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Statement in Opposition to the Appointment of
Caleb Stegall to the Kansas Court of Appeals
By Senate Democratic Leader Anthony Hensley
Senate Committee on Judiciary
September 3, 2013

Mr. Chairman and Committee members:

I want to voice my strong opposition to Governor Sam Brownback's appointment of Caleb Stegall to the Kansas Court of Appeals.

As a member of the Kansas Legislature for 37 years, serving with both Democratic and Republican Governors, I have seen countless nominations considered by the Kansas Senate. Until today, I have never seen the Senate consider a gubernatorial nomination to the Kansas Court of Appeals.

This is not because I missed votes on such matters, but it is because the nomination of Court of Appeals judges went through an open and non-partisan process that selected individuals based on merit and not based on political ideology and partisan political patronage.

I am opposed to the nomination of Caleb Stegall for a number of reasons.

First and foremost, the process in which this nomination has come before the Senate, and thereby the people of Kansas, has been disgracefully lacking in any transparency as the applicants for this nomination were, and remain today, kept secret by Governor Brownback so as to avoid public scrutiny.

Second, the nomination of Caleb Stegall demonstrates the worst kind of political cronyism that is alive and well today under Governor Sam Brownback.

In addition to these first two reasons, I am summarizing a list of many more reasons why the nomination of Caleb Stegall should be rejected by this Committee:

- In 2012, Mr. Stegall was a two-time applicant to the Judicial Nominating Commission for vacant positions on the Kansas Court of Appeals. He was passed over both times for more-qualified candidates with judicial experience as District Court Judges.
- Mr. Stegall has no experience serving as a judge in any capacity. While he has provided some details as to his legal work as an attorney, that experience does not seem to set him apart from many attorneys across the state who do not have the luxury of being so closely allied with Sam Brownback.
- Ironically, in 2005 Brownback criticized President Bush's appointment of White House Counsel Harriet Miers to the U.S. Supreme Court because she did not have a judicial "track record" while three individuals Brownback preferred were all members of the judiciary with extensive experience on the bench.
- From what details I have learned about Mr. Stegall's legal work, I know that he has worked for some of the most right-wing conservative groups and individuals in Kansas including Americans for Prosperity (AFP), The Kansas Policy Institute (KPI), former Attorney General Phill Kline and, of course, Sam Brownback.
- Not only do the names of these groups and individuals cause concern regarding Mr. Stegall, but the work itself indicates an inability to prevent his own right-wing political agenda from clouding his legal work. This is evidenced by two prime examples: his legal analysis of the *Montoy* decision for KPI and the filing of a lawsuit on behalf of AFP to block the Kansas City, Kansas casino project.
- While the application only asked for legal publications, Stegall has many non-legal writings that are a cause of concern. He was the editor of an online blog he started oddly named "*The New Pantagruel: Hymns in the Whorehouse*" in which he advocated for a radical new view of world order.
- In addition to the articles published in this online magazine, the editorial board issued a statement in 2005 in response to the court decision to allow for the removal of Terri Schiavo's life support. The statement advocated for "forcible resistance" to try to save the life of Terri Schiavo. This insistence on ignoring a legal judgment of a court of law brings Mr. Stegall's qualifications to serve on Kansas's second highest court into serious question.
- Mr. Stegall has been extensively involved in changing the process of how judges are selected in Kansas. This is evidenced by his testimony provided to the 2011 Kansas House Judiciary Committee regarding 2011 HB 2101 which provided for changing how Kansas Court of Appeals judges are selected.

- A blog entry by *Kansas Watchdog* on August 20, 2013, originally stated, before all negative remarks about Mr. Stegall's nomination were redacted by Kansas Watchdog's blogger, that Mr. Stegall "has contributed \$5,000 to Brownback's political campaign contributions in the last 4 years."
- In 2008, Caleb Stegall published an article in *Taki's Magazine* which stated "[a] few weeks ago I attended a meeting of Kansas Secessionists." This statement alone is enough to raise serious questions about Mr. Stegall's political agenda.

