TESTIMONY OF ALAN TARR

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My name is Alan Tarr. I serve as Director of the Center for State Constitutional Studies and hold the position of Distinguished Professor of Political Science at Rutgers University in Camden, New Jersey. I have done research on state courts throughout my career, culminating in the publication last year of *Without Fear or Favor: Judicial Independence and Judicial Accountability in the States* (Stanford University Press). I also served as the chief academic consultant on the American Bar Association's State Court Assessment Project. It is an honor to be invited to share my thoughts on this important legislation.

For most of the 20th century, those who advocated the reform of state judicial selection championed what they called "merit selection," a system under which a nominating committee submits a list of names to the governor, who is obliged to appoint from that list. These reformers enjoyed considerable success, so that today 24 states choose some or all of their judges via a commission-based process, and another 10 use that system for filling midterm vacancies. Kansas, of course, is among those states, having first instituted merit selection in 1958. No state that has instituted a commission-based system has abandoned such a system, which is why the proposed legislation is attracting national attention. If this proposal is enacted and works well, it can be expected that other states will reexamine their systems of judicial selection, and many may follow Kansas's lead.

The proposal to switch from commission-based selection to appointment by the Governor with the advice and consent of the Senate is hardly radical. Gubernatorial appointment with confirmation was the dominant system in the states during the late 18th and early 19th centuries. A similar system is of course used to select federal judges. In my view such a system is superior to commission-based selection, and I support its adoption in Kansas. I do so because the proposal better meets three crucial criteria. First, a system of judicial selection must safeguard appropriate judicial independence. Second, the judicial selection system must elevate highly qualified judges to the bench. Third, the system must provide for appropriate political checks, so that a single person does not dominate the selection process.

Judicial Independence

Judicial independence requires that judges be free to decide cases according to law, insulated from illegitimate external influences. Consideration of federal judicial selection reveals how the current proposal enhances such independence. Whatever the political support drawn upon to secure appointment, federal judges retain their decisional independence, because they will never have to draw upon that support again. As presidents have learned, sometimes to their regret, once federal judges are appointed, they have a tendency to go their own way. This would also apply to Kansas judges under the proposed reform, because governors would not control their continuation in office.

The proposal retains the system of retention elections for continuation in office. Any time a judge must come up for renewal, there is a potential threat to judicial independence. Sitting judges may be targeted for defeat because of one or a few controversial decisions. For example, in 1996 both Justice Penny White of the Tennessee Supreme Court and Justice David Lanphier of the Nebraska Supreme Court were defeated in retention elections because of their unpopular votes in controversial cases. More recently and closer to home, 3 members of the Iowa Supreme were defeated in 2010 because of their votes in a same-sex marriage case. Uncertainty about the likelihood of retention in office may affect judicial decision-making, because judges may seek to avoid decisions that will bring the

wrath of interest groups down on them, and this too could have a chilling effect on judicial independence. The proposed legislation does not solve the problem posed by incumbents seeking to remain in office. But neither does it aggravate the problem. Currently only 3 states—Massachusetts, New Hampshire, and Rhode Island--grant tenure during good behavior or until a mandatory retirement age specified in the state constitution. Kansas has chosen the next best guarantee of independence—namely, retention elections—because the vast majority of judges are retained in office.

The Quality of the Bench

Proponents of merit selection insist that it attracts more qualified persons to the bench than do alternative selection systems. However, there is reason to be skeptical. The claim rests in part on the idea that "merit selection" eliminates politics from judicial selection, but all available evidence indicates this is not true. The classic study of judicial appointment in Missouri, the state that pioneered the merit system, concluded that commission-based appointment transformed the politics of judicial selection but did not eliminate politics. More recent accounts have documented partisan conflict and competition between elements of the bar—for example, between plaintiffs' attorneys and defense attorneys--in several merit selection systems. The seven justices of the Florida Supreme Court who decided *Bush v. Gore* were all Democrats, even though there was a merit selection system in place in Florida, because they were all appointed by a Democratic governor. Today there are Republicans on the Florida Supreme Court, because Republican Governor Jeb Bush and then-Republican Governor Charlie Crist had the opportunity to make appointments. Recent research confirms the continued influence of partisan politics even under merit selection: governors overwhelmingly appoint fellow partisans to seats on the supreme court bench. Thus appointment via merit selection appears to be no less partisan in its results, than is appointment without a commission, as occurs in the appointment of federal judges, or selection by election.

Determining whether there is a connection between mode of selection and the quality of those chosen is extraordinarily difficult. What research there is shows that judges chosen via merit selection do not differ appreciably in their qualifications from those chosen by other selection systems. For example, judges chosen by merit selection do not attend better law schools, they do not have greater legal or judicial experience, and they are just as likely to have had partisan political careers. Although these findings are hardly dispositive, they caution against accepting claims that merit selection produces a better bench. A comprehensive study of the effects of New York's switch to merit selection concluded that it coincided with a decline in the national reputation of the Court of Appeals, the state's highest court. Some proponents of merit selection have suggested that attorneys who would make excellent judges fail to seek positions because they want to avoid the political process. Yet the proposed reform hardly makes the mode of selection more political.

Finally, proponents of commission-based selection contend that the expertise of those on the commission will ensure that only qualified persons appear on the list transmitted to the governor, so only qualified persons will be appointed. This may in fact be true, but the real question is whether the governor will lack such sage advice if there were no "merit plan" commission. This seems unlikely. In the absence of a commission, the governor would undoubtedly seek out advice for legal and political experts in making his appointments, just as the President does in appointing federal judges. Indeed, since governors in most "merit" states appoint some members of the commissions, they may well appoint the same persons whose counsel they would seek in the absence of a commission. Beyond that, elimination of a "merit plan" commission as a legal requirement does not preclude governors from establishing their own advisory commissions, if they think it would be helpful. Thus, Governor Jeanne

Shaheen of New Hampshire created a judicial nominating commission by executive order in 2000, and her successor, Governor John Lynch, continued the practice.

Checks and Balances

A major advantage of the proposed system of gubernatorial appointment and Senate confirmation is that it introduces a check on gubernatorial power. In elaborating the advantages of such a check, one can hardly improve on what Alexander Hamilton wrote in *The Federalist Papers*, No. 76: "To what purpose then require the cooperation of the Senate? I answer, that the necessity of their concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters. . . . The possibility of rejection would be a strong motive to care in proposing."

The composition of "merit" commission means that they are not an adequate alternative check. Most states with commissions, including Kansas, recognize that the governor's perspective should be taken into account in the commission's deliberations and ensure this by giving the governor the authority to appoint some or all non-lawyer members of the commission. Furthermore, unless it is required on law that membership on the commission be bi-partisan, governors tend to appoint members of their own party to commission slots. Many of those selected have been politically active prior to their appointment—according to one study, one-third of non-lawyer commissioners had served in a party office, and almost one-quarter had held public office. A commission of this sort is unlikely to frustrate chief executives in their choices. The fact that governors in "merit" states overwhelmingly appoint fellow partisans confirms this point.

Conclusion

There is much talk these days about returning to the wisdom of the Founders. The proposed reform of judicial selection does precisely that. It brings to Kansas a tried-and-true system developed in the Constitutional Convention of 1787, which was also the predominant system in the original 13 states. I believe that it represents an improvement over the system of commission-based selection and urge its adoption.