being designated as either "Qualified" or "Highly Qualified." The vote count for each candidate's evaluation of "Qualified" or "Highly Qualified" shall be included in the executive summary of each candidate.

*Id.*

<sup>66</sup> *Judicial Selection in the States: Virginia*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/judicial\\_selection/index.cfm?state=VA](http://www.judicialselection.us/judicial_selection/index.cfm?state=VA) (last visited Sept. 21, 2016).

<sup>67</sup> *FAQs: Federal Judges*, U.S. COURTS, <http://www.uscourts.gov/faqs-federal-judges> (last visited Sept. 2, 2016).

<sup>68</sup> Dillard, *supra* note 61, at 2.

<sup>69</sup> *Id.* at 3.

<sup>70</sup> See LaToya Gray, *Virginia's Judicial Selection Process*, 9 J. AM. SOC'Y LEGIS. CLERKS & SECRETARIES 2, 17 (2003), <http://www.ncsl.org/print/aslcs/jrnFall03.pdf> (noting that, "up until the 1980s, the Democrat majority in the General Assembly of Virginia held private meetings to discuss who would be appointed or re-appointed to judicial offices. The fact the meetings were not open to the public implies unfairness in Virginia's judicial selection process").

system.<sup>71</sup> It seems that only with recent events have these drawbacks been subject to increasingly critical public debate.

Most critique, if any, of Virginia's judges occurs after judges take the bench, through the constitutionally provided impeachment process.<sup>72</sup> Article VI, Section 10 provides for the creation of the JIRC, "consisting of members of the judiciary, the bar, and the public and vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge."<sup>73</sup> The JIRC begins the impeachment process by filing a complaint with the Virginia Supreme Court.<sup>74</sup> If the Court finds the judge disabled, the judge shall be retired.<sup>75</sup> If the Court finds sufficient evidence of misconduct or other factors prejudicial to a judge's ability to carry out his or her duties, the Court "shall censure him or shall remove him from office."<sup>76</sup> However, as with the JCEC's oversight of judges appointed to courts of record,<sup>77</sup> this provision applies only to courts of record and the State Corporation Commission, leaving it up to the legislature to provide similar provisions by law for the general district and trial level courts.<sup>78</sup> To date, the legislature has made no such provisions.<sup>79</sup>

## II. WHY ARE REFORMS BEING CONSIDERED?

### A. *Reasons for Calls for Reform*

Several factors are used to support recent calls for reform.<sup>80</sup> One is likely the fact that impeachment of judges has been rare in Virginia's history.<sup>81</sup> Compare this with West Virginia, whose electoral system has come into question as a consequence of recent judicial corruption

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<sup>71</sup> Dillard, *supra* note 61, at 4 (noting that Virginia's unique system provides a way of overcoming the problem of voter apathy associated with electoral processes, while at the same time creating a problem with its lack of transparency in the appointment process).

<sup>72</sup> *See infra*, Part II.A.

<sup>73</sup> VA. CONST. art. VI, § 10.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *See supra* note 64 and accompanying text.

<sup>78</sup> *Judicial Elections*, VA. GEN. ASSEMBLY, <http://viriniageneralassembly.gov/viriniageneralassembly.php?secid=20&activesec=2#!hb=1&mainContentTabs=4&content=4,includes/contentTemplate.php%3Ftid%3D52%26ctype%3Db%26cid%3D93> (last visited Oct. 26, 2016).

<sup>79</sup> *Id.*

<sup>80</sup> *See supra* notes 1–7 and accompanying text.

