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RECONSIDERING VIRGINIA JUDICIAL SELECTION

Carl W. Tobias *

The 2008 Virginia General Assembly adjourned this summer without electing judges to vacancies on the State Corporation Commission (the “Commission” or “SCC”), the Supreme Court of Virginia, and numerous circuit courts. Thus, Democratic Governor Tim Kaine recently appointed practicing lawyer and former SCC counsel James Dimitri to the Commission, Court of Appeals of Virginia Judge LeRoy Millette to the supreme court, Chesterfield Circuit Judge Cleo Powell to the opening created by Judge Millette’s elevation, and numerous attorneys as circuit court judges. Although the jurists whom the Governor appointed seem very well-qualified, the judges may only serve for five months, unless the 2009 General Assembly elects them. The 2008 Assembly’s failure to elect judges for these vacancies demonstrates that the selection process is ineffective, and perhaps broken, as this development has eroded the delivery of justice and may have undermined public respect for judicial selection. The process for choosing judges, therefore, deserves reassessment to ascertain whether the system merits reform. This piece undertakes that effort.

This article first evaluates the origins and development of Virginia’s procedure for appointing judges. This analysis determines that Virginia and South Carolina are the only jurisdictions that currently select judges through a process of legislative election. The examination also discerns that the Old Dominion has employed this system throughout most of its history since the American Revolution. The regime concomitantly operated rather efficaciously for much of the time when one major political party

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controlled the governorship and both houses of the General Assembly. Moreover, the review finds that legislators and additional observers have articulated, evaluated, and discussed various suggestions for change over the years and that the Assembly has recently instituted or experimented with some, but it has permanently adopted very few.

The second section assesses recent developments which implicate judicial selection in the Old Dominion. The section finds that increasing partisanship and divisiveness have attended the process for choosing judges, especially with the rise and growth of a real two-party system as well as divided government in Virginia. The portion shows how the experience in the 2008 General Assembly—which failed in one regular and two special sessions to elect judges for numerous vacancies, despite a plethora of opportunities to name the jurists—suggests that the system is ineffective, if not beyond remediation.

The final section, accordingly, explores numerous recommendations for future treatment of judicial selection in Virginia. This part descriptively evaluates the benefits afforded and disadvantages imposed by the processes that many other states employ when choosing members of the bench. The section concludes by proffering a number of solutions which appear to hold the greatest promise for improving Virginia judicial selection.

I. THE HISTORY OF VIRGINIA JUDICIAL SELECTION

The origins and development of judicial selection in the Old Dominion might seem to warrant relatively little exploration in this paper, as that background has been treated elsewhere.¹ Nonetheless, considerable analysis is appropriate because this examination should inform appreciation of the problems that arose historically when naming judges, of the recent complications, and of possible remedies for those difficulties.

1. See, e.g., THOMAS R. MORRIS, *THE VIRGINIA SUPREME COURT: AN INSTITUTIONAL AND POLITICAL ANALYSIS* (1975); W. Hamilton Bryson, *Judicial Independence in Virginia*, 38 U. RICH. L. REV. 705 (2004); J. Amy Dillard, *Separate and Obedient: The Judicial Qualification Missing from the Job Description*, 38 CUMB. L. REV. 1 (2007); Alex B. Long, *An Historical Perspective on Judicial Selection Methods in Virginia and West Virginia*, 18 J.L. & POL. 691, 730–66 (2002).

Throughout much of Virginia's history, the Commonwealth has essentially followed the judicial selection regime that the state presently employs.² This system provides for the General Assembly to elect judges unless a vacancy occurs when the legislature is not in session or the Assembly adjourns without electing judges to openings.³ In those circumstances, the Governor appoints the judge, who serves until the next legislative session at which time the Assembly may either elect the gubernatorial appointee or someone else.⁴

Virginia and South Carolina are the only jurisdictions in the United States that authorize their legislatures to elect judges.⁵ A substantial number of jurisdictions employ some form of popular election, although certain states prescribe initial gubernatorial appointment with subsequent retention elections.⁶ Moreover, a significant number of jurisdictions rely on several types of merit selection commissions, which recommend multiple prospects to the Governor, who appoints from that group.⁷ A few states employ selection regimes that resemble the federal system because the jurisdictions have gubernatorial nomination with legislative advice and consent.⁸

2. See VA. CONST. art. VI, § 7. For analyses that emphasize the earlier history, see Bryson, *supra* note 1; Long, *supra* note 1. For analysis that emphasizes the recent history, see Dillard, *supra* note 1. See generally 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 739-46 (1974).

