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Testimony Before the Senate Committee on Federal and State Affairs
In Support of SCR 1611
Tuesday, February 25, 2025

Chairman Thompson, Vice-Chairman Blew, Ranking Member Faust-Goudeau, and Committee:

I support SCR 1611 because it would restore a fundamentally democratic and fundamentally Kansan approach to selecting our state supreme court. To give some context to my support for judicial selection reform, I've personally participated in and been the beneficiary of every type of "selection" process in Kansas. I was elected by my local bar and currently serve on the 2nd Judicial District Nominating Commission. I have participated in the selection of a magistrate judge as a nominating commission member. I have been selected as a district court judge finalist by a nominating commission. I have also been elected to three terms as a county attorney, and I've been appointed by the governor and confirmed by the Kansas senate to statewide positions twice.

"Triple Play" of 1958: Retirement Vacancy Appointment Scandal, Not Election Scandal
The "triple play" in 1958 was a scandal that involved a governor's *vacancy* appointment in between elections. Instead of just fixing the vacancy appointment provision, voters gave away their own ability to elect justices and gave control over the selection system to their lawyers. SCR 1611 would do what Kansans should have done in 1958—repeal the gameable vacancy appointment process and preserve elections.

Systemic "Double Plays": Retirement-Vacancy Appointments Since 2003
Since 2003, six justices have chosen to retire under a Democratic governor, including two who were appointed by a Republican governor. One justice died under a Democratic governor, and one was elevated by a Democratic president during a Republican governor's term. In other words, no supreme court justice has chosen to retire under a Republican governor in the past 22 years.

Name	Term Start	Term End	Retired under	Appointed by
Melissa Taylor Standridge	12/14/2020	1/13/2029	Current	Kelly (D)
Keynen "KJ" Wall Jr.	8/3/2020	1/13/2029	Current	Kelly (D)
Evelyn Z. Wilson	1/24/2020	1/13/2029	Current	Kelly (D)
Caleb Stegall	12/5/2014	1/13/2029	Current	Brownback (R)
Dan Biles	3/6/2009	1/13/2029	Current	Sebelius (D)
Marla J. Luckert	1/13/2003	1/13/2029	Current	Graves (R)
Eric S. Rosen	11/18/2005	1/13/2027	Current	Sebelius (D)
Carol A. Beier	9/5/2003	9/18/2020	Kelly (D)	Sebelius (D)
Lee A. Johnson	1/8/2007	9/8/2019	Kelly (D)	Sebelius (D)
Nancy Moritz	1/7/2011	7/29/2014	Elevated by Obama during Brownback (R)	Parkinson (D)
Lawton R. Nuss	10/17/2002	8/3/2010	Parkinson (D)	Graves (R)
Robert E. Davis	1/11/1993	1/12/2009	Sebelius (D)	Finney (D)
Donald L. Allegrucci	1/12/1987	1/8/2007	Sebelius (D)	Carlin (D)
Robert L. Gernon	1/13/2003	3/30/2005	Sebelius (D) (died in office)	Graves (R)
Bob Abbott	9/1/1990	6/6/2003	Sebelius (D)	Hayden (R)

Since 2003: **Retired under: 7 D, 1 R** **Appointed by: 10 D, 5 R**

SCR 1611 Would Fix Vacancy Gamesmanship

A less noticed "feature" of the current judicial selection system is that it has allowed justices to time their retirements to line up with a governor and nominating commission makeup that suits their own preference for a successor. In other words, Kansas traded one triple play in 1958 for a steady succession of "double plays" between retiring justices and governors ever since.

The only justice appointed by a Republican governor since 2002 was appointed not due to a "timed retirement" but rather upon President Obama appointing a Democrat-appointed supreme court justice to the Tenth Circuit. In 2014, Justice Nancy Moritz was appointed to the Tenth Circuit, opening up a spot on the Kansas Supreme Court during a Republican governor's term.

