Approved: March 30, 2005
Date

MINUTES OF THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman John Edmonds at 1:30 P.M. on March 17, 2005 in Room 313-S of the Capitol.

All members were present except:

Representative Ray Cox- excused
Representative Broderick Henderson- excused
Representative Lance Kinzer- excused
Representative Ray Merrick- excused

Committee staff present:

Athena Andaya, Legislative Research Department
Mary Torrence, Office of the Revisor
Carol Doel, Committee Secretary

Conferees:

Honorable Supreme Court Justice, Ed Larson
Representative Oharah
Patricia Riley, Supreme Court Nominating Commission
Rich Hayse, President Elect of the Kansas Bar Association
Jerry Palmer, Kansas Trial Lawyers
Charlotte O'Hara

Others attending:

See attached list

Chairman Edmonds opened the floor for any bill introduction. Hearing none, he opened the public hearing on **HCR 5012** a proposition to amend sections 5 and 8 of article 3 of the constitution of the State of Kansas; providing or the election of justices of the supreme court.

Representative Lynne Oharah as a proponent of **HCR 5012** gave testimony that this resolution would amend the constitution to a truly non-partisan method of selecting our supreme court justices and put the Supreme Court Justice selection back in the hands of our citizens who are the qualified electorates in making the decision of who would best interpret the laws contained in our constitution. (Attachment 1)

Charlotte O'Hara, a proponent of **HCR 5012**; presented the opinion that today we are still in a time of crisis with the activist judges legislating from the bench. Ms. O'Hara listed a number of examples of activist judges legislating from the bench. She further related that the Separation of Powers was the genius of our Funding Fathers, but our out of control jurists are ignoring this separation and replacing it with their own judicial tyranny. That is the reason there is an urgency to pass **HCR 5012**. (Attachment 2)

Written testimony was presented in support of **HCR 5012** by David Barton. (Attachment 3)

There were no other proponents of **HCR 5012** and the Chair opened the floor to the opponents of the resolution.

Honorable Supreme Court Justice, Ed Larson, stands in opposition to **HCR 5012**. Justice Larson gave his personal background, changes in the method of selection of supreme court justices, as well as speaking about the supreme court nominating commission, and the danger of twenty-first century judicial elections. Justice Larson also related that raising money and campaigning takes time that should be spent deciding cases, writing opinions and administering a states judicial system. In conclusion, Justice Larson, stated that "If it is not broken, don't try to fix it." and he sincerely believes that out system of non-partisan selection of Kansas Supreme Court Justices is not broken. (Attachment 4)

Patricia Riley, appeared before the committee on behalf of the Supreme Court Nominating Commission as an opponent of **HCR 5012**. Ms. Riley explained that the Commission consists of nine members. Four are lawyers elected by lawyers from each of the state's four congressional districts. Four are lay members appointed by the Governor. The Chair is a lawyer, elected by lawyers statewide. She also explained the procedure for getting appointed to the Supreme Court. (Attachment 5) Ms. Riley also submitted a copy of

all of the forms that must be completed for the Commission to review prior to appointment. (Attachment 6)

Delivering testimony in opposition to **HCR 5012** was Richard Hayse, Kansas Bar Association President-elect. Mr. Hayse opined that a Supreme Court justice must not only be broadly experienced in legal matters, but also unbiased and compassionate toward all parties in a case, diligent in gleaning the essential facts of each case from the lower court record, and probably above all, a scholar of the law. He further stated that not everyone who can win an election would necessarily possess these attributes. His testimony related that it would be a serious error to undermine the qualifications and independence of our judiciary by switching to an elective system. (Attachment 7)

Jerry Palmer, a practicing attorney, presented testimony for the Kansas Trial Lawyers Association in opposition to **HCR 5012**. Mr. Palmer stated that the current system works well and does not need to be fixed. In their opinion , with the general lack of information that is available about judicial candidates and the high correlation between dollars spent and results with the ever increasing demand for medial dollars in these types of elections, we should all be very cautious about trying to elect the third branch of government. In conclusion, Mr. Palmer stated that the Kansas Trial Lawyers Association, the Kansas Bar Association, representing lawyers who are in the courtrooms who deal with the judges and justices regularly from all sides of litigation are overwhelmingly in favor of preserving the current system and not electing our Supreme Court justices, but rather leaving that job to the Supreme Court Nominating Commission and the Governor. (Attachment 8) Mr. Palmer included in his testimony a copy entitled "Expensive Justices" an analysis of 2000 and 2002 partisan judicial elections in Sedgwick County. (Attachment 9)

No other person wished to testify in opposition to **HCR 5012**.

Written testimony was presented by Judy Krueger in opposition to **HCR 5012**. (Attachment 10)

With no further business before the committee, Chairman Edmonds adjourned the meeting.

FEDERAL AND STATE AFFAIRS
GUEST LIST

Date 3/17/05

[illegible signature]	Parkinson
Sandy Braden	Civic Council of GKC
[illegible signature]	KU
Dave Cook	KUMC
[illegible signature]	KUMC
L. WADE	HTO-KUMC
Ron Seeber	Hein Law Firm
Jean Redeker	KU
Claire Roushee	KFL - Kansans For Life
Kathy Ostrowski	KFL
Mary Kay Culp	KFL
Chris May	KFL
Jeanne Gawdun	KFL
Wesley Smith	
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HCR5012

Mr. Chairman
Members of the committee

In 1861 our constitution set forth how our Supreme Court Justices were be chosen. Quote **" SEC. 2. The Supreme Court shall consist of one Chief Justice and two Associate Justices, (a majority of whom shall constitute a quorum,) who shall be elected by the electors of the State at large."** In 1900 the number of judges were increased to 7 members. Again the judges were elected by the citizens of Kansas. The elections were patrician and the majority of the judges that were elected were Republicans. Only in one year was an election of supreme court justices non-patrician. This system seemed to serve the citizens well until 1957.

A three-way political maneuver in 1957 sent former Governor Fred Hall to the Supreme Court and created controversy in our Supreme Court Justice election process. It was at this time the KBA came up with a nonpartisan nominating and appointment plan that was to take politics out of the judicial system . This plan is now embedded in our constitution and is quoted as follows **"5. Selection of supreme court justices. (e) The supreme court nominating commission shall be composed as follows: One member, who shall be chairman, chosen from among their number by the members of the bar who are residents of and licensed in Kansas; one member from each congressional district chosen from among their number by the resident members of the bar in each such district; and one member, who is not a lawyer, from each congressional district, appointed by the governor form the residents of each such district."** This to me does not seem to meet any definition of nonpartisan. It is more leaning toward a committee comprised of appointments from the KBA and a governor's task force.

You have before you HCR 5012 which would amend the constitution to a truly nonpartisan method of selecting our supreme court justices and put the Supreme Court Justice selection back in the hands of our citizens whom are the qualified electorates in making the decision of who would best interpret the laws contained in our constitution.

FEDERAL AND STATE AFFAIRS
Date 3-17-05
Attachment 1

This resolution is quite simple. It states that elections of Supreme Court Justices "shall be nonpartisan and from the state at large."

This resolution brings government back closer to the citizens of Kansas and lets them determine who is best qualified to interpret and rule on the laws and rights contained in our constitution.

You may hear arguments today pointing out that we need to keep money and politics out of the selection process and I would say that if we go with this train of thought, then we have corruption in our election process all the way from the County Clerk to the President of this great nation. I would also say that money and politics do not corrupt; it is the individual that corrupts. I would also submit to you that the current system is not immune to corruption. We would be naïve to think that political parties and special interest groups don't try to influence the selection and appointment process.

You may also hear testimony today that states that our current system picks the most qualified individuals to sit on the supreme court. I would say that the group of individuals that are selecting these judges now will still have an opportunity to select a candidate or candidates. This process will not exclude any person that meets the qualifications and has the desire to serve the people in one of the most important positions in this great state.

In closing, I would like to reiterate: the citizens of the United States residing in Kansas are best suited to pick the judges that will interpret and protect the constitution of the state of Kansas.

Lynne Oharah
Rep. Dist. 4

TESTIMONY BY CHARLOTTE O'HARA ON HCR 5012 March 17th, 2005

Mr. John Edmonds, Chairman of Federal and State Affairs Committee
Members of the committee

As you have heard in the opening remarks, as Kansas became a state in 1861, our constitution set forth that the State Supreme Court Justices would be chosen by election. The question must be asked why? Why would the founders of our state chose the election process rather than the appointment process that was used widely in the eastern states at that time?

Our state entered the U.S. in a time of war; our country was being ripped apart with brother fighting against brother in our Civil War. Part of the cause of that great war was an egregious ruling by the U.S. Supreme Court in 1857, Dred Scott vs. Sanford. In that ruling our Supreme Court went far beyond judicial review, in fact was "the first case in which the Supreme Court tried to expand its power over other branches of government. It was for many reasons one of the most disastrous court decisions in history." (Quote from The Supremacists by Phyllis Schlafly) Thus began the movement of activist judges.

That ruling dismissed Dred Scott's complaint saying blacks "had no rights that the white man was bound to respect," and went on to find that the Missouri Compromise of 1820, which did not allow slavery in most western territories, was unconstitutional. That decision started the days of "Bleeding Kansas" and was a major contributor to the beginning of the Civil War.

Western territories coming into the U.S. during that period, chose to elect the State Supreme Court Justices, because they viewed the appointment of judges an elitist Eastern method in which accountability was impossible, especially after the Dred Scott decision. This was a time of the Populist Movement, the birth of the Republican Party, the growth of the Abolitionist Movement which all demanded that their judges stand for election, help do away with the scourge of slavery and be accountable to the people.

That tradition, election of State Supreme Court Justices, still remains in many states. Texas, Colorado, Utah, Nevada, Arkansas, Oregon, Washington, Ohio, North Carolina and Wisconsin, are a few with a total of 21 states electing State Supreme Court Judges. 9 of these states use partisan elections with the remaining 12 using non-partisan elections. So as you can see, this is not a radical idea to put more power in the hands of the electorate.

Today, we are still in a time of crisis with activist judges legislating from the bench at a far greater level than ever before in our country's history. Example:

1. Abortion on demand, with the cost of 48 million babies' lives
2. Same sex marriage, with states, such as Kansas being forced to pass Constitutional Amendments to protect Traditional Marriage
3. Pornography being classified as protected speech under the 1st Amendment, to the point of many not allowing their children to view TV during "family hours"
4. Schools, judges requiring state legislatures to spend more money on schools. Example, the decision handed down by our own Kansas Supreme Court putting an April 12th deadline on this body to increase spending on our public schools. Also, the court requiring the K.C., Missouri

Schools to spend an additional BILLION DOLLARS or more on their schools in the 80's and 90's. When did the judges become empowered with this ability to legislate from the bench?

