Approved: March 30, 2000
Date

MINUTES OF THE JOINT SENATE & HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Tim Emert at 12:40 on March 20, 2000 in Room 313-S of the Capitol.

All members were present.

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

Conferees appearing before the committee:
Former Governor Robert Bennett, Co-Chairperson of the Kansas Citizens Justice Initiative
Jill Docking, Co-Chairperson of the Kansas Citizens Justice Initiative
John Bremer, District Magistrate Judge, Decatur County
John Todd, Attorney, Wichita
William Davitt, Attorney, Wichita
Sheila Walker, Director, Division of Vehicles,
Lee Davidson, Deputy Sumner County Attorney
Barbara Tombs, Executive Director, Kansas Sentencing Commission,
Charles Simmons, Secretary, Department of Corrections
Randy Allen, Executive Director, Kansas Association of Counties
Kristi Hiebert, Assistant Attorney General, Consumer Protection Division,
Richard Shank, Southwestern Bell Telephone,

SCR 1642 - Resolution providing for nonpartisan selection of district judges

Former Governor Robert Bennett testified as a proponent of **SCR 1642**. He reviewed the structure and function of the Kansas Justice Commission, presented an overview of it's report on the selection and evaluation of district court judges in Kansas and discussed it's recommendation to adopt a constitutional amendment to provide for a uniform method of non-partisan selection of district court judges statewide. He further discussed several language changes he felt should be made in the proposed amendment. (Attachment 1) On inquiry by the Committee, the conferee detailed the mechanics of the proposed evaluation in the amendment.

Jill Docking testified in support of **SCR 1642.** She stated that she has served, along with Mr. Bennett, as Co-Chairperson of the Kansas Citizens Justice Initiative. She discussed her initial preference for partisan selection of judges because she felt elections promoted accountability but, through personal experience, has learned the value of non-partisan evaluative selection.

John Bremer, District Magistrate Judge, Decatur County, presented the Kansas District Magistrate Judges Association's views on **SCR 1642.** He stated that members of the Association are split on this issue. He discussed several matters of concern and offered language changes in the amendment. (Attachment 2)

William Davitt, Attorney, Wichita, testified as an opponent of **SCR 1642.** He discussed the negative aspects of election of judges and appointment of judges. He alluded to a better way of selecting judges and ceded the podium to John Todd, Attorney, Wichita, to explain.

Mr. Todd testified as an opponent of **SCR 1642** as well as an opponent of the current Kansas Constitution regarding election of judges. He discussed suggestions made by Gerry Spence in several of his publications regarding selection of judges and made reference to his previous testimony before the Senate Judiciary Sub-Committee which call for municipal court reform.(Attachment 3)

The meeting recessed at 1:23 p.m.

The Committee meeting continued at 3:30 p.m.

Hearing on **SB 429 - DUI suspension of driver's licenses**, was opened.

Sheila Walker, Director, Division of Vehicles, appeared as a proponent of the bill. She informed the members

that the bill would delete provisions allowing a driver's license suspension for the length of a diversion agreement for drivers under the age of 21 whose blood alcohol content is .08 or greater. It would also change language from "at least" to "up to" so that drivers affected would serve either a 30 day or one-year suspension. (Attachment 4)

Hearing on **SB 429** was closed.

Hearing on **SB 620- Relevant written statements made under oath shall be considered in juvenile conditional release violation hearings**, was opened.

Lee Davidson, Deputy Sumner County Attorney, requested the bill be introduced so the juvenile offender code for violations of conditional release would mirror the adult hearing procedures. The bill would also preclude the necessity of having a lab professional who performs toxicology screens on blood or urine from having to attend the hearing. (Attachment 5)

Hearing on **SB 620** was closed.

Hearing on **SB 595 - Stalking by electronic means**, was opened.

No conferees appeared to testify.

Hearing on **SB 595** was closed.

Hearing on **SB 491 - Sentencing dispositions, supervision & violators**, was opened.

Barbara Tombs, Executive Director, Kansas Sentencing Commission, estimated that the proposed bill would reduce prison admissions between 1,584 to 1,631 over a ten-year period. If the time was increased to 120 days and served in the county jail it would decrease the population between 450 to 514 over a ten-year period. The mandatory placement of probation violators in community corrections could also decrease the prison population between 291 to 384 for a period of ten-years and those on postrelease supervision would decrease admissions between 750 to 826. (Attachment 6)

Charles Simmons, Secretary, Department of Corrections, appeared in support of the bill. He commented that the Legislature has two options: either build prisons or change the sentencing guidelines to reduce the capacity of those in prison. Currently, prisons are operating at capacity with 8,700 inmates. (Attachment 7)

Randy Allen, Executive Director, Kansas Association of Counties, appeared as a opponent to the bill. He stated that it would cause a hardship on many counties who already have overcrowded jails. He urged the Legislators to look at other ways to ease overcrowding in the prisons. (Attachment 8)

Hearing on **SB 491** was closed.

Hearing on **SB 431 - addition of unwanted charges to telephone bills prohibited**, was opened.

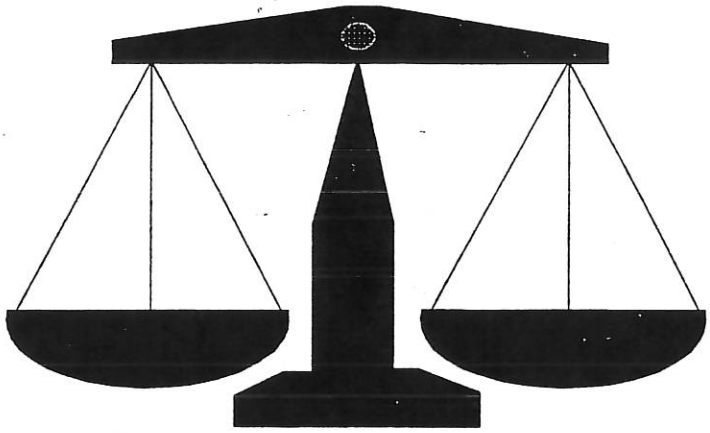
Kristi Hiebert, Assistant Attorney General, Consumer Protection Division, reported that the Attorney General's Office began tracking cramming complaints in April 1998 and they received 121 for that year and in 1999 they received 59 complaints. Southwestern Bell reported that they received an average of 486 complaints in 1998 and an average of 221 for 1999. They attributed the decreases to the prohibition against using sweepstake/prize drop boxes to add telecommunication services. Consumers usually do not have cramming complaints against their own carrier.

Ms. Hiebert stated that they have worked closely with the communications industry to draft the original provisions of **SB 431.** (Attachment 9)

Richard Shank, Southwestern Bell Telephone, appeared as an opponent to the amendment that was placed on in the Senate which would require Southwestern Bell to obtain express authorization for services they sell for their subsidiaries. (Attachment 10)

Hearing on **SB 431** was closed.

KANSAS CITIZENS JUSTICE INITIATIVE



FINAL REPORT OF THE KANSAS JUSTICE COMMISSION

Approved June 11, 1999

III. Rationale

Recommendation 1: <u>Methods of Selecting and Evaluating District Court Judges.</u>

(a) Kansas should adopt by a constitutional amendment a uniform method of non-partisan selection of district court judges statewide.