SCR 1611 would fix both the 1958 "triple play" and the current "double play" gamesmanship by requiring an election upon the retirement of a supreme court justice. And SCR 1611 would constitutionalize staggered terms to prevent six of seven justices being subject to "retention" at one election, like what will currently occur in 2028.

Nominating Commission: Softball Questions and Ideology Screening, Not "Merit"

I have personally observed multiple nominating commission interviews and deliberations for the past three supreme court vacancies since 2019. Nominating commission proceedings for supreme court justices involve interviews of around 20-30 minutes per applicant. There is no rigorous questioning, no media present at interviews, and hardly enough time to determine each candidate's legal experience, let alone their approach to constitutional interpretation. The Supreme Court Nominating Commission often asks the same questions for each applicant. Most focus on personal biography, hobbies, interest in the position, and past experience. Hardly any questions from lawyer members focus on judicial philosophy, view of precedent, or approach to statutory and constitutional construction, yet these are the most important questions to ask.

Actual questions within these 20-minute interviews in recent years have included:

> What ways would you contribute to the court as it's currently made up?
> One trait that would make you a good SCOKAN justice.
> Any insight in bridging divides between branches?
> Challenging ethical dilemma you have faced?
> What lesson do you hope your kids have learned from you?
> Describe your research and writing skills.
> Would you rotate law clerks or have permanent clerks?
> Why would being younger than other applicants would be beneficial to SCOKAN?
> I see you have ballet experience--will there be a SCOKAN ballet show at some point?
> SCOKAN requires collaboration in decision making. Can you collaborate with others?

This is not "merit" selection. This is running out the clock so the lawyer-controlled commission can pick judges with a preferred ideology without the public knowing anything about them.

Picking the "correct ideology" over merit is not a conspiracy theory. I also attach former Supreme Court Nominating Commission Member Felita Kahr's testimony from a 2013 legislative hearing regarding the attorney-controlled nominating commission's overt bias against conservative judicial candidates. *See* ***Exhibit A (2013 Felita Kahrs Testimony)***.[1]

[1] *available at* https://kslegislature.gov/li_2014/b2013_14/committees/misc/ctte_h_jud_1_20130122_10_other.pdf; *see also* Felita Kahrs, Testimony before the House Judiciary Committee (January 22, 2015), *available at* https://kslegislature.gov/li_2016/b2015_16/committees/ctte_h_jud_1/documents/testimony/20150122_10.pdf.

Control the Nominations, Control the Appointment
"I don't care who does the electing so long as I do the nominating." -William "Boss" Tweed, political boss of Tammany Hall, quoted in J. Jackson Barlow et al. The New Federalist Papers 338 (1988).

Nominating commissions skew selection criteria toward the professional interests of attorneys and the political makeup of the bar. The bar as a trade group is not reflective of the state as a whole in terms of judicial philosophy and political ideology. Of course the bar does not want to give up the power to control who gets on the supreme court—no industry group would give up this uniquely outsized influence and power over state government once they have it.

However, we don't allow CPAs to select our state treasurer, CEOs to select our governor, lawyers to select our attorney general, insurance agents to select our insurance commissioner, or filing clerks to select our secretary of state. "Merit" selection is a fancy name for "industry-controlled" selection. Lawyers are just as political as the next voter but currently have 200-times the voting power in selecting judges in our state. Kansans should elect their government, not their lawyers.

Lawyers are Uniquely Self-Interested in Less Rigorous Vetting
In some ways, lawyers are the worst "voters" to be picking judges, since they have a vested financial interest in maintaining good relationships with the judges who are selected. This is not hypothetical: the following is a transcription of January 16, 2020 nominating commission deliberations I personally observed:

> *Terry Campbell (CD2 lawyer member): "Because our meetings are public now, some of us have trouble saying one candidate is better than another."*
>
> *Michael Stout (Statewide chair lawyer member): "It's awkward to discuss personal characteristics with people staring at you."*
>
> *Linda Weis (non-lawyer lay member): "This is our public duty. We shouldn't feel embarrassed."*
>
> *Gerald Schulz (CD1 lawyer member): "We have to look at these judges. I don't want to say something critical because I have to appear."*
>
> *Linda Weis (non-lawyer lay member): "Are you fearful of retaliation?"*

