

MERIT SELECTION: THE WORKINGS OF THE KANSAS SUPREME COURT NOMINATING COMMISSION

A Response to Professor Ware's Article—From the Perspective of
a Supreme Court Nominating Commission Member

*Patricia E. Riley**

There is an attack afoot against our state's merit selection process for appointments to the Kansas supreme court and court of appeals. Outside of the legislature, the charge is being led by Professor Stephen Ware, who contends that the supreme court nominating commission does not select nominees on the basis of merit. This article is intended to detail the workings of the nominating commission to demonstrate that the commission serves its intended purpose of merit selection and that no change in the selection process is warranted.

The purpose of the supreme court nominating commission is to evaluate applicants for vacancies on the supreme court and court of appeals and nominate to the governor the three most qualified.¹ The governor appoints one of those three to the appellate bench within sixty days of submission of the names. If the governor were to fail to make the appointment within sixty days, the chief justice of the supreme court would be required to make the appointment from one of the three nominees.²

The nominating commission is currently composed of nine members. The practicing lawyers in each congressional district elect one lawyer, the governor appoints an equal number of non-lawyers, one from each congressional district, and practicing lawyers statewide elect a lawyer as chair.³ Currently, there are four congressional districts, but as that number changes, so does the number of commission members. The term of each commission member is equal in years to the number of congressional districts in the state.⁴ The terms of all lawyers and gubernatorial appointments are staggered.⁵ No member of

* Patricia Riley is currently a lawyer member of the Kansas Supreme Court Nominating Commission from the Second Congressional District, serving her second, four-year term.

1. KAN. CONST., art. 3, § 5; KAN. STAT. ANN. §§ 20-132 to -133, -3004.

2. KAN. CONST., art. 3, § 5; KAN. STAT. ANN. §§ 20-135, -3005.

3. KAN. CONST., art. 3, § 5; KAN. STAT. ANN. §§ 20-119 to -120, -3004.

4. KAN. STAT. ANN. § 20-125.

5. § 20-129.

the nominating commission can serve more than two terms.⁶

The composition of the nominating commission is determined without regard to political affiliation.⁷ The election process for the lawyer members of the nominating commission is low-key and non-partisan. To stand for election, a member of the bar must submit a nomination form to the clerk of the supreme court along with a consent to serve if elected.⁸ Prior to elections, letters of endorsement may be mailed to members of the bar. These letters generally refer to the legal experience of a lawyer standing for election. The names of the nominees are placed on a ballot mailed by the clerk to each of the practicing attorneys eligible to vote. The clerk oversees the ballot counting and any necessary run-off elections.⁹ Likewise, all gubernatorial appointments to the nominating commission are required to be without regard to the political affiliations of the appointees.¹⁰ This process stands in stark contrast to Professor Ware's suggestion that the legislature appoint members to the nominating commission, which would ensure that political beliefs, rather than merit, would play a significant role in the selection process.

The members of the nominating commission bring diverse backgrounds and points of view to the merit selection process, which helps to ensure a thorough assessment of the applicants' qualifications. The lawyer members of the commission vary in many respects, including the nature of their practice, the size of their firms, the types of clients they represent, the size, geographic location and economic basis of their communities, their political affiliations and gender.¹¹ This diversity fosters a thorough examination of the judicial applicants' qualifications from different points of view. It also underscores the fallacy of Professor Ware's implied assertion that lawyer members are so united in their "personal worldview(s)" that they control the selection process by voting in bloc. Likewise, the gubernatorial appointments to the commission come from different parts of the state and bring vastly different backgrounds and experience to the selection process.¹² While the lawyer members may

6. § 20-131.

7. The nominating commission is required to be nonpartisan. *See* KAN. CONST., art. 3, § 5(d) and (g); KAN. STAT. ANN. § 20-124.

8. KAN. STAT. ANN. § 20-119.

9. §§ 20-120 to -124.

10. KAN. CONST., art. 3, § 5; KAN. STAT. ANN. § 20-124.

11. For example, the chair, Richard Hite, is a partner in a Wichita defense firm; Lee Woodard is a business and construction lawyer from Wichita; Kerry McQueen is a general practitioner from a firm in Liberal that handles plaintiff and defense work; Tom Bath is a criminal defense attorney from Overland Park; and the author is from a civil litigation firm in Topeka that handles plaintiff and defense work. Professor Ware's article lists the political affiliation of each of the nominating commission members, but prior to that, their political affiliation was unknown to the author and no attempt was made to discover this information because it was irrelevant to the process. However, assuming Professor Ware's information about political affiliation is correct, it shows diversity in this regard, as well.

