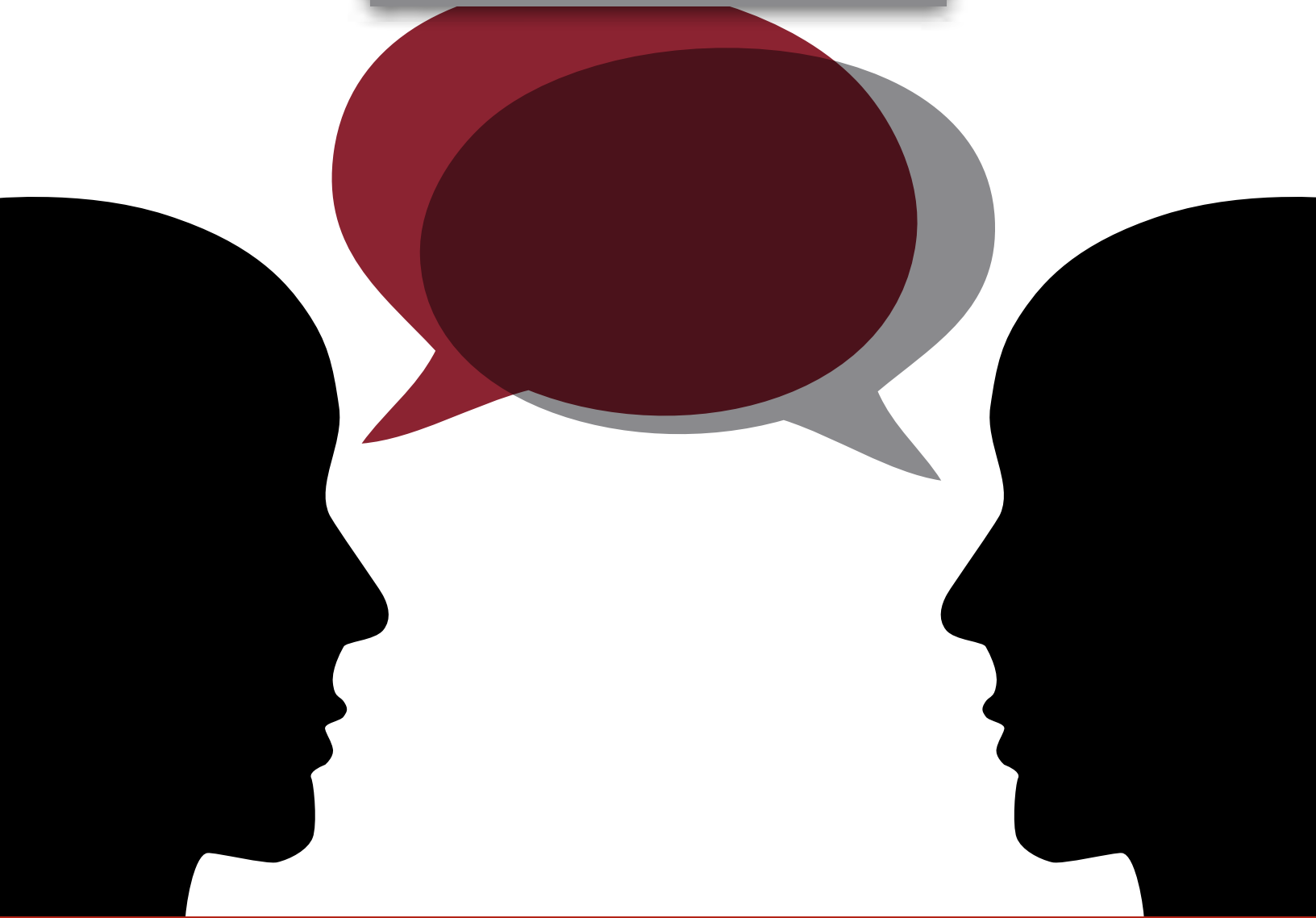


AN  
UNCOMMON  
DIALOGUE

WHAT DO WE WANT  
IN OUR JUDGES  
& HOW DO WE  
GET THERE?



