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Testimony in Support of Senate Concurrent Resolution 1601
Proposing to Change the Method of Selecting Appellate Judges

Presented to the Senate Judiciary Committee
By Attorney General Derek Schmidt

January 16, 2013

Mr. Chairman, members of the committee, thank you for the opportunity to testify today in support of Senate Concurrent Resolution 1601.

As a member of the Kansas Senate almost eight years ago, I drafted and co-sponsored with Senator Susan Wagle 2005 Senate Concurrent Resolution 1606, which for the first time in recent history proposed changing the method of selecting Kansas Supreme Court Justices by adding to the existing process the additional step of Senate confirmation. That first proposal ultimately received the votes of a majority of Senators but not the two-thirds required to advance out of the chamber. My views on the need and reasons for revision of the process for selecting appellate judges have not changed, and I am attaching for your consideration my 2005 testimony that describes those in detail.

Now, as in 2005, "I am advocating this amendment … out of a sincere belief that this reform will result in a stronger and better-respected judiciary." As we predicted then, this issue has not gone away. Let me add two thoughts about why, in my view, this resolution should be advanced:

First, it is time for the people to vote. The fact that this debate endures after eight years of consideration by the Legislature, in various forms, clearly demonstrates that this is a real and legitimate issue about the nature of our Kansas system of self-government. Thoughtful Kansans have sincerely-held views on both sides of the question. This is precisely the kind of constitutional question that should be decided by the people themselves. This issue is not going to be settled until the *people* of our state decide whether their system for choosing appellate judges should be changed.

Second, the federal system of judicial selection works. The measure before you proposes a *modified* version of the federal system, which has been used for selecting federal judges for more than two centuries. For all its perceived warts, the federal system of judicial selection is, to paraphrase Winston Churchill, the worst system of selecting judges yet devised -- except for all the others.

As some of you know, I spent seven years of my early career as a staff member in the United States Senate during the 1990s. I saw the federal process up close. I served during the confirmation processes for Justice Clarence Thomas (1991), Justice Ruth Bader Ginsburg (1993), and Justice Stephen Breyer (1994), as well as the confirmations of numerous judges to the circuit courts and federal district courts. The process is intense. But it is a marvel of our American system that ultimately produces the strongest and most well-respected independent judiciary in the world.

The measure before you seeks to bring the strengths of the federal system to Kansas but also seeks to curb aspects of the system that have proven unwieldy or undesirable. For example, SCR 1601 seeks to ensure that vacancies on the appellate courts not endure interminably, particularly in election years, by providing that if the governor fails to timely appoint a new judge for Senate consideration then the Chief Justice must do so. The measure also imposes strict timelines for Senate action. Under SCR 1601, unlike in the federal system, neither the governor nor the Senate may use inaction as a means of delaying

the filling of a vacant position. SCR 1601 also retains the periodic retention vote for sitting judges and justices, which is a hallmark of our current Kansas system; only the method of initial selection would be altered.

* * *

Mr. Chairman, I would bring to the committee's attention three matters that the committee may wish to change from the language of SCR 1601 as it was introduced. I believe all three arise from drafting issues, not from policy choices:

First, the term "nomination" should not be in the resolution. It is my understanding that wherever the term "appointment" is used in SCR 1601 it is synonymous with the common meaning of "nomination." It is my understanding that nowhere in SCR 1601 is the word "appointment" used with the intent of conveying power to the appointing authority, whether the Governor or the Chief Justice, to cause an appointee to assume office or begin performing duties as a Justice or a Judge of the Court of Appeals without first receiving a vote of confirmation by a majority of the Senate. If my understanding of this usage is correct, then I believe there is a clerical error in the resolution in two places: On page 4, line 4, and again on page 6, line 1, the phrase "nomination or appointment" is used. That language appears to be redundant since the term "nomination" appears nowhere else in the resolution and has no independent meaning. Therefore, I suggest deleting "nomination or" at both references.

Second, redundant language in Section 6 and Section 7 should appear in only one place. On page 6, lines 6-7, and again on page 6, lines 38-39, the following language appears: "The supreme court or the court of appeals may assign a district judge to serve temporarily on the court of appeals." I see no reason this language needs to appear twice in the Constitution, so I suggest deleting it from one place or the other. Probably deleting the first reference, on page 6, lines 6-7, is preferable.

