

To: Kansas Senate Standing Committee on Judiciary

From: Harry McDonald representing MainStream Coalition

Subject: Judicial Selection

Date: January 16, 2013

Mainstream Coalition holds that any consideration of changing judicial selection is both unnecessary and ill-advised.

1. Changing judicial selection in Kansas is a solution in search of a problem.
  - a. Our current method of judicial selection provides for the non-political, merit nominations of Supreme Court and Appellate Court justices. It further provides an opportunity for the Kansas public to remove justices after one (1) year of service and every six (6) years thereafter. To my knowledge there has never been a judge removed as a result of this policy. Even recently, when some entities within the state campaigned for the removal of a supreme court justice, the people were not convinced and retained this individual. I can only conclude that our method of judicial selection is functioning as designed to produce a judiciary which is not beholding to any political party, nor any other entity. If this were not the case, surely, sometime in the past there would have been cause enough to convince the public not to retain at least one judge. Merit selection with subsequent public review of performance seems to be a highly successful method of judicial selection with no need for change.
  - b. Though it has been argued that a change in judicial selection is necessary because the current judiciary has overstepped its constitutional authority by “appropriating” money as a result of its rulings, we disagree. It is true that Kansas has three equal and independent branches of government, each with specific constitutional authority. It is true that the legislature alone has the power of appropriation. What must not be ignored is that the legislature has, not only constitutional powers, but also constitutional responsibilities. Our legislature is required to “make suitable provision for finance of the educational interests of the state.” Further, the legislature is required to “provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools.” The branch of our government with constitutional authority to determine whether or not the laws enacted by our legislature comply with the constitutional guarantees to our citizens is the judiciary. Though members of the other branches of our government may not like it, it is the responsibility of the judiciary to protect citizens from unconstitutional actions no matter how well intentioned those actions may have been and no matter what other branch took those actions. All laws are enacted by the legislature and all laws are subject to judicial challenge by the citizens of Kansas who suspect they are unconstitutional even when these laws involve appropriation. All such review is granted by our constitution solely to the judiciary.
2. Changing judicial selection in Kansas is ill-advised for several reasons.
  - a. We can see from the example of our federal courts that the ability of the judiciary to function efficiently is often compromised when selection involves political appointment. If Kansas emulated the federal model by having the Governor nominate justices for confirmation by the Senate, it is predicable that we would see numerous delays and obstructions. This would be

particularly bad when we would have a governor from one party and a senate majority for the other. It would also be a problem if the senate was controlled by the same party as the governor but without a filibuster-proof majority. I ask you simply to reflect on the well documented difficulties of the George W. Bush and the Barack Obama presidencies in having judicial nominees receive timely confirmations and the resulting stress this has placed on the federal court systems to provide justice in a timely fashion.

- b. Direct popular election of justices would also present a problem. The judiciary is the only branch of Kansas government which is currently above the political arena and so it can function to protect our citizens from the “tyranny of the majority.” One of our constitutional protections for a minority viewpoint is this very separation of powers. While the legislature enacts laws, the judiciary rules on their constitutionality. Even in the realm of appropriation, which is exclusively legislative, the independent judiciary can declare a law unconstitutional. Our fear is that a system where judges are directly elected by popular vote would result in judges who are significantly under the influence of the very groups and agencies involved in the cases they hear. We fear a judiciary not just with the same political convictions as the other two branches of government, but one where the political convictions dominate their rulings. The constitutional rights of someone in the minority would become harder to protect.
- c. Our last general election demonstrated the power of the executive branch to influence legislative elections. If we grant our governor the power to appoint judges and then make those judges subject to public vote for retention, what can protect our citizens rights from the political pressure of the executive branch on the judiciary, a judiciary charged with determining the constitutionality of actions taken by the other two branches of our government?

So in conclusion, MainStream Coalition recommends that no action be taken to change our method of judicial selection. Such changes are unnecessary because our current system selects judges who function efficiently and are universally retained by popular vote. They are also unnecessary because our judiciary is wrongly accused of overstepping its constitutional authority. The judiciary is charged with determining the constitutionality of all laws, even those involving appropriation. Changing judicial selection is also ill-advised because political appointment of justices has proven itself to be inefficient at the federal level and because popular election of justices makes it harder to protect the rights of the minority. The branch of government with the greatest responsibility to protect the rights of the citizens of Kansas must be kept above the political fray.