Approved: August 3, 2005
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on February 21, 2005, in Room 123-S of the Capitol.

All members were present.

Committee staff present:
- Mike Heim, Kansas Legislative Research Department
- Jill Wolters, Office of Revisor of Statutes
- Helen Pedigo, Office of Revisor of Statutes
- Nancy Lister, Committee Secretary

Conferees appearing before the committee:
- Senator Wagle
- Senator Schmidt
- Phill Kline, Attorney General
- Roger Kemp
- Jack Focht, Attorney and Past President of the Kansas Bar Association
- Justice Fred Six, retired
- Dave Rebein, Supreme Court Nominating Commission

Others attending:
- See attached list.

Chairman Vratil opened the meeting and hearing on **SCR 1606**;

SCR 1606 Constitutional amendment to have the supreme court justices appointments subject to consent by the senate

Proponents:
Senator Susan Wagle stated she was an advocate for the resolution for several reasons. The Supreme Court is the third branch of government and affects the quality of life for Kansans, yet the people of Kansas have no say in who is selected for these positions. In thirty states, people have more influence in the nominating process for Supreme Court Justices through voting or indirectly contacting their elected officials than what the appointment process allows. Currently, the nominating of justices is controlled by a majority of attorneys. Senator Wagle was supportive of the confirmation process Kansas uses in appointing Department Secretaries and stated she believed that court nominees should be subject to the same scrutiny. (Attachment 1)

Senator Derek Schmidt described the resolution as an opportunity for changing the justice selection process to strengthen the system by adding senate confirmation. Senator Schmidt stated that the objective of the resolution was to protect the institution of the court from the weakening that can come when public opinion concludes there is a pattern of conduct by a court majority that uses its "independence" to exert its own political preferences at the expense of foundational legal doctrines or at the expense of the popularly accountable branches of government. Senator Schmidt stated that the merit-selection system by itself lacks important checks and balances, and that it is appropriate to consider factors other than a justice's experience and credentials. Senator Schmidt stated that the approximately 9,500 members of the Bar in Kansas ultimately decide who is going to serve in the judicial branch of state government, and he believes this policy is inconsistent with the principles of Kansas. (Attachment 2)

General Kline, Kansas Attorney General, asked Chairman Vratil to allow him to introduced the next speaker, Roger Kemp, who lost a daughter to a brutal crime in 2002, and then make some remarks afterwards, and the Chairman concurred.

Roger Kemp, a citizen of Kansas, testified that he lost a daughter in a brutal murder at a Leawood swimming pool June 18, 2002. During the trial, he had faith in the justice system and a jury to decide the punishment of the murderer of his daughter. Mr. Kemp stated he is very unhappy that the justices have taken away the death penalty as an option, saying it is unconstitutional because the law isn't "worded right". Mr. Kemp stated that he supports our senate having the opportunity for final approval of Kansas Supreme Court candidates and

that it would be good to know where the candidates stand on important issues of our day. (Attachment 3)

General Phill Kline, Kansas Attorney General, testified in support of the bill, stating that the current process for selecting Justices vests authority solely in the executive branch and a private sector organization in closed proceedings with little or any public scrutiny. The Nominating Commissions are selected in a process that has less than one percent of the electorate actively participating and little if any media coverage of the naming of the Nominating Commission or the selection process. General Kline stated there is nothing in the process that allows for appropriate scrutiny to prevent the perversion of the process through the application of pressure by legal employers, campaign contributors or interest groups to direct a selection. Senate confirmation would bring to the light the significance of the process, and through the accountability of openness, provide a greater check against the collusion of interests. (Attachment 4)

Opponents:
Jack Focht, Attorney and Past President of the Kansas Bar Association, testified in opposition to the bill, stating that the current system for appointing judges works well. Mr. Focht stated that the independence of judiciary is a value that all Kansans and Americans value and they do not want political decision makers to be subject to the whims of the ebb and flow of the "majority". Mr. Focht stated that it is inappropriate to attempt to pick or confirm judges because of their view points, that the only view wanted from our judges should be a desire to interpret our laws fairly in accordance with the Constitution. (Attachment 5)

Justice Fred Six, retired Justice from the Kansas Supreme Court, spoke in opposition to the bill. Justice Six stated that 48 years ago he was an eye witness to the infamous "triple play of 1957" when, Chief Justice William Smith, hospitalized and an invalid, announced his intention to resign, but coordinated that resignation with Governor Fred Hall, in order to effect Hall's appointment to the Supreme Court. (Attachment 6)

Justice Six stated that Kansans desire a Supreme Court that is independent and accountable. The current system gives voters a chance to reaffirm justices every six years on the voting ballot. Kansas requires Justices to retire at age 70 or to finish out a term if the 70th birthday falls within a six-year term.

