

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Wint Winter, Jr. at  
Chairperson

10:00 a.m./~~p.m.~~ on January 25, 1989 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Winter, Yost Moran, Bond, Feleciano, D. Kerr, Martin, Morris, Oleen, Parrish, Petty, Gaines and Rock.

Committee staff present:

Mike Heim, Legislative Research Department  
Gordon Self, Revisor of Statutes  
Jane Tharp, Committee Secretary  
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Randy Hearrell, Kansas Judicial Council  
Ron Miles, Board of Indigents' Defense Services  
Gary Marsh, Chief Court Service Officer  
Edward Collister, Private Attorney in Douglas County

The chairman announced the agenda for next week. On Monday the child abuse bills are scheduled; Tuesday, briefing on prison overcrowding and a KBI report; Wednesday, community corrections and Thursday, sentencing reform.

Senate Bill 10 - Membership state board of indigents' defense services.

Randy Hearrell, Kansas Judicial Council, presented background information on the public defender advisory committee. The two bills that came out of this study are Senate Bill 10 that expands the state board of indigents' defense services, and Senate Bill 11 concerning municipal courts. A committee member discussed a proposed amendment to the bill in Section 2, Subsection (c), lines 70, 71, and 72 adding a period after word business. Mr. Hearrell had no objection to the amendment. He said he would doubt if the committee would have an objection to it. It is merely a drafting change.

Ron Miles, Board of Indigents' Defense Services, presented background information. He stated the board had to revise the budget estimates. They are now paying \$50 an hour for private counsel. Last year the governor did support the plan and recommended funding. This year the governor's budget includes funding for two new offices in Johnson and Wyandotte Counties. Discussion was held with Mr. Miles concerning rules regarding qualification. A committee member inquired how many cases if reversed on appeal represented by incompetent counsel. Mr. Miles replied most decisions are very hard to reverse. The chairman inquired does the board have a position on Senate Bills 10 and 11? Mr. Miles replied no, the board did not want to take a stand on this bill.

Gary Marsh, Chief Court Service Officer, testified, while I am not here to support a public defender system statewide, I do believe there are advantages to modification of the way it is presently handled. A copy of his testimony is attached (See Attachment I).

Edward Collister, Private Attorney in Douglas County, appeared to discuss a statewide public defender program. He said he has two concerns; one, it is extremely important to retain local control; and two, the judiciary should have some responsibility how this system is set up and operates. A copy of his testimony is attached (See Attachment II).

The chairman recognized Charles Whitman from Lawrence. Mr. Whitman said he felt the topic had been covered well.

The chairman introduced Ron Wurtz, Shawnee County Public Defender. He stated he was present to answer any questions.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,  
room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on January 25, 1989.

Senate Bill 10 - continued

Senator Feleciano moved to approve the minutes of January 23, 1989. Senator Oleen seconded the motion. The motion carried.

A copy of a letter from James E. Wells, Municipal Court, City of Topeka concerning Senate Bill 11 is attached (See Attachment III).

Copy of a letter from Judge Robert A. Thiessen, The City of Wichita Municipal Court, concerning Senate Bill 11 is attached (See Attachment IV).

Copy of the guest list is attached (See Attachment V).



TESTIMONY

TO: Senate Judiciary Committee

RE: Senate Bill No. 10

DATE: January 25, 1989

My name is Gary L. Marsh and I am the Chief Court Service Officer for the 5th Judicial District which includes Lyon and Chase Counties. In 1980 and 1981, for a period of nine months, I was Acting Court Administrator. Since that date I have been involved in the local Court's operating budget which includes monies for Court-appointed attorneys on indigent cases involving juvenile, misdemeanor, and care and treatment matters.

While I understand that Senate Bill No. 10 does not, on its face, lend itself to the remarks I wish to make, I do feel that the matter of expansion of the public defender program into other areas of the state deserve a closer look. While I am not here to support a public defender system statewide, I do believe there are advantages to modification of the way it is presently handled.

