

Testimony of Debbie L. Nordling
Before the Senate Committee on Judiciary
SCR 1601 – A Proposition to amend the Kansas constitution, relating to the judiciary
SB 8 – An Act concerning judicial appointments

Thursday, January 17, 2013
Hearing Room 346-S

Chairman King and Members of the Committee:

Thank you for the opportunity to appear today to give testimony in support of the current system for selection of appellate judges in Kansas. My name is Debbie L. Nordling. I served as a lay member of the Supreme Court Nominating Commission for eight years (1998-2006). I believe in and support our current merit based selection process for the appointment of appellate judges. I feel very passionately that our current system is effective, and we do not need to change it.

In 1998, I was appointed by Governor Graves to represent the 1st Congressional District. I served six years under Governor Graves and two years under Governor Sebelius.

During my eight years of service I participated in helping to interview candidates to fill fourteen openings in the appellate courts, which I believe may be a record for the highest number of ‘appointments’ for a member of the commission. I have first-hand experience that our current selection process consistently delivers excellent appellate judges to the State and is the most fair and non-threatening system available.

The Commission consists of nine members: four are attorneys - elected by attorneys from each of the State’s four Congressional Districts; and four are lay members, appointed by the Governor. The ninth member, the Chair, is an attorney elected by attorneys statewide. The Commission represents a balance and fairness for the whole state, consisting of both legal and lay persons.

All nine members of the Commission receive instruction on the application process, backgrounds and investigations. We reviewed guidelines for interview questions, with an emphasis on confidentiality concerns and ADA guidelines. Three members of the Appellate Court spoke with us on the nature of our task, along with two law professors. We had great training for the review process.

Chief Justice Kay McFarland and Justice Fred N. Six were very clear that the selection of judges should be based on their abilities. I was very aware of how important the effects our

recommendations would have on the people who live and work in Kansas.

I always understood that my job was to select the most qualified person. If I or members of my families or my friends had to participate in appellate legal proceedings, I wanted the most qualified persons to hear and decide the case. I understood from the beginning of my appointment that I would be accountable to the citizens in my State for our recommendations submitted to the governor.

Our current system does not select someone to be picked for a judge because of politics, nationality, gender, religion, money, power or geography. Our current system does select persons with a full range of qualities, such as: self-restraint, self-discipline, thoroughness of legal research, power of logical analysis, a sense of justice, a knowledge of the world, a clear writing style, common sense, fair mindedness, realism, hard work, foresight, modesty, a gift for compromise, candor, and a commitment to reason.

The Commission's job to find candidates with such full range of qualities is not easy. Each applicant was reviewed carefully, their legal writings were read and discussed, and background information was gathered and reviewed. Background information was also garnered from the applicant's colleagues, the community, and from members of the judiciary. All nine members of the Commission actively worked diligently to gather all possible information on a candidate. Since each member of the Commission represented a different parts of our State and different demographics, a broad and diverse interview process occurred for every candidate.

What I saw on the commission was the lawyer members analyzed and explained the legal writings and experiences. I saw the non-lawyers bring out the personality characteristics and human sides of the applicants. Over and over I saw a wonderful balance in the interview process.

I want to publicly state that not once in the 14 appointments in which I participated did the attorneys on the committee try to control, coerce, or dominate me during the selection process. The members of the commission respected and listened to my lay input. The Commission focused on finding the most qualified candidates - that was our job.

A good Kansas friend of mine always said, "Cream rises to the top." I liked that saying, and so in January of each year - to celebrate Kansas' birthday - I take a cream jar to our local elementary school and I tell a story to the students about how cream rises to the top, and how education is important to them. Consistently, in 100's of interviews we conducted, I saw the cream of Kansas lawyers rise to the top for submission of panels of three qualified candidates

from which the governor could make an appointment. This system works well.

