

The Untold Story

**behind the unchecked power
of the Kansas Supreme Court**

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Preface

As the Kansas Supreme Court becomes more and more controversial in its rulings, some people have begun to wonder how it is that a person gets appointed to our State's highest court. This article will describe the events which led to the destruction of the "original system" (which was the direct election of justices by the voters of Kansas), and the enactment of the "current system" (the Supreme Court Nominating Commission). Once people understand that the voters have been taken out of the judicial selection process, they'll understand why the Supreme Court no longer cares what the people of the Kansas think.

In recent years, there has been a lot of debate in Kansas about how we should select our appellate judges - Supreme Court and Court of Appeals. Prior to 2013, justices and judges of both those courts were selected by a lawyer-dominated nominating commission. In 2013, the Kansas legislature, working with Governor Sam Brownback, changed how the judges of the Court of Appeals are now selected: the governor nominates, and the state senate confirms - much as it is done at the federal level.

Although the Court of Appeals selection method was changed with a mere statutory change (63 votes in the Kansas House, 21 votes in the Kansas Senate, and approval by the governor), **the system for changing how Supreme Court justices are selected cannot be changed by statute. The system for appointing the Supreme Court is encased in the Kansas Constitution itself, and to change that, a constitutional amendment must be adopted by the legislature (a super majority of 84 votes in the Kansas House, and 27 votes in the Kansas Senate), and then submitted to the voters of Kansas.**

And even though a vast majority of our state legislators, and the people they represent, want to change how our Supreme Court is selected, a handful of liberal Republicans (and their friends on the Democratic side of the aisle) have done all they can to oppose this much-needed legal reform, and to block the people of Kansas from voting on this constitutional amendment.

The Kansas Supreme Court

The Supreme Court is the highest court in Kansas. It consists of seven justices. **The Supreme Court Nominating Commission submits a list of three individuals to the governor for appointment to the Court. If the governor refuses to select one of these individuals, then the Chief Justice of the Supreme Court makes the selection.**

The Nominating Commission is a nine-member board responsible for recommending qualified individuals for appointment to the Kansas Supreme Court. Four of the Commission's members are non-attorneys appointed by the Governor; four others are attorneys selected by attorneys in each of the State's four Congressional Districts. The Chair of the Commission is an attorney elected by attorneys in a statewide vote.

After the first year in office, a newly appointed justice is subject to a retention vote in the next general election. **If a majority of electors votes to retain the justice, he or she remains in office for a term of six years.** Justices are subject to a similar retention vote at the conclusion of each term.

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Liberal Republicans vs. Conservative Republicans

The conflict between liberal Republicans and conservative Republicans has existed, in some form or another, since statehood; but the real “smackdown” between the factions began 100 years ago, when liberals like Alf Landon bolted the Republican Party after it re-nominated conservative William Howard Taft for the presidency. The liberal Republicans had supported former President Theodore Roosevelt for the nomination, and after failing in their efforts, left the party to form the Bull Moose Party.



Alf Landon

After dividing the GOP vote between Taft and Roosevelt, and thus delivering the presidency to Democrat Woodrow Wilson in 1912, liberal Republicans began to realize that they held the trump cards in most elections. They learned that they could compete in GOP primaries, and if they won, then “party unity,” accompanied by the requisite hugs and kisses, was a desirable outcome. But if they lost their primaries, then unity be damned---they would support the Democrats.

The two most recent examples of this phenomena were in 2002 and 2014. In 2002, after conservative Tim Shallenberger won the GOP primary for governor, liberal Gov. Bill Graves, Lt. Gov. Gary Sherrer, and all the flying monkeys within their command, did everything they could to sabotage Shallenberger, resulting in the election of Democrat Kathleen Sebelius. Then, in 2014, when liberal

Republicans sensed that Gov. Sam Brownback was politically vulnerable, they threw everything they had at Brownback, and supported Democrat Paul Davis. That particular effort was unsuccessful.

It is not for nothing that liberal Republicans in Kansas long ago earned the moniker of being the “rule or ruin” wing of the Republican Party. After helping to defeat Taft in 1912, the “rule or ruin” Republicans spent decade after decade insisting on getting their own way....or else. The only time the implied threat of liberal Republicans to help the Democrats doesn’t work is when the Democrats themselves are in such disrepute nationally that the conservative Republicans cannot be sabotaged in a general election. That’s what happened in 2010, when conservative Sam Brownback was elected governor.