<sup>81</sup> No Virginia Supreme Court Justice has ever been impeached, and there are only two instances of impeachment proceedings against lower court judges, in 1903 and 1908. Jeffrey D. McMahan, Jr., Comment, *Guarding the Guardians: Judges' Rights and Virginia's Judicial Inquiry and Review Commission*, 43 U. RICH. L. REV. 473, 475–76 (2008).

issues.<sup>82</sup> Those critical of Virginia's judicial appointment process may view this fact as evidence that her judges are largely insulated from censure on the bench by protection through the political interests which got them to the bench. Jeffrey McMahan claims that "[either] Virginia judges are some of the most elite in the nation and strictly adhere to the judicial canons, or impeachment 'is politically and procedurally cumbersome.'"<sup>83</sup> McMahan's analysis suggests the latter, and presents options to improve Virginia's impeachment process.<sup>84</sup>

However, McMahan's dichotomy may not be valid. Impeachment proceedings may very well be cumbersome, but this does not necessarily indicate that Virginia's judges are not good. No judge is perfect—not even Virginia's judges. What is missing is the ability to ascertain their quality *before* impeachment becomes necessary. Hence, the suggestion in this Note is that a more efficient option is to open the curtains on the vetting process itself to better understand the quality and caliber of judges when they are selected, rather than waiting until they err on the bench to reevaluate that quality and caliber through impeachment. Therefore, a scant record of impeachments of Virginia's judges is not the strongest support for undertaking reforms to the judicial appointment system.

Another suggestion offered to support calls for reforms is that Virginia's political culture is changing; therefore, her method for selecting judges must also change.<sup>85</sup> It is true that Virginia has gradually shifted in recent decades from a predominantly conservative political climate to one more mixed with progressive and liberal-leaning demographics.<sup>86</sup> Traditionally considered a "red state," Virginia was unexpectedly considered a swing state in the last two presidential elections, signaling change in the political makeup of her voters.<sup>87</sup>

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<sup>82</sup> *E.g.*, *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 868 (2009) (holding that a state's failure to disqualify a judge who refused to recuse himself after winning election to the bench on three million dollars in campaign contributions from Massey—in the midst of Massey's appeal from a \$50 million trial court verdict—violated the Due Process Clause).

<sup>83</sup> McMahan, *supra* note 81, at 476 (quoting W. Hamilton Bryson, *Judicial Independence in Virginia*, 38 U. RICH. L. REV. 705, 715 (2004)).

<sup>84</sup> *See generally, id.* (stating that the passage of House Bill 475 in 1942, which granted the Virginia Supreme Court the power to determine whether a judge is competent to remain in office, is an example of an effort by the Virginia legislature to circumvent the impeachment process).

<sup>85</sup> *Id.* at 476.

<sup>86</sup> Scott Horsley, *Why New Swing State of Virginia May Determine Presidency*, NPR (July 13, 2012, 5:02 PM), <http://www.npr.org/sections/itsallpolitics/2012/07/13/156741555/why-new-swing-state-of-virginia-may-determine-presidency> (quoting one analyst as stating that with minorities comprising an increasing percentage of Virginia's traditionally white working class population, "[t]his is not your father's Virginia.").

<sup>87</sup> *See The Incomer Effect*, ECONOMIST (Sep. 29, 2012), <http://www.economist.com/node/21563733> (asserting that the change in Virginia's demography has diluted the

This trend might seem to echo the cultural divisions that precipitated Virginia's constitutional conventions of the late nineteenth century.<sup>88</sup> A similar process has been observed in other states, where changes in political culture precipitated significant changes to how judges were selected.<sup>89</sup> However, such changes have been gradual and markedly recent, and there is no evidence that Virginia's current constitutional structure cannot accommodate this changing makeup without fundamental reforms to how she selects her judges.<sup>90</sup> A likelier reason is public perception that Virginia's judicial selection is simply not democratic enough, compared to other states' methods.<sup>91</sup>

*B. The Grass is Always Greener: Judicial Selection Methods in Other States and their Influence on Calls for Reform*

Virginia has maintained the same judicial system since the late nineteenth century,<sup>92</sup> even while other states have implemented considerable reforms to their judicial systems.<sup>93</sup> Knowing that other systems exist and curiosity about how they would work in Virginia are part of the call for reforms.<sup>94</sup> However, just because Virginia's system has resisted change when other states have embraced it does not necessarily imply that her system is defunct.