When the Governor received the names of three successful candidates from the Commission, from each pool, they were the cream of Kansas lawyers. I knew when the Governor picked, they could not go wrong. The three qualified persons to come before them were independent persons who would make decisions based on facts and the law of each case. I knew that the three persons would make good and hard decisions. They would not be swayed by politics or unpopular decisions.

I think to change the system to a Senate selection or confirmation process would be to invite the circus to town. I believe you would not have as qualified attorneys and judges consider such positions. I think potential candidates would be hesitant to put themselves and their families and communities through a highly political confirmation process.

When I read about the confirmation selection process, I recognized this would be a radical change in our legal system. In the present system there is a check and balance. The "check" is that interested applicants express an interest in the job by filling out an application for an appellate court position and the best candidates are submitted to the Governor for selection to the vacant position; and the "balance" is that under the current system the justices must be retained in office by the voters of Kansas. Any system of selection will have some level of politics, but I believe our current system has the least and a balanced political influence.

My first hint that the nominating commission might be controversial and political came in February of 2003 when Governor Sebelius scolded the Commission for not sending more minority candidates to fill the bench. I have attached the article from the Kansas Legislature dated February 10, 2003. I thought Richard Hite, our chairman on the Commission at the time, did an excellent job in responding. He basically replied we were given a job, we did the job, so don't change the rules.

I started collecting articles from different papers across the state. I found it interesting to read the brewing argument. I found humor in the articles which indicated that the Commission was secretive, elitist, controlled by attorneys, and was out of touch. Not once in my eight years and 100's of interviews did any reporters or professors call me and ask how the process worked.

I have attached another article from the Hutchinson News, dated August 1, 2005. This article helped me understand the repeated attacks on the Court and the Commission. The last paragraph in the article opened my eyes. It states, "That's likely to make the selection process an issue every time the Supreme Court issues a decision legislators don't like." Now, I finally

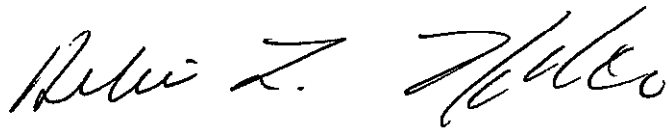
understand some want this process to be about politics.

In 2006, just as my time on the Commission was winding down, different bills were proposed in the Legislature to change the selection process. It became very clear to me that some people in our State want appellate judges who are beholden to special interest groups. If we make the courts political, we can say goodbye to public trust and confidence.

I have followed many of the appellate judges whom I helped to be appointed to the appellate courts. I have attached two more articles, one from Chief Justice Lawton Nuss and one from Judge Steve Leben. Both articles illustrate the system is not broken, the take away lesson should be: "If it ain't broke, don't fix it".

In closing, I request that you not alter the current Supreme Court Nominating Commission selection process. The current selection system is not broken or flawed. Merit selection has churned out the cream of Kansas lawyers to serve well the laws and citizens of Kansas, and not the politics of Kansas. Our current judiciary selection process needs to remain independent of politics.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Debbie L. Nordling". The signature is written in a cursive, flowing style.

Debbie L. Nordling

DLN:ckh
Attachments

Debbie Nordling Testimony, Sup Ct Nom Comm, Senate 2013 01 17

KANSAS LEGISLATURE



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Sebelius seeks minority judges

12:51 a.m.
- 2/10/2003

Gov. Kathleen Sebelius has told judicial nominating commissions she wants to appoint more minority judges. But the first nominees she received after the request were white men.

"The bottom line is this: The Kansas bench should look like Kansas," she said in a letter sent Jan. 23 to several groups, including the Supreme Court Nominating Commission and the district court nominating commissions.

The letter was distributed about a month after news reports showed former Gov. Bill Graves filled 55 vacancies on Kansas courts during his eight years in office. All of his appointees were white.

Last week, the Supreme Court Nominating Commission gave Sebelius the names of the three white nominees for an appointment to the Kansas Court of Appeals. Under state law, Sebelius must pick one of those three candidates or give up the selection to the state's chief justice.