Judicial Selection and President Bush's Nomination of Harriet Miers

Mr. Stegall's involvement in lobbying the legislature to change the process by which we select our Court of Appeals judges is very concerning. On February 16, 2011, Mr. Stegall testified before the House Judiciary Committee regarding House Bill 2101 which sought to change how Kansas Court of Appeals judges were appointed. Mr. Stegall points out that:

"The manner in which those who govern are selected and installed in positions of societal trust and authority is of fundamental importance. In fact, the particular mechanism of selection goes a long way towards defining the overall system of government – whether it is democratic or republican in form, or whether it is one form or another of authoritarian government."

He goes on to criticize the nominating commission's process for selecting applicants based on the claim that it fails the democratic process by ceding "the authority to select one-third of Kansas's government to a small, select group of unaccountable specialists."

Mr. Stegall was a two-time applicant before the nominating commission in 2012 vying for the seats vacated by Judge Christel Marquardt who retired and Chief Judge Richard Greene who passed away while on the bench.¹ Both times, he was passed over for other applicants. While opponents of the nominating commission, including one of Mr. Stegall's references for his most recent application Felita Kahrs², argue that Mr. Stegall

¹ <http://salina.com/search/k3443-BC-KS-KansasAppealsCour-2ndLd-Writethru-10-12-0429-clone>; <http://cjonline.com/news/2012-10-12/govs-chief-counsel-among-appeals-court-candidates>

² Appointed to the Supreme Court Nominating Commission by Sam Brownback on November 19, 2011. She is a non-lawyer member of the commission. <http://www.gardneredge.com/news/2011/11/19/5163-governor-announces-appointments-to-commissions-and-boards#.UhTah427KAq>. Felita Kahrs was one of the members of the nominating commission to come out publicly criticizing the nominating commission process. As John Hanna reported in the AP which appeared in the Hays Daily News on January 23, 2013, "Felita Kahrs, Topeka, told legislators she believes the panel was biased, and Bob Hayworth, Stilwell, said claims the nominating process isn't political are disingenuous." <http://www.hdnews.net/Story/judgesAP012313>

was the most qualified applicant and passed over for political reasons, you need only look as far as the applicant selected to know this is not true.

In both instances, Mr. Stegall was passed over for members of the judiciary. These individuals were serving as district court judges with proven track records and opinions that could be used to evaluate them for their ability to serve on the Kansas Court of Appeals. Judge Kim Schroeder, who replaced Christel Marquardt, was appointed in 1999 to the 26th Judicial District Court by Governor Bill Graves. Tony Powell, who served in the legislature, was elected to the bench in 2002 where he served as a District Court Judge in Sedgwick County until his appointment to the Court of Appeals in 2012.³

Concern over the appointment of a General Counsel to the bench is something that Governor Brownback is familiar with. In 2005, President George W. Bush nominated White House Counsel to the U.S. Supreme Court. This selection did not sit well with certain members of the U.S. Senate, including Sam Brownback.

“Her nomination, Brownback acknowledged in an interview Wednesday night, has been an undeniable disappointment to the conservative movement. ‘What I was hoping for was (Judge Michael) Luttig (of the U.S. Court of Appeals for the Fourth Circuit). (Fifth Circuit Judge) Priscilla Owen, you don’t have as much of a record, but you have some. (Fifth Circuit Judge) Edith Jones, you have a much clearer record,’ he said.

‘That’s what I was hoping, that we would get that sort of nominee, where there’s no guessing game about this, because you have that written record.’ ‘There was missed opportunity here,’ Brownback lamented. What was lost was the chance to educate the country, if for example, Bush had nominated someone such as Luttig who has 14-year record of judicial decisions or Jones who has served for 20 years on the federal appeals court.”⁴

It is clear from the statements by Brownback that he had hoped for someone with a track record from serving on the bench prior to being appointed to the highest court in the land. The same should be said about his appointment to the Court of Appeals. While we will never know if any of the other applicants had any previous judicial experience, we certainly know that Mr. Stegall has no experience as a member of the judiciary.