Prior to last year when the rate of pay for attorneys was severely limited, attorneys could not afford to take indigent appointments. Now that the rate has been increased, it is my feeling that the cost per case will exceed that for a public defender. Additionally, the overall quality of representation should increase with a public defender.

I have seen incidents, especially in cases involving a high profile crime, where an attorney's private practice can suffer either because of the negative results of the publicity or because of the amount of time required by the attorney in case preparation. On the other hand, there can be situations where attorneys who do not have much of a private practice may exploit the system by spending more time on a case than should be required.

Attachment I

SJC  
1-25-89

In 1988, Lyon County budgeted \$54,300 for local legal fees. The renegotiated contract for 1989 decreased slightly to \$51,300. According to Ron Miles, the State spent \$64,000 for fiscal 1988 and last summer he projected that would increase to \$110,000 for fiscal 1989. He has reported that for the first half of fiscal 1989, AID paid out \$57,700 in Lyon County which would equate to over \$115,000. If the county fees and AID fees were combined, it would be in excess of \$166,000 for legal costs. Based on that, it would appear that a public defender office could be equipped and staffed at a cost savings to the taxpayers of Lyon County and the State of Kansas.

In summary, I support the public defender concept. I recognize that the system would need to be flexible to address the different issues of rural and urban Kansas, but on balance believe a well-developed system would be a more efficient operation for all concerned.

Respectfully,

Gary L. Marsh  
Chief Court Service Officer  
5th Judicial District

GLM:dg

TESTIMONY OF ED COLLISTER

I thank you all for an opportunity to appear before this Committee and discuss a statewide public defender program with you. My name is Ed Collister; I am a private attorney; my office is at 3311 Clinton Parkway Court, Lawrence, Kansas 66047; phone number (913) 842-3126. I am the Chairman of the Douglas County Bar Association Committee on Indigent Defense Services and a member of the voluntary panel of attorneys for appointment indigent cases in Douglas County. I have previously appeared or presented my views on a statewide public defender system to appropriate legislative and executive bodies, and on behalf of the Douglas County Bar Association, appeared in the Supreme Court case of Stephan v. Smith as an amicus curiae for the Association. I have worked with state government, for state government, and am a private practitioner. As a result of the research I have done in the area of dispensing indigent defense services, there are some concerns that I have which I feel important enough that I want to convey them to you.

I have not had the opportunity because there simply has not been time to analyze all the issues involved. I only found out about this hearing on Monday inasmuch as I was out of town and therefore my remarks are abbreviated. What I thought I might do is to outline for you the areas of concerns that I see and suggest some overriding principals that I think are important.

Attachment II  
SJC  
1-25-89

I really do not want to comment in detail about one system of defense representation versus another system or the economics of each respective system. Figures concerning costs do not represent much to the person who is delivering the service in any event. All he is asking for is reasonable compensation whether he is a private individual or state employee. In addition, costs of systems in the abstract are not good indicia of whether the system works or not, or of the quality of the service delivered. Even if one were to concede that it was possible to save a lot of money with a pure public defender system for the State of Kansas, which I do not think is true, by saving money one might diminish services.

My feelings are based in significant part in the way indigent defense services work in Douglas County. We have had for many years, and still do, a voluntary panel of lawyers serving as court-appointed counsel in indigent felony cases. That system has worked admirably. I have surveyed the judges in our district in the past and visited with others who know how defense services are dispensed and the quality of the service is regarded uniformly as high. At times, we have not been able to live within the budget allocated to us by the indigent defense services budget, and upon research that appears to have been the result of an abnormal amount of serious felony cases requiring actual jury trial. The current system is working in Douglas County. For those who make decisions solely on economics, we are delivering indigent defense services much cheaper than comparable services

could be delivered by an adequate office. Now you notice, I used key phrases. Those phrases were "comparable services" and an "adequate office". Mr. Miles' office has made presentations to our local bar association suggesting that within the budgetary authorization for Douglas County, a public defender system could be supplied, at least in past years, with one full-time public defender or some part-time public defenders working out of the Topeka office. I canvassed our local judges and District Attorney to determine their thoughts on whether such a system would work in practice and the response was unanimously in the negative. The same conclusion was apparent to those of us who were in private practice.

