

SUPREME COURT OF WISCONSIN

No. 12-08

**In the Matter of the Petition to Create Supreme
Court Rule 74.02, Appointment of the Judicial
Commission Members**

FILED

DEC 10, 2015

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On July 31, 2012, the petitioner, then-Chief Justice Shirley S. Abrahamson,¹ filed a petition proposing the court create a rule requiring that the supreme court's appointment of members to the Wisconsin Judicial Commission be discussed and appointments made in open administrative conference.

The court discussed this matter at its open administrative conference on September 19, 2012. Justices David T. Prosser, Patience Drake Roggensack, Annette Kingsland Ziegler, and Michael J. Gableman voted not to conduct a public hearing. Chief Justice Shirley S. Abrahamson and Justices Ann Walsh Bradley and N. Patrick Crooks dissented. The court discussed the matter again at its September 25, 2012 open administrative conference. Justices Prosser, Roggensack, Ziegler, and Gableman voted to deny the petition. Chief Justice Abrahamson and Justices Bradley and Crooks dissented from the

¹ Effective May 1, 2015, Patience Drake Roggensack succeeded Shirley S. Abrahamson as Chief Justice of the Wisconsin Supreme Court. This order reflects the justices' respective titles at the time the events described herein occurred.

decision to deny the petition. The matter was held to permit Chief Justice Abrahamson to draft a separate writing to accompany this order.

The court discussed the matter again at open administrative conference on November 16, 2015, and required that any writings to accompany this order be received by November 30, 2015.

Therefore,

IT IS ORDERED that petition 12-08 is denied.

REBECCA G. BRADLEY, J., did not participate.

Dated at Madison, Wisconsin, this 10th day of December, 2015.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. (*dissenting*). I object to the secret and exclusionary process now being used by this court to appoint persons to the Wisconsin Judicial Commission. The process is antithetical to the process the court should follow—working together as a collegial court to select the most qualified persons to serve. I therefore would adopt the petition.

¶2 This petition, which the court denies, creates an open, transparent system that allows all the justices of this court and the public to be involved in the process of appointing members to the Judicial Commission.

¶3 Who sits on the Judicial Commission is of importance not only to members of this court but to all judges of the state and the public at large.

¶4 The Judicial Commission investigates possible misconduct or permanent disability of a judge or circuit or supplemental court commissioner, Wis. Stat. § 757.85(1)(a), and plays a critical role in ensuring that that our judicial officers are competent, fair, neutral, impartial, and non-partisan. An open, transparent appointment process would help dispel any perception that justices of the supreme court may choose their own prosecutors in judicial discipline cases or otherwise improperly influence the Judicial Commission's work.

¶5 I became concerned in 2012 about the integrity of the court's appointment process, especially for appointments to the Judicial Commission, when the court refused to reappoint Attorney John Dawson, chair of the Wisconsin Judicial

Commission, to a second full term. Reappointment was usual unless a person had failed to fulfill his or her obligations as a member of the Commission.

¶6 Attorney Dawson had fulfilled his obligations. Attorney Dawson's reappointment was recommended by the Appointment Selection Committee and the members of the Judicial Commission. Why wasn't the usual process of reappointment applied? Could it be because Attorney Dawson was on the Commission when complaints were filed against Justices Michael Gableman and David Prosser of this court?

¶7 Justices Ann Walsh Bradley, N. Patrick Crooks, and I wrote a public letter to Attorney Dawson dated May 11, 2012, stating that we disagreed with the court's altered reappointment process and its decision not to reappoint him.²

¶8 This incident motivated me to seek to strengthen the integrity of appointments by proposing an open, transparent appointment process.³

¶9 My concern about the integrity of the court's appointment process, especially for appointments to the Judicial Commission, has significantly increased over the past few

² The letter is available on the court system's website as an attachment to the memorandum filed in support of Rule Petition 12-08, at <http://www.wicourts.gov/supreme/docs/1208petitionsupport.pdf>.

³ See also Patrick Marley, Former Prosser aide made recommendations for judicial panel, Milwaukee J. Sentinel, July 7, 2012, available at <http://www.jsonline.com/news/statepolitics/former-prosser-aide-made-recommendations-for-judicial-panel-4660olg-161687715.html>.

months, as the court is in the process of appointing a new member of the Judicial Commission. Why the increased concern? Because the appointment selection process—designed to ensure the integrity of the appointments and the Judicial Commission—has come unglued.