<u>Rationale</u>

In the American democracy, violence and governmental crises are averted through submission of disputes to courts for resolution. This works based upon a simple principle that is not found in many other places in the world: there is a shared attitude of acceptance among the public of the results of court proceedings, which itself is based upon respect for the *integrity* of the judicial process. We believe that partisan elections have become so expensive that they necessarily erode public faith in the integrity of the judicial system; that the election system can erode the independence of the judiciary, as judges are supposed to defend and uphold our constitutional rights regardless of public opinion; and that promoting oneself based on popular sentiments is contrary to the judge's job description. We also believe that Kansas should complete the transition it began in the 1970's to a single, unified court system by adopting a uniform method of judicial selection – merit selection.

All appellate judges in Kansas are appointed through non-partisan selection and are subject to periodic retention votes. Kansas is one of twelve states that has a bifurcated system in which local districts choose between electing their judges in partisan elections and having judges chosen through a non-partisan selection process. About half of the judicial districts in the state presently use each system: 14 of 31 judicial districts, covering 53 counties, elect their judges in partisan elections, while 17 of 31 judicial districts, covering 52 counties, use the non-partisan selection process. The four largest counties are evenly divided: Johnson and Shawnee counties use merit selection; Sedgwick and Wyandotte counties use partisan elections.

The non-partisan selection system presently used in Kansas provides for substantial public input. In fact, in many ways, it actually increases the extent to which informed public input can guide judicial selections. Half of the members of each nominating commission are non-lawyers appointed by the elected members of the local county commission (or, in multi-county districts, by each county commission in the district). The other half of each nominating commission consists of lawyers elected by the lawyers in the judicial district. News releases are routinely sent out soliciting public input regarding nominees, and letters from the public regarding nominees are received and considered. The commission then interviews the nominees, in addition to considering the comments it has received. Once the commission sends three names to the Governor, who must choose one as the new judge, there is once again an opportunity for substantial public input to the Governor, who is elected by all of the people. Thus, the non-partisan system provides for knowledgeable, public participation, while judicial elections often receive much less publicity — and generate much less voter interest — than elections for other public offices. Voters in partisan judicial elections often

are forced to make uninformed choices because candidates for judge are prohibited by rules of judicial ethics from stating how they would rule on legal issues or decide cases.

This issue is one on which the baseline opinions of those who work within the system are greatly at odds with those held by the general public. Those within the system strongly favor the non-partisan system.

How District Judges Should Be Selected	Judges	Attorneys	General Public
Appointed by Governor	77%	77%	35%
Partisan Election	23%	23%	65%

Although we do not doubt that the baseline public opinion favors election, it probably is not as strong as the Justice Commission survey suggests. There simply is no way, in the context of a telephone survey on this subject, to provide sufficient detail about the process to the person answering the survey. Our question asked: "There are people who argue that state and local judges should run for office in a competitive election as candidates of a political party, while others believe that these judges should be appointed by the governor with citizens voting every four years on whether or not to retain the appointed judge. For [local trial judges], please indicate whether you think the judges should be elected or appointed by the governor." The question did not provide information regarding the existence of nominating commissions, or the screening procedures used by those commissions. In a fuller presentation of the issue – something simply unattainable in a telephone survey – we think the baseline view of the public would be much closer.

We believe that this difference in viewpoint can be narrowed or eliminated through a well-conceived discussion of the issue as part of the election process in which a proposed constitutional amendment would be considered. The Commission's recommendation is supported by members who reside in both election and selection districts. Majorities of voters in the districts that already use the non-partisan system approved that change in the past, and some counties have turned down attempts to switch back. In Shawnee County in 1984, 64 percent of voters chose to retain non-partisan selection after the issues were widely discussed in a visible campaign. We believe that these results are examples of effective education campaigns about the inherent problems of partisan elections, something with which judges and attorneys are much more familiar.

Contested, partisan elections require substantial fund-raising by committees supporting the judges seeking election. Who would contribute to judicial elections? The answer is simple: lawyers and others who have frequent business before the courts. This relationship leads parties before the court to question the fairness and integrity of the process. If your lawyer gave nothing to the judge, and the other lawyer gave $500, will you suspect unfair influence when you lose? What if the opposing lawyer was the judge's campaign chairperson? Will you try to settle the case because you

fear that you will not be able to get a fair hearing? Unfortunately, these are not abstract, hypothetical questions. That is one of the things that judges and attorneys know about the system.

Election of Judges Creates Potential for Conflict of Interest When Attorneys or Parties Have Supported Judge	Judges	Attorneys
Strongly Agree	55%	40%
Agree	24%	38%
Neutral	8%	9%
Disagree	11%	9%
Strongly Disagree	3%	5%

Appointment of Judges Leads to a More Impartial Judiciary	Judges	Attorneys
Strongly Agree	37%	53%
Agree	32%	27%
Neutral	14%	13%
Disagree	7%	5%
Strongly Disagree	9%	2%

The problems inherent in judicial elections were well summarized by Stacie Sanders, whose father is a district judge, in her Note: "Kissing Babies, Shaking Hands, and Campaign Contributions: Is This the Proper Role for the Kansas Judiciary?" 34 Washburn L.J. 573 (1995). In addition to the conflict of interest and appearance of impropriety issues, she provides testimonial evidence of the time investment required for retail politics: door-to-door campaigning, fund-raising and advertising, all while carrying on a full-time job that has a docket that does not go dormant. Unlike the legislative branch of government, the judicial branch does not have a season when it is not in session. The expense of these campaigns is also quite significant. Even in a rural district, in which the expenses might be the least, the Sanders article reports expenditures of twenty percent of the judge's annual salary for a contested race. In Sedgwick County, one campaign committee spent approximately $57,000. This, too, is an impediment to obtaining the best possible judges. To campaign full-time, the lawyer in private practice will necessarily work less hard on the income-producing aspects of the practice and will spend substantial sums of his or her own funds in a contested race in which the result cannot be guaranteed. If he or she wins, there is a possible election loss looming only four years away, and if the incumbent loses, he or she no longer has a private practice base with ongoing clients to which to return. Lawyers typically apply in greater numbers for a judicial vacancy when non-partisan selection is used than when they are forced to run as a Republican or a Democrat in a partisan election.

The central issue, though, in our view, is the inherent conflict between the independence, integrity and impartiality a judge must display and represent and the need to raise funds and engage in retail partisan politics. This conflict has led the Kansas Commission on Judicial Qualifications – the group that receives, reviews and acts upon ethical complaints against Kansas judges – to take the rare step of writing to the Kansas Justice Commission in support of merit selection of judges. Its letter noted "that some of the most difficult issues involving judicial ethics ... [relate] to [what is] appropriate political activity for those judges subject to partisan election." Its comments, made after considering election-related ethical complaints and issues over many years, are compelling:

> Kansas has removed its Supreme Court Justices and Court of Appeals Judges from the political process. Electors in seventeen of the state's thirty-one judicial districts have likewise voted to remove their district judges from the political process. Judges in those seventeen judicial districts are subject to a nonpartisan selection process.

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.