There are several methods in use among all the states. The majority, twenty-two states, uses a method in which independent commissions make recommendations for gubernatorial appointment.<sup>95</sup> Four states use pure gubernatorial appointment.<sup>96</sup> Eight use partisan elections, and fourteen use non-partisan elections.<sup>97</sup> Only two, Virginia

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traditionally conservative political culture, which now "lives on only in the state's southern and western reaches.").

<sup>88</sup> See *supra* Part I.

<sup>89</sup> Meryl J. Chertoff et al., *Federalist Society Panel Discussion: Judicial Selection, Federal and State*, 32 AM. J. TRIAL ADVOC. 453, 464 (2009) (stating that the politics of the period affect the selection arrangements in individual states).

<sup>90</sup> *Id.*

<sup>91</sup> While Tennessee experienced an overhaul in its judicial selection process a mere two years ago, change had taken place for the majority of other states over the course of some seventy years in the nineteenth century. *Id.* at 454, 464.

<sup>92</sup> Gray, *supra* note 70, at 18.

<sup>93</sup> See, e.g., *infra* notes 108, 150–54.

<sup>94</sup> *A Better Way to Pick Judges in Virginia*, *supra* note 8 (claiming that "a better method exists" and referencing the elective method in North Carolina and the merit selection processes of Utah, Rhode Island, and Tennessee).

<sup>95</sup> *Selection & Retention of State Judges: Methods from Across the Country*, INST. FOR ADVANCEMENT AM. LEGAL SYS., 3 (Sep. 18, 2015), [http://iaals.du.edu/sites/default/files/documents/publications/selection\\_and\\_retention\\_of\\_state\\_judges\\_charts.pdf](http://iaals.du.edu/sites/default/files/documents/publications/selection_and_retention_of_state_judges_charts.pdf).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

and South Carolina, use “legislative election” to appoint their judges.<sup>98</sup> Such diversity among approaches is a reflection of the variety of political culture among all states.

There are potential problems with each type of selection method, and many of them stem from a clash between the desire to involve popular opinion in choosing judges and the need to maintain a stable and independent judiciary.<sup>99</sup> For example, judicial elections, whether partisan or non-partisan, carry the same risks of partisanship, pandering, and public apathy as any campaign for public office.<sup>100</sup> The gubernatorial appointment and Senate confirmation method, while more objective and less partisan than the election method, often excludes potential nominees who do not have the necessary connections to political parties to be considered, thus narrowing the pool of talent available for the bench.<sup>101</sup> Alternatively, the merit-based method is gaining traction in academia, but will require significant constitutional restructuring that will be difficult to achieve in some states currently relying on the election method.<sup>102</sup>

Moreover, experience has shown that sweeping constitutional restructuring in the interest of improving judicial selection does not always lead to the desired result. For example, Tennessee amended its constitution to switch from a merit-based appointment system that had been in place with success for several decades back to one similar to the state's eighteenth century model, where the legislature primarily controlled judicial selection.<sup>103</sup> This switch was instigated by questionable political initiatives to make the judiciary more amenable to

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<sup>98</sup> *Id.* Note that both these states have traditionalistic political cultures. SMITH & GREENBLATT, *supra* note 9, at 13.

<sup>99</sup> Roger Handberg, *Judicial Accountability and Independence: Balancing Incompatibles*, 49 U. MIAMI L. REV. 127, 129 (1994) (explaining that the competing values of judicial independence and judicial accountability drive public debate over methods of judicial selection).

<sup>100</sup> Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J. L. & PUB. POL'Y 273, 277–78, 282–83, 290–91 (2002) (identifying problems with the popular election of judges including special interest groups and campaign contributions eroding judicial impartiality, qualified jurists being discouraged from entering the campaign race, and the public's inability to make an informed decision due to lack of information or interest).

<sup>101</sup> *Id.* at 305.

<sup>102</sup> *Id.* at 307–08.