3. VA. CONST. art. VI, § 7.

4. See *id.*

5. See *supra* note 2; S.C. CONST. art. V, §§ 3, 9, 14. For analysis of South Carolina, see Martin Scott Driggers, Jr., *South Carolina's Experiment: Legislative Control of Judicial Merit Selection*, 49 S.C. L. REV. 1217 (1998); Kimberly C. Petillo, Note, *The Untouchables: The Impact of South Carolina's New Judicial Selection System on the South Carolina Supreme Court, 1997-2003*, 67 ALB. L. REV. 937 (2003).

6. See 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 (2002); Long, *supra* note 1, at 702-03; LARRY C. BERKSON, AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT 2-3, <http://www.ajs.org/selection/docs/Berkson.pdf>. See generally ABA, JUSTICE IN JEOPARDY: REPORT OF THE ABA COMMISSION ON THE 21ST CENTURY JUDICIARY (2003), <http://www.abanet.org/judind/jeopardy/pdf/report.pdf>.

7. See Behrens & Silverman, *supra* note 6, at 301-02; Long, *supra* note 1, at 702; BERKSON, *supra* note 6, at 2-3. A commission advises the South Carolina General Assembly. See S.C. CODE ANN. §§ 2-19-10 to -20 (2005). Somewhat analogous panels have been used in the federal system. See generally LARRY C. BERKSON & SUSAN B. CARBON, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES (1980); ALAN NEFF, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES AND CANDIDATES (1981).

8. See Behrens & Silverman, *supra* note 6, at 300-01; Long, *supra* note 1, at 702;

At various historical junctures, the Commonwealth has relied upon elements of several regimes canvassed in the paragraph immediately above. The first Constitution of Virginia in 1776 provided for the General Assembly to elect appellate judges, who would "continue in office during good behaviour," thus essentially instituting life tenure, an important constituent of the federal system.⁹ The 1851 Virginia Constitution replaced legislative election with election by the voting populace, while the document substituted a term of years for the equivalent of life tenure.¹⁰ The popular election of judges, however, proved to be relatively short-lived, as the 1870 Constitution provided for General Assembly election of all Virginia judges for a term of years with the possibility of reelection.¹¹ The Commonwealth reinstated the earlier legislative election approach because General Assembly members wanted to employ judgeships as political patronage.¹²

This system has basically remained intact since 1870.¹³ Article VI, section 7 of the Constitution of Virginia provides that supreme court justices and "judges of all other courts of record shall be chosen by the vote of a majority of the members elected to each house of the General Assembly" with justices serving twelve-year terms and all other judges serving for eight years.¹⁴ The constitution also states that, if a judicial vacancy occurs "while the General Assembly is not in session, the Governor may appoint a successor to serve until thirty days after the commencement of the

BERKSON, *supra* note 6, at 2-3; *see also* U.S. CONST. arts. II, III.

9. *See* VA. CONST. of 1776 art. XIV; *see also* U.S. CONST. art. III; VA. CONST. of 1830 art. V, § 1; Behrens & Silverman, *supra* note 6, at 300; Bryson, *supra* note 1, at 711.

10. *See* VA. CONST. of 1851 art. VI, §§ 6, 10, 27, 34; *see also* Bryson, *supra* note 1, at 711. "The rejected 1861 Constitution, Art. VI, § 5, would have returned to the 1830 Constitution's principle of tenure in office during good behavior after appointment" HOWARD, *supra* note 2, at 741 n.5.

11. *See* VA. CONST. of 1870 art. VI, §§ 5, 11, 13, 14; *see also* Bryson, *supra* note 1, at 712; Long, *supra* note 1, at 751; *supra* notes 6, 9, 10 and accompanying text.

12. *See* JACK P. MADDEX, JR., THE VIRGINIA CONSERVATIVES 1867-1879: A STUDY IN RECONSTRUCTION POLITICS 92-93 (1970); *see also* Bryson, *supra* note 1, at 712.