Modern-day elections, including judicial elections, require large commitments of money and time. Family members, friends, fellow church members, clients and others are routinely requested to provide work and money for these campaigns, but normally those most interested in who will be elected judge are the attorneys who work in that court. It is a fact of life that a judge who must raise money and enlist help to conduct a campaign to attain the office is under obligation to someone and usually to many. As a result, that judge's impartiality is subject to question anytime a party or an attorney comes before the judge who is known to have contributed to the judge's election campaign. The judge then becomes subject to disqualification in that case if the judge's impartiality might reasonably be questioned. The more successful the judge is as a fund-raiser, the more significant the impact on the judge's ability to perform his or her job. However, it is no less problematic when the judge goes in debt to conduct the campaign and has to engage in fund-raising activities to retire the debt after the election. The public does not understand this dilemma and the election process significantly diminishes the impartial appearance of all judges, no matter how circumspect their conduct.

It is a tribute to the integrity of the Kansas judiciary that relatively few serious disciplinary complaints are filed against judges. In presenting this position paper in support of nonpartisan selection, the Commission on Judicial Qualifications does not impugn the integrity of individual judges but rather suggests that judges and the public would be well served by removing judges from the political process.

We agree with the Kansas Commission on Judicial Qualifications and with the judges and attorneys who work in our judicial system on a daily basis. The system needs to be changed to protect its integrity and independence. We ask Kansas to adopt a constitutional amendment expanding the current, non-partisan selection system to the entire State. Members of the Commission are committed to lead the educational effort to explain to voters why this change is so important to the continued integrity of – and public confidence in – our judicial system.

(b) To increase the information available to voters, the constitutional amendment adopting non-partisan selection of district court judges should authorize creation of a Kansas Judicial Evaluation Commission. The Commission would prepare and make available to the public evaluations of each judge prior to each judicial retention election. The Commission should include lawyer and non-lawyer members, appointed in equal numbers by the Governor and by the Kansas Supreme Court.

Rationale

All public officials should be accountable to the citizens of this State. The work done by judges is uniquely difficult for the public to evaluate. The actions of a judge over his or her term of office take place in hundreds of individual cases. Most of the time, no one other than the parties is present. Finding out whether a judge is generally fair, knowledgeable, polite to litigants, or is otherwise doing a good job cannot be accomplished by a trip to the library, a single visit to the courthouse, or even several courthouse visits. When voters are asked whether a judge should be retained in office, they should be given some solid information upon which they might make that decision.

In addition to public accountability, most workers benefit from some supervision and feedback regarding their work. Judges generally do not receive any. Each judge is assigned a docket of cases and is responsible for handling them. No one systematically reviews the judge's work and provides feedback. Comments made to the judge by attorneys or litigants are always suspect: if such comments are negative, they may just be sour grapes regarding a particular decision; if positive, they may just be an attempt to curry favor with a judge the attorney or litigant is likely to see again in the future.

At least four states – Alaska, Arizona, Colorado and Utah – have well-established, statewide judicial performance evaluation programs in place. These programs provide a comprehensive review of each judge's performance prior to retention elections. Some of them also provide interim reports to the judge during his or her term of office, allowing private feedback to be exchanged and, hopefully, acted upon.

The American Judicature Society, which since 1913 has supported improvement of the nation's courts and efficient administration of justice at all levels, recently completed an extensive study of these judicial performance evaluation programs, conducting voter exit surveys during the 1996 election and also conducting surveys of judges and judge evaluators. Especially after such programs have been in place for more than one election, voters were aware of the evaluation process and many voters indicated they obtained information specifically from those reports. In Alaska, where two decades of information was available, there was a direct correlation between the ratings of the judges in the evaluations and their votes in the retention elections. Judges reported that the reviews were fair and that the reports would help them in improving their job performance.

Kansas lawyers strongly support implementing some formal method of judicial evaluation. Kansas judges, by a sizeable plurality, also support such evaluations.

Some Form of Evaluation Should Be Implemented	**Judges**	**Attorneys**
Strongly Agree	15%	41%
Agree	33%	34%
Neutral	35%	14%
Disagree	9%	7%

We agree that such a program should be established in Kansas. Good examples of such programs are found in each of the states listed above. Alaska has had the longest experience, having started retention evaluations in 1976. Its commission conducts a professional survey of lawyers, police officers and probation officers; sends a questionnaire to each judge; surveys jurors; reviews performance-related data (such as case handling statistics); sends a separate questionnaire to selected lawyers who have recently appeared before the judge; and seeks general public input. The commission then publishes the result of each survey, along with its recommendation of whether the judge should be retained in office. Similar processes, with some variations, are used in each of the states. Sample reports from other states are found in Appendix C.

The establishment of a judicial performance evaluation program is not without accompanying costs. To provide a credible evaluation, with appropriate public input, is an involved process.

These programs can have several potential benefits. First, they provide meaningful information that voters can use when evaluating whether a judge should be retained in office. Second, they can be a powerful mechanism for removing the rare judge who proves unfit for the bench. This can occur either by voters acting upon an unfavorable recommendation or by a judge choosing not to seek retention after learning that he or she will be receiving an unfavorable review. Third, they provide meaningful information for judges to use in improving their own performance. At present, Kansas judges do not receive any systematic feedback about their job performance.

State	1996 Budget
Alaska	$107,550
Arizona	$256,400
Colorado	$17,000
Utah	$121,750

Notes:
1. Utah figure based on 1997-98 budget request; 1996 data not available.
2. Colorado figure apparently excludes separate funding of local commissions.

We propose including this recommendation in the same constitutional amendment package that would make merit selection a uniform, statewide method of selecting judges. We think the two recommendations go hand in hand, and that guaranteeing the citizens a useful judicial performance evaluation process would be quite helpful in justifying support for the nonpartisan, merit selection system. Indeed, we doubt that the judicial evaluation process we propose could be implemented fully in districts where judges are elected since it would be unfair to publicize the evaluation of an incumbent judge but provide no evaluation for the opponent.

We suggest that the constitutional provision not attempt to provide detailed procedures for the judicial evaluation commission to follow. The methodologies will, no doubt, need to be developed and refined over time. This can best be done, in our view, under rules adopted by the Kansas Supreme Court. Arizona's program, for example, operates primarily under rules established by the Arizona Supreme Court. Some others establish their own rules or operate under statutory directives. The Kansas Supreme Court has the constitutional mandate to supervise the lower courts of the State. In addition, through its staff and its own training, the Kansas Supreme Court is uniquely qualified to design and implement a judicial performance evaluation program. A variety of helpful resources are available. Accordingly, we recommend that the constitutional amendment

authorize creation of the performance evaluation commission, while leaving the rules governing its operation to be established by court rule.

March 20, 2000

Senate Judiciary Committee Members
and
House Judiciary Committee Members

Testimony Seeking Amendment of SCR No. 1642

Judge John Bremer
Legislative Committee Chairman
Kansas District Magistrate Judges Association

Mr. Chairmen, members of this joint meeting of the Senate and House Judiciary Committees:

I would like to thank you for the opportunity to address you today. I am John Bremer, District Magistrate Judge from the 17th Judicial District and Legislative Chairman for the District Magistrate Judge's Association. I will be presenting the association's views on this issue.

Members of our association are split on the issue of nonpartisan selection of judges of the district court. About half have nonpartisan selection and like it and, the other half don't and don't want anything to do with it. There are a few exceptions in both camps.

Our legislative committee reviewed the resolution and considered urging this committee to maintain the status quo except for two matters.

