



## KANSAS REPUBLICAN PARTY

February 9, 2014

### **Testimony in Support of: HCR5004, HCR5005**

#### **TESTIMONY:**

Supreme Court Justices have immense and virtually unchecked discretion in rendering their interpretation of law. Every judicial selection system seeks merit, each system looks for intelligence, competence and honesty. But due to their immense discretion, the Supreme Court should possess a diversity of world-views that reflect those of the people of Kansas. If the design of the nomination system disproportionally limits the world-views of nominated justices by screening out some and disproportionality selecting others it is doing a profound disservice to the people of Kansas and undermining the legitimacy of the Judicial Branch.

Moreover, there is a substantial difference between the theory and the reality of how the members of the Kansas Bar select the members of the Nominating Commission.

The Legislature should give the people of Kansas the opportunity to weigh in by voting on the selection system for their Supreme Court. There is enough popular support for a change to warrant a vote. In 1957, Senator Potucek, who opposed the change to the judicial selection system, still voted to give the vote to the people. Today's legislature should follow his precedent.

#### **Key Points**

- The Key Issue is whether the voters will be given a chance to state their preference on what method is used to select their Supreme Court Justices.
- Supreme Court Justices have immense discretion in making their rulings which can have substantial effect on the lives of Kansas residents. The Judicial selection system, therefore, must ensure selection of Justices who match the general worldview of Kansans.
- Kansas is the Only state with a judicial selection board with a majority of lawyers who are not selected directly or indirectly by voters.
- Lawyers purportedly select judges based on "merit" and not on "politics". The fatal flaw in this argument is that it does not logically follow that lawyers are less inclined to consider the political beliefs of judicial candidates. Indeed, lawyers are as likely, if not more likely,

to focus on the politicized decisional propensities of judges compared to voters and elected officials.

- Our current system does not remove politics from judicial selection it merely moves the politics into closer alignment with the ideological preferences of the lawyers who vote for members of the selection board. This has profound consequences for Kansas because the distribution of ideological preferences among members of the bar differs from that of the public. As a result, giving majority control of the judicial nominating process to the bar results in Justices who hold a different worldview than the Kansas public.
- Moreover, unlike the general public, the lawyers who select judges usually practice before the judges and therefore the judicial selection process has direct impact on their personal professional and financial interests.

### **What Has Changed Since 1958:**

- Larger Firms. In 1958 a 10-lawyer firm was large. Today many firms with KS lawyers have 100s of lawyers. This poses the threat of a single firm organizing its lawyers to vote a particular person on the selection board.
- Lawyer Specialization: In 1958 most lawyers had a general practice, some trial work, both plaintiff and defense, some business work. So they would want an all-round fair Justice. Today lawyers specialize in narrow areas.
  - Business lawyers do not go to court, so they care less about Justices
  - Trial lawyers specialize in plaintiff/defense and in certain practice areas and will prefer a board member who will pick a Justice who tilts one way or another.
  - There is anecdotal evidence of lawyer interest groups organizing their members to vote in judicial selection board elections- (but without a list of who voted, it is impossible to verify)
- Surveys and Studies Show that Since the 1950s Lawyers Have
  - Have gone from being more conservative to being more politically liberal than the general public
  - Become significantly less likely to participate in community service and civic affairs.

### **Lawyer Turnout for Electing Board Members<sup>1</sup>—is Low-**

- This was characterized as a group of highly interested experts
- Voting is a simple mail ballot- winner must get a majority, a runoff vote of the top 2 lawyers is used if no one gets an initial majority
- 2014: CD1: 547 (52%)
- 2013 Statewide: 2289 (25%) 1<sup>st</sup> round; 2481 (27%) runoff
- 2013: CD4: 659 (37%)
- 2012 CD3 – 4 candidates, no majority in 1<sup>st</sup> round, redistricting took out one of the two finalists, so winner w/o a majority of the vote -
- 2011: CD2 727 (33%) 1<sup>st</sup> round // 700 (32%) runoff
- 2010: CD1 436 (42%)
- 2009: KS: 2,532 (28%) 1<sup>st</sup> round // 2,696 (30%) runoff
- 2009: CD4 735 (28%)
- 2008: CD3 723 (20%)
- 2007: CD2 759 (40%) runoff // 765 (40%) initial