Third, Section 6 should include language establishing the jurisdiction of the Court of Appeals. The resolution includes such language for the Supreme Court (Page 1, line 36, through page 2, line 6) and for the District Courts (page 6, lines 27-28) but is silent on the jurisdiction of the Court of Appeals. I suspect this is an oversight. The precise scope of jurisdiction for the Court of Appeals may include questions of policy, but I would suggest something similar to: "The Court of Appeals shall have such jurisdiction as may be provided by law, and its jurisdiction shall be co-extensive with the state."

Thank you, Mr. Chairman, for the opportunity to testify today. I would stand for questions.

Testimony in Support of Senate Concurrent Resolution 1606
Proposing Senate Confirmation of Supreme Court Justices

Presented to the Senate Judiciary Committee
by Senator Derek Schmidt
February 21, 2005

Mr. Chairman, members of the committee, thank you for the opportunity to testify today in support of Senate Concurrent Resolution 1606. This measure proposes an amendment to the Kansas Constitution to add one additional step – the step of Senate confirmation – to the current "merit selection" process used to select state Supreme Court justices.

While there are differing points of view about the wisdom of this proposal, I must say at the outset that the knee-jerk reaction against it to date by so many in the organized bar, by the governor, and by a number of editorial writers has been enormously disappointing. Disappointing but, sadly, not surprising – after all, why would either the bar or a governor, who under our current system exercise joint monopoly power over selecting justices, embrace any proposal to check their monopoly?

I also understand the initial concern of editorial writers who, with due respect, are informed principally by the headlines of the day and not by a studied understanding of the long history of the philosophical struggle for balance that has brought our state to the current system of selecting justices – a system that I believe is incomplete and that now imperils the very judicial authority it was established to protect.

Some critics of this proposal stand aghast that the legislature would dare to critique actions of the court. But I believe we have a duty – a *duty* – to do so. We all are sworn to uphold the Constitution of this state, and that requires us to defend the integrity of each of its institutions of government. There is a real risk that certain actions by the court could undermine the institution of the court. We should heed the warning of Chief Justice McFarland: "The only currency and legitimacy this court possesses is the confidence of the public that we will decide cases based on the consistent application of the law, rather than on the proclivities of individual court members."

So, while others will argue that reform is needed because of one case or another – just as many argued in the late 1950s that reform was needed because of the unseemly abuse of the system in the so-called "Triple Play" that led to the appointment of Governor Hall as Justice Hall – I will make a different case. My thesis is simple: Just as the system of selecting justices (by popular election) was flawed for almost a century before the "Triple Play" served as a catalyst for change, so I believe our current system of selecting justices (by commission and governor alone) has for years been flawed by the absence of adequate checks and balances. Legislative and public concern about one or more recent decisions by the court may well be the modern version of the "Triple Play" serving as a catalyst for further reform.

The objective of SCR 1606 is not to "punish" the court for decisions with which some may disagree. To the contrary, the objective is to protect the institution of the court from the weakening that is sure to come when public opinion concludes there is a pattern of overreaching, erratic behavior, and raw political conduct by a court majority that uses its "independence" to exert its own political preferences at the expense of foundational legal doctrines such as *stare decisis*. Again, Chief Justice McFarland's words in her dissent in the recent case striking down the Kansas death penalty law are revealing about inner workings of the current court:

> The majority's decision today, by the barest of margins, discards our 3-year old decision in *Kleypas*, not because that decision has become unworkable, or the laws or facts underpinning it have changed, or a United States Supreme Court decision mandates it, but *simply because this new majority has the power to do so*. (Emphasis added)

In short, I am advocating this amendment not out of pique or frustration but rather out of a sincere belief that this reform will result in a stronger and better-respected judiciary. I am also profoundly concerned that if we fail to take this reasonable step to refresh the balance between judicial independence and accountability, we will invite more severe reactions as time goes on.

HISTORICAL PERSPECTIVE

The Judicial Branch of government is unique in its role of administering impartial justice. But those two terms – "impartial" and "justice" – have often been at odds throughout American history. "Impartiality" by definition requires independence and an absence of obligation to outside interests. "Justice" by definition requires a respect for community norms and for overall societal expectations. The importance of societal expectations in considering whether a court acts "justly" is particularly important when considering the actions of a court of last resort, such as the Kansas Supreme Court, which not only settles the day-to-day disputes that arise between private litigants but also, by its pronouncements and through our system's acceptance of common law, actually establishes general law that binds our people as a whole.

