Approved: February 3, 2000
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on January 20, 2000 in Room 313-S of the Capitol.

All members were present except:
Representative Geraldine Flaharty - excused
Representative Andrew Howell - excused
Representative Phill Kline - excused
Representative Rick Rehorn - excused
Representative Clark Shultz - excused
Representative Dale Swenson - excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:

Representative Richard Reinhardt
Donna Sandidge, Oakley Sunglasses Inc.
Paul Davis, Kansas Bar Association
Honorable David Mikesic, 29th Judicial District, President of Kansas District Judges Association
Honorable Michael Freelove, 16th Judicial District, District Magistrate Judge

Hearings on **HB 2596 - creating the crime of counterfeiting; relating to forfeiture**, were opened.

Representative Richard Reinhardt introduced Donna Sandidge, Oakley Sunglasses Inc. Ms Sandidge explained to the committee that Oakley Sunglasses are manufactured and assembled in the United States and sales throughout the world in selected retail stores for $100 - $225.

They have a tremendous counterfeit problem, such as receiving an average of 50 counterfeit glasses sent to their warranty department each week. This causes loss of sales and stockholder concerns, not to mention "customers" who believe that they have purchased a pair of Oakley Sunglasses, only to find out that they are counterfeits.

Their documentation shows they have a huge financial loss of profits in Kansas. One account has called repeatedly saying that his sales have decreased because of the counterfeier taking customer sales from his store by selling his "Oakleys" at a discounted rate and portraying them as genuine Oakleys. (Attachment 1)

Hearings were **HB 2569** were closed.

Hearings on **HB 2499 - nonpartisan election of judges**, were opened.

Paul Davis, Kansas Bar Association, urged the committee to keep an open mind when discussing the topic of election & selection of judges. The Bar supports the method of selecting district court judges as a uniform method of non-partisan, merit selection. He provided the committee with a history of judicial selection in Kansas and an article by Jeffrey Jackson, entitled *The Selection of Judges in Kansas: A Comparison of Systems.* (Attachment 2)

Honorable David Mikesic, 29th Judicial District, President of Kansas District Judges Association, appeared as an opponent. He stated that the Association feels that if they have to run for an elected office that they want their party affiliation known. (Attachment 3)

Honorable Michael Freelove, 16th Judicial District, District Magistrate Judge, also opposed the bill. He believes that the non-partisan election of judges would be a process that the public wouldn't understand. (Attachment 4)

The committee meeting adjourned at 4:45 p.m. The next meeting is scheduled for January 24, 2000.

**STATE COMMITTEE HEARING**

**STATE OF KANSAS**
**2000**

REGARDING H.B. 2526

JANUARY 20, 2000

---

Introduction DONNA SANDIDGE, INTELLECTUAL PROPERTY CONSULTANT, OAKLEY, INC.
Name, position, traveled from California to testify regarding the importance of HB2526.

Oakley, Inc.
Oakley, Inc. is an innovation-driven designer, manufacturer and distributor of high-performance sunglasses having its worldwide headquarters in Foothill Ranch, California.

The glasses are manufactured and assembled in the United States.

The products are available for sale throughout the world, in select retail stores for $100 - $225 and represent over 250 million dollars in sales for our accounts each year.

Selective Distribution
- Selectively distributed so accounts can educate consumers on the product and assist them in buying the best product for their needs; technical product
- Never includes swap meet vendors, street vendors, or door-to-door peddlers
- Carefully selected base of approximately 7,100 accounts, representing more than 10,000 retail locations, including optical stores, sunglass retailers and specialty sports stores

Our Products
- UV Protection
- Impact Resistance

Moreover, genuine Oakley glasses exceed government standards for impact resistance. This means that Oakley glasses can withstand the brunt of a

shotgun blast from fifteen yards and can withstand the impact of a 500 gram conical missile dropped on the lenses of the glasses from a height of four feet.

- Optically Correct

Why should we react?

- Trademarks are intended to indicate the source or origin of a product to the buyer; that source indicates quality and quality control.
- In Oakley's case, our product line is technologically unique and undergoes stringent quality control examinations; no seconds are released for sale.
- We view trademark theft the same as we view someone walking in our warehouse and taking a carton of sunglasses out.
- Oakley, Inc. is committed to protecting our goodwill and reputation and will spend over one million dollars on our intellectual property and anti-counterfeiting programs this year.
- Frankly, we have a tremendous counterfeit problem. We receive an average of 50 counterfeit glasses through warranty each week.
- Counterfeits do not generate repeat business.
- Health and Safety Risks – previously illustrated
- Financial issues
    1. Loss of sales and morale for our accounts
    2. Analyst and stockholder concerns affect stock
- Ultimately, the consumer, your constituent, is the victim
    1. Recent trend of kids selling to kids; moral issue
    2. Recent trend of house parties
    3. Angry b/c purchased genuine product for high dollars, now seeing what they perceive as the same product for less money.
    4. Most of our tips on counterfeiters are loyal Oakley users or consumers who have been duped by counterfeiters

History: Why Kansas?

- Our accounts in Kansas are documenting lost sales to counterfeiters. We feel our hands are tied without a meaningful law to prosecute trademark theft.
- In particular, one account has called repeatedly with accurate information on a counterfeiter stealing sales and consumers from his store. He has begged us to assist in the introduction of legislation in this state. He reports that the local law enforcement would like to assist him, but have no ammunition.
- Over the past year, an interesting pattern has evolved. Known counterfeiters in Missouri and Oklahoma (many of them apprehended

under those local penal codes) are traveling to Kansas to sell counterfeit Oakley glasses in that state. The general perception of these traveling salesmen is that Kansas is a safe place to sell. The same vendors we have successfully stopped in Missouri and Oklahoma are simply traveling to those states with more lenient laws.

- In fact, we have an open investigation on a counterfeiter in Topeka shipping product to Miami, and possibly exporting counterfeit Oakley merchandise.

Passage of House Bill 2526 will greatly assist US-based companies in combatting the crime of counterfeiting and protecting consumers from such fraud.

On behalf of Oakley, Inc., I thank the Committee for the opportunity to submit this testimony

---

OAKLEY, INC.
ONE ICON
FOOTHILL RANCH, CA
92610
1.800.733.6255

---

KANSAS BAR ASSOCIATION

1200 SW Harrison St.
P.O. Box 1037
Topeka, Kansas 66601-1037
Telephone (785) 234-5696
FAX (785) 234-3813
Email: ksbar@ink.org

# LEGISLATIVE TESTIMONY

January 20, 2000

TO: CHAIRMAN MIKE O'NEAL AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE

FROM: PAUL T. DAVIS, LEGISLATIVE COUNSEL

RE: HOUSE BILL 2499

The Kansas Bar Association appears today as neither a proponent or opponent of House Bill 2499. While we view this bill as a step in the right direction, we believe the best method of selecting district court judges is a statewide uniform method of non-partisan, merit selection. The first comprehensive study since 1974 of the Kansas court system is the Kansas Justice Initiative. The first recommendation of the Initiative was to adopt a constitutional amendment providing for the non-partisan, merit selection of district court judges. The Special Committee on Judiciary studied this issue during the interim and has recommended the introduction of a constitutional amendment. The Kansas Bar Association strongly supports this finding of the Kansas Justice Initiative and urges the legislature to enact such a constitutional amendment.

When asked the question: Should we elect or appoint judges? An elected official's natural gut reaction is to favor electing members of the judiciary. However, we ask you to please keep an open mind on this issue. The attributes of the systems for selection are complex and deserve a thorough analysis before reaching a conclusion. I have enclosed an article in the most recent Kansas Bar Journal which provides a wonderful comparison of the two systems. I urge you to read the article because I know it will provide you with a better analysis of the issue.

The most powerful testimonial to taking a thorough look at this issue was provided by Jill Docking, who served as Co-Chair of the Kansas Justice Commission with former Governor Robert Bennett. Ms. Docking testified before the Special Committee on Judiciary this past summer that before serving on the Commission she was an ardent supporter of electing judges. But after carefully studying the issue during the proceedings of the Kansas Justice Commission and receiving input from judges, lawyers and litigants, she now believes that the non-partisan, merit selection of judges is the superior manner of selection. Therefore, we believe it is best to begin with a history of where Kansas has been in terms of judicial selection.

**History of Judicial Selection in Kansas**

When Kansas achieved statehood in 1861, there was a strong movement throughout the Union to elect judges. Kansas became part of this movement and elected judges in a partisan manner until 1913[1]. Around the turn of the century, a general dissatisfaction with the partisan selection method gained momentum causing several states to change to non-partisan election of judges. Many people felt that the whole election system subjected judges to the realm of politics, and therefore, eroded public confidence in the judiciary. Once again, Kansas conformed with this national trend and shifted to the nonpartisan election of judges in 1913. However, the legislation authorizing non-partisan election of judges was quickly repealed in 1915 after a great deal of dissatisfaction with the process[2].