13. *See* VA. CONST. art. VI, § 7; VA. CONST. of 1902 art. VI, §§ 91, 96, 99; *see also* HOWARD, *supra* note 2, at 739-46. *See generally* Bryson, *supra* note 1, at 712.

14. VA. CONST. art. VI, § 7. The Constitution of Virginia was last revised in 1971. *See id.* "The Commission on Constitutional Revision considered alternative plans," including most that were analyzed *supra* notes 6-8 and accompanying text, but it "saw no advantage to those plans over the method of judicial selection in Virginia." HOWARD, *supra* note 2, at 742 (citations omitted). The revision predated the advent of large-scale expenditures in judicial elections.

[Assembly's] next session . . . [and,] [u]pon election by the General Assembly," a new jurist shall commence serving a full term.¹⁵

The selection process has generally functioned efficaciously when one of the principal parties controlled the Governor's Mansion and both houses of the General Assembly, as was true for most of the time since the regime's 1870 adoption.¹⁶ The procedure for choosing judges has operated less smoothly over the past few decades with the rise and expansion of the modern Virginia Republican party and the corresponding phenomenon of divided government in which the Governor has been a member of one party and the other party has possessed a majority in either the Senate or the House of Delegates.¹⁷ For much of the period when Democrats controlled the governorship and both General Assembly houses, Republican senators and delegates had relatively little input on the choice of judges. Thus, it should not have been surprising that once Republicans secured control of the Governor's Mansion as well as the Senate and the House, Democratic legislators would contribute minimally to judicial selection.

Over the last dozen years, relations between Virginia Democrats and Republicans in the General Assembly have been contentious, a phenomenon witnessed most relevantly in the gradual deterioration of the judicial selection process. For example, in 1996, the Assembly failed to fill thirty percent of the openings because of partisan infighting, which allowed Republican Governor George Allen to appoint judges for these vacancies once the legislature adjourned.¹⁸ The next year, Democrats and Republicans vehemently disagreed over the election of someone to fill the supreme court vacancy created by Justice Roscoe Stephenson's retirement; the controversy terminated in a stalemate, thus permit-

15. VA. CONST. art. VI, § 7. If the Assembly adjourns without filling vacancies, as happened in 2008, the Governor may appoint judges to those openings. *See id.*

16. Professor Bryson found one major historical exception in the 1870s and 1880s, which he believes posed a threat to judicial independence; the situation, however, prevailed for a rather short time. *See* Bryson, *supra* note 1, at 708-12. *See generally* MARGARET VIRGINIA NELSON, *A STUDY OF JUDICIAL REVIEW IN VIRGINIA, 1789-1928*, at 110-20 (1947).

17. For somewhat analogous developments at the federal level, see BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* (2006); Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 *EMORY L.J.* 527 (1998).

18. *See* Dillard, *supra* note 1, at 10; *see also* Ross MacKenzie, Editorial, *On the Growing Partisanization of the General Assembly*, *RICH. TIMES-DISPATCH*, Jan. 19, 1997, at F7.

ting Governor Allen to appoint the replacement.¹⁹ In 1998, the parties engaged in a “nine-hour standoff,” which left thirty judgeships unfilled, although legislators eventually agreed to elect judges for practically all of the openings.²⁰

Once the Republican party captured the governorship and the General Assembly, Republicans predictably limited Democratic input in judicial appointments, but Republican Senate and House members also instituted certain measures that modified the selection process. In 1998, Assembly Republicans and Democrats began considering the establishment of an informal Joint Judicial Advisory Committee that would screen supreme court and court of appeals candidates.²¹ The fourteen-member Advisory Committee, comprised of numerous former Republican and Democratic leaders, secured background information, financial disclosure reports, and writing samples from candidates and solicited input from state and local bar associations.²² Civic organizations and citizens then interviewed the prospective judges and submitted recommendations to the Assembly for vacancies on the two appellate courts.²³ In 2000, a joint resolution of both General Assembly houses concomitantly requested that the supreme court formulate evaluation criteria to assist the Assembly in electing judges.²⁴

Notwithstanding these modifications, the selection process has grown increasingly controversial. Certain observers voiced concern that the program for assessing candidates might threaten

19. See Dillard, *supra* note 1, at 11; Long, *supra* note 1, at 696–97.

20. See Dillard, *supra* note 1, at 12; Pamela Stallsmith, *10 Judges Elected; 1 Spot Open*, RICH. TIMES-DISPATCH, Mar. 16, 1998, at A8.