Richard Hite, of Wichita, chairman of the Supreme Court Nominating Commission, said Friday that he hadn't yet received Sebelius' letter. But even if he had, Hite said he would have nominated the same three men because they were the most qualified out of 47 applicants.

"The job assigned to us is to select those we believe would be the best appellate judges, the ones most Kansans would like to have if they had a case in the appellate courts," Hite said.

One of the people passed over was Jennifer Lynn Jones, a black female municipal court judge from Wichita who in the past had been a district judge.

In her letter, Sebelius said Kansas' minority population was growing every year.

"Having a judiciary that reflects this changing racial and ethnic makeup is critical to maintain the credibility of our system," she said.

Sebelius said she didn't blame Graves for failing to nominate a minority candidate to the bench. Graves was given only one minority candidate from the nominating commissions.

"One of the fundamental problems is a lack of applicants from underrepresented communities," Sebelius said in her letter. She said she would work hard to reach out to those communities, and she urged the nominating commissions to do the same.

State Sen. Anthony Hensley, D-Topeka, said he was shocked that the nominating commission would not listen to the governor's wishes.

"If she runs into obstacles, we may have to take legislative action," he said. Hensley said he had no specific plan of action, but added, "if the message is delivered by the Legislature and the executive branch that we are serious about having a more responsive selection process, hopefully things will change."

Little public discussion

Process for selecting Kansas Supreme Court justices has advantages - but flaws, too

By JOHN HANNA
AP Political Writer

TOPEKA — Justice Eric Rosen will join the Kansas Supreme Court without much public discussion of his background, and legislators won't get a chance to weigh in on what they think of him.

That's the norm for any new justice for nearly a half century, but of late it has had conservative Republicans whining like children ordered to clean up their room.

But is their discontent reason enough to change a process that drains much of the politics out of selecting justices, a process that has applicants screened based on legal education, work history, judicial temperaments and even their ability to write clear decisions?

Rosen brings to the court a reputation for thoughtfulness and evenhandedness as a Shawnee County district judge, and his appointment by Gov. Kathleen Sebelius received widespread praise.

"The last thing we want to do is interject more politics into the process,"

said Bill Rich, a law professor at Washburn University of Topeka.

But the process also has its flaws.

It gives a small group of attorneys and gubernatorial appointees strong influence over court appointments, and there's no opportunity for the general public to weigh in on various candidates before an appointment. When applicants fail to make the cut, people typically don't find out why.

"There's no public scrutiny, and the public doesn't know what it's getting," said Kris Kobach, a University of Missouri-Kansas City law professor and a vocal conservative Republican.

The current process is dictated by a 1958 constitutional amendment. A nine-member commission — five elected by attorneys, four appointed by the governor — screens applicants for positions on the Supreme Court and Kansas Court of Appeals.

The commission names three finalists, and the governor has 60 days to choose among them. If the governor fails to make a decision, the appointment is made by the chief justice.

Voters do have a role. Supreme Court justices face a retention vote by the voters every six years and Court of Appeals judges every four years.

Republican legislators, particular-

of picking Kansas justices

Focus on

justice selection

ly conservatives, talk about having the Senate confirm new justices or having them run in elections.

It's no secret why. They don't like what the justices have been doing of late.

In December, a divided Supreme Court struck down the state's death penalty law.

In January, a unanimous court told the Legislature to fulfill its constitutional duty and spend more money on public schools. In June, the court set a figure — and its demand for an additional \$148 million in aid forced a special session.

With education funding, conservatives said nothing justified the judiciary giving specific instructions to legislators, even a constitutional duty to fund a suitable education for every child. They fear court decisions will lead to large tax increases.

And conservatives everywhere are quick to howl like a scalded dog about "activist" courts whenever they see a ruling they don't like.

"This is a challenge and debate going on in Kansas and in a number of other states," said Grover Norquist, president

of Americans for Tax Reform, the conservative anti-tax group.

Yet conservatives are correct that appointees get to Kansas appellate courts without having much public discussion of their records.