In the 1923 and 1925 legislative sessions, the Kansas Bar Association advocated nominating judicial candidates at party conventions instead of party primaries in an effort to address problems related to the lack of voter recognition of judicial candidates. These attempts, however, were thwarted by the legislature[3]. In the 1930s, the newly formed American Judicature Society devised a new system for selecting judges which was endorsed by the American Bar Association and adopted in Missouri in 1940. It provided for a judicial nominating committee that would screen candidates for the bench and then

---

[1] Kansas Constitution Article 3, Section 11 (1859).
[2] John F. Fontraon, Jr., *The KBA Story in Requisite Learning and Good Moral Character: A History of the Kansas Bench and Bar*, p. 16 (1982)

submit several recommendations to the governor, who would then make the appointment. This plan, known as merit selection, gained wide acceptance throughout the country after World War II[4].

The Legislature considered constitutional amendments in both 1953 and 1955 that would have adopted the non-partisan, merit selection of judges statewide but they were defeated in committee. Then in 1956 the infamous "triple play" occurred. Governor Fred Hall was defeated in the Republican primary by Warren Shaw, who went on to lose the general election to George Docking. After the election, Chief Justice Bill Smith submitted his resignation to Governor Hall, who in turn resigned as Governor. Lieutenant Governor John McCuish became Governor and appointed Hall to the Supreme Court. It was McCuish's only official act during the 11 days he served as Governor[5].

The Legislature acted quickly by submitting a proposal to adopt the merit selection of Supreme Court justices, which was passed by a significant margin in the 1958 general election. The merit selection plan (also known as the commission plan) provides for a statewide nominating commission composed of both lawyers and non-lawyers. Lawyer members are elected by other members of the bar while the non-lawyer members are selected by the governor. Candidates for the Supreme Court are reviewed by the nominating commission which then forwards three names to the governor. This procedure has also been used for the Court of Appeals since it was established in 1975[6].

In 1972, the Constitution was once again amended to allow judicial districts to opt for non-partisan, merit selection of judges. Voters in a judicial district may submit a petition to have the issue put on the ballot for the general election[7]. Since 1972, 17 of the 31 judicial districts in Kansas have opted for non-partisan selection of district court judges. When a judicial district exercises this option, a nominating commission of lawyers and non-lawyers is formed. The Commission follows the same selection process for Supreme Court justices and Court of Appeals judges.

---

[3] Id at 16-17.
[4] Sari S. Escovitz, *Judicial Selection and Tenure*, p. 6 (1975).
[5] *Id* at 17.
[6] K.S.A. 20-3004 and K.S.A. 20-3005.
[7] Kansas Constitution, Article 3, Section 6.

**Non-partisan, merit selection ensures judicial independence**

Judicial independence is a hallmark of our form of government. It is deeply rooted in the founding of our nation and the Constitution. The concept of judicial independence is that judges should be free to decide cases according to their merits, without fear of reprisal from the public or the executive or legislative branches of government. [8] However, elections directly subject judges to these very pressures, and increase the likelihood that judges will be removed from office simply because a decision, although legally correct, is unpopular to a majority of persons, or even to a vocal minority[9]. When the Kansas Justice Initiative surveyed Kansas judges and lawyers on this issue, 40% of attorneys strongly agreed with the statement that "election of judges creates a potential for conflict of interest when attorneys or parties before the court have supported the judge in an election." However, the most surprising result was that 55% of judges said they strongly agreed with this statement.

The Kansas Commission on Judicial Qualifications, the group that receives, reviews and acts upon ethical complaints against Kansas judges, took the rare step of writing to the Kansas Justice Commission in support of the non-partisan, merit selection of judges. "Judges in the remaining fourteen judicial districts who are elected through a partisan political process find themselves enmeshed in the political system to attain and retain an office founded on impartiality and independence. The conflict is inherent in the system," wrote the Commission on Judicial Qualifications. Additionally, elections have the effect of eroding public faith in the integrity of the judicial system. If your lawyer gave nothing to nothing to the judge's campaign and the opposing lawyer was the judge's campaign chair, will you suspect unfair influence when you lose?

The role of a judge is much different from all other elected officials. Judges don't have constituents in the sense that they do not represent the voters of their district. Their only duty is to an unenfranchised lady with a blindfold and scales. Their only platform should be equal and impartial justice under the law[10]. While citizens have the right to

---

[8] Penny J. White, *It's a Wonderful Life, or is it? American Without Judicial Independence*, 27 U. Mem. L. Rev. 1, 3 (1966)

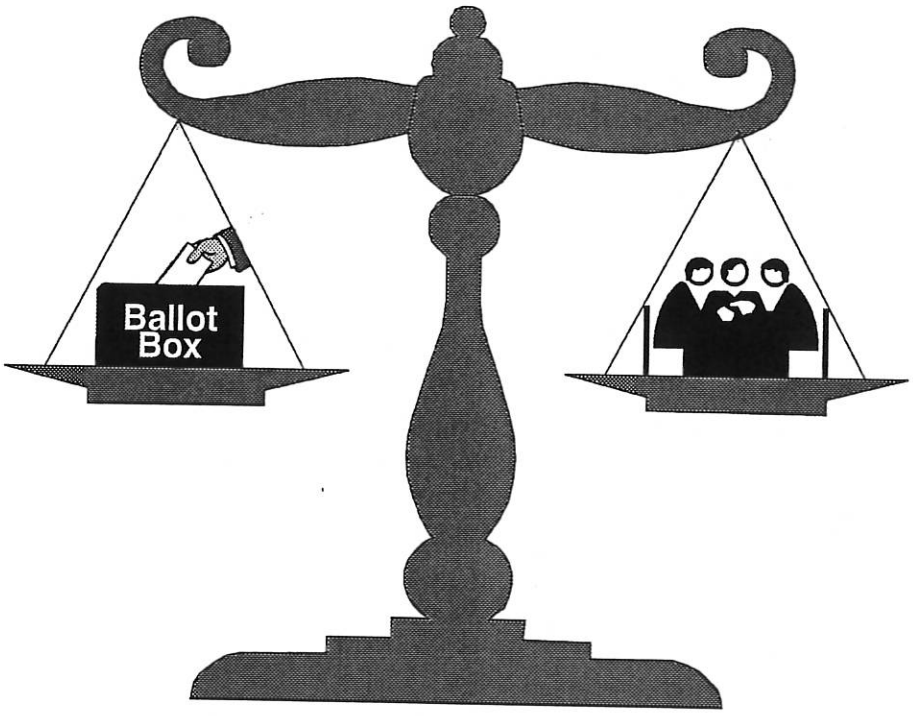
[9] Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, 69 J. Kan. Bar. Assn., January 2000 at 38.

[10] Maurice Rosenberg, *The Qualities of Justice—Are They Strainable?*, 44 Tex. L. Rev. 1063, 1069 (1966)

attempt to influence the actions of their legislators or executive, they have no such right to influence their judges[11].

For these reasons, the Kansas Bar Association supports the non-partisan, merit selection of judges. House Bill 2499 is progress but the many problems created by judicial elections will still remain. Once again, we urge you to keep an open mind on this issue. I hope the attached article will help you carefully analyze this issue. I thank you for your time today and am happy to stand for any questions.

[11] Norman Krivosha, *Acquiring Judges by the Merit Selection Method: The Case for Adopting Such a Method*, 40 SW. L.J. 15, 16 (May, 1986)




# THE SELECTION OF JUDGES IN KANSAS: A COMPARISON OF SYSTEMS

**By Jeffrey D. Jackson**

Since 1958, judicial selection in Kansas has been the product of a bifurcated system, wherein supreme court and court of appeals judges are selected through the use of a non-partisan commission system, and district court judges are selected by either a non-partisan commission system or partisan election, at the option of the local judicial district.[1] The selection of judges has recently become an issue in the state of Kansas due to the Kansas Justice Initiative. The Initiative, conducted by the Kansas Justice Commission, represents the first "stem to stern" study of the Kansas court system since 1974, and focuses upon ways to improve the court system, including reform in the selection of judges.[2] A survey conducted on behalf of the Kansas Justice Commission by the Docking Institute of Public Affairs concluded that nearly 63% of citizens in Kansas favored the election of district court judges rather than the appointment of such judges by the governor, and 54percent favored the election of appellate court judges.[3] Conversely, a survey of judges and attorneys in the state by the same organization revealed a strong bias in favor of gubernatorial appointment over competitive election.[4]

The conclusions to be drawn from this response are highly questionable. It is clear that neither of the choices given to respondents in the survey actually reflect either of the methods currently used to select judges in Kansas. The questions asked failed to distinguish or explain the difference between partisan and nonpartisan election, and further did not explain the role of the judicial nominating commission in the selection of candidates from whom the governor appoints district and appellate court judges.

The effect of these surveys has been two-fold. First, the results of the surveys have already led some groups to call for a movement toward partisan election in order to "reform" the judicial selection system in accordance with the "will of the people."[5] In its final report, however, the Kansas Justice Commission has recommended the presentation of an amendment to the Kansas Constitution which would adopt a uniform method of non-partisan judicial selection statewide, and which would also create a judicial evaluation committee, with the responsibility of evaluating the performance of judges and making public those evaluations prior to retention elections.[6]

One reason for the difference of opinion on this issue arises from the inherent difficulty of attempting to reduce the concepts involved in judicial selection into simple choices, such as those used in the surveys. In reality, the mechanics of the different methods of judicial selection and the policies each method is designed to address are far more complex, and the advisability of one method over another is not readily apparent to the casual observer. Before any conclusions are drawn regarding what method of judicial selection is best for Kansas, a more thorough analysis is needed.

