

**Testimony of District Judge Timothy H. Henderson
Before the House Judiciary Committee
Related to Judicial Selection Reform
Wednesday, January 16, 2013**

Chairman Kinzer, and members of the committee:

I appear today in support of Judicial Selection Reform, a proposed constitutional amendment which would place before the voters of Kansas the question of whether we should elect our appellate judges.

I have been an elected judge for the 18th judicial District, Sedgwick County, Kansas, for over 12 years.

Thank you for giving me the opportunity to address this committee. While others have, more eloquently than I could, expressed the need for change, please let me address the arguments you will hear tomorrow by the opponents of this resolution.

The most common criticism you hear about the proposed changes being made is that the court is being politicized. However, when you examine our current system, a different picture presents itself. Currently, under Kansas law, the nominating commission is composed of four lawyer members, four non-lawyer members and a chairman who is a lawyer. As you know, we are the only State that gives a majority to a select privileged class, Kansas lawyers.

Lawyer members are selected by a vote of the members of the bar. In that process, it is typical for those lawyers to solicit votes and spend money sending out support letters for those running for membership on the nominating commission. Therefore, membership on this nominating commission for this sacrosanct, non-politicized, merit-based system is based upon a political process.

Further example of the political nature of the current system is shown through the recent nomination of my friend and colleague, Judge Anthony Powell. On November 30, 2012, the Wichita Eagle reported that a lawyer commissioner member commented that he was lobbied and "taken to the woodshed" by a number of Judge Powell's colleagues concerning his absence from a previous panel sent to Governor Brownback. Not only was this commissioner an elected representative of the attorneys of Kansas, he was lobbied by his constituents regarding his vote on the nominating commission. I believe the term for that is called politics.

There are some other terms that members of this committee will hear tomorrow. You will hear about the unique qualifications and special experiences that make attorneys uniquely qualified to pick the judges of Kansas. These are qualities that set them apart from the non-lawyers of the state of Kansas.

Throughout the history of our republic these analogies have been made. The earliest voting requirements were that a person owned land in order to be qualified to vote. They call this elitism.

Then there were requirements that a voter submit to a poll tax or a literacy test. They call this racism.

Then there were claims that certain members of our society were too delicate and fragile to be subjected to the rough-and-tumble world of politics. They call this sexism.

Remember that those who seek to have a lawyer-dominated nominating commission, or a nominating commission that disproportionately represents attorneys, are essentially telling the non-lawyers of this committee that you are not as qualified to represent your constituents because you do not have the special abilities that a law license conveys upon an attorney.

I am proud to be an attorney. I am proud of the good my profession has done throughout our country's history. That does not, however, entitle me or vest upon me the right to have a vote that counts more in the selection of judges than any other Kansan.

So when those tomorrow praise the elitism of a lawyer-dominated commission, there's another term I wish that you would consider. When our founding fathers turned away from the power of a monarchy they called that form of politics democracy.

The next argument that will be made, which is inherently contradictory to the criticism of politics, is that there is an election process for judges called retention. However, the facts get in the way of the fiction of democracy being provided through retention.

The Journal Judicature in Volume 90, Number 5 released in March – April 2007, presented a study on judicial retention through an article called Judicial Retention Election Trends 1964-2006. Its research indicated that in only 56 of the 3,605 judicial retention elections the result was non-retention. That means judges in a retention model had a .0088% chance of not being retained. That is a percentage that would make a Soviet era politician envious.

Fifty-one percent of the 56 judges not retained were from the state of Illinois. Illinois is the only state to have, at the time of this article, a retention system that required a 60% vote for retention. If the legislature chooses not to go with an elective process for our appellate courts, a retention system with a higher percentage requirement is the only way to create even a marginally significant chance for accountability in the judiciary.

Calling our current retention system a method to make judges accountable is a meaningless and intellectually dishonest lie thrust upon the people of Kansas.

Tomorrow you will also hear about the expense of judicial elections and the corrosive influence donations will have on the process. While I believe these concerns are exaggerated scare tactics, there is a simple solution that will promote more equal representation for the citizens of Kansas.

For the Court of Appeals, you could easily divide the court into four circuits based upon the congressional districts of Kansas. You can have three Court of Appeals members for each circuit and elected only within that circuit. That would greatly reduce the expense of running for office as well as making justice more accessible and representative. There would not be any difficulty

having enough appellate judges. Kansas law already allows for district judges to be appointed to the Court of Appeals to help cover heavy dockets. You would also have a Court of Appeals that has members from all parts of Kansas rather than domination by a certain region on the court. Finally, while our Court of Appeals does travel, for oral argument there is still cost in that travel. Travel for both the litigants as well as the court is greatly reduced by regional circuits.

I am told that the legislative process involves the art of compromise. I know that there are many who prefer a federal model, others prefer elections. These are an attempt to balance the independence of the court versus accountability for the court.

A regional elected Court of Appeals would be balanced against a Supreme Court that is chosen through a federal process with a 60% retention requirement.

Ultimately, I am not here to advocate for a particular system. Regardless of my opinion or those that will testify tomorrow, the real question is do we trust the people of Kansas. We show that trust and we demonstrate our faith in them by giving them the opportunity to vote on a constitutional amendment that would change how judges and justices are chosen in Kansas.

I urge you to trust the people. I urge you to give them the opportunity to vote.

Thank you for allowing me this opportunity to testify.