

A COMMENT ON “SELECTION TO THE KANSAS SUPREME COURT”

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Professor Stephen Ware’s article is a well written and scholarly-looking brief advocating one of the political goals espoused by the Federalist Society. The article was originally published as a Federalist Society “white paper,” and so there is no claim of objectivity.

The Federalist Society does not like nonpartisan merit judicial selection, and so it has a program of attacking merit selection systems all over the country.¹ The society wants to abolish judicial selection systems that include nonpartisan screening and vest control over the judicial selection process in state legislatures. The attacks are basically the same in all the states. The society seeks to minimize the role of lawyers in the selection process, and they want to give the legislature veto power over any nominees chosen by the governor. The publication of a “white paper” written by a friendly law professor is part of the society’s modus operandi.² The present article follows that pattern. First, it attacks the role of the bar in connection with the judicial nominating commissions. Then it advocates a requirement of state senate confirmation for all appellate judges.

The article does not make a persuasive case for either point. The paper does, however, contain some interesting information. The author and his research assistants, aided by Chris Steadham of our law school’s Wheat Law Library, have looked at the methods of judicial selection in all of the states, and in those states that, like Kansas, utilize a nonpartisan nominating commission, they have looked at the composition of the nominating commissions. All that material, however, while interesting, does not begin to support the conclusions the author seeks to draw from it.

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1. See Editorial, *Saving the Missouri Plan*, 91 JUDICATURE, No 11, pages 160 and 211 (2008) mentioning attacks in Arizona, Colorado, Kansas and Missouri. To that list we may now add Tennessee. See “A Report on Re-authorization of the Tennessee Plan,” another “white paper” from the Federalist Society, available at http://www.fed-soc.org/doclib/20080225_ReauthorizationofTennesseePlan.pdf.

2. See Justice at Stake Newsletter (online), Mar. 10, 2008.

The article starts out by boldly asserting that “Kansas is the only state in the union that gives members of its bar majority control over the selection of state supreme court justices.” The author surely must mean control over the *nomination* of candidates for selection. In Kansas, the selection procedure has two separate phases. First, the nominating commission screens the qualifications of the applicants for judicial positions and recommends three names to the governor. The governor then selects one of the named persons to fill the judgeship. The members of the bar have no role at all in the second phase of the process. This confusion of the nomination phase and the ultimate selection phase runs throughout the article.

In any event, however, that first bold statement is almost immediately contradicted by footnote 5, which points out that lawyers comprise a majority of the nominating commissions in Alaska, Indiana, Iowa, Missouri, Nebraska, South Dakota and Wyoming as well. It is true that in those other states one of the lawyer members is *ex officio*, such as the chief justice of the state supreme court, but they are full voting members, so it is hard to see how the situation in those states is any different from that of Kansas. There are organizations of lawyers, like the Kansas Bar Association, but that is not the “bar” as used in connection with our judicial nominating commission. The “bar” is all lawyers licensed to practice in the state of Kansas, including the chief justice and all other state officials that are licensed to practice. On March 13, 2008 the “bar” had 8,900 members. The group includes lawyers in private practice, plaintiffs’ lawyers, defendants’ lawyers, tax lawyers, corporate counsel, probate lawyers, bankers, real estate brokers, civil servants, homemakers and others. It is a population with very diverse interests. The only thing they share in common is the fact that each one is licensed to practice law, of whatever nature, in Kansas. Most of them also share a common interest in seeing to it that our courts are staffed by competent unbiased judges. The “bar” is not an organization.

Even if Kansas were the only state where lawyers comprise a majority of one on the nominating commission, it does not follow that the “bar”(if there were such an entity) would “control” the nominating process. If the lawyer members and the non-lawyer members of the commission voted in blocs, then perhaps it could be said that lawyers would be in a position to control the process. There is no evidence whatsoever that the commissioners do behave that way, however. In fact, the material contained in Appendix A shows quite clearly that the commissioners do not vote in blocs. Lawyer members have no more clout than non-lawyer members. There is no support at all for the contention that lawyers control the nominating process.

But even if lawyers did control the nominating process, what of it? The author apparently thinks that would be bad, but why? He asserts that “lawyers comprise an interest group, just like other interest groups.” Then he starts talking about bar associations and their efforts to lobby on behalf of their members. This, again, tends to obscure the point. The “bar” in our nominating commission is not the bar association, nor any organization at all. It is a diverse group of persons who have in common an interest in competent and

unbiased judges. So why would it be bad if such a group controlled the nominating system? If there were some evidence that our nominating commissions were not producing well qualified, unbiased judges, then there might be some grounds for complaining about the system. There is, however, no such evidence. The article never claims that our system has not worked well. The author seems to think that the system he proposes would be better, but he offers no reason why it would be better, unless you accept on faith, as he apparently does, that letting lawyers be a majority of one on the nominating commission is bad.

One section of the article asks the question, “Is the Bar an Interest Group or Faction?” This is important to the argument against lawyers on the nominating commission. To answer that question, the author offers no evidence except the opinions of some others who would answer, “Yes.” He says,

Scholars who have studied judicial nominating commissions around the United States conclude that the commissions are very political but that their politics—rather than being the politics of the citizens as a whole—are a somewhat subterranean politics of bench and bar involving little public control.³

He should have said, “Some scholars, etc.” Certainly not all have reached that conclusion. But in any event, what in the world does that statement mean? I have been a member of the Kansas bar for over fifty years, and I have never encountered any underground “politics of bench and bar.”