21. See Dillard, *supra* note 1, at 12–14; Long, *supra* note 1, at 697; Margaret Edds, Op-Ed., *Picking Judges: You Can't Take Rice out of Rice Pudding*, VIRGINIAN-PILOT, Mar. 5, 2000, at J5.

22. See Dillard, *supra* note 1, at 13–14; Long, *supra* note 1, at 697; Edds, *supra* note 21; Ruth S. Intress, *Republicans Present 14 Finalists for Judgeships*, RICH. TIMES-DISPATCH, Feb. 23, 2000, at A8.

23. See Long, *supra* note 1, at 697. In 2000, Republican Assembly members also established local citizen committees in some localities that would complement suggestions of local bar associations. See Dillard, *supra* note 1, at 13; Long, *supra* note 1, at 697; *GOP Forms Judges Panel*, RICH. TIMES-DISPATCH, Jan. 11, 2000, at B4; see also Carl Tobias, *Senators Worked Together To Fill the 4th Circuit*, RICH. TIMES-DISPATCH, July 15, 2007, at E1 (analyzing a somewhat analogous federal entity).

24. See VA. CODE ANN. § 17.1-100 (Cum. Supp. 2008); H.J. Res. 212, Va. Gen. Assembly (Reg. Sess. 2000); Dillard, *supra* note 1, at 7; Long, *supra* note 1, at 697. “2009 is the first year that judges up for reappointment will have had a sufficient number of performance evaluations for legislators to review.” Michelle Washington, *Lawmakers To Get Brief Shot at Filling Judicial Vacancies*, VIRGINIAN-PILOT, Apr. 21, 2008, at A1.

judicial independence,²⁵ while others expressed concern that specific regions of Virginia were neglected or that Republicans dominated the Advisory Committee's membership.²⁶ Indeed, the Republican General Assembly refused to reelect certain judges whom earlier Democratic Assemblies had elected.²⁷ The gradually deteriorating interparty relations worsened in the 2008 General Assembly session when the legislature was unable to elect judges for more than a dozen vacancies, including openings on the SCC and the supreme court. These developments are explored next.

II. RECENT DEVELOPMENTS

The 2008 General Assembly had the opportunity to elect two Supreme Court of Virginia justices, two court of appeals judges, and numerous circuit court judges. In fairness, Governor Kaine had appointed Justice Bernard Goodwyn to the supreme court and Judge Millette to the court of appeals when vacancies materialized after the 2007 Assembly session had adjourned.²⁸ Moreover, Justice Steven Agee did not officially resign from the supreme court until July 2008, while Judge Millette's court of appeals seat only became vacant when Governor Kaine appointed the jurist to the opening that Justice Agee's resignation created.²⁹ Nonetheless, Republicans initially withheld their support for Justice Goodwyn and Judge Millette, although the 2008 Assembly eventually elected them.³⁰ Moreover, President George W. Bush

25. See Dillard, *supra* note 1, at 18–29; Long, *supra* note 1, at 698; Matthew Dolan, *State Looks at Ways To Judge the Judges*, VIRGINIAN-PILOT, Jan. 29, 2001, at A1.

26. See Long, *supra* note 1, at 698; Edds, *supra* note 21; Laurence Hammack, *Lawyer Wins Judgeship on Merits of His Case*, ROANOKE TIMES, May 30, 2000, at B1; see also Washington, *supra* note 24.

27. See Dillard, *supra* note 1, at 18–29; Cindy Clayton & Matthew Dolan, *Former Deputy Prosecutor in Line for Norfolk Bench*, VIRGINIAN-PILOT, Feb. 20, 2001, at B1; Michael Sluss, *Judge's Plight Sparks Debate*, ROANOKE TIMES, Feb. 17, 2001, at A1; see also *supra* notes 18–20 and accompanying text.

28. See Anita Kumar, *Kaine Appoints Circuit Judge to Supreme Court*, WASH. POST, Oct. 11, 2007, at B6; Anita Kumar & Sandhya Somashekhar, *Va. Senate Panel Rejects Tax-Relief Plan That Passed Last Year*, WASH. POST, Feb. 9, 2008, at B1; Jerry Markon, *Sniper Judge Is Named to Appeals Court*, WASH. POST, Nov. 27, 2007, at B4.

