



# SENATE CONFIRMATION OF JUDICIAL APPOINTMENTS

Office of Legislative Research and General Counsel

## SUMMARY

**Senators have expressed concern about how thorough the Senate has been in performing its constitutional duty of confirming judicial appointments.**

- The primary purpose of Utah's judicial selection system is to select highly qualified and skilled judges without regard to any partisan political consideration.
- Utah's merit selection process is comprised of four interdependent components consisting of nominating commissions, gubernatorial appointment, senate confirmation, and retention election.
- Senate confirmation serves as both a check on the governor's judicial appointment authority and provides a process for limited legislative input into the judicial selection process.

**What are the Senate's Options Regarding Senate Confirmation of Judicial Appointments?**

### **Option 1. Maintain current process**

Presume the candidate is qualified to hold judicial office, review the candidate's resume, and hold a meeting or public hearing if needed.

### **Option 2. Enhance senate review of judicial appointments**

Receive more detailed information regarding judicial appointees.

Require pre-screening meetings, interviews, or public hearings.

### **Likely Consequences of Option 1**

- The Senate would continue to allow the governor and the nominating commissions to play the major role in investigating the backgrounds, credentials, and judicial temperament of judicial appointments.
- The Senate may confirm some gubernatorial appointments that might not have been confirmed if the Senate had taken a more active role.

### **Likely Consequences of Option 2**

- The Senate would more fully exercise its constitutional duty, become a significant check in the judicial selection process, and play an important role in helping determine the composition of the state judiciary.
- Increased senate review may result in the denial of some appointments, which may discourage qualified individuals from applying for future judicial positions.

## **The Issue**

Senators have expressed concern about how thorough the Senate has been in performing its constitutional duty of confirming judicial appointments.

The Utah Senate could:

- be more thorough in the exercise of its constitutional duty to confirm judges; or
- continue to presume judicial appointments are qualified and only in extraordinary circumstances interview the candidate or hold a public hearing.

## **Utah's Judicial Selection Process Requires Senate Confirmation**

- The Utah Constitution provides for a judicial selection process that consists of nominating commissions, gubernatorial appointment, senate confirmation, and unopposed retention elections.
- The Legislature is required to provide for the composition and procedures of the judicial nominating commissions, and the Senate is required to render a decision on each judicial appointment made by the governor.
- If the Senate fails to approve an appointment within 60 days, the office is considered vacant, and the selection process begins anew.

## **Senate Confirmation is Important to the Judicial Selection Process**

Senate Confirmation:

- serves as a check on the governor and the nominating commission's appointment authority; and
- allows the legislative branch some influence in the judicial selection process.

Senate confirmation is the authority to reject an appointee. As such, senate confirmation is the final review a judicial candidate receives prior to taking office.

## Senate Confirmation is Uncommon Among the States

Utah is one of eight states that requires the Senate to confirm state judicial appointments.

Of those eight states, five (Delaware, Hawaii, Maryland, **Utah**, and Vermont) provide for:

- judicial selection to be done by a judicial nominating commission subject to gubernatorial appointment with senate consent.

The remaining three states (Maine, New Jersey, and Rhode Island) provide for:

- senate confirmation of gubernatorial appointments without involving a nominating commission.

Utah's judicial selection process also includes a retention election which no other senate confirmation state has. In Utah, the question of judicial retention is decided through an unopposed retention election.

### Selection Methods for Full Term Judicial Vacancies

#### 32 states select judges by a contested election

- 19 states Non-partisan elections
- 13 states Partisan elections

#### 18 states select judges by appointment

- 3 states allow the legislature sole appointment authority
- 5 states select judges through a nominating commission with gubernatorial appointment which does not include senate confirmation
- **5 states, including Utah, select judges through a judicial nominating commission, subject to gubernatorial appointment with senate consent**
- 3 states select judges through a gubernatorial appointment, subject to senate consent without involving a nominating commission
- 2 states select judges through a judicial nominating commission, subject to gubernatorial appointment with consent from an executive council

The retention of judges is done in other confirmation states by the legislature; the nominating commission; the governor, subject to senate consent; or a partisan election, except for Rhode Island where judges are appointed for life terms.

In the other senate confirmation states, the senate exercises a greater influence in the judicial retention process than Utah does. Since these states have some authority to rectify poor judicial selections, one might assume that the senate consent process in these states might be less rigorous than Utah's. However, the opposite is true. Every senate confirmation state exercises more influence during its senate confirmation process than does Utah.

## Senate Confirmation in Utah Seems Perfunctory When Compared to Other State Confirmation Processes

A review of other state senate confirmation practices indicates that Utah's confirmation process relies on the least amount of information and is the most informal.

Senate Rule 24.04.1 allows the Utah Senate Confirmation Committee to interview the appointee or hold a public hearing to listen to any person desiring to make a statement regarding the appointment.