By using this example, I do not mean to say that the voluntary system is going to work in every county or ever judicial district in the state. Douglas County may be different than Osage, Coffey, or Anderson counties, the counties out of which arose the Stephan v. Smith case. And our situation surely is different than bigger metropolitan areas such as Sedgwick, Wyandotte or Johnson counties. In Kansas there is a wide diversity of problems unique to various areas of the state in the delivery of any kind of legal services. There always has been. Western Kansas has its peculiar problems of lack of population, relatively speaking, and immense size. Metropolitan areas have small size and great population densities. A statewide system has to take those things into consideration, whatever that system may be. That is why I am concerned about any proposal to implement a statewide system. Let me suggest two specific areas of concern.



The prospect of centralized control in any but basic administration supervision, scares me. First, the research I was able to do in connection with writing the amicus brief in Stephan vs. Smith case led me to look at states surrounding Kansas which might have similar kinds of population diversification problems. In those states, states like Nebraska, South Dakota, North Dakota and Oklahoma, flexibility in allowing the local governmental entities basically to determine which of alternative forms of delivery of indigent defense services were used in that locality. That means the decisionmaking authority for determining how defense services were distributed was made at a local level as opposed to the state level. I believe it is important to establish that control at the local level. A state or regional administrator is one thing. But, if that administrator controls distribution of services from a state office utilizing state employees, the considerations that he makes may or may not be feasible at many of the local levels. For example, if Douglas County is progressing fine with a voluntary appointment system, why not let them continue. If Shawnee County is solving its problem with a public defender, let them continue with that plan. If in western Kansas distance between county seats means that neither of those two systems is the best in practice; that some kind of a contract system is better for those locales, why not let them decide to use that system. Those are decisions, if the objective is to maximize delivery locally of the services, that ought to be made on the local level. Centralization of that authority in the state simply means more bureaucracy. I am not saying that bureaucracy is bad by definition. Centralized

control ought to be a last resort, especially if we have to add to a bureaucracy to implement a program that can be delivered in many cases by private business. If it is absolutely necessary that we add government employees, then add them. But until it is absolutely necessary, try to use existing available resources.

Remember one other important factor. Each county has its own prosecutor, the prosecutor is paid by the county regardless of whether he is called a District Attorney or County Attorney. His office and staff and determinations concerning the operation are all made locally. Each county has its district court. The district court is organized in judicial districts. Although selection of the judge may be made by the Governor, or in a local election, district-wide for that judicial district, he functions on a local level. The same principal of local control ought to be used with defense services.

The second overriding consideration that I think ought to be seriously looked at is some organized form of input from the judiciary. I am not saying that the administration ought to be part of the judiciary branch; I don't mean that. I just mean that the judicial branch of government ought to have some significant input in the direction that the system goes. After all, ultimately it is a judge who has to appoint a lawyer to defend an indigent felony defendant; it is a court that has to conduct any proceeding involving a felony indigent defendant; and it is that same court which is part of a supervised judicial

system. There should be some form of judicial branch input so that the system considers the effect of its decisions on court operation. It is interesting that in the states that I was able to conduct research upon for the amicus brief that I wrote, I found none where the delivery of indigent defense services was part of the executive branch of government. That function was handled either as an independent agency that was a branch of the judicial branch of government, or part of the judicial branch itself.

I do not think the latter is necessary, but I do think serious consideration ought to be given as to whether or not the administration of this system is purely an executive function or something else. I have attached some excerpts of statutory material from surrounding jurisdictions.

