

No One Size Fits All In Judicial Selection

By Kevin K. Washburn/Chair, N.M. Judicial Selection Process
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During recent meetings of the bipartisan committees created by the Constitution to recommend candidates for judicial vacancies to the governor, some members have sought to open all deliberations to public scrutiny. The duty of these committees, which are bipartisan by design and are required by the Constitution to include lawyers, judges and lay people, is to create a short list for the Governor for each judicial appointment.

In general, the committees have tended to conduct interviews of each candidate in public, but have retreated behind closed doors to discuss the candidates. In a recent editorial, the *Journal* criticized a Court of Appeals selection commission for discussing the candidates in “executive session,” closed to the public and the media.

While the *Journal*'s preference for transparency is understandable, reasonable minds can differ on this question. Transparency is important, but so is another important public value: robust deliberation in government decision-making. Unfortunately, in the judicial selection process, these two important values sometimes compete with one another.

Should the committees function more like a legislative body in which lobbying occurs in private but official meetings occur in public, or more like a jury, in which the evidence is produced in an open trial, but deliberations occur strictly in private? Neither example fits perfectly in this context. Good people can come to different conclusions about which value should prevail in the judicial selection context.

The case for transparency in government decision-making is strong. Sunshine provides informal public accountability for decision-makers; it assists public understanding of decisions; and it reduces mistrust. Secrecy almost always undermines trust in governmental processes and allows conspiracy theories to flourish.

In an era in which trust in government is not high, transparency can improve public acceptance of decisions of governmental bodies. Indeed, greater transparency might demystify the process of judicial selection in New Mexico and reduce controversy about selections. Transparency may be especially useful for public bodies, like the committees, that are not required to explain their decisions.

Unfortunately, transparency can undermine frank and robust deliberation. Frank discussions among decision-makers tend to produce better decisions. Committee members may be reticent to speak up and actually deliberate if their discussions occur in front of the public or the media.

In an open process, committee members may be less likely to air their honest concerns about a candidate. Judges are powerful and we live in a small community. Members may fear retaliation by a candidate who later becomes a judge, or they may simply not want to be seen

offering public criticism of a colleague with whom they must work in the future. If members are unwilling to air their views, the quality of the committee's decision may well suffer.

In sum, full transparency could mean that no actual deliberation occurs, and thus may actually harm the deliberation process. And if committee members do raise concerns about a candidate, they may cause unnecessary damage to the candidate's reputation. That might further discourage good lawyers from seeking judicial positions. In sum, secrecy is sometimes justified.

Fortunately, the rules that govern this process allow each selection committee to make the decision for itself at each meeting. Indeed, the last meeting produced a robust and healthy debate on the issue begun by committee member Michael Brasher. After debate, the majority voted to close the deliberations. In light of the important public values at stake, it is important that selection members give careful thought to whether confidentiality is needed in any given meeting and to vote accordingly.

The current "case-by-case" approach is sensible because it allows each committee to consider the competing values and to make a decision in context. I will insure that the question continues to be raised for healthy discussion in future meetings and I invite public input.