While Mr. Stegall has an impressive academic record finishing 3rd in his law school class at the University of Kansas School of Law, his resume lacks what would seem to

³ http://www.pancakeday.org/index.php?option=com_content&view=article&id=10411:governor-appoints-judge-kim-schroeder-and-judge-anthony-powell-to-kansas-court-of-appeals&catid=12:local-news&Itemid=40; <http://midwestdemocracy.com/articles/kansas-governor-puts-trial-judges-to-appellate-court/>

⁴ http://www.nbcnews.com/id/9604860/ns/us_news-the_changing_court/t/sen-brownback-key-nominee-miers-fate/#.Uh4zAxthySp

be an important piece for Governor Brownback: no judicial experience. His work history includes serving 2 years as Jefferson County Attorney, nearly 6 years owning his own practice and an approximate 5 years at Foulston Siefkin as an associate although there is a one year gap where he served as a law clerk for 10th Circuit Judge Deanell Tacha.

It is interesting, however, that in multiple places Mr. Stegall lists himself as General Counsel for Americans for Prosperity, a well-known organization funded by the Koch brothers.⁵ However, the one place he does not include this information is in the application submitted to Governor Brownback and this committee. The question is, why would Mr. Stegall leave this information out?

The Kansas Policy Institute and *Montoy*

Another concern that is routinely raised when a judge is selected for appointment to the bench is whether this judge will be an activist judge. A review of Mr. Stegall's analysis of the *Montoy* decision, which appeared in the Kansas Policy Institute's *A Kansas Primer on Education Funding – Volume II: Analysis of Montoy v. Kansas*⁶, shows that Mr. Stegall's political views are strongly tied to his legal analysis and drive the outcome of his decision. While attorneys wear their "advocate hats" when representing and working for clients, they have a professional obligation to constrain their advocacy to the law and not insert political or personal opinions. It's clear from the writing that both the political views of Mr. Stegall and his client, Kansas Policy Institute, were driving the opinion and analysis of this decision.

"[T]he Court demonstrated in *Montoy* its willingness to delegate the Legislature's lawmaking and appropriation powers to private consultants and attach constitutional significance to demonstrably biased cost studies. . . . The Court took upon itself the full weight and power to set and enforce education policy for Kansas by establishing circuitous [convoluted] definitions of a "suitable" education in Kansas that functions less as legal judgment and more as judicial price-fixing and policy judgment." *Volume II*, pg. 3.

Mr. Stegall continues on to discuss possible "solutions" to this decision which include funding reform, consolidation of school districts and, in his words "most importantly," constitutional reform.

"Finally, and most importantly, legislators must consider constitutional reform. Until then, taxpayers will be held hostage by a powerful special interest with constitutional carte blanche to spend with virtually no limit." *Id.*

⁵ http://www2.ljworld.com/chats/2008/jul/29/caleb_stegall/; http://en.wikipedia.org/wiki/Caleb_Stegall;
<http://www.bizjournals.com/wichita/stories/2008/03/24/daily23.html>

⁶ <http://www.kansaspolicy.org/ResearchCenters/Education/Studies/65168.aspx>

Whether or not one believes that Mr. Stegall simply had his advocate hat on while writing this analysis, it seems clear that he agrees with this philosophy. After Mr. Stegall wrote this analysis, Sam Brownback was elected Governor and he selected Mr. Stegall as his General Counsel. This is not a position you accept if you disagree with the political ideologies of your new boss. Not coincidentally, after Brownback's election and taking office, he began his quest to redefine the term "suitability" which is the same term Mr. Stegall took to task in the quote above.⁷ You have to wonder, why did Brownback select Mr. Stegall as his General Counsel? Was it the \$5,000 in campaign contributions,⁸ Mr. Stegall's work for AFP or his overzealous attack on the Kansas Supreme Court through the KPI? One thing is certain, this is now an opportunity to start working to change that definition through the takeover of the judiciary.

