

To: Senate Select Committee On Judicial Oversight And Reform  
From: Andrew T. Billstein  
For: August 20, 2024 meeting  
Re: Judicial Selection Methods and Other Considerations

### Introduction

Presuming that there is still nothing new under the sun, following my selection to serve on this committee, I spent significant time reading about other instances where the legislative, executive and judicial branches of government have considered their respective roles as co-equal branches of government in a particular state or at the federal level. As I surmised, the important issues presently under consideration in the State of Montana are not unique.

The following materials are intended to simply provide an outline for consideration and discussion by committee members regarding (a) the methods by which judges are selected and (b) possible areas where the judicial branch can be improved with the assistance of the legislature.

### Judicial Selection Methods and Other Considerations

- I. Are concerns about the independence of co-equal branches of government unique to Montana?
  - a. Expressing concerns about the United States Supreme Court, for example, is fashionable at the moment.
  - b. Should the legislative and executive branch be consistent in a political philosophy when expressing concerns regarding the judicial branch?
- II. Judicial Selection Methods.
  - a. Elections
    - i. Nonpartisan: A judicial candidate, in theory, does not identify as a political party in campaigning for election
    - ii. Partisan: A judicial candidate affiliates with a political party
  - b. Appointment or “merit” selection
    - i. Who appoints? Usually governor, sometimes legislature
    - ii. Likely some appointment system even in election states to fill vacancy or certain judgeships
    - iii. Screening before appointment? Most states have a nominating commission but the composition of the nominating commission varies

- c. Wide disparity among states: [Judicial Selection: An Interactive Map | Brennan Center for Justice](#)

### III. Strengths and Weaknesses of Selection Methods<sup>1</sup>.

#### a. Role of money in judicial elections

- i. Promises/pressures while campaigning: In one published study, 95% of members of the general public stated that they believe donations influence a judge's decision and 46% of state court judges agreed
- ii. Judges hear cases where campaign supporters are parties or participants (attorneys, other individuals and organizations)
- iii. Does best fundraiser= best judge? In 2013-14, 90% of judges who raised the most money prevailed in his or her election

#### b. Politicization of campaigns

- i. Overtly political statements (I am a member of a particular party) or buzzwords (law and order candidate or I support the constitution)
- ii. Loyalty to party or perceived party
- iii. Appointment system not immune to these issues

#### c. Diversity

- i. Some research suggests that appointment systems improve diversity on the bench
- ii. Are some otherwise qualified candidates unwilling to go through the process of campaigning?
- iii. Is there a danger that non-diverse courts and judges can produce successive non-diverse courts and judges?

#### d. Judicial independence vs accountability

- i. Do different selection methods simply make judges more susceptible to different sets of powers? Are political parties, branches of government or special interests just different overseers?

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<sup>1</sup> For more information, see *Judicial Selection for the 21<sup>st</sup> Century*, John F. Kowal, Brennan Center for Justice  
*Rethinking Judicial Selection in State Court*, Alicia Bannon, Brennan Center for Justice

- ii. Accountable to whom? Are a majority of qualified voters a reasonable check on judges?

IV. Comparison of Montana and Wyoming Supreme Courts.

- a. Montana. See attached Exhibit A
- b. Current Montana Candidates. All information from candidate's own website
  - i. Government lawyer for 6 years, varied private practice for 14 years, district court judge for 20 years
  - ii. Federal law clerk then federal magistrate judge
  - iii. Private practice then deputy Montana attorney general then county attorney
  - iv. Prosecutor then general private practice then district court judge
- c. Wyoming Supreme Court. See attached Exhibit B

V. Possible Areas of Improvement.

- a. Judicial Pay.
  - i. MCA 2-16-403 provides that salaries for Montana Supreme Court justices are the greater of what Montana pays or the average of Idaho, Montana, North Dakota, South Dakota and Wyoming salaries
  - ii. According to the National Center for State Courts, Montana Supreme Court justices make \$162,053. The chart attached as Exhibit C lists the state salaries of all judges and but the chart does not appear to be consistent with MCA 2-16-403. Do judicial salary comparisons consider insurance, pension or other benefits?
- b. Public Funding and Recusal.

