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OPPOSING SCR 1601
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My name is Jim Concannon. I have taught courses on appellate practice, civil procedure, and evidence at Washburn Law School for 40 years. While I was Dean at Washburn, I had the privilege to serve as Co-Reporter, with Dean Michael Hoeflich, of the Kansas Citizens Justice Initiative, a 46-member, bipartisan Commission appointed by the Governor, leaders of the Legislature's judiciary committees, and the Kansas Supreme Court to make recommendations to improve the Kansas justice system. More recently, I served from its inception as a member of the Kansas Commission on Judicial Performance.

Proposals similar to SCR 1601 have been presented in many sessions of the Legislature since 2005, and I have testified against them on several occasions. The Kansas method of selecting appellate judges has worked effectively for more than 50 years and I oppose such a radical change, one that will make the process for selecting our appellate judges far more partisan. No persuasive case has been made for a change, and certainly not for this change. I have spoken with a number of people, both lawyers and nonlawyers, who have served on the Commission, all of whom took their responsibility quite seriously. None of them suggested that a decision ever had been made on a 5-4 vote, much less by a vote of five lawyers on one side and four nonlawyers on the other. I do not believe that having a 5-4 majority of nonlawyers on the Nominating Commission, rather than a 5-4 majority of lawyers, would have changed in a material way the nominations made by past Commissions. SCR 1601 is akin to using a sledgehammer to kill a fly on a window - it will accomplish its purpose but also will leave lots of collateral damage.

SCR 1601 and previous proposals were prompted by disagreement with a handful of appellate decisions out of the many thousands of appeals decided by our appellate courts. Yet, it is a misunderstanding of our form of government to view the function of a court as being to reach the result in a particular case that a majority of citizens would like the court to reach. Courts must apply constitutional provisions and statutes that may have been adopted years ago, and we give to our courts the responsibility to interpret those provisions when they are ambiguous. Courts must have the courage, and independence, to perform their critical role in our system to uphold the rule of law even when doing so goes against the popular will of the moment. If a majority believes a court's interpretation of a statute does not reflect current preferred policy, the legislature simply can amend the statute. If it is believed that the court has misinterpreted the Constitution or, as might be the case with Article VI, that the public consensus on an issue today differs from when the Constitution was adopted, the legislature may submit an amendment to the people. But we should have learned from President Franklin Roosevelt's happily-failed effort to expand the United States Supreme Court and pack it with his appointees when he disagreed with some of its decisions that we should not seek to undermine the integrity of an equal branch of government simply because we disagree with a few of its decision.

No doubt, proponents once again will argue that liberal lawyers have dominated the Nominating Commission. Data in Professor Ware's own study of the eleven appointments to the Kansas Supreme Court between 1987 and 2007 refutes that argument. Of the 22 lawyers who served on the Commission, 15 were registered Republicans, compared to 7 Democrats.[1] For 10 of the 11 appointments, there were more Republican lawyers on the Commission than Democrats. The only time there were more Democrat lawyers than Republicans, the Commission nominated two Republicans and one Democrat, and Republican Ed Larson was appointed as a Justice. For eight of the 11 appointments, there were more Republican members of the entire Commission than Democrats. In two of the three instances in which Democrats outnumbered Republicans on the entire Commission, there were two Republican nominees and one Democrat, and a Republican was appointed - Justice Larson and Justice Lee Johnson, the latter by a Democrat governor. Republican lawyers outnumbered Democrat lawyers in all five instances in which two Democrats were nominated, including the one instance in which all three were Democrats. In four of those five instances, Republicans outnumbered Democrats on the entire Commission, the only exception being the oldest of the appointments, in 1987. For the most recent appointment, the Commission nominated one Republican, one Democrat and one candidate who was not affiliated with a party, and the Governor appointed the unaffiliated nominee. There simply is no evidence that the Commission has made partisan nominations.

Likewise, there simply is no public groundswell to change the way we select our judges. In the last 25 years, voters in four different judicial districts have been asked whether they wanted to continue having their judges appointed after nomination by a non-partisan nominating commission or instead change to a method that would eliminate screening by the commission of the qualifications of those seeking to become a judge. In every instance, they have voted to continue merit selection, often by overwhelming margins. In Johnson County in 2008, 59% of voters voted for merit selection, little changed from the 62% that voted for merit selection in 1984. In Lyon and Chase counties in 2002, the margin was 65%-35%. In Shawnee County in 2000, it was 62% for merit selection, comparable to the 64% who voted that way in 1984. Most recently, in 2010 in Leavenworth and Atchison counties, 56% voted for merit selection, up from 50.5% in 2000. When voters focus on how the role of a judge differs from that of a public official who is supposed to represent constituents, how a judge must decide cases impartially and without political influence, and on the special qualifications a judge must have, by a large margin they favor the greater assurance that the nominating commission gives that our judges will be qualified.

There are several essential qualifications that a Justice of Judge should have, in addition to the courage I mentioned earlier. We certainly want judges to be neutral, impartial, and fair decision makers, influenced only by the law and the record presented to them. We want to select as judges the most skilled lawyers we can. The Supreme Court Nominating Commission assures that the Governor must select a lawyer with those characteristics. The Judicial Performance Commission posted on its website evaluations of each Justice of the Supreme Court and Judge of the Court of Appeals, six and eleven respectively, subject to a vote by the people at the general

[1] I have confirmed the party affiliation of the three lawyer members to whom Professor Ware was unable to assign an affiliation, by calling family members and former law partners.

elections of 2008 or 2010 to decide whether the Justice or Judge should be retained in office, or not. The evaluations were based on confidential surveys of attorneys who appear before the court, both winners and losers, and all Kansas District Judges, who must implement the appellate courts' decisions. They evaluated the appellate judges on 18 different criteria, including whether the judge is fair and impartial and appropriately follows established legal precedent. I urge you to visit the Commission's website and review the survey results. The overall scores in the surveys, ranging from 3.32 to 3.70 on a 4.0 scale among attorneys, and from 3.48 to 3.73 among District Judges, together with the overwhelming percentages of attorneys and District Judges who recommended retention of each Justice and Judge attests that the Nominating Commission has consistently nominated highly qualified candidates for judicial vacancies and that the perception of their performance is very high.

SCR 1601 will not make our system better.