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LEGISLATIVE TESTIMONY ON JUDICIAL SELECTION

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Thank you for allowing me to present testimony today. I am Jeffrey Jackson, a professor of law at Washburn University law school. I've been studying and writing in the field of judicial selection for the past fifteen years. My research has focused on first principles in judicial selection systems, and how selection systems can maximize judicial quality.

My writing has at times been critical of the current commission system in Kansas, which, although strong in many areas, has some weaknesses, especially with regard to its connection to the democratic process. I have even called for the study of modifications that would help to increase that connection.

However, the changes currently proposed for judicial selection are simply the not the proper way to address this issue. This is especially true of two of the proposed systems: The gubernatorial appointment with senate confirmation option, which is in essence the federal system; and the partisan election option. Neither of these systems are superior to the current system, and either one would actually be a worse fit with regard to the State.

The Federal System

While the idea of adopting the federal system has some initial appeal, it is important to understand how this system came about and the reasons for its adoption. There really is nothing magical about the federal system. It was not adopted because everyone thought it was the best possible system for selecting judges. Rather, it was a compromise between the general practice that had been used in the colonies where the executive traditionally appointed the judges without any input, and the fear of the smaller states that a popularly elected president would appoint judges to advance the interests of the larger, more populous states. Senate confirmation was added to give the smaller states a check to prevent this from happening. Thus, the federal system of judicial selection is specifically designed to meet the unique demands of federalism inherent in our national system of government. Nor was this compromise without contention. Over the course of the eight days on which the question was debated at the Convention, a number of systems were proposed, from pure executive appointment to pure appointment by both houses of Congress to Dr. Benjamin Franklin's proposal of appointment by lawyers. See 1 M. Farrand, *The Records of the Federal Convention of 1787*, pgs. 116, 119, 224, 232; 2 M. Farrand, pgs. 23, 41, 80, 389, 495. At one point, on July 21 of 1787, the federal system was voted down 6-3 in favor of a pure senatorial appointment. It was only on September 4 that the current federal model was adopted. *See* 2 Farrand, pg. 495. Even then, many of the Framers were dissatisfied. Elbridge Gerry of Massachusetts remarked regarding the federal system that "The appointment of the Judges like every other part of the Constitution [should] be modeled as to give satisfaction

both to the people and to the States. The mode under consideration will give satisfaction to neither." 2 Farrand, pg. 80.

Kansas simply does not have the same federalism concerns with regard to our state government. It seems odd that Kansas would adopt such a system when even the Framers acknowledged that it was an unwieldy compromise. Currently, the federal system is in use in only two states: New Jersey and Maine. (It should be noted that proponents often cite California, New Hampshire, South Carolina and Virginia as having the federal system as well. However, this not entirely accurate: California has gubernatorial appointment subject to confirmation from a judicial selection committee composed of the Chief Justice of the California Supreme Court, the Attorney General, and the senior presiding Court of Appeals judge. New Hampshire has a judicial selection commission whose members are appointed by the governor for three year terms, and who provide a list of candidates from which the sitting governor picks. Both South Carolina and Virginia select their judges without input from the Governor; rather, the entire legislative assembly picks the judges.) Further, New Jersey, which does use the federal system, has always operated according to an agreement whereby the Governor, in filling a vacancy, selects a judge from the same political party as the judge that is replaced.

In contrast, Twenty-two states currently use some form of the commission system for their highest court. It should be noted, of course, that the composition of the judicial selection commissions in these states vary. As noted by many of the proponents of change, Kansas is at one end of the spectrum in having five commissioners appointed by the bar and four by the governor. However, this is not radically different from systems such as Alaska, which has three commissioner appointed by the bar and three by the governor, or Indiana, which has the same distribution plus the Chief Justice of the Indiana Supreme Court.

One argument often raised is that the federal system results in the appointment of better judges. There is simply no empirical basis that I have ever seen for this argument. If the argument is that federal appellate judges from Kansas are better than our state judges, one important factor must be taken into account. The two current sitting Tenth Circuit Judges from Kansas, Chief Judge Mary Beck Briscoe and Judge Nancy Moritz, *both came from Kansas Appellate Courts*, and thus were first selected by the system that somehow is claimed to result in the selection of inferior judges.

Partisan Election

Partisan election has had a strong history in Kansas. It was the selection method for ninety-four of the first ninety-seven years of our state's existence. (A non-partisan election system was put in place in 1913, but quickly failed and was jettisoned in 1915). However, there is a very good reason that it was abandoned for state-wide judicial selection. Partisan election of judges at the state level has a number of specific problems. First, it injects partisan politics into the selection process, requiring judicial candidates to raise money and actively campaign. This is generally regarded as a bad idea. There is also a problem with the lack of familiarity of the voter in a statewide election regarding the quality of judges on the ballot. Voters in statewide elections for political offices have much better information, because candidates for those offices are able

to outline their views and what programs they intend to pursue if elected. The same is not and should not be true of judges. This lack of information makes partisan election a poor method of judicial selection on a statewide basis. The only level at which partisan election makes sense as a judicial selection method is the county level, where voters are much more likely to have knowledge of the character and competence of the candidates.

Conclusion

If the concern really is, as I understand it, that the current system is not representative enough, there are ways to fix that short of trading it in for systems that don't work as well. The selection system itself can be modified to increase representativeness without sacrificing all of its benefits.

Any decisions regarding judicial selection have to be made with the unique role of judges in our system in mind. Contrary to what has been said, judges are not and should not be politicians. While they do have a part to play in our governmental process, their role is a unique one and vastly different from that played by officials in both the legislative and executive branches. Part of their expected role is essentially counter majoritarian. They have to be counted on to provide impartial justice, even where that frustrates the popular will of the majority. While this role may not be a popular one, it is a legitimate one. The legitimacy of the process is strengthened when they are viewed by the public as having been selected on merit, and it is compromised when the public views judges as having been selected as the result of a political decision.