To that end, this article will discuss the history of judicial selection which led to the adoption of the two systems currently in use in Kansas, as well as the different objectives which are vital to the development of a system of judicial selection. The article will also analyze the manner in which each of the two current methods seeks to meet those objectives and its relative success in so doing.

## II. JUDICIAL SELECTION - THE KANSAS EXPERIENCE

Kansas entered the Union in 1861, at a time when the movement toward an elected judiciary was at its peak.[7] In conformance with that movement, Kansas provided that all of its judges were to be elected.[8]

Dissatisfaction with the involvement of political parties in the selection process, however, led some states to move to nonpartisan election in the late 1800's and early 1900's.[9] While the nonpartisan system was implemented as a reform attempt, it came under quick criticism, with the major objection being that the electorate was unable to make reasoned choices without the benefit of party labels to differentiate between the candidates.[10] As was the case in other states, Kansas experimented with nonpartisan elections in the early 1900's as a means to alleviate some of the problems associated with partisan elections.[11] Enacted in 1913, nonpartisan judicial elections proved to be unsatisfactory, and the legislation authorizing them was repealed in 1915.[12]

The Kansas Bar Association spearheaded further attempts at reform in 1923 and 1925 which would have resulted in the nomination of judicial candidates at party conventions

**Footnotes**

1. *See, infra* notes 23-29 and accompanying text

2. Kansas Justice Initiative,website at http://ks courts. org/ksjstin.htm.

3. The Docking Institute of Public Affairs Center for Survey Research, Kansas Citizens Justice Initiative Public Opinion Survey, at 21, 65-66. (1998). Respondents were asked the questions: "Should local trial judges be elected by citizens or appointed by the governor?" and "Should judges who hear appeals be elected by citizens or appointed by the governor?".

4. The Docking Institute of Public Affairs Center for Survey Research, Kansas Citizens Justice Initiative Surveys of Kansas Judges and Attorneys (1998) at 9. As in prior survey, judges and attorneys were asked to identify whether district court judges should be selected by gubernatorial appointment or competitive election. 77.4% of judges surveyed and 76.5% of attorneys surveyed favored gubernatorial appointment.

5. *See* Jim Hitch, *Let Us Judge Who's the Judge, Hays Daily News*, July 24, 1998, at A6. This editorial, which was quoted in several other area newspapers, concludes that "[w]e are not generally pleased with the way justice is being administered, apparently, and that is why the problem is being studied". Based on this conclusion and the results of the Kansas Justice Commission surveys, the editorial states that the public should get its way and judges should stand for election. According to Hitch, "[j]judges ned to be in touch with real people who might have something to say about the way justice is administered." *Id.*

6. *See* Kansas Citizens Justice Initiative-Draft Final Report, May 4, 1999. Such a judicial evaluation commission would be made up of lawyers and non-lawyers on an equal basis, appointed by the Governor and the Supreme Court. *Id.*

7. *See* Sari S. Escovitz, *Judicial Selection and Tenure* 6 (1975). Early judicial selection systems in America either vested the power of appointment in one or both houses of the legislature, in the governor with the advice of his council, or in the governor subject to the consent of the council. However, this appointment method of selecting judges was short-lived, and was soon eclipsed by the popular election of judges. *Id.* at 4-5. The use of popular elections for the judiciary flourished during the popular sovereignty movement, and became the predominant method for selecting the state judiciaries, especially in the newly settled West, with every new state form 1846 to 1912 adopting judicial elections in some form. *See* Phillip L. Dubois, From Ballot to Bench 3 (1980); Lyle Warrick, Judicial Selection in the United States: A Compendium of Provisions 3 (2nd Ed. 1993).

8. *See* Ks Const. art. 3, § 11 (1859) (providing that "[a]ll the judicial officers provided for by this article shall be elected at the first election under this constitution").

9. Warrick, *supra* note 7, at 3-4. Warrick reports that by 1927, twelve states employed a nonpartisan system for the election of judges.

10. *Id.* at 4. This is a prevalent criticism of nonpartisan elections. Nathan Heffernan notes: "If a candidate cannot pose as either a Republican or Democrat and espouse the respective partisan position, what can the candidate stand for in an election?" Nathan S. Heffernan, Judicial Responsibility, Judicial Independence and the Election of Judges, 80 Marq. L. Rev. 1035, 1043-44 (1997).

11. John F. Fontraon, Jr., The KBA Story, in Requisite Learning and Good Moral Character: A History of the Kansas Bench and Bar 16 (1982). Under this nonpartisan plan, separate judicial ballots were voted on at primary elections. These ballots, rather than listing the judicial candidates as belonging to a particular party, instead listed all of the candidates for the particular office. The two candidates receiving the most votes in the primaries were declared the nominees and had their names placed on the general election ballot. *Id.*

rather than party primaries, thus alleviating one of the problems with popular elections at the primary level: lack of voter recognition.[13] However, these attempts were rebuffed by the legislature. One disgruntled KBA committee member stated that the attempt failed because it was viewed by the legislature as "an effort to take from the people their cherished right of selecting men for judicial positions concerning whose qualifications they know nothing".[14]

***. . . the election system subjected judges to the realm of politics.[15]***

In fact, the entire idea of an elected judiciary, whether achieved in a partisan or nonpartisan manner, came under attack in the early 1900's on the grounds that the election system subjected judges to the realm of politics.[15] Critics such as Roscoe Pound complained that '"putting courts into politics, and compelling judges to become politicians in many jurisdictions . . . had almost destroyed the traditional respect for the bench.'"[16] This criticism led Albert M. Kales, the director of research for the newly formed American Judicature Society, to devise a new system for selecting judges, which, after a lengthy period of time and some revision, was endorsed by the American Bar Association and adopted in 1940 by the State of Missouri.[17] The so-called "Missouri Plan" provided for a judicial nominating committee to nominate candidates for the bench, a governor could then make appointments from the list. The appointed judge would then subsequently run for retention in a noncompetitive election.[18] This plan, which became also known as the "merit plan" or "commission plan", began gaining acceptance throughout the country in the 1950's.

The advent of the commission plan spurred debate as to whether that plan should be adopted by Kansas. A resolution for the submission of a constitutional amendment which would adopt the commission plan was introduced in 1953, but defeated in the house judiciary committee.[19] Again proposed in 1955, the resolution was defeated in the senate judiciary committee.[20] However, subsequent events were to lead to the adoption of the commission plan for the selection of supreme court justices: The intensive lobbying efforts of the Kansas Bar Association; and public outcry over the infamous "triple play" of 1956.[21]

The "triple play" involved Chief Justice of Kansas Supreme Court Bill Smith, Governor Fred Hall, and Lieutenant Governor John McCuish. In 1956, Governor Hall was defeated in the Republican Primary by Warren Shaw, who then lost the general election to Democrat George Docking. In December of that year, Chief Justice Smith, who was seriously ill, forwarded his resignation to Governor Hall. Hall then immediately resigned his post of Governor in favor of Lieutenant Governor McCuish, who prematurely returned from a Newton Hospital to make his first and only official act of his 11 day tenure as Governor: The appointment of Hall to the supreme court.[22] Such a result would have been avoided under the commission plan, as the nominating commission would have determined which candidates to send to the governor for appointment, rather than allowing the governor to appoint replacement justices in between elections.

The legislature submitted a proposal to amend the constitution to adopt the commission plan for the selection of supreme court justices only, and this amendment was passed by a wide margin in the 1958 general election.[23] The Kansas commission plan for the selection of supreme court justices provides for a statewide supreme court nominating commission, composed of a member of the bar from each of the four congressional districts as well as a non-lawyer member from each district.[24] The lawyer members are selected by a vote of the members of the bar in each congressional district, while the non-lawyer members are appointed by the governor.[25] The commission is chaired by a member of the bar who is selected in a statewide vote of all members of the bar.[26] Candidates for the supreme court are reviewed by the commission, which nominates three of the candidates to the governor, who then selects the new justice from among those three candidates within 60 days.[27] In the event the governor fails to make a selection within 60 days, the chief justice of the supreme court makes the selection.[28] This same procedure is also used to select judges to the court of appeals.[29] Once selected, judges in these two courts must stand for retention at the next general election which occurs after one year in office, and if retained, must stand for retention every four years thereafter.[30]