<sup>103</sup> Penny J. White, *If It Ain't Broke, Break It: How the Tennessee General Assembly Dismantled and Destroyed Tennessee's Uniquely Excellent Judicial System*, 10 TEN. J. L. & POL'Y 329, 334–35, 338–39, 345, 354–55 (2015). It is worth noting that the merit system retained judges through popular election, giving voters the last say in evaluation of judicial performance. The proposed changes significantly altered this electoral aspect of the system.

partisan interests.<sup>104</sup> Discontent with this new system came in part from Tennesseans' closely-held views that the judiciary should be beholden to the public more than to another branch of the government.<sup>105</sup> The switch was viewed as a purely political move that betrayed public trust in the judiciary.<sup>106</sup> In other words, the switch failed partly due to Tennessee's political culture, which is traditionalistic like Virginia and believes in maintaining the existing social order and undertaking change gradually and incrementally.<sup>107</sup>

Debate over the merits of different judicial selection processes is strong and ongoing.<sup>108</sup> There is no consensus on the overall best method; theory about judicial selection methods in state systems essentially views it as a "philosophical struggle" plagued by politicization of the process—no matter the method—which is unlikely to change.<sup>109</sup> Given that judicial selection is closely tied to the prevailing political culture in a state, this conclusion seems palpable.<sup>110</sup>

Yet, it is worth noting that the appointment process is not without considerable support in the debate.<sup>111</sup> One point in its favor is that federal and Supreme Court judges are selected using a form of judicial appointment, rather than an election or merit-based system.<sup>112</sup> Another is that the appointment method avoids some of the pitfalls that come with other methods, like campaign financing, lack of public interest in the judicial selection process, involvement of special interest groups, and overall lack of a robustly independent judiciary.<sup>113</sup> According to Martin Scott Driggers, Jr., "[t]he obvious advantage of an appointive system is the insulation provided to the judiciary. Judges are not directly subject to the swaying tide of public opinion. . . . [S]tate appointment procedures hold judges accountable through some limit on their terms of office and

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<sup>104</sup> *Id.* at 360 ("[T]he General Assembly's newly stated purpose . . . underlying judicial selection was not to totally remove judges from politics, but only to '[b]etter' insulate judges, to minimize, but not eliminate political activity, and to make the courts only 'less political.'" (quoting 2009 Tenn. Pub. Acts, ch. 517)).

<sup>105</sup> *Id.* at 383–84.

<sup>106</sup> *Id.* at 383.

<sup>107</sup> SMITH & GREENBLATT, *supra* note 9, at 13.

<sup>108</sup> See Michael R. Dimino, Sr., *The Worst Way of Selecting Judges – Except All the Others that Have Been Tried*, 32 N. KY. L. REV. 267, 267–68 (2005) (arguing that the election process is the best way to select judges); see also Jona Goldschmidt, *The Relationship Between Method of Judicial Selection and Judicial Misconduct*, 18 WIDENER L. J. 455, 456 (2009) (noting that there is still debate over which selection method produces better quality judiciary).

<sup>109</sup> Chertoff et al., *supra* note 89, at 472–73.

<sup>110</sup> *Id.* at 478.

<sup>111</sup> Behrens & Silverman, *supra* note 100, at 276.

<sup>112</sup> *Id.* at 300.

<sup>113</sup> *Id.* at 274–76, 290–91.

through the election of the appointing authority.”<sup>114</sup> The appointment method seems to provide for a more integral and objective judiciary than the election method.<sup>115</sup>

Thus, because there is no perfect system, the appointment method's considerable advantages must be carefully weighed against the drawbacks of other adoptable methods within the context of a state's political culture to determine how well it fits. In that perspective, the complaints about Virginia's current method outlined in the next section are viewable as minor issues amenable to correction within the current structure, not systemic flaws which other methods would necessarily remedy.<sup>116</sup>

### C. Problems with Virginia's Process

The fact that Virginia uses the appointment method of selecting its judges is possibly not the problem at all. The real issue is *how* the legislature undertakes making the appointments. Claims of horse-trading should be taken seriously because, although they do not necessarily imply that Virginia's judges themselves are inadequate, they cast a shadow over the integrity and fidelity of Virginia's whole judicial system.<sup>117</sup>