The early 1950's

When Sam Brownback was elected governor in 2010, a contributing factor to his election was that liberal Republicans were unable to find a way to derail him on his way to the governor's mansion. Brownback's accomplishment was a rare feat: prior to Sam's election as governor, the last time a conservative snuck past the old guard was in 1950.

As it was in 2010, 1950 was not a good year for Democrats in Kansas...or for liberal Republicans. Nationally, the Democrats had controlled the White House



Ed Arn

since 1932, and the off-year election of 1950 saw the Democrats lose five U.S. Senate seats and 28 U.S. House seats. And here in Kansas, conservative Ed Arn of Wichita, a popular former Attorney General and Supreme Court justice, was in the process of being elected governor. He won his primary, 55-35%, and won the general elections, 54-44%.

Having decided that they could not stop Arn, liberal Republicans put all their firepower behind Fred Hall, a liberal running for Lt. Governor. (Note: prior to 1974, governor and lieutenant governor candidates ran separately from one another, and served two-year terms; commencing in 1974, governors and lieutenant governors ran as a team, and if elected, served four year terms.) With the help of old guard liberals, Hall a 34-year old firebrand attorney from

Dodge City, was successful in his campaign to become Lieutenant Governor.

After his election in 1950, Lt. Gov. Hall immediately began staking out positions that were different than Gov. Arn, and he attempted, with some success, to use his powers as presiding officer in the state senate to bring attention to his views on various matters. He quickly became a target for angry conservatives. So, while Gov. Arn was coasting to re-election in 1952, there was an effort (led by Arn behind the scenes) to defeat Hall in his primary for Lt. Governor. The effort failed, barely. And since 1952 was a great Republican year in Kansas – favorite son Dwight Eisenhower was at the head of the ticket – both Arn and Hall easily won their general election races.

Almost immediately after the 1952 elections, Lt. Gov. Fred Hall announced his candidacy for governor – and he spent the next two years campaigning. Arn, who had already served the traditional two-year terms, was stepping down. And although conservatives mounted a serious challenge to Fred Hall, Hall won the 1954 GOP primary, 52-45%. In November, Hall defeated Democrat George Docking, 53-46%.

Fred Hall, champion of liberal Republicans in Kansas, was governor of Kansas. He was 38 years old. And he intended to use the governorship as a stage from which he would, in the mold of Theodore Roosevelt, be elected to the presidency.

Fred Hall as Governor

There is not enough space in this article to adequately describe all the things that Fred Hall did as governor that annoyed conservatives. Suffice it to say that liberals loved him, and thought him a great man, and conservatives held the opposite view. Everyone agrees that he was the most controversial governor in Kansas history. Hall was famously quoted, shortly after his election, as saying “never before in our state has a governor owed so little to so few, and so much to so many.” He then spent his two years poking the “few” in the eye as often as he could.



Governor Fred Hall

The most notable poke-in-the-eye Hall gave to conservatives was when the legislature passed a “right-to-work” law, and in a transparent effort to earn a name for himself nationally with organized labor, Hall vetoed the bill. His veto created a national furor.

The veto of “right-to-work,” which basically mandated that individuals do not have to belong to a labor union in order to secure employment, was the last straw with conservatives. They targeted Hall for defeat; many conservatives couldn’t wait to destroy Hall’s dream of holding national office. In the August 1956 GOP primary, Kansas conservatives supported Topekan Warren Shaw – and to the surprise of no one, except possibly Fred Hall, Shaw defeated Hall in the primary, 53-42%.

Of course, Hall and other members of the “rule or ruin” wing of the GOP did the predictable thing once they had lost the primary: they withheld their support of Shaw in the general election. And, just as predictably, the defection of so many Republicans had the effect of electing Democrat George Docking to the governorship.

Had the story ended there, it would have been just another battle in which a liberal Republican, having lost a primary, turned around and helped the Democrat win the general election. But it didn't end there. What followed in the closing days of the Hall administration was an orchestration of corrupt acts that would end up making major changes in this State that exist to this very day.

The Triple Play

Having succeeded in sabotaging Warren Shaw's general election chances, Fred Hall and the other liberal Republicans had no intention of riding off into the sunset. The question became how they could keep Fred Hall, still only 40 years old, in the game, now that he had lost the governorship.