Dave Rebein, Supreme Court Nominating Commission, introduced guests at the meeting, Pat Riley and Dale Cushinberry, also members of the Nominating Commission. Mr. Rebein stated that he wanted to speak not so much in opposition to the resolution as in favor of the existing merit system. He summarized that politics are left at the door for anyone serving as a Commission member, as they resign any political office held. (Attachment 7) Mr. Rebein summarized that the resolution might put a damper on number of attorneys that would put their name in the hopper; despite the good intentions of the resolution, it might also politicize the process and end up screening good conservative applicants, as it has in the federal process.

Written testimony was provided by Ann Kindling, Kansas Association of Defense Counsels (Attachment 8), and Nancy Kindling, representing the League of Women Voters of Kansas (Attachment 9).

Chairman Vratil adjourned the meeting at 10:30 A.M. The next meeting is scheduled for February 22, 2005.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/21/05

NAME	REPRESENTING
Michael White	KCDAA
Jack Focht	KBA
FRED N SIX	Self on invitation of Sup. Ct
Anne Kindling	KADC
DAVID RESEIN	Supreme Court Nominating Commission
Carol G. Green	same
JIM CLARK	KBA
Barbara Nuss	
JACK FOWLER	KS SUPREME CT
JEFFREY ALDERMAN	KANSAS BAR ASSOC.
MICHAEL CROW	KANSAS BAR ASSOC.
Scott Heidner	KADC
Jessica Bourquin	KGC
Sandy Barnett	KCSDV
Joyce Grover	KCSDV
Whitney Damron	KS Bar Assn.
Brent Haden	KS Livestock Assoc.
TERRY HOLDREN	KFB

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/21/05

NAME	REPRESENTING
J Butler	KSC
Jeriah Forbes	Reno County 4-H
Lacey Howard	Reno County 4-H
Samuel Fishburn	Reno County 4-H
Chris Johnson	Peggy Palmer Job Shadow
[illegible]	
[illegible]	
Ken Alexander	self
Jim Marg	Foulston Siefkin LLP
Randall Hodgkinson	N/A
Meriah Forbes	Reno County 4H
Molly Zongker	Reno County 4-H
Erin Harper	Reno County 4-H
Jeff Bottenberg	Polsinelli, Shalton, Welte, Suelthaus
Kevin Graham	AG
Phill Kline	AG
Tiffany Muller	KJEP
Janis McMillen	League of Women Voters

State of Kansas

Senate Chamber

Susan Wagle

Thank you Chairman Vratil and members of the Judiciary Committee for this opportunity to stand before you as an advocate for SCR 1606. In the interest of your time constraints, I will be brief.

I co-authored this constitutional amendment for the following reasons.

1) The Supreme Court is the third branch of government. The decisions that are rendered across the street affect the quality of life the people of Kansas experience as much as the executive branch and legislative branch of government. Yet, the people of Kansas have no say in who is selected for these influential positions.

2) Twenty-one states elect their Supreme Court Justices. Three states have legislative elections. Six states authorize gubernatorial appointment with Senate Confirmation. In thirty states the people have more influence in the nomination process for Supreme Court Justices either directly by voting or indirectly by contacting their elected officials than what the appointment process allows currently in Kansas.

3) The nominating committee is controlled by a majority of attorneys, the very individuals who appear before the courts seeking favor from the Justices. The Kansas nomination process reeks of conflict of interest. In a similar situation in 1993 the Federal Courts declared the process by which Kansas selected its Secretary of Agriculture as unconstitutional due to the one person, one vote principle. The Secretary used to be selected by the very farm groups the Secretary regulated (i.e. Farm Bureau, Kansas Grain and Feed Assoc., etc). U.S. Senator Sam Brownback was the last individual who was selected by this process. Once found unconstitutional and not in the best interest of good government in the Tenth Circuit, the legislature changed the Secretary of Agriculture position to one selected by the Governor and subject to the Senate confirmation process.

4) The Senate confirmation process is an effective public process in Kansas. Currently all Executive Secretaries go through this process as do numerous other Board appointees. Constituents who have concerns regarding qualifications, employment history, business practices, personal investments, etc. are able to contact their elected Senators to express their concerns. I would say the process has proven that it works, and certainly the highest court nominees in Kansas should be subject to the same scrutiny.

5) I will readily admit to you I represent the district where the Carr brothers randomly chose some of our most outstanding and promising young people to abuse, torture, and leave for dead.

