AGAINST JUDICIAL NOMINATING COMMISSIONS

G. Alan Tarr
Director, Center for State Constitutional Studies
Rutgers University

A key element of any "merit selection" system is the judicial nominating commission, whose job is to develop a list of qualified candidates from which the governor selects a judge. The composition of Kansas's current nominating commissions is deeply flawed because the legal profession holds a majority of the seats on the commission, giving it the opportunity to dominate the nomination process. This flaw might be corrected by altering the composition of the commission. Reforms could also be instituted to ensure greater transparency in the nominating process. However, such reforms would not address the fundamental problems posed by the commission. These include:

1. Lack of accountability: The federal model ensures accountability by vesting the appointment power in a single set of hands, so that the chief executive can be held responsible for his/her choices. The commission destroys such accountability, because the chief executive can always plead that he/she would not have chosen a particular person were he/she not limited to choosing from the commission's list.

2. A reduced pool of candidates: The nominating commission typically selects from among those candidates who put themselves forward for consideration. It is essentially reactive. Moreover, potential candidates can look at the sorts of persons the commission has nominated in the past and decline to apply because they believe their chances of being selected are slim. In contrast, a governor can be proactive, approaching highly qualified attorneys who had not considered a career on the bench and persuading them to serve.

3. The difficulty of defining merit: The nominating commission is supposed to pick the most qualified candidates. However, it may well find that it has more qualified candidates than it has slots. How then should it select from among them? Or the commission may find that candidate A has some qualities desirable in a judge, while candidate B has other desirable qualities. There is no consensus within the legal profession as to how to rank order the desirable qualities for a judge. How then to decide? When I teach about merit selection, I use an exercise where I describe a set of six plausible candidates with different backgrounds (e.g., work as a prosecutor, as a legal services attorney, as a small-firm practitioner, or as a large-firm specialist) and ask students to choose which ones they would submit to the governor. There is no consensus among the students and, I would suspect, neither is there consensus among the commission members. A commission can weed out clearly unqualified candidates, but it has no particular expertise in choosing among qualified candidates. That should be the job of the governor, a person who is electorally accountable for his/her choices.

4. No essential function: Proponents of "merit selection" argue that the legal profession is knowledgeable about the legal process and about the qualifications of those who might be considered for judgeships, that it has a vested interest in the quality of the court system, and that therefore it should be given a place in the selection process. In response, one might note that a prosecutor and a criminal defense attorney might well differ on what sort of person they want on the bench. The same is true for a plaintiff's attorney and a defense attorney who argue tort cases, and perhaps even for a Republican attorney and a Democratic one. This is not to say that the legal profession cannot contribute to the selection of judges, merely that it need not have an institutionalized position in the process. Presidents confer with attorneys before choosing federal judges, and governors confer with members of the legal profession before they make their choices. If the federal model were adopted in Kansas, governors would consult with the legal profession. Input from the legal profession does not require a commission.

5. The quality of the bench: Proponents of "merit selection" argue that it leads to a more qualified judiciary. If you compare the federal judges in Kansas selected through presidential appointment and senatorial confirmation with the state judges selected through "merit selection," I suspect you would find little difference in quality. More generally, there is absolutely no research that shows judges selected via "merit selection" are more qualified than those chosen by other modes of selection. Ultimately, the claim that "merit selection" enhances the quality of the judiciary is mere assertion.