### **Why is lawyer participation so low?** Our belief is that the low turnout is caused by:

- (1) Many lawyers have no connection with appeals because the focus of their practice is not appellate work or event litigation, so they have no greater knowledge of what makes a good justice than the average voter, and feel unqualified to vote.
- (2) Lawyers near Kansas City may live in Kansas but practice primarily in Missouri
- (3) Some lawyers practice primarily in Federal court and are disinterested or feel unqualified to vote for a system that selects state Justices.
- (4) Some lawyers are uninformed, and simply choose not to vote.

### **No Media Coverage of these elections**

- Voters are excluded from this process- no information on who runs for the board

### **Courts Keeps No Record of who Voted**

- *no ability to analyze who voted* (location, type of lawyer, age, gender, law firm, etc)

### **Lawyers Generally Do Not Know Much About the Candidates**

- no campaigning, or relevant information on lawyer candidates
- generic vote request letter from candidates are used
- generic recommendation letters from peers are used

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<sup>1</sup> Approx Attorneys: Statewide: 9100; CD1: 1050; CD2: 2200; CD3: 4250; CD4: 1800

### **The Current Judicial Selection System is Partisan**

- 2CD: the losing candidate (Trial Lawyer Assoc, \$50K Dem donor)
- Board members said candidate's personal politics are discussed
- Sup Ct Justice held a fund raiser at her home

**The Current System is Susceptible to Stealth Control:** The current system of placing lawyers on the judicial selection board is highly susceptible to a stealth campaign. Lawyers, a tiny individually-identifiable group of generally disinterested and uniformed voters, the majority of whom do not vote, is easy prey for organized special interest groups with substantial pecuniary interests at stake. This is especially so when the identity of who voted is kept secret and there are no reporting requirements or media attention to the process.

As Senator Fayette Rowe pointed out in 1958, under the Missouri Plan, Tom Pendergast still named all the judges in Kansas City.

### **Countering Word Games/Arguments:**

#### ***Calling the current system “the Merit System”***

- All judicial selection systems seek merit-- nothing makes the current system the merit based in contrast to the others.
- Every system is a merit system, no system is the merit system.

#### ***“If it Ain’t Broke Don’t Fix It”***

- Given many court decisions, many consider it broke.
- This phrase states resistance to change without a reason. We want continual process improvement, not sitting on a system that is barely functional
- If we followed that advice we’d still be walking everywhere, because walking ain’t broke, but cars are so much better.

#### ***“Brownback Power Grab”:***

- Brownback has been in office 4 years, for 2 years the senate opposed many things he tried to do, so the Senate is not a rubber stamp.
- From 1970 – 2018, the Governor was a Republican for 24 years, and a Democrat for 24 years.
- Judicial vacancies do not occur very often. Of the current Justices, Brownback has had one appointment; he may not get another. Sebelius appointed five, Graves one.

#### ***“Judicial Independence”:***

- Independence is not based on how the judges are selected, job security is the key to independence. Justices have job security, no justice has ever not been retained

***People favor the Current System***

- Then let them vote on it- if you trust your voters

***Primary Election turnout is also low:***

- Not relevant to lawyer turnout, they are supposed to be a highly interested body of experts

***“Retention Elections” show system picks good justices:***

- Not relevant, this is about nominating the best, not nominating the good enough to keep
- Every justice is retained because the voters generally have no idea who they are voting to retain

***In 1958 the People of Kansas rose up in righteous anger and changed the system:***

- The predominant issue in the 1958 election was the “right to work” constitutional amendment, which passed.
- The Judicial Selection Amendment as one commentator noted “slipped through” unnoticed.

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