REPRESENTATIVE, 30TH DISTRICT
SEDGWICK COUNTY
14 SANDALWOOD
WICHITA, KANSAS 67230

The horror of waking up to the news of four young people executed and found naked in the ice and snow near our home was equal to watching the attacks on our country the morning of 9-11. Only, this morning, we feared for our children, our parents and our loved ones who resided nearby. Some time later, the trial of the Carr brothers was broadcast on TV and we watched and listened in horror as details of abuse were made public. News broadcasts also described the disrespect those on trial showed authorities, victims and victims families during the entire proceeding. It was reported they actually taunted the young lady they abused who had miraculously lived, they spit on victims families, and they made unwanted advances towards our District Attorney to the point where she had to have them brought to the courtroom with their legs in shackles. When the Carr brothers were given the death penalty, we believe justice was served. To have that verdict deemed unenforceable by the new majority of the seven who sit across the street; to have to live with the possibility that the Carr brothers and five others who have committed similar gruesome crimes could be made eligible for parole sometime in the future, is distressing to say the least. Then, to read the reason the justices changed their mind is because, quite frankly, they had a new majority and simply had the power to do so. It is obvious we do have a new majority on the Supreme Court, the times have changed, and, their new approach to injecting their views into the legislative process and the policy that is written in this building is troubling. I predict, when the movie is released that depicts the Carr Brother murders, and when people in my home town figure out the impact of the death penalty decision, they will be angry, and they will want the legislature to act. I believe the passage of SCR 1606 is an appropriate response to the new activism that is being displayed across the street.

Thank you for your time and your attention. I will stand for questions at the appropriate time.

Susan Wagle
State Senator
District 30

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State Capitol, Room 356-E
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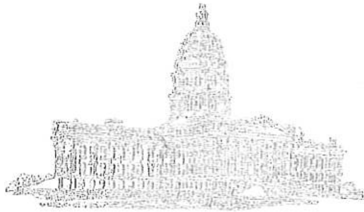

Senator Derek Schmidt
Majority Leader

Committee Assignme...
Chair: Confirmation Oversight
Vice-Chair: Assessment & Taxation
Organization Calendar & Rules
Member: Judiciary
Agriculture
Legislative Post Audit

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Testimony in Support of Senate Concurrent Resolution 1606 Proposing Senate Confirmation of Supreme Court Justices

Presented to the Senate Judiciary Committee by Senator Derek Schmidt February 21, 2005

Mr. Chairman, members of the committee, thank you for the opportunity to testify today in support of Senate Concurrent Resolution 1606. This measure proposes an amendment to the Kansas Constitution to add one additional step – the step of Senate confirmation – to strengthen the current "merit selection" process used to select state Supreme Court justices.

While there are differing points of view about the wisdom of this proposal, I must say at the outset that the knee-jerk reaction against it to date by so many in the organized bar, by the governor, and by a number of editorial writers has been enormously disappointing. Disappointing but, sadly, not surprising – after all, why would either the bar or a governor, who under our current system exercise joint monopoly power over selecting justices, embrace any proposal to check their monopoly?[1]

I also understand the initial concern of editorial writers who, with due respect, are informed principally by the headlines of the day and not by a studied understanding of the long history of

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[1] The current selection process for Kansas justices requires a constitutional entity known as the Supreme Court Nominating Commission to propose three names for consideration by the governor. The governor must choose one of the three to fill the opening on the Court; if the governor fails to do so, the Chief Justice is constitutionally obliged to do so. The nominating commission consists of nine members: The chairman is an attorney elected by a statewide vote of members of the bar, four other members are selected one each from each congressional district elected by the members of the bar in that district, and the remaining four members are appointed by the governor.

Senate Judiciary
2.21.05
Attachment 2

the philosophical struggle for balance that has brought our state to the current system of selecting justices – a system that I believe is incomplete and that now imperils the very judicial authority it was established to protect.

Some critics of this proposal stand aghast that the legislature would dare to critique actions of the court. But I believe we have a duty – a *duty* – to do so. We all are sworn to uphold the Constitution of this state, and that requires us to defend the integrity of each of its institutions of government. There is a real risk that certain actions by the court could undermine the institution of the court. We should heed the warning of Chief Justice McFarland: "The only currency and legitimacy this court possesses is the confidence of the public that we will decide cases based on the consistent application of the law, rather than on the proclivities of individual court members."[2]

So, while others will argue that reform is needed because of one case or another – just as many argued in the late 1950s that reform was needed because of the unseemly abuse of the system in the so-called "Triple Play" that led to the appointment of Governor Hall as Justice Hall – I will make a different case. My thesis is simple: Just as the system of selecting justices (by popular election) was flawed for almost a century before the "Triple Play" served as a catalyst for change, so I believe our current system of selecting justices (by commission and governor alone) has for years been flawed by the absence of adequate checks and balances. Legislative and public concern about one or more recent decisions by the court may well be the modern version of the "Triple Play" serving as a catalyst for further reform.

