More than a half-century ago, some unpopular political maneuvering in Kansas caused voters there to create one of the nation's more unique structures for appointing judges to a state supreme court. That change purposefully reined in the nomination powers of state elected officials, namely the governor.

Over the past few years, the legislative and executive branches have been exploring ideas to get some of that authority back.

"Kansas is the only state in the country where the selection of supreme court justices is controlled by a handful of lawyers," Gov. Sam Brownback said in his annual State of the State address this year.

He has been among the state's political leaders pushing for a constitutional change, one that would either alter Kansas' merit-based selection process or get rid of it altogether. Like many states with merit-based appointment systems, Kansas uses a nominating commission to create a pool of candidates to fill open positions to the Supreme Court.

Unlike other states, a majority of members on Kansas' commission (five of the nine) comes from a vote of the state's practicing attorneys (the other four members are appointed by the governor). When choosing a Supreme Court justice, the Kansas governor must choose from one of the three candidates selected by the commission. Once on the court, a justice is then soon subject to a retention election.

Kansas' independent nominating commission has been part of the state Constitution since 1958. A year before, incumbent Gov. Fred Hall had been defeated in the Republican primary and then resigned from office. But the lieutenant governor appointed Hall to fill a vacant Supreme Court seat — a move that caused a political scandal and that served as a catalyst to change the nomination process in order to avoid favoritism.

Brownback and some legislators, though, believe the current process is too "undemocratic." A constitutional amendment introduced in the Kansas Legislature would discontinue the use of a nominating commission and create a process similar to the federal model: nomination by the governor and consent by the state Senate. This proposal has thus far failed to get the super-majority vote needed for legislative approval.

But lawmakers continue to search for alternatives, with HCR 5013 [2] being one of the latest constitutional changes under consideration.

This proposal would keep the state's judicial nominating commission but expand its membership to 15: four elected by attorneys in the state, five appointed by the governor and six appointed by legislative leaders from both political parties (the majority party in each chamber would get two appointments; the minority party in each chamber would get one appointment).

Proposals to tweak judge selection

Kansas is not the only state where legislators are scrutinizing how judges to the "court of last resort" are selected, according to Bill Raftery of the National Center for State Courts. One legislative trend, he says, has been to consider moving to a "quasi-federal" model: allow the governor to choose anyone who meets basic minimum requirements and then provide a state senate or other "collegial body" with the power of consent.

These proposals are "quasi-federal" because they differ from the U.S. constitutional model in important ways. For example, state supreme court judges, once appointed, would still face voters in retention elections. Another difference is the inclusion of a "default confirmation mechanism."
“So if the Senate doesn’t act,” Raftery says, “the process is not held up.”

In Kansas, for example, one measure (HCR 5005) would require the state’s upper chamber to vote on a nominee within 60 days (if in session) or within 20 days of the beginning of the next legislative session.

According to Raftery, Kansas’ HCR 5013 reflects another legislative trend: proposals that would retain the use of judicial nominating commissions, but put control of their members more in the hands of elected officials.

**Overview of process in Midwest**

In the Midwest, five states currently employ some type of judicial “nominating” or “qualification” commission as part of its merit-selection process. In states such as Iowa, Indiana and Nebraska, there is an even split between the number of commissioners elected by attorneys and appointed by the governor. One spot on these states’ commissions is also reserved for a justice of the supreme court.

In all five of these states, supreme court justices (though initially selected via merit selection) face retention elections once their initial term is complete. In the Midwest’s six other states, justices come to the supreme court via a direct election by the people. South Dakota was last to change its method of judicial selection; it moved to a merit-based system in 1980. In all Midwestern states, altering the method of supreme court selections requires a constitutional amendment.

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