- i. Recusal Examples and adoption of recusal rules

Williams v. Pennsylvania, chief justice who was a former district attorney refused to recuse himself in an appeal where significant argument in appeal was prosecutorial misconduct. US Supreme Court narrowly ruled that it was error for judge not to recuse himself

Caperton v A.T. Massey Coal, judge who had received \$3,000,000 in donations from mining company refused to recuse himself in case involving the mining company. US Supreme Court again narrowly ruled that it was error for judge not to recuse himself

ii. Potential Public Funding Option

- c. Changes to length of terms. 8 years, life, other?
- d. Changes to Judicial Selection Process. Very rare for states to change selection method. How about electing nominating commission members who select the judges?
- e. Expanding Courts of Limited Jurisdiction or Use of Special Masters.

VI. Conclusion. Is it likely that two things are true:

A suggestion that an improvement can be made to the judicial branch of government is not necessarily a meanspirited partisan attack on the court. The American Bar Association itself has stated “[judges] must be strong-minded and tolerant of criticism, yet resistant to intimidation.” The description seems to apply to the requisite mindset of any public servant.

The improvement of the judicial branch of government likely requires well thought out and varied proposals focusing on attracting more candidates, method of selection, evaluation while in office and review of recusal rules.

EXHIBIT A

MONTANA SUPREME COURT JUSTICES SINCE 1972  
 (IF WIKIPEDIA/STATE LAW LIBRARY ARE TO BE BELIEVED)  
 (JUSTICES WHO BEGAN SERVING AFTER 1972 ONLY)

Name	Birth City	City of Practice	Gender	Ethnicity	Type of Practice	Term
Paul Hatfield	Great Falls	Great Falls	Male	Caucasian	County atty/district court judge	1977-78
Frank Haswell	Great Falls	Great Falls/Whitefish	Male	Caucasian	Private practice/city atty/district court judge	1978-85
Jean Turnage	St. Ignatius	Polson	Male	Native American	County attorney	1985-2000
Karla Gray	Escanaba, MI	Butte	Female (1 <sup>st</sup> MT female chief justice)	Caucasian	Law clerk/private company lobbyist	2001-2008
Daniel Shea		Missoula	Male	Caucasian	Dept county atty	1977-1985
John Sheehy	Butte	Billings	Male	Caucasian	Private practice	1978-1991
Frank Morrison	Stockville, NE	Whitefish	Male	Caucasian	Private practice - plaintiff	1981-1987
Fred J. Weber	Deer Lodge	Havre	Male	Caucasian	Private practice	1981-1995
L. C. Gulbrandson	Vida	Glendive	Male	Caucasian	Private practice/city attorney/state court judge	1983-1989
William Edward Hunt, Sr.	Tacoma, WA	Various	Male	Caucasian	Dept county atty/county atty/worker's comp. judge	1985-2000
R. C. McDonough	Glendive	Glendive	Male	Caucasian	City atty/county atty/district court judge	1987-1993
Diane Barz	Bozeman	Billings	Female (1 <sup>st</sup> to serve on MT Supreme Court)	Caucasian	Dept county attorney/public defender/district court judge	1989-1990