In 1972, the constitution was amended again to allow

12. *Id.*
13. *Id.* at 16-17.
14. *Id.* at 17.
15. Escovitz, *supra* note 7, at 7-8
16. Warick, *supra* note 7, at 4 (quoting from Roscoe Pound, The Causes of Popular Dissatisfaction with he Administration of Justice, reprinted in 20 Judicature 178 (1937)).
17. Escovitz, *supra* note 7, at 8-9. Kale's plan as originally devised would have used an elected justice to full judicial vacancies from a list submitted by a judicial nominating commission. The appointed judges would then, after a short period of time, be subject to a retention election. In 1926, Harold Laski, a political scientist from England, revised the plan by substituting the governor for the elected justice as appointing officer. This plan was endorsed by the American Bar Association in 1937. *Id.*
18. *Id.* at 9. The initial plan adopted by Missouri provided that the judicial nominating commission, composed of three lawyers elected by members of the State Bar Association and three lay persons appointed by the governor and chief justice of the Missouri Supreme Court, submit a list of three nominees to the governor for selection.
19. *Id* at 17.
20. *Id.*
21. *See* Fontron, supra note 11, at 17 (explaining lobbying efforts of the Kansas Bar Association); Stacie L. Sanders, *Kissing Babies, Shaking Hands, and Campaign Contributions: Is this the proper Role for the Kansas Judiciary?*, 34 Washburn L. J. 573, 577-578 (1995) (noting the role of the "triple play" in the decision to implement the commission plan).
22. Brain J. Moline, Bill Smith: *The Jurist as Politician*, J. Kan. Bar Ass'n, Nov-Dec 1988 at 31, 34-35.
23. Fontron, *supra* note 11, at 17.
24. K.S.A. 20-119; 20-120; 20-124.
25. K.S.A. 20-120; 20-124.
26. K.S.A. 20-119.
27. K.S.A. 20-135.
28. K.S.A. 20-135.
29. *See* K.S.A. 20-3004 to 20-3005. The Kansas Court of Appeals was established in 1975.

judicial districts to opt for a nonpartisan selection of district judges.[31] In accordance with this amendment, Kansas adopted statutory provisions to implement the commission plan at the district court level for those judicial districts who wished to do so.[32] Under the statutory scheme established by the legislature, voters in a judicial district may submit a petition signed by at least 5 percent of the qualified voters who voted for the office of secretary of state in the preceding general election to change their district's method of judicial selection from election to the commission plan, or vice versa.[33] It is the duty of the secretary of state, upon receipt of such a petition, to place this issue on the ballot at the next succeeding general election occurring more than 90 days after the filing of the petition.[34]

***Once a district votes to institute the commission plan for its judges, it is required to set up a district judicial nominating commission . .***

Once a district votes to institute the commission plan for its judges, it is required to set up a district judicial nominating commission consisting of an equal number of lawyers and non-lawyers, chaired by a supreme court justice or district court judge appointed by the Chief Justice of the Supreme Court.[35] The lawyer members of such commission are elected by the lawyers of judicial district, while the non-lawyer members are appointed by the county commissioners of the counties within the judicial district.[36] Whenever a vacancy occurs in the office of district judge, the commission nominates 2-3 persons for the office and submits those names to the governor, who then has thirty days to make the appointment from the nominees.[37] If the governor fails to do so within thirty days, the chief justice of the supreme court makes the appointment.[38] As is the case with supreme court and court of appeals judges, each newly appointed district judge must then stand for retention at the next general election which occurs after one year in office, and if retained then remains in office for a four year term before having to once again stand for retention.[39]

Since the establishment of the commission plan as an alternative to the partisan election of district court judges, 17 judicial districts have opted to implement the plan, while 14 districts still continue the partisan election of their district court judges.

With this historical perspective, we now turn to an examination of some of the recognized objectives that judicial selection systems are designed to foster. Among these are judicial independence and its converse, judicial accountability, as well as judicial quality and representativeness.

***The concept of judicial independence is that judges should be free to decide cases according to their merits,***

## III. GOALS OF JUDICIAL SELECTION

### A. JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Judicial independence has been called "the backbone of the American democracy",[40] the "bulwark of the Constitution",[41] and "an indispensable element of our constitutional framework and its commitment to freedom".[42] The concept of judicial independence is that judges should be free to decide cases according to their merits, without fear of reprisal from the public or the executive or legislative branches of government.[43] In other words, a judge, in deciding a case, should not be forced to consider whether his or her decision, if contrary to public opinion or the will of the executive or legislative branch, will result in the loss of his or her job, but instead should be free to make the proper decision under that judge's understanding of the law and facts, whether the decision is popular or not.

The importance of an independent judiciary has been long recognized in American legal theory.[44] Joseph Story, in 1821, stated: "It is in vain, that we insert bills of rights in our constitutions, as checks upon legislative power, unless there be firmness in courts, in the hour of trial, to resist the fashionable opinions of the day."[45] History is replete with examples of decisions made by the courts which, although contrary to public opinion or the will of the other branches

30. KS Const, art. 3, § 5; K.S.A. 20-3006.

31. Sanders, *supra* note 21, at 579. The amended section requires the legislature to "provide a method of nonpartisan selection of district judges and for the manner of submission and resubmission thereof to the electors of the judicial district". KS Const. art. 3, § 6. The amendment was approved by the electorate, 349,264 to 211,026. Francis H,. Heller, *The Kansas State Constitution: A Reference Guide* 83 (1992).

32. *See* K.S.A. 20-2901. et seq. In 1973, Chief Justice Harold R. Fatzer appointed a Judicial Study Advisory Committee to survey the court system and make recommendations for its modernization, including a recommendation for a plan to implement a nonpartisan selection system. The Committee enthusiastically recommended the Missouri plan. Sanders, *supra* note 21, at 579-80.

33. K.S.A. 20-2901(a), (g).

34. K.S.A. 20-2901(g).

35. K.S.A. 20-2903. The chairperson of the commission does not vote, but instead simply presides over the meetings of commission.

36. K.S.A. 20-2904, 2905. The number of members on each commission is dependent on the number of counties in each judicial district. In a district consisting of one county, each member of the board of county commissioners appoints one non-lawyer member, and the same number of lawyer members are elected. In judicial districts consisting of two counties, each county board appoints two members, while in three county judicial districts, each county board appoints one non-lawyer member. K.S.A. 20-2905(1) to (3).

37. K.S.A. 20-2909, 20-2911.

38. K.S.A. 20-2911(a).

39. K.S.A. 20-2912.

40. Penny J. White, *It's a Wonderful Life, or is it? America Without Judicial Independence*, 27 U. Mem. L. Rev. 1, 3 (1966).

41. William H. Rehnquist, *An Independent Judiciary: Bulwark of the Constitution*, 9 N. Ill. U.L. Rev. 1 (1998).

42. Dan L. Nolan, Jr., We Must Maintain an Independent Judiciary, Tenn. Bar J., Sept-Oct 1997, at 3.

43. *See* White, *supra* note 40 at 4.

44. Alexander Hamilton wrote in 1778 that judicial independence was necessary to "guard the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjuncters, sometime disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency in the

of government, have become recognized as important to the protection of constitutional rights, including *Gideon v. Wainright*,[46] which established the rights of indigent defendants to counsel, and *Brown v. Board of Education*.[47]

***...and those choices reflect and are influenced by the judge's personal attitudes and values.***

It is clear that judicial independence is a necessary and important part of the American legal system. Therefore, it would seem that a necessary aim in a system of selecting and retaining judges should be to minimize, insofar as possible, the vulnerability of the judiciary to outside influences which would attempt to influence judges to follow the popular will rather than to reach an unpopular ruling. However, this leads to the question of whether there is any place in the legal system for the concept of judicial accountability.

Judicial accountability is simply the concept that, in a democratic society, judges should in some degree be held accountable to the people for their actions.[48] Proponents of judicial accountability argue that, rather than impersonally applying fixed and enduring principles of law, judges are generally required to make choices in their determination of facts and in the selection and application of appropriate legal principles, and those choices reflect and are influenced by the judge's personal attitudes and values. Thus, the argument goes, judges are actually acting as political decision-makers, and in a democratic society should be held popularly accountable, as other decision-makers are, for their decisions.[49]

Phillip Dubois, one of the advocates of judicial accountability as an important component in the selection of judges, contends that the independent exercise of the power of judicial review is essentially undemocratic because it allows judges to make public policy decisions without being responsive to, or held accountable by, the people or their representatives in government.[50] He states that, whatever may be the justification for judicial independence at the United States Supreme Court level, such justification is not particularly relevant when applied to state courts, which they argue are more often concerned with issues of common law development and statutory interpretation than important constitutional issues.[51] Instead, they favor a balancing approach between independence and accountability, with the balance tilted in favor of accountability.[52]

These arguments are not entirely persuasive. Contrary to the assertions of judicial accountability advocates, there are indeed major differences between the role of a judge and that of members of the other branches of government.[53] First, judges do not have constituents in the sense that they do not represent the voters of their district; instead, "[a] judge has no constituency except the unenfranchised lady with the blindfold and scales, no platform except equal and impartial justice under the law".[54] While citizens have the right to attempt to influence the actions of their legislators or executive, they have no such right to so influence their judges.[55] Further, the policy decisions made by judges are inherently different in that, rather than attempting to enact basic laws which reflect the will of the people and which will apply prospectively, generally judges are charged with interpreting and applying already enacted laws to actual disputes.[56] This activity carries a far greater potential for injustice if the judge bases his or her ruling on the popularity of the decision rather than the law.[57]

Further, Dubois's notion that state judges should be less independent and more accountable because they are less concerned with constitutional issues is unrealistic. As Robert P. Davidow, a critic of Dubois's view on the subject, points out, almost any state court case can involve federal constitutional issues, and in particular, state criminal cases frequently involve the application of constitutional rules and safeguards.[58] Although the bulk of state court work may not be primarily concerned with constitutional issues, this does not mean that the rights of the individual parties are any less worthy of protection from the pressures of the public and government. It does not matter whether the state court at issue is the highest court in the state, an intermediate level appellate court, or a district court. In particular, district courts stand as a first line of defense for the constitutional rights of the parties. As such, they are frequently called upon, especially in criminal cases, to make decisions which, although they correctly preserve the constitutional rights of the parties, are likely to be unpopular. Consider a situation in which a district judge is faced with determining whether a particular search conducted in connection with a traffic stop is legal. If the judge finds that the search was illegal, he risks incurring the wrath of both the government, whose prosecution is thereby made more

meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community." *The Federalist No. 78*, at 103 (Alexander Hamilton).