5. The Kansas Supreme Court overturning of our death penalty in December 2004.
6. The U.S. Supreme Court finding of death penalties for juvenile's unconstitutional using international law as reasons for their findings.
7. U.S. Supreme Court finding prayer in schools as unconstitutional.
8. The courts are being used to determine that any mention of God be disallowed in the public square with the Establishment Clause as the basis of their decisions.

The list could go on and on, but as well informed legislators you are already aware of many of the egregious decisions that are being handed down on a daily basis from activists judges. In fact, President George W. Bush has identified activist judges being one of the most critical issues that must be addressed for the good of our country.

The principle of Separation of Powers was the genius of the our Founding Fathers, but our out of control jurists are ignoring this separation and replacing it with their own judicial tyranny.

That is why there is such an urgency to pass this HCR 5012 out of committee and onto the House floor so that the people of this great State of Kansas will have State Supreme Court Justices who will be accountable to the people.

If you fear the right of the people to elect our State Supreme Court Justices please listen to these words of wisdom from Thomas Jefferson. "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion."

Should Kansans Elect Their Judges?

By David Barton
March 16, 2005

The Constitution originally organized the judiciary in a manner providing for appointed judges, serving for the duration of "good behavior" (Art. III, Sec. 1, Par. 1). That appointed system performed admirably while a common value system was embraced by the nation. (For example, even though Declaration signers Benjamin Franklin and the Rev. Dr. John Witherspoon held divergent religious views, there were few differences in their governmental philosophy or approach to common cultural values.) The success of the appointed system was further enhanced by the fact that the judiciary did not view itself as a super-legislature; policy-making was anathema to that branch, and it was extremely unusual for the judiciary to strike down any act of the legislature. As a supreme court explained in 1838:

> The Court, therefore, from its respect for the Legislature – the immediate representation of that sovereign power [the people] whose will created and can at pleasure change the Constitution itself – will ever strive to sustain and not annul its [the Legislature's] expressed determination. . . . [A]nd whenever the people become dissatisfied with its operation, they have only to will its abrogation or modification and let their voice be heard through the legitimate channel, and it will be done. But until they wish it, let no branch of the government – and ***least of all the Judiciary*** – undertake to interfere with it. [1]

Most judges today no longer embrace this view. Consequently, State policies on issues from education to criminal justice, from religious expressions to moral legislation, from financing to health now stem more frequently from judicial decisions than legislative acts. In fact, in recent years, even the federal court has described itself as "a super board of education for every school district in the nation," [2] "a national theology board," [3] and amateur psychologists on a "psycho-journey." [4] Judges now endorse the declaration of Supreme Court Justice Benjamin Cardozo that:

> I take judge-made law as one of the existing realities of life. [5]

As a result, there are now two constitutions for most states: the ratified constitution with its explicitly written language, and the living constitution that evolves from decision to decision (or, as explained by Supreme Court Chief-Justice Charles Evans Hughes: "We are under a Constitution – but the Constitution is what the judges say it is." [6]) And unfortunately, just as there are now two constitutions, there are also now two public policy-making bodies: the elected legislature and the appointed judiciary.

With two such radically different constitutions and distinctively different public policy bodies, citizens should have the choice of the constitution and public policies under which they must live. Otherwise (as Samuel Adams wisely observed):

> [I]f the public are bound to yield obedience to [policies] to which they cannot give their approbation, they are slaves to those who make such laws and enforce them. [7]

While defenders of an activist judiciary often assert that an independent appointed judiciary does not hold political views, such claims are specious and are not confirmed by contemporary experience. As Thomas Jefferson long ago observed, it is naïve to assume that judges do not have political views on most issues before them:

> Our judges are as honest as other men and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. . . . and their power the more dangerous as they are in office for life and not responsible – as the other functionaries are – to the elective control. [8]

Recent months have provided numerous examples of the people expressing a clear will on an issue and the judiciary then abrogating that will.

Most recently, a state judge just struck down California's Prop 22 (enacted in 2000) declaring that marriage is only between a man and a woman. That judge unilaterally took the definition of marriage out of the hands of the people and substituted his own – as did judges in Hawaii, Vermont, and Massachusetts.

And in Nevada, even though the state constitution requires a 2/3rds majority of the legislature to increase taxes, its supreme court ordered that clause to be ignored and instead directed a tax increase to boost spending on education. Unbelievably, the state court ruled that part of the state constitution was unconstitutional.

Then in New Jersey, the 2002 Democratic candidate for U. S. Senate fell far behind in the polls; with 35 days left before the election, that candidate withdrew his name from the ballot. The Democrats sought to place a new name on the ballot but State law stipulated that a candidate's name could be replaced only if the "vacancy shall occur not later than the 51st day before the general election." Despite the clear wording of the law, the appointed court ordered a new name to be placed on the ballot. That candidate surged in the polls and because the court ignored the law in order to advance a political agenda and gives one party two choices rather than one, Democrats won a U. S. Senate seat they were destined to lose.

There are many other similar examples demonstrating that in States with an appointed judiciary, judges are quite comfortable in exerting political influence rather than simply upholding and applying State laws.

Given the growing proclivities now evident throughout appointed judiciaries, it is time for Kansas to move toward elected judges – as Texas, New York, Louisiana, Pennsylvania, Alabama and more than half the States already have. And any argument that what occurred in New Jersey, California, Nevada, *et. al*, will not occur in Kansas (notwithstanding Kansas' recent death penalty and school finance decisions) ignores the fact that the current trend is not the result of demographics; rather, it is the result of what has been taught in law schools in recent decades. Consequently, the instances of judges acting as super-legislators will continue to increase in Kansas, as it already has in other states.

The election of judges can now help preserve America's two fundamental government principles: government by "the consent of the governed," as authorized and approved by "We the people." Additionally, there are three fundamental historic principles that further buttress the current attempts to move toward elected judges.

<u>Principle #1: Under American Government as Originally Established, the People are Ultimately in Charge of All Three Branches</u>

The same Framers who established the three separate branches also established the principle that none of the branches was to be beyond the reach of the people. For example, the early State constitutions written by those who also framed the national government contain declarations such as:

> All power residing originally in the people and being derived from them, the several magistrates and officers of government vested with authority – whether legislative, executive, ***or judicial*** – are their substitutes and agents and are at all times accountable to them [the people]. [9]

Thomas Jefferson reiterated this important principle on numerous occasions. For example, when setting forth to the French the most important aspects of American government, he explained:

> We think, in America, that it is necessary to introduce the people into every department of government. . . . Were I called upon to decide whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making them. [10]

Since judges often have the final word, it is important that the people have a voice in that branch. In fact, if the "execution of the laws" by the judiciary regularly counters the will of the legislature (and thus uncorrectable by the people), then citizens will lose respect for government. As Luther Martin accurately warned at the Constitutional Convention:

> It is necessary that the supreme judiciary should have the confidence of the people. This will soon be lost if they are employed in the task of remonstrating against [opposing and striking down] popular measures of the legislature. [11]

Supreme Court Justice Joseph Story (a "Father of American Jurisprudence," appointed to the Court by James Madison) further warned that an unaccountable judiciary would create a general dislike and distrust of the judiciary by the citizenry:

> [An] accumulation of power in the judicial department would not only furnish pretexts for [complaint] against it but might create a general dread of its influence. [12]

It is an established principle of American government that the judiciary is to be accountable to the people, and judicial elections safeguard this principle.

Principle #2: The Independence of the Judiciary is ***Not*** Violated by the Election of Judges

Today, the term "independent" as applied to the judiciary has largely become a euphemism for "unaccountable"; and not surprisingly, many judges, when given increased levels of protection from the public, feel freer to advance personal agendas. Thomas Jefferson wisely observed that no official was to be so "independent" as to be beyond the reach of the people:

> It should be remembered as an axiom of eternal truth in politics that whatever power in any government is independent is absolute also; in theory only, at first, while the spirit of the people is up, but in practice as fast as that relaxes. Independence can be trusted nowhere but with the people in mass. [13]

Only the people – and not the judiciary – can be safely trusted with complete independence. The term "independent" as currently used in relation to the judiciary is incorrectly applied – as pointed out by William Giles (1762-1830), a member of the first federal Congress:

> With respect to the word "independent" as applicable to the Judiciary, it is not correct nor justified by the Constitution. This term is borrowed from Great Britain – and by some incorrect apprehension of its meaning there – . . . is applied here. [14]

In fact, when some clamored that the judiciary should be "independent," judge and U. S. Rep. Joseph Nicholson (1770-1817) forcefully reminded them:

> By what authority are the judges to be raised above the law and above the Constitution? Where is the charter which places the sovereignty of this country in their hands? Give them the powers and the independence now contended for and they will require nothing more, for your government becomes a despotism and they become your rulers. They are to decide upon the lives, the liberties, and the property of your citizens; they have an absolute veto upon your laws by declaring them null and void at pleasure; they are to introduce at will the laws of a foreign country, differing essentially with us upon the great principles of government; and after being clothed with this arbitrary power, they are beyond the control of the nation, as they are not to be affected by any laws which the people by their representatives can pass. If all this be true – if this doctrine be established in the extent which is now contended for – the Constitution is not worth the time we are now spending on it. It is, as its enemies have called it, mere parchment. For these judges, thus rendered omnipotent, may overleap the Constitution and trample on your laws; they may laugh the legislature to scorn and set the nation at defiance." [15]

The notion of independence as now applied to the judiciary was repugnant to the Framers of American government – as confirmed by Constitution signer John Dickinson:

> What innumerable acts of injustice may be committed, and how fatally may the principles of liberty be sapped, by a succession of judges utterly independent of the people? [16]

In short, the modern notions of judicial independence are glaringly absent from the constitutional organization of the branches. No branch is to be unaccountable to the people, and judicial elections ensure accountability.

Principle #3: The Judiciary is to be Accountable to the People, and Election of Judges Currently Accomplishes what Impeachment Did During the First Century of American Government

Originally, every appointed judge was made accountable to the people through impeachment; and literally dozens of impeachment proceedings were conducted during the first century of the nation. [17] Judges were removed from the bench for everything from cursing in the courtroom to rudeness to witnesses, from drunkenness in private life to any other conduct or behavior that was unacceptable to the public at large. (Only in the past half century has the level for an impeachable offense been redefined to be the commission of a major felony; with this new standard, the people's ability to hold judges accountable has been greatly diminished.) The election of judges will now ensure the same level of judicial accountability that impeachments once provided. It is instructive to examine the original grounds for removal of judges through impeachment and to note that these would be the very same grounds used today for removal of judges through elections.