To foster public trust in Virginia's judiciary, both the legislature and the judges themselves must meet calls for dedication to impartiality, merit, and transparency. Recent events have proven that the legislature has failed in this respect.<sup>118</sup> Part of its failure is the result of the almost inevitable power struggle between the legislature and the Governor.<sup>119</sup> Recent conflict over interim judicial appointments exposed just how far the legislature is willing to take its control over judicial appointment to prove a point.<sup>120</sup> Governor McAuliffe's interim appointment of a judge to fill a vacancy on Virginia's highest court in 2015 became a battleground of partisanship between the Democrat Governor and the GOP-led

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<sup>114</sup> Martin Scott Driggers, Jr., *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. L. REV. 1217, 1222 (1998).

<sup>115</sup> See Behrens & Silverman, *supra* note 100, at 304 (arguing that an appointive system is better than the election method because it provides for multiple levels of accountability to voters while still maintaining an independent and impartial judiciary).

<sup>116</sup> Compare *A Better Way to Pick Judges in Virginia*, *supra* note 8 (arguing in favor of the merit selection process implemented in Utah, Rhode Island, and Tennessee to make Virginia's judiciary equal, rather than "subordinate," to the legislature).

<sup>117</sup> See *A Better Way to Pick Judges in Virginia*, *supra* note 8.

<sup>118</sup> See *supra* note 6 and accompanying text.

<sup>119</sup> See, e.g., Jenna Portnoy & Laura Vozzella, *In Decorous Richmond, a Bitter Partisan Battle Over a Judicial Post*, WASH. POST (Aug. 17, 2015), [https://www.washingtonpost.com/local/virginia-politics/virginia-legislature-returns-to-richmond-ready-to-rumble/2015/08/16/f6cfea56-447c-11e5-8e7d-9c033e6745d8\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-legislature-returns-to-richmond-ready-to-rumble/2015/08/16/f6cfea56-447c-11e5-8e7d-9c033e6745d8_story.html).

<sup>120</sup> *Id.*

legislature.<sup>121</sup> The legislature wanted to vet its own judicial candidate, claiming the Governor filled the vacancy while the legislature was in recess without giving any notice or soliciting any input.<sup>122</sup> This struggle was about each branch of government fighting the other for power, not about the qualifications of the two judicial candidates who were under consideration.<sup>123</sup>

Such struggles are not limited to initial appointments, either. Though Virginia's constitution has more defined regulations for reappointment of judges than initial appointments, partisan struggles have marred reappointments as well in recent years.<sup>124</sup> Again, these conflicts mostly arise over disagreement between party factions in the legislature, not over the qualifications of the candidates themselves.<sup>125</sup> However, this partisanship appears to have created an interrogation of judicial candidates up for reappointments based on how candidates align ideologically with either faction of the legislature.<sup>126</sup> This trend is discernable because of the JIRC's participation on the reappointment review process,<sup>127</sup> leaving somewhat of a paper trail for the public to understand how the process goes.

Such documentation is not typical for the appointment process, however, because the General Assembly is not required to keep one<sup>128</sup> and the involvement of third parties in reviewing candidates is minimal.<sup>129</sup> With claims from members of the assembly that the process resembles horse-trading and simply no record to show otherwise, the process (though not necessarily the candidates themselves) is subject to suspicion that the legislature may be employing a political litmus test when it vets candidates for initial appointment, as well.<sup>130</sup>

Short of rewriting Virginia's constitution to rebalance the power between branches of the state government, the problem of infighting and

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<sup>121</sup> *Id.*

<sup>122</sup> When there is a vacancy during a legislative recess, the Governor may appoint an interim candidate whom the legislature must confirm upon reconvening. *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See, e.g., Dillard, *supra* note 61, at 7, 11–12.

<sup>125</sup> *Id.* at 12–13.

<sup>126</sup> *Id.* at 30–31 (arguing that in Virginia, a judge will receive a litmus test for reappointment so legislators can anticipate whether the judge will rule favorably in politically sensitive cases).

