Approved 2-6-89
Date

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 February 2, 19 89 in room 514-S of the Capitol.

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

Committee staff present:

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

Conferees appearing before the committee:

Brad Smoot, Kansas Coalition for Tort Reform
Judge Richard B. Walker, Criminal Justice Coordinating Council
Neil A. Woerman, Office of Attorney General
Michael A. Barbara, Professor of Law, Washburn Law School
Richard Ney, Sedgwick County Public Defender
William R. Arnold, Kansas Council on Crime and Delinquency

Brad Smoot, Kansas Coalition for Tort Reform, requested a resolution for a proposed constitutional amendment be introduced concerning tort reform. Following his explanation, Senator Gaines moved to introduce the bill. Senator Morris seconded the motion. The motion carried.

The chairman announced another day will be scheduled for Senate Bill 49. He asked John Torbert and Ken Hayes if they could come back on that day to testify.

Senate Bill 50 - Establishing the Kansas sentencing commission.

Judge Richard B. Walker, Criminal Justice Coordinating council, testified this bill was drafted and introduced at the request of the Criminal Justice Coordinating Council. The Council believes that Kansas needs a sentencing commission to facilitate the development of a rational sentencing system which addresses the levels of punishment crime should receive, disparity in sentences between individual judges, and correlates these findings with prison resources available. A copy of his testimonty is attached (See Attachment I). During discussion a committee member inquired how will the judges accept the decision by the U.S. Supreme Court? Judge Walker responded some strongly resist any effort that is made. Let's get something on the table that you can look at. Another committee member inquired about giving instructions to sentencing commission in regard to the parole board. Judge Walker replied the sentencing commission is parole neutral. That is a major policy decision that you need to make. Let the commission do the work and then consider its recommendations and go from there. A committee member said the Federal guidelines will double prison population. In the bill should we tell the commission they are to presume parole would be the norm? Should we specify that kind of thing in here? Judge Walker responded, the language isn't that hard in Senate Bill 50. I suppose you could say, and they shall create a system that would stay within the existing capacities. I don't have any objection to doing that. The committee member inquired whether other professions be made part of the commission. Judge Walker replied the larger you get it the more difficult for the commission to get together and have a quorum and do its work. He encouraged the committee to only add people with caution.

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on February 2, 1989

Senate Bill 50 - continued

Neil A. Woerman, Office of Attorney General, presented testimony on behalf of Attorney General Robert T. Stephan. The Attorney General pledges his full support and assistance to the efforts of this committee and to the efforts of the sentencing commission which would be created by Senate Bill 50. A copy of the statement is attached (See Attachment II). Mr. Woerman stated the Attorney General would like to be part of the commission. A committee member inquired about the disparity in sentencing between judges. Mr. Woerman replied he agrees under the present system sentences do occur that are widely different for people who have same type of crimes and background. We are fully supportive of this type of model.

Michael A. Barbara, Professor of law, Washburn Law School, testified in support of Senate Bill 50. He stated I have supported this concept since 1977 and proposed it to the Kansas Judiciary when I was president of the Judges Association. A structured sentencing system, as set out in the bill, will lead to a sound and workable sentencing reform and could be a key factor in controlling prison population. A copy of his testimony is attached (See Attachment III). He said he was concerned about the people who testified against the community corrections bill. He stated he is in favor of expanding community corrections. He cautioned the committee before developing any substantial building program, you have to know what is going to happen with the sentencing program. A committee member inquired regarding the acceptance on the part of the judiciary; most judges are not in favor of changing the sentencing. Professor Barbara responded I think it is a mistake for judges to resist it. It can be worked to maintain judicial discretion and maintain capabilities of the defendant. The committee member inquired of the old criminal code. Professor Barbara replied, I think it needs to be studied.

Richard Ney, Sedgwick County Public Defender, testified in support of the bill. He stated uncontrolled judicial discretion has taken justice out of our justice system. We must direct our state to a sentencing guidelines system which controls disparity by use of set determinate sentences. A copy of his testimony is attached (See Attachment IV). During discussion a committee member inquired to what extent should there not be a parole board? Mr. Ney replied I would urge that determinate sentencing should be part of this bill. I think there should be fixed sentencing; there should be provisions when judge can name exceptional circumstances. The committee member inquired you are not opposed to having discretion with the judges? Professor replied it should be limited to a certain percentage.

