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# Selection and Retention of Judges

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**Department of Legislative Services**  
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DEPARTMENT OF LEGISLATIVE SERVICES  
OFFICE OF THE EXECUTIVE DIRECTOR  
MARYLAND GENERAL ASSEMBLY

Warren G. Deschenaux  
Executive Director

November 5, 2015

Ladies and Gentlemen:

Circuit court judges are the only judges in Maryland who run in partisan, contested elections to retain their seats after appointment by the Governor and after the expiration of a judge's 15-year term. The election process for circuit court judges has been a recurring issue for the General Assembly for more than 30 years. The attached report, *Selection and Retention of Judges*, was prepared by the Department of Legislative Services, Office of Policy Analysis, in response to continuing legislative interest in this issue.

The report was prepared by Susan H. Russell and reviewed by Douglas R. Nestor. The manuscript was prepared by Catherine Zablotty and Michelle J. Purcell.

I trust that this information will be of assistance to you.

Sincerely,

A handwritten signature in black ink, appearing to read "Warren G. Deschenaux".

Warren G. Deschenaux  
Executive Director

SHR/kms



# **Selection and Retention of Judges**

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This paper will review the constitutional requirements establishing the qualifications of judges and governing the selection and retention of judges in Maryland, the historical development of these requirements, recent study commission recommendations and legislative activity relating to election of circuit court judges, the judicial appointment process, and judicial selection methods in other states.

## **Constitutional Requirements**

### **Qualifications of Judges**

A judge of the Court of Appeals, the Court of Special Appeals, a circuit court, or the District Court must be:

- a citizen of the United States and Maryland;
- a qualified and registered voter;
- a resident of the State for at least 5 years;
- a resident of the applicable geographical area for at least 6 months immediately preceding election or appointment;
- at least 30 years old, but less than 70;
- a member of the Maryland Bar; and
- “most distinguished for integrity, wisdom and sound legal knowledge.” (Md. Constitution, Art. I, § 12 and Art. IV, §§ 2, 3, 5A(f), and 41D.)

## **Selection and Retention of Appellate Judges**

When a vacancy occurs on the Court of Appeals or Court of Special Appeals (by the death, resignation, removal, retirement, disqualification by reason of age, or rejection by the voters of an incumbent, the creation of a new judgeship, or otherwise) the Governor is required to appoint a qualified person to fill the office, by and with the advice and consent of the Senate.

The judge's continuance in office is subject to approval or rejection by the registered voters of the appellate judicial circuit or geographical area from which the judge was appointed at the next general election following the expiration of 1 year from the date of the occurrence of the vacancy and at the general election next occurring every 10 years thereafter.

An appellate judge runs in an uncontested, "retention" election, in which the judge's name appears on the ballot, without opposition, and the voters vote yes or no for his or her retention in office. If the voters reject the retention in office of a judge, or if the vote is tied, the office becomes vacant 10 days after certification of the election returns. (Md. Constitution, Art. IV, § 5A.)

### **Selection and Retention of Circuit Court Judges**

When a vacancy occurs on a circuit court (by death, resignation, removal, disqualification by reason of age or otherwise, expiration of a judge's 15-year term, creation of a new judgeship, or in any other way), the Governor is required to appoint a qualified person to fill the office. The appointee holds the office until the election and qualification of a successor. A successor is required to be elected at the first biennial general election for Representatives in Congress after the expiration of the term of 15 years (if the vacancy occurred in that way) or the first such general election after 1 year after the occurrence of the vacancy in any other way than through expiration of a term. (Md. Constitution, Art. IV, § 5.)

A circuit court judge runs in a "contested" election, in which any challenger who meets the constitutional requirements may run.

Circuit court judges are nominated by the two principal political parties during the primary election. Because Maryland holds closed primaries, in which only members of a particular political party may vote for that party's candidates for nomination, candidates for circuit court judge register their candidacies with both parties so as to appear on the ballots of both principal political parties during the primary. The practice of "cross-filing" candidacies dates back to 1941. The candidates who receive the majority of votes in each of the primaries move on to the general election ballot, where their names appear without any indication of their party affiliation, along with the names of any petition candidates and nonprincipal political party candidates who have received their party's nomination.