1936 Republican
presidential nominee
Alf Landon

That's when Alf Landon, the Grand Wizard of liberal Republicans in Kansas, kicked into gear. Landon, a former governor, and the 1936 Republican nominee for president, loved politics – but especially loved plotting against conservatives. And in December of 1956, as the Hall administration wound down, Landon convened a meeting of the top liberal Republicans. They met in Landon's beautiful Topeka mansion, and in attendance (besides Landon) were outgoing Governor Fred Hall, outgoing Lt. Governor John McCuish, and the Chief Justice of the Kansas Supreme Court, 69-year-old Bill Smith, a longtime Landon crony.

The purpose of Landon's meeting was simple: to figure out a way to keep Fred Hall alive politically so that he could run for governor again in 1958. And at that meeting, its participants hatched a daring plan that was as bold as it was breathtakingly corrupt: shortly after the Christmas holiday, when most Kansas voters would be

focused on church, family and travel, the old guard liberals would make Fred Hall a member of the Kansas Supreme Court!

And on January 3, 1957, 11 days before Fred Hall was to leave office, and a day when most of the attention was directed to the swearing in of the new congress, Chief Justice Bill Smith, for “health reasons,” resigned his position on the Kansas Supreme Court. Five minutes later, Governor Fred Hall resigned as governor, elevating Lt. Gov. John McCuish to the governorship. And a few moments after that, Governor McCuish appointed Fred Hall to the vacant position on the Supreme Court. From beginning to end, the “Triple Play” took less than 15 minutes to execute.



John McCuish

The participants in the Triple Play were hoping that their job switches would be “lost in the shuffle” of a busy holiday season and in the other news of the day, and would not be much noticed by the people of Kansas. They would be sorely disappointed. To steal (and mangle) a phrase from Fred Hall himself, never have so few underestimated the intelligence of so many.

The Reaction

The people of Kansas rose as one in their denunciation of Fred Hall's job switch. A maneuver that was designed by Alf Landon and his pals to keep Fred Hall's political career alive had the effect, instead, of destroying Hall's career. For the rest of their lives, not one of the participants in the Triple Play was ever placed in a position of public trust again.

The Kansas Senate – already somewhat hostile to Hall – wasted no time in responding to the public outcry. As soon as the 1957 legislative session opened four constitutional amendments were introduced that would have addressed what Hall had done. The Senate eventually settled on one approach (see below) to dealing with the gubernatorial abuse of power, and the House, with minor changes that the Senate accepted, passed the same constitutional amendment. And just like that, a change to the constitution was submitted to the voters that would radically alter the judicial selection system in Kansas.

(Note: today, more than half a century later, many people believe that the system of judicial selection that existed in Fred Hall's time was one in which the governor appointed the members of the Supreme Court, with the legislature having no role. But that is simply not true. *Up until 1958, members of the Supreme Court were directly elected by the voters of Kansas. The only reason Hall could be appointed to the Supreme Court was that there was a vacancy – by virtue of Chief Justice Smith's resignation – that had to be filled until the next election.*)

The most charitable thing that one can say about the response of state legislators to the Triple Play is that they were caught up in the firestorm of public opinion and possibly in their own blind hatred of Fred Hall, and they simply over-reacted to what Hall had done. One supposed that in the heat of the moment, otherwise clear-thinking public servants lost their perspective, and submitted to the voters a judicial selection system that not only clipped the wings of future governors in filling vacancies on the appellate court, but in their mad rush to avenge the corruption of Hall and his cronies, also eviscerated the ability of the people of Kansas and their elected legislators, to be involved in the judicial selection process.



Fred Hall

Because what the legislature did was submit to the voters a constitutional amendment that mandated that, in the future, it would be the Supreme Court Nominating Commission – and not the people of Kansas – who would select members of the highest court. And the people of Kansas, in their frenzy to register their disgust with Fred Hall, approved it. With only minor changes to it since, the system adopted by the voters in the election of 1958 is still in place.

The Supreme Court Nominating Commission

So who is on the Nominating Commission, and how does it work? Pursuant to the language in the constitution, the current Supreme Court Nominating Commission is comprised of nine “non-partisan” people: five attorneys, elected by the members of the bar (one at-large, and one from each of the four congressional districts), and four non-attorneys (also one from each of the four congressional districts), who are appointed by the governor.

When a vacancy occurs on the Supreme Court, attorneys who wish to be considered for that position make application. The Nominating Commission meets in secret to discuss their qualifications. No one outside the Commission knows what is said behind closed doors or on what basis the choices are made. At the end of their discussion, the Nominating Commission submits three names to the governor. The governor must select one of these three, and if the governor refuses, the Chief Justice of the Supreme Court makes the selection.