The objective of SCR 1606 is not to "punish" the court for decisions with which some may disagree. To the contrary, the objective is to protect the institution of the court from the weakening that is sure to come when public opinion concludes there is a pattern of overreaching, erratic behavior, and raw political conduct by a court majority that uses its "independence" to exert its own political preferences at the expense of foundational legal doctrines such as *stare decisis* or at the expense of the popularly accountable branches of government. Again, Chief Justice McFarland's words in her dissent in the recent case striking down the Kansas death penalty law are revealing about inner workings of the current court:

> The majority's decision today, by the barest of margins, discards our 3-year old decision in *Kleypas*, not because that decision has become unworkable, or the laws or facts underpinning it have changed, or a United States Supreme Court decision mandates it, but *simply because this new majority has the power to do so*.[3] (Emphasis added)

In short, I am advocating this amendment not out of pique or frustration but rather out of a sincere belief that this reform will result in a stronger and better-respected judiciary. I am also profoundly concerned that if we fail to take this reasonable step to refresh the balance between

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[2] Dissent of Chief Justice McFarland, *State v. Marsh*, Supreme Court of Kansas No. 81,135 (1994).

[3] Id.

judicial independence and accountability, we will invite more severe reactions as time goes on.[4]

HISTORICAL PERSPECTIVE

The Judicial Branch of government is unique in its role of administering impartial justice. But those two terms – "impartial" and "justice" – have often been at odds throughout American history. "Impartiality" by definition requires independence and an absence of obligation to outside interests. "Justice" by definition requires a respect for community norms and for overall societal expectations. The importance of societal expectations in considering whether a court acts "justly" is particularly important when considering the actions of a court of last resort, such as the Kansas Supreme Court, which not only settles the day-to-day disputes that arise between private litigants but also, by its pronouncements and through our system's acceptance of common law, actually establishes general law that binds our people as a whole.

For those reasons, the history of judicial selection in the United States – and, in microcosm, in Kansas – is the history of the people, acting directly or through their elected representatives, seeking to strike the proper balance between judicial independence and judicial accountability

The sense of where that balance properly lies has shifted over time.

In the original 13 American colonies, judges were appointed by the king. After independence from England was achieved, all 13 of the new American states continued to appoint their judges. Interestingly, eight states then provided that the *legislature* appoint judges. To this day, Virginia and South Carolina still oblige their legislatures to choose their judges.[5] The other five original states provided for appointment by the governor in consultation with or with the consent of his executive council.[6]

But in the early 19th century, reform was in the air. Appointment was no longer considered the best means of choosing judges, and many states moved toward popular election of judges. By the Civil War, 24 of the 34 states elected their judges. Thereafter, every new state entering the Union did so with popular election of at least some of its judiciary until Alaska in 1959.
The 20th century trend toward a "merit selection" system – which was recommended by the American Bar Association in the late 1930s and was first adopted by Missouri in 1940 – was a reaction to the 19th century reforms. Kansas adopted such a system for our Supreme Court in 1958 and in the 1970s for our Court of Appeals and for some, though not all, of our trial courts.

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[4]Notably, another proposed constitutional amendment addressing the subject of selection of justices has been introduced this year in the House of Representatives. It would provide for the popular election of justices.

[5]*State Court Organization 1998*, Bureau of Justice Statistics, U.S. Department of Justice, p. 24.

[6] Berkson, Larry C. *Judicial selection in the United States: A Special Report*, originally published in *Judicature*, the journal of the American Judicature Society, Volume 64, Number 4, October 1980, pages 176-193, and updated in January 1992 and February 1999.