What were the offences that allowed for the removal of judges during America's early years? According to Justice Joseph Story, those offences included "political offences growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests." [18] And Alexander Hamilton explained that judges could be removed for "the abuse or violation of some public trust. . . . [or for] injuries done immediately to the society itself." [19]

Constitutional Convention delegate Elbridge Gerry considered "mal-administration" as grounds for a judge's removal, [20] and early constitutional scholar William Rawle also included "the inordinate extension of power, the influence of party and of prejudice" [21] as well as attempts to "infringe the rights of the people." [22] Very simply, judges could be removed whenever they disregarded public interests, affronted the will of the people, or introduced arbitrary power by seizing the role of policy-maker.

But would not a system of judicial elections be unfair to judges, or become a deterrent to good judges serving? Certainly not. As explained by Justice Story:

> If he [a judge] should choose to accept office, he would voluntarily incur all the additional responsibility growing out of it. If [removed] for his conduct while in office, he could not justly complain since he was placed in that predicament by his own choice; and in accepting office he submitted to all the consequences. [23]

In fact, rather than keeping good judges from serving, the election of judges would do just the opposite: it would will help remove the most incompetent from office and – in the words of John Randolph Tucker (a constitutional law professor and early president of the American Bar Association) – it would "protect the government from the present or future incumbency of a man whose conduct has proved him unworthy to fill it." [24]

Very simply, judicial elections guard the principle of judicial accountability set forth by Justice James Iredell (placed on the U. S. Supreme Court by George Washington), who asserted:

> Every man ought to be amenable for his conduct. . . . It will be not only the means of punishing misconduct but it will prevent misconduct. A man in public office who knows that there is no tribunal to punish him may be ready to deviate from his duty; but if he knows there is a tribunal for that purpose, although he may be a man of no principle, the very terror of punishment will perhaps deter him. [25]

Election of judges is nothing more than a tool to protect the rights of the people collectively. It once again makes the judiciary an accountable branch (as was originally intended), holding individual judges responsible for their decisions and thus preventing their usurping, misusing, or abusing power.

Summary

In this day of rampant judicial agendas, proposals that judges should be protected from citizens are untenable. History is too instructive on the necessity of direct judicial accountability for its lessons to be ignored today; and while judicial accountability through the use of impeachment on the federal level appears to be a thing of the past, judicial accountability through the direct election of State judges should not be. Elected judges should know that if they make agenda-driven decisions, they not only may face a plethora of opponents in their next race who will remind voters of their demonstrated contempt for State law but they will also have to face the voters themselves. Election of judges restores the original vision that:

> All power residing originally in the people and being derived from them, the several magistrates and officers of government vested with authority – whether legislative, executive, ***or judicial*** – are their substitutes and agents and are at all times accountable to them [the people]. [26] ■

[1] *Commonwealth* v. *Abner Kneeland,* 37 Mass. (20 Pick) 206, 227, 232 (Sup. Ct. Mass. 1838).

[2] *McCollum* v. *Board of Education;* 333 U. S. 203, 237 (1948).

[3] *County of Allegheny* v. *ACLU;* 106 L. Ed. 2d 472, 550 (1989), Kennedy, J., concurring in part and dissenting in part.

[4] *Lee* v. *Weisman;* 120 L. Ed. 2d 467, 516 (1992), Scalia, J., dissenting.

[5] Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), p. 10.

[6] Charles Evans Hughes, *The Autobiographical Notes of Charles Evans Hughes*, David J. Danelski and Joseph S. Tulchin, editors (Cambridge: Harvard University Press, 1973), p. 144, speech at Elmira on May 3, 1907.

[7] *Boston Gazette,* January 20, 1772, Samuel Adams writing as "Candidus."

[8] Thomas Jefferson, *The Writings of Thomas Jefferson* (Washington, D. C.: The Thomas Jefferson Memorial Association, 1904), Vol. XV, p. 277, to William Charles Jarvis on September 28, 1820.

[9] *A Constitution or Frame of Government Agreed Upon by the Delegates of the People of the State of Massachusetts-Bay* (Boston: Benjamin Edes & Sons, 1780), p. 9, Massachusetts, 1780, Part I, Article V.

[10] Thomas Jefferson, *The Writings of Thomas Jefferson* (Washington, D. C.: The Thomas Jefferson Memorial Association, 1904), Vol. VII, pp. 422-423, to M. L'Abbe Arnoud on July 19, 1789.

[11] James Madison, *The Papers of James Madison,* Henry D. Gilpin, editor (Washington: Langtree & O'Sullivan, 1840), Vol. II, pp. 1161-1171, Luther Martin at the Constitutional Convention on July 21, 1787.

[12] Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray, and Company, 1833), Vol. II, p. 233, § 760.

[13] Thomas Jefferson, *The Writings of Thomas Jefferson* (Washington, D. C.: The Thomas Jefferson Memorial Association, 1904), Vol. XV, pp. 213-214, to Judge Spencer Roane on September 6, 1819.

[14] Charles S. Hyneman and George W. Carey, *A Second Federalist* (1967) supra note 91 at 183-84 (quoting Senator William Giles.

[15] *Debates In the Congress of the United States on the Bill for Repealing The Law "For the More Convenient Organization of the Courts of the United States"; During the First Session of the Seventh Congress* (Albany: Collier and Stockwell, 1802), pp. 658-659.

[16] *Empire and Nation,* Forrest McDonald, editor (Indianapolis, Liberty Fund, 1999), John Dickinson, Letters From a Farmer in Pennsylvania, Letter IX, p.53.

[17] David Barton, *Restraining Judicial Activism* (Aledo: WallBuilder Press, 2003), p. 10, n. 25, 26.

[18] Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray, and Company, 1833), Vol. II, pp. 233-234, § 762.

[19] *The Federalist Papers,* #65 by Alexander Hamilton.

[20] James Madison, *The Papers of James Madison,* Henry D. Gilpin, editor (Washington: Langtree and O'Sullivan, 1840), Vol. III, p. 1528, Elbridge Gerry at the Constitutional Convention on Saturday, September 8, 1787.

[21] William Rawle, *A View of the Constitution of the United States of America,* second edition (Philadelphia: Philip H. Nicklin, 1829), p. 211.

[22] William Rawle, *A View of the Constitution of the United States of America,* second edition (Philadelphia: Philip H. Nicklin, 1829), p. 210.

[23] Story, *Commentaries on the Constitution of the United States* (Boston: Hilliard, Gray, and Company, 1833), Vol. II, pp. 256-257, § 788.

[24] John Randolph Tucker, *The Constitution of the United States: A Critical Discussion of its Genesis, Development, and Interpretation,* Henry St. George Tucker, editor (Chicago: Callaghan & Co., 1899), Vol. I, pp. 411-412, § 199 (f), p. 415, § 199 (o).

[25] *Debates in the Several State Conventions on the Adoption of the Federal Constitution,* Jonathan Elliot, editor (Washington: Printed for the Editor, 1836), Vol. IV, p. 32, James Iredell at North Carolina's Ratification Convention on July 24, 1788.

[26] *A Constitution or Frame of Government Agreed Upon by the Delegates of the People of the State of Massachusetts-Bay* (Boston: Benjamin Edes & Sons, 1780), p. 9, Massachusetts, 1780, Part I, Article V.

House Federal and State Affairs Committee

March 17, 2005

Testimony of Edward Larson, Kansas Senior Judge

Comments in Opposition to HCR 5012

1. PERSONAL BACKGROUND

For the last 18 years I have served as an appellate judge, from 1987 to 1995 on the Kansas Court of Appeals, from 1995 to 2002 on the Kansas Supreme Court and since 2002 as a Kansas Senior Judge. I am a 1954 graduate of Kansas State University, served in the United States Air Force from 1954 to 1957, attended KU Law School from 1957 to 1960, and from 1960 to 1987 was engaged in the general practice of law in Hays, Kansas.

2. 1958 CHANGE IN THE METHOD OF SELECTION OF SUPREME COURT JUSTICES

From statehood in 1861 until 1958, Supreme Court Justices in Kansas were elected in political elections.

I would never impinge the rulings or the motives of the elected justices who served our state with distinction over almost 100 years. However, changes were taking place in Missouri and many other states in an attempt to remove the judicial selection process from the political arena.

In a speech to the Kansas Bar Association in 1958, Retired Supreme Court Justice Hugo T. Wedell of Wichita, speaking in favor of a constitutional amendment to provide for our present method of selection of Supreme Court Justices on a non-political basis and to prohibit their activity in politics, said;

> "In all candor, then, I again ask, why should anyone and especially lawyers insist on retaining a political system of appointing and electing justices? In the first place, such a system burdens the court with the weaknesses and evils of politics, and second, as repeatedly demonstrated, it is not geared to reasonably insure that judicial fitness for the trust will be the primary consideration in an election. In my opinion, no judicial system can reasonably hope to carry both burdens and maintain the respect and confidence of our people, and certainly not of the legal profession."

Changes are never easy, but the impetus for this amendment to pass in Kansas came from the infamous 1957 "triple play" where Justice William Smith resigned, Governor Fred Hall resigned, Lt. Governor John McCuish became Governor and

appointed former Governor Fred Hall to the Kansas Supreme Court to fill Justice Smith's resigned position. This event drew deserved criticism and the Supreme Court nonpartisan selection amendment passed as Article 3, § 5 of the Kansas Constitution.

3. THE LAST JUDICIAL ELECTION

Alfred G. Schroeder of Newton was the last Justice elected to the Kansas Supreme Court. Facts of his election are recorded in Encomium Proceedings in 240 Kan. XIX and XX. The primary race included Justice Schroeder, Judge Langdon Morgan of Hugoton, Paul Wilson, then an assistant attorney general, L.F. Cushenberry of Oberlin and William S. Norris of Salina. It is reported that Schroeder and his son, both tall men, and friends from Newton would drive pickup trucks up to utility poles, stand on the trucks and tack Schroeder signs ten feet above the ground. Many of the signs were still in place years later all over the state. Schroeder did not have support of reputed "party leaders," but won the primary and in the general election defeated F.F. Wasinger of Hays by a comfortable margin.

Chief Justice Schroeder served for 30 years, 10 as Chief Justice, and was an extremely competent, hard working jurist who served the state well. With the passage of the constitutional amendment, he was the last Justice to be elected to the Supreme Court.

4. THE SUPREME COURT NOMINATING COMMISSION

The Commission commenced with six lay members (one from each congressional district) appointed by the Governor and six lawyers (each elected by resident members of the bar from each congressional district). The chairman is elected statewide from members of the bar residing in Kansas.

I will not mention the names of all members who have served but the chairs have been Justice Hugo T. Wedell, Clayton M. Davis, William C. Farmer, Robert C. Foulston, Jack E. Dalton, Lynn R. Johnson and currently, Richard C. Hite.