<sup>127</sup> *Id.* at 17. See also *Rules of the Judicial Inquiry and Review Commission*, VA. JUDICIAL SYS., [www.courts.state.va.us/agencies/jirc/rules.html](http://www.courts.state.va.us/agencies/jirc/rules.html) (last visited Oct. 25, 2016).

<sup>128</sup> See *Nominations Committee Name Change, Policies Approved*, *supra* note 64 (only requiring oral reports of the JCEC member's findings from investigation of a judicial nominee).

<sup>129</sup> See *id.* (describing a recommendation and nomination process confined within the JCEC and Virginia State Bar).

<sup>130</sup> Dillard, *supra* note 61, at 2.



using judicial appointments as pawns in the struggle for power is unlikely to change.<sup>131</sup> What can change, however, is the legislature's accountability to the public for any abuse of the judicial appointment process. This is the real source of the issues that are prompting calls to reform Virginia's judicial process. Keeping this in mind, a few narrowly defined reforms could significantly streamline the process, instead of restructuring Virginia's judicial appointment system.

### III. ANALYSIS OF REFORM PROPOSALS AND SUGGESTED SOLUTIONS

#### *A. Proposals by the Governor's Integrity Commission*

The Integrity Commission's proposals mainly focus on strengthening the initial screening process of potential judicial candidates.<sup>132</sup> Specific reforms considered include adding paid investigators to the Bar review panel, establishing regional review panels, and working towards a state process that is more formal and uniform.<sup>133</sup> The Integrity Commission is primarily concerned with the actual quality of the judicial candidates and establishing a process for the local circuit and general district courts.<sup>134</sup>

While the Integrity Commission claims its proposals will increase transparency and minimize political considerations,<sup>135</sup> it is unclear how simply implementing a screening process for general district and circuit courts and increasing the State Bar's level of evaluation will accomplish either goal. The recent agitation shedding light on the politicization of

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<sup>131</sup> See Entin, *supra* note 26, at 539–40 (arguing that problems of partisanship can never be fully resolved because “political considerations are ubiquitous in judicial selection, even when the judges need not face the voters.”).

<sup>132</sup> Morgan, *supra* note 1.

<sup>133</sup> *Id.*

<sup>134</sup> The Integrity Commission's specific proposals are as follows:

“Judicial Selection—The Commission recommends the following changes to Virginia's procedures for selecting judges in order to ensure the selection of highly qualified candidates while increasing transparency and minimizing political considerations.”

- The current procedure under which the Virginia State Bar evaluates candidates for the Court of Appeals and the Supreme Court should also be applied to candidates for circuit, general district, and juvenile and domestic relations courts.
- The evaluation of circuit, general district, and juvenile and domestic relations court candidates should be conducted by bar committees in each of the state's judicial circuits under the auspices of the Virginia State Bar.
- The current procedure employed in Fairfax County by the county bar and by the county's legislative delegation should be utilized in judicial circuits across the state as candidates for the circuit, general district, and juvenile and domestic relations district courts are evaluated.

*Draft 2015 Recommendations for Commission Consideration*, INTEGRITY COMM'N, <https://governor.virginia.gov/media/4692/draft-2015-recommendations-for-commission-consideration-distr-version.pdf> (last visited Nov. 13, 2016).

<sup>135</sup> *Id.*

the process was over an appointment to Virginia's highest court,<sup>136</sup> which does not factor into the Integrity Commission's considerations.<sup>137</sup>

Putting in a screening process where there is none is assuredly a step in the right direction. It will possibly lessen incentives for legislators to give judicial appointments as favors by adding a layer of scrutiny over how names are offered up for appointment. However, the Integrity Commission seems to be missing an understanding of where the lack of transparency and politicization truly lies. Lasting improvements will require a more direct approach. The problem is the politicization of the legislature's selection process, not the qualifications of the judicial candidates. As noted earlier, the instances of impeachment of Virginia judges has been few.<sup>138</sup> The majority, approximately seventy-five percent, of complaints about Virginia judges filed with the JIRC have been found meritless.<sup>139</sup> Instead, targeting the legislature's use of judicial appointments as political trades will improve both the quality of candidates selected and the integrity of the overall process.<sup>140</sup>