After the presidential primary in March 2004, a suit was filed in St. Mary's County circuit court requesting an injunction to prevent the State Board of Elections from certifying the primary results of circuit court judge candidates on the grounds that unaffiliated voters, who generally are not permitted to vote in party nominating elections (*i.e.*, primaries), are unconstitutionally disenfranchised from participating in the initial selection process for circuit court judges. Following a ruling by the trial court, the case, *Suessman v. Lamone*, 383 Md. 697 (2004), was appealed to the Court of Appeals. The court held that there is a legitimate State interest in keeping partisanship out of judicial elections, while holding on to the party primary system. The court held that the "State's attempts to achieve this goal do not violate the equal protection provisions of

either the Maryland or Federal Constitutions simply because some voters who decline to join a political party nevertheless wish to vote in that party's primary."

### **Selection and Retention of District Court Judges**

The Governor, by and with the advice and consent of the Senate, is required to appoint a judge to the District Court whenever a vacancy occurs. A judge appointed by the Governor may take office upon qualification and before confirmation by the Senate, but ceases to hold office at the close of the regular annual session of the General Assembly next following the appointment or during which the judge was appointed by the Governor, if the Senate does not confirm the appointment before then. The term of office of a District Court judge is 10 years. If the 10-year term of a judge expires before the judge reaches age 70, that judge shall be reappointed by the Governor, with the Senate's consent, for another 10-year term or until attaining the age of 70, whichever occurs first. (Md. Constitution, Art. IV, § 41D.)

**Exhibit 1** summarizes the various requirements for selection and retention of judges.

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#### **Exhibit 1**

#### **Requirements for Selection and Retention of Judges in Maryland**

	<u>Initial Selection</u>	<u>Senate Confirmation</u>	<u>Subject to Election</u>	<u>Type of Election</u>	<u>Term</u>
<b>Appellate Courts</b>	Appointed by Governor	Yes	Yes	Retention	10 years
<b>Circuit Courts</b>	Appointed by Governor <i>or</i> Elected by Voters	No	Yes	Contested	15 years
<b>District Court</b>	Appointed by Governor	Yes	No	N/A	10 years

Source: Department of Legislative Services

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### **Historical Background**

Maryland's first constitution, adopted in 1776, provided for appointed judges. Article 48 of the Constitution of 1776 empowered the governor "for the time being, with the advice and consent of the council, [to] appoint the chancellor and all judges and justices" and Article 40

provided that "the chancellor [and] all judges ... shall hold their commissions during good behaviour, removable only for misbehaviour, on conviction in a court of law." The rationale was stated in Article 30 of the Declaration of Rights:

That the independency and uprightness of judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people; wherefore the chancellor and all judges ought to hold commissions during good behaviour ....

In the 19th Century, with the advent of Jacksonian democracy, popular election of judges was adopted in many states, including Maryland. Under the Constitution of 1851, many of the officers who had formerly been appointed by the Governor were made subject to the elective process, including State judges, who were to be elected for 10-year terms. The requirement that judges be elected was retained in the Constitution of 1864; however, the length of the term was increased to 15 years. These provisions were essentially carried forward in Maryland's fourth and final constitution, the Constitution of 1867.

A reevaluation of the election system began in the 20th Century. In 1937, the American Bar Association adopted a merit selection policy, and in 1940, Missouri became the first state to establish a merit selection method of choosing judges, which came to be known as the "Missouri Plan." Under this method of judicial selection, candidates were nominated by a committee that examined their experience and credentials; those appointed by the Governor were then subjected to retention elections. Eight more states adopted a merit selection plan for at least some judicial vacancies over the next 30 years. In the 1970s, 15 additional states adopted a form of merit selection for at least some levels of their judiciaries.

In Maryland, The Missouri Plan came to be known as "The Niles Plan." Judge Emory H. Niles first proposed the plan in his address as outgoing president of the Maryland State Bar Association in June 1962 and lobbied to have it included in the new constitution drafted in 1967.

The Constitutional Convention of 1967-68 proposed a complete revision of the Maryland Constitution. With respect to the judiciary, the proposed constitution provided for four tiers of courts, all fully State-funded and consolidated at each level, merit selection and retention of all judges, and the abolition of orphans' courts. Although the constitution was rejected by the voters in May 1968, several of its proposals relating to the judiciary were later achieved, including the creation of the District Court (by constitutional amendment in 1970), the establishment of judicial nominating commissions (by executive order in 1970), and the elimination of contested elections for appellate judges (by constitutional amendment in 1976).