For those reasons, the history of judicial selection in the United States – and, in microcosm, in Kansas – is the history of the people, acting directly or through their elected representatives, seeking to strike the proper balance between judicial independence and judicial accountability

The sense of where that balance properly lies has shifted over time.

In the original 13 American colonies, judges were appointed by the king. After independence from England was achieved, all 13 of the new American states continued to appoint their judges. Interestingly, eight states then provided that the *legislature* appoint judges. To this day, Virginia and South Carolina still oblige their legislatures to choose their judges. The other five original states provided for appointment by the governor in consultation with or with the consent of his executive council.

But in the early 19th century, reform was in the air. Appointment was no longer considered the best means of choosing judges, and many states moved toward popular election of judges. By the Civil War, 24 of the 34 states elected their judges. Thereafter, every new state entering the Union did so with popular election of at least some of its judiciary until Alaska in 1959.
The 20th century trend toward a "merit selection" system – which was recommended by the American Bar Association in the late 1930s and was first adopted by Missouri in 1940 – was a reaction to the 19th century reforms. Kansas adopted such a system for our Supreme Court in 1958 and in the 1970s for our Court of Appeals and for some, though not all, of our trial courts.

Today, 21 states elect their Supreme Court justices (8 in partisan elections, 13 in non-partisan elections); 24 states (including Kansas) use nominating commissions and gubernatorial appointment; four states provide for direct gubernatorial appointment without involvement of a commission; and, as mentioned above, Virginia and South Carolina still provide for legislative appointment of justices.

ARGUMENTS FOR REFORM

I support our Kansas system of so-called "merit selection," although I think that name can be rather misleading through the implication that it somehow miraculously produces the "best" possible justices. I certainly do not advocate a return to the era of electing Kansas Supreme Court justices. But I do believe our system would be strengthened by adding the additional step of Senate confirmation of persons who have been nominated by the nominating commission and appointed by the governor before that person could assume office as a justice of the Kansas Supreme Court. Consider these reasons:

1. The merit-selection system by itself lacks checks and balances

Despite popular mythology, the current justice-selection system is not free of politics. It is, however, largely free of the checks and balances that we ordinarily rely upon to *contain* the desires of competing political factions. "It is important to acknowledge that the merit selection process is not free from political and other external influences. Studies of judicial nominating commissions have shown that politics can play a part in both the selection of commission members and in their deliberations."

In this context, I am not asserting that our system is "political" in any pejorative sense. Our selection process is operated by honorable people who take their jobs seriously. Contrary to the protests of some in the bar, it is not a slander to call a process political. To say there are politics involved in the current "merit selection" of justices is not to harken back to the era of the smoke-

filled room; rather, it is to acknowledge that human power relationships are by definition political.

The current system merely substitutes the politics of the bar and the politics of the governor for the politics of the state as a whole. The academic literature bears out the influence of bar associations in selecting justices through systems like ours. As a former executive branch staff person and a longtime observer of the selection process, I have seen with my own eyes some of the considerations Kansas governors bring to bear in judicial selection. Politics plays a role.

Our current system removes the selection process largely from public view and has pretended that because politics are not seen by many they do not exist. But judgments still must be made as to which of several qualified candidates are "better", and those are inherently political judgments. The academic literature suggests what common sense also would dictate: That merit-selection panels, like the Kansas Supreme Court Nominating Commission, are excellent tools for screening less-qualified applicants from the pool. But once that is accomplished, there is little to suggest that merit-selection panels are superior to other selection methods for choosing among several well-qualified candidates.

Seven states have acknowledged this inherent shortcoming in a selection system such as ours and have developed systems that still rely on the strengths of the merit-selection process but balance it with the additional step of Senate confirmation. That is precisely what we are advocating in SCR 1606.

<u>2. It is appropriate to consider factors other than a justice's experience</u>

This is not a call for a return to political favoritism or horse trading. Rather, it is an acknowledgment that the law is not always black-and-white – particularly when it presents itself in the form of the difficult issues that confront the Supreme Court. If the difficult questions of law could always – or even usually – be settled with a clearly correct answer merely by reading and applying the law, then there would be no need to have seven justices on the Supreme Court. One would suffice – so long as that one was sufficiently learned in the law.

But, of course, that is not the nature of the law – as evidenced by the many split decisions of our Supreme Court. Being properly credentialed and learned in the law is a necessary but not a sufficient condition for being an excellent justice. Judgment also is required as is a sensitivity to societal norms, trends, conditions and expectations. To put the point another way, justices *require* a certain amount of political savvy.