*B. A Better Solution: Constitutional Amendment to Increase Accountability and Clarify the Legislature's Selection Process*

As the process stands, Virginians hold their legislators accountable for irresponsibility in the judicial selection process at the voting booth.<sup>141</sup> Yet, voters know little about legislators' decision-making process,<sup>142</sup> unless there are issues such as recent events where information leaks to the public.<sup>143</sup> The Governor's Integrity Commission is a well-intentioned attempt to answer public outcry at the wasteful politics plaguing judicial appointment, but it is defective in that it does not empower voters to participate in solving the problem.<sup>144</sup>

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<sup>136</sup> See *supra* note 6 and accompanying text.

<sup>137</sup> *Draft 2015 Recommendations for Commission Consideration*, *supra* note 134.

<sup>138</sup> McMahan, *supra* note 81 and accompanying text.

<sup>139</sup> *Id.* at 493. McMahan surmises that "[t]he remaining meritorious complaints are likely disposed of under Rule 15(A)(4) [which provides for a supervision agreement between the judge and the JIRC], as a judge would rather agree to confidential supervision or resign than face public scrutiny for his malfeasance." *Id.*

<sup>140</sup> See Chertoff et al., *supra* note 89, at 462–63 (encouraging the examination of specific judicial qualifications to reduce politicization of selection process).

<sup>141</sup> Dillard, *supra* note 61, at 2, 4 & n.15.

<sup>142</sup> *Id.* at 3. See also Behrens & Silverman, *supra* note 100, at 290 (noting many voters don't even know the names of current judges).

<sup>143</sup> See, e.g., Portnoy, *supra* note 119.

<sup>144</sup> The Commission's website does solicit comments and suggestions from the public and holds local meetings open to public attendance, but the fact is that decisions about what reforms to make are still at the discretion of the Integrity Commission, which must answer to the Governor, not voters. *You Can Help Make Virginia Government More*

Virginia's judges are meant to be insulated from direct public influence by having the legislature serve as the porous layer of accountability.<sup>145</sup> Currently, there is a disconnect between Virginia's constitutional mechanisms and the actual practice of judicial appointment. That disconnect could easily be solved by a constitutional amendment requiring the legislature to maintain a record of its proceedings when it interviews and selects judicial candidates.

As entrenched as Virginia's traditionalistic status quo mentality is, her constitution has been amended regarding the judiciary articles as recently as 2002.<sup>146</sup> However, there have been no amendments to § 7 regarding selection or qualification of judges.<sup>147</sup> The process is relatively simple. An amendment may be proposed by either house of the General Assembly. Once it obtains majority support by both houses in the current and next regular session after the following general election, the amendment may be ratified by popular vote.<sup>148</sup>

An amendment may be added to Article VI, Section 7 requiring the legislature to maintain records of the recommendations procedure, inter-legislative deliberations, interviewing processes, and confirmation of all judicial candidates. These records, which could easily be incorporated into the legislative history, would be made available to the public either as accessible from the General Assembly's website, as most of its legislative session materials are,<sup>149</sup> or at the very least be available by a Freedom of Information Act request. In determining how to keep the records and make them available to the public, the legislature's need for discretion on delicate matters of determining the personal and professional qualifications of each candidate should be balanced with the promotion of as much transparency as possible. This balance will allow Virginians to form reasoned opinions on the choices and decisions of legislatures regarding judicial appointments. In this way, Virginians may make more informed decisions at the voting booth when it comes time to hold legislators accountable for their role in Virginia's judicial selection process.

South Carolina went through similar growing pains in the 1990s.<sup>150</sup> Like Virginians, South Carolinians grew unhappy with "perceived

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*Transparent and Accountable*, INTEGRITY COMM'N, <https://governor.virginia.gov/integrity-commission> (last visited Oct. 25, 2016).

<sup>145</sup> Dillard, *supra* note 61, at 4.