Also, the Supreme Court has never had a black or Hispanic justice, an unsettling fact for a state whose birth helped lead to the extinction of slavery and where the Hispanic population doubled in a decade.

Could those issues be addressed without changing the selection process itself, by getting a larger and more diverse pool of applicants, and if news organizations devote more attention to scrutinizing finalists?

"You need to have some accountability when offices of this importance are being filled," Kobach said.

Yet others are right to suspect conservatives' motives in seeking change.

Ultimately, they want courts that will let their legislators work unhindered and permit long-standing social mores to go unchallenged. Because they've won elections, some assume making the selection process more political will result in a judiciary far more likely to issue rulings they like.

"They're looking to find somebody who

is not independent, not impartial, who favors a certain viewpoint," said Richard Hite, a Wichita attorney and chairman of the Kansas Supreme Court nominating commission.

Advocates of change also must confront the ghost of the infamous "Triple Play."

Before the 1958 amendment, Supreme Court justices ran in partisan elections; governors filled vacancies between elections.

In 1956, Gov. Fred Hall failed to win the GOP nomination for a second term. Supreme Court Chief Justice William Smith became ill and resigned shortly before Hall was to leave office in January 1967.

With only 11 days left in his term, Hall resigned as governor. It took his successor, John McCuish only minutes to appoint Hall to the Supreme Court.

The resulting furor helped give the 1958 amendment enough support to get on the ballot and into the constitution. No similar furor has occurred since.

However good the process, it's not as open and accessible to the public as systems with legislative confirmation or election of justices.

That's likely to make the selection process an issue every time the Supreme Court issues a decision legislators don't like.

System to choose jurists works

By LAWTON R. NUSS

As a former Marine Corps combat engineer, I appreciate Army general George S. Patton Jr. Just before his troops stormed Normandy beaches to help liberate Europe, he gave them a rousing speech. The general reminded them that they had all “admired the champion marble player, the fastest runner ... and the All-American football players.” General Patton’s inspirational point? “Americans love a winner.”

What Patton said about Americans in 1944 is still true about Kansans in 2012. We love winners. Winners are produced by competition. And rugged competition has produced all of our state’s appellate jurists — Court of Appeals judges and Supreme Court justices — since 1958.

I know this, because I started competing to become one in 1995. I completed my lengthy application, attached samples of my legal writings, and listed judges and fellow lawyers familiar with my work. I also submitted to an investigation and an interview by the nine Kansans on the state nominating commission. My 29 competitors did the same. After this thorough screening process, the commission selected three people from whom the governor would choose Kansas’ next Court of Appeals judge. My qualifications were not good enough; I was not selected by the commission.

Another opportunity arose a few months later. This time I competed against 27 other

applicants, and my result was the same as before.

Because I was determined to earn a position as an appellate jurist, I tried to improve my competitiveness. To hone my writing and ana-



lytical skills, I researched and wrote several legal articles for publication — and volunteered to author appellate briefs for other lawyers. To sharpen my

understanding of the law’s application to the real world, I sought more cases to try to Kansas juries. To achieve a broader perspective of the law, I expanded my law practice to include additional legal fields.

In my third competition, in 2000 I was selected from 22 applicants as one of the three people submitted to the governor. But he chose one of my two remaining competitors. So I worked harder to improve my legal abilities and understanding of the law before the next vacancy.

In 2002, I competed against 17 other applicants wanting to become a justice on the Supreme Court. My name was again one of three sent to the governor. And this time I was chosen — by the same governor who had chosen someone else two years earlier. In my view, I was finally successful because I had steadily improved my qualifications during the previous seven years.

But now new ways of choos-

ing Kansas appellate jurists are being proposed to replace our 50-year-old competitive system of merit selection.

When comparing systems, several fundamental features of our present system must be considered. First is the democratic feature. Our system grants the equal opportunity — to be chosen an appellate jurist — to each Kansas lawyer and trial judge with at least 10 years’ experience. Nearly 11,000 individual notices are mailed for every vacancy. And to have a chance of achieving such an important position, the person only needs to apply.