# AN UNCOMMON DIALOGUE:

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WHAT DO WE WANT IN OUR  
JUDGES & HOW DO WE  
GET THERE?



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INSTITUTE *for the* ADVANCEMENT  
of the AMERICAN LEGAL SYSTEM



## **IAALS—Institute for the Advancement of the American Legal System**

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IAALS, the Institute for the Advancement of the American Legal System, is a national independent research center at the University of Denver dedicated to continuous improvement of the process and culture of the civil justice system. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable civil justice system.

Rebecca Love Kourlis	Executive Director
Malia Reddick	Director, <i>Quality Judges Initiative</i>
Natalie Knowlton	Manager, <i>Quality Judges Initiative</i>



The *Quality Judges Initiative* is dedicated to advancing empirically informed models for choosing, evaluating, and retaining judges that preserve impartiality and accountability. Through comprehensive analysis of existing practices and the collaborative development of recommended models, *Quality Judges Initiative* empowers, encourages, and enables continuous improvement in processes for choosing, evaluating, and retaining judges.

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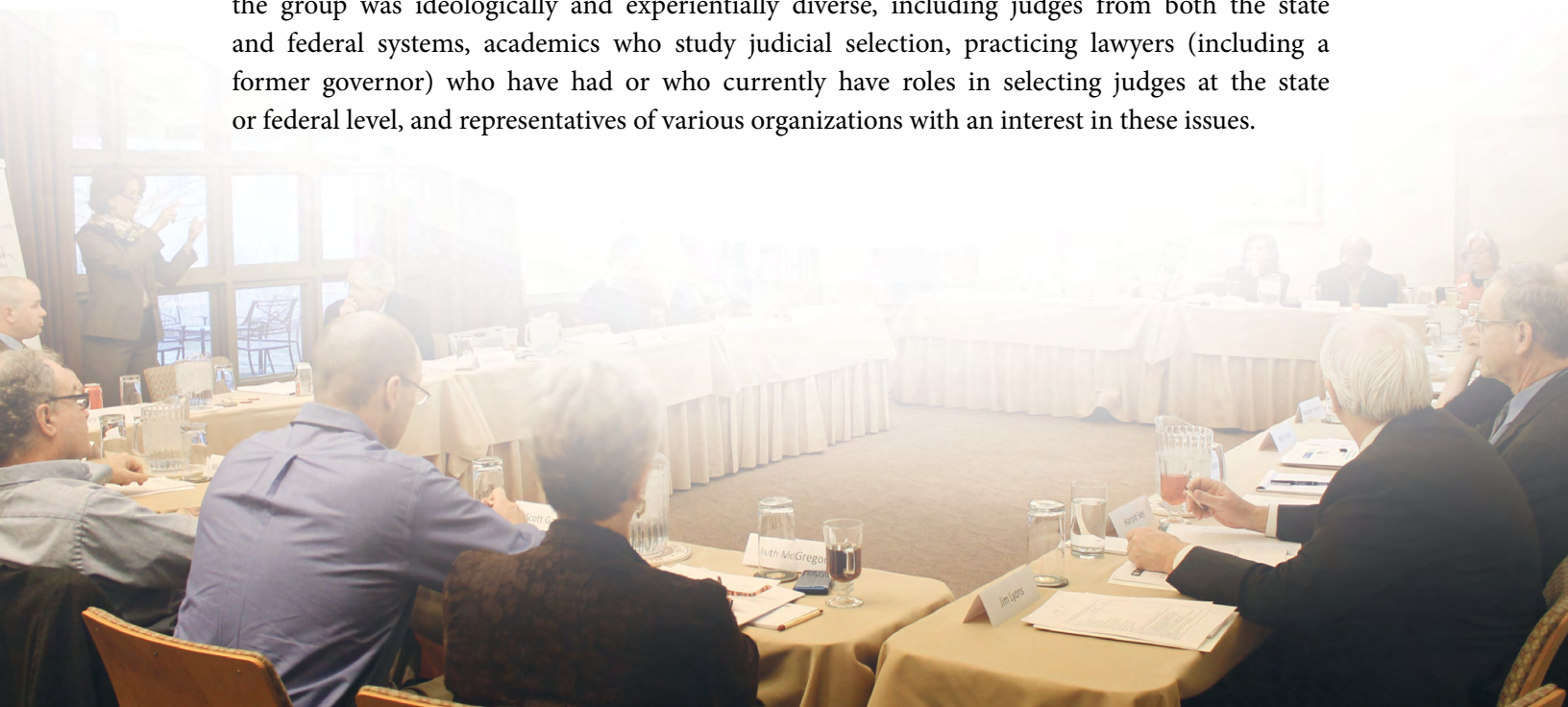
**Stephen Ware**, Professor of Law at the University of Kansas School of Law