Terry Trieweiler	Dubuque, IA	Whitefish	Male	Caucasian	Private practice - plaintiff	1991-2003
Charles Erdmann	Great Falls	Helena	Male	Caucasian	Mostly government attorney/some private practice	1995-1997
Jim Regnier	Aurora, IL	Great Falls	Male	Caucasian	Private practice – plaintiff	1997-2004
John Warner	Great Falls	Havre	Male	Caucasian	Private practice – general/district court judge	2003-2009
William Leaphart	Butte	Helena	Male	Caucasian	Private Practice	1995-2010
James Nelson	Moscow, ID	Cut Bank	Male	Caucasian	Private practice/county attorney	1993-2012
Brian Morris	Butte	Bozeman/Helena	Male	Caucasian	Law clerk/private practice/dept of justice	2005-2013
Patricia O’Brien Cotter	South Bend, IN	Great Falls	Female	Caucasian	Private practice – plaintiff	2001-2016
Mike Wheat	Spokane, WA	Butte/Bozeman	Male	Caucasian	Dept county attorney/private practice - plaintiff	2010-2017
Mike McGrath	Butte	Helena	Male	Caucasian	County atty/MT AGs office	Current (elected 2008)
Laurie McKinnon	Baltimore, MD	Choteau	Female	Caucasian	Prosecutor/dept. count atty/private practice – abuse and neglect/district court judge	Current (elected 2012)
James Rice	Ontario, Canada	Helena	Male	Caucasian	Public defender/private practice	Current (appointed 2006)
Beth Baker	Spokane, WA	Helena	Female	Caucasian	Law clerk/MT Dept of Justice/dept county atty/county atty/private practice	Current (elected 2010)
Jim Shea	Butte	Butte/Helena	Male	Caucasian	Public defender/Worker’s comp	Current (appointed 2014)

					judge/private practice – plaintiff	
Dirk Sandefur	Great Falls	Great Falls	Male	Caucasian	Public defender/county atty/district court judge	Current (elected 2016)
Ingrid Gustafson	? WY	Billings	Male	Caucasian	Government atty/private practice/public defender/district court judge	Current (appointed 2018)

## Professional Background of Judges (by Race and Ethnicity)

	TOTAL	WHITE	BLACK	LATINO	ASIAN	NATIVE AMERICAN
<b>TOTAL</b>	▼ 350	287	36	22	12	4
Private practice/law firm	82%	84%	67%	82%	92%	25%
Judge	65%	64%	75%	64%	58%	100%
Prosecutor	38%	36%	44%	55%	33%	50%
Law clerk	35%	37%	19%	36%	42%	0%
State/Local government attorney	21%	20%	36%	32%	8%	25%
Public defender	9%	9%	14%	14%	8%	0%
Elected/statewide official	9%	9%	8%	0%	0%	0%
Lawyer in governor's office	9%	9%	8%	14%	0%	0%
*Academia	8%	7%	11%	5%	17%	25%
In-house counsel	6%	4%	5%	0%	17%	0%
Federal government attorney	6%	5%	17%	9%	8%	0%
State legislator	6%	5%	6%	0%	0%	0%
Court staff/attorney	6%	6%	6%	9%	0%	0%
Other	5%	5%	6%	5%	0%	0%
Nonprofit	4%	4%	6%	5%	0%	0%
Civil legal services	2%	1%	8%	9%	0%	0%
Other elected official	2%	2%	0%	0%	0%	0%
Law enforcement	1%	0%	0%	5%	8%	0%
Lawyer for legislature	1%	1%	0%	5%	0%	0%
Attorney General	1%	1%	0%	0%	0%	0%

**Note:** Percentages do not sum to 100 because justices may have served in multiple roles, such as serving as a prosecutor before working at a law firm. The columns provide the percentage of judges within a demographic category with a given professional background (e.g., the percentage of white judges who had been prosecutors). Judges with multiple racial or ethnic backgrounds were counted more than once.

\*Adjunct positions are no longer being counted under the "Academia" category. This reflects a change in approach from our 2019 report and prior updates.



EXHIBIT B

CURRENT WYOMING SUPREME COURT JUSTICES  
(IF THEIR BIOS ARE TO BE BELIEVED)

Name	Birth City	City of Practice	Gender	Ethnicity	Type of Practice	Term
Kate M. Fox			Female	Caucasian	Federal court clerk (1 year), private practice	Began serving 2014
Lynne Boomgaarden			Female	Caucasian	Federal court clerk, private practice, director Office of State Lands and Investments	Began serving 2018
Kari Gray			Female	Caucasian	Private practice for 12 years, Director of Department of Family Services, Trust Officer of Converse Bank	Began serving 2018
John G. Fenn			Male	Caucasian	Private practice 13 years, district court judge 14 years	Began serving 2022
Robert C. Jarosh			Male	Caucasian	Federal court clerk (1 year), private practice	Began serving 2024