Judicial philosophy matters. But in our current selection system, only the governor exercises power in choosing a judicial philosophy. Indeed, the nominating commission prides itself on doing just the opposite – making nominations based on factors other than philosophy (which it tends to consider "political" factors). I recall vividly a conversation I had with a member of the nominating commission regarding a then-new appointee to the Supreme Court. The commissioner told me (I'm closely paraphrasing): "We knew that [the particular justice] was going to be a problem, but [he/she] was highly qualified and we didn't have any choice but to

recommend [him/her].” Of course, the governor did have a choice – and, not surprisingly, that particular nominee, in my view, closely reflects the views of the governor who made the appointment.

Yes, judicial philosophy matters a great deal. Consider, as a hypothetical example, a future opening in the Kansas Supreme Court for which the nominating commission forwards three nominees: Antonin Scalia, Ruth Bader Ginsberg, and David Souter. All are highly qualified, fully learned in the law, competent, and full of “merit” by any measure. But it would make an enormous difference for the direction of the court and, thereby, for the state which of the three would be selected.

Under our current system, that decision would fall to the governor alone. Under our proposal, the governor’s unfettered power to choose the direction of the court would be checked and balanced by the Senate.

While much of the bar’s reaction to SCR 1606 has been negative, I have been pleasantly surprised by several members of the Kansas bar who have approached me since the proposal was introduced and have offered their quiet support. As a partner in one of our state’s large law firms said to me, “It’s about time. Before we let somebody ascend to Mount Olympus, we should at least ask what they intend to do when they get there.”

3. Our current selection system is constitutionally suspect

The Supreme Court Nominating Commission, *de facto*, chooses the justices of the Supreme Court. True, the governor exercises the final judgment, but whoever the governor chooses has first been recommended by the commission. The governor does not have the option of rejecting all recommendations and asking for a new slate.

The court, in turn, exercises broad governmental powers that affect almost every aspect of Kansas government and, thereby, the lives of our citizens. Everything from the nature of the state’s police powers to our contract law to our rules of inheritance to certain lawful limitations on sexual relations are determined by the Supreme Court. And the Supreme Court’s membership, in turn, is determined principally by the nominating commission.

Five of the nine members on the nominating commission – a working majority – are elected by Kansas attorneys. The chairman of the commission is elected by attorneys statewide, and four other members are elected by attorneys in each congressional district. To the extent that the Supreme Court’s actions affect every Kansan, not just attorneys, it is apparent to me that the nominating commission’s actions “materially affect residents of Kansas who are not represented by the present method of ... selection” of commissioners.

While the matter has not been tested, I am concerned that this scheme violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by denying the principle of “one man, one vote.” The structure of this system appears to me quite similar to the

structure of the old Kansas Board of Agriculture – a board with members elected only by interest groups that in turn chooses a public official who exercises broad, general powers.

As you know, that arrangement was struck down as unconstitutional by in federal district court by Judge Lungstrum in 1994 as a violation of "one man, one vote." His decision was upheld by the Tenth Circuit Court of Appeals. It is law in Kansas.

I am well aware that there is ample room for argument about the applicability of the *Hellebust* case to our Supreme Court selection process. But my concern is reasonable, and in light of what I believe to be growing public concern about the actions of our Court, the possibility of an eventual legal test to the current process is real.

Even if the federal Constitution permits this arrangement, the notion that Kansas lawyers – who are a tiny minority of our population – should wield such disproportionate influence over the selection of one of our three co-equal branches of government is contrary to most Kansans' notions of how governments ought to be chosen. The current system was adopted during a period of public outrage at the "Triple Play" of 1957 – a time when an irritated public likely would have adopted *any* reform put before it. Upon more thoughtful reflection, I doubt most Kansans would favor a system that gives attorneys such substantial power in choosing the Supreme Court. It is worth noting that the most common reaction I have seen when I mention this proposal to citizens I represent is: "I thought the Senate *already* confirmed state Supreme Court justices."

CONCLUSION

For the reasons described above, I believe our system of government would be well-served by addition of Senate confirmation on top of our existing merit-selection system for selecting Supreme Court justices. It would provide a check and balance to the political judgments of the governor in choosing among well-qualified candidates, and it would cure any potential constitutional infirmity in our current system.

Most important, it would help ensure the long-term public respect and confidence that are so vital to the independence of our judiciary. For these reasons, I encourage the committee to recommend SCR 1606 favorably.