Elections are Fundamentally Kansan
Kansans prefer to elect our government. That was true for the first 100 years of our statehood, and it's true today. Kansans also elect the district court and magistrate judges in 14 of the 31 judicial districts in our state. And from 1861 to 1958, Kansans elected our state supreme court. If it works for both Wyandotte County and Sedgwick County, as well as 12 other judicial districts across the state, it will work for Kansas. Unlike the federal government, in which only one executive branch official is elected, Kansans directly elect many different state and local officers: Governor, Lieutenant Governor, Attorney General, Secretary of State, State Treasurer, Insurance Commissioner, State Board of Education, all 165 legislators, mayors and city councils, and county-wide officers (commissioners, clerk, treasurer, register of deeds, sheriff, county attorney) in all 105 counties.

I urge you to support SCR 1611 to restore democratic legitimacy to Kansas judicial selection.

EXHIBIT A

Testimony

Kansas House Judiciary Committee

January 22, 2013

Felita Kahrs,
Kansas Supreme Court Nominating Commission Member

I would like to thank the Chairman and members of this committee for the opportunity to be here today and to explain why I am an advocate of reforming the judicial selection process. Before I begin, my personal history is: I obtained my undergraduate degree from Norfolk State University in English Education and my Masters of Science degree from Johns Hopkins University in Baltimore, MD in Administration and Supervision. I have worked in education for close to 20 years as a teacher, Vice Principal and Principal in both Public and Private Schools. Presently, I work for Non-Public Educational Services, Inc., (NESI) as the Title I Quality Assurance Manager. We are an organization that offers Title I (supplemental) reading and math services to private school students in Kindergarten through 12th grade.

I currently sit as a member of the Supreme Court Nominating Commission, appointed by Governor Brownback in 2011. I have participated in two nomination processes and from those experiences; I am here today to testify that the current system needs reform for the reasons that: 1) the selection process is not merit based, 2) it is political, and 3) it is unfair.

First, the assessment of the candidates was not made based on the set of selection criteria we received. Before we began the interviews, the Chief Judge addressed us and gave us what he called the essential qualifications and traits to look for to find the best candidates. The Commission favorably discussed, reflected, and compared the Chief Judge's recommendations with the first several candidates; however, when it came time to discuss candidates who were known for their conservative political views, everything changed. Although the qualifications and traits of these candidates exceeded and in some cases far surpassed candidates preferred by the majority of the Commission; suddenly, they discarded the Chief Judge's words and the information he shared was no longer valid in their opinion. One of the candidates was immediately dismissed by a strong majority of the Commission because of his affiliation with the Governor; hence, the selection process was not based on merit but rather ideology.

Second, the process is political. This was most evident during our deliberations regarding the two conservative candidates. Our discussions became extremely heated and sometimes hostile. I witnessed disdain towards these candidates from some of the Commissioners. The tenor of the comments were: *this candidate is too political, this candidate is too closely associated with the Governor, this candidate was openly pro-life while serving in the legislature;* and doubts were raised about them being able to separate their politics from their duty to serve in the sought role. Additionally, there was a sudden and obvious change of heart towards one of conservative candidates during the second nomination process. One of the Commissioners reminded the Commission that this current process was already in danger of reform and admonished the group that to not send a conservative to the Governor this second time would be unwise. I believe this conservative candidate only survived the cut because they feared the wrath of the legislature and the possible consequence of it.

Last, the process is unfair. Our current system is fixed which guarantees there will always be a majority of voting members on the Commission who represent the views of the Kansas Bar Association which is left of center. It was clear that the five lawyers all held similar views, and I could only guess their politics, likewise, were similar and undoubtedly reflected the views of the Bar. Thus, based on my observation and reflection, I reiterate that the current system should be reformed because it is not merit based, it is political, and it is unfair.