William R. Arnold, Kansas Council on Crime and Delinquency, testified in studying the guidelines system in Minnesota they had a problem in racial disparity. I don't think we have this in Kansas. He stated the sentencing commission must continue to operate on a regular basis. He reported, in Minnesota guidelines, there is the provision to appeal sentences. The number of exceptions run now about 11%; it has increased about four or five percent in operation of the guidelines. There is no increase in judge bargaining by the prosecutors. He reported in Minnesota the opinions of the judges about the system; 54% favored supporting the guidelines and 45% opposed. The judges generally felt the guidelines were an improvement over the previous system. Sixty-five percent felt it was an improvement and thirty-three percent felt it was worse. Judges felt it is effective. He said he would try to make copies available to the committee of his testimony given last year.

Following two corrections to the minutes, Senator Parrish moved to approve the minutes of January 31, 1989, as corrected. Senator Rock seconded the motion. The motion carried.

The meeting adjourned.

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

Copy of a statement from Johnson County Board of Commissioners is attached (See Attachment VI).

Copy of position statement from Kansas Coalition for Tort Reform (See Attachment VII).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 2-2-89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Jan Johnson	Topeka	Dept of Corrections
Richard Ney	Wichita	Sedg. Co. Pros. Def.
Wm. R Arnold	Lawrence	Ks Council on Crime & Del
Tom Wilhelm	Lawrence	Gov Liaison
Jeff Bakid	Topeka	Dept of Corrections
Paul Shelby	Topeka	Supreme Court
Neil Woerman	Topeka	Atty. Gen.
Richard Walker	Newton	Dist Judge
Tom Walker	"	Rep
Jan Brax	Topeka	Defenders Dept
Kris Callahan	Topeka	am. cons. assoc
Gerhard Metz	"	KCCI
Ken Wilke	"	Shawnee County
Michael A. Barbara	"	self
John Torbert	"	KDC
Gary Ray	Olathe	J Co Commissioner
Nancy Lindberg	Topeka	A. G.
Sandy Smith	Topeka	KPB
Mike Hayden	Topeka	KPB
Ann Hebberger	Overland Park	LWVK
Gayla Russell	Topeka	KDOC
Edwina J Tomasic	Topeka	Parole Board
Steven A. Robinson	Topeka	Ombudsman for Corrections
Dawn Pellant	Topeka	KDOC
Whitney Damron	Topeka	MJ & Assoc

Attachment II
Senate Judiciary Committee
2-2-89

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: _____

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Alex Schmidt	2119 Quail Creek Dr.	—
Becky Shirley	Topeka	Intern
Brad Smoot	Topeka	KCTR
[illegible]	[illegible]	[illegible]
[illegible]	" "	K.A.C.S.O.
Therese Bangert	118 NW Fillmore Topeka	KCCD
Kathleen Sebelius	Legislature	
[illegible]	KCDAA	[illegible]
Helen Stephens	Topeka	KPOA
William Rich	Topeka	Washburn Law School
Lisa Mathewson	"	"
ROBERT HEDBERG	TOPEKA	YOUTH SERVICES
Ron Smith	"	Ks Bar Assoc

RICHARD B. WALKER
District Court Judge
Harvey County Courthouse
Newton, Kansas 67114

JUDGES OF THE NINTH JUDICIAL DISTRICT
Harvey and McPherson Counties
ADMINISTRATIVE JUDGE
CARL B ANDERSON, JR.
DISTRICT JUDGES
THEODORE B. ICE, Division I
RICHARD B. WALKER, Division II

TELEPHONE
(316) 283-6900

February 2, 1989

Chairman Winter and members of the Senate Judiciary Committee:

I appear here today in support of Senate Bill 50, which would create the Kansas Sentencing Commission. This bill was drafted and introduced at the request of the Criminal Justice Coordinating Council, which was created in mid-1989 by Governor Hayden, and includes among its members Senator David Kerr and Senator Frank Gaines of this committee. I am appearing here today as the designated representative of the CJCC to explain the bill and why it is needed.

This bill is quite similar to House Bill 3125 which was introduced in the 1984 legislative session and blends portions of that bill with some provisions used by the State of Minnesota in their sentencing commission legislation.