Kansas is the only State out of 50 which has a Supreme Court Nominating Commission that has a majority of its members who are attorneys who are elected by the rest of the bar. In other words, we are the only State in which one profession, lawyers, has absolute control over an entire branch of government.

The only involvement the voters of Kansas have in the process is a “retention vote” that occurs once every six years. Since the inception of the Nominating Commission system, not one justice has been denied retention.

Enough time has passed since adoption of this system that there is not a single appellate judge who owes the people of Kansas anything - every current appellate judge was appointed through the auspices of the Nominating Commission – and it is no coincidence that as the Kansas Supreme Court becomes less and less accountable to the people of Kansas, it has become more and more involved in the making of public policy.

Conspiracy of Attorneys?

Although it is plausible that the legislature was simply caught up in the moment, and over-reacted to what Fred Hall had done (they could have avoided a repeat of what happened by simply requiring senate confirmation of any gubernatorial appointment to fill a vacancy), a less charitable view (more realistic?) is that a particular special interest group, attorneys, exploited for their own ends the anger which resulted from the Triple Play.

While conservative Republicans and liberal Republicans were bashing each other, it was the State's attorneys who moved in quite deftly with their own agenda. Leaders in the legal profession, seeing a golden opportunity to cut the people of Kansas out of the judicial selection process altogether, decided that this was one crisis that should not be allowed to go to waste. Indeed the lawyers saw that the furor over the Triple Play could be harnessed for the purpose of turning judicial selection over to...the lawyers.

It should be noted that in 1957, the 40 members of the Kansas Senate included 19 attorneys (including Senate President Paul Wunsch) – compared to just three attorneys in the current state senate. Indeed, the finger prints of the Kansas Bar were all over the constitutional amendment that gave attorneys control over who our appellate judges would be. It takes 27 votes to pass a constitutional amendment in the state senate, and the constitutional amendment that was eventually adopted was sponsored by 29 senators (15 of whom were the Senate's attorney members). Passage of the constitutional amendment was assured. Only four of

the Senate's attorneys failed to sponsor the amendment, and when it came time to vote on it, 17 of the 19 attorneys in the Senate voted for it (along with 22 of the 23 attorneys in the House of Representatives).

And why wouldn't they? The constitutional amendment they were submitting to the electorate was being "demanded" by the voters, angry with Hall. That same amendment made them, as attorneys, a special class of citizen, who, by virtue of their profession, could control who sits on the highest court of the State. Sweet deal.

The Immediate Aftermath

Fred Hall had made no secret of his intention to serve on the Supreme Court only until such time as he could again seek the governorship. In April 1958, 15 months after being appointed to the court, Hall resigned his new position, and announced that he would again be a candidate for governor of Kansas.

But his enemies were waiting for him this time. The legislators who had submitted the constitutional amendment to the voters needed a way to remind the people of Kansas about Fred Hall's duplicity; so they scheduled the vote on the constitutional amendment for the same day they thought Fred Hall would be on the ballot for governor, the day of the general election, which would be held in November.

But even Hall's bitterest enemies over-estimated Hall's political strength. The Triple Play had so offended the electorate that Hall didn't make it to the general election in 1958: he lost the Republican primary for governor by a whopping 76% to 19%. Fred Hall was politically dead at the age of 42. And in the general election, although it must have seemed somewhat anti-climactic, the constitutional amendment pertaining to judicial selection was approved by the electorate, 60-40%.

Final Note

After his crushing defeat in 1958, former Governor Fred Hall moved to Beverly Hills, California to practice law. He even ran for the US Senate in California, losing the Republican primary in 1964 to retired actor George Murphy. In 1970, shortly after moving back to Kansas (Shawnee Mission), Hall died at the age of 53.

Former Governor John McCuish never sought office again and died just five years after leaving office. He was 55 years old.

Former Chief Justice Bill Smith, whose resignation from the Supreme Court for “health reasons” was an integral part of the Triple Play, enjoyed something of a recovery, and lived another eleven years. He died in 1968, at the age of 80.

And Alf Landon, the senior advisor to the Triple Play conspirators, outlived them all by a considerable amount. He was nearly 70 years of age when Hall was appointed to the Supreme Court in 1957, and lived another 30 years after that, dying in Topeka just one month after his 100th birthday.

And the true legacy of the infamous Triple Play – the Supreme Court Nominating Commission, born in corruption, and nurtured into old age by a self-serving legal profession – lives on to this day.