The size has been reduced as we have lost congressional seats but the Commission has rendered bipartisan service and has been composed of caring, interested individuals who have studied the records of applicants, shared investigative duties and truly tried their very best to insure that no matter which one of the three candidates sent to the Governor was appointed, the State of Kansas would benefit by his or her service.

5. THE DANGER OF TWENTY-FIRST CENTURY JUDICIAL ELECTIONS IS "MONEY"

There are a multitude of sources which show us that, in states such as Texas, Alabama, Illinois, Pennsylvania, Washington, Michigan, Ohio, Kentucky and others, the candidate who raises the largest amount of campaign contributions is normally the candidate that is elected to the judicial position he or she sought.

For example, the July 2004 issue of *Trial* reports that, in 2000, state supreme court election campaigns raised $45.6 million – a 61% increase over 1998 and double the amount raised in 1994.

In nine out of eleven races in 2002, the candidate who ran the most TV ads – funded by his or her campaign and supportive interest groups combined – won the election.

In West Virginia in 2004, a coal company executive contributed $3.5 million of his own money in a successful effort to defeat an incumbent justice he believed to be bad for business. See *ABA Journal*, February 2005, p. 40.

Texas is a state where great sums of money have been spent on judicial elections at all levels. Chief Justice Thomas Phillip in his 2003 State of Judiciary address asked for changes in the manner Texas selected judges. He said "Today, long ballots, partisan sweeps and big money campaigns have completely negated the original intent of judicial elections." The bipartisan report asked for retention elections and suggested the use of a nominating commission.

With few exceptions, in judicial elections it is not the qualifications of the candidates that determine the winner, but rather the money spent on the campaign.

6. RAISING MONEY AND CAMPAIGNING TAKES TIME THAT SHOULD BE SPENT DECIDING CASES, WRITING OPINIONS AND ADMINISTERING A STATE'S JUDICIAL SYSTEM

Every election is different, but for much of the election year a candidate spends a large amount of time campaigning for election or re-election. This takes time away from the duties essential to the office he or she occupies.

7. CAMPAIGNS FOR JUDICIAL OFFICE HAVE BECOME "NOSIER," "NASTIER" AND CERTAINLY "COSTLIER."

When candidates fight for judicial office, the public views the election as just another political race.

The public becomes concerned that most judges' impartiality is compromised by their need to raise campaign money. This perception threatens the public trust and confidence in our state courts.

8. JUDICIAL ELECTIONS BECOME THE TARGET OF SPECIAL INTEREST GROUPS

Information from all over the United States show that special interest groups pour money and time into attempting to elect judges they believe will be favorable to their views.

Different issues have driven campaigns but in the main the most involved are business or professional groups, plaintiff or defense lawyers, builders, labor unions, prosecutors, and land users.

All of these institutions and individuals have little or absolutely no effect on nominating commissions and in the end the public is better served.

9. CONCLUSION

We often say "If it is not broken, don't try to fix it." I sincerely believe that our system of non-partisan selection of Kansas Supreme Court Justices is not broken. I urge this committee and the Kansas Legislature to defeat HCR 5012.

Thank you for your consideration.

Edward Larson
Kansas Senior Judge

Before the House Federal and State Affairs Committee
Thursday, March 17, 2005

Testimony in Opposition to HCR 5012
Patricia E. Riley, Member
Supreme Court Nominating Commission

Thank you for the opportunity to appear today to give testimony in opposition to the passage of House Concurrent Resolution No. 5012. My name is Patricia E. Riley. I appear today on behalf of the Supreme Court Nominating Commission.

Since ratification of the constitutional amendment that created this Commission in 1958, Kansas has had a rigorous merit selection process for appellate judges. We believe that throughout its existence the Commission has earned a reputation for integrity and independence. Based upon the collective experience of the Commission and its members over the years, we believe that an independent judiciary is vitally important and more likely to occur under our current merit selection process than through popular elections.

The Commission consists of nine members. Four are lawyers elected by lawyers from each of the state's four congressional districts. Four are lay members appointed by the Governor. The Chair is a lawyer, elected by lawyers statewide. The blend of lawyer and lay members contributes significantly to the success of our Commission. Many voices are heard in the selection process and the voice of the general public is well represented by our lay members.

The selection process is an exhaustive search for the best-qualified candidates. When a vacancy occurs on either the Supreme Court or the Court of Appeals, the Commission mails notice of the vacancy to each active attorney admitted to practice in Kansas. A copy of the application form is attached to my testimony. I invite you to review the detailed information requested of each applicant, including legal writing samples. After the application deadline, the Commission conducts personal interviews in Topeka.

The stack of resumes on the table typifies the starting point of the Commission's selection process. There were twenty-four applications for the last position filled on the Supreme Court when Justice Bob Abbott retired and Justice Carol Beier was appointed in 2003. Each member of the Commission receives and reviews a copy of every

application. Any member of the Commission can make background inquiries about any one of the applicants; however, individual assignments are made to conduct background checks as to each applicant to ensure that each applicant is thoroughly investigated. During interviews, each of the nine Commission members has the opportunity to ask questions and engage the applicant in discussion regarding his or her qualifications for the appellate judgeship.

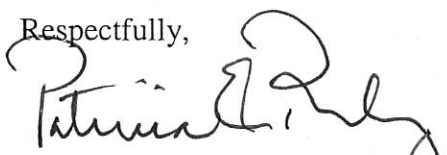
When the Governor receives three names from the Commission, they are three highly qualified individuals who have been chosen without regard to political consideration or how they would decide a particular issue if it were to come before the Court. The current merit selection process is more likely to test for qualities such as intellect, legal writing ability, ethics, legal knowledge and judicial temperament than is an election. An independent judiciary is more likely to occur through the current merit selection process, where there is no political or issue oriented litmus test, than through a political campaign where the outcome can be determined by special interests and fundraising.

Most vacancies on the Supreme Court will attract no more than thirty interested lawyers. Many otherwise qualified attorneys may be reluctant to conduct a costly, contentious and time-consuming statewide campaign.

Elections are not necessary to ensure judicial accountability. Those appointed to the appellate bench under the current process are subject to the voice of the people. Each justice must stand for retention at the first general election following his or her appointment to the Court, and every six years thereafter.

In 1958, Kansas made the decision to change to merit selection of appellate judges. The Supreme Court Nominating Commission takes its job very seriously. There is a very thorough background check and interview process. Politics are set aside in the search for excellence. This system has served Kansas well for almost fifty years. There is no need to change this system.

Respectfully,



Patricia E. Riley, Member
Supreme Court Nominating Commission

SUPREME COURT NOMINATING COMMISSION

Date _____

Full Name _____

Residence Address _____

City, State, Zip _____ Telephone No. _____

Office Address _____

City, State, Zip _____ Telephone No. _____

If applying for a Supreme Court vacancy, are you between the ages of 30 and 70? _____

If applying for a Court of Appeals vacancy, are you between the ages of 30 and 75? _____

Place of Birth _____

Are you a citizen of the United States? _____

Are you a resident of Kansas? _____

How many years have you been a practicing lawyer and/or judge of a court of record or any court in the state of Kansas and/or a full-time teacher of law in an accredited law school? See K.S.A. 20-105 and K.S.A. 20-3002(a). _____

If requested to do so, are you willing to be personally interviewed by one or more of the members of the Supreme Court Nominating Commission? _____

If you should be one of three nominated for one of the Kansas Appellate Courts, would you agree to serve if appointed by the Governor? _____

[NOTE: The Kansas Bureau of Investigation release form authorizes an investigation should you be one of three nominated. One notarized copy must be attached to the original of your nomination forms. The Commission will conduct a preliminary investigation of credit, criminal, and traffic history of all potential nominees.]

The personal data information shown on the attached form or previously submitted is incorporated herein. (Attach any modifications to previously submitted data forms.)

I hereby waive any privilege of confidentiality I may have concerning information which the Supreme Court Nominating Commission may desire to obtain from any source concerning my qualifications.

_____

Signature of Nominee

July 2004

FEDERAL AND STATE AFFAIRS
Date 3-17-05
Attachment 6

An original and nine copies of this form and its attachments should be submitted to:

Carol G. Green
Clerk of the Kansas Appellate Courts
Kansas Judicial Center
301 SW 10th Avenue, Room 374
Topeka, Kansas 66612-1507

If letters in support of the nomination are submitted, they should be addressed to the Commission Chair Richard C. Hite and mailed to the attention of Carol G. Green at the above address. Such letters may accompany the nomination form or may be submitted separately.

Please answer the following questions on 8 1/2 x 11 paper. State the question, then give the answer.

Personal Data of: _____

1. List each college and law school you attended, degrees earned, scholastic honors, major academic activities. Please also state your class ranking and grade point average on graduation from law school.

2. List all courts and administrative bodies before which you have been admitted to practice.

3. (a) List chronologically your legal and other work experience since your graduation from law school, including non-legal occupations. See K.S.A. 20-105 and 20-3002, which require a potential nominee to have been engaged in the "active and continuous practice of law" for at least ten years prior to the date of appointment. Include in your list the months and years of legal experience to verify that you meet this statutory requirement.

(b) List published articles on legal subjects. Include as an attachment to this nomination form a sample of your legal writing in the form of a brief, memorandum, opinion, etc.

4. Summarize your experience in courts and describe the most significant litigated matter(s) you have personally handled.

5. (a) Have you ever held judicial office? If so, provide copies or give citations to significant opinions.

(b) Have you ever submitted your name for a vacancy on one of the Kansas Appellate Courts? If so, when?

6. State your approximate individual net worth and the nature of your substantial financial interests.

7. If appointed, are there any business interests, offices, or positions you now hold from which you would be unwilling to resign or divest yourself if required by the Canons of Judicial Conduct?

8. Have you ever been charged or convicted of a violation of any law except traffic offenses? [DUI violations and reckless driving offenses should be included.] If you answer "yes" to this question, please supply the information requested in Footnote 1.

9. Has a tax lien or other collection procedure ever been instituted against you by federal, state, or local authorities? If you answer "yes" to this question, please supply the information requested in Footnote 1.

10. Have you ever been sued by a client or been a real party defendant in interest in any other legal proceedings? If you answer "yes" to this question, please supply the information requested in Footnote 1.

11. Have you ever been disciplined or cited for a breach of ethics or professional conduct at the state disciplinary level? If you are a judge, have formal proceedings ever been instituted against you by the Commission on Judicial Qualifications? If you answer "yes" to this question, please supply the information requested in Footnote 1.

12. List all bar associations, professional associations, or professional societies of which you are or have been a member.

13. If you have been in the military service, state the length of service, the branch and dates you served, your rank on discharge, and the type of discharge.