**Russell Wheeler**, Visiting Fellow in Governance Studies at the Brookings Institution



In March of 2013, IAALS—the Institute for the Advancement of the American Legal System at the University of Denver—sponsored “An Uncommon Dialogue” about judicial selection. IAALS convened a group of thirty legal experts for two days to share perspectives on essential attributes for judges and how to put judges with those attributes on the bench. The Federalist Society for Law and Public Policy Studies and The Aspen Institute Justice & Society Program facilitated the participation of a number of those experts. The dialogue took place at Colorado Springs’ Penrose House, an education and conference center available exclusively for the nonprofit community to gather, discuss issues, and seek innovative solutions to challenges. El Pomar Foundation uses this neutral meeting place to promote cooperation across organizational and/or philosophical boundaries.

Consistent with El Pomar Foundation’s mission and the purpose of the gathering, the group was ideologically and experientially diverse, including judges from both the state and federal systems, academics who study judicial selection, practicing lawyers (including a former governor) who have had or who currently have roles in selecting judges at the state or federal level, and representatives of various organizations with an interest in these issues.





## OUR PROCESS

The purpose of the gathering was to identify areas of agreement and disagreement among people who care deeply about the court system and the judges who serve in it, and who have divergent opinions about the role of judges and the best ways to select them.

IAALS provided no advance readings or substantive meeting materials. Rather, participants approached this conversation with a clean slate. To ensure a common base of knowledge, the agenda included three presentations. The first described the current landscape of judicial selection in both the state and federal arenas. Malia Reddick, Director of the *Quality Judges Initiative* at IAALS, referenced efforts in some states to move away from the so-called Missouri Plan (also known as merit selection or commission-based gubernatorial appointment) toward a modified federal judicial selection process of gubernatorial appointment, legislative confirmation, and periodic retention elections. She also described trends in selecting federal judges in the last decade, including a record number of vacancies and an increased time to confirmation. Reddick then discussed developments in recent years in electing judges, including a sharp rise in campaign fundraising and spending, even in heretofore low-key judicial retention elections; increased attention to standards for judicial disqualification; and a relaxation in rules for campaign conduct. Reddick also noted efforts in a few states to do away with contested judicial elections. While three states considered moving away from a commission-based appointment process in the 2013 legislative session, two elective states examined whether to adopt such a process. In 11 other states, judicial selection issues were before the legislature, on the minds of some voters, or both.



The second formal presentation focused on ideology and judicial decision-making. Russell Wheeler, Visiting Fellow in Governance Studies at the Brookings Institution and a member of the IAALS Board of Advisors, described different academic models of judicial decision-making, ranging from the traditional view that judicial decisions are merely the application of the law to the specific case before the judge, to the view that judicial decisions, however cloaked in legal language, are simply expressions of judges' preferred policy choices, at least at the appellate level. He presented data on the relationship between federal judges' decisions and the political party of the presidents who appointed them. Wheeler also spoke about the use of screening commissions by senators for district judge recommendations to the White House and their impact on the selection process. He related data about time to confirmation under each president and numbers of appointees of each president.

Charles Geyh, John F. Kimberling Professor of Law at Indiana University Maurer School of Law, discussed some of the empirical research on the role of ideology in the decisions of state supreme court justices, noting that there is much less research here than for federal judges. According to Geyh, scholars have found that ideology matters for state court judges, but that much more than ideology factors into the decisions (a point Wheeler also made about federal judges). Geyh also discussed some of the implications that making ideology a factor in selecting and reselecting judges may have for their decisional independence.