Philosophically, I guess it bothers me that it is the executive branch of government that is responsible for enforcing the laws, and now also determines method of providing defense services. In theory, how can the same branch of government provide defense services when it provides prosecution services. Traditionally, that would be a conflict of interest for any lawyer involved in a lawyer-client situation.

There is no easy solution, but some of the procedures used in some of our surrounding sister states bear serious study.

Thank you again.

Recognizing that there has to be a blending or admixture of the three powers of government and recognizing there must be a significant interference by one department with the operation of another department before there is a violation of a separation of powers, we think that significant interference has manifested itself as this case demonstrated, and it is just a matter of time before more serious conflicts erupt. The experiences of the present system demonstrate that that significant interference is inevitable in the framework embodied in K.S.A. 22-4501 et seq.

We also must observe that in Kansas the three branches of government are equal, there is no residual authority in either the executive or legislative departments. State ex rel. Anderson v. State Office Building Commission, 185 Kan. 563, 568-569, 345 P.2d 674 (1979).

While the judiciary does not have any power to figure out how reasonable compensation is paid, not only is there authority that the determination of reasonable compensation is the peculiar province of the judiciary, but there is practical experience elsewhere than in Kansas to suggest that that happens uniformly other than when our executive branch makes such a determination.

We have not had time to investigate the systems in each one of our 49 sister states, but we have been able to determine the following about those states in our neighborhood:

(a) **NEBRASKA:** Nebraska has a mixed system providing for a public defender in certain counties, who is a county officer and must be in charge of indigent appointments, and is appointed by the equivalent of our county commissioners or elected. The salary is set by county commissioners. Revised statutes in Nebraska 1943, 29-1804. In 29-§1804.07 and §1804.08, in situations where there is no public defender or if for some other reason a public defender cannot serve, a private attorney is appointed. In §1804.11, it provides that the County Board pay bills of those private attorneys. The executive does not set the fee, the District Court does. 29-§1804.12. There also may be a judicial district public defender, whose salary is fixed by the Court. 29-§1805.02. Certain counties can contract for a public defender and negotiate the contract. 29-§1824-26. Notice the executive's participation is limited.

(b) **MISSOURI:** In Missouri, by legislation enacted in 1982 (presumably caused by the Court's ruling in State ex rel. Wolff v. Ruddy, supra), a state public defender office and a public defender commission were established. The Governor appoints a state public defender commission with the advice and consent of the Senate. Missouri Revised Statute 600.015. That commission reviews budget requests, among other things. §600.017. The Office of the State Public Defender is specifically created as an independent department of the judicial branch of government. §600.019. Its director is a lawyer appointed by the commission on a salary set by the commission. §600.019. From that point on, the director hires public defenders and private counsel on terms deemed appropriate to him. §§600.021, 042.

(c) **OKLAHOMA:** In Oklahoma, attorneys are appointed by the Court and reasonable compensation is determined by the court, subject to maximum limits contained in legislative authorization. Oklahoma Statutes §§22-464 and 1271. There is a provision for public defenders in some counties, but the determination as to whether or not a public defender is necessary is determined by the Court and the salary is commensurate (which the Oklahoma Court has defined to be equal) to that of the prosecutor. §§19-137.1, 138.1, 138.3, 138.4.

(d) **SOUTH DAKOTA:** In South Dakota, the Board of County Commissioners may: 1) establish a public defender office; 2) establish a system for appointing private counsel on an equitable basis; or 3) combine 1 and 2. South Dakota Codified Laws, 1979, §23-A-40-7. The fee is fixed by the judge within guidelines set by the presiding judge; must be reasonable and just compensation; must include necessary expenses and costs; and is paid by the county. The South Dakota Supreme Court decided that an attorney cannot be ordered by the Court to represent an indigent without reasonable compensation. Johnson v. City Commission of the City of Aberdeen, 272 N.W.2d 97, 101 (S.D. 1978). In post-judgment representation, the same procedure is used and the court still decides what the fee should be. §23-A-40-9.