<sup>146</sup> VA. CONST. art. VI, § 1 (amended 2002).

<sup>147</sup> *Id.* at § 7.

<sup>148</sup> *Id.* at art. XII, § 1.

<sup>149</sup> *Legislative Essentials*, VA. GEN. ASSEMBLY, <http://virginiageneralassembly.gov/virginiaLegislature.php?secid=20&activesec=2#!hb=1&mainContentTabs=4> (last visited Oct. 7, 2016).

<sup>150</sup> Driggers, *supra* note 114, at 1228.

inbreeding” in judicial appointments, with the General Assembly able to appoint less qualified candidates based on personal relationships through a loophole in the appointment process.<sup>151</sup> Constitutional reforms were passed to create a Judicial Merit Selection Commission to review qualifications of judicial candidates.<sup>152</sup> The reforms are considered to be “a step away from back room deals and partisan politics and a step toward a more independent and accountable judiciary.”<sup>153</sup> Although the reforms have the potential to perpetuate the partisan infighting that prompted their adoption, they are considered an appropriate response to problems identified in the appointment process similar to those now being highlighted in Virginia.<sup>154</sup>

South Carolina’s story serves as a caution against switching to a different judicial selection method for political reasons. An amendment to Virginia’s constitution requiring recordkeeping of the judicial vetting process at all levels does not carry the same risks as South Carolina’s reforms. Yet, such an amendment could potentially be just as effective.

This amendment is not proposed lightly. Such a significant change to the way the legislature operates in picking judges will have longstanding effects on the process that perhaps cannot fully be anticipated until such an initiative is undertaken. Certainly the logistics will involve careful policy concerns about maintaining stability in the process. However, in the interest of long-term improvements, codifying transparency in the state Constitution is more likely than the remedial measures proposed by the Commission to withstand the test of time and politics in terms of holding legislators accountable. Certainly, the JIRC can play a more significant role beyond merely filing complaints to start an impeachment process, to perhaps being employed as an impartial third party to keep records on legislative appointment proceedings and propose recommendations as needed to ensure compliance with the new amendment, much as it does now to carry out the requirements of removal and retirement proceedings in accordance with Article VI, Section 10.<sup>155</sup> In short, an amendment would also provide a stronger foundation for the current oversight methods, such as the JIRC, to be more effectively involved.

#### CONCLUSION

Virginia’s judicial structure is closely tied to its traditionalistic political culture, which emphasizes stability and endurance in its

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<sup>151</sup> *Id.* at 1227–28.

<sup>152</sup> *Id.* at 1228.

<sup>153</sup> *Id.* at 1235.

<sup>154</sup> *Id.*

<sup>155</sup> VA. CONST. art. VI, § 10.

government. What changes have been made to Virginia's judicial process since Virginia's founding have been incremental, and even reversed. This history sets Virginia apart from other states which have made changes to their judiciaries. It follows that Virginia should not compare herself to other states in considering potential reforms.

While the current judicial appointment process is in need of greater transparency, this can be done with improvements to the process without the need for an overhaul of Virginia's system. Such an overhaul would prove counterproductive, if Virginia's rocky history of judicial reform attempts is any indication of potential consequences.

A constitutional amendment requiring the legislature to keep a public record of the appointment process would dispel much of the dissatisfaction with the secrecy of Virginia's appointments and also help reduce the horse-trading tendencies legislators sometimes engage in when making appointments by holding their decisions accountable to the oversight of the very voters who put them in office. Additionally, the legislature can pass laws to increase the involvement of the JIRC in reviewing judicial candidates at all court levels to ensure candidates are chosen for their capabilities and qualifications, and not purely as political favors. These small changes would both preserve Virginia's unique and functional judiciary and answer citizens' concerns over elitism in the judicial selection process.

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\* J.D. Candidate, Regent University School of Law, 2017. The Author thanks Phoenix for his patience and support, everyone at Regent Law Review for this opportunity, and Professor Benjamin V. Madison, III for his guidance throughout the process. Soli Deo gloria.