The first is the detail in which the method of evaluating judicial performance is to be described in the Kansas Constitution as found starting on line 6 of page 2 of

the resolution. We believe this description is too specific for the Constitution since even minor changes are difficult. Our discussions with other judges in other states lead us to believe that the Supreme Court should establish the evaluation procedure by court rule following the guidelines and recommendations passed by the legislature. This would continue the checks and balances which exist between the branches of government and would allow the guidelines and recommendations to be changed as necessary. This first matter is a minor consideration to our association and we leave it in your sound discretion.

The second matter is near and dear to all of the members of our association. When the county courts were consolidated with the state courts, the counties went along with the merger with the understanding that the existence of a resident judge with an office in each county was preserved and protected by KSA 20-301(b). Sadly, this isn't the case. The Kansas Association of Counties feels that it is necessary to continue to express its support for "one judge/one county" in it's year 2000 Legislative Platform Policy Issues and, my association feels it is necessary to annually appear before various committee hearings to protect 301(b). Those of you who have been on your committees long know that 301(b) has a lot of popular support.

The reason I mention this is if the sentence starting at line 21 of the resolution was amended to read "Each judicial district shall have at least one district judge and each county of such district shall have at least one judge of the district court who is a resident of and has the judge's principal office in that county." Our legislative committee and our association could back this bill and, this backing would probably be quite influential in the passage of a constitutional amendment in those areas where judges now stand for election.

Earlier I mentioned that we thought that the language of this resolution was too specific and that it might hamper necessary revision. Now we are urging you to adopt more specific language in another area and, I suspect that you are wondering if this more specific language might not also hinder necessary change.

My answer is no. The change sought by the elimination of 301(b) is actually a matter of county consolidation and support for this section is strong because the counties and their residents want no part of consolidation. Yet, counties have been known to enter into mutually advantageous consolidation agreements for fire protection across county lines and for landfills. There is no reason to believe that the counties could not be persuaded to consolidate if they

were convinced that it was necessary and if they could do so in a mutually advantageous manner.

The inclusion of the language of the proposed amendment would require that a matter that is actually county consolidation be handled as a matter of county consolidation this would gain county support by allowing the counties to consolidate in a mutually advantageous manner rather than at the direction of outsiders who would not have to live with the disruptive results.

We urge you to adopt the above language from 301(b) in your resolution.

I thank you for your consideration.

John R. Todd
1559 Payne
Wichita, Kansas 67203
(316) 262-3681 office
(316) 264-6295 residence
e-mail: johntodd@fn.net

Date: March 20, 2000

To: Members of the SENATE and HOUSE COMMITTEES ON JUDICIARY

Subject: SENATE CONCURRENT RESOLUTION NO. 1642

My name is John Todd. I live in Wichita, and am here to speak as a *private citizen* who is interested in Court reform. I am a real estate broker by profession.

I *do not* favor the appointment of District court judges as proposed in this Senate Concurrent Resolution, nor do I favor the election of judges as the Kansas Constitution currently allows.

I *favor* Gerry Spence' suggestion as detailed in his book ***"From Freedom to Slavery"*** and quote Mr. Spence as follows:

"Our judges should be drafted in the same manner that jurors are drafted—to act as judges for a limited calendar of cases after which they would be released to return to their practices. Every trial lawyer should be required to support the system in this fashion the same as every citizen is required to serve as a juror. If judges were drafted from the trial bar we would soon clear our dockets, because we could call up as many judges as were necessary to bring our dockets current. If judges were drafted, we would no longer be saddled for life with the political cronies of those in power, or be faced with judges who have received campaign contributions from our opponents. To be sure, we would experience some bad judges. But, Lord knows, we have them now—and often for life! On the other hand, we would benefit from the best minds in the legal business, who under our present system rarely seek the judiciary."

In his book, ***"With Justice For None"***, Mr. Spence further explains:

"If we could only raise the caliber of judges slightly, we could elevate the qualify of justice enormously. Even a majority of ABA members believe that "a significant proportion of judges are not qualified to preside over serious cases."

Perhaps we expect too much of them. Judges are usually not individuals born of expansive minds and spacious souls. Often they have enjoyed mediocre success in practice or in politics and have sought the judiciary to obtain respect and power."

I have enclosed copies of testimony I presented this morning before the Senate Judiciary Sub-Committee regarding **Senate Bill No. 632** that calls for ***Municipal Court Reform.*** I would call your attention to two Wichita Eagle articles enclosed with that testimony that describes how the Wichita Municipal Court has been incarcerating citizens in the Sedgwick County jail for collection of fines, reminiscent of the 17th Century English *"debtor's prisons"*. The articles further question if citizens are receiving "due process of law" as guaranteed by statutes and the Constitution, and whether the Municipal Court is more interested in collecting revenue than dispensing justice. The citizen abuses found in Wichita Municipal Court in my opinion are directly related to the manner in which Judges are selected. I would suggest that Senate Concurrent Resolution No. 1642 be expanded to bring the Municipal Courts under the supervision of the Kansas Supreme Court, and further provide that Municipal Court Judges be selected in the same manner as District court judges.

Thank you for allowing me to speak today. I would be glad to answer questions.

Sincerely,

John R. Todd

John R. Todd
1559 Payne
Wichita, Kansas 67203
(316) 262-3681 office
(316) 264-6295 residence
e-mail: johntodd@fn.net

Date: March 20, 2000

To: Members of the SENATE JUDICIARY SUB COMMITTEE

Subject: SENATE BILL NO. 632

My name is John Todd. I live in Wichita, and am here to speak as a *private citizen* who is interested in Municipal Court reform, and *favor* the passage of Senate Bill No. 632. I am not an attorney. I am a real estate broker by profession.

I have been studying the Wichita Municipal Court as an interested citizen since 1977. As a frequent visitor to the Court I have witnessed the workings of the Court, and I have had the opportunity to visit with citizens, many of whom, in my opinion been have been victimized by the actions of the Court.

I would call your attention to two Wichita Eagle newspaper articles enclosed with this testimony that describes how the Wichita Municipal Court has been incarcerating their citizens in the Sedgwick County jail for collection of fines, reminiscent of the 17th Century English *"debtor's prisons"*. The articles question if citizens are receiving "due process of law" as guaranteed by state statutes and the Constitution, and whether the Municipal Court is more interested in collecting revenue than in dispensing justice? In my opinion, the newspaper articles *clearly* explain the need for reform of the Wichita Municipal Court.

The primary problem inherent in the Wichita Municipal Court deals with the fact that there is no *separation of power* between the Legislative (the City Council), the Executive (the City Manager), and the Judiciary (the Judge) Branches of Government. The City Council promulgates the Law. The City Council hires the City Manager who hires the City Attorney to prosecute violators of the Law. Then, The Judge, who is hired by the City Council, tries the Case. The paychecks of the City Manager, the City Attorney, and the Judge are written by the City Council. The Municipal Court therefore is *not independent!*

The Municipal Court is not a Court of record. There is no stenographic record of the Court proceedings. The Judge can therefore say or do anything he wishes *with impunity!* I heard one Wichita Municipal Court Judge refer to his docket as the *"cattle call"*. On another evening, a friend of mine was threatened with 5 years in prison by the Judge if he didn't follow the Judges wishes. The Municipal Court jurisdiction actually allows a maximum sentence of one year in jail!