14. State any other information which you believe should be disclosed in connection with the Commission's consideration of your potential nomination to the Appellate Courts.

15. List the names, addresses, and telephone numbers of five persons who are well acquainted with your legal ability and of whom inquiry may be made by the Commission.

    In addition, if you are a practicing attorney, list the names, addresses, and telephone numbers of three judges before whom you have made an appearance in the last five years and three lawyers who have been adverse to you in litigation or negotiations within the last five years. If you are a judge, list the names, addresses, and telephone numbers of at least five lawyers who have appeared before you within the last five years.

Footnote 1.

1. The title of the proceedings.
2. If formal proceedings have been filed, the style of the case and the court or tribunal in which the case was filed and the location of same.
3. The date of the alleged violation or incident giving rise to the charge.
4. A statement of the relevant facts.
5. The identity of the principal parties involved.
6. The outcome of the proceedings, specifying any sentence, decision, and/or judgment entered.

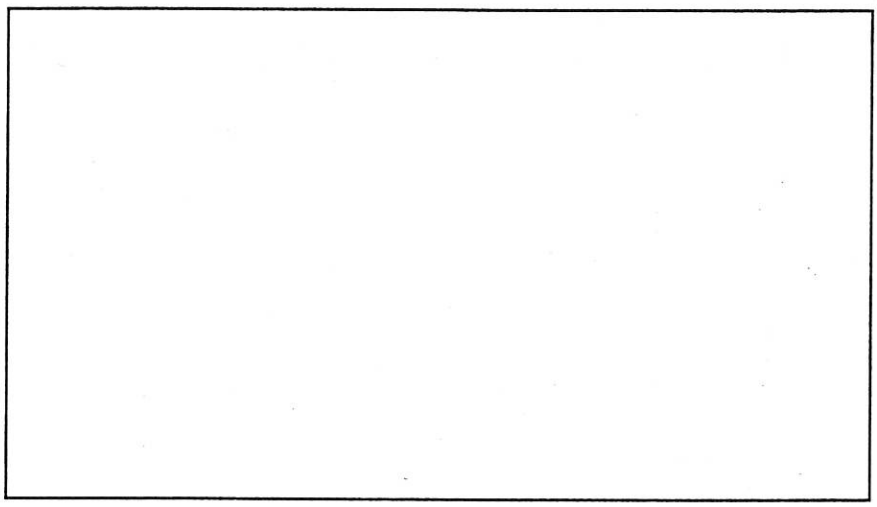
SUBMIT ONLY ONE COPY OF THE FOLLOWING TWO PAGES (DRIVER'S LICENSE PAGE AND KBI RELEASE FORM) WITH YOUR ORIGINAL APPLICATION.

In order to facilitate background investigations, the Commission requests that you complete the form below and attach a copy of your current driver's license in the space provided.

Driver's License Number:_____

Issuing State:_____

Expiration Date:_____



Kansas Bureau of Investigation

Larry Welch
Director

Phill Kline
Attorney General

_____
Date

I hereby authorize and request any former and present employer, creditor, bank, savings and loan, credit union, finance company, mortgage company, credit card company, credit reporting agency, collection agency, school, college, university, agencies in the criminal justice system, or any other person, company or corporation to release any and all information and documentation relating to my employment, personnel records, evaluations, credit, financial condition, financial information, school activities, grades, degrees, character, integrity, criminal history including expunged records and any other information whatsoever to any Agent of the Kansas Bureau of Investigation.

_____
Signature

_____
Typed Name

_____
Social Security Number

Subscribed and sworn to before me this _____ day of _____, _____.

_____
Notary Public

6-7

1620 S.W. Tyler / Topeka, Kansas 66612-1837 / (785) 296-8200 FAX (785) 296-6781

KANSAS BAR
ASSOCIATION

Testimony in Opposition to
HOUSE CONCURRENT RESOLUTION NO. 5012

Presented by Richard F. Hayse, Kansas Bar Association President-elect
House Federal and State Affairs Committee
Thursday, March 17, 2005

The Kansas Bar Association has a long-standing position favoring merit selection of judges. That position is even more emphatic with regard to appellate judges for both the Court of Appeals and the Supreme Court.

Our lodestars in selecting justices are that they must be of the highest possible qualification, and they must be absolutely unbiased and independent. HCR 5012 would seriously undermine those objectives.

- Qualified

As citizens and as lawyers we want the most qualified and competent people selected for our Supreme Court whenever a vacancy occurs.

The only requirement in the Kansas statutes to be a Supreme Court justice is that the person must have been continuously engaged in the practice of law for at least ten years. But not just anyone who can meet that minimum test would make a good – or even an adequate – justice. This proposed amendment would even lower that threshold to five years, which seems to reflect a serious lack of appreciation for the experience and learning necessary for the job.

A Supreme Court justice must not only be broadly experienced in legal matters, but also unbiased and compassionate toward all parties in a case, diligent in gleaning the essential facts of each case from the lower court record, and probably above all, a scholar of the law.

Not everyone who can win an election would necessarily possess these attributes. This would potentially leave us with a Supreme Court staffed with individuals who, although they can win a popular vote, are not well-suited to the rigorous intellectual requirements of the job.

Our current method of selecting appellate court judges and justices works extremely well. In part this is because of the filtering process which results from the commendable work of the 9 members of the Supreme Court Nominating Commission in scrutinizing the background, competency and character of applicants.

There is no conceivable way Kansas voters could devote the time and attention necessary to cull through the qualifications of candidates for elective Supreme Court positions, as the members of the Nominating Commission do now.

If a justice should become incompetent while serving, that justice could be removed by vote in the next retention election. In a worst case assumption, the justice could be removed by a finding of incapacity by the Nominating Commission, or by impeachment by the House of Representatives. (Art. 3, Sec. 15) There are ample safety valves for replacement of a justice who becomes incapacitated while on the bench.

- Independent

The other major qualification for a justice is independence from any outside source of influence over the decision-making process.

Electing justices on a statewide basis would necessarily entail raising substantial campaign funds for each of the seven positions on the bench. Just as with other political races, the Kansas business community and special interests would be the primary source of donations to such races, which could be expected to total millions of dollars in each election.

As a point of comparison, Attorney General Kline raised nearly $415,000 in the 2002 general election cycle for his statewide campaign. Races for a seat on the Supreme Court could be expected to be every bit as contentious, based on the experience in other states.

A study of the 2000 and 2002 judicial elections for district court in Sedgwick County concluded that, with few exceptions, the winner of the election was the person who raised the most campaign funds.

Speaking as both a citizen and as a practicing attorney, the absolute last thing I want when addressing a jurist is for that person to have been elected on the basis of campaign funds raised or contributed by my opponent or my opponent's attorney.

Let's also remember that the judiciary is one of three independent branches of our state government, and not an agency of some other branch. The system of checks and balances devised by this country's founding fathers was carried over into our state constitution, as well.

The supreme executive power is vested in the Governor (Art. 1, Sec. 3). The legislative power is vested in the House and the Senate (Art. 2, Sec. 1). The judicial power is vested in the courts (Art. 3, Sec. 1).

The current method of selecting justices is intentionally designed to insulate them from political winds, popular whim and from the other two branches of government. The overriding imperative is that each judicial decision should be dictated by the facts of each case and the law applicable to those facts – not to any other influence or power.

Kansas enjoys an enviable bench of appellate judges selected under the current system. It would be a serious error to undermine the qualifications and independence of our judiciary by switching to an elective system.

The KBA respectfully urges this committee not to report HCR 5012 favorably.

* * *

KANSAS TRIAL LAWYERS ASSOCIATION
Lawyers Representing Consumers

To: Chairman Edmonds and Members of the House Federal and State Affairs Committee

From: Jerry Palmer for the Kansas Trial Lawyers Association

Date: March 17, 2005

Re: **HCR 5012**

My name is Jerry R. Palmer. I am a practicing attorney and have been for 39 years in the City of Topeka. I have also served two terms on the Supreme Court Nominating Commission from the Second Congressional District. My testimony is on behalf of the association of lawyers who practice in courts throughout the state and is in opposition to the resolution.

(1) **The current system works well and does not need to be fixed.** Since the time Kansas adopted the Missouri Plan for the appointment of justices of the Supreme Court and judges for the Court of Appeals no justice or appointed judge has been disciplined by any legal body nor has there been any scandal associated with such person. The system of four elected lawyers being elected in each congressional district on a rotating basis with a lawyer chairman and four appointees by the Governor on a rotating basis with term limits of two terms has provided fresh perspectives. From my experience on the Commission during eight years of these appointments I found that irrespective of the politics of the lawyers elected or persons appointed that in the end there was near unanimity on usually two of the three candidates with only the third person among the top five candidates on the first ballot. I served with business people and labor leaders and no matter from what walk of life they came they were usually in agreement

Terry Humphrey, Executive Director
Fire Station No. 2 • 719 SW Van Buren Street, Suite 100 • Topeka, Ks 66603-3715
E-Mail: triallaw @ ink.org

with the lawyer members. Many of the people who have been selected would not have run for election and thus there has been a much broader field of candidates from which to choose, usually 20 or more applicants. The advantage of the system is that the Governor essentially has to pick from the three and I believe it is a true statement to say that the Governor has always selected one of the three persons proposed rather than going for a new panel or by default the selection going to the chief justice of the Supreme Court. There are still lawyers around who remember the triple play that involved putting a sitting Governor onto the Supreme Court by resignation from the office of Governor and having the lieutenant Governor appoint that person to the court.

(2) **Supreme Court elections are expensive.**

Supreme Court elections are an expensive way to select justices and the influence of money in those elections cannot be overestimated. Figures that have been provided from the 2002 elections versus the 2004 elections indicate that the total spent in Supreme Court contested elections was up from $29 million in 2002 to $42 million plus in 2004 and that interest groups pumped in at least $10 million. Total spending on television advertising including groups and the candidates exceeded $21 million nearly doubling the previous record set in 2000 of $10.7 million and in virtually every race the candidate who spent the most won. In two of the races substantial money was supplied to the races by litigants who had pending matters before that Supreme Court; one instance was in Illinois and the other was in West Virginia. Each of those elections has generated a documentary which includes the campaign advertising which is far less civil than the worst races in this state.

(3) **Studies in Kansas of Sedgwick County which does have partisan judicial elections are instructive.**

The Kansas Appleseed Center for Law and Justice did an analysis of the 2000 and 2000 partisan elections in Sedgwick County. Their conclusion was that in seven judicial races of 2000

the candidate who raised the most money won all but two. In 2002 the candidate who raised the most money was successful in all four judicial races. They also concluded that judicial elections cost substantially more than other county-wide elections and that the costs were rapidly increasing. They found that lawyers contribute heavily to the campaign of those judges in front of whom they will appear. Moreover district judges do not like judicial elections because they are concerned about being politicians and this should not be political. One of their charts indicated that in the survey 52% of the voters felt their vote was uniformed versus 48% who thought they were informed and only 25% of the voters could name at least one of their elected district court judges and 75% could not.