12. For example, currently, Dale Cushinberry, an African American, is a principal of a large Topeka high school; Janet Juhnke is a retired professor and academic dean/vice-president of a college from Salina; Vivien Jennings owns an independent book store in the Kansas City area,

focus more on analysis of the applicants' legal experience, analytical abilities and legal writings to judge the qualifications of the applicants, the non-lawyers often demonstrate a broader approach to the analysis of the applicants' qualifications, bringing information to the forefront of the interviews and discussions that otherwise might not have been addressed.¹³

The merit selection process begins by requiring applicants for an appellate position to provide to the nominating commission in-depth, exhaustive background information about their qualifications. When a vacancy occurs on either the supreme court or court of appeals, the clerk notifies the nominating commission and sends out notice to all practicing attorneys in the state. Applicants are required to fill out extensive questionnaires about their background and qualifications, including college and law schools attended; degrees earned; scholastic honors; major academic activities; class ranking and grade point average on graduation from law school; work and legal experience after law school; courts in which admitted to practice; published articles; court experience; most significant legal matters personally handled; judicial offices held and, if the applicant has held judicial office, citation to significant opinions; approximate net worth and nature of substantial assets; willingness to resign or divest oneself of business interests, offices, or positions if required to do so by the Canons of Judicial Conduct; details of any past history of tax liens or collection procedures; details of any legal proceedings brought against the applicant by a former client; details of any prior disciplinary action or citations for ethical violations, and if a judge, any formal proceedings against the applicant by the Commission on Judicial Qualifications; a list of all bar associations, professional associations, or professional societies of which the applicant has been a member; details of any military service; any additional information the applicant desires to be considered; the names and contact information of five persons who are well acquainted with the applicant's legal ability and who may be contacted; if the applicant is a practicing attorney the names of three judges before whom the applicant has made an appearance in the last five years and three lawyers who have been adverse to the applicant in litigation or negotiations within the last five years; and, if the applicant is a judge the names and contact information of at least five lawyers who have appeared before the applicant within the last five years. Each applicant is required to include as an attachment a sample of the applicant's legal writing, such as a brief, memorandum, opinion, or legal article, and must agree to be interviewed by the nominating commission. Most applicants provide several

and David Farnsworth is a retired university professor from Wichita.

13. One of the author's favorite examples was a question often posed to applicants by a prior commission member, Sue Bond. She would ask most applicants whether they had contacted any supreme court justice or court of appeals judge to ask them about the actual duties and responsibilities of the job, assuming that if the applicants had not bothered to find out the actual day to day details of the job for which they were applying, they probably weren't the person for the job. It was an approach that did indeed reveal interesting facts about the applicants (perhaps how they saw themselves in relation to the sitting judges, or their motivation in seeking the job, among others), but one that the lawyer members might not have taken.

writing samples, most often appellate briefs or judicial opinions authored by the applicant because they reflect the legal reasoning and writing skills crucial to an appellate judge.¹⁴

Once the deadline for submission of applications has passed, the chair of the nominating commission assigns two commission members to each applicant—one to conduct a background check and the other to serve as lead interviewer. Assignments are made without regard to whether the commissioner is a lawyer or non-lawyer. However, it is not unusual to assign the background check of an applicant who has not previously appeared before the commission to a seasoned commissioner who has previously conducted background checks and made reports to the commission. The assignments, applications and writing samples are distributed to the commission to review in preparation for the interviews.

A conference call is held during which preliminary issues are addressed regarding qualifications and commission interest in interviewing the applicants. During the conference call, the chair inquires as to whether at least one commission member desires to interview each of the applicants; if no support for an interview is voiced, an interview is not granted. It is a very rare occasion when an applicant is not scheduled for an interview, but it could occur when an applicant either patently does not meet the required qualifications, such as not having been in the active practice of law for the ten years immediately preceding the application, or when the commission has interviewed the applicant recently on one or more occasions without any change in the make-up of the commission and no interest is expressed in favor of an additional interview.