The Criminal Justice Coordinating Council believes that Kansas needs a sentencing commission to facilitate the development of a rational sentencing system which addresses the levels of punishment crime should receive, disparity in sentences between individual judges, and correlates these findings with prison resources available. The commission would have a broadly based membership, and should be tied to a capable staff which can bring the immense amount of information available under control in time to meet the short reporting deadlines set in the bill (interim report by January, 1990; final report by January, 1991).

In perhaps no other area does the Kansas Legislature currently commit so many resources, for judges, prosecutors and defense lawyers, probation officers, correctional officers, parole officers, without stepping back to see how the whole thing fits together. You are expected to make critically important multimillion dollar decision on this system without any real overview on the many pieces of the sentencing puzzle. The task of the sentencing commission would be to give you concrete recommendations on who should go to prison, and for approximately how long. It should also make you better predictors of how changes will affect the system. While it cannot promise instant relief from crowded prisons, it can give you a rational basis for deciding who should be in prison. What you ultimately adopt will then send a much clearer message to judges and correctional officials as to who you expect to be incarcerated.

The Criminal Justice Coordinating Council believes this work is so important and urgently needed taht it should not be delegated to an existing agency, but assigned to a newly created commission as its primary task. Several other states and the federal government have already created similar commissions.

Attached to this page are two minor recommended amendments which I believe will help clarify the legislation. Since the CJCC did not review a final draft of the bill before its introduction, these recommendations should be considered mine alone.

Richard B Walker

SJC
2-2-89

Attachment I

Suggested amendments to Senate Bill 50:

On page 1, line 26, strike the word "fixed" and insert "presumed"

Rationale: The CJCC did not feel that the legislature should make any decision on whether to maintain the current indeterminate term method of sentencing or adopting a new determinate sentencing system or some alternative hybrid system until after the commission had completed its work and made recommendations. The word "fixed" seems to suggest a change to a determinate sentencing system is desired which is not at all what the CJCC is recommending. The term "presumed" indicates that the guidelines would recommend a particular sentence to the sentencing judge (using any kind of sentencing scheme) which could then be departed from by the judge if appropriate findings were made.

On page 3, line 80, strike the words "and recommended guidelines"

Rationale: At the end of only six months of work, the commission should be required to give the legislature a progress report, but could hardly be ready to give you any intelligent set of guidelines. These should be submitted along with the final report in 1991.

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

STATEMENT ON BEHALF OF
ATTORNEY GENERAL ROBERT T. STEPHAN
DELIVERED BY
NEIL A. WOERMAN, CHIEF OF STAFF
TO THE SENATE COMMITTEE ON JUDICIARY
RE: SENATE BILL 50, ESTABLISHING A SENTENCING COMMISSION
FEBRUARY 2, 1989

Mr. Chairman and Members of the Committee:

Attorney General Stephan regrets that he is unable to appear before you personally today to support Senate Bill 50, which would establish a sentencing commission to recommend a new sentencing model for the State of Kansas.

Attorney General Stephan was indeed pleased with the introduction of Senate Bill 50. The bill calls for the commission to develop a sentencing guideline model or grid based on fairness and equity. It states that such a model or grid "shall establish rational and consistent sentencing standards which reduce sentencing disparity and shall specify the circumstances under which imprisonment of an offender is appropriate and a fixed sentence for offenders for whom imprisonment is appropriate based on each appropriate combination of reasonable offense and offender characteristics." While it may take a couple of minutes for that language to sink in, in short, the bill seeks to make sense out of our sentencing system.

Attachment II
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2-2-89

Should this bill become law, it will move one step closer to what Attorney General Stephan called for nearly a decade ago which is a form of sentencing he termed presumptive sentencing. In describing a presumptive sentencing plan before a committee of this legislature in 1980, Attorney General Stephan said:

"Citizens continually tell me they are amazed when they learn that a person who receives a sentence up to 28 years can be released in 120 days. I know that people think something is wrong when two persons having essentially the same background can commit the same crime, yet receive different sentences.

"The objective of the proposal I submit to you today is to put some order and uniformity into criminal sentencing and to make certain that the same crime under similar circumstances draws essentially the same sentence, no matter who the judge is, who the criminal is or where he lives."