¶10 In the spring of 2015, four members of the court refused to accept any person recommended by the Appointment Selection Committee for the Judicial Commission and asked for additional nominees.⁴

¶11 On November 3, 2015, the court was to consider at a closed conference the list of nominees for several committees proposed by the Appointment Selection Committee, including those for the Judicial Commission. For the last 15 years, the court has discussed each name submitted by the Appointment Selection Committee at a closed conference and then, by secret ballot, voted on the names submitted.

¶12 A significant change in process was instituted at the November 3, 2015 meeting, when we didn't reach the appointment item on the agenda. As justices were leaving the conference, it was suggested that the appointees be selected by e-mail and that

⁴ The Appointment Selection Committee was set up about 15 years ago as completely independent of the Supreme Court to ensure that no member of the court would be "in a position to exert influence over any member of the Appointment Selection Committee or any of its decisions The appointment procedure established by the court is designed to produce appointments based solely on the quality of integrity, intelligence, experience and commitment." See Supreme Court Internal Operating Procedures, Section IV, available at <http://www.wicourts.gov/sc/IOPSC.pdf>.

each justice could vote for any attorney she or he wished, not limited to the nominees of the Appointment Selection Committee or even to the persons whose resumes the Appointment Selection Committee had accumulated.

¶13 All of the resumes accumulated by the Appointment Selection Committee, including resumes for persons not recommended for appointment by the Appointment Selection Committee, were distributed to the justices after the November 3 conference. Several justices complained that the voting process was chaotic. It turned out to be chaotic. I refused to vote because of the chaotic process.

¶14 Although the justices never agreed that the e-mail vote should be sent only to Patience Roggensack, the votes were sent only to her. Some apparently were e-mailed and others hand delivered. On November 16, 2015, Patience Roggensack sent the name of the purported Judicial Commission appointee to the justices along with the names of several other purported appointees, without stating the vote or revealing the ballots. The purported Judicial Commission appointee was not on the list recommended by the Appointment Selection Committee for the Judicial Commission.

¶15 How could at least four justices (a vote of four was needed) agree on one nominee when there was no list of nominees to consider and the list of potential nominees could include the entire membership of the Wisconsin bar? Could four justices vote for the same attorney by chance? Not likely. What is the statistical probability? It's probably a one-in-a-million shot.

What is more likely is that four or five justices caucused (in person, by phone, or by e-mail), cutting out two justices from participation in selecting a nominee.

¶16 Ann Walsh Bradley and I asked to see the ballots. I was denied access because I had not voted. Ann Walsh Bradley did vote. Ann Walsh Bradley wrote that she had problems with the appointment process as it was unfolding, that the process was irregular, and that we had not agreed the ballots be secret from the justices, or that Patience Roggensack would be the only justice who had access to the ballots cast. Ann Walsh Bradley asked that a discussion of, and conference vote for, the appointments to the Judicial Commission and the attorney and public members of the Board of Bar Examiners be added to the November 16 agenda.

¶17 Patience Roggensack placed the appointments on the November 16, 2015 closed conference agenda but no substantive discussion of the procedure or names occurred.

¶18 Ann Walsh Bradley continued to write to object to the process, request a copy of the ballots, and ask for court discussion. She stated that as a duly elected constitutional officer she is entitled to the requested information.

¶19 Patience Roggensack sent Ann Walsh Bradley only three ballots for the Judicial Commission position. No four affirmative votes for any one person were furnished. Ann Walsh Bradley pointed out that it would be unfortunate if as a justice of this court she would be forced to file a public records request in order to get information to which she is entitled.

She asked for a copy of the ballots by the end of November 30. She did not receive any more ballots.

¶20 Patience Roggensack finally put the issue of the Judicial Commission appointment on the agenda distributed for the December 3, 2015 closed conference in the following distorted form: "(AWB) Request to change voting process on court appointments from secret ballots to acknowledged ballot votes." Ann Walsh Bradley explained that in order to adequately address her concerns about the irregularity of the process, she would need a copy of the ballots. The discussion, limited to the subject as framed by Patience Roggensack in the agenda, proved fruitless.

¶21 In sum, who sits on the Judicial Commission is of importance not only to members of this court but to all judicial officers of the state and the public at large. An open, transparent appointment process would help dispel any perception that justices of the supreme court are choosing their own prosecutors in judicial discipline cases or influencing the Judicial Commission's work.

¶22 I object to the secret and exclusionary process now being used to appoint members of the Judicial Commission (and members of other court committees). This process is antithetical to the process the court should follow—working together as a collegial court to select the most qualified persons to serve.

¶23 I also object to the court's denial of the open, transparent system proposed in this rule petition that would involve all the justices of this court and the public.

¶24 For the reasons set forth, I dissent to the denial of Rule Petition 12-08.

¶25 I am authorized to state that Justice ANN WALSH BRADLEY joins this writing.