It is not uncommon for an applicant to apply for a judicial vacancy on more than one occasion, sometimes being nominated after two or more applications, and sometimes returning after being nominated, but not appointed by the governor. Some applicants relax in second or third interviews, thus allowing a more fluent dialogue with the commission and deepening the commission's understanding and knowledge of the individual.

Reports from the Kansas Continuing Legal Education Commission, the Commission on Judicial Qualifications, and the Office of the Disciplinary Administrator are distributed to the nominating commission regarding each applicant, detailing the nature and number of continuing legal education credits each applicant has earned and the disposition of any ethics complaints filed against the applicants.

Letters of endorsement are sent to the chair of the nominating commission and distributed to the commission members prior to the interviews. These letters are often from lawyers or judges who have known the applicant for many years, but also from clients, clergy, former teachers, and other

14. If submissions appear to be co-authored, the applicant is questioned about his or her role in preparation of the writing to ensure it accurately reflects the applicant's skills.

2008]

RILEY: MERIT SELECTION

433

community members who have had occasion to judge the ethics, diligence, integrity, and skills of the applicant. The letters of endorsement often provide the nominating commission with particular insight into an applicant's character, not only through broad summaries of the writer's experience with an applicant, sometimes over long periods of time, but also with anecdotes about an applicant's conduct in a particular situation.

The background checks conducted by the commission prior to the interviews are wide-ranging and crucial to the merit selection process. The background information is reported to the commission when it meets to conduct the interviews. There are no set rules as to the information to be gathered by the assigned commission member. Often, the background check begins with the assigned commissioner making telephone calls to the lawyers and judges listed in the applicant's submission, including the listed opposing counsel in matters handled by the applicant. If requested, the identity of the person providing the information is not shared with the commission, though that occurs infrequently. Normally judges before whom the applicant appears provide candid and informative assessments. Judges are in a unique position to provide insight into the ethics, legal skills, writing ability, diligence, integrity, reputation and demeanor of the applicants, and their opinions are given great weight. Likewise, when the applicant is a district court judge, attorneys who have appeared before the judge are contacted to inquire about the judge's diligence, courtroom demeanor, integrity, writing abilities, legal scholarship and reputation. Members of the supreme court and court of appeals are often consulted concerning their knowledge of the applicants, many of whom have appeared before them or are peers with whom they are familiar. Unsolicited calls are also normally made to other attorneys and community members who are not listed in the applicant's submission. For example, if the background information provided by the applicant lists community organizations in which the applicant participates, the assigned member may contact that organization or persons they know to be affiliated with that organization to inquire about the applicant's work or conduct in that endeavor. If the assigned commission member knows someone in the applicant's community, those people are often called. Calls are also made to attorneys practicing in the same community as the applicant. When the applicant is a sitting judge, appeals from the judge's decisions will identify the attorneys on both sides of the case and those attorneys may be contacted regarding the judge's qualifications. If the applicant is a judge, decisions of the judge are likely to be read and appeals from those decisions reviewed. Appellate decisions in appeals handled by lawyer applicants also may be reviewed and note made of not only the outcome of the appeals but the appellate courts' discussions of the arguments made by the applicants in the appellate briefs.

While the assigned commission member has the primary responsibility for the background check of a particular applicant, some or all of the other commission members usually make calls and conduct research regarding the applicant's qualifications. Any commission member is free to conduct a

background check on any applicant. The assignments simply assure that background checks are conducted on every applicant. When the information from all sources is consistent, it gives the commission greater confidence in the accuracy of the information; likewise, if a report is inconsistent with the other information gathered, it may be scrutinized more carefully.

The commission member appointed to serve as lead interviewer for an applicant serves several functions, chief among them are to contact the applicant in advance of the interview to familiarize the applicant with the interview process, escort the applicant from the waiting room to the interview, introduce the applicant to the commission and ask the opening interview question. Often an opening question will be discussed with the applicant in advance. Normally it is a broad question that gives the applicant an opportunity to introduce himself or herself to the commission.¹⁵

The interviews provide the commission with the opportunity to get to know the applicants on a personal level, explore their views on the role and function of the appellate courts, their motivations in seeking the position, their understanding of the law and scope of appellate review, their breadth of experience, including their research and writing experience, their knowledge of and willingness to assume the duties of the position to which they aspire, their demeanor, and, in general, their qualifications for the position. Each commissioner approaches this task in his or her own unique way. While one commissioner may ask applicants to describe the most important contributions they would make if appointed to the court, another may ask them to discuss their views of the importance of *stare decisis* in our legal system and to describe the circumstances under which deviation from established precedent would be justified. The interviews also provide the commissioners with an opportunity to follow-up on any questions raised by the applicants' submissions, background checks, letters to the commission and agency reports. The interviews last twenty to thirty minutes and take place in the Judicial Center in Topeka.