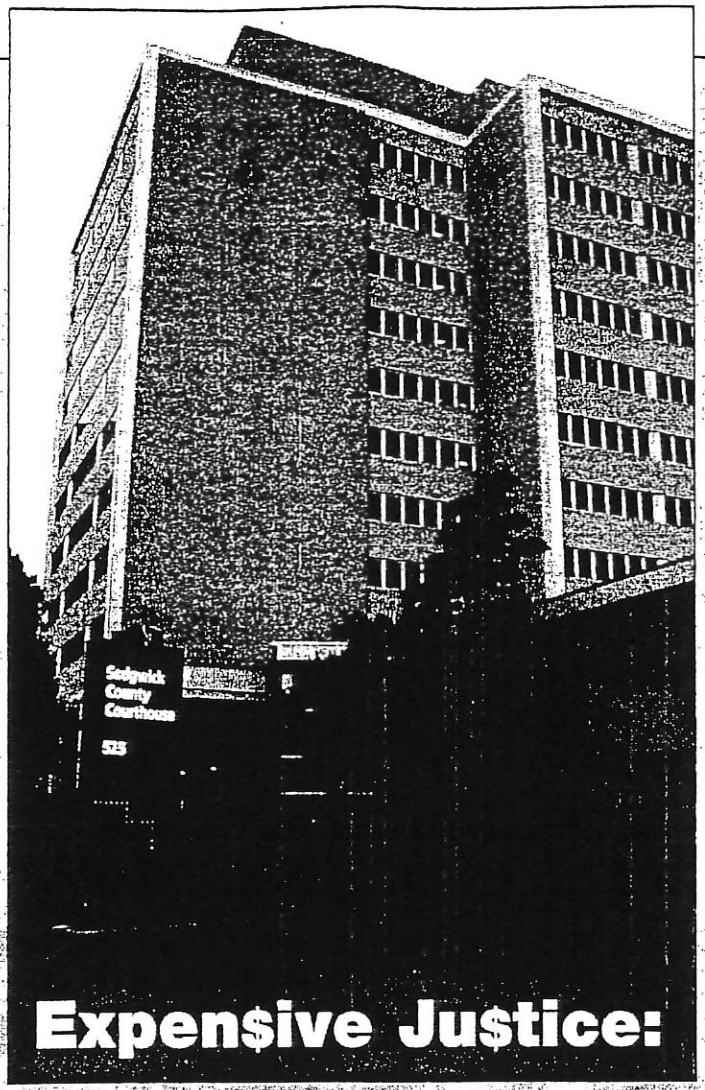
Conclusion:

With the general lack of information that is available about judicial candidates and the high correlation between dollars spent and results with the ever increasing demand for media dollars in these types of elections we should all be very cautious about trying to elect the third branch of government. We have a system that has worked well and produced quality candidates, Occasionally the Legislature may disagree with the position taken by the Supreme Court. On the other hand it is the role of the Court to interpret the Constitution and apply it to legislation so there is a fundamental tension which probably ought to be preserved. The pejorative term "activist judge" is usually reserved for someone who sits on the bench, who disagrees with the speaker's interpretation of the law. The independence of the judiciary is a critical value in our society to maintain the checks and balances of the three branches of government. If, though, we do know that money determines the outcome locally in our state and nationally in other states with Supreme Court justices who run for election, do we really want to change a system that has worked so well so long? The Kansas Trial Lawyers Association, the Kansas Bar Association, representing lawyers who are in the courtrooms who deal with the judges and justices regularly

from all sides of litigation are overwhelmingly in favor of preserving the current system and not electing our Supreme Court justices but rather leaving that job to the Supreme Court Nominating Commission and the Governor.

Respectfully submitted,

Jerry R. Palmer
palmerjer@palmerlaw.com



Expen$ive Ju$tice:

An Analysis of 2000 and 2002 Partisan Judicial Elections in Sedgwick County

Kansas Appleseed

A Report by Kansas Appleseed Center for Law and Justice

FEDERAL AND STATE AFFAIRS
Date 3-17-05
Attachment 9

Kansas
APPLESEED

P.O. Box 1795
4831 W. 6th St.
Lawrence, KS 66049

785.312.7777

Email:
kansas@appleseeds.net

Report Authors
Gaye Tibbets
J. Steven Massoni
with assistance from
Jennifer L. Hill
Lynette Zimmerman

June 2003

Dear Fellow Kansan,

Thank you for being interested in our justice system.

District court judges work in judicial districts throughout the state making decisions about our most personal and important disputes, including divorce, child custody, personal injury, criminal, probate, and adoption.

Because of the influence judicial decisions have in the lives of Kansans, we hope that the best and fairest lawyers will have both the desire and the opportunity to become judges, no matter their personal fortunes or political connections.

To see whether partisan elections are meeting that goal, we took a snapshot of the two most recent district court elections in Sedgwick County, the state's largest judicial district. This snapshot brought into focus a number of disturbing trends in judicial elections, including conflicts caused when lawyers who contribute to a judge's campaign later appear before that judge for a ruling, and the undeniable influence that a candidate's personal fortune and ability to raise money has on the candidate's ability to reach the bench.

Though the numbers and figures are unique to this county and these elections, the principles are applicable in all of the judicial districts across the state that use partisan elections to choose their judges.

We hope you will join Kansas Appleseed Center for Law and Justice as we strive to make the Kansas judicial system one in which we can feel confident.

Jack Focht
Chair, Kansas Appleseed

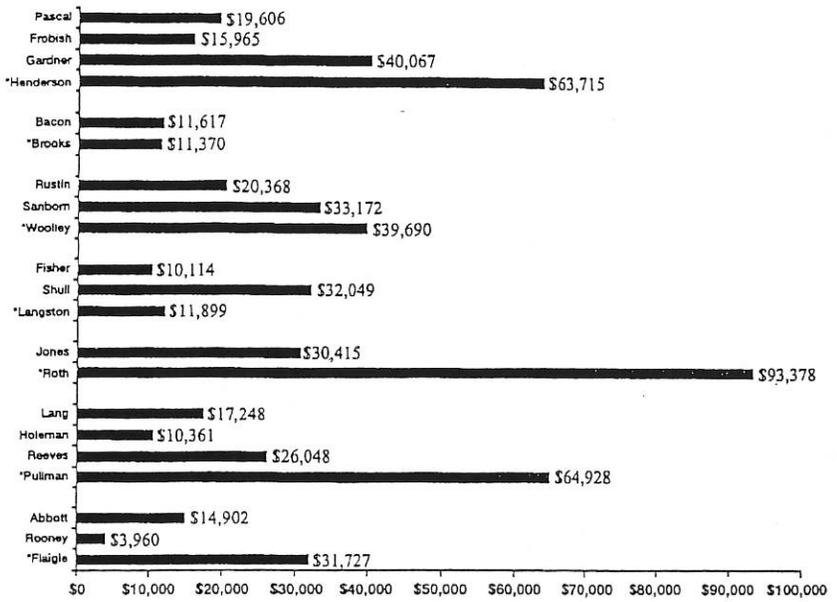
Executive Summary

The partisan political method of selecting judges no longer serves Sedgwick County well. Political campaigns are expensive, and an attorney who aspires to the bench must raise substantial amounts of money in order to run a successful campaign. Those candidates who can afford to make five figure donations to their campaigns are the candidates most likely to win. The twin burdens of political campaigning and potential conflicts of interest in holding court with those who have contributed for or against the judge's campaign make the district court judge position in Sedgwick County much less attractive than its counterpart in judicial districts that do not hold partisan judicial elections. Consequently, judicial candidates in Sedgwick County are increasingly limited to lawyers who have government jobs, giving the county a bench with less and less diverse experience.

Kansas's district court judges are assigned to 32 judicial districts. Not all judges arrive at the bench the same way. Fourteen of our judicial districts elect their judges in partisan elections. In these elections, judges run in primaries and general elections and conduct traditional political campaigns. Wyandotte, Sedgwick, Reno and Ford counties are among the 14 districts that select judges this way. Judges who are appointed reach the bench in a process that includes lawyer and citizen input, interviews, background and reference checks, and gubernatorial selection. These judges must stand in a retention election every four years. These retention elections are nonpartisan and, with few exceptions, do not allow campaigning or campaign contributions. Shawnee and Johnson counties are among the 17 districts that select district court judges in an appointment /retention method.

Chart 1

Total Contributions Raised by Each Candidate in Sedgwick County 2000 Judicial Elections
***indicates winner**



THE BEST PREDICTOR of a Candidate's Ability to Become an Elected Sedgwick County Judge is the Amount of Money A Candidate Can Raise or Can Afford to Donate to the Candidate's Own Campaign

In the seven judicial races of 2000, the candidate who raised the most money won all but two. (Chart 1)

In 2002, the candidate who raised the most money was successful in all four judicial races. (Chart 2)

For a potential judicial candidate, the message is clear: Raising more money than your opponent is almost always necessary to win.

