

**HOUSE JUDICIARY COMMITTEE
Representative John Barker, Chair**

**Testimony in Opposition to HCR 5013
Relating to the Supreme Court Nominating Commission**

February 16, 2016, 3:30 p.m., Room 112-N

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Mr. Chairman and committee members, thank you for the opportunity to testify today in opposition to HCR 5013.

I have served on the Supreme Court Nominating Commission for almost eight years, now finishing my second and final term, ending in July. That tenure has allowed me to see the Commission function through one year of Governor Sebelius, two years of Governor Parkinson, and five years of Governor Brownback.

When I joined the Commission, all the lay appointments were from Governor Sebelius' office. Now all the lay appointments have been made by Governor Brownback. In both cases they had important input to the screening process. And, I believe, demonstrated the wisdom of the process in place.

The selection of commission members is arguably the most important factor in determining the commission's capacity to inspire public trust and confidence in its work. If the commission's work is perceived as political deal-making, a commission-based process offers little real benefit. If, on the other hand, the commission's work is perceived as a balanced, rigorous, and transparent process in which the qualifications of the applicants are the determinative factor, then it can foster public confidence in process and the courts.

Likewise there is value in the transparency this Commission brings. The applicants are identified publicly, the interviews are open to the public and only the deliberations are confidential. In addition, the applicants are measured by a statutorily mandated yardstick.

I was selected by my fellow colleagues with the promise to select the most qualified candidates for these positions. My term has allowed me to screen more than seven positions for the Court of Appeals, and three vacancies for the Supreme Court.

But what does selecting the most qualified mean? I will tell you what I told my peers when I ran twice for this position:

1. Intelligence. Academic standing in undergrad and law school. Applicants must demonstrate excellence in the profession. This is obviously the most important requirement.

2. Experience. You need a breadth of depth of experience in the legal practice. Has he or she handled difficult, challenging cases? The court sees a wide variety of legal issues. Ideally the applicant would have experience in most of those areas.
3. Have they represented clients across the economic divide? Both affluent clients, and also clients below the poverty line. Many of the legal challenges that arise come from men and women who cannot afford an attorney. I want to see an applicant who understands and hopefully has represented this demographic.
4. Do they play well with others? They need to embrace civility, show a respect for adversarial process. Disagree without being disagreeable. This is important because they need to work with other judges on the bench and yes, from time to time they will disagree, perhaps even strongly. This is a healthy part of the decision making process.
5. Is there a strong work ethic? Have they demonstrated a willingness to work hard? Come in early and stay late? Or is this a retirement plan to move from a smaller town and move to Topeka. I have certainly seen applicants looking for a smooth transition to retirement. Those are not good candidates for the bench.
6. Do they give back? Attorneys have an ethical obligation to do free legal work for clients. This shapes their perspective.
7. Geography matters. I believe the bench needs to resemble Kansas. Small towns, large towns. I'm from a small town and have some partiality to attorneys who have practiced in smaller communities. At the same time, for the last 30 years I've lived in Johnson County and understand the attributes a larger city practice can bring. We need representation from both on the appellate bench.

There are other intangibles that can weigh in the process as well.

These are my priorities and I cannot speak to the other members of the Commission. But I know the screening efforts have resulted in sending to the Governor candidates who are, in fact, the most qualified of those who have applied.

With the most recent Supreme Court vacancy, the Commission sent to the Governor these names: Judge Karen Arnold Burger, District Court Judge Merlin Wheeler from Emporia, and Caleb Stegall. In 2010 the Commission recommended Judge Merlin G. Wheeler, Court of Appeals Judge Nancy L. Moritz and Court of Appeals Judge Thomas E. Malone. And in 2008, the list of three included Douglas County Chief Judge Robert W. Fairchild and Court of Appeals Judge Tom Malone, and Dan Biles.

In terms of this concurrent resolution, one should rightfully inquire where is the evidence the system is broken? I have had the privilege to appear in many courts around the country. Our judges, from top to bottom, represent the finest of our profession. And the nonpartisan retention

process provides what I believe to be perfect framework for citizen based input and periodic review of the performance of our appellate judges.

The Commission works, and has demonstrated its ability to provide the Governor with three solid choices from which to pick who he or she believes would make the best judge.

House Concurrent Resolution 5013 substitutes a political body for a merit based selection. I urge its rejection.

Thank you.