I have heard that California and at least one other western state has achieved Municipal Court reform by bringing their Municipal Courts and Judges under the supervision of their state Supreme Courts. The passage of Senate Bill No. 632 or the expansion of Senate Concurrent Resolution No. 1642 to bring the Municipal Courts and Municipal Judges under state Supreme Court supervision would certainly solve the *"separation of powers"* problems discussed earlier. The removal of the Municipal Courts and the money they generate from the Cities, would also end the *'debtor's prisons"*, and eliminate the corruption inherent when a Court is used as a *"revenue source"*.

I would recommend that the Legislature take a look at modifying the Home Rule provisions of the Kansas Constitution in a manner so that Cities could not *"opt"* themselves out of state statutes and the Constitution. Paragraph 16 of the Bill of Rights in the Kansas Constitution says that: *"No person shall be imprisoned for debt, except in cases of fraud."* Cities should not be allowed to sidestep these important Constitutional protections.

Court reform needs to start with the Municipal Courts and work it's way up. The slogan above the door of the Sedgwick County Court House a "free and independent Court for a free and independent people" needs to have real meaning.

Thank you for allowing me to speak today. I would be glad to answer questions.

Sincerely,

John R. Todd

KANSAS BAR ASSOCIATION

PRESIDENT
John C. Tillotson

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FAX 785-234-3813

October 30, 1997

Mr. John R. Todd
John Todd & Associates
805 South Main, Suite 103
Wichita, Kansas 67213

Re: Kansas Citizens Justice Initiative

Dear Mr. Todd:

I read with interest your letter of October 23, 1997 describing your concern over the operations of municipal courts.

During the 1974 study of the organization of Kansas courts, the Study Committee recommended that municipal courts be brought into the state court system. This would mean that judges and court procedures would be under the supervision of the Kansas Supreme Court, as are all other general jurisdiction and magistrate courts in the state of Kansas. It would also mean that the proceeds of filings and court costs would be removed from the municipal coffers and placed into the general operations budget for the state court system. This proposal was vigorously resisted by the large municipalities at the time of the 1974 recommendations and it failed to become law. My suspicion is that this source of revenue has become even more important to certain first class cities in the 1990's.

I urge you, however, to approach the Commission members when they meet in Wichita and discuss this matter with them.

Thanks for your interest in our project.

Very truly yours,

John C. Tillotson
President

JCT:mkv
cc: Ms. Jill Docking

3-6

STATE OF KANSAS
P[illegible]raves, Gover[illegible]

DEPARTMENT OF REVENUE
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Office of the Secretary

TESTIMONY

TO: Representative Mike O'Neal
Members of the House Judiciary Committee

FROM: Sheila J. Walker, Director of Vehicles Sheila J. Walker

DATE: March 20, 2000

SUBJECT: Senate Bill 429

Chairman O'Neal and members of the House Judiciary Committee, my name is Sheila Walker, and I serve as Director of the Kansas Division of Motor Vehicles. Thank you for the opportunity to provide testimony today in support of Senate Bill 429.

The 1996 Kansas Legislature enacted zero tolerance, making it unlawful for any person less than 21 years of age to operate or attempt to operate a vehicle in this state with a breath or blood alcohol content of .02 or greater. The law became effective in January 1997. The license sanction for a first occurrence was a 30-day suspension. On a second and subsequent occurrence, the license sanction was a 90-day suspension.

The 1999 Legislature made the license sanction even tougher for drivers under 21 whose blood alcohol content measures between .02 and .0799. Starting July 1, 1999, the license sanction for a first occurrence is a one-year suspension. On a second and subsequent occurrence, the license sanction is, again, one year.

But there's a discrepancy for drivers under 21 whose blood alcohol content is .08 or greater. Currently, the license sanction is a one-year suspension *or* the length of diversion. We are aware of at least one court that has allowed 30-day license suspensions, rather than a full year. This may inadvertently reward the under 21 driver who has a higher blood alcohol content.

Senate Bill 429 is designed to clean up this discrepancy. Current language says we should suspend the license for "at least" 30 days and "at least" or "up to" one year, depending on the circumstances. We recommend consistency, dropping the "at least" and "up to" phrases, so affected drivers serve the standard 30-day and one-year suspensions.

We respectfully ask the committee to consider an additional amendment to this bill as well.

Ten days ago, the Kansas Supreme Court held that a person who had not obtained a driver's license could not be charged with driving while suspended although the person had committed an

offense which would otherwise have resulted in a license suspension. For example, if an unlicensed driver commits a DUI violation, which carries with it a mandatory driver's license suspension, the unlicensed driver can only be charged with driving without a license, rather than driving while suspended. The message this sends to bad drivers is: just don't get a Kansas driver's license.

The Supreme Court suggested that the Legislature take action to amend current law. This proposed amendment effectively suspends the privilege of an unlicensed driver to obtain a license for the same period of time that a licensed driver would have a suspension of driving privileges.

The division would appreciate passage of these simple cleanup measures. We appreciate your consideration.

MEMORANDUM

TO: Members of the House Judiciary Committee

FROM: Lee J. Davidson
Deputy Sumner County Attorney

RE: SB 620

DATE: March 21, 2000

The advent of the juvenile justice reform act and the placement matrix has resulted in more adjudicated juvenile offenders remaining in the local community. This necessitates some form of probation or supervision, whether it be standard probation through Court Services, intensive supervision probation through Community Corrections, conditional release supervision, or some other type of community-based program.

As you are probably well aware, alcohol and drug usage has been identified as a primary risk factor among the vast majority of juveniles who find themselves in the system. Hence, a universal condition of probation or supervision is the prohibition of the use of alcohol or illicit substances. This condition is enforced by random testing of the probationer's breath, blood, or urine.

Most smaller counties in Kansas do not have access to a local laboratory able to process toxicology screens of blood and urine samples taken from probationers in a safe, timely, and cost-effective fashion. Consequently, most counties contract with an out of town laboratory for these services. Our local Community Corrections office contracts with Pharmchem Laboratories in Texas.

Normally, an attested laboratory report of a "dirty" blood or urine sample forms the basis of a motion to revoke or modify probation. As you are well aware, a probationer has the right to contest a motion to revoke probation and it is the burden of the prosecution to prove the violation of probation by a preponderance of the evidence. In adult criminal cases, the prosecution is allowed to use affidavits in lieu of the live testimony of the lab professional who performed the toxicology screen, pursuant to K.S.A. 22-3716(b).

The Kansas Supreme Court upheld K.S.A. 22-3716 in the case of State v. Yura, 250 Kan. 198, 825 P.2d 523 (1992), stating that the statute does not abridge the probationers constitutional right to confront and cross examine witnesses so long as the State demonstrates good cause to use an affidavit in lieu of live testimony and the affidavit proffered by the State bears sufficient indicia of reliability.

Unfortunately, in juvenile offender proceedings, there is no such statute, nor is K.S.A. 22-3716(b) incorporated into the Kansas Juvenile Offender's Code by reference. I have attempted to admit

the laboratory reports without the presence of live testimony as a "business record" pursuant to K.S.A. 60-245a. However, K.S.A. 60-245a subsection (e) mandates that notice of intention to issue a subpoena of business records where the attendance of the custodian of business records is not required be given to all parties of the action at least ten days prior to the issuance of the subpoena. If a party objects, the subpoena will not be issued without further order of the Court. The District Court of Sumner County has interpreted K.S.A. 60-245a to require the presence of the custodian of business records if a party makes such an objection.