There is a great deal of similarity between the Attorney General's 1980 testimony and the charge of this bill to a sentencing commission. The sentencing model suggested appears also to resemble the sentencing guidelines recently adopted in the Federal system and which has passed constitutional muster. The Attorney General urges you to approve Senate Bill 50. Serious consideration of this approach to our criminal justice system, to sentencing and to correction's policy has been a long time in coming. Attorney General Stephan pledges his full support and assistance to the efforts of this committee and to the efforts of the sentencing commission which would be created by Senate Bill 50.

Thank you for this opportunity to express the Attorney General's support for this bill.

SENATE COMMITTEE ON JUDICIARY - SB 50

Testimony of Michael A. Barbara, Professor of Law, Washburn Law School, former Kansas District Judge and former Kansas Secretary of Corrections, February 2, 1989.

I am in favor of SB 50, establishing a Kansas sentencing commission to develop sentencing guidelines. I have supported this concept since 1977 and proposed it to the Kansas judiciary when I was president of the Judges Association. A structured sentencing system, as set out in the bill, will lead to a sound and workable sentencing reform and could be a key factor in controlling prison population.

Sentencing guidelines, legislatively mandated, will be more effective in carrying out sentencing goals than any legislative enactment of determinate or fixed sentencing. Guidelines will still allow for important differences in sentencing in individual cases than definite, fixed sentences.

Experience since 1978 has taught us that legislative determinate sentencing has had an effect of increasing prison population.

Sentencing guidelines, properly implemented, can maintain sentencing discretion where it belongs, with the judiciary, can address sentencing goals, control prison population and still provide certainty and truth in sentencing.

Some states which have implemented sentencing guidelines have not met with much success in achieving these goals. The main reasons for their failure were the lack of coordinating sentencing policies with correctional policies, non-consideration of prison capacities and non-consideration of the use of intermediate and non-incarceration sanctions as well as use of imprisonment. SB 50 addresses these factors.

I believe we are on the right track by addressing this problem with a comprehensive view. The expansion of community corrections statewide will be a substantial factor in diverting certain nonviolent offenders from the state prisons. The Criminal Code Advisory Committee of the Kansas Judicial Council is studying the substantive criminal code and its penalties. These are positive factors in coordinating sentencing and correctional policies.

1988 prison population figures released by the Department of Corrections show that 61% of felons committed to prison had no prior felony conviction and 81% had no prior incarceration. More than two-thirds (68%) were D and E felony convictions. Surely a more comprehensive sentencing system with a focus on alternative sanctions would go a long way towards alleviation of the prison overcrowding problem facing us today and tomorrow. This issue can be addressed in SB 50 as written.

Attachment III
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Expansion of prison facilities, sorely needed at this time, must be considered and evaluated within the scope of SB 50 and that which will be fashioned out of it by the sentencing commission. Caution is urged in this regard.

Testimony of Richard Ney
Before the Senate Judiciary Committee
Senate Bill 50
Presented February 2, 1989

Two young men, charged and convicted of the same offense. Their prior records are the same, even the recommendation of the prosecutor is identical. They are sentenced on the same day in the same courthouse. One is sent to prison, one is placed on probation. The reason for the difference in sentencing is simple -- they were sentenced by different judges. Most distressing is when two judges hear the cases of co-defendants and one is given a greatly different sentence than the other for the same crime.

Any participant in the criminal justice system can tell you this is literally a daily scenario. The disparity is not limited to sentences between one judge and another, a given judge often will grant probation to one individual and the next day deny probation in an identical case involving an identical defendant.

Minnesota was one of the first states to create a systematic approach to sentencing by use of a sentencing grid. In that system, a number of factors are weighed and given numerical value, including the nature of the offense and the offender's past record. The resulting numerical value determines whether the offender will be incarcerated and the length of the sentence he will serve. This procedure creates a uniformity in sentencing clearly not currently found in Kansas.

Implementation of such a sentencing grid would also restore a sense of fairness to sentencing in Kansas that does not now exist. It is a fact which any participant in the criminal justice system

Attachment IV
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will verify that whether a person is sentenced to prison depends on what county he is charged in and what judge within a county he is assigned. To have two similar defendants sentenced to vastly disparate sentences merely because of which judge he was lucky or unlucky enough to draw is not only bad for the concept of justice, but also bad in the context of prison population control. Sentencing guidelines have effectively controlled prison population in Minnesota.