Questions concerning the applicants' political affiliations or political views are inappropriate, as are any questions as to how applicants would decide a particular issue. For example, while it would be fair to ask an applicant about the salient considerations in the controversy over a law regulating picketing, it would be unfair and improper to ask how the applicant would decide an appeal challenging the constitutionality of an anti-picketing law if it were to come before the court. No applicant is asked how he or she would decide any issue that could come before the appellate court.

The commission votes to determine the names of three nominees to send to the governor. A majority of the commission must vote in favor of an

15. An example of an oft asked lead question is as follows: "Please describe to the commission your background and experience that you believe qualifies you for a position on the appellate court."

2008]

RILEY: MERIT SELECTION

435

applicant's nomination.¹⁶ The remainder of the voting process is not prescribed by law, but by practice and with leadership from the chair and advice from the clerk. The current practice is that voting takes place in stages. Throughout the two or three days of interviews, during the breaks between interviews, discussions occur and voice votes are taken to determine whether any commission member has an interest in the applicants interviewed to that point. The vote of one member keeps an applicant under consideration. The purpose of these interim votes is to reduce the names under consideration prior to the final discussion conducted at the conclusion of all interviews before the final vote. The interim votes are non-binding, so that even if an applicant receives no show of support in the preliminary vote, any member can revive consideration of the applicant by request to the chair to do so. All commissioners, lawyers and non-lawyers alike, have equal voting rights.

At the conclusion of the interviews, a final discussion occurs regarding the comparative qualifications of the applicants still under consideration. All members participate in the discussion, which involves a comparison of all the applicants' qualifications and background check material. Discussions never include the applicants' political affiliations or the positions of the applicants on legal, social or political issues that might come before the court. Though the final vote is by written ballot, the interim voice votes and the discussions leave little doubt as to the opinions of the majority of commission members. By the time of the final discussion, the names of five or six applicants have generally risen to the top because of the level of their qualifications. Discussions then focus on distinctions among those applicants. Support for applicants has never broken down along lawyer/non-lawyer lines, or along issues unrelated to merit. While the commission members are of different political parties, no discussion has ever indicated that support for applicants has broken down along party lines or political issues. Instead, differences of opinion focus on such issues as the applicants' qualifications unearthed in the background checks or in the matters raised in the endorsement letters, their legal writing, legal experience, including length and breadth of practice, and courtroom experience, though this list is by no means exhaustive.

The clerk is present during the discussions and voting, but does not participate in either. Instead, she is present to assist in the balloting and to answer questions of procedure, agency reporting or constitutional or statutory requirements. At the conclusion of the discussions, the clerk passes out the ballots, collects them, counts the votes and announces the results. The names of the applicants receiving the three highest numbers of votes are sent to the governor. A nominee must receive a minimum of five votes.

The chair notifies the governor of the names of the three nominees. Commissioners are not permitted to disclose the identities of the nominees until after public announcement of the names, which usually occurs the day after voting.

16. KAN. STAT. ANN. §§ 20-123, -3004.

The merit selection system currently in place is not broken and does not need fixing. As can be seen from the detailed description of the procedure currently followed, the focus of the entire process is upon merit selection, without regard to political issues and without any attempt to determine how the applicants would vote on issues that might come before the court, thus ensuring a well qualified, independent appellate judiciary. It is a system that was demanded by the citizens of this state in 1958 in reaction to the infamous "triple play" in which political maneuvering was used to facilitate an appointment to the supreme court. So strong was the electorate's reaction to the injection of politics into the appointment process that a constitutional amendment was proposed, publicly debated and passed in the next general election to create our current system. That constitutional system was designed to take politics out of the selection process to ensure that appointments to the supreme court were based solely on merit. Any attempt to introduce the legislature into the selection process or to open the system to elections where applicants would have to commit themselves in advance to positions on issues likely to come before them if elected and to raise campaign funds from political interest groups and lawyers likely to appear before them would re-inject politics into the system. The current merit selection process was demanded by the citizens to avoid just such a result. The supreme court nominating commission works as the citizens expected; no change is warranted.