Today, 21 states elect their Supreme Court justices (8 in partisan elections, 13 in non-partisan elections); 24 states (including Kansas) use nominating commissions and gubernatorial appointment; four states provide for direct gubernatorial appointment without involvement of a commission; and, as mentioned above, Virginia and South Carolina still provide for legislative appointment of justices.[7]

ARGUMENTS FOR REFORM

I support our Kansas system of so-called "merit selection," although I think that name can be rather misleading through the implication that it somehow miraculously produces the "best" possible justices. I certainly do not advocate a return to the era of electing Kansas Supreme Court justices. But I do believe our system would be strengthened by adding the additional step of Senate confirmation of persons who have been nominated by the nominating commission and appointed by the governor before that person could assume office as a justice of the Kansas Supreme Court. Consider these reasons:

1. The merit-selection system by itself lacks important checks and balances

Despite popular mythology, the current justice-selection system is not free of politics. It is, however, largely free of the checks and balances that we ordinarily rely upon to *contain* the desires of competing political factions. "It is important to acknowledge that the merit selection process is not free from political and other external influences. Studies of judicial nominating commissions have shown that politics can play a part in both the selection of commission members and in their deliberations."[8]

In this context, I am not asserting that our system is "political" in any pejorative sense. Our selection process is operated by honorable people who take their jobs seriously. Contrary to the protests of some in the bar, it is not a slander to call a process political. To say there are politics involved in the current "merit selection" of justices is not to harken back to the era of the smoke-filled room or to partisan wrangling; rather, it is to acknowledge that human power relationships are by definition political.

The current system merely substitutes the politics of the bar and the politics of the governor for the politics of the state as a whole. The academic literature bears out the influence of bar

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[7]Ibid, Berkson.

[8]Becker, Daniel and Malia Reddick, *Judicial Selection Reform: Examples from Six States*, American Judiciature Society (2003), "Merit Selection in New York", p. 21. The report cites three studies in support of this conclusion: See, Richard A. Watson & Rondal G. Downing, *The Politics of Bench and Bar: Judicial Selection Under the Missouri Nonpartisan Court Plan* (1969); Beth M. Henschen, Robert Moog, & Steven Davis, *Judicial Nominating Commissioners: A National Profile*, 73 Judicature 328 (1990); and Joanne Martin, *Merit Selection Commissions: What Do They Do: How Effective Are Then?* (ABA, 1993).

associations in selecting justices through systems like ours.[9] As a former staff person in the Office of the Governor and a longtime observer of the selection process, I have seen with my own eyes some of the considerations Kansas governors bring to bear in judicial selection. Politics plays a role.

Our current system removes the selection process largely from public view and has pretended that because politics are not seen by many they do not exist. But judgments still must be made as to which of several qualified candidates are "better", and thus deserving of nomination of appointment. Those are inherently political judgments. The academic literature suggests what common sense also would dictate: That merit-selection panels, like the Kansas Supreme Court Nominating Commission, are excellent tools for screening less-qualified applicants from the pool. But once that is accomplished, there is little to suggest that merit-selection panels are superior to other selection methods for choosing among several well-qualified candidates.[10]

Seven states have acknowledged this inherent shortcoming in a selection system such as ours and have developed systems that still rely on the strengths of the merit-selection process but balance it with the additional step of Senate confirmation.[11] The American Judicature Society has established a Model Merit Selection Plan – and that model (*see* attached chart), expressly contemplates Senate, legislative or executive council confirmation. That is precisely what we are advocating in SCR 1606.

2. It is appropriate to consider factors other than a justice's experience and credentials

This is not a call for a return to political favoritism or horse trading. Rather, it is an

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[9] Consider this excerpt from Reddick, Malia, *Merit Selection: A Review of the Social Scientific Literature*, The American Judiciature Society web site, http://www.ajs.org/js/, referencing Charles H. Sheldon, *The Role of State Bar Associations in Judicial Selection*, 77 Judicature 300 (1994): "In 1990, Charles Sheldon surveyed leaders of state bar associations regarding their organizations' involvement in judicial selection. In states where the bar elects lawyer members of judicial nominating commissions, the bar leadership appoints lawyer commission members, or the bar nominates or recommends lawyers to the governor to be appointed to nominating commissions, state bar leaders believed that the bar was, at a minimum, fairly effective in influencing judicial selection. Bar leaders were less enthusiastic about bar efforts to affect judicial elections, including committee recommendations to the public and bar polls." (Footnotes omitted).

[10] See, e.g., Reddick, Malia, *Merit Selection: A Review of the Social Scientific Literature*, The American Judicature Society web site, http://www.ajs.org/js/.

[11] The states are Delaware, Hawaii, Maryland, New Jersey, New York, Utah, and Vermont. In addition, New Hampshire provides for gubernatorial appointment with approval of an elected executive council. The District of Columbia also selects its judges through presidential appointment from a judicial nominating commission with confirmation by the United States Senate.

acknowledgment that the law is not always black-and-white – particularly when it presents itself in the form of the difficult issues that confront the Supreme Court. If the difficult questions of law could always – or even usually – be settled with a clearly correct answer merely by reading and applying the constitutions, statutes and cases, then there would be no need to have seven justices on the Supreme Court. One would suffice – so long as that one was sufficiently learned in the law.