See [About the Supreme Court – Wyoming Judicial Branch \(state.wy.us\)](https://state.wy.us/about-the-supreme-court)

## EXHIBIT C

### Salaries and Rankings - Listed Alphabetically by Jurisdiction Name

The table below lists the salaries and rankings for associate justices of the courts of last resort, associate judges of intermediate appellate courts and judges of general jurisdiction trial courts. Salaries are ranked from highest to lowest, with the highest salary for each position having a rank of "1." The lowest salary has a rank of 56, except for the intermediate appellate courts, which only exist in 42 jurisdictions. The adjustment factor for general jurisdiction courts is available for 52 of the jurisdictions. Salaries are as of July 1, 2023.

	Court of Last Resort		Intermediate Appellate Court		General Jurisdiction Court		General Jurisdiction Court <i>Adjusted for Cost-of-Living Index</i>		
	Salary	Rank	Salary	Rank	Salary	Rank	Factor	Salary	Rank
Alabama	\$185,640	33	\$184,579	24	\$148,512	50	93.1	\$159,564	33
Alaska	\$215,436	19	\$203,522	16	\$199,193	16	131.9	\$151,003	42
American Samoa	\$140,000	54	<i>Not Applicable</i>		\$66,075	56	<i>Not Available</i>		
Arizona	\$205,000	25	\$190,000	22	\$164,700	34	102.5	\$160,728	31
Arkansas	\$203,625	26	\$197,596	20	\$192,919	21	90.6	\$212,966	4
California	\$282,177	1	\$264,542	1	\$231,174	3	134.9	\$171,356	24
Colorado	\$209,616	23	\$201,312	19	\$193,008	20	111.1	\$173,761	22
Connecticut	\$216,063	18	\$202,957	17	\$195,167	18	126.5	\$154,233	36
Delaware	\$212,315	22	<i>Not Applicable</i>		\$199,612	15	109.9	\$181,641	16
District of Columbia	\$246,600	4	<i>Not Applicable</i>		\$232,600	2	159.5	\$145,814	43
Florida	\$251,414	3	\$212,562	11	\$191,163	23	101.3	\$188,661	11
Georgia	\$186,112	32	\$184,990	23	\$183,892	24	93.4	\$196,987	8
Guam	\$160,454	51	<i>Not Applicable</i>		\$144,110	52	<i>Not Available</i>		
Hawaii	\$237,684	7	\$220,800	6	\$215,100	6	149.6	\$143,793	46
Idaho	\$165,212	48	\$157,212	40	\$151,212	47	99.8	\$151,585	41
Illinois	\$271,379	2	\$255,419	2	\$234,380	1	99.8	\$234,766	1
Indiana	\$214,586	20	\$208,594	14	\$178,168	26	95.5	\$186,505	14
Iowa	\$187,326	30	\$169,765	33	\$158,056	41	97.7	\$161,716	30
Kansas	\$168,598	46	\$163,156	37	\$148,912	48	98.2	\$151,648	40
Kentucky	\$165,097	49	\$158,536	39	\$152,004	46	92.4	\$164,449	28
Louisiana	\$193,227	28	\$180,807	27	\$173,788	29	97.3	\$178,636	17
Maine	\$155,397	52	<i>Not Applicable</i>		\$145,642	51	116.9	\$124,564	51
Maryland	\$216,433	17	\$203,633	15	\$194,433	19	126.6	\$153,529	37
Massachusetts	\$226,187	12	\$213,924	9	\$207,855	10	132.4	\$157,006	35
Michigan	\$181,483	38	\$182,656	25	\$168,759	33	91.2	\$185,134	15
Minnesota	\$206,668	24	\$194,738	21	\$182,805	25	102.4	\$178,464	19
Mississippi	\$173,800	43	\$168,467	34	\$158,000	42	88.5	\$178,576	18