At this point, I am left with three options: (1) pay the lab professional who performed the toxicology screen on the blood or urine sample to travel to Sumner County and testify, (2) pay the custodian of business records to travel to Sumner County to lay the foundation for business records, or (3) dismiss the motion to revoke probation. Most times, my county's budgetary constraints force me to dismiss a motion to revoke probation based solely on a "dirty" blood or alcohol test.

As you may imagine, word of my dilemma spread like wildfire among the ranks of the county's juvenile probationers. Enforcement of the condition of probation prohibiting the use of alcohol or illicit substances became much more difficult in juvenile offender proceedings.

For many years, juvenile offenders were not afforded the full panoply rights available to adults. While that has certainly changed over the years, even now alleged juvenile offenders only have the right to a trial by jury in certain circumstances. It appears to be an oversight that the legislature enacted and the Kansas Supreme Court affirmed (in State v. Yura, above) a law restricting the constitutional right to confront and cross examine witnesses by allowing written affidavits to be used in adult criminal probation violation proceedings under certain circumstances but not did impose a similar restriction in juvenile offender proceedings. This oversight can be corrected by amending K.S.A. 38-1666 to add the language contained in K.S.A. 22-3716(b).

State of Kansas

KANSAS SENTENCING COMMISSION

Honorable Richard B. Walker, Chair
District Attorney Paul Morrison, Vice Chair
Barbara S. Tombs, Executive Director

Testimony on Senate Bill 491
House Judiciary Committee
March 13, 2000

The Kansas Sentencing Commission is testifying today in support of Senate Bill 491. The proposed bill reflects the Commission's recommendations in compliance with the directive set forth in K.S.A. 74-9101(b)(15). Under this statute, the Sentencing Commission is required to produce official inmate population projections and when the projections indicate the inmate population will exceed current capacity within two years "the Commission shall identify and analyze the impact of specific options for (a) reducing the number of prison admissions; or (b) adjusting sentence lengths for specific groups of offenders."

The Sentencing Commission spent considerable time over the past months assessing and analyzing various options that had the potential to reduce prison population, specifically in the area of probation and parole/postrelease condition violators. As indicated in the FY 1999 data, condition violators accounted for approximately 67% of admissions to prison last year. Given this offender group's significant impact on admissions, developing legislation to address this population became the focus of the Commission's efforts. SB 491 contains several modifications to current sentencing policy that are recommended by the Sentencing Commission to reduce prison population.

Sections 1– 4 of the bill amend current statutory provisions by increasing the amount of jail time that a judge can order as a condition of a probation sentence from the current maximum of 30 days to 120 days. During FY 1999, 1,579 condition probation violators were revoked and sentenced to serve their underlying prison sentence. Often a judge is faced with the situation where an offender on probation has served his/her 30-days in jail and commits a condition violation that could be appropriately sanctioned by additional jail time. Given that under current law extended jail time is prohibited, the judge is forced to revoke the offender and place the offender in the custody of the Secretary of Corrections to serve the underlying prison sentence in a state correctional facility. Many of these offenders serve less than six months in prison when jail credits and goodtime credits are applied to their underlying prison sentence. In addition, by extending the allowable period of incarceration in a county facility, the offender is often able to continue employment through a work release program, maintain family contact and participate in local treatment programs to address specific issues related to the offender's

behavior. Often the decision to revoke probation and sentence the offender to the Department of Corrections results from the lack of a more appropriate sanction than believing it is the most suitable sanction for the violation. By expanding the period of jail time from 30 days to 120 days, the limited number of available prison beds can be reserved for violent offenders with lengthy sentences. It is projected that admissions would decrease between 450 and 514 over the ten-year projection period and the number of prison beds required would be reduced by 61 to 67 beds over the same forecast period.

Section 5 of the bill establishes a new provision for offenders who violate the conditions of their probation but have not been convicted of a new crime. The new provision states that conditional probation violators may not be sentenced to a state correctional facility without a prior placement in a community corrections program. In reviewing the FY 1999 sentencing data, approximately 35% or 543 condition probation violators were revoked directly from Court Services and sentenced to the Department of Corrections without a prior placement in Community Corrections. Since Community Corrections programs were developed to provide a higher level of supervision and operate more as an intermediate sanction, it is a more efficient use of resources to provide a graduated level of supervision prior to a revocation resulting in incarceration in a state correctional facility.

The bill does contain a provision that permits a judge to place a condition probation violator directly into the custody of the Secretary of Corrections if there is a finding that the offender poses a significant threat to public safety or the best interest of the offender will not be served by placement in community corrections.

In projecting the bedspace impact for this proposed policy change, a 7.3 month average length of stay was used with an escalating failure rate in the community corrections program to calculate a true prison bed savings. A failure rate of 25% was used for the first year; 40% for the second year and 50% for the third and subsequent years to account for the delayed entry factor. It is forecasted that admissions to prison would decline between 384 and 291 over the 10-year forecast period and the number of prison beds required would be reduced between 180 and 145 beds over that same period.

Section 6 of the bill modifies the periods of postrelease supervision for some of the lower severity levels. The Commission attempted to focus on parole/postrelease condition violators due to the growth in admissions attributed to this specific offender group. During FY 1999, 2,236 parole/postrelease condition violators were admitted to prison, accounting for approximately 38% of the total admissions for that year. The Commission felt that re-examining the periods of postrelease supervision was appropriate and necessary.

In reviewing the periods of postrelease supervision in other sentencing guideline states, there was no consistent trend indicated. Some states have shorter periods of supervision, for example North Carolina has a nine-month period of supervision. Other states set the period of supervision as a percentage of the offender's total sentence, for example Minnesota calculates the period of postrelease supervision as one-third the length of the

sentence imposed. It should also be noted that on April 20, 1995, legislation was passed that increased the original 24/12 months of postrelease supervision to the current 36/24-month period. The Commission also discussed research findings relevant to appropriate periods of supervision and the corresponding need to ensure public safety. Senate Bill 491 proposes the following changes to the periods of postrelease supervision.

Severity Level	Current	Proposed
Non-drug Severity Levels 1-4	36mos-Earn Back to 24 mos	36mos-Earn Back to 24 mos
Drug Severity Levels 1 & 2	36mos-Earn Back to 24 mos	36mos-Earn Back to 24 mos
Non-drug Severity Levels 5-6	36mos-Earn Back to 24 mos	24mos-Earn Back to 12 mos
Drug Severity Level 3	36mos-Earn Back to 24 mos	24mos–Earn Back to 12 mos
Non-drug Severity Levels 7-10	24mos-Earn Back to 12 mos	12 mos-Earn Back to 6 mos
Drug Severity Level 4	24mos-Earn Back to 12 mos	12 mos-Earn Back to 6 mos

Given the seriousness of the offenses and the lengths of sentences on nondrug severity levels 1-4 and drug severity levels 1-2, the Commission did not recommend that the current periods of postrelease supervision be modified for these specific severity levels.

In addition, to realize an immediate impact on prison bed savings, it is the recommendation of the Commission that the modified periods of postrelease supervision be fully inclusive and applicable to any offender who has been sentenced under the Sentencing Guidelines Act. By including all offenders sentenced under Sentencing Guidelines there will be no basis for litigation or appeals on the part of offenders, since all offenders sentenced for crimes committed on or after July 1, 1993 will be eligible to have their periods of postrelease supervision converted. In addition, the Commission did not perceive public safety as being jeopardized since the period of incarceration for all offenders remain unchanged and the modified periods of postrelease are fairly consistent with the original periods of postrelease established with the enactment of the Sentencing Guidelines.

