

To: Senator Kellie Warren, Chair, and Members of the Committee
From: Eric R. Bolinder, Managing Policy Counsel, Americans for Prosperity
Date: March 4, 2022
Re: Judicial Selection Reform

Dear Chair Warren and members of the Committee:

Thank you for the opportunity to submit testimony to the Committee on this important issue. Kansas's Supreme Court selection system empowers the Supreme Court Nominating Commission to prepare a list of three candidates, and only those three candidates, for the governor to choose from. While some members of that Committee are appointed by the governor, a majority are lawyers elected by members of the state bar. This results in a judicial selection process captured by the whims of the state bar—and totally insulated from political accountability by Kansans, the people whose rights the Kansas Supreme Court adjudicates. The judiciary makes up one-third of government and should be chosen through a process where everyone, regardless of their profession, gets a voice.

Judicial philosophy is one of the most important characteristics of any judge. Will judges be activist, legislating from the bench and imposing their own views on the outcomes of the case? Or will they be engaged, applying the plain text of the Constitution and the law, leaving their own views at the door? The first approach can turn the judiciary into a super legislature with limitless power to impose its will on Kansans. In its proper role, the judiciary is supposed to adjudicate disputes, protect individual rights, and act as a check on the other two branches. And that's what the second approach—commonly known as originalism and textualism—leads to.

However, when a state like Kansas employs a judicial selection method dominated by the state bar, you can end up with activist judges. That is because members of the bar tend to skew left—and therefore have a far less conservative approach to judicial review. This is not some devious plot. It's just human nature. Those selecting judges are going to select people who think like them, with judicial philosophy being the most important variable. Professor Brian T. Fitzpatrick has written multiple [articles](#) in the Vanderbilt Law Review chronicling how states that use judicial nominating commissions, including Kansas, have a judiciary that skews far to the left of their citizens.

But thankfully, there are ways to fix this. One option is to adopt the federal model created by our nation's founders. The governor would select judges who would then be confirmed by the Senate. Or, alternatively, the state could employ judicial elections, allowing Kansans to make their own determination on what makes a good judge—and vote accordingly.

Critics may allege that so-called "merit selection" results in better, more qualified judges. But Professor Fitzpatrick's [research](#)—as well as our experience with

the federal model—shows that there is no difference in overall competence of judges as correlated to selection method. Opponents may also argue that an election method will just bring more politics into selection, not less. First, research shows that this method *reduces* skew, drawing judges closer to the electorate's center. Second, make no mistake: judges in Kansas are chosen through an electoral method *right now*. But that electorate is made up of members of the state bar only.

Sincerely,

Eric R. Bolinder
Managing Policy Counsel
Americans for Prosperity