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Special Committee on Judiciary

Testimony Presented by Senator Ty Masterson

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The issue of Judicial Selection Reform is not a new topic of discussion for the Kansas Legislature. For well over a decade, numerous proposals have been discussed to reform the Kansas Supreme Court selection process and on the last day of the 2019 session, I made a motion to bring SCR 1610, a measure to reform the Kansas Supreme Court selection process, to the floor of the Senate for debate. After the nomination of Judge Jeffrey Jack to the Kansas Court of Appeals and the Kansas Supreme Court ruling that inserted an unfettered right to abortion into our 1859 State Constitution, it had become abundantly clear to me that we could no longer wait to reform this elitist Supreme Court selection process.

Currently there are 12 other states that use some version of a nominating committee, but we are the ONLY state in the union that gives a single trade association all the power through a majority. There are 22 states that actually elect, 13 where the Governor appoints with some type of confirmation, and 2 that even have their legislature appoint (SC and VA). We have the least democratic, least transparent system in the entire country. Those in favor of the current system try to persuade us that the politics are removed, or that this method brings forth properly vetted, fair, non-partisan nominees that are not based on any political ideology. In reality, however, it brings in the worst kind of politics, internal politics, and the charade of “more qualified” has long been exposed. Any remnant of this charade came crashing down with

Governor Laura Kelly's nomination of Jeffry Jack. Governor Kelly's own "dream team" nominating commission produced Judge Jack. The only thing that prevented the ultra-partisan and unfit judge from ascending to the Kansas Court of Appeals was the federal model, which had been implemented for the nomination process for the Kansas Court of Appeals in 2013.

Were it not for Senate confirmation, Jack would sit on the Kansas Court of Appeals today. Had Governor Kelly nominated Jack for the Kansas Supreme Court under the current system, Jack would be on the high court today. Had Jack been nominated to the Court of Appeals under the old nominating commission model, he would be on the court today. Senate confirmation is the only thing that prevented what would have been a disastrous appointment with a unanimous vote.

The one thing that I believe both sides of the aisle can agree on is that the federal model worked exactly as intended. The Governor's appointment was thoroughly vetted by the Senate through the confirmation process, and the Senate was able to discover Jack's partisan and vulgar behavior. In contrast, in 2005 Jeffry Jack was selected by a local nominating commission and then Governor Kathleen Sebelius appointed him to a position as a District Judge. A nominating commission did not prevent Jack from taking the bench in 2005, and a nominating commission did not catch Jack's obvious lack of judicial temperament in 2019. The only difference between 2005 and 2019 was that Governor Sebelius' appointment of Jack was *not* subject to senate confirmation. Thankfully in 2019, Governor Kelley's nomination was subject to senate review and the Senate did their job to stop an unfit judge from ascending to a higher court.

The federal model with the necessary check of senate confirmation gives the people's elected representatives and thereby the people themselves greater input into the process of judicial selection. Input that today is lacking as evidenced in the latest Kansas Supreme Court decision, which invented a right to abortion in our State Constitution.

Governor Kelly herself acknowledged that the purpose of the federal model reform was to increase the role of the people's elected representatives in the selection of judges as shown in her March 22, 2019 letter to Attorney General Derek Schmidt.

"The 2013 change was intended to place such appointments more fully in the hands of elected political representatives and remove the Supreme Court Nominating Commission from the process. As a member of the legislature, I opposed that switch because the nominating commission process had worked well for decades, but there is no doubt its proponents intended to give the governor, as an elected representative of the people, a stronger role in selecting Court of Appeals judges." – Governor Laura Kelly, Letter to Attorney General Derek Schmidt, March 22, 2019

This is one of the few times when Governor Kelly and I agree. The people of Kansas deserve a voice in the process of the selection of judges to the highest court in our state. The current model of selection has produced an activist bench that no longer has any likeness to the people of Kansas. The federal model provides the people increased input through their elected representatives and the necessary checks and balances to ensure that only properly vetted nominees are appointed. It has produced United States Supreme Court Justices ranging in philosophy from Antonin Scalia to Ruth Bader Ginsburg. I am the first to admit transparency can be messy, even ugly at times, but it is absolutely necessary to produce a high court that reflects the people it presides over.

It is time that the Legislature finally give the people of Kansas a greater voice in the process of judicial selection for the Kansas Supreme Court. I urge passage of a Constitutional Amendment that will give the people an opportunity to vote on whether they support moving to the federal model of judicial selection or prefer the current system.