In the event the County Commissioners decide to have a public defender system, the county provides the finances. There is an advisory commission composed of one layman, two commissioners, and two attorneys established. §7-16A-4. The County Commissioners set the salary, and the advisory commission appoints the attorney. §7-16A-1, 16A-3, 16A-4. In the event it is necessary to have a substitute attorney where there are public defender districts such as for conflicts, that attorney may be appointed (§7-16A-12) and is paid in the manner prescribed for the appointment counties or districts, that is, upon a fee determined by the court (§7-16A-12).

(e) **COLORADO:** Colorado provides that there is a right to counsel at the state's expense. Colorado Revised Statutes §18-1-501. An Office of the State Public Defender is established to provide representation. That office is an agency of the judicial branch of government. §21-1-101. There is a five-member public defender commission appointed by the Supreme Court. §21-1-101. The commission appoints the state public defender for a five-year term. §21-1-101. The salary is fixed by the general assembly and cannot be reduced during the public defender's term. §21-1-102. The public defender appoints deputies, fixes salaries, after the same are reviewed by the Court and establishes regional offices. §21-1-102. For cause, a private attorney may be appointed in place of the public defender. Reasonable compensation fixed by the court and paid from state funds, is paid for those services. §21-1-105.

(f) **NORTH DAKOTA:** In North Dakota, a straight appointment system is used. North Dakota Rules of Criminal Procedure 44 provides for the right to counsel for an indigent. The legislature has provided that court appointed attorneys are paid reasonable rates to be determined by the Court, paid by the counties in county courts, and paid by the state if in district court. North Dakota Centennial Code §29-07-01.1.

Two things are obvious and universal in these jurisdictions:

1. Each one of them handled the problem of representation for indigent defendants differently.

2. With the exception of the appropriation power, with which the judiciary is confronted in all its operations, it was the judicial branch of government or those solely responsible to the judicial branch of government who were responsible for administering the system of providing for indigent defense services.

Not one executive was involved. There may be a lot of reasons why that was the case, but one is that regulating the practice of law; regulating the pay of those who practice law; regulating the responsibilities that relate to competency to handle certain kinds of cases; and regulating the problems of the administration of the criminal justice system in the Courts are all exclusively and uniquely within the responsibility of the judiciary branch of government.

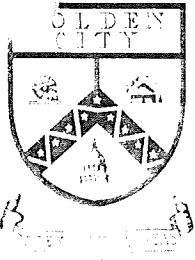
A second body of information helped create the conclusion that an unconstitutional incursion into the province of the judiciary has occurred. The evidence introduced in the hearings which led Respondents to make their decisions reveals clear reasons why the current system is a substantial interference with the operation of the judicial branch of government.

Not only do we have the executive branch of government hiring judicial officers, we have them setting their salaries, requesting their budgets, and making determinations on compensation, reasonable or otherwise. All of those decisions have to affect the administration of the court system.

As a practical matter, let's see some of the things the executive has done:

1. In the face of an increase in costs of providing defense services, the executive responsible for administering the system, the State Board of Indigent Defense Services, did not request any additional funds for appointed counsel (T. 100).

2. In the face of an executive request to trim the budget by 3.8%, the salaries of public defenders who are executive employees and the salaries of the employees of the office of the State Board of Indigent Defense Services were not reduced, but the money available to pay private attorneys appointed to defend indigents was reduced 12%, including such a reduction in out-of-



# CITY OF TOPEKA

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Municipal Court  
214 E. 8th Street  
Topeka, Kansas 66603  
Phone 913-354-1781

Senator Wint Winter  
Room 120 South  
State Capitol  
Topeka, KS 66612

January 23, 1989

Dear Senator Winter:

On January 20, 1989, I received a telephone call from your office reference Senate Bill No. 11. I was invited to testify Wednesday, January 25, 1989. I informed your Secretary I was unable to testify on that date but I would provide a written comment as President of the Kansas Municipal Judges Association.