Second, and more important to all Kansans, is the quality feature. As demonstrated by my experience, equal opportunity to all means that more than one person will apply. And that obviously means competition — one where politics and its money fortunately play no role. But without such a competition that compares side-by-side the qualification of numerous applicants, no new system can truly claim it produces the best appellate jurists for Kansas.

Even General Patton’s “champion marble player” had to compete against all comers on a level field to earn the title. As a fourth-generation Kansan, I say we should require no less for our state’s appellate jurists. That is why I support our merit selection system.


Lawton R. Nuss is a Salina native. He has served on the Kansas Supreme Court since 2002 and as chief justice since 2010.

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AS I SEE IT

Keep merit-based judicial selection in Kansas

BY STEVE LEBEN
Special to The Star

In early January, there's a good chance that the Kansas Legislature will consider a proposal to scrap the merit-selection system that has been used to select Kansas appellate judges since 1958, when Kansas voters adopted it by constitutional amendment.

The change is most likely to start with the court I sit on — the Kansas Court of Appeals, which hears most of the state's appeals. The Kansas Supreme Court, which reviews our work on request while also handling some appeals directly (like death-penalty appeals), hears fewer cases, though it certainly hears some very important ones.

Altering the way judges are selected is an important change, so it's crucial to ask: Why do it?

Why begin with the Court of Appeals is the easy part — our court was created by statute in 1977 and can be changed by a majority vote of the Legislature. The Kansas Supreme Court was established by the Kansas Constitution, so its selection system can only be changed through a constitutional amendment. That requires a two-thirds majority in the Kansas House and Senate, followed by voter approval.



Steve Leben of Fairway has been a member of the Kansas Court of Appeals since 2007. He served as a district judge in Johnson County from 1993 until 2007.

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So why change the selection system for the Court of Appeals? I've asked some legislators whether they've ever heard a complaint about our court. I haven't heard one yet. We handle about 1,800 cases a year, issuing written opinions in about 1,200 of them. Our decisions are timely, and we do our best to get the cases right. We must hit it right quite a bit; the Kansas Supreme Court over the past decade granted only about 10 percent of the requests for review, and in many of those cases, our decision was approved.

Rather than a reflection on court quality, the reason to change seems political. The Kansas Supreme Court's 2005 decision on school finance ruffled feathers, and some other decisions may have too. But the merit-selection system was designed specifically to limit — to the greatest degree possible — the influence of politics on judicial selection. And we want the judicial branch of government to be out of the political realm as much as possible; we rely on courts and judges to protect our constitutional rights, even when that may be unpopular at a given moment.

So do judges selected by merit selection — in Kansas or elsewhere — do a worse job in some way? That could be a reason for change. But a survey of attorneys and company managers at large businesses says that judges in Kansas and other merit-selection states are among the best in the country.

Specifically, the U.S. Chamber of Commerce surveyed attorneys at businesses with at least \$100 million in annual revenues, asking a series of questions designed to determine the quality of the state's judges and — in the opinion of these business leaders — whether the state's "lawsuit climate" was reasonable and balanced. This year, Kansas ranked fifth overall, and four of the top five states use merit-selection systems for their appellate judges. For the specific questions about Kansas judges, these business attorneys ranked Kansas judges in the top ten states in all categories — impartiality, competence, and fairness.

I don't mean to suggest that the only way to evaluate Kansas judges is to ask business leaders. Their views are only one indicator. But the politicians who are seeking to change the system also tend to associate themselves with the Kansas Chamber of Commerce and business interests. So if businesses that operate nationally recognize the Kansas courts as among the nation's best, we must again wonder about the real issue here.

So when you see proposals this January to change the way appellate judges are selected, ask: What's the problem we're trying to fix? Is this the best way to do it? And shouldn't the decision be one for the voters to make, given that they chose the present system?

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