

September 3, 2013

The MainStream Coalition, which has its home base in Johnson County, was founded 20 years ago, amid rising concerns that religion was having undue influence on decision-making by our elected officials - at all levels of government. Among the many other issues supported by members of MainStream is having a highly qualified and independent judiciary. As an organization, we have been strong supporters of the merit selection process for selection of appellate judges and justices.

I am not here to speak about the individual whose nomination is being considered today. Given the secrecy surrounding the naming of this individual, it is impossible to evaluate his credentials and experience compared with the other individuals who submitted their applications, and whose identities remain unknown to the public.

It is important to acknowledge that the Kansas Judiciary ranks among the top five in the country, and considering that our judiciary has provided our citizens and our businesses with a highly capable and fair judicial system, we must ask - what is motivating the change?

- Is it to provide a better court system - better than our current highly-ranked system?
- Is it to give the executive and legislative branches more control over our judiciary - and blur the lines among the three branches of government?
- Or is there some - as yet unstated - rationale for this sudden and significant change? We are left to wonder and to speculate.

The current process for selecting members of our appellate courts has always involved participation by the sitting Governor - by selecting the four non-attorney members of the Supreme Court Judicial Nominating Commission, and by making the final selection from among the three persons advanced to the Governor by the Nominating Commission. This process allows for both professionals and lay persons to evaluate potential nominees to the appellate courts, as both groups bring a unique and important perspective to this process. If the Governor prevails in his current efforts, the judicial system will then be heavily influenced by the executive and legislative branches of our government.

Consider these facts:

- The Constitutional powers of the Governor, with regard to the judiciary, are limited to his naming four of nine members of the Judicial Nominating Commission, and selecting a judge from among three persons put forward by the Judicial Nominating Commission.
- No member of the supreme court nominating commission shall, while a member, hold any other public office by appointment or any official position in a political party - or for six months thereafter be eligible for nomination for the office of justice of the supreme court.
- The Nominating commission may act only by the concurrence of a majority of its members.

These practices underscore the efforts to keep political considerations out of our judicial system. And as noted by former Kansas Attorney General Steve Six - "The people of Kansas did not elect Governor Brownback to name judges to the Court of Appeals in an autocratic manner."

If the process used for the current proposed appointee is to be continued, we need to be concerned about the direction our state is going - one in which secretiveness trumps transparency. The Governor cannot claim a mandate from voters for the secretive selection process he now employs which is much different from the democratic/populist selection process on which he campaigned. The people, the legislature and most importantly the Governor should pay heed to the comments made jointly by former US Senator Nancy Landon Kassebaum and former federal judge Deanell Tacha, now Dean of the Pepperdine University School of Law, who stated "We cannot let Kansas be the place where the judiciary is under any cloud of suspicion that the selection process is based on anything other than merit and that the judges are answerable to anything other than the law, including the Constitution."

We want to encourage the best and brightest among our attorneys to consider a judicial appointment during their careers. But how can we encourage these potential judicial candidates if they know they are not a "favorite" of the sitting Governor - whomever that may be?

To sum it up: a statement by US Supreme Court Justice Anthony Kennedy during a Nov. 10, 2005 C-SPAN program hosted by the American Bar Association on International Justice and the Rule of Law: "Judicial Independence for judges is to not do as they choose, but to do as they must."

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Past President