45. Joseph Story, Address before Suffolk Bar, Boston, 4 Sept. 1821, in *Miscellaneous Writings of Joseph Story* 198, 229 (William W. Story ed. 1852).

46. 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

47. *Brown v. Board of Education*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 2d 1083 (1955). *See* White, *supra* note 40, at 6-7. In a compelling article, White explores the idea of what an America without judicial independence might be like.

48. *See* Phillip l. Dubois, *Accountability, Independence, and the Selection of Judges: The Role of Popular Judicial Elections*, 40 SW L.J. (Special Issue), May 1986, 31, 37.

49. *Id.* at 37-38. *See* also David Adamany & Phillip Dubois, *Electing State Judges*, 1976 Wis. L. Rev. 731, 772 (stating that judges should be accountable like other policy makers and that "[n]o persuasive reason has been advanced for insulating state judges from accountability); Tyrie A. Boyer, *Erosion of Democracy*, 49 U. Miami L Rev. 139, 144 (1994) (arguing that judges should be particularly accountable because the judiciary is the most powerful branch and the sole interpreter of the Constitution).

50. Dubois, *From Ballot to Bench*, *supra* note 7, at 25.

51. *Id.* at 26-27.

52. *See* Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, *supra* note 48 at 40.

53. *See* Norman Krivosha, *Acquiring Judge by the Merit Selection Method: The Case for Adopting Such a Method*, 40 SW. L.J. (Special Issue), May 1986 15, 16-17; Robert P. Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 Case W. Res. L. Rev. 409, 420-24 (1981).

54. Maurice Rosenberg, *The Qualities of Justice - Are They Strainable?*, 44 Tex. L. Rev. 1063, 1069 (1966).

55. Krivosha, *supra* note 53, at 16.

56. Davidow, *supra* note 53, at 421-22.

57. *Id.* at 421-22.

difficult, and the public, who may feel that the judge is "letting criminals go on a technicality."

***In order for a court system to function, it is essential that the public have a proprietary interest in the system.***

This does not mean, however, that the concept of judicial accountability has no place in the formation of a method of selecting and retaining judges. Instead, accountability works in combination with independence to ensure that the judicial system retains the respect and confidence necessary to its effectiveness.[59] In order for a court system to function, it is essential that the public have a proprietary interest in the system. Thomas E. Brennan notes that while other cultures might accept "a justice system administered by their elders, hereditary Levites, or monarchial appointments", the confidence of the community in America requires some degree of participation.[60] If the public instead feels that it has no voice in the selection and retention of their judges, the system itself will lack legitimacy. To this end, all selection and retention systems, whether state or federal, involve some level of accountability.[61] The question is only one of degree.

As the above analysis demonstrates, judges should not be subjected to the pressure that their decision, if contrary to public opinion or the will of the government, will result in the loss of their jobs. On the other hand, there should also be some avenue by which a judge who has proven to be clearly biased or incompetent may be removed from bench. Further, if the public is to have faith in the legal system, the public itself must be able to not only engineer the removal of such judges, but to have some input into their selection.

Thus, it would seem that the ideal system of selection and retention of judges would provide a high level of independence for individual judges, so that they are free to make decisions in accord with the law rather than worrying about public or government opinion as to the results. There must also be a system whereby the public can remove the judges, but removal must not be made so that it will be used simply as a tool to remove those judges who make decisions with which the popular majority disagrees.

**B. QUALITY**

If the above goal of judicial independence seems somewhat subjective, in that there are many different positions on the mix between independence and accountability, there are no such problems with the goal of quality. The question with regard to quality is one of composition, not degree: What are the attributes that make for a qualified judge?

***All would agree that a high level of competence is to be sought in a judge.[62]***

One attribute that seems basic with regard to judicial quality is competence, that is, the ability of the judge to understand the law and apply it to a situation. All would agree that a high level of competence is to be sought in a judge.[62] However, there is little consensus as to the other attributes that comprise judicial quality. Frequently listed desirable attributes for judges include honesty, moral courage, diligence, courtesy, patience, decisiveness, independence, impartiality, open-mindedness and experience.[63] It should be noted that these are all personal attributes which are not unique to the field of judge, but rather are generally desirable for any job.[64]

One method to determine what attributes are uniquely essential to judicial quality is to examine the rules governing judicial behavior. The Kansas Code of Judicial Conduct[65] provides five canons which govern the behavior of judges in the state. It is possible, from examining the types of behavior that the Code attempts to foster, to distill two specific attributes which its authors felt were essential to judicial quality.

First, and foremost, the Code stresses impartiality, both in action and appearance. All of the five canons concern impartiality to some extent.[66] Second, the Code stresses diligence in the performance of official duties. In addition to disposing of all judicial matters promptly, efficiently and fairly, judges are directed to place the duties of the office above all and to refrain from those activities which would interfere with the performance of those duties.[67]

For purposes of objective analysis, then, the three important attributes which make up the objective of judicial qual-

58. *Id.* at 420-21.

59. *See* Strephen B. Burbank, *The Past and Present of Judicial Independence*, 80 Judicature 117, 118 (1996). Burbank uses the history of the federal judiciary to point out the roles played by both independence and accountability in our representative democracy.

60. *See* Thomas E. Brennan, *Nonpartisan Election of Judges: The Michigan Case*, 40 SW. L.J. (Special Issue), May 1986, at 23, 24.

61. It is true that in the federal system this accountability is severely minimized. However, it exists pre-appointment in that the judge must be confirmed by the senate, who themselves are elected, and it exists post-appointment in that a judge may be impeached for treason, bribery or other high crimes and misdemeanors. *See* U.S. Const. art II, § 3; art III, § 1. *See* also William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 Vand. L. Rev. 1 (1990) (examining the influence of public opinion on the judicial selection process).

62. Actually, maybe not everyone would agree. Witness the statement of Senator John Hruska following Senate hearings on the nomination of G. Harrold Carswell for associate justice of the Supreme Court. When interviewed about testimony indicating that Carswell was not the most competent person for the job, Hruska states "There are a lot of mediocre judges and people and lawyers, and they are entitled to a little representation, aren't they? We can't have all Brandeises, Frankfurters, and Cardozos." Roman L. Hruska, Interview after speech in United States Senate, quoted in the *New York Times*, 17 Mar. 1970, at 21. *See* Davidow, *supra* note 1, at 418-19 (relating Hruska incident and stating that, other things being equal, the most intelligent people should be in government).

63. Davidow, supra note 53, at 417.

64. *See* Rosenberg, *supra* note 54, at 1067-68. Rosenberg notes that measuring these qualities is a highly subjective sand difficult process.

65. Rule 601A, 1998 Kan. Ct. R. Annot. 445-471. This Code, with some modifications, is based on the *American Bar Association Model Code of Judicial Conduct* adopted on August 7, 1990. Id. at 445.

66. *See Id.* at 449-469. Cannon 1 directs judges to act in accordance with the other standards in order to maintain public confidence in the impartiality of the judiciary. Cannon 2(B) provides that a judge "shall



2-11

ity are competence, impartiality, and diligence. A system of judicial selection and retention should therefore seek to fulfill this objective by encouraging the advancement of competent, impartial and diligent individuals to the bench, and not only to retain those individuals, but also refrain from impeding their impartiality and diligence.

***... the three important attributes which make up the objective of judicial quality are competence, impartiality, and diligence.***

### C. REPRESENTATIVENESS

The final objective of systems of judicial retention and selection should be representativeness; that is, judges should be representative of the community in which they serve. Davidow suggests that this function is analogous to the jury system in criminal cases, where the objective is for jurors to reflect a cross-section of the community, with the expectation that their view will reflect the beliefs, attitudes and values of the community.[68] Thus, a system of judicial selection and retention should seek to achieve a judiciary which reflects the values of the entire community, rather than favoring any one particular group.

With these objectives firmly established, we now turn to an examination of the success of the two methods through which Kansas judges are selected in meeting these objectives.