"The New Pantagruel: Hymns in the Whorehouse"

The New Pantagruel⁹ was published by Pantagruel Press, Inc. in 2005 and lists Caleb Stegall as the head editor where he wrote many articles and also approved articles to be published by other contributing editors. Mr. Stegall described The New Pantagruel as an online magazine with a "radically new vision for humanity and the world" that would be "rooted in ancient tradition, nature and Christian revelation."¹⁰ The volumes of articles that can be found in the archives on the website has concerning information that can again be linked to Mr. Stegall's legal career.

As mentioned previously, Mr. Stegall served as General Counsel for AFP where he filed a lawsuit to attempt to block the competitive bidding of state owned and operated casinos on behalf of AFP.¹¹ Again, it could be argued that this was Mr. Stegall wearing his advocate hat and not necessarily pursuing his personal beliefs. However, in an article titled "*Plastic Sinners, Plastic Sins*" by Caleb Stegall, Stegall takes gambling and Bill Clinton to task likening the playing of slot machines to receiving oral sex from an office intern.

"The real lesson to be learned here is that playing slot machines is the gambling equivalent of receiving oral sex from an office intern. Both of these acts represent within our culture the corrosive effect of modernity; both of these acts

⁷ <http://www.kansas.com/2011/01/27/1693053/what-is-suitable-funding-for-kansas.html>

⁸ The link that follows originally had a paragraph raising issues with Stegall as Brownback's appointment which included Stegall making \$5,000 in campaign contributions to Brownback. That paragraph has since been removed. The original with the paragraph described above is attached at the end of this testimony. <http://watchdog.org/102012/kansas-governor-nominates-chief-legal-counsel-for-appellate-court/>

⁹ <http://web.archive.org/web/20070208102117/http://www.newpantagruel.com/about.php>

¹⁰ <http://cjonline.com/news/state/2013-08-25/stegalls-identity-framed-letters-essays>

¹¹ <http://www.bizjournals.com/wichita/stories/2008/03/24/daily23.html>

represent within our culture the corrosive effect of modernity; both acts bear the unmistakable marks of pornography.”¹²

In the same article, Mr. Stegall goes on to attack the attempt by the horse and dog tracks to place slot machines at the racetracks. Mr. Stegall later states:

“Clearly we are a people who want our “comfort sins” – vices that assuage our mechanical needs but leave our souls untouched. Society’s structures of efficient machinery aim to put a slot machine in every laundromat [sic] and oral sex in every hallway.”¹³

This writing is, at the very least, concerning when considered in light of the fact that he represented AFP in a lawsuit attempting to block the implementation of state owned and operated casinos. The case, which was later dismissed after being viewed as frivolous and without merit, begs the question: was this case driven by the law or a personal political agenda?

“Forcible Resistance” to Court Order

In 2005, Mr. Stegall and members of *The New Pantagrue*’s editorial board issued an editorial statement regarding the removal of Terri Schiavo from life support. The statement said:

“It now appears that all legal recourse to save Terri’s life has failed. As Terri’s family and millions of people know, the State is wrong. There is a higher law. If last-ditch efforts in the Florida Legislature and the United States Congress also fail, and the administration of Governor Jeb Bush fails in its duty to uphold the higher law, those closest to Terri—her family, friends, and members of their communities of care—are morally free to contemplate and take extra-legal action as they deem it necessary to save Terri’s life, up to and including forcible resistance to the State’s coercive and unjust implementation of Terri’s death by starvation.”¹⁴

This is at the very least alarming considering Mr. Stegall wants to be a member of the judiciary. How can an individual who openly advocated going outside the law by adhering to a “higher law” and suggested the use of “forcible resistance to a valid court order be entrusted with serving on the second highest court in Kansas?