With no further explanation, the author follows that statement with another long quote from the same source: “The conclusion is inescapable: ‘merit’ selection has very little or no merit, if by merit we mean that nonpolitical (that is professional) considerations dominate the selection process.”⁴

The author cites to a book by Stumpf and Paul⁵, but there is no evidence to support their “inescapable conclusion.” Stumpf’s and Paul’s opinions are no better than Professor Ware’s. The intemperate tenor of the language Stumpf and Paul use suggests that their opinions are too biased to be worth anything.⁶

Actually, the data included in Appendix A seems to show pretty clearly that in Kansas our nominating commissions are in fact dominated by

3. Stephen Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J.L. & PUB. POL’Y 386, at 396 (2008).

4. *Id.*

5. HARRY P. STUMPF & KEVIN C. PAUL, AMERICAN JUDICIAL POLITICS 142 (2d ed. 1998).

6. For instance: “The legal profession desires a larger voice in judicial selection for the same reason that other interest groups do—to advance their cause through judicial policymaking. “Merit” selection gives them that added leverage. All the better if they can sell their old line of increased political influence over the courts by using the attractive, but phony, label of “neutral professionalism.” *Id.* at 147.

“nonpolitical (that is professional) considerations.” In 1988, a nominating commission that included 4 Republicans and 5 Democrats nominated 3 Republicans. In 1993, a commission comprised of 8 Republicans and 3 Democrats, nominated 3 Democrats. In 1995, a commission of 7 Democrats and 2 Republicans nominated 2 Republicans and one Democrat. Other examples could be cited, but this is surely sufficient to refute, at least for Kansas, the material quoted from Stumpf and Paul and others.

The conclusion is “inescapable”: there is simply nothing here to support the contention that the “bar” controls the nomination process and engages in subterranean skullduggery.

The author then turns to a discussion of alternatives to nonpartisan nominating commissions. Here, not surprisingly, he comes up with the Federalist Society’s recommendation of state senate confirmation of all appellate judges. The arguments for that recommendation are no better than those offered to show “bar” control.

The main argument for a senate-confirmation requirement seems to be a belief that that is a good idea because that is the process the framers of the United States constitution chose for the selection of federal judges. The author asks, “So the question is, when taking the long view, did the Framers of the United States constitution get it right?”⁷ Most of us would agree that they got it right for the kind of tripartite, separated powers federal government the Framers set up. They had to give Congress a role in the process of selecting the judges who would wield the federal judicial power. But part and parcel of that process was the constitutional grant of life tenure and irreducible salary to all Article Three federal judges⁸. The Framers provided a politically partisan system for selection of federal judges, but once the political hurdle of Senate confirmation has been overcome, the judges are independent of partisan politics. Judicial independence provided by life tenure and irreducible salary is an essential feature of the Framers’ plan. A Senate-confirmation requirement makes sense if the judges are to become, as the federal judges are, free of any further “accountability” (to use the Federalist Society’s buzzword). It does not follow, however, that state senate confirmation would make sense in a state setting where judges do not have independence protections of life tenure and irreducible salary.

In Kansas, our judges have fixed terms of office. The judges of the supreme court and courts of appeals must face retention elections periodically. Their “accountability” is thus publicly tested directly before the people. Since we cannot provide the kind of independence protections that federal judges enjoy, we have to take steps to provide some measure of independence from partisan politics at the nomination level. That is why we have the nonpartisan merit nomination procedure. Under our system, the lawyer members of the commission are elected without disclosure of their political affiliations. The

7. Ware, *supra* note 3, at 395-96.

8. U.S. CONST. art III, § 1.

non-lawyer members, although they are appointed by governors, serve staggered terms so that it rarely happens that all are appointed by the same governor. Although the governor, a partisan political official, makes the ultimate selection, some degree of independence of the judges from partisan political pressure is provided by the non-partisan nomination process. The governor can only choose a candidate that has been nominated by a nonpartisan process. If a politically partisan legislative confirmation requirement were imposed, it would eliminate the limited judicial independence protection that the nonpartisan nomination process provides.

It is interesting to note that when Congress created a local court system for the District of Columbia, they did not provide for Senate confirmation of the judges. The judges of the local D.C. courts are not Article III judges, and so they do not have life tenure. Congress recognized that it would make no sense to require Senate confirmation of judges who serve limited terms. Instead, they adopted a system much like our Kansas plan. Vacancies on the D.C. courts are filled by judges chosen by the President from a list of three submitted by a nominating commission of seven members, four of whom are lawyers.⁹

Our system works very well indeed. The material in Appendix A shows quite clearly that our judicial nominating commissions operate largely free from partisan political concerns. The fact that none of our appellate judges has ever lost a retention-election is strong evidence that our selection system has produced the kind of competent, unbiased judges the people of Kansas want and need. The article makes no case at all for changing our system.

9. D.C. CODE, § 1-204.34 (2008).