## IV. AN ANALYSIS OF THE TWO SYSTEMS

### A. JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

With regard to the concept of judicial independence and accountability, the commission system scores highly. Although providing for more accountability than the federal system, the commission system as used in Kansas allows judges to decide cases free from the external pressures of the government and the public. By only subjecting judges to a retention vote, the commission system helps to diminish the possibility that judges will be called to account for the results of their decisions rather than for their skill as judges.

It is with regard to the subject of accountability that the commission system is often criticized. Critics note that historically, very few judges lose in retention elections, and point to this as proof that accountability is lacking under the commission system.[69] However, if this criticism is accurate, it is not because the system fails to provide for a method of accountability. While judges are subject to selection by the nominating commission and appointment by the Governor, the commission system requires that they stand for retention at what is essentially the first available general election following their appointment, thus giving the public an early opportunity to pass on the propriety of the selection.[70] Following this early evaluation, the judge is subject to a retention election every four years, thus giving the public periodic opportunities to voice its opinion on the judge's performance in office.[71] While it may be said that the overwhelmingly high rate of retention shows a lack of accountability, this claim is impossible to evaluate without empirical evidence showing that demonstrably bad judges are being retained.

***It is with regard to the subject of accountability that the commission system is often criticized.***

Further, the measure of judicial accountability in a selection and retention system is not only whether judges are being retained or dismissed, but also the effect of the system on judicial behavior.[72] A 1991 survey of current and former judges in 10 states, including Kansas, found that a majority of the judges felt that voter image of their performance was the most important factor in retention elections, and a majority also felt that retention elections influenced judicial behavior. A majority also felt that competent judicial performance was the most effective thing a judge could do to win a retention election.[73] These responses indicate a larger degree of judicial accountability in the commission system than the sole use of retention rates might suggest.

Partisan elections, on the other hand, are not as protective of judicial independence. Rather than shielding judges from the pressures of the public in reaching a decision, partisan elections directly subject judges to these very pressures, and increase the likelihood that judges will be removed from office simply because a decision, although legally correct, is unpopular to a majority of persons, or even to a vocal minority. The simple threat of losing his or her job because of an unpopular decision may be enough to create unwarranted pressure on a judge.

not allow family, social, political or other relationships to influence the judge's conduct or judgement", use the office to advance his or her own or other's private interests, or convey or permit others to convey the impression that they can influence the judge. Cannon 3(A)(5) directs the judge to perform judicial duties without bias or prejudice. Cannon 3(E) requires the judge to disqualify himself or herself in a proceeding where the judge's impartiality might be questioned. Cannon4(1) directs the judge to refrain from extra-judicial activity that would cause reasonable doubts on the judge's capacity to act impartially as a judge. Cannon 5(A)(3)(d)(i) and (ii) prohibit a judicial candidate from making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office and from making statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.

67. *See* Cannons 3(B)(8), 4(A)(3) (1988 Kan. Ct. R. Anno. 450-464).

68. Davidow, *supra* note 53, at 423.

69. *See* Dubois, *supra* note 48, at 45-46. Dubois notes that the merit system itself tends to favor incumbents because it provides little in the way of cues, and thus incumbents are favored in the absence of other information.

70. *See* K.S.A. 20-2912.

71. *Id.*

72. Larry T. Aspin and William K. Hall, *Retention Elections and Judicial Behavior, Judicature*, May-June 1994, at 306, 312-13. 64.7% of the judges surveyed felt that voter image of judicial performance was the primary determinant in the way people voted in judicial retention elections, while 60.5% indicated that judicial retention elections influenced judicial behavior. *Id.*

73. *Id.* 43.7% cited "competent performance on the bench", while

The strength of partisan elections supposedly lies in their ability to guarantee accountability.[74] In theory, at least, judicial elections provide for a large measure of desired accountability, in that the public can easily remove biased or incompetent judges and elect more qualified judges. However, there is a question as to whether this accountability actually exists in practice. It has been pointed out that while some voters in partisan judicial elections may make their choices based on the actions or fitness of the candidate in question, others may be influenced simply by the party of the candidate, resulting in the election of '"party hacks and brothers-in-law" on party slates.[75] Dubois counters these arguments by asserting that elections achieve accountability by setting out the "general directions and broad boundaries of public policy".[76] Thus, the public has the choice, by choosing judges of a particular party, to broadly influence the general tenor of the court's decision. However, this notion of accountability seems no more concrete than that claimed by the advocates of the retention election, in that while in each case it is possible for an incompetent or biased judge to be removed from office, there is no guarantee that the public will do so.

***The strength of partisan elections supposedly lies in their ability to guarantee accountability . . .***

Further, although the partisan election system claims to provide the public with a voice in the actual selection of judges, in reality the majority of judges in partisan election systems are appointed by the state governor to fill judicial posts which become vacant between elections.[77] This original selection of judges provides for even less public input than that under the commission system, because there is no bipartisan committee to check the power of the governor to appoint the judge of his or her choosing.[78]

On the whole, the commission system seems superior with regard to the goal of judicial independence and accountability. While it provides for a large amount of independence, it also offers a measure of accountability that allows the public input in determining its judges. While the partisan election system allows for what should theoretically be a greater degree of public accountability, this accountability is somewhat diluted in practice due to partisan politics, and comes at the expense of judicial independence.

***The goal of a selection system with regard to quality should be to select to the bench competent, impartial and diligent judges, . . .***

### B. QUALITY

We now turn to the second major goal of selection systems, that of judicial quality. As stated above, judicial quality can be divided into three attributes which are important for judges to possess: competence, impartiality, and diligence. The goal of a selection system with regard to quality should be to select to the bench competent, impartial and diligent judges, and to make sure that those judges are retained and that their abilities in those areas are not compromised.

With regard to the attribute of competence, little empirical data exists. While the commission selection system lays claim to its base in "merit", there is little evidence that judges elected under a partisan system are any less competent than their commission selected counterparts.[79]

What is known, however, is that in some cases, popular election has resulted in the defeat of highly competent incumbent judges simply because they failed to display charismatic campaigning skills, or are members of a different political party than that which has become popular.[80] An especially egregious example of this activity occurred in Texas in 1994, when Stephen Mansfield campaigned for the Texas Court of Criminal Appeals on promises of greater use of the death penalty, greater use of the harmless error doctrine, and sanctions for attorneys who filed what he termed to be "frivolous appeals" in death penalty cases. Despite the fact that Mansfield had been found before the election

others cited such things as "be fair and impartial", "good management of cases" and "be knowledgeable". In total, 53.3% of the judges referenced competent judicial performance.

74. *See* Dubois, *From Ballot to Bench*, *supra* note 7, at 28. Dubois notes that the role of popular elections in enabling the public to assert control over the course of judicial policy-making is the "mainstay" of the argument favoring such elections over other methods of judicial election and retention.

75. Janice C. May and Nathan C. Goldman, *Judicial Selection: An Analysis*, 45 Tex. B.J. 316, 317-18(1983). May and Goldman also question the findings of partisan election advocates like Dubois who believe that the party label is an important factor in determining future judicial decisions. *Id.*

76. Dubois, *supra* note 48, at 50-51.

77. *See* Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. (Special Issue), May 1986, at 53, 65-67. A survey of Texas judges found that of the judges serving in 1984, 67% of the trial court judges had obtained their posts through appointment, and 51% of appellate court judges had done so. *See* also Krivosha, *supra* note 53, at 19. Krivosha notes that the legal system in partisan election states works simply because most judges are actually appointed to their posts rather than elected.

78. Krivosha, *supra* note 70, at 19.

79. *See* Champagne, *supra* note 77, at 53, 104-05. A subjective survey conducted by the Missouri bar found that, on the subject of judicial quality as a whole, members of the bar found little difference between elected judges or commission selected judges. There was some difference, in that fewer commission selected judges earned the highest marks, and further that fewer commission selected judges received the lowest marks. Thus there was a greater variance in the perceived quality of the elected judges. *Id* at 104. A study by entry Glick and Craig Emmert of state supreme court justices showed that both merit and elected judges had comparable educational backgrounds. Henry Glick and Craig Emmert, *Selection Systems and Judicial Characteristics*, 70 Judicature 229-235 (1987).

80. See Heffernan, *supra* note 10, at 1036-37. In Wisconsin, which operates under a nonpartisan election system, three Wisconsin Supreme Court justices, including Chief Justice George Currie in 1967, were defeated by opponents simply because they were, in Heffernan's terms "charismatically impaired" in that they lacked the presumptuous ego that candidates for political office seem to require. *Id.* *See* also Thomas E. Brennan, *Nonpartisan Election of Judges: The Michigan*

to have misrepresented his record, had virtually no experience in criminal law, and had been fined for practicing law without a license in Florida, he defeated an incumbent judge who had served twelve distinguished years on the court.[81] Thus, on this issue the retention vote encompassed in the commission system does a better job of ensuring that qualified individuals, once on the bench, are retained.