¹² *Plastic Sinners, Plastic Sins*,
<http://web.archive.org/web/20070208102117/http://www.newpantagrue.com/about.php>

¹³ Id.

¹⁴ <http://www2.ljworld.com/news/2013/sep/01/stegall-urged-forcible-resistance-schiavo-court-r/>

Kansas Secessionists?

An article that was posted in October of 2008 by Caleb Stegall in Taki's Magazine started off with the following sentence: "A few weeks ago I attended a meeting of Kansas secessionists."¹⁵ This statement demonstrates just how radical Mr. Stegall's views are and those views are problematic in allowing such an individual to serve as a member of the Kansas Court of Appeals.

Kansas Watchdog Flip Flops on Stegall Article

On August 20th, Kansas Watchdog published an article regarding Brownback's appointment of Caleb Stegall to the Court of Appeals. The following paragraph appeared in the original article:

"The announcement brought with it cries of cronyism. Indeed. Stegall's nomination does raise eyebrows, despite Brownback's insistence that he's the best man for the job. His current position advising the governor aside, Stegall has contributed \$5,000 to Brownback's political campaign in the last four years. He also testified in favor of the judicial reform change in 2011, and has been previously passed over for a judicial seat."

However, days after this article was posted, the previous paragraph was completely removed from the online story leaving the article without any negative reaction to Mr. Stegall's appointment. While we don't know why this change occurred, we know that the Koch brothers are a major backer of this online blog and that both Brownback and Mr. Stegall are their guys. This likely caused the redaction.¹⁶

Conclusion

The nomination of Caleb Stegall raises many concerns from his qualifications and background to the fact that he helped Sam Brownback strong-arm the legislature into passing the change in the selection process that guaranteed Mr. Stegall's nomination to the next vacant position on the Kansas Court of Appeals.

The analogy I would draw under the circumstances is when George W. Bush assigned Dick Cheney to lead the search for a Vice Presidential running mate for the 2000 election. When the search was completed, Dick Cheney became the running mate!

Mr. Stegall's legal work for KPI in analyzing the *Montoy* decision and the lawsuit he filed on behalf of AFP to block the KCK casino project both closely mirror his political

¹⁵ http://takimag.com/article/what_we_eat_who_we_are#axzz2dTSp1x8B

¹⁶ <http://watchdog.org/102012/kansas-governor-nominates-chief-legal-counsel-for-appellate-court/>;
<http://watchdog.org/102531/democratic-leader-flip-flops-on-kansas-judicial-nominee/>;
<http://watchdog.org/102814/partisan-politics-fuel-kansas-democrats-change-of-heart/>;
<http://watchdog.org/103718/kansas-democrats-use-double-standard-on-judicial-nomination-criticism/>

ideology. Both cases stand in stark contrast to what a large majority of people, including the Kansas Supreme Court, view as the law.

An individual who openly advocates “forcible resistance” of a valid court order relying on a “higher law” raises serious questions as to their qualification to be appointed to the second highest court in the state of Kansas.

The process that brought Mr. Stegall to this confirmation hearing has lacked any form of transparency and leaves us with more questions than there are answers.

For those reasons, I respectfully request this Committee reject the nomination of Caleb Stegall to the Kansas Court of Appeals and demonstrate to the citizens of Kansas that while the Brownback Administration has little respect for an open and transparent process, this committee and this legislature does.



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Kansas governor nominates chief legal counsel for appellate court

By Travis Perry / August 20, 2013 / No Comments

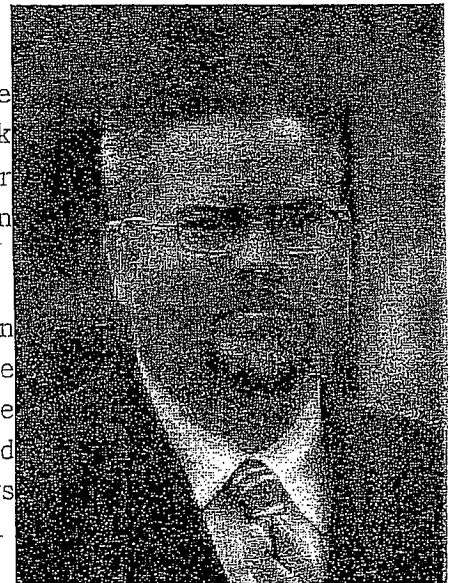


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By Travis Perry | Kansas Watchdog