29. See Jerry Markon, *U.S. Appeals Court Gets New Judge*, WASH. POST, July 31, 2008, at VA1; Neil H. Simon & Jeff E. Schapiro, *Agee Wins OK from Senate*, RICH. TIMES-DISPATCH, May 21, 2008, at B3.

30. See Kumar & Somashekhar, *supra* note 28; Jerry Markon, *Sniper Judge Takes Seat on Top Va. Court*, WASH. POST, Sept. 7, 2008, at PW3 [hereinafter Markon, *Sniper Judge*]; Jeff E. Schapiro, *Kaine To Fill Judgeships Amid Lawmaker Gridlock*, RICH.

had nominated Justice Agee to the U.S. Court of Appeals for the Fourth Circuit in mid-March of 2008, to which the Senate confirmed the jurist in May; thus, the 2008 Assembly could rather easily have anticipated and provided for the supreme court vacancy that Agee's elevation created.³¹

The 2008 Assembly had myriad opportunities to elect judges because the Virginia Senate and House of Delegates convened in one regular session and two special sessions. For example, numerous media outlets reported that legislators had reached an agreement regarding certain vacancies and even reported the names of some prospects whom the Assembly was considering for the openings.³² The Democratic Senate and the Republican House of Delegates, however, were ultimately unable to forge consensus while Republicans in both chambers seemingly disagreed among themselves.³³

When a vacancy occurs while the General Assembly is not in session, or when the Assembly adjourns without electing judges to fill empty positions, the constitution assigns the Governor appointing responsibility.³⁴ Because Republicans have not committed to supporting Governor Kaine's choices, the well-qualified jurists whom he appointed will serve five months without the assurance that the 2009 Assembly will elect them.³⁵ This uncertainty presumably reduced the eligible candidate pool for these crucial judicial offices. Although considerable prestige and business-generating publicity may attend someone's short-term appointment to high level offices—such as SCC commissioner, supreme court justice, and court of appeals judge—numerous qualified attorneys might be unwilling to disrupt their practices

TIMES-DISPATCH, July 11, 2008, at A5 [hereinafter Schapiro, *Lawmaker Gridlock*].

31. See Future Vacancies in the Federal Judiciary—110th Congress, http://www.uscourts.gov/ctapps/webnovada/CF_FB_301/archived/futurevac10_01_08. (last visited Oct. 24, 2008); see also *supra* note 26.

32. See, e.g., Anita Kumar, *Bickering in Va. General Assembly Leaves Judicial Posts Open*, WASH. POST, May 11, 2008, at C8; Jeff E. Schapiro, *Lawmakers Approve Bond Bill*, RICH. TIMES-DISPATCH, Apr. 24, 2008, at A1; Julian Walker, *Legislators Near Deal on Selecting Judges*, VIRGINIAN-PILOT, July 9, 2008, at B1.

33. See Schapiro, *Lawmaker Gridlock*, *supra* note 30; Julian Walker, *Lawmakers Fail To Reach a Deal on Naming Judges*, VIRGINIAN-PILOT, July 10, 2008, at B3.

34. See VA. CONST. art. VI, § 7; *supra* note 13 and accompanying text.

35. See Markon, *Sniper Judge*, *supra* note 30; Schapiro, *Lawmaker Gridlock*, *supra* note 30.

for possible election.³⁶ Sitting judges would be even less willing to accept elevation and risk losing their judicial positions.

Even though Governor Kaine skillfully navigated the obstacles described above, this judicial selection process is ineffective. A regime that intrinsically shrinks the number of eligible candidates and inherently allows protracted vacancies lacks efficacy. The SCC operated for nine months absent one commissioner, imposing pressure on the remaining two members and the Commission staff. The supreme court similarly functioned over two months with a vacancy. Both entities and the court of appeals will operate for five months with lingering uncertainty about the new appointees' tenure. The circuit courts have employed substitute judges who are less familiar with the courts' procedures, traditions, and staff, which delays case resolution and reduces efficiency.³⁷ These developments have impaired judicial operations, undermining the delivery of justice and public respect.

