

TESTIMONY

TO: **The Honorable Jeff King, Chair**
 And Members of the Senate Judiciary Committee

FROM: **Professor Michael Hoeflich**

RE: **SCR 1601 and SB 8** – Altering the merit selection method of
 selecting appellate judges and justices

DATE: **January 17, 2013**

Chairman King and members of the Senate Judiciary Committee, my name is Michael Hoeflich and I appear in opposition to the proposed changes outlined in SCR 1601 and SB 8.

I wish to thank the Committee for permitting me to testify before them today. I realize that there will be a number of conferees testifying both pro and con about the proposed legislation to change the manner in which judges are selected to serve on the Kansas Court of Appeals. I want to make a single point in my testimony based on my own personal experience. I believe that the proposed bills would significantly politicize the judicial selection process in Kansas, the results of which, in my opinion, would be very unfortunate. The current form of judicial selection and the proposal for changes adopted by the Kansas Bar Association are both designed to minimize political factors and maximize the importance of merit in the selection process. This, I believe is crucial if Kansas is to have the best judges possible. By adopting SCR 1601 and/or SB 8 and incorporating a confirmation hearing into the new process, I believe that Kansas will then face the same sort of problems that have plagued the Federal judicial selection process.

I began my statement by saying that I wanted to speak about my own personal experience. During my last year in law school I was fortunate enough to serve as a research assistant to the late Judge Robert Bork. During that year I was privileged to work closely with Judge Bork on a number of important cases. I also was fortunate that we became friends during that year. After graduation and after a short time in practice I decided to become a law teacher and joined the faculty of the law school at the University of Illinois. Soon after this, Judge Bork was nominated by President Reagan to take a seat on the United States Supreme Court. What happened during Judge Bork's confirmation hearings is now history. So savage were the attacks on Judge Bork during this process that a new phrase entered our vocabulary: "to be borked." As most legal and political historians agree, Judge Bork's Senate confirmation proceedings completely altered the federal judicial selection process. I believe that Judge Bork failed to gain Senate confirmation not based on any standard of merit or qualifications but, rather, on political grounds. Furthermore, Judge Bork was subjected to vicious political and personal attacks on national television. Because of these attacks and the Senate's reliance not on merit but on partisan politics, the

United States lost the opportunity to have one of the most brilliant jurists of his era on the U.S. Supreme Court. What happened to Judge Bork was not only a national tragedy, in my opinion, but, also, a personal tragedy for Judge Bork, one from which he never fully recovered. I would hate to think such a thing could happen here in Kansas, but I fear that the proposed legislation before this committee will make this possible.

A number of years after Judge Bork's confirmation hearings, I was appointed to be the dean of the law school at Syracuse University. It was in my role as dean at Syracuse that I invited then Judge Clarence Thomas to come to Syracuse to give the law school commencement address and to receive an honorary LLD. Judge Thomas graciously agreed to come. During his visit to Syracuse Judge Thomas and I became friends. A few months after this, President George H.W. Bush nominated Judge Thomas to a seat on the U.S. Supreme Court. Once, again, what happened at his confirmation hearings is now history. Once, again, a man who had devoted his life to public service was subjected to vicious personal attacks not because of merit considerations but because of partisan politics. Once, again, a good man was humiliated on national television. I have been fortunate enough to remain friends with Justice Thomas and I believe it is fair to say that what he was forced to endure during his confirmation hearings affected him deeply and permanently. No individual should have to endure what Justice Thomas endured during those hearings. Once, again, I would hate to think that this could happen in Kansas, but I fear that the proposed legislation will make this possible.

As a legal historian I like to take the "long view" when evaluating legislation. At the moment, the Governor is a conservative and both houses of the Legislature are conservative as well. Many members of the Kansas House and Senate may well believe that what happened to Judge Bork and Justice Thomas could not happen here. But it is important to remember that very little is certain in politics over the long term. During the eighteen years I have lived in Kansas, there have been both Republican and Democratic governors and the political composition of both the Kansas House and Senate has varied. There may well come a time when either the governorship or the composition of the Legislature change again. With these changes may come increased political divisions and rancor and the possibility that these divisions might well set the stage for the kinds of confirmation hearings that have become standard in the U.S. Senate. In such a case, I believe that many potential nominees for Kansas appellate courtswill choose not to be nominated so as to avoid the possibility of being "borked." This, I would suggest, would be a tragedy for the state.

Thank you.

Michael Hoeflich