OSAWATOMIE — With the nomination of Caleb Stegall for the Kansas Court of Appeals, Gov. Sam Brownback (http://ballotpedia.org/wiki/index.php/Sam_Brownback) has closed one chapter and opened another in the saga surrounding judicial selection in the Sunflower State.

Stegall, the governor's chief legal counsel, will face confirmation by the Kansas Senate during a Sept. 3 hearing as part of the upcoming special session. His nomination comes as little surprise to many, and was reported more than a month ago — and denied by Brownback staffers — by WIBW News (<http://www.wibwnewsnow.com/source-gov-brownbacks-top-staff-lawyer-to-fill-kan-court-of-appeals-vacancy/>).



(<http://watchdog.wpengine.netdna-cdn.com/wp-content/blogs.dir/1/files/2013/08/Caleb-Stegall.jpg>)

Brownback spoke highly of Stegall during a news conference announcing the nomination Tuesday morning.

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"If confirmed, Caleb will be one of the most, if not the most, ^{NAMED: Caleb Stegall, chief legal} qualified person to go on the Kansas Court of Appeals over the ^{counsel for Kansas Gov. Sam} past decade," Brownback said. "Caleb's history of academic ^{Brownback, has been nominated to fill} accomplishment, broad private sector experience and success, ^{the open seat on the Kansas Court of} Appeals. ^{commitment to public service, temperament, character and peer support is without equal."}

Check out Stegall's qualifications and background here. (<http://governor.ks.gov/docs/default-source/documents/caleb-stegall-nominee-packet.pdf?sfvrsn=4>)

The announcement brought with it cries of cronyism. Indeed, Stegall's nomination does raise eyebrows, despite Brownback's insistence that he's the best man for the job. His current position advising the governor aside, Stegall has contributed \$5,000 to Brownback's political campaign in the last four years. He also testified in favor of the judicial reform change in 2011, and has been previously passed over for a judicial seat.

However, Brownback cites letters of recommendation (<http://governor.ks.gov/docs/default-source/documents/caleb-stegall-nominee-packet.pdf?sfvrsn=4>) from Democrats like former state attorney general Steve Six (http://ballotpedia.org/wiki/index.php/Stephen_Six) as evidence of bipartisan support. Brownback also said House Minority Leader Paul Davis (http://ballotpedia.org/wiki/index.php/Paul_Davis,_Kansas_Representative), D-Lawrence, has previously voiced support for Stegall's qualifications.

However, following the announcement Davis released comments to the contrary.

"The Kansas judiciary should be a pillar of independence and transparency, not a parking lot for Gov. Brownback's well-connected, partisan pals," Davis said in a news release.

Davis did not respond to calls for further comment from Kansas Watchdog.

But while lawmakers and talking heads launch themselves into the debate about whether this is the right or wrong choice for the state, political observers say the reality is much different for most Kansas residents.

"It's driven by politics, I don't think your average Kansan knows or cares a bit about how we get judges," said Steve Cann, political science professor at Washburn University in Topeka. "There's no public interest in this."

Cann and fellow Washburn political science professor Mark Peterson are both personal advocates of Kansas' previous selection by which appellate judges were narrowed via nominating committee in an attempt to keep politics out. But Peterson previously told Kansas Watchdog that the public itself is a weakness with that method.

"It's insider baseball. The public has to respond after the fact, and the public's got to pay attention," Peterson said. "At least one thing you can say, in favor of the proposed system, a bad judge is going to reflect badly on the party in power that appointed that individual to that position."