The final formal presentation was made by Chris W. Bonneau, Associate Professor of Political Science at the University of Pittsburgh, and Natalie Knowlton, Manager of the *Quality Judges Initiative* at IAALS. They spoke about the processes in place for ensuring accountability of judges. Bonneau approached the topic from the perspective that accountability is best assured by contested partisan elections, and Knowlton shared the view that judicial performance evaluation programs can foster judicial accountability in a variety of selection systems.

## OUR DISCUSSION

The participants broke into smaller groups twice. First, groups discussed the following question: "What do we want in our judges?" Each small group generated its own list and then reconvened to assess convergences and differences among the groups' lists or among individual participants. That assessment continued through the following morning.

The second breakout group focused on the information that those responsible for screening judges in an elective or appointive system should have about a judicial candidate/applicant and how they would go about getting that information. Different groups considered what they would want to know as, respectively, counsel for an appointing governor, a judicial nominating commission member, a member of the U.S. Senate Judiciary Committee, and a voter.

The second day's plenary session identified areas of consensus and areas of disagreement. In general, there was unsurprising agreement about some basics—the importance of courts to society; the need for highly qualified judges in those courts; and the importance of preserving the legitimacy of the courts, which, in Alexander Hamilton's well-worn phrase, have "no influence over either the sword or the purse." On a more granular level, there was substantial consensus about the essential attributes of a judge. Time constraints precluded delving, as planned, into preferred methods for selecting those judges, and the pros and cons of each, or considering whether there might be an as-yet untried process that would incorporate advantages of the existing methods.

But, every journey begins with a step—and the participants were heartened by the degree of consensus they were able to achieve. Indeed, general agreement upon the essential qualities of judges may mean that the paths to selecting judges with those qualities can vary, and the debates about selection methods can be more productive.

## OUR CONSENSUS

Contrary to most discussions or debates about judicial selection, in which participants tend to focus on the selection method and polarize accordingly, this meeting focused first on desired attributes of judges in the federal and state systems. It became increasingly apparent that broad consensus existed about a certain category of attributes—what one participant called “neutral” attributes and another participant called “baseline” attributes. In short, people of very different backgrounds and perspectives do, indeed, agree upon what, at a minimum, they want from judges. Those attributes are:

### DILIGENCE

- Attends to tasks
- Demonstrates a strong work ethic
- Achieves timely docket management without sacrificing due process

### COMPETENCE

- Demonstrates excellent substantive legal knowledge
- Demonstrates excellent analytical ability
- Demonstrates excellent written and oral communication skills, with an emphasis on clarity and the ability to explain process and outcomes
- Balances experience with openness to new learning to achieve deliberative excellence

### DEMEANOR/TEMPERAMENT

- Is respectful
- Is courteous
- Is patient
- Is even-keeled
- Is collaborative
- Is collegial
- Demonstrates appropriate judicial humility
- Demonstrates a commitment to fairness through an ability to convey to the parties that they have been heard<sup>1</sup>