Those who want to run for judge in Sedgwick County must also be able to buy their jobs with their own funds. In 2000, the candidates themselves contributed just over $200,000 to their own campaigns. Three of the seven successful candidates spent more

Chart 2

Total Contributions Raised by Each Candidate in Sedgwick County 2002 Judicial Elections
***Indicates winner**

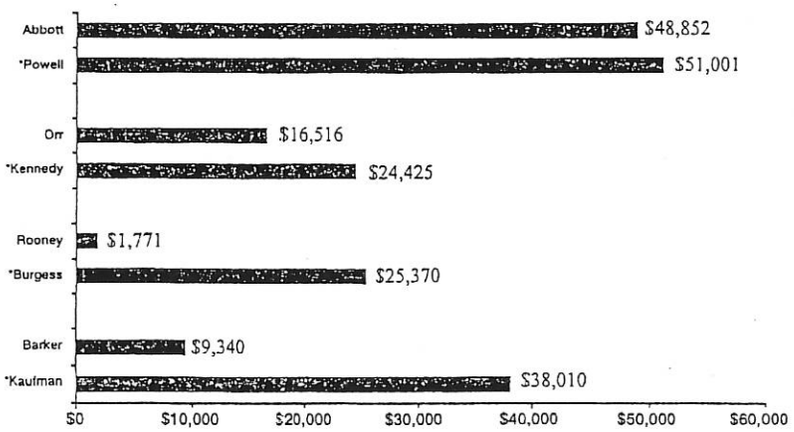
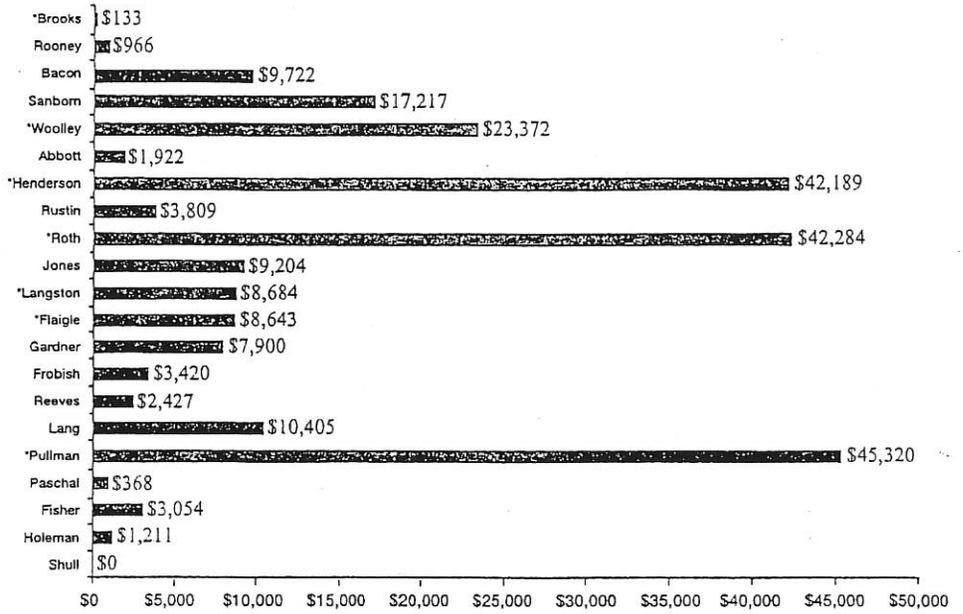


Chart 3

Amount of Candidate's Contributions to Own Campaign in 2000 Sedgwick County Judicial Elections

*Indicates winner

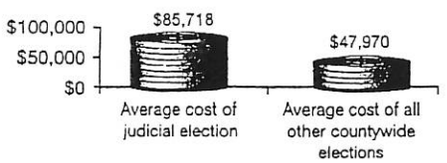


than $40,000 of their own money to be elected. (Chart 3)

The average contribution of each candidate to his or her own campaign was $11,380. However, the average personal contribution made by *successful* candidates was $23,307. In 2000, candidates in partisan elections were most likely to reach the bench if they could invest several thousand dollars of their own money. The bench was least accessible to candidates without several thousand dollars cash on hand.

Chart 4

Chart 4
Comparison of Average Cost of Judicial and County Elections, Sedgwick County, 2000



JUDICIAL ELECTIONS Cost Substantially More than Other Countywide Elections and Costs Are Rapidly Increasing

In 2000, the average cost of a judicial election in Sedgwick County was 44% higher than the average cost of other countywide races. Overall, the price tag for the seven judicial races in the 2000 elections was $600,028 – an average of $85,178 per race. In contrast, the other four 2000 countywide elections generated spending of $191,878 – an average of $47,970 per race. (Chart 4)

Not only are judicial races more expensive, but their costs are increasing rapidly. In 1980, the most money spent in one race by a single Sedgwick County

judicial candidate was $13,285[1]. Twenty years later, in 2000, the most money spent by a single candidate was $89,568 – a 674% increase. (Chart 5)

LAWYERS CONTRIBUTE HEAVILY to the Campaigns of Those Judges In Front of Whom They Will Appear

Where does the money for these more expensive races come from? In 2000, the largest group of contributors after the candidates themselves was lawyers who would later appear in front of the judges. (Chart 6)

To win, judicial candidates must raise more money than their opponents. Candidates know that the pool from which fundraising is most productive is lawyers who will later depend on the successful candidates for the lawyers' success or failure in the courtroom. When the lawyers know that judges are dependent on money to win and that they will eventually appear in front of the winner, they have an incentive to cover their bets by making multiple contributions. In fact, in 2000, 27 lawyers or firms contributed to candidates *on both sides of the race.*

DISTRICT COURT JUDGES do not like judicial elections because they are concerned about being politicians in a job that should not be political

In a 1998 survey, 84% of the state's district court judges did not believe partisan elections were the best way to choose judges[2]. (Chart 7)

Chart 5

674% Increase in Top Spending for Sedgwick County Judicial Candidates from 1980 to 2000

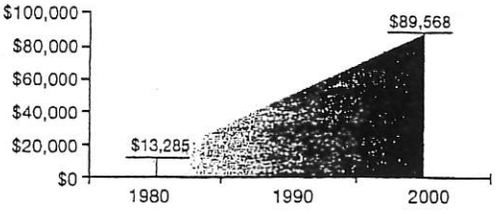


Chart 6

Sources of Contributions to Sedgwick County Judicial Campaigns, 2000

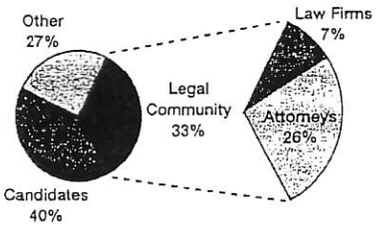
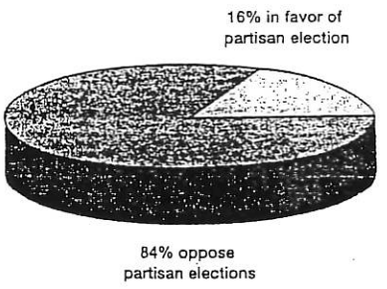


Chart 7

District Court Judges' Opinions on Judicial Selection



Judges are painfully aware of the conflicts between staying politically popular and approaching each case impartially.

In confidential interviews during early 2002, successful and unsuccessful candidates for judge across the state were interviewed about the campaign process and used these phrases about things they did not like about having to run for office:

From judges across the state:

- *"You try to put it out of your head, but a weekly light bulb goes off 'will this decision have any effect on the next election?' I **hate** it."*
- *"Litigants get characterized in my head as prospective voter, contributor, or opponent."*
- *"Even your time on the bench becomes a sales pitch for yourself."*
- *"It is tough to rule against someone in your county who is a voter when the case is from someone out of county who is not."*
- *"Making a legally correct decision in a criminal case is a 'nightmare' because if it is unpopular, you could lose your job."*
- *"Some judges have admitted taking into account the political consequences of their decisions."*
- *"What makes a good judge does not make a good politician."*
- *"I am a great believer in the political process, but judges are not there to represent the will of the people, but the rule of law. It is like trying to fit a square peg into a round hole."*

About accepting contributions from lawyers:

- *"If you are honest, you cannot separate who contributed or worked against you. Those who say otherwise are 'selling a crock of bull.'"*
- *"I hated being asked for contributions when I was a lawyer and I feel like it's a shakedown when raising money as a judge."*
- *"Why would lawyers contribute to both sides of a campaign unless they thought it made a difference in how they were treated after the election?"*

From candidates:

- *"If you are in private practice, being a candidate in a campaign will 'eat your lunch.'"*
- *"Appearing in parades and handing out candy to get a job demeans the position."*
- *"My opponent and I were both qualified, we both incurred debt, and I don't think we did anything that benefited the public."*
- *"Our inability to give information about our beliefs means voters rely on stereotypes, which gives us a homogenous bench."*
- *"The judiciary is not the place for mudslinging."*
- *"The need to raise money was shocking,"*

Candidates from private practice report, "It takes years to recover" from an unsuccessful try at the bench.

Judges do not like elections because they are time-consuming; they do not attract a diverse group of candidates; and they are partisan, that is, they heavily depend on the political party in which the candidate is registered. Judges must also rely on donations from attorneys who will later appear in court. Successful candidates can count on making heavy contributions of time and money to their own campaigns. When they reach the bench, judges who rely on their pleasing voters to keep their jobs must worry when there is a conflict between doing the right thing and doing the popular thing.

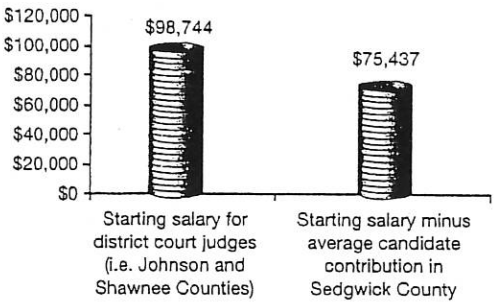
THE JOB of being district court judge is less attractive in Sedgwick County than in counties that appoint judges because of the money and the time involved in campaigning and the lack of job security caused by elections

Judges in counties that appoint their judges do not have to finance their own political campaigns. Because the starting salaries are the same in all counties, successful Sedgwick county candidates start their jobs with what they spent on the election – an average of $23,307 – less in their pockets than their counterparts in Johnson and Shawnee counties. (Chart 8)

It is not only the personal financial investment that makes the elected judicial position less attractive than its appointed

Chart 8

Comparison of Salary Available to Elected and Appointed District Court Judges



counterpart. Judicial candidates in Sedgwick County must be able to spend long hours in a political campaign for a non-political job. Eleven candidates from past Sedgwick county judicial elections were recently interviewed and they estimated that they spent between 600 and 2000 hours campaigning, a time demand one described as "ridiculous." Because judicial races last five to ten months, those estimates are that a candidate or a judge who has been challenged takes on the equivalent of a full-time job for almost half a year in addition to his or her employment every election cycle. Only those lawyers whose jobs allow them to make this kind of time commitment can be successful candidates.

Private practice lawyers, who practice law and also handle the business end of their law practices, are less and less willing to devote the kind of time required to run for judge in Sedgwick County. For example, in the 2000 races, two thirds of the candidates were either current or recent government (or government contractor) employees.

