

BUDGET WOES LINKED TO HOW JUSTICES ARE CHOSEN BY KRIS W. KOBACH

Kansas' 2009 legislative session has been dominated thus far by the budget crisis, which is hardly surprising. But all of that attention on the shrinking coffers has overshadowed an equally important, and related, debate -- whether Kansas should change its method of selecting state Supreme Court justices.

The House Judiciary Committee recently heard testimony on House Concurrent Resolution 5005, which would scrap the current Supreme Court Nominating Commission and replace it with the federal model -- allowing the governor broader discretion to pick nominees, but subjecting the nominees to Senate confirmation.

At the hearing, no fewer than seven law professors showed up to testify. Five (including me) supported the proposal. Two defended the status quo.

Twenty-two states use some form of nominating commission. But Kansas has the most extreme version in the country. Only Kansas gives its lawyers the power to select a majority of the commission's members. This creates an institutional bias that favors more power for courts and more profit for attorneys. Moreover, the commission makes its decisions behind closed doors without any accountability to the public.

New research makes the picture even worse: The lawyer members of the commission tilt radically to the left and are out of sync with the majority of Kansans.

Because federal campaign contributions are accessible on the Web, it is possible to chart the political allegiances of the members of the nominating commission. The results are shocking. Between 1987 and 2007, the lawyers on the commission gave a whopping 83 percent of their federal campaign contributions to Democrats. If they were representative of the people of Kansas, they'd be giving about 40 percent of their contributions to Democrats.

So we have two biases on the commission: a preference for liberal policies and a disproportionate amount of control by lawyers. Over time, the commission has produced a Supreme Court that reflects those inclinations, with liberal rulings and rulings that inflate the power of the judiciary -- a natural consequence of giving disproportionate influence to lawyers.

The infamous Montoy decision of 2005 epitomized these institutional leanings. In Montoy, the Kansas Supreme Court unconstitutionally seized the power of the purse and ordered the Legislature to increase K-12 education spending by \$285 million in fiscal year 2005-06, and an additional \$568 million in 2006-07. The Montoy decision represented a court determined to advance judicial power and the liberal policy of limitless spending on education.

Which brings us back to the current fiscal crisis. The reckless decision of the court in Montoy is taking its toll. Kansas' current budget crisis is largely due to the extraordinary increases in spending ordered by the court.

The verdict is in. The time has come to bring accountability to the process of selecting Supreme Court justices. We simply cannot afford the status quo.