Traditionally,

- senators have received only the appointee's resume;
- few appointees have been interviewed by the Senate Confirmation Committee; and
- few public hearings have been held by the Senate Confirmation Committee to take public comment regarding an appointee's qualifications.

Of the eight states that provide for senate confirmation of judicial appointments:

- Utah is the only state that does not hold a mandatory interview or hearing regarding each appointee; and
- Utah is the only state that has traditionally received only a resume in the confirmation process.

## If Utah Decides to Change its Senate Confirmation Process, What are Some Options?

### Receive more detailed information regarding judicial appointees, including:

- resume
- application packet
- criminal background check
- references
- personal statement
- writing samples, including publications in law reviews and other legal periodicals
- prior judicial opinions if appointee has previously held judicial office
- complete copies of any supplemental investigations conducted both by the nominating commissions and the governor's office
- independent investigations as circumstances require
- independent references from co-workers, partners, business associates, etc.

### Require mandatory pre-screening meetings, interviews, or public hearings

- Some states hold a meeting at the time the nominating commission provides names to the governor to review the application packets of each nominee.
- Once the governor makes an appointment, all states except Utah require that the appointee be interviewed. Some states require the candidate to be placed under oath, and at least two states require either a transcript or a video recording of the interview or hearing.
- All of the other senate confirmation states provide for an independent investigation when the Senate Confirmation Committee desires clarification on any issue.

## Consequences of Changing the Senate Confirmation Process

If the Utah Senate were to adopt some of the practices of the senate confirmation process used in other states, the likely consequences include:

### Confirmation decisions would be based on reliable information

Current Senate inquiries into judicial candidates rely heavily on information known personally by senators or by word of mouth recommendations. Requiring a more formal review of references, for example, would increase the reliability of the information used by the Senate.

### Increased Senate review may result in a denial of confirmation

Increasing the role of the Senate Confirmation Committee may result in the committee receiving information upon which it could recommend that the Senate vote against an appointee.

If the full Senate votes to decline an appointee confirmation, that action has the potential of harming an appointee's professional reputation, damaging the political relationship with the governor, and discouraging other candidates from making future application, depending on the reasons for the denial.

### Candidates for judicial office may be discouraged from making application

A more rigorous senate confirmation process may result in fewer judicial applicants.

## Conclusion

Utah's judicial selection process is a merit-based process comprised of four interdependent components: nominating commissions, gubernatorial appointment, senate confirmation, and retention election. Utah's unique judicial selection process is designed to select highly qualified and skilled judges that are selected by merit, without regard to partisan political consideration.

No other state employs all four steps of Utah's unique process to select judges. In Utah, the merit selection process is the exclusive method for judicial selection, because it is believed to be the best process by which to select highly qualified and skilled judges and it avoids the pitfalls of a contested election process.

Utah's current senate confirmation procedures allow the nominating commissions and the governor to assume the major roles in investigating the backgrounds, credentials, and judicial temperament of each judicial appointment.

The Utah Senate could:

- continue with its current confirmation process which provides little independent review into each candidate's qualifications; or
- play a more meaningful role in helping determine the composition of the state judiciary by enhancing its senate confirmation procedures.

## Additional Information

### Requirements and Restrictions Placed on Utah Judges

#### Minimum Constitutional Requirements

**Age:** 30 yrs old for Supreme Court and 25 yrs old for all other courts

**Residency:** Utah resident for 5 yrs for Supreme Court and 3 yrs for all other courts of record. Judges must also reside within the judicial district for which selected.

**Citizenship:** United States

**Bar Membership:** Utah

#### Statutorily Restricted Activities

No judge may:

- hold non-judicial elected office;
- hold office in any political party;
- practice law;
- have a law partner engaged in the practice of law;
- make contributions to a political party;
- make contributions to an organization engaged in political activity; or
- use political party designation, reference, or description to obtain or retain judicial office.

#### Discipline and Removal

##### Judicial Conduct Commission

Investigates complaints against judges and is authorized to reprimand, censure, suspend, remove, and involuntarily retire judges for:

- willful misconduct;
- final conviction of a crime punishable as a felony;
- willful and persistent failure to perform judicial duties;
- disability that seriously interferes with the performance of judicial duties; or
- conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

##### Powers of the Utah Supreme Court

The Supreme Court is required to review and then implement, reject, or modify every order of the Judicial Conduct Commission. Moreover, the Supreme Court may discipline judges on its own motion.

##### Retention Election

At the first general election held more than three years after appointment, each judge shall stand for an unopposed retention election. Following initial voter approval, each Justice of the Supreme Court shall stand for an unopposed retention election every tenth year, and each judge of other courts of record shall stand for an unopposed retention election every sixth year. A judge who fails to receive a majority of the votes cast at the retention election is removed from office.

##### Impeachment

The Legislature may impeach judicial officers for high crimes, misdemeanors, or malfeasance in office.