The constitutional amendment establishing the District Court (Chapter 789 of 1969, ratified November 3, 1970) provided for a 10-year term with no elections for District Court judges. Another proposed constitutional amendment passed by the General Assembly in 1969 (Chapter 791) contained parallel provisions (with the exception of a 15-year term) for appellate

and circuit court judges, but that amendment was rejected by the voters at the 1970 general election.

The current system of 10-year terms and retention elections for appellate court judges was created by a constitutional amendment introduced on behalf of the Mandel Administration and passed by the General Assembly in 1975 (Chapter 551). This amendment was ratified by the voters at the general election in 1976, leaving only circuit court judges subject to contested elections.

### **Recent Study Commission Recommendations and Legislative Activity**

A number of study commissions during the 20th century have recommended changes in the manner of selecting circuit court judges, the most recent being the Commission to Study the Judicial Branch of Government in the 1980s and the Commission on the Future of Maryland Courts in the 1990s.

The Commission to Study the Judicial Branch of Government was created by the General Assembly by resolution in the 1981 session and issued its final report in December 1982. Among its major recommendations was a recommendation that the constitutional requirement for the election of circuit court judges should be amended to allow for retention elections for 10-year terms.

Legislation to implement this recommendation was proposed by the Hughes Administration during the 1984 session (Senate Bill 493/House Bill 686), but both bills received unfavorable reports in their respective houses of origin. A similar measure introduced in 1985 (Senate Bill 73) passed the Senate after a three-day filibuster, only to receive an unfavorable report from the House Judiciary Committee.

Three years later, in 1988, the Schaefer Administration proposed legislation (Senate Bill 313/House Bill 502) to provide for retention elections for circuit court judges; this time it passed the House, but was reported unfavorably by the Senate Judicial Proceedings Committee.

The Commission on the Future of Maryland Courts, created by Chapter 561 of 1995, renewed the call for a change in the method of selecting and retaining circuit court judges. In its 1996 final report, the commission recommended that circuit court judges should stand for retention elections for 14-year terms; however, legislation was never introduced to implement this recommendation.

Since 1996 almost four dozen bills have been introduced relating to the appointment and election of circuit court judges. The largest number of these (20) would have provided for retention elections (generally for 10-year terms) and required Senate confirmation of appointees. The next largest category of bills would have addressed the election process itself by requiring circuit court judges to be elected on a nonpartisan basis; the majority of these (8) would have allowed any registered voter to vote in a primary election regardless of party affiliation, while others (5) would

have required a candidate for circuit court judge to be elected at a general election on a nonpartisan basis and prohibited nomination at a party primary. **Appendix 1** summarizes the bills introduced between 1996 and 2015 relating to the appointment and election of circuit court judges.

### **Appointment Process**

Governor Marvin Mandel established the first judicial nominating commissions (originally called judicial selection commissions) by executive order in 1970 to recommend to the Governor the names of persons for appointment to the appellate and trial courts of Maryland. Each governor since then has used the nominating commission process to screen candidates for judicial vacancies.

The current executive order (Executive Order 01.01.2015.09, effective February 2, 2015) establishes the Appellate Courts Judicial Nominating Commission and 16 Trial Courts Judicial Nominating Commissions.

The appellate commission has 17 members, including 12 persons appointed by the Governor, and 5 persons submitted for appointment by the president of the Maryland State Bar Association. The chair is designated by the Governor. The appellate commission is responsible for recommending the candidates legally and most fully professionally qualified to fill any vacancy that occurs on the Court of Appeals or the Court of Special Appeals.

Each Trial Courts Judicial Nominating Commission is composed of 13 members, including 9 persons appointed by the Governor and 4 persons submitted for nomination by the presidents of the bar associations in the political subdivisions for which the commission is responsible. The chair of each commission is designated by the Governor. Each trial courts judicial nominating commission is responsible for recommending the candidates legally and most fully professionally qualified to fill all trial court vacancies (District Court or circuit court) that occur in its respective commission district.

A commission member is not eligible for appointment to a judicial vacancy that occurs during the term for which the member was appointed to the commission.