Missouri	\$196,926	27	\$180,018	28	\$169,798	31	90.6	\$187,442	13
Montana	\$162,503	50	<i>Not Applicable</i>		\$148,872	49	103.9	\$143,266	47
Nebraska	\$212,316	21	\$201,701	18	\$196,393	17	100.9	\$194,596	9
Nevada	\$170,000	45	\$165,000	35	\$160,000	38	112.2	\$142,640	48
New Hampshire	\$179,942	39	<i>Not Applicable</i>		\$168,761	32	121.3	\$139,114	49
New Jersey	\$221,855	15	\$211,319	13	\$200,163	14	121.3	\$164,968	27
New Mexico	\$191,683	29	\$182,099	26	\$172,994	30	100.3	\$172,439	23
New York	\$233,400	8	\$222,200	5	\$210,900	9	112.3	\$187,863	12
North Carolina	\$167,807	47	\$160,866	38	\$152,188	45	95.2	\$159,821	32
North Dakota	\$179,312	40	<i>Not Applicable</i>		\$164,532	35	108.0	\$152,348	38
Northern Mariana Islands	\$126,000	55	<i>Not Applicable</i>		\$120,000	54	<i>Not Available</i>		
Ohio	\$184,575	37	\$172,034	32	\$158,206	40	92.4	\$171,204	25
Oklahoma	\$173,469	44	\$164,339	36	\$156,732	43	93.2	\$168,097	26
Oregon	\$176,724	41	\$173,316	31	\$163,476	37	118.9	\$137,514	50
Pennsylvania	\$244,793	5	\$230,974	3	\$212,495	8	102.1	\$208,112	5
Puerto Rico	\$120,000	56	\$105,000	42	\$89,600	55	100.0	\$89,600	52
Rhode Island	\$230,343	10	<i>Not Applicable</i>		\$223,031	4	128.1	\$174,078	21
South Carolina	\$223,987	14	\$218,387	7	\$212,987	7	98.9	\$215,405	3
South Dakota	\$186,770	31	<i>Not Applicable</i>		\$174,448	28	99.7	\$174,930	20
Tennessee	\$219,144	16	\$211,860	12	\$204,552	11	92.3	\$221,720	2
Texas	\$184,800	35	\$178,400	29	\$154,000	44	96.5	\$159,507	34
Utah	\$224,050	13	\$213,900	10	\$203,700	12	103.4	\$197,001	7
Vermont	\$184,771	36	<i>Not Applicable</i>		\$175,654	27	121.2	\$144,945	45
Virgin Islands	\$226,564	11	<i>Not Applicable</i>		\$191,360	22	<i>Not Available</i>		
Virginia	\$232,748	9	\$214,786	8	\$203,540	13	102.5	\$198,657	6
Washington	\$239,868	6	\$228,338	4	\$217,391	5	114.9	\$189,265	10
West Virginia	\$149,600	53	\$142,500	41	\$138,600	53	95.5	\$145,167	44
Wisconsin	\$184,819	34	\$174,366	30	\$164,487	36	100.2	\$164,161	29
Wyoming	\$175,000	42	<i>Not Applicable</i>		\$160,000	38	105.3	\$152,006	39
<b>Mean</b>	<b>\$197,880</b>		<b>\$192,171</b>		<b>\$176,430</b>				
<b>Median</b>	<b>\$192,455</b>		<b>\$192,369</b>		<b>\$174,118</b>				
<b>Range</b>	<b>\$120,000 to \$282,177</b>		<b>\$105,000 to \$264,542</b>		<b>\$66,075 to \$234,380</b>				

\*The figures presented use the C2ER Cost-of-Living Index. The Council for Community and Economic Research-C2ER is the most widely accepted U.S. source for cost-of-living indices. C2ER does not provide cost of living index for U.S. Territories (except for San Juan, Puerto Rico). Due to the rounding of C2ER factors to the nearest hundredth for publication purposes, user calculations of our adjusted salary figures may not equate to the published totals. More detailed information can be found at [www.c2er.org](http://www.c2er.org).