The Commission does recommend a six month phase-in period for the modified periods of postrelease supervision that will allow the Department of Corrections adequate time to complete the necessary sentence recalculations and required computer programming for the department's database. The bill proposes that offenders sentenced on nondrug severity levels 9 and 10 and drug severity level 4 have their postrelease supervision periods recalculated by September 1, 2000. Offenders on nondrug severity levels 7 and 8 will be converted by November 1, 2000. Offenders sentenced on nondrug severity levels 5 and 6 and drug severity level 3 be converted by January 1, 2001. It is projected that the implementation of the changes in the periods of postrelease supervision will result in a reduction of between 218 and 238 prison beds required over a ten-year projection period.

The cumulative prison bedspace impact from the various sections of SB 491 are presented below:

Total SB 491 Bedspace Saving By Bill Section

Fiscal Year	Sections 1-4	Section 5	Section 6	Total Beds Saved
2001	61	180	218	459
2002	56	167	218	441
2003	46	134	224	404
2004	48	146	227	421
2005	43	130	231	404
2006	54	158	234	446
2007	54	142	239	435
2008	46	147	234	427
2009	53	144	241	438
2010	67	145	238	450

Section 7 of the bill was amended by the Senate Judiciary Committee to specify that if the Secretary of Corrections desires to contract with a city or county jail to house offenders that have been placed in the Secretary's custody, the city or county shall provide and maintain appropriate and recognized standards of safety, health and security. Failure of a local correction facility to maintain those recognized standards will prevent the Secretary from entering into a contractual agreement with that facility.

Section 10 of the bill, at line 22, indicates the effective date of the modified periods of postrelease supervision will be upon publication in the Kansas Register. All other provisions of the bill will be effective on July 1, 2000.

Senate Bill 491 contains recommendations that support the underlying goal of Sentencing Guidelines that incarceration should be reserved for the serious and violent offenders, while simultaneously addressing the issue of public safety. The changes proposed in this bill are supported by the both the Department of Corrections and the Kansas Parole Board. The longer sentences imposed for violent offenders do contribute to a sense of safety in our communities but also require fiscal resources. Reserving our prison beds for offenders whose crimes require and deserve lengthy periods of incarceration is one of the elements of both sound fiscal and sentencing policy. The Sentencing Commission hopes you will act favorably and support the passage SB 491.

For Additional Information Contact

Barbara Tombs
Executive Director

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Bill Graves
Governor

Charles E. Simmons
Secretary

MEMORANDUM

DATE: March 13, 2000

TO: House Judiciary Committee

FROM: Charles E. Simmons
Secretary of Corrections

RE: SB 491

SB 491 increases the length of time an offender can be confined in a county jail as a condition of probation; requires the use of community corrections as an intermediate sanction for probation violations; reduces the length of time certain offenders must remain under postrelease supervision; authorizes conservation camp programs to be completed in less than six months; and requires that cities and counties contracting with the department for the housing of offenders sentenced to the department's custody maintain appropriate standards of safety, health and security. SB 491 was introduced at the request of the Sentencing Commission.

SB 491 increases the length of time that an offender may be confined in a county jail as a condition of probation or a suspended sentence from 30 to 120 days. This provision provides sentencing courts with an option when initially sentencing an offender or imposing a sanction due to an offender having violated a condition of probation. This authority provides an additional option for retaining offenders in the community as an alternative to revocation and admission to prison.

SB 491 further diverts offenders from the department's custody by mandating the use of community corrections for certain offenders who violate a condition of their probation, suspended sentence or other nonprison sentence. Offenders who have not previously been assigned to community corrections supervision for the current offense are to be placed into community corrections for probation or other nonprison supervision violations unless the violation was for the commission of a new misdemeanor or felony offense; or the court finds that the public safety would be jeopardized or the welfare of the offender would not be served by assignment to a community correctional services

House Judiciary
3-20-2000
Attachment 7

program. This would be consistent with the intent that community corrections be an intermediate alternative between probation and incarceration.

SB 491 also reduces the length of the postrelease supervision period for certain crime severity levels. Persons sentenced for nondrug severity level 5 and 6 offenses and severity level 3 drug offenses will have a 24 month period of postrelease supervision period rather than 36 months. The postrelease supervision periods for nondrug severity level 7 through 10 offenses and severity level 4 drug offenses are reduced from 24 to 12 months. Good time credits may reduce 36 and 24 month periods of postrelease supervision by up to 12 months. A 12 month period of postrelease supervision may be reduced by up to 6 months. Offenders convicted of nondrug severity level 1 through 4 offenses, drug severity level 1 and 2 offenses or sex offenses for which a 60 month period of postrelease supervision has been imposed will not be affected by SB 491. The postrelease supervision periods provided by SB 491 are equal to or longer than originally established by the Sentencing Guidelines Act. The postrelease supervision modifications of SB 491 would be applied retroactively. These changes in the length of periods of postrelease supervision will allow the department to utilize limited resources for higher risk offenders who have convictions for more severe crimes.

SB 491 clarifies the duration of conservation camp programs. Current law provides that a sentencing court may place an offender into a conservation camp for a period not to exceed six months as a condition of probation. Additionally, the Department of Corrections may place offenders into a conservation camp program. However, in regard to placements made by the department, current law provides that the program is a six month program. SB 491 clarifies that participants may progress through the conservation camp program sooner than six months. Conversely, conservation camp participants placed into the program by the department and who are still serving the prison portion of their sentence could remain in the program for a period longer than six months if their behavior and progress in the program remain acceptable.

SB 491 also requires that city and county jails that contract with the department for the housing of inmates sentenced to the custody of the department maintain appropriate standards of safety, health, and security. This provision codifies the department's current practice. Contracts the department enters into with cities and counties for inmate placement allow the department to have the right of inspection of the jail and provides that the jail maintain standards of care and discipline not incompatible with those of the State. The jail would also be subject to inspections of the State Fire Marshal.

SB 491 passed the Senate by a vote of 35 to 4. The department urges favorable consideration of SB 491.

CES/TGM/ll

cc: Legislation file

KANSAS
ASSOCIATION OF
COUNTIES

Testimony concerning SB 491
House Judiciary Committee
March 13, 2000
Presented by Randy Allen, Executive Director
Kansas Association of Counties

Mr. Chairman and members of the committee, my name is Randy Allen, Executive Director of the Kansas Association of Counties. Thank you for the opportunity to testify ***in opposition to SB 491.*** We are concerned about the bill for its potential negative impact upon 1) county budgets and property tax levies; and 2) pressure on already limited jail capacity in county jails and the impact it could contribute to the need for additional jail space.

As we understand the bill, a court could confine a prisoner in a county jail for up to 120 days (currently up to 30 days maximum) in lieu of sending the prisoner to a state correctional institution. It is our further understanding that the "extended stay" under the provisions of SB 491 would be at county cost, with no offer of state money to reimburse counties for daily prisoner costs.

SB 491 seems to be an attempt to increase capacity for housing state prisoners without constructing additional prison space at state expense. It appears that counties would be forced to absorb an additional cost -- both for the daily cost of housing such prisoners but also for the capital expense of jail construction as the impact of this measure is factored into design capacity discussions and decisions in the future.

