



To: Senator Jeff King, Chairman
Members of the Senate Judiciary Committee

From: Michael J. Fleming, Wendt Goss P.C.
Legislative Chairman, Kansas Association for Justice

Date: January 17, 2013

RE: SCR 1601 relating to the judiciary; SB 8 concerning judicial appointments (OPPOSED)

The Kansas Association for Justice (KsAJ) is a statewide, nonprofit organization of trial attorneys. KsAJ has long supported the current system of selecting appellate court judges, known as merit selection. Kansas' current selection process is the best means to identify judicial candidates based on their qualifications and to avoid the risk of bias, undue influence, and partisan politics in the courts. KsAJ opposes SCR 1601 and SB 8.

The Kansas Constitution was amended by voters and merit selection established after the "Triple Play," which has been called one of the most bizarre political events in Kansas history. In 1957, a Republican "lame duck" governor announced the resignation of the chief justice of the Supreme Court, who was in ill health. The governor then announced his own resignation. Moments later, the newly sworn in lieutenant governor appointed the just-resigned governor to fill the vacancy on the Supreme Court.

The Triple Play strategically deprived the newly-elected Democrat governor, due to be sworn in within days, of a judicial appointment. The Triple Play was denounced by members of both the Republican and Democrat parties.

The Triple Play led to implementation of the current nonpartisan, merit selection process for selecting the Kansas Supreme Court. The Nominating Commission process and merit selection were later implemented for the Court of Appeals. The Constitution also provides for nonpartisan selection and retention election for district court judges upon a vote of the people in each judicial district.

KsAJ supports the current laws on judicial selection. The current Nominating Commission process for the appellate courts is the best way to identify and evaluate professionally qualified candidates for the judiciary and to reduce the risk of bias and undue influence in the judicial branch. In the current merit selection process, Nominating Commission members constitute a diverse cross section of citizens (both

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lawyers and non-lawyers) whose sole goal is to find qualified candidates. The nonpartisan Nominating Commission conducts a thorough analysis of judicial applicants to provide the governor with the best three candidates. From those three options, the governor makes a final appointment selection.

The importance of a professionally qualified, independent, and impartial judicial branch cannot be overstated. Yet proponents of changing merit selection, and the Constitution, cannot provide hard evidence of how the current judicial selection system has worked to the detriment of judicial independence, impartiality, or high-quality decision making. And supporters of change have not proposed concepts that assure judges will be selected in a nonpartisan, merit-based process that also assures the independence of the judicial branch.

- **Judges must be selected based on their professional qualifications, not partisan politics.** Under SCR 1601 and SB 8, Kansans will not have the same assurances that judicial appointments are made based on qualifications instead of partisan politics.

Placing sole discretion in the executive branch to nominate judicial candidates places too much power in the hands of one person—the governor. Under current law, the nonpartisan citizen Nominating Commission vets applicants in a competitive process to determine which three are the most professionally qualified to serve. SCR 1601 gives constitutional authority to the executive, using criteria of his or her own choosing, to identify and vet one judicial candidate. Only after the governor selects a candidate would the Senate review the governor’s selection.

- **Judges must be selected through a process that is as transparent, nonpartisan, and free from political influence as possible.** SB 8 implements the Commission on Judicial Qualifications and Senate confirmation review process, which takes place *after* the governor names a final candidate. However, it cannot replicate the competitive prospective process of the current Nominating Commission. Similar to a job interview, under the current merit selection system, applicants are interviewed by a citizen panel and the most qualified applicants are sent to the governor. Voters can be reassured that candidates are thoroughly evaluated *before* they are sent to the governor.

The nonpartisan Nominating Commission process combines the expertise of the legal community and non-lawyer citizens to identify the best qualified judicial candidates. Every governor has the power to appoint judges as well as select members of the Nominating Commission, reducing any party’s political influence on the court or the selection process.

- **Judges must be able to make unpopular decisions based on the facts and the law, not on what is politically popular.** While a court’s decisions may be controversial and objectionable, legislative and executive responses to such decisions calling for reorganizing the selection process, overreach.

Opponents of the current merit selection, Nominating Commission process too often describe dissatisfaction with the decisions of the appellate courts. And yet, judges must be free to make decisions that are not influenced by political and popular will. Otherwise, justice is a sham, and the judicial branch is not a truly independent or co-equal branch of state government. The current merit selection process is the best way to achieve a balanced and diverse court, reduce the risk of bias and ensure high-quality decision making.

The Kansas Association for Justice respectfully requests that the current laws on judicial selection, and the current merit selection and Nominating Commission process for the appellate courts, be retained.