III. SUGGESTIONS FOR THE FUTURE

Because Virginia's regime for appointing judges is apparently less effective than it could be, the Commonwealth should evaluate several ways to reform this system. The possible alterations may be categorized into near-term, comparatively mundane devices, which can usually be implemented by passing legislation, and relatively dramatic techniques, most of which require constitutional amendment.

A. *A Short-Term Measure*

One measure that the Old Dominion could adopt in the near term is a merit selection commission that would recommend mul-

36. See Jeff E. Schapiro, *Kaine Fills 2 Court Spots, One on SCC*, RICH. TIMES-DISPATCH, Aug. 16, 2008, at A1; Carl Tobias, *Kaine Can Thread Judicial Needle*, RICH. TIMES-DISPATCH, July 22, 2008, at A9; see also Editorial, *Week's End*, RICH. TIMES-DISPATCH, July 12, 2008, at A10.

37. See Julian Walker, *Wheels of Justice Grind Slower over Shortage of Judges*, VIRGINIAN-PILOT, Aug. 4, 2008, at B1; see also Tobias, *supra* note 36. On October 7, 2008, Governor Kaine announced the appointment of three judges to fill vacancies on the Circuit Court for the City of Norfolk. Julian Walker & Michelle Washington, *Kaine Appoints Three to Norfolk Circuit Court*, VIRGINIAN-PILOT, Oct. 8, 2008, <http://hamptonroads.com/print/483226>. The court had functioned for months without one-third of its nine judges, and the court's clerk called the appointments "long overdue." *Id.*

tiple, excellent candidates whom the General Assembly in turn could elect.³⁸ When evaluating the advisability of a panel, legislative members might want to consult the accumulated experience of the states and the federal government, which have used analogous entities.³⁹ The Assembly may correspondingly think about issues such as commission composition, panel members' terms, who should be the chair, whether the commission must submit a minimum number of candidates, and whether the legislature may reject the names tendered and request additional candidates.⁴⁰ More specifically, this panel should be comprised of highly qualified judges, legislators, attorneys, and citizens whom the Assembly and the Governor appoint. The panel might also include seats that are designated for specific interests, as is prescribed for certain Virginia agencies.⁴¹

The idea warrants serious consideration because many of the fifty jurisdictions and the federal government have successfully deployed commissions principally to advise governors when appointing judges and presidents when submitting judicial nominees.⁴² Virginia has employed a similar panel;⁴³ observers criticized the approach, however, arguing that the commission was less balanced than it could have been and might have compromised judicial independence.⁴⁴ Thus, the Commonwealth should ensure that the panel has diverse membership, especially vis-à-vis political party affiliation, geography, race, and gender, and has the requisite expertise, professionalism, and resources to avoid threatening judicial independence.⁴⁵

38. See *supra* note 7 and accompanying text. When the Governor exercises judicial appointment power, the official should consider using a panel, although time restraints might limit its efficacy.

39. See *supra* notes 7, 22–23 and accompanying text.

40. See Behrens & Silverman, *supra* note 6, at 306; see also *infra* note 41 and accompanying text.

41. See, e.g., VA. CODE ANN. § 10.1-1302 (Cum. Supp. 2008); VA. CODE ANN. § 28.2-102 (Repl. Vol. 2004); VA. CODE ANN. § 62.1-44.9 (Cum. Supp. 2008).

42. See *supra* notes 7, 22–23 and accompanying text.

43. See *supra* notes 22–23 and accompanying text.

44. See *supra* notes 25–26 and accompanying text.

45. See *supra* notes 24, 40–41 and accompanying text.

B. *Longer-Term Measures*

Virginia may also wish to consider longer-term, more dramatic alterations that would replace General Assembly election with various alternatives, although legislators might be understandably reluctant to relinquish the authority they currently possess to elect judges. Perhaps the most promising option is gubernatorial nomination, which many jurisdictions require to be premised on merit selection panel recommendations with legislative advice and consent.