***. . the mere requirement of participating in partisan politics discourages some qualified individuals with experience from running for the bench . . .***

Further, it has been suggested that the mere requirement of participating in partisan politics discourages some qualified individuals with experience from running for the bench, in that not only are the costs of participating in an election high and results uncertain, but the time involved takes the candidate away from his or her practice.[82] While proponents of judicial elections, in rebuttal, point to the number of highly competent judges which have chosen to engage in the "high risk" game of partisan politics, this does not effectively counter the argument that an even larger pool of highly qualified judges might seek the nomination if the uncertainty of doing so were reduced.[83]

Both the systems in theory show some vulnerability with regard to impartiality. The greatest potential problem occurs with partisan judicial elections, and involves the need to raise campaign funds. In a partisan election, campaign costs can be fairly substantial.[84] The money for these costs has to come from somewhere, and in most cases it comes from lawyers who expect to practice before the judge to whom the money is donated.[85] This raises serious questions with regard to a judge's impartiality in cases involving lawyers who are contributors. If nothing else, it creates an appearance of impropriety which diminishes respect for the judicial system.[86]

Even where contributions do not come from lawyers, contributions from other special interests raises concerns with judicial impartiality. Recently, there has also been a trend of business interests becoming involved in the financing of judicial campaigns in order to elect pro-business judges.[87] Such special interests contributions, no matter what the source, pose a grave threat to the impartiality of a judge who is dependent upon such sources for campaign financing, and even where they do not actually influence the judge's decision, they undermine public confidence and respect.

Kansas has attempted to lessen the problems inherent in political campaigning by passing rules which prohibit judicial candidates in a partisan election from directly soliciting or accepting campaign contributions, mandating instead that such contributions be solicited and accepted by a committee established by the candidate.[88] However, because candidates must publicly disclose campaign contribution over fifty dollars, this rule does little to prevent the problem, in that candidates are certainly aware of major contributors to their campaign.[89]

This is not to say that the commission system has no vulnerability with respect to campaign contributions. Nationally, some judges have been known to accept substantial contributions for retention campaigns.[90] However, such contributions are generally much smaller than those involved in partisan elections.[91] Further, Kansas has enacted rules which serve to minimize, if not entirely eradicate, campaign financing problems in retention elections. Under Cannon 5(C)(4) of the Kansas Rules of Judicial Conduct, only those incumbent judges in a retention election who face active opposition to their retention may engage in soliciting and accepting campaign funds through a committee set up for that purpose.[92] As a result, those judges up for retention who do not face active opposition may not solicit or accept campaign funds.[93] Thus, there is little opportunity for problems with regard to impartiality to develop.

Certainly, with regard to the attribute of impartiality, the partisan election system falls short. Under a partisan election system, judges are forced to actively seek campaign contributions from lawyers, law firms, and other special interests, all of which not only potentially affect the impartiality of the judge, but compromise the confidence of the public in the judiciary. On this score, the commission system, especially as it is used in Kansas, is clearly the better choice.

The third component with regard to quality, diligence, is again difficult to empirically measure. While there is no

*Case*, 40 SW. L.J. (Secial Issue), May 1986, at 23, 24. Writing in favor of nonpartisan elections rather than partisan elections, Brennan notes that in a twenty year period, six members of the Michigan Supreme Court with nearly fifty years of judicial experience were defeated at the polls by opponents "whose principal qualification was loyalty to a different political party".

81. *See* Stephen B. Bright, *Political Attacks on the Judiciary*, 80 Judicature 165, 171 (1997).

82. Krivosha, *supra* note 53, at 18; Sanders, *supra* note 21, at 582.

83. *See* Heffernan, *supra* note 10, at 1045 ) arguing that many great lawyers have chosen to seek the bench despite the risks).

84. *See* Mark Hansen, *A Run for the Bench*, A.B.A. J., October 1998, at 68, 69. Hansen notes that in 1995, two candidates for the Pennsylvania Supreme Court raised together nearly $2.8 million dollars. *See* also Champagne, *supra* note 77, at 84-88. Champagne found that in 1982, the average total contributions to successful district candidates in Dallas County was over $44,000.00 while the average contributions for winning candidates for the Texas Supreme Court for 1982-84 was over $570,000.00. Sanders reports that in Kansas a district judge might expect to spend twenty percent of a year's salary on his or her campaign. Sanders, *supra* note 21, at 582-83 n. 65.

85. Marlene Arnold Nicholson and Bradley Scott Weiss, *Funding Judicial Campaigns in the Circuit Court of Cook County*, 70 Judicature 17, 21-22 (1986). Nicholson and Weiss found that in the 1984 elections in Cook County, Illinois, contributions from lawyers and law firms consisted of 54% of the total outside contributions to judges in partisan elections. *See* also Hansen, *supra* note 84, at 70 (finding that more than 40 percent of the nearly $9.2 million dollars raised by the seven winning candidates for the Texas Supreme Court in 1994 came either from parties and lawyers with cases before the court or from contributions linked to those parties.

86. *See* Joel Achenbach, *Why Reporters Love Judicial Elections*, 49U. Miami L. Reve. 155 (1994). Achenbach, a reporter for the *Washington Post*, addressing his own experience in the Florida Judicial system, states that: "I wondered whether my lawyer contributed to this guy's election campaign. Did the opposing counsel make a contribution?

evidence which suggests that elected judges are any less diligent than those selected through the commission system, the partisan election system provides one important roadblock which hinders the ability of its judges in this regard. In order to gain election and to retain office, judges in a partisan election system must take time out to run political campaigns. Often these campaigns drastically detract from the time the judge has to fulfill his official duties.[94] As a result, the justice system suffers. Such problems are largely avoided by the commission system, especially where, as in Kansas, judges who do not face active opposition are forbidden to campaign for retention.

Overall, with regard to the general goal of selection systems to promote judicial quality, it may be said that while there is little difference in the systems with regard to attracting competent judges, the commission system does a better job than the partisan election system in retaining knowledgeable judges. Further, the commission system is clearly superior to the partisan election system in promoting impartiality and diligence of judges.

### C. REPRESENTATIVENESS

The final goal to be promoted in developing a system of judicial selection and retention is representativeness. Stated simply, the judicial selection system should attempt to produce a judiciary which reflects the values of the entire community, rather than favoring any one particular group. At first glance, it would seem that the partisan election system would provide the best opportunity for establishing a representative judiciary, because any person may become a candidate. However, in practice this is not necessarily true with regard to opportunities for minorities or women to become judges. A 1985 nationwide survey found that those states which had adopted the commission system had a higher percentage of minority and women judges than those which selected judges through partisan election.[95] One reason for this apparent discrepancy has to do with the dilution of minority voting strength in judicial districts.[96] Because a majority is required to elect a judge in a partisan election, and because judicial districts are usually fairly largely drawn, it is extremely difficult for minority judges to be elected.[97] Under the commission system, on the other hand, at least some minority and women judges tend to be appointed. The main problem with representativeness in the commission system is that the lawyer members of the commission tend to be white males, while the non-lawyer members, because they are appointed by the governor, tend to belong to the majority political party and make nominations with its view in mind.[98]

The bottom line is that neither system does a particularly effective job of ensuring representativeness.[99] However, it appears that the commission system is slightly better in this regard than the partisan election system, and provides more opportunities for women and minorities to become judges.

## V. EVALUATION

Of the two systems currently in use, the commission system better achieves the goals of judicial selection. It provides for a large degree of judicial independence, while at the same time providing a modicum of accountability to the people of Kansas. While the commission system is not markedly better than the partisan election system in selecting the most competent judges, it better insures that those judges, once selected will retain their seats. The commission system in Kansas also eliminates almost entirely the necessity for judicial campaigns found under the partisan election system, and as a result promotes the impartiality and diligence of its judges. Finally, although neither system is particularly proficient in achieving the goal of representativeness, the commission system seems to provide more opportunity for the selection of minority and women judges.

The proposal to adopt the commission system recommended by the Kansas Justice Commission embodies the advantages of the commission system. In addition, it takes steps to address one of the main problems associated with the selection of judges: lack of public awareness. In order to provide the public with more information regarding the qualification of judges, the a Kansas Justice Commission has recommended the formation of Kansas Judicial Evaluation Commission.[100] This judicial evaluation commission would be made up of both lawyer and non-lawyer members, chosen equally by the Governor and the supreme court.[101] It would have the responsibility of evaluating judges and making such evaluations available to the public prior to retention elections.[102]

The creation of a commission for judicial evaluation, as recommended by the Justice Commission, has the advantage of providing the public with a guide to use in evaluat-

How would I know that I hadn't already lost the case?" Id. at 157.

87. *See* Charles Mahtesian, Bench Press: Business Moves in on the *State Courts, Governing*, August 1998, at 18. In part, this trend is a response to efforts of organized labor in funding judicial candidates. *Id.* at 19.

88. *Kansas Code of Judicial Conduct*, Canon 5(C)(2) (1998 Kan. Ct.R. Annot. 468).

89. Sanders, *supra* note 21, at 583. K.S.A. 25-4148 requires the filing of periodic reports which disclose the name and address of each person who has made one or more contributions in excess of $50, along with the amount and date of such contributions. *Id.*

90. *See* Marlene Arnold Nicholson nd Norman Nicholson, *Funding Judicial Campaigns in Illinois*, 77 Judicature 294, 295-96 (1994) (finding that some justices in Illinois Supreme Court retention elections raised as much as $25,000 in 1980-90).