Determinate sentencing is a concept that has worked extremely well as part of the system. A determinate sentence or flat sentence is imposed by the judge and represents the actual time, less good time credit, that the offender will serve. There is no minimum or maximum term and there is no parole decision. When the individual has served his time he is released and serves a specified period of time on conditional discharge, a program much like parole.

The difference in determinate sentencing states is that there are no parole decisions nor indeed any parole board. Both the offender and institution know the amount of time he will serve and must schedule any rehabilitation programs necessary during that time. Twelve years ago, Illinois adopted determinate sentencing and by its use has effectively controlled its prison population. Determinate sentencing coupled with a sentencing guideline system would have a dramatic effect in managing prison population levels over the long-term in Kansas.

One reason for rising prison population is that extremely long sentences are being handed down for relatively minor, nonviolent offenses. These sentences are the product of

application of the Habitual Criminal Act and consecutive sentencing. The Habitual Criminal Act allows a judge to impose double or triple the normal maximum sentence based on one or two prior felony offenses. These prior offenses need not be recent or of a serious nature. For example, a person could receive a sentence of six to twenty years for the offense of burglary, twice the normal maximum, because of a felony worthless check case 15 years in the past.

The imposition of enhanced sentences is left entirely within the discretion of the court, without guidelines for when it should or should not be used. This is contrary to American Bar Association Standards which recommend specific findings of dangerousness before habitual offender laws can be imposed. ABA Standards also would prohibit enhancement if more than five years had elapsed between the current charge and the commission of the last prior offense.

The use of consecutive sentences is similarly uncontrolled. When consecutive sentences are coupled with the Habitual Criminal Act the results are sentences of a nature that the Legislature never envisioned.

A recent case in Sedgwick County found an individual convicted of three sales of marijuana to the same undercover agent on consecutive days. The offender had a record of several nonviolent offenses. The sentencing court imposed the maximum of five to 20 years on each of the three counts of sale of marijuana. Under the Habitual Criminal Act, the court tripled each of these sentences of sentences of 15 to 60 years on each count. The court then ordered that the sentences run consecutive to one another for

a total of 45 to 180 years. This individual will be eligible for parole after 32 years, while a person convicted of first-degree murder would be eligible for parole after 15 years.

ABA Standards recommend against the use of consecutive sentencing and habitual offender enhancement in tandem. The laws of a number of states forbid more than the two highest sentences that a defendant receives from being run consecutively. Unlike most other jurisdictions, current sentencing laws in Kansas require consecutive sentences in a number of circumstances, whether the court deems such a sentence appropriate or not.

Controls must be placed on the use of consecutive sentences and the Habitual Criminal Act in order to place ceilings on sentences that are commensurate with the nature of the offense. Unbridled use of these devices has lead to long sentences and a growing pool of individuals who will not reach their parole eligibility date for decades. A sentencing guideline commission can implement these controls.

Uncontrolled judicial discretion has taken justice out of our justice system. We must direct our state to a sentencing guideline system which controls disparity by use of set determinate sentences. A system which removes the one-way escalator of habitual offender and consecutive sentence provisions. A system which returns consistency and the appearance of justice to our courts.

Johnson County
Kansas

February 2, 1989

TO: The Senate Judiciary Committee

FR: Gerry Ray, Intergovernmental Coordinator
Johnson County Board of Commissioners

RE: Senate Bill 49

Johnson County supports Community Corrections and recognizes the benefits of a statewide system, however there is concern about Senate Bill 49 requiring counties to establish and operate such programs. We have always considered Community Corrections a voluntary partnership between the state and participating counties and do not support a digression from that philosophy. There are questions as to the necessity or efficiency of operating community corrections in all areas of the state and we would urge careful scrutiny to ascertain if the actual number of offenders brought in under a statewide system justifies the expense involved.

The County further supports the existing method of funding through an entitlement formula rather than by a grant system that has been proposed as an amendment to SB 49. It is recommended that a review of the entitlement formula be conducted to insure equity among the counties with similar caseloads.

As an update on the Johnson County Program the following information is provided for the committee's review:

...In 1988 the five criminal court judges in Johnson County referred 153 cases to the Community Corrections program in addition to 305 cases that were under supervision on January 1, 1988.