But, of course, that is not the nature of the law – as evidenced, *inter alia*, by the many split decisions of our Supreme Court. Being properly experienced and credentialed in the law is a necessary but not a sufficient condition for being an excellent justice. Judgment also is required as is a sensitivity to societal norms, trends, conditions and expectations. To put the point another way, justices *require* a certain amount of political savvy.

Judicial philosophy matters. Of *course* it does. To pretend otherwise is to believe the law is a math or science rather than an art or social studies. But in our current selection system, only the governor exercises power in choosing a judicial philosophy for our state. Indeed, the nominating commission prides itself on doing just the opposite – making nominations based on factors other than philosophy (which it tends to consider "political" factors). I recall vividly a conversation I had with a member of the nominating commission regarding a then-new appointee to the Supreme Court who this commissioner happened to believe was not a desirable addition to the Court. The commissioner told me (I'm closely paraphrasing): "We knew that [the particular justice] was going to be a problem, but [he/she] was highly qualified and we didn't have any choice but to recommend [him/her]." Of course, the governor did have a choice – and, not surprisingly, that particular nominee, in my view, closely reflects the views of the governor who made the appointment.

Yes, judicial philosophy matters a great deal. Consider, as a hypothetical example, a future opening in the Kansas Supreme Court for which the nominating commission forwards three nominees: Antonin Scalia, Ruth Bader Ginsberg, and David Souter. All are highly qualified, fully learned in the law, competent, and full of "merit" by any measure. But it would make an enormous difference for the direction of the court and, thereby, for the state which of the three would be selected.

Under our current system, that decision would fall to the governor alone. Under our proposal, the governor's unfettered power to choose the direction of the court would be checked and balanced by the Senate. That is as it should be.

While much of the organized bar's reaction to SCR 1606 has been negative, I have been pleasantly surprised by several members of the Kansas bar who have approached me since the proposal was introduced and have offered their quiet support. As a partner in one of our state's large law firms said to me, "It's about time. Before we let somebody ascend to Mount Olympus, we should at least ask what they intend to do when they get there."

3. Our current selection system is constitutionally suspect

The Supreme Court Nominating Commission, *de facto*, chooses the justices of the Supreme Court. True, the governor exercises the final discretion, but whoever the governor chooses has first been recommended by the commission. The governor does not have the option of rejecting all recommendations and asking for a new slate.

The court, in turn, exercises broad governmental powers that affect almost every aspect of Kansas government and, thereby, the lives of our citizens. Everything from the nature of the state's police powers to our contract law to our rules of inheritance to certain lawful limitations on sexual relations are determined by the Supreme Court. And the Supreme Court's membership, in turn, is determined principally by the nominating commission.

Five of the nine members on the nominating commission – a working majority – are elected by Kansas attorneys. The chairman of the commission is elected by attorneys statewide, and four other members are elected by attorneys in each congressional district. To the extent that the Supreme Court's actions affect every Kansan, not just attorneys, it is apparent to me that the nominating commission's actions "materially affect residents of Kansas who are not represented by the present method of ... selection" of commissioners.[12]

While the matter has not been tested, I am concerned that this scheme violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by denying the principle of "one man, one vote." The structure of this system appears to me quite similar to the structure of the old Kansas Board of Agriculture – a board with members elected only by interest groups that in turn chose the secretary who exercised broad, general powers.

As you know, that arrangement was struck down as unconstitutional in federal district court by Judge Lungstrum in 1994 as a violation of "one man, one vote."[13] His decision was upheld by the Tenth Circuit Court of Appeals. It is law in Kansas.

I am well aware that there is ample room for argument about the applicability of the *Hellebust* case to our Supreme Court selection process. But my concern is reasonable, and in light of what I believe to be growing public concern about the actions of our Court, the possibility of an eventual legal test to the current process is real.

Even if the federal Constitution permits this arrangement, the notion that Kansas lawyers – who are a tiny minority of our population – should wield such disproportionate influence over the selection of one of our three co-equal branches of government is contrary to most Kansans' notions of how governments ought to be chosen. That is the same conclusion President Bush reached when in 2001 he eliminated the longstanding official advisory role of the American Bar Association in the federal judicial selection process. As then-White House Counsel Alberto Gonzales stated at the time: "In our view, granting any single group such a preferential, quasi-

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[12] *Hellebust v. Brownback*, 42 F.3d 1331, 1334 (Tenth Circuit 1994).
[13] *Hellebust v. Brownback*, 824 F.Supp.1511 (Kansas 1993).

official role in the nomination process would be unfair to the other groups that also have strong interests in judicial selection."[14]

The current Kansas selection system was adopted during a period of public outrage at the "Triple Play" of 1957 – a time when an irritated public likely would have adopted *any* reform put before it. Upon more thoughtful reflection, I doubt most Kansans would favor a system that gives attorneys such substantial power in choosing the Supreme Court. It is worth noting that the most common reaction I have received when I mention this proposal to citizens (other than attorneys) I represent is: "I thought the Senate *already* confirmed state Supreme Court justices."

