



MainStream Coalition
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★ Rational Voices for Irrational Times ★

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Testimony to House Committee on Judiciary
Chair, Representative John Barker
Wednesday, February 11, 2015, Committee Meeting, 3:30 PM, Room 112-N
Connie Bahner, Committee Assistant-785-296-5805,
Connie.Bahner@house.ks.gov

Position – OPPOSE
Constitutional Amendments to Article 3 ([HCR 5004](#), [5005](#))

Testimony in Opposition to HCR 5004 and HCR 5005

Mainstream Coalition position regarding Judicial Selection and the Separation of Powers,
written by Tim Owens, former chair of the Senate Judiciary Committee

Separation of Powers: The Check and Balance system foreseen by the Founding Fathers

If Governor Sam Brownback has his way, he will control all three branches of government. There will be no true check and balance, and his ultra-conservative agenda will be a given.

The Executive Branch: Sam Brownback controls the executive branch as the elected chief of state for the State of Kansas.

The Legislative Branch: With the latest round of State elections, the legislature has taken a different turn than it had followed for the last two decades. After purging members of his party who opposed his agenda, the governor exerts tremendous influence and control over both chambers of the Statehouse.

The Judicial Branch: Now, Governor Brownback wants to control the selection process of this third branch of government in order to put judges on the bench who would make rulings in accordance with his plan and his philosophy.

In a meeting in his office while I served as the chairman of the Senate Judiciary Committee, a meeting which included some members of his staff and Senator Jeff King, who is now the chair of the Senate Judiciary Committee, the governor pointedly asked me why I could not see my way to allow his modification to the selection of judges process to go through and become like the federal model where the president names someone whom he or she desired to be a federal judge and then looks to the senate for confirmation of that appointment. Governor Brownback pointed his finger at me and said, "Tim, why can't you go along with us on this judicial selection issue and let us change the way we select judges so we can get judges who will vote the way we want them to?" The definite intent was that we needed to change our courts so that they would rule in a way that supported the ultra-conservative agenda as opposed to the agenda that some in the legislature felt was expressed in the "Montoy case" involving the funding of public education.

I was appalled that the governor, who also happens to be a lawyer, and has sworn to defend the Constitution and uphold the law, would verbalize such a thing. I believe in the separation of powers set out in our Constitution, and I believe in the independence of the judiciary.

The judicial branch, as I responded to the governor, is the branch established to interpret and apply the law to the legislation that has been passed by the legislature and implemented by the executive branch. It is imperative that the judicial branch remain as independent and non-partisan as possible so that the other branches do not overstep their bounds and responsibilities to the electorate. A court's responsibility is to remain above partisan conflict and to evaluate each case on its own merits and in accordance with the evidence presented to it. At the appellate level the court is to consider basically three things: 1. Did the evidence presented to the lower court give that court sufficient basis to make the ruling it did; 2. Was it in accordance with the state and federal constitutions and if those were different then to follow the supremacy clause and rule in accordance with the federal constitution; and 3. What did prior case law dictate on rulings of like facts (stare decisis).

I am proud that I told the Governor that I could not and would not proceed as he wished and create a Judicial System that was less than the most Independent Judiciary we could devise. I told him I felt that the merit selection process was one that had worked well since 1953 and that we should continue to use it and not to revert to political cronyism and partisan selection. At the meeting, Governor Brownback made clear that any option that did not give him controlling power over the make-up of a selection panel or give him the ultimate individual selection capability, would not be acceptable.

If the legislature allows for a change in the selection of the Supreme Court (requiring a constitutional amendment) or the selection of the appellate court judges (requiring only a simple majority of both houses and a signature of the governor), we will no longer have a completely independent judiciary in Kansas, but rather will have a judiciary that at some points along the process will be beholden to the governor for their appointment and who will in all likelihood cast votes from the bench that do exactly what the ultra-conservatives have railed about for some time.....become activist judges who vote on political bases and who judge cases on the basis of philosophy instead of the three areas cited above. We will no longer have an independent judiciary and our checks and balances will no longer keep our government in Kansas balanced and in accordance with the separation of powers.

Ask yourselves, if you have to go to court, do you want a judge who is impartial or one who will do what the governor wants? In the Declaration of Independence, Thomas Jefferson indicted the king for making judges dependent upon him, rather than independent. Is that what we want in Kansas? I think not.

Respectfully submitted,

Tim Owens, former chair of the Senate Judiciary Committee
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MainStream Coalition is a non-partisan, grassroots organization. We grew from an outpouring of concerns over the infringement of governmental separation of powers and of church and state. For over two decades now, we have worked to advocate for state policies that perpetuate good governance and traditional Kansas moderate values.