This notion deserves careful analysis, as it provides safeguards against gubernatorial overreaching through the merit selection commission and Assembly rejection of nominees found unqualified, thus preserving legislative authority and the balance of power among the three branches. The idea mirrors the federal system, which has operated rather efficaciously for more than two centuries, although the federal approach has recently experienced the same partisanship and divisiveness that have plagued the Virginia Assembly's election of judges.⁴⁶ Nonetheless, the concept warrants exploration because the federal regime has generally proven efficacious. The Governor and the legislature, therefore, should attempt to increase bipartisanship to defuse the politicization that has recently suffused Virginia judicial selection because these efforts improve the process, safeguard judicial independence, and enhance public respect for all three branches.⁴⁷

The popular election of judges is another major alternative that numerous states have long applied, even though the system is less ubiquitous than it used to be.⁴⁸ This scheme has obvious superficial democratic appeal because the regime allows the people to elect members of the bench directly. Many observers, however, have articulated a growing number of, and increasingly persuasive, criticisms of judicial elections. For example, when judicial candidates accept campaign contributions from lawyers and parties who litigate cases before them, this creates the appearance of impropriety, while judges' reliance on this money and political

46. See *supra* note 17 and accompanying text.

47. See, e.g., Christopher Peace, *As Statesmen, GOP Should Confirm Governor's Pick for SCC*, RICH. TIMES-DISPATCH, Sept. 7, 2008, at E4; Jeff E. Schapiro, *Path to Naming Judges Can Be Rocky*, RICH. TIMES-DISPATCH, Apr. 25, 2008, at B2. For additional support for this measure, see Behrens & Silverman, *supra* note 6, at 304; ABA, *supra* note 6, at 70-73.

48. See *supra* note 6 and accompanying text.

party support threatens judicial independence.⁴⁹ When candidates assume positions on social or political issues, this analogously undermines the perception of impartiality.⁵⁰ The lack of instructive information conveyed in judicial campaigns concomitantly leaves voters uninformed, while the distasteful rhetoric exchanged undercuts public confidence.⁵¹ Most of these factors dissuade numerous qualified attorneys from seeking judicial office.⁵² Therefore, the approach is not viable, and the Commonwealth should eschew it.⁵³

These longer-term reforms are comparatively far-reaching and their institution would require amendment of the Constitution of Virginia.⁵⁴ Therefore, the Assembly may want to invoke the venerable study commission process, which legislators have long employed to analyze a number of particularly difficult complications and formulate efficacious solutions.⁵⁵ A study commission should comprehensively assess the dilemma that judicial selection currently presents, consider a broad spectrum of promising solutions, and recommend various improvements which the people of Virginia might concomitantly adopt through the constitutional amendment process.⁵⁶

If the Commonwealth finds the longer-term reforms too drastic, the General Assembly should at least seriously consider the short-term merit selection panel idea broached above or create a study commission to evaluate the notion. Should legislators nevertheless reject both of these approaches, they must institute

49. I rely substantially here and in the remainder of this paragraph on Behrens & Silverman, *supra* note 6, at 277–79; ABA, *supra* note 6.

50. See, e.g., Behrens & Silverman, *supra* note 6, at 292–94; Mary Libby Payne, *Mississippi Judicial Elections: A Problem Without a Solution?* 67 MISS. L.J. 1, 9–25 (1997).

51. See, e.g., Behrens & Silverman, *supra* note 6, at 290–91; Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 MARQ. L. REV. 1031, 1044–45 (1997).

52. See, e.g., Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 995–96 (2001); Behrens & Silverman, *supra* note 6, at 285–87; Heffernan, *supra* note 51, at 1036–37, 1044.

53. Notwithstanding these disadvantages, should Virginia decide to adopt popular elections, the Commonwealth should at least prescribe initial General Assembly election or gubernatorial appointment and subsequent retention elections. See *supra* note 6 and accompanying text.

54. See *supra* notes 2, 14–15 and accompanying text; see also Behrens & Silverman, *supra* note 6, at 308.

55. See VA. HOUSE OF DELEGATES R. 20 (2008); VA. SENATE R. 19(a), (i) (2008).

56. See VA. CONST. art. XII.

measures that will depoliticize the selection process and enhance bipartisanship.⁵⁷

CONCLUSION

The 2008 Virginia General Assembly's failure to fill numerous vacancies by electing judges has impeded judicial operations and undercut public respect, while this development suggests that the selection process is ineffective and merits remediation or amelioration. Therefore, the Commonwealth should carefully explore numerous alternatives which may improve the selection of judges.

57. *See supra* note 47 and accompanying text.