...The verified wages of those under supervision in 1988 exceeded $1.3 million. They paid $250,000 in taxes, $110,000 restitution to victims and court costs of $38,000. These monies came back into the community's economy rather than a cost to taxpayers of up to $13,000 per year for incarceration in a Kansas Correctional Institution, making the Johnson County entitlement of $992,000 an excellent investment.

...As of January 31, 1989 the Johnson County Community Corrections program is supervising 375 probationers on Intensive Supervision and 33 in residential/work release, for a total caseload of 408. Since the beginning of 1988 there has been an 18% increase in caseloads therefore there should be commensurate increases in economic benefits to the community.

SJC
2-2-89
Attachment VI

Office of County Administrator 100 E. Park, Suite 205 Olathe, Kansas 66061 (913) 782-5000 Ext 5251

Statewide, the ten existing Community Corrections programs in twelve counties provide sentencing alternatives to over 2,000 people who would otherwise be in prison. This is a significant number representing the type of results that deserve serious consideration due to the relief which is being provided to the overburdened state prison system.

The Johnson County Commission believes the existing community corrections system is working and that the above information illustrates its success. Therefore the Commission requests that the Judiciary Committee recommend there be no changes in the statutes pertaining to the relationship between the state and counties for the continued operation of the Community Corrections Program.

Gerry Ray

KANSAS COALITION FOR TORT REFORM

POSITION STATEMENT

INTRODUCTION

We are the Kansas Coalition for Tort Reform. Our membership includes individuals, private business and public corporations, professionals, and local and statewide associations. We represent Kansans from all walks of life - farmers; businesses, large and small; local and statewide chambers of commerce; health care providers and others concerned about the civil litigation and liability crisis.

BACKGROUND

In Kansas, the costs of personal injury litigation and the corresponding availability and affordability of liability insurance first became a crisis in the health care field. In 1985 and 1986, the Legislature attempted to put much-needed stability into the medical malpractice insurance market by passing laws to reform the way our court system handles medical malpractice claims and suits. These "tort reforms" included limitations on how much money could be awarded in malpractice cases.

The 1987 Legislature recognized that other professions, businesses and consumers have also experienced serious litigation and liability problems. The Kansas Legislature again responded by enacting new laws designed to remedy these problems. These changes included both procedural revisions and a limit on recovery for pain and suffering (non-economic damages), but specifically excluded medical malpractice cases, which already had been covered by the earlier 1985-86 legislation.

In July 1987, the Kansas Supreme Court ruled in a 4-3 decision that the medical malpractice reform legislation was unconstitutional because the 1985-86 tort reform laws applied only to medical malpractice cases, rather than uniformly to all personal injury cases. In response to the Court's ruling, the 1988 Legislature carefully drafted a new set of tort reform laws generally applicable to all personal injury lawsuits. On June 3, 1988, the Kansas Supreme Court struck another blow against the Legislature's tort reform efforts, declaring that our state constitution did not permit the Legislature to place caps on damage awards.

The 1988 Court ruling sent a clear message to the Legislature, consumers, health care providers, and the business community in Kansas that even modest legislative intrusion into the Court's absolute control over tort law would not be allowed. In spite of compelling need for, and the public benefits of, statutory tort reform, it is apparent that the Kansas courts will not allow the Legislature to impose any restraints on the tort system without first amending the state constitution.

Attachment VII
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THE PROBLEM

During these years of dedicated legislative effort, the liability and insurance situation in Kansas has worsened. Some physicians have left the state or retired early, while others have been forced to reduce basic health care services in order to qualify for lower-risk, less-expensive liability insurance.

Businesses are compelled either to increase their prices or discontinue goods and services offered to consumers. At a time when many other states have passed successful tort reforms (at last count, 18 states had passed limits on non-economic damages), Kansas is seen by the business and professional communities as an unpredictable environment with an unstable tort system and a Legislature that is unable to assert its authority in this vital area of public policy.

Today, the legal system for resolving personal injury disputes remains unrestrained and very costly. Of the total dollars expended by Kansas medical malpractice insurers, less than half are actually paid to plaintiffs as compensation for their injuries. Transaction costs, particularly legal fees, consume the majority of medical malpractice insurance dollars. This unacceptable situation is characteristic of the liability environment in general.