When a vacancy occurs or is about to occur in a judicial office in Maryland, the appropriate nominating commission is notified of the vacancy by the Administrative Office of the Courts (AOC). This notification activates the commission process. Under the terms of the Governor's executive order, the commission has 85 days from the date of notification to submit its report to the Governor.

Upon receiving notification of a vacancy, the commission chair sets a closing date by which applicants for the office must file a personal data questionnaire with the AOC and a date for an initial commission meeting, which must be at least 15 calendar days after the closing date. Blank personal data questionnaires are available on the Maryland Judiciary's website.

Each commission is required to seek out qualified applicants from a diversity of backgrounds to fill a vacancy and to review all applications submitted, unless the Governor (1) reappoints an incumbent judge to fill the vacancy or (2) appoints a person to fill the vacancy

from any list of candidates submitted during the preceding two years for a prior vacancy on that court. The commission must notify and request recommendations from the Maryland State Bar Association and other appropriate bar associations and may also seek recommendations from interested citizens and from its own members.

If fewer than three candidates apply for a vacancy, the vacancy must be automatically re-advertised. If, after re-advertisement, there remain fewer than three applicants, the commission may proceed with evaluating the applicants.

A commission may seek information beyond that contained in the materials submitted by an applicant. The commission may obtain pertinent information from knowledgeable persons known to commission members, the Attorney Grievance Commission, judges, personal references given by the candidate, criminal justice agencies, or other sources. The commission must place notices in at least one newspaper read by members of the general public identifying the applicants and inviting written and signed comments to the commission regarding the applicants. A criminal justice agency, including the Criminal Justice Information System Central Repository, may release criminal history record information to a commission upon request of its chair, for the purpose of evaluating a candidate.

A commission must interview each applicant in person unless, due to extraordinary circumstances, a candidate is unable to appear in person. In cases of extraordinary circumstances, and with the prior approval of the Governor, an interview may be held via video teleconference.

In considering a person's application for appointment to fill a vacancy, a commission is required to consider the applicant's integrity, maturity, temperament, diligence, legal knowledge, intellectual ability, professional experience, community service, and any other qualifications that the commission considers important for judicial service, as well as the importance of having a diverse judiciary.

At least 11 members must be present at a voting session of the Appellate Courts Judicial Nominating Commission, and at least nine members must be present at a voting session of any Trial Courts Judicial Nominating Commission. In order to be recommended to the Governor for appointment, an applicant must receive the votes of a majority of members present at a voting session of the appropriate commission, as taken by secret ballot. A commission may conduct more than one round of balloting during its deliberations, in order to achieve the required number of candidates.

A commission must recommend at least three qualified candidates for appointment to fill each vacancy. If there are multiple vacancies on the same court, a commission must submit to the Governor a list of at least three qualified persons for each individual vacancy.

Upon request of the Governor, a commission must reconvene for further deliberations, or re-advertise a vacancy to new applicants. If a commission determines that fewer than three qualified applicants have applied for the vacancy, the commission must notify the Governor, who may direct the commission to re-advertise the vacancy to new applicants or to submit the names of applicants it recommends.

A commission must report in writing to the Governor the names of the persons found by the commission to be legally and most fully professionally qualified to fill a vacancy and release the list to the public concurrently with submission of the report to the Governor.

Persons on a list submitted to the Governor, but who are not appointed, are included in a pool and will be automatically considered for later appointment to a vacancy on the same court for which nominated. The pool candidates are included along with a new commission list, provided that the subsequent vacancy occurs within two years after submission of the initial list.

### **Other States**

Other states use a wide variety of methods for choosing judges, and few use the same method for all levels of their judiciary. In some states, the method varies by county.

In most states, at least some judges are chosen in partisan or nonpartisan elections, with mid-term vacancies filled by gubernatorial appointment. In seven states (Alaska, Delaware, Hawaii, Maine, Massachusetts, New Jersey, and Rhode Island), no judges run for election. In many states, some judges are appointed by the governor and then run in retention elections. In South Carolina and Virginia, judges are selected by the legislature. In Connecticut, the governor nominates judges from candidates recommended by a judicial selection committee; the governor's nominee must then be appointed by the legislature.

**Appendix 2** summarizes judicial selection and retention methods in other states.

**Appendix 1. Legislation Relating to the Appointment and  
Election of Circuit Court Judges**

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