CONCLUSION

For the reasons described above, I believe our system of government and the citizens we serve would be well-served by the addition of Senate confirmation on top of our existing merit-selection system for selecting Supreme Court justices. It would provide a check and balance to the political judgments of the governor in choosing among well-qualified candidates, and it would cure any potential constitutional infirmity in our current system.

Most important, it would tend to strengthen the long-term public respect and confidence that are so vital to the independence of our judiciary. For these reasons, I encourage the committee to recommend SCR 1606 favorably.

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[14] *Bar Watch Bulletin*, The Federalist Society for Law and Public Policy Studies (March 2001).

8-9

The American Judicature Society's Model Merit Selection Plan in Theory and in Practice

Phase One

Option 1

Judicial appointment system established by **statute** or by **state constitutional amendment**

A constitutional amendment or state statute utilizes the force of law to underscore and codify a particular aspect of the process, e.g., removing political parties from all nomination processes.

Executive order systems permit successive administrations to design the process or alter levels of influence over the commission without formal approval from the legislature.

State governor establishes a judicial appointment system by **executive order**

Option 2

Phase Two

Nominating Commission

- Comprised of both lawyers and lay persons
- AJS recommends 5 members; in practice, state commissions vary from 5 to 24 members
- Responsible for recruiting, investigating, interviewing, & evaluating candidates for judgeships
- Commission carries out screening duties independent of formal control by governor or legislators
- Commission is subject to anti-discrimination rules
- Commissioners appointed by governor, bar associations, judges, legislators, or existing members. Appointments made on a nonpartisan or bipartisan basis
- Staggering terms of service
- Term limits of service
- Commissioners prohibited from applying for judgeships for specified number of years after leaving commission
- In most states, commissioners prohibited from holding paid public office or any official political party position.
- Commission should encompass the diversity of the jurisdiction and the bar

Phase Three

Commission submits a list of nominees to appointing authority

- Appointing authority typically vested in state governor
- Commission produces a list of best-qualified nominees only
- Final list of nominees made public, and public comment invited
- Appointing authority constrained to appoint only from list of nominees recommended by commission
- AJS recommends commissions submit no more than 5 and no less than 2 nominees per vacancy, though in practice maximum and minimum number varies by state law or executive orders.
- Deadlines established for appointing authority to act on submitted nominees. Typically, appointing authority must act within 30 days or responsibility passes to Chief Justice or the presiding judge.

Phase Four

Candidate appointed to bench by governor

Nominee may be subject to confirmation by state senate, entire state legislature, or an executive council

Phase Five

Retention Mechanism

- Judges retained through an uncontested retention election

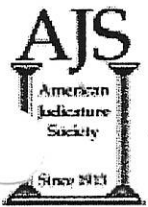
OR

- Judges reappointed through nominating commission and appointing authority.

On retention election ballots, the sole question presented to voters is whether or not Judge X shall be retained in office ("Vote Yes or No")

Reappointment systems may consider other nominees in addition to the sitting judge in order to form a recommendation.

Establishing a formal state-sponsored and funded **judicial performance review and evaluation** provides information to voters in public comments sessions & retention elections.



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8-9

It is an honor to be in the State Capitol before your committee. Thank you for the invitation. Yet I sit before you with a heavy heart, many people would give anything to be before a committee in the State Capitol – I would give anything to not be here. But as a citizen of our state I have seen something that deeply troubles me.

You see we lost our daughter (I won't say anything today about Ali that I haven't previously said to the media) in a brutal murder at a Leawood swimming pool June 18, 2002. I have told the media many times I have full faith in our justice system and would expect the full weight of the justice system to come down upon the murderer of our daughter. But I always added it is not my decision of what his punishment will be but the decision of his peers, the jury. But now, this decision has been taken away from the jury because the Kansas Supreme Court has ruled the death penalty statute is unconstitutional.

I sit before you as a citizen of the State of Kansas and you as representatives of the people of the State of Kansas. You and your peers and your peer's predecessors wrote the death penalty statute into law at the direction and at the consent and decree of the people of Kansas. The Kansas Supreme Court Justices having their own agenda took away the death penalty option from the people of Kansas.