Chart 9

Occupation of Judicial Candidates Sedgwick County, 2000

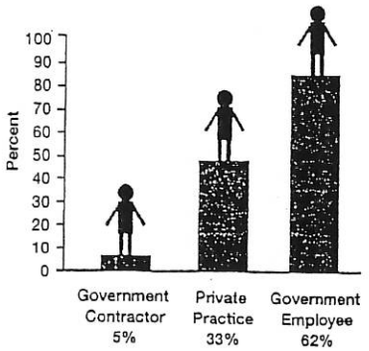
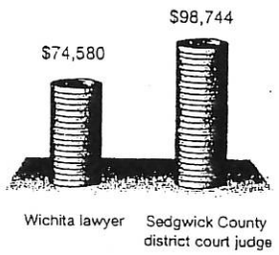


Chart 10

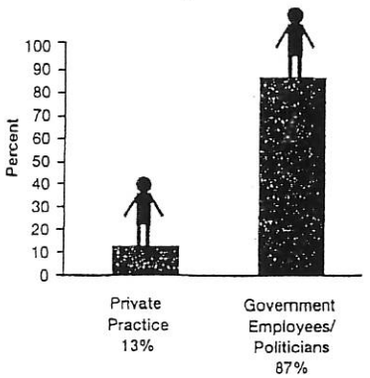
Comparison of Beginning Judicial Salary to Average Lawyer Salary, Sedgwick County



A popular myth about the limited number of applicants to the bench is that a judicial salary does not tempt those in private practice. The average salary for a Wichita lawyer is $74,580[3]. The starting salary for a Sedgwick County district court judge is $98,744, yet the trend in the last two elections is clearly that private lawyers are less and less interested in a Sedgwick county judicial position.

Chart 11

Occupation of Judicial Candidates Sedgwick County, 2002



Government employees have secure jobs to which they can return if they are unsuccessful candidates. One candidate who had a lucrative private practice described the time demands of judicial campaigns as being so overwhelming that a successful lawyer could not afford to "gamble his or her practice" to try to be elected judge. Though the majority of lawyers in Sedgwick County are in private practice, only seven, or one-third of those willing to run in 2000, had private law practices. (Chart 9)

The 2000 election was not an anomaly. Of the eight candidates in the 2002 election, seven were previous politicians or current or recent government employees. So in 2000, 33% of candidates were from private practice, and in 2002, only 13% were from private practice. (Chart 11)

Government lawyers make up a small contingent of the local bar, yet in the last two elections they were increasingly the only lawyers interested in the time-consuming requirements of a judicial campaign.

By contrast, in Johnson and Shawnee counties, where judges are paid the same salary but are not required to run for political office, judges appointed in the last ten years came from private practice in a ratio more reflective of the make up of the bar.

PARTISAN POLITICS Allow Only a Fraction of the Voters to Choose Who Will Become Judge

In the 2000 election, there were seven contested races and Republicans won all seven of them. To quote an anonymous successful Republican candidate, "A trained monkey could have been elected if it had been registered Republican in 2000."

Not surprisingly, Sedgwick County Democrats avoided the 2002 races. The race for the three seats open because of retirements were decided in the Republican primary, as was the one challenge to an incumbent. Many of the "Republicans" facing off for district judge in the last few election cycles were Democrats during previous elections.

The one-party nature of judicial elections limits voter input. There are 229,591 registered voters in Sedgwick County.[4] Almost half, or 100,877 are Republican.[5] So the choice of who would serve as district judge was available to less than half of the voters. (Chart 12)

Of the 44% of voters who could have voted, only 41% of those made it to the polls, and of those who went to the polls, one in five did not mark the ballots for judges. Ultimately, only 14.2% of the county's voters decided who would be district judge. (Chart 13)

DESPITE an Increasingly Political Process, Voters Remain Uninformed, No Matter How Judges Are Selected

In both 2000 and 2002, candidates purchased campaign ads that both touted their own qualifications and accused their opponents of not working hard enough or of accepting out of town contributions. A sitting district court judge was recently quoted "...we are candidates and we are entitled to free speech, and to raise money and to spend it on our campaigns, like candidates for other

Chart 12

Percent of Voters Who Could Vote for Judge in 2002 Judicial Elections, Sedgwick County

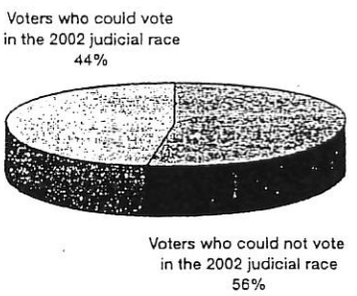


Chart 13

Percent of Voters Who Voted in 2002 Judicial Elections Sedgwick County

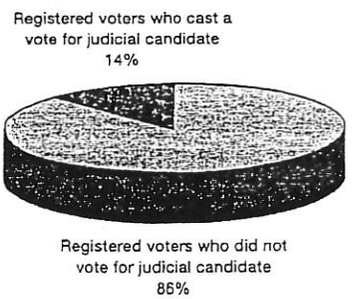


Chart 14

Percent of Voters Who Felt They Cast an Informed Vote for Judge

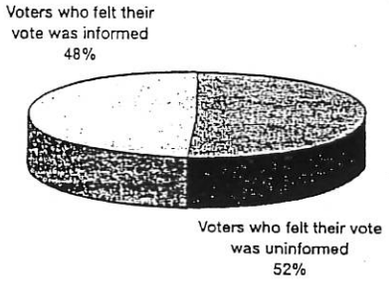


Chart 15

Percent of Voters Who Can Name at Least One of Their Appointed District Court Judges

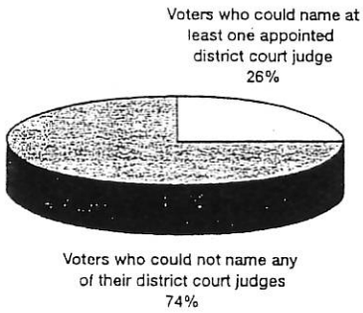
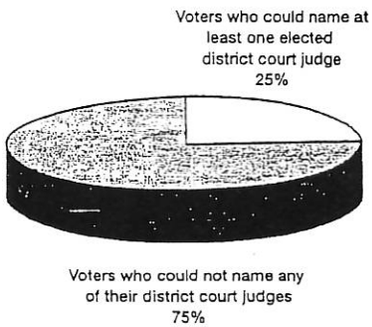


Chart 16

Percent of Voters Who Can Name at Least One of Their Elected District Court Judges



offices."[6] Another Sedgwick County judicial candidate opted to challenge an incumbent judge rather than run for a vacant seat, not because the incumbent judge was a poor judge, but because he was seen as less politically challenging than the candidate for the open seat.[7]

Voters admit that they are often in the dark about the qualifications of judicial candidates in both partisan elections and in nonpartisan retention elections. In a statewide telephone survey of 307 voters who voted for judge in the most recent elections, only 48%, or less than half, felt that they made an informed choice.[8] (Chart 14)

Of those who felt they made an informed choice, 10% claimed to have done "the best they could with inadequate information."

Of the 307 surveyed, 25% did not know or could not remember why they voted for the candidate they chose and 10% admitted that they just guessed.[9] Voters ranked name recognition and incumbency as the most important factors in choosing a judicial candidate.[10]

Elected judges are no better known among their constituents than judges who are appointed. A popular argument for election is that judges who are elected would be better known by the public and therefore, more accountable to the citizens they serve than judges who are appointed. When surveyed, the percent of voters who could name a district court judge was essentially the same no matter how the judges were selected. (Charts 15 and 16)

Conclusion

There are two methods of selecting district court judges. Sedgwick County has opted to choose its judges through a partisan election system that is expensive, time-consuming, and rewards candidates who can afford to contribute large sums of money to their own campaigns. It also puts judges in the uncomfortable position of having to raise money from lawyers who will later appear in front of them.

If Sedgwick County lawyers and citizens want to adopt the non partisan appointment/retention system used in half of the state's judicial districts including Johnson, Shawnee, Douglas and Harvey counties, they must file an appropriately supported petition with the Secretary of State. The petition would ask the Secretary of State to submit the issue to Sedgwick County voters in the 2004 general election.[11] For more information, contact Kansas Appleseed Center for Law and Justice at 785-312-7777 or kansas@appleseeds.net.

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[1] Kansas Historical Society, 1980 Sedgwick County Judicial Election records.

[2] Kansas Citizens Justice Initiative Survey of Judges and Attorneys, performed by Docking Institute of Public Affairs, at Fort Hays State University, 1998

[3] Bureau of Labor Statistics, U.S. Dept. of Labor.

[4] Kansas Secretary of State website, http://www.kssos.org/

[5] *Id.*

[6] *Kansas Lawyer,* Volume 12, Number 25,

[7] Wichita Eagle, August 2, 2002

[8] Kansas Voter Survey, March 2002.

[9] Kansas Voter Survey, March 2002

[10] Kansas Voter Survey, March 2002.

[11] K.S.A. 20-2901.

Testimony Opposing
Election of Kansas Supreme Court Justices

To be presented to the
House Federal & State Affairs Committee regarding
House Concurrent Resolution 5012 on
March 17, 2005

Judy Krueger
4308 Wimbledon Drive
Lawrence, KS 66047

Chairman Edmonds and members of the Committee. Previously I have written to members of the Senate opposing Senate Confirmation of Justices of the Supreme Court because it would make those selections one more pawn in the political process. One can see at the Federal level votes for or against taxes, highway projects, or support of environmental issues traded for votes to confirm a certain justice. The recent, and to some, politically unpopular decision by the Supreme Court regarding Kansas' death penalty law seems to have precipitated actions to revamp the Supreme Court Justice selection process.

The process involving the Supreme Court Nominating Commission and appointment by the governor has worked rather well for nearly 50 years. I would guess that no matter what system is settled upon, some group or other is going to object because it does not control the process or its outcomes. Perhaps, there is not perfect system. One must weigh whether changes to the current system will produce better qualified candidates, more impartial justices, better timeliness in carrying out the law, better access to the court, or better use of resources? Will the changes to the system be worth the cost of the effort, and will the resulting delivery of justice be improved?

The resolution before you raises a couple of specific questions. Regarding qualifications, HR 5012 states only that candidates must have practiced law at least five years and are in good standing before the state supreme court. It does

not specify that a candidate have practiced law in Kansas for the specified length of time. Having no complaints recorded at the state Supreme Court would not mean a candidate could pass a KBI background check, nor that the candidate is generally respected by peers.

Timeliness and court-load certainly impact the delivery of justice. If HR 5012 became part of the Constitution, could a position on the Supreme Court be vacant for over two years if a vacancy occurred in November of a general election year, but after election day?

A non-partisan election does not rule out politics. It does not mean a candidate would be impartial and have no sense of obligation to those supporting his candidacy. A non-partisan election does not mean citizens will take interest, nor have time to ferret out qualification questions.

I would add this thought about elected justices: do you want your issues to come before a justice whose campaign you opposed or did not support? Perhaps your adversary or a close affiliate was a campaign supporter of the justice? Whether or not a justice should recuse himself, or would, is hard to say. In any case, election of justices would pose the situation of conflict of interest much more frequently. It would impose on justices the personal burden of weighing whether or not they can truly make impartial decisions knowing their opinions may be "politically" unpopular, or go against one or more large campaign contributors. It has often been observed that campaign contributions influence at least access to elected officials. That is not what the public would like to think about access to or justice in the courts.

Thank you for your consideration of these thoughts opposing the passage of HCR 5012.