91. *Id.*

92. 1998 Kan. Ct. R. Annot. 469.

93. *See* Cannon 5(D), *Kansas Rules of Judicial Conduct* (1997 Kan. Ct. R. Annot. 447) (prohibiting judges from engaging in any political activity not authorized by the Rules).

94. Sanders, *supra* note 21, at 583-84. In addition to time spent actively campaigning, the pressure of an upcoming election may prove distracting for the judge in the performance of his or her official duties. *Id. See* also Heffernan, *supra* note 10, at 1045 (noting that one of the problems of the Wisconsin elective system is that judges must spend time away from their duties to campaign).

95. Fund for Modern Courts, Inc., *Success of Women and Minorities in Achieving Judicial Office. The Selection Process* (Dec. 1985). The study found that in states using the commission system 17.1% of the judges were women or minorities, as compared with 11.2% in those states using partisan election.

96. Davidow, *supra* note 53, at 427.

ing judges, thus furthering the goal of accountability by allowing the public to make a more informed decision on which judges it retains. A judicial evaluation commission will presumably also further the goal of judicial independence by providing the public with an independent view, which will help to counteract the influence of campaigns waged by those who would seek to remove judges simply because of a disagreement with a particular ruling.

***Judicial selection in Kansas has for the most part mirrored that in the nation as a whole.***

## VI. CONCLUSION

Judicial selection in Kansas has for the most part mirrored that in the nation as a whole. It has evolved throughout the years in an attempt to achieve the possible judiciary, with the proper mix of independence and accountability, made up of the most competent judges who are representative of the values and ideals of the areas in which they serve. This steady evolution has moved Kansas from a statewide system of partisan election of judges to a system in two which different methods of judicial selection are used. While no method of judicial selection is perfect, the people of Kansas deserve to have the best judges available. It is for such reasons that studies such as the one undertaken by the Kansas Justice Commission are necessary. A comparison of the selection systems currently in use reveals that the commission system, particularly when used in conjunction with a system for evaluating judges and disseminating those evaluations to the public, and not partisan election, is the best method for Kansas.

Jeff Jackson

### About the Author:

Jeffery D. Jackson is a reserch attorney for the Hon. Robert Davis, Kansas Surpreme Court. He is a 1992 graduate, cum laude, of the Washburn University of Law. Prior to his current employment, he was a staff attorney for the Kansas Court of Appeals and law clerk for Justice Davis, as well as an associate with the firm of Bennett & Cillon, L.L.P. in Topeka.

97. *Id.*
98. *See Id.* at 430. Kansas has actually been fairly progressive in this regard. Of the 9 members of the commission in 1997-98, four were women.
99. *Id.* at 425-26, 430-31.
100. *See Kansas Citizens Justice Initiative-Draft Final Report, supra* note 6.





2-16

# The Kansas District Judges' Association

JANUARY 20, 2000

HOUSE JUDICIARY COMMITTEE MEMBERS
STATE CAPITOL
TOPEKA, KANSAS

**RE: HB 2499**

Dear Judiciary Committee Members:

On January 18, 2000, the Kansas District Judges Association executive committee reviewed the above legislative proposal. After discussing the pros and cons of the proposal to remove political party affiliation of judicial candidates when on the ballot the executive committee has voted to oppose HB 2499.

District judges in popular election districts feel that if judges are to run in political elections we want to retain our party label. The current system of electing district judges has worked well for twenty-four years and party affiliation should not be removed at this time.

Thank you for your consideration of our position.

SINCERELY,

David P. Mikesic

DAVID P MIKESIC
PRESIDENT, KDJA

WYANDOTTE COUNTY COURTHOUSE
710 N 7TH ST
KANSAS CITY, KANSAS 66101

PHONE: 913-573-2834

House Judiciary
1-20-2000
Attachment 3

JANUARY 20, 2000

REPRESENATIVE MICHAEL R. O'NEAL
AND
HOUSE JUDICIARY COMMITTEE MEMBERS
TESTIMONY IN OPPOSITION TO HB NO. 2499

MR. CHAIRMAN, MEMBERS OF THE HOUSE JUDICIARY COMMITTEE, I WOULD LIKE TO THANK YOU FOR THE OPPORTUNITY TO ADDRESS YOU TODAY. I AM MICHAEL A. FREELOVE, DISTRICT MAGISTRATE JUDGE FROM THE 16TH JUDICIAL DISTRICT. I AM HERE AS A REPRESENTATIVE OF THE KANSAS DISTRICT MAGISTRATE JUDGES ASSOCIATION TO PRESENT THE VIEWS OF THE ASSOCIATION ON THIS ISSUE.

THE KANSAS DISTRICT MAGISTRATE JUDGES ASSOCIATION'S LEGISLATIVE COMMITTEE MET LAST TUESDAY TO REVIEW AND CONSIDER HOUSE BILL NO. 2499. THE COMMITTEE VOTED TO OPPOSE THE BILL.

THE COMMITTEE'S PRINCIPAL OPPOSITION TO THE BILL IS THE REQUIREMENT THAT DISTRICT MAGISTRATE JUDGES IN MULTI-COUNTY JUDICIAL DISTRICTS WOULD BE REQUIRED TO RUN FOR ELECTION DISTRICT WIDE RATHER THAN JUST THEIR COUNTY OF OFFICE AS IS PRESENTLY THE LAW.

IN VISITING WITH REPRESENTATIVE O'NEAL, CHAIRMAN OF THIS COMMITTEE AND THE AUTHOR OF THIS BILL, THE ASSOCIATION WAS ASSURED THAT THIS PORTION OF THE BILL WOULD BE CORRECTED SO DISTRICT MAGISTRATE JUDGES WOULD RUN ONLY IN THEIR HOME COUNTIES IN THE DISTRICT. HOWEVER, WE WOULD REQUEST THAT WHEN THIS IS CORRECTED THAT THE NUMBER OF SIGNATURES REQUIRED TO FILE BY PETITION BE ADJUSTED TO PRESENT LAW OF 2% OF PARTY VOTER REGISTRATION.

THE REMAINING ISSUE BEFORE OUR COMMITTEE IS THE WHOLE CONCEPT OF NON-PARTISAN ELECTION. IT IS OUR VIEW THAT SELECTION OF AN OFFICE HOLDER IS BY IT'S VERY NATURE A POLITICAL PROCESS. BY EXCHANGING A PARTISAN POLITICAL PROCESS FOR A NON-PARTISAN POLITICAL PROCESS WE ARE MERELY EXCHANGING A PROCESS THAT THE PUBLIC UNDERSTANDS FOR ONE THAT THEY DO NOT.

THE NON-PARTISAN PROCESS REQUIRES A RUN OFF ELECTION WHEN THREE OR MORE CANDIDATES FILE FOR OFFICE. THIS WOULD INCREASE OUR CAMPAIGN EXPENSES, ONE OF WHICH IS MAILING. AS YOU KNOW THIS CAN BE EXTREMELY BURDENSOME. UNDER THE NON-PARTISAN PROCESS A CANDIDATE WOULD HAVE TO ADDRESS THE WHOLE ELECTORATE DURING A RUN OFF ELECTION AS WELL AS IN THE GENERAL

ELECTION. IN EFFECT THE CANDIDATE WOULD FACE TWO GENERAL ELECTIONS.

THE PRESENT REQUIREMENT IN ELECTED DISTRICTS IS FOR THE CANDIDATE TO FILE AS A CANDIDATE IN THE PARTY OF THEIR CHOICE. IN NON-PARTISAN ELECTIONS THEY WOULD NOT DECLARE A PARTY AFFILIATION. IN ELECTED DISTRICTS ALL DISTRICT COURT JUDGES CURRENTLY RUN ON A PARTISAN BASIS AS DO ALL ELECTED OFFICIALS IN STATE AND COUNTY OFFICES WITH THE EXCEPTION OF LOCAL SCHOOL BOARD MEMBERS WHO ARE ELECTED WITHIN THE SCHOOL DISTRICT.

OUR ASSOCIATION BELIEVES THAT NON-PARTISAN ELECTIONS WOULD INCREASE VOTER APATHY AND DECREASE THE NUMBERS AT THE POLLS, A PROBLEM IN ALL ASPECTS OF GOVERNMENT ELECTIONS.

AS PUBLIC SERVANTS WE ARE ALL PROUD OF OUR POLITICAL AFFILIATION; HOWEVER, AS WITH ANY OTHER AFFILIATION WE MIGHT HAVE, WE DO NOT ALLOW THE CONNECTION TO INFLUENCE OUR DECISIONS.

OUR ASSOCIATION BELIEVES THAT NON-PARTISAN ELECTIONS WOULD BE OF NO BENEFIT TO THE CITIZENS OF THE STATE OF KANSAS NOR TO THE CANDIDATES FOR THESE OFFICES.

MR. CHAIRMAN, COMMITTEE MEMBERS, WE URGE YOU TO CONSIDER OUR CONCERNS AND RETAIN THE PRESENT LAW AS IT RELATES TO THE ELECTION OF DISTRICT MAGISTRATE JUDGES.

THANK YOU.