THE NEW YORKER

FEBRUARY 5, 2016

THE POLITICAL WAR AGAINST THE KANSAS SUPREME COURT

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Kansas Supreme Court Chief Justice Lawton R. Nuss and his fellow-justices may soon be subject to partisan elections, if the state legislature has its way.

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In his annual State of the Judiciary speech a couple of years ago, Chief Justice Lawton R. Nuss, of the Kansas Supreme Court, began with a joke about bribery. A lawyer was sure his side would win a court case because he had given the judge a lot of money. The punch line went, "We are dealing with a respectable judge. He is a man of honor. He would not think of taking from both sides." The chief justice continued, "We chuckle, and perhaps even laugh. Because that is certainly not the way judges decide cases in Kansas. We do not take money from either side. Nor do we decide cases based on money's distant cousins: threats and other pressures."

A week earlier, in his State of the State speech, Kansas's governor, Sam Brownback, had pointedly pressured Nuss and his colleagues on the state's highest court. A trial court had found, "beyond any question," that the state system of financing public schools was unconstitutional because it provided inadequate funding and distributed money unfairly. The Kansas Supreme Court had recently heard oral argument in an appeal of the ruling. The court was expected to decide the case soon. Brownback claimed, "This is the people's business, done by the people's house through the wonderfully untidy—but open for all to see—business of appropriations." He contrasted this with the "unaccountable, opaque" decision-making of the Kansas Supreme Court.

Since 1958, Kansas has relied on a merit-selection system to choose the members of its Supreme Court: a commission of lawyers and non-lawyers nominates three candidates for an open position, and the governor picks one to appoint. Merit selection is meant to strike a balance between independence and accountability. The justices are held accountable in retention elections, but, in the fifty-six years that the system has been used, no justice has been voted out of office, because no justice has proved inept, unethical, or otherwise unfit for service on the court. The court is largely viewed as moderate, reasonable, and business-friendly. That has not kept Brownback from making regular attacks on it.

When the Kansas Supreme Court upheld the heart of the trial-court ruling on financing public schools, it devoted about two-thirds of its opinion to explaining why the court had a duty under the state constitution to decide the issue and not leave the problem to the governor and the legislature. "Determining whether an act of the legislature is invalid under the people's constitution is solely the duty of the judiciary," the court wrote. "The judiciary is not at liberty to surrender, ignore, or waive this duty." The legislature and the governor's response was to pass and sign a law that stripped administrative power over lower state courts. And then to pass and sign another law that stripped the state's entire court system of funding if any court struck down any part of the previous law.

This past December, the State Supreme Court ruled that the first of the retaliatory laws is unconstitutional because it usurps the "general administrative authority" that the state constitution gives the judiciary. Because of the second retaliatory law, the ruling put in jeopardy all of the judiciary's funding.

Last week, the legislature blinked, passing a bill that would reverse the defunding law. Jeff King, the Republican chairman of the Kansas Senate Judiciary Committee, was its main proponent. On Thursday, he told me that the superseded law was not intended to defund the judiciary, but rather to give the legislature an opportunity to reconsider the judiciary's budget if a court struck down the part of the law shifting budgetary authority from the State Supreme Court to local trial courts. "That's what we have courts for," he said. "We in the legislature get to rewrite the law when the court interprets it differently from what we intended." That is a clever but unconvincing revision of recent history, to save face for the legislature while abiding by the court's decision.

The bill is being hailed as a victory for judicial independence. It will be a victory if it becomes law—and King told me that Brownback will sign it "very soon"—but a modest and perhaps short-lived one. Republicans in the legislature have drafted bills calling for a system in which the governor would nominate and the State Senate would confirm justices. That sounds benign but could be terrible for Kansas, where the right wing holds the governor's office and is prominent in the State Senate. There is little balance between the political branches. There is scant check of one by the other.

Republicans have also drafted bills calling for partisan election of justices. That has proved to be a travesty in many states, but particularly in Wisconsin, as I have reported. Since 2000, when spending in judicial elections jumped significantly, they have become a case study in the worst aspects of money in politics. Spending by special interests, which are clearly concerned about the decisions that judges reach rather than their capability and impartiality in reaching them, has grown dramatically as a share of total spending. An increasing portion of that spending has come from national organizations or their local affiliates, which are, again, clearly concerned about results, with most of the money coming from the political right.

The nature of the campaigns is often as misleading and bad for judges and for the law as their purpose. TV attack ads have often focussed on the criminal-justice records of candidates for election and reëlection as judges, with the intent of making them look soft on crime and scaring voters. A year ago on "Last Week Tonight," Jon Oliver encapsulated the issue: "The problem with an elected judiciary is that sometimes the right decision is neither easy nor popular. And yet campaigns force judges to look over their shoulder on every ruling, because while political attack ads can be aggressive, judicial attack ads can be downright horrifying."

Since 2002, sometimes with other organizations, the Brennan Center for Justice has produced eight reports about "The New Politics of Judicial Elections." In the report about 2011–12, which focussed on state-supreme-court races in the last presidential cycle, the center observed that "many seemed alarmingly indistinguishable from ordinary political campaigns." Retired U.S. Supreme Court Justice Sandra Day O'Connor, who is the most prominent and persistent critic of judicial elections, called them "political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution."

One of the most important disputes about judicial elections is whether O'Connor's point is correct. Chief Justice John G. Roberts, Jr., has expressed concern that such allegations are incorrectly based on the view that spending on judicial elections results in influence on what judges decide. But most Americans are convinced that this is the reality: in a 2013 poll by the Brennan Center and Justice at Stake, almost nine out of ten people said that donations to a judge's campaign and so-called independent spending on TV ads and other forms of electioneering have "some" or "a great deal" of influence over the judge's decisions on the bench. Judicial elections are eroding public confidence in the impartiality of judges, and they are undermining the rule of law.

This year provides a major test for the Kansas Supreme Court and its reputation: five of its seven justices must be reëlected by a majority of Kansas voters. While a Kansas judge has never lost a retention election, these have become intensely contested across the country in recent years, including in Kansas, and any justice who wants to be reëlected must raise money for his or her campaign and wage it earnestly.

Retention elections in 2010 in Iowa and Illinois, the legal scholar James Sample observed, represent "a bell that will never be un-rung." In Iowa, the chief justice and two other justices were voted off the State Supreme Court, a year after the court had unanimously struck down a ban on same-sex marriage. That happened in large part, Sample concluded, because, in the face of a fierce, well-funded effort to oust them for making that ruling, the justices chose neither to raise money to defend themselves nor to campaign actively. In Illinois, by contrast, where the chief justice was inaccurately attacked for being anti-business, pro-criminal, and worse, he chose to campaign hard and was reëlected.

Elections often make judges indistinguishable from politicians, and judging indistinguishable from politics. As of now, when reasonable citizens disagree with rulings of the Kansas Supreme Court, they mainly trust its good intentions and the nonpartisan process that has led to appointment of capable, well-qualified, and conscientious justices for the past three generations. The saving grace for the court is that it generally functions as a court, apart from politics. Kansans should do everything they can to keep it that way.