At this time, the Association cannot support the suggested legislation. Notification given January 20, 1989, to testify January 25th is not sufficient time for me to forward the proposed legislation to the KMJA Executive Committee located throughout the State of Kansas and to receive their respective opinions and directions. Most of the Judges do not have access to legislative proposals including the members of the Executive Committee and, therefore, I must direct a copy to them.

My own personal opinion is that there is no need to require any reporting or informational process flowing from the various Municipal Courts in the State of Kansas to the Supreme Court. All of the various Municipal Court Judges report to and are supervised by their respective Governing Bodies. The Governing Bodies hire, fire and retain their Judges based upon the Judges' performance. Any reporting to the Supreme Court would be an unnecessary burden upon the various Courts and their Governing Bodies.

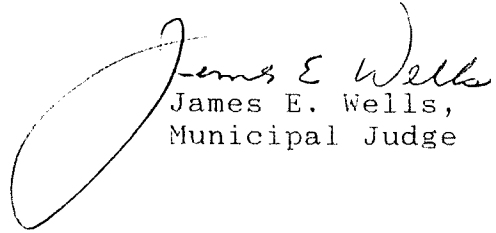
I would assume one of the reasons for reporting to the Supreme Court would be to determine if the Municipal Courts were processing cases in a timely manner. I can speak for Topeka only. First appearance is four weeks upon presentation of a citation. Trials are scheduled within 6 weeks of a request and within ten days of a request if all witnesses are available.

Copies of Senate Bill No. 11 have been sent to the members of the Executive Committee of the KMJA along with a copy of this communication. After receiving direction from said Committee, I will further report. Otherwise, the KMJA reports being against Senate Bill No. 11, at least until such time as the Executive Committee gives further direction.

*Attachment III*  
*SJC*  
*1-25-89*

Thank you for asking our opinion.

Very truly yours,

A handwritten signature in cursive script that reads "James E. Wells". The signature is written in dark ink and is positioned to the left of the typed name and title.

James E. Wells,  
Municipal Judge

cc: Fred Benson, Secretary  
KMJA  
Executive Board, KMJA



# THE CITY OF WICHITA

ROBERT A. THIESSEN, Judge Div. I  
THOMAS A. BUSH, Judge Div. II  
HAROLD E. FLAIGLE, Judge Div. III  
MAURICE MOWREY, Clerk of the Court  
JOHN J. EISENBART, Chief Probation Officer



MUNICIPAL COURT  
CITY HALL — THIRD FLOOR  
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COURT CLERK  
(316) 268-4431  
JUDGES CHAMBERS  
(316) 268-4629  
CHIEF PROBATION OFFICER  
(316) 268-4562

January 25, 1989

Senator Winter, Chairperson  
Senate Judiciary Committee  
State Capital Building  
Topeka, Kansas 66612

Re: Senate Bill 11

Ladies and Gentlemen:

The City of Wichita appears in opposition to SB 11. This bill would mandate that municipal court judges provide whatever reports or information that might be requested by the judicial administrator or Supreme Court. Our concerns are as follows:

1. There is no need for new legislation in this area. KSA 12-4108 already requires that such information be provided by the municipal clerks, which are the record keepers. We feel that there has been no showing that new legislation would provide any needed information.
2. To the best of my belief, the municipal judges of Kansas as a group were not aware of the interim study or hearings in this area. Our court and other judges have not had the opportunity to study this bill. We would request time to study it and learn of the reasons for it.
3. There is an underlying concern of the intent behind this bill. More importantly, if new reports or information is being sought by this bill, we are concerned about the unknown costs, requirements, and burdens on the municipal courts.

In conclusion, we do not see a need for this legislation. If there is, however, we would respectfully request that there be time for more study of the issues involved.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Robert A. Thiessen".

Robert A. Thiessen, Judge Attachment IV

SJC  
1-25-89