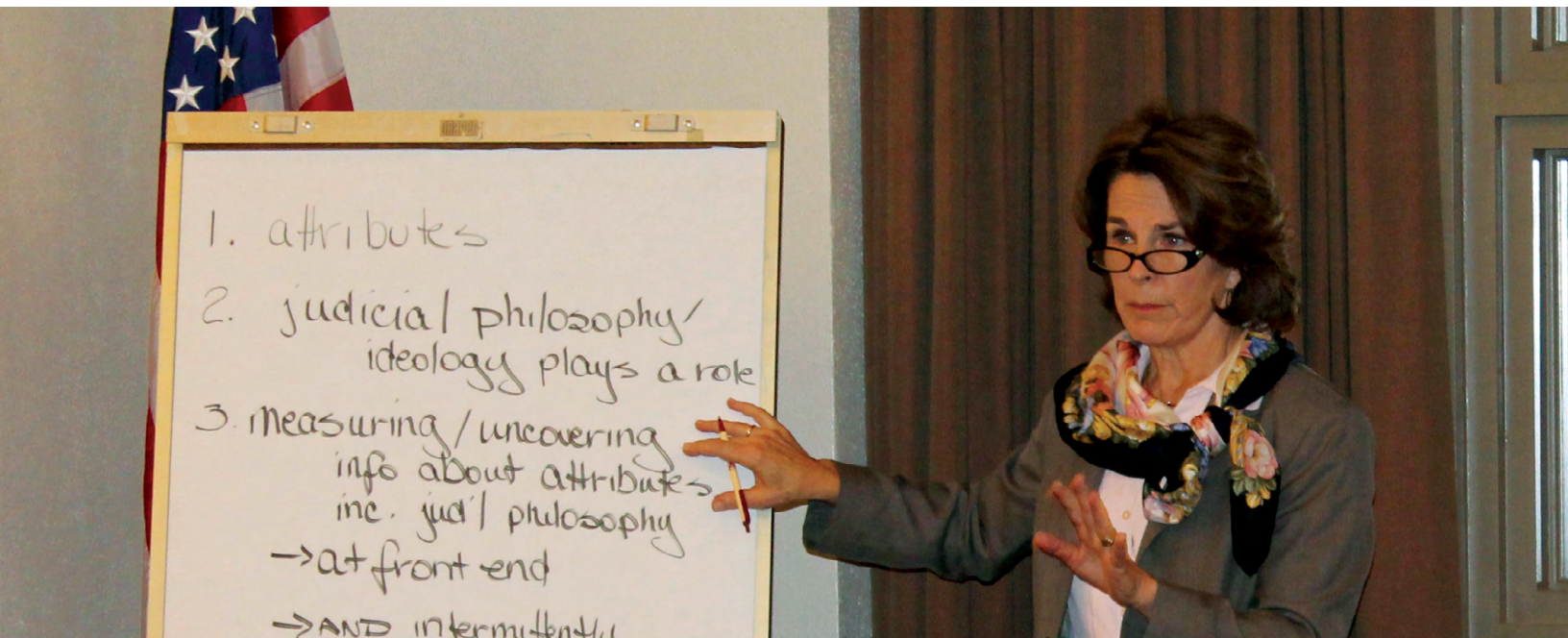
### IMPARTIALITY

- Does not prejudge cases on the merits
- Is even-handed
- Is open-minded and willing to reconsider personal points of view
- Provides a full and fair opportunity for litigants to present their case

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<sup>1</sup> Some participants wished to include “is empathetic” and “is compassionate” in this portion of the list. However, the balance of the group thought the terms were too laden with implication, particularly in relationship to a criminal docket. However, none of the participants disagreed with the notion that judges (particularly trial judges) need to be sensitive to the interests of all the parties in a courtroom or in a case.





### INTEGRITY/CHARACTER

- Is honest
- Is intellectually curious
- Is principled
- Acts in a way that engenders respect for the courts

When asked about ways to obtain information about a candidate's/applicant's credentials in these categories, participants identified, among other things, reputation in the community, reputation among lawyers and judges, educational background, and information about experience, areas of practice, and other community activities.

Participants acknowledged that the sources of information necessarily differ depending upon the selection process in place. But the comments presumed some role for an initial screener of the candidate/applicant who would have access to broad-based information. The comments also presumed that the candidate/applicant may not necessarily have judicial experience and thus that some of the identified attributes could only be *considered* in the screening process rather than *required*. As the discussion progressed, the selection process began to divide logically into two stages for purposes of the conversation:

### INITIAL APPOINTMENT

- Role of the bar
- Role of a nominating commission
- Role of the appointing authority
- Presence or absence of legislative confirmation

### RESELECTION

- Who decides
- How to ensure accountability



The next category of qualifications transcended the “neutral” or “baseline” qualifications and began to delve into judicial philosophy and perhaps into political ideology. Although the discussion was detailed and far-ranging, the group reached general consensus as to only three attributes in this category:

#### JUDICIAL/DECISION-MAKING PHILOSOPHY

- Recognizes that the primary responsibility of a court is to decide the case before it
- Recognizes the impact/consequences of a decision but does not allow these factors to drive the decision
- Appreciates stability in law and precedent, while recognizing the need for change

In this category, there was robust discussion and some deep-seated disagreement. An example was one small group’s suggestion that the decision maker should try to determine if the judicial candidate/applicant understands the difference between the “is” power of the courts—a court interpreting the law as it is—and the “ought” power of the courts—a court determining what the law ought to be. Many participants believed that the question really inquired into the candidate’s/applicant’s understanding of separation of powers, but that it might cross over into federalism issues as well. In either event, this suggestion did not achieve consensus.