If these Justices are to be given a lifetime achievement award by the governor's office, it seems only just they are to be held accountable for their actions by the people of Kansas. You as our representatives should have the opportunity for final approval so we can all be aware of where a candidate for the Kansas Supreme Court stands on the important issues of our day and does not have agendas' contrary to the wishes of the people of Kansas. Your approval of a Justice nominee is a needed link in the checks and balances which have made our government so great.

Our daughter, Ali, was a big believer in what was right and wrong. Let us be sure we have Justices on our Supreme Court who know and understand the intent of the law as prescribed by the people of Kansas. Not Justices who want to play scrabble with words and practice the art of word smiting. Abraham Lincoln was asked one time if he thought law was difficult. He answered, loosely quoted, "No, actually law is simple, it is simply knowing right from wrong!"

The Justices of the Kansas Supreme Court have taken away the option of the death penalty from the people of Kansas. I don't remember any of them with me when I discovered Ali brutally murdered in the swimming pool pump house. I don't remember any of them with me when I stayed with Ali's body all night at the morgue and I certainly don't remember any of them being there when I lowered Ali's casket into her grave. And yet they tell me the death penalty isn't constitutional because it isn't worded properly. Where is the justice in this injustice?

With checks and balances, with the much needed approval of the Kansas Legislature of nominees for Justices of the Kansas Supreme Court, we can stop the injustices for the people of the great State of Kansas.

Roger D. Kemp

February 21, 2005

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

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February 21, 2005

Dear Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify in favor of the amendment to the Constitution to provide for Senate Confirmation of the Governor's appointments to Kansas Appellate Courts. Currently, the process for selecting Justices vests authority solely in the executive branch and a private sector organization in closed proceedings with little or any public scrutiny.

The closed nature of the process and the imbalance in power invites collusion and the promotion of individual agendas and by its nature disturbs the important balance of power between the three branches of government. It is this balance, established at our nation's founding, that insures liberty, enshrines limited government and recognizes the rights of the people while preserving the rights of the minority.

The Judicial power of our state and national government's is significant in its ability to interpret and apply constitutional principles. Our founding fathers clearly established the courts as the interpretive body with the power to set aside legislative and executive action that conflicted with the rights and powers articulated in the Constitution. The United States Supreme Court in the case of Marbury vs. Madison, a case that challenged, and in its conclusion restricted, the power of President Thomas Jefferson, first articulated this power.

This power is now clearly established and widely recognized and is proper, for if the will of the majority expressed through legislative action or executive application can set aside the rights articulated for all in our constitution then those rights are truly illusory and clearly in jeopardy.

The courts, however, can present an equally dangerous threat to liberty if they fail to recognize the longstanding principles of jurisprudence that restrain their power and instead, attempt to legislate or infringe on the executive through creative interpretation or the vague articulation of principles. Either course presents the opportunity for mischief.

As stated by Alexander Hamilton in the Federalist Papers: "there is no liberty if the power of judging be not separated from the legislative and executive powers."

Hamilton and the framers of our Constitution recognized that allowing life appointed judges to legislate from the bench destroys the framework of a republic and instead creates and oligarchy – a government of the elite that disenfranchises the will of the people.

Furthermore, the founders expressly recognized the danger of tying the judiciary too closely to either of the other branches of government when it vested the power of appointment in the President while granting the Senate the role of advice and consent. Again, as stated by Hamilton: "if the power (of making appointments) was committed either to the executive or legislative (exclusively), there would be danger of improper complaisance (by the judiciary) to the branch which possessed it…."

In other words, allowing one branch of government to control the selection of the other would invite collusion towards personal ends. This reference is not to personal financial gain or fraud, but rather the invitation to personal issue agendas.

Kansas currently has a system that invites such collusion in that is mainly secretive and vests authority solely in the executive. Our current system allows a select committee comprised of a few individuals to deliberate in secret and put forth three names for the Governor. No one knows of the discussions that take place nor is there generally any public review of the qualifications of the individuals considered. The nominating commissions are selected in a process that has less than 1% of the electorate actively participating and little if not media coverage of the naming of the nominating commission or their selection process.

Nothing in the process allows for appropriate scrutiny to prevent the perversion of the process through the application of pressure by legal employers or campaign contributors or interest groups to direct a selection. In other words, the very politics that some decry would enter the process with Senate confirmation is already present: the only difference is the politics are secret rather than public. Senate confirmation would bring to the light of day the significance of the process and through the accountability of openness provide a greater check against the collusion of interests.

This necessity is only made more clear by the increasing tendency of some