On the basis of these concerns, we urge the committee to hold this bill and look for other solutions to the prison capacity problem other than shifting the burden to county governments and county property taxpayers.

If you have questions, I would be happy to respond.

The Kansas Association of Counties, an instrumentality of member counties under K.S.A. 19-2690, provides legislative representation, educational and technical services and a wide range of informational services to its member counties. Inquiries concerning this testimony should be directed to Randy Allen or Judy Moler by calling (785) 272-2585.

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Testimony of
Kristy Hiebert, Assistant Attorney General
Consumer Protection Division
Office of Attorney General Carla J. Stovall
Before the House Judiciary Committee
SB 431 as amended by Senate Committee of the Whole
March 20, 2000

Chairperson O'Neal and Members of the Committee:

Thank you for allowing me to appear before you this afternoon on behalf of Attorney General Carla J. Stovall to testify in support of SB 431 as amended by the Senate Committee of the Whole. My name is Kristy Hiebert and I am an Assistant Attorney General for Consumer Protection. As you may know, this bill was referred to both the House Utilities Committee and this Committee. It has been heard by the House Utilities Committee and unanimously recommended for passage as it is currently drafted.

Cramming is the unauthorized submittal of additional charges to a consumer's telephone bill and usually results in much higher damages to consumers than slamming. Cramming charges range from $5.00 to $50.00 on monthly telephone bills. Examples of unauthorized charges include voice mail, personal 800#'s and Internet access/web page design. As you can imagine, consumers are not happy when these charges appear on their telephone bill without their authorization.

We did not begin tracking cramming complaints until April of 1998. We received 121 cramming complaints through the end of 1998. In 1999, we received 59 cramming complaints. As with all areas of consumer violations, the number of complaints we receive in our office on cramming reflects only a small percentage of actual consumer violations. Southwestern Bell advises that in 1998, they received an average of 496 cramming complaints per month from Kansas customers. This decreased in 1999 to an average of 221 cramming complaints per month, or approximately 2,650 in 1999.

We believe the decrease in cramming complaints in 1999 is attributable to both the 1998 prohibition against using sweepstake/prize drop boxes to add telecommunication services and the increased effort by the telecommunication industry to protect their customers from this abusive practice. However, unauthorized Internet-related charges are currently the most common cramming complaint. With the increased use and popularity of the Internet, we anticipate similar complaints in the future.

Senate Bill 431 seeks to amend K.S.A. 50-6,103, the statute enacted in 1998 which prohibits slamming (the unauthorized switching of a consumer's local or long distance telephone service without a consumer's express authorization), to also prohibit cramming (adding unauthorized charges to a consumer's telephone bill). Since 1998, we have worked with industry in drafting SB 431, and believe these new provisions on cramming and slamming will further our joint effort to stop these practices.

Briefly summarized, the provisions in SB 431 would:

- Include cramming as a prohibited practice by:
  - prohibiting the addition of any supplemental telecommunications services or billing or collecting for such services without the consumer's express authorization and placing the burden of proving the express authorization on the supplier (page 2, lines 6-19);
  - defining "supplemental telecommunications services" to include the types of items that are often crammed onto consumers' phone bills, including: personal 800 numbers, calling card plans, Internet advertisement and website services, voice mail services, paging services, psychic services, dating services or memberships, travel club memberships, Internet access services and service maintenance plans (page 1, lines 27-36);
  - prohibiting deceptive, misleading or confusing conduct when soliciting a consumer to add any supplemental telecommunications services (page 2, lines 23-29); and
  - imposing civil penalties of $5,000 to $20,000 against crammers or third-party billing companies for cramming violations (page 2, line 43, page 3, lines 1-4).
- Replace the phrase "local exchange carrier or telecommunications carrier" with the term "supplier" to allow the Attorney General to pursue all entities involved in a cramming or slamming scheme when such company knew or had reason to know the express authorization had not been obtained, such as the companies' demanding payment from consumers (page 2, lines 20-22, 43, page 3, lines 1, 11-12).
- Exempt a consumer's existing local or long distance carrier from the cramming provisions (page 2, lines 6-7). Our complaint history demonstrates that existing companies are not a problem in the cramming area. These existing carriers would still be liable for any deceptive acts and practices under general consumer protection provisions, and would certainly lose existing customers if they bill their customers for unauthorized services. An amendment added on the Senate floor provides that

the phrase "existing local exchange carrier or telecommunications carrier" does not include an affiliate or subsidiary thereof (page 1, lines 19-21).

- Allow organizations and businesses to bring their own private cause of action for slamming and cramming (page 3, lines 21-25). Currently, the slamming law does not protect anyone other than a consumer as defined by the Act (an individual or sole proprietor) from slamming or cramming. This amendment would not expand the authority of the Attorney General, but merely give these entities a private cause of action for slamming and cramming.

On behalf of Attorney General Stovall, I urge your favorable consideration of Senate Bill 431. I would be happy to answer any questions of the chair or the members. Thank you.

House JudiciaryCommittee
March 20, 2000
SB 431

Chairman O'Neal, members of the committee, I am Richard Shank, area manager in external affairs for Southwestern Bell in Hutchinson. I thank you for allowing me time to discuss issues involved in Senate Bill 431 before you today.

First, let me say that Southwestern Bell supports the concept of the original draft of SB 431. Southwestern Bell worked with the Attorney General's office and the industry to develop that language. We still support that original bill.

Southwestern Bell must, by federal law, bill for telecommunications providers on a non-discriminatory basis. The vast majority of charges submitted to SWBT for billing are legitimate. However, some unscrupulous providers continue to "cram" onto our customers' bills charges for services not authorized, and sometimes not even received. Dealing with cramming complaints has cost Southwestern Bell considerable expense in handling time and an invaluable loss of good will with our customers.

Therefore, Southwestern Bell has taken significant steps toward reducing instances of cramming through changes in its billing and collection practices. Southwestern Bell also took a leadership role in 1998 in helping the industry develop a set of "best practices" designed to eliminate offending providers. In short, Southwestern Bell has:

- educated its customers about how to prevent cramming
- stopped billing for 40 providers
- stopped billing for the services most likely to be the source of cramming problems, such as monthly fees for calling cards, prepaid calling cards, and debit calling cards
- put in place a plan to put offending providers on a "moratorium" when the provider reaches a threshold level of adjustments or complaints

These efforts have had a positive impact on the cramming problem. From May through December 1998, we averaged 496 cramming complaints per month in Kansas. In 1999 we averaged 221 complaints per month, a reduction of over 50% in just one year. Southwestern Bell believes the industry's continuing efforts combined with the provisions proposed in the original SB 431 will continue to bring positive results.

However, we cannot support this bill with language that requires Southwestern Bell to obtain express authorization for services we sell for our subsidiaries. The original bill provided an exemption for existing local exchange carriers from obtaining "express authorization". That exemption was supported by the Attorney General's office and the industry because local exchange carriers are not causing the problem.

The new language that specifically removes subsidiaries and affiliates from the definition of local exchange carrier essentially removes the local carrier exemption for Southwestern Bell, as we may sell many services (voice mail, cellular, among others) for our subsidiaries. Customers do not distinguish those subsidiaries from the "telephone" company and expect to do business with us for all our products. The fact is, we have been selling services for those subsidiaries, and by the Attorney General's office's testimony, this has not caused a problem. We propose that the original language of SB 431 be restored in this regard.