Participants considered the meaning of the concept of the “rule of law”—both to lawyers and judges and to laypeople—and explored the difference between the application of the rule of law in a broad substantive area and the dispensing of justice on a case-by-case basis. Again, although no consensus emerged about the way to frame appropriate attributes, there was widespread consensus that these areas of inquiry are important in the judicial selection process.

To that end, the small groups also brainstormed about appropriate questions designed to elicit information about a candidate’s judicial philosophy, including, by way of example, the use of precedent, the meaning of the rule of law and of judicial independence, and the appropriate use of legislative history. The participants recognized that these inquiries could be relevant either at the initial selection stage or at the reselection stage of the process.

There was another major component of the discussion that related to the attributes of a bench, or a court, rather than the attributes of a particular judge. One participant spoke of “essential attributes” for a judge and “desirable attributes” for the court as a whole. This inquiry is, to a large extent, particular to an initial appointing authority such as a governor or the president, who might look at the composition of a bench as a whole and try to ensure that it contains diversity of background, legal expertise, and life experience in order to ensure that it is as representative of the population appearing before it as possible.<sup>2</sup> There was clear disagreement about the degree to which such factors are appropriate for a selecting official to consider.

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<sup>2</sup> This suggestion was hotly debated. In general, the group agreed that a bench should be diverse, but participants were hesitant to spell out different kinds of diversity. Additionally, the group debated the interrelationship between the individual attributes and the composition-of-the-bench attributes.



## WHERE WE ARE NOW

Everyone who participated in this Uncommon Dialogue did so because of a true commitment to preserving the legitimacy of the courts and a recognition of the importance of the courts to our way of life.

Participants did achieve important consensus.

First, we recognized that there essentially are two stages of selection and that there may be different considerations for, or at the very least different kinds of information available to, the decision maker at each stage. The first stage involves the initial selection, and in many states, the governor has that authority and in some states exercises it with input from a judicial nominating commission. In other states, voters make the initial selection decisions. We agreed that the decision maker(s) at the initial selection stage need(s) to focus on neutral qualifications/attributes and need(s) to get as much information as possible about the applicant/candidate. We also acknowledged that this may be more difficult if the applicant/candidate has not previously served as a judge.

The second stage is the reselection stage, when the judge stands for reelection, reappointment, or retention. At that point, different information may be available to the decision maker, some of which relates to the judge's actual performance on the job.

We also agreed that judicial selection involves more than the assessment of neutral qualifications. Every participant acknowledged that factors related to judicial philosophy and political ideology do play a role in the selection decision. The latter may be considered directly or through surrogate criteria, such as political party preference.

The real divergence came when we tried to define judicial philosophy and political ideology considerations and how to get at them. Some participants indicated that they believed the appointing entity should appoint only judicial applicants whose judicial philosophy matched up with its own. Other participants suggested that the citizenry is the ultimate arbiter and that the popular vote is the only way to determine whether a particular judicial candidate's views comport with the voters' wishes. Still other participants believed that judicial philosophy is relevant only to the extent that it represents an acknowledgement of the separation of powers and the importance of the rule of law.

In short, to the extent that participants represented some of the nation's thought leaders as to the role and preferred selection methods for judges, we *do* agree, at the most important and most basic level, about what we want in our judges. We begin to part company when we talk about judicial philosophy, although we all agree that it, too, plays a role in judicial selection, along with candidates' policy preferences.

We at IAALS hope that this conversation will continue, in many locations and among many thoughtful people—with a view toward finding the areas of agreement from which to begin to build a real consensus about the components of a good judicial selection system.





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