Senate Judiciary H.780 Judicial Nominating Process

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Dear Chair Sears and Honorable Committee members:

This bill includes a couple of useful changes to increase the diversity of the Judiciary by potentially increasing the number of applicants for Judicial vacancies. In our experience, the wider the pool, the greater the opportunity for candidates with diverse experiences. That said, I have several concerns with this bill I would ask the Committee to address:

I. **In order of importance, the most problematic change is to the Governor's Constitutional power of appointment which raises separation of powers issues.**

The foundation of the Governor's judicial appointment power is Constitutional, not statutory: Chapter II, Section 32 of the Constitution:

***The Governor, with the advice and consent of the Senate, shall fill a vacancy in the office of the Chief justice of the State, associate justice of the Supreme Court or judge of any other court, except the office of Assistant Judge and of Judge of Probate, from a list of nominees presented by a judicial nominating body established by the General Assembly having authority to apply reasonable standards of selection*.**

This system of judicial selection, known as the Missouri Plan or "merit selection" was to ensure the selection of judges based on merit. This is opposed to the system prior to 1974 under which the Legislature was responsible for judicial appointments.

On page 13 of this bill, the proposed amendment in Section 603(b), would require the Judicial Nominating Board to provide the Governor with additional names of well qualified candidates upon request. However, it also limits the Governor to one request for additional names.

Not only is this a solution in search of a problem, since a second request for additional names has, to my knowledge, never been an issue, this language diminishes and interferes with the Governor's power to appoint. There is no authorization in the Constitution for the Legislature to impair the Governor's duty in this way.

The Constitution directs the Legislature to create a judicial nominating body with authority to apply "reasonable standards of selection." The Governor is directed to make a selection from "a list of nominees." Not THE list, but A list. There is no constraint on the Governor's authority to request a list.

On two separate occasions I have had JNB chairs tell me the Governor has no authority to ask for more names. I have been asked to hearings to debate this point with the JNB and each time the JNB has agreed to conduct a search for more names. The reasons for a Governor to reject a list (as is the case in prior administrations), or request additional names, vary. During Governor Scott's tenure:

- The Governor requested additional names to expand a list for a search requested by Governor Shumlin, at the time the former Governor sought to fill a Supreme Court seat which was not yet vacant.
- Governor Scott was presented with 2 names for one vacancy.
- On a third occasion, the lack of diversity on the Superior Court bench, the very few names provided per vacancy when faced with multiple vacancies and the lack of diversity among candidates had become a concern.

Neither the Legislature nor the JNB has the authority to narrow or constrain or otherwise impede the Governor's Constitutional duty to appoint members of the Judiciary.

There is Constitutional history behind Section 32 which limits tinkering by the Legislature. In Turner v. Shumlin (which held a Governor could not fill a vacancy when there is in fact no vacancy), footnote 4, the Court makes 2 points:

- The Constitutional Commission wanted to design a process as free from politics as possible; and
- The Commission likened the appointment process to the preexisting and familiar process involving executive branch officials subject to the advice and consent of the Senate.

There is also longstanding administrative interpretation to support asking for more names or rejecting a list.

- In 1996 Governor Dean rejected a list to fill the position of Frederick Allen and appointed Chief Justice Amestoy;
- In 2003 and 2005 Governor Douglas appointed Justices Reiber and Burgess. In one of those cases Governor Douglas rejected a list or requested additional names.

I respectfully request the Committee delete the last sentence of 4 VSA 603(b) as follows:

~~A request from the Governor for additional names pursuant to this subsection shall not be made more than once.~~

II. I support the effort to add diversity to the pool of applicants, specifically the optional nomination process in 602(b)(2) which may encourage more applicants, but feel other changes in this bill, discussed below, could slow the process and undermine this goal.

In 2019 Governor Scott raised the issue of the lack of diversity on the bench. We pointed out that the short lists we were receiving were primarily male. At the time there were 34 trial judge positions and 9 women on the bench. Many had recognized the shorter lists were counterproductive.

In its October 4, 2017 letter to the JNB, (which I am happy to share) the Judicial Conduct Board noted the shorter lists sent to a governor create a perception ***"that the JNB – rather than identifying well-qualified candidates in a given applicant pool and sending those names to the Governor – is to some extent overstepping its authority and usurping the appointment authority conferred on the Governor by Title 4 V.S.A. § 603."***

Since 2019, the JNB has made good efforts to address the issue of diversity on the bench, including trainings, and has increased the size of lists and diversity of candidate experience coming to the Governor. We have slowly but surely increased gender diversity to shape the bench to include 50% women and LGBTQ+ representation.

This is despite a prior legislative change from "qualified" to "well qualified" which also had the result of creating shorter lists, as all candidates in the pool were considered in relation to each other and not necessarily on their own merits. This was a phenomenon observed by JNB member John Kellner who joined the JNB in 2001 and wrote a piece in the VT Bar Journal in 2013 (also happy to share).

We know that exclusionary lines serve to undermine the confidence of the public (and potential applicants) in the fairness of the Board's process.

Provisions to slow the process and negatively impact the goal of equity.

As to the make up of the Board with the addition of 1 member, a Board of 12 with no tiebreaker is problematic from a governance perspective The Chair of the JNB pointed out in House testimony it is already practically impossible to schedule Board meetings for the 5 months of legislative session. Again, given the conscious efforts go improve JNB process and diversify the candidate pool, it's not clear this additional member is needed.

Other than this I have no specific objection to the addition of the Executive Director of Racial Equity. **I do, however, have concerns about the open-ended nature of who might be the Executive Director's designee.** While it's reasonable to add "or designee"

because the Executive Director has already been placed on a voluminous number of boards, commissions, councils and task forces, in her House testimony the Executive Director commented on the lack of limits on a designation. This is a novel view, and it would be helpful to clarify the Legislature's intent; **it is my position the Executive Director's designee should be directly accountable to the Executive Director.**

Since the Governor only has two votes as it is on the 11 member Board composed primarily of legislators, I cannot support any efforts to further reduce or alter the Governor's appointments.

Finally, I would ask the Committee delete 4 VSA 602(e) on page 13, as it could serve to further limit diversity:

~~The Board shall consider the candidate's ties to the Vermont legal community and the candidate's familiarity with the Vermont legal system.~~

First, it is well known there is little diversity in the Vermont Bar. Second, the entire process is already oriented to the selection of trial attorneys only, which further narrows the likely pool of candidates. Third, it is not at all clear a) what it means (member of the VBA? VBA Committee work? VBA leadership? Attendance at Inns of Court? Membership in the Trial Lawyers Association?), or b) what this has to do with a merit-based selection, particularly given the attributes of a candidate that already exist in 4 VSA 602(d):

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> (2) Legal knowledge and ability. A candidate shall possess a high degree of knowledge of established legal principles and procedures and have demonstrated a high degree of ability to interpret and apply the law to specific factual situations.
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> ***
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> (9) Courtroom experience. For Superior Court, a candidate shall have sufficient trial or other comparable experience that ensures knowledge of the Vermont Rules of Evidence and courtroom procedure. For the Environmental Division of the Superior Court, a candidate shall have experience in environmental and zoning law.

This may have been inserted in response to objections made by the legal community to the revised minimum years of practice, but this is an issue for the JNB which has the obligation to identify "well qualified" candidates. The Vermont Bar has 3 members on the JNB and they will likely have some say in the selection process.

Thank you.