We face a dilemma, indeed. Professionals and businesses in Kansas desire liability insurance for two reasons: (1) to protect against financial disaster, and (2) to make certain that injured persons will be adequately compensated. Yet when the insurance coverage becomes unavailable or unaffordable, neither objective can be met. High insurance rates and uncertain availability of coverage create disincentives for businesses to locate in Kansas and make it difficult to recruit and retain health care providers. This situation is harmful to all Kansans, and particularly to those in small towns and rural areas.

THE SOLUTION

Members of the Kansas Coalition for Tort Reform support the jury system and believe that injured persons should be adequately compensated. However, we do not believe that non-economic damage awards can continue to escalate totally unrestrained. Kansas simply cannot afford increasing costs of litigation which bear no reasonable relationship to actual monetary losses.

Under the Court's interpretations of the state constitution, the Legislature cannot limit the amount of money awarded to plaintiffs in personal injury cases without first amending the state constitution. Thus, the constitutional issue is whether the people of Kansas want the courts to have exclusive authority over tort liability issues or would like that power to be shared with their elected Legislature.

The constitution of Kansas belongs to the people of Kansas. It is the written authority by which the powers of the public are delegated to the three branches of government. The people created the constitution, and only the people can change it. In order for the people to be able to vote on this most critical issue, two-thirds of the Legislature must vote to put the issue on the ballot. If the people approve the amendment, the Legislature would then be authorized to re-enact the same or similar limits on non-economic damages that it has already passed.

The Legislature has tried for years to remedy the tort litigation crisis, only to be thwarted by the courts. In such cases, where ongoing disagreements exist between the legislative and judicial branches of government over establishing public policy, we must turn to the people for guidance and resolution. The Coalition believes that Kansans should be given the right to vote on the critical issue of tort reform.

RESOLUTION NO. _____

A PROPOSITION to amend Article 2 of the Constitution of the State of Kansas by adding a new section thereto authorizing the Legislature to limit the amount of recovery for non-economic damages in any claim for personal injury.

BE IT RESOLVED by the Legislature of the State of Kansas, two-thirds of the members elected to the Senate and two-thirds of the members elected to the House of Representatives concurring therein:

Section 1. The following proposition to amend the Constitution of the State of Kansas shall be submitted to the qualified electors of the State for their approval or rejection: Article 2 of the Constitution of the State of Kansas is amended by adding a new section thereto to read as follows:

Article 2, Section 31. Limitation on non-economic damages.

(a) The legislature may enact laws limiting the amount of non-economic damages awarded for any claim for personal injury. No provision of this constitution shall limit the powers of the legislature herein conferred, except that the legislature may not limit non-economic damages awarded against a party causing the injury if such party has been convicted of a crime arising from the conduct causing the injury.

(b) Non-economic damages are losses for which there is no unit value, mathematical formula or rule of calculation and include but shall not be limited to pain and suffering, disability, disfigurement, inconvenience, mental anguish, humiliation, loss of capacity to enjoy life, bereavement, loss of society, loss of companionship, loss of consortium, loss of reputation and other losses which are intangible in nature.

Section 2. The following statement shall be printed on the ballot with the amendment as a whole.

Explanatory Statement: This amendment would allow the legislature to limit the amount of non-economic damages a person could recover in a personal injury action. Non-economic damages include pain and suffering, disability, disfigurement, inconvenience, mental anguish, loss of capacity to enjoy life, bereavement, loss of reputation, loss of society, loss of companionship, loss of

consortium, humiliation, and other losses for which there is no unit value, mathematical formula or known rule for calculation. A "personal injury" includes all actionable injuries to an individual as distinguished from injuries to the individual's property, and includes bodily and emotional injuries as well as injuries to reputation and character. The limitation would not apply if the conduct of a party causing the injury results in a criminal conviction.

A vote for this amendment would allow the legislature to limit the amount of non-economic damages a person could recover in any claim for personal injury.

A vote against this amendment would continue the present system of assessing and awarding damages for non-economic losses.

Section 3. This resolution, if concurred in by two-thirds of the members elected to the Senate and two-thirds of the members elected to the House of Representatives, shall be entered on the journals, together with the yeas and nays. The Secretary of State shall cause this resolution to be published as provided by Section 1 of Article 14 of the Constitution and shall cause the proposed amendment to be submitted to the electors of the State at the general election in the year 1990 as provided by law unless a special election is called at a sooner date by concurrent resolution of the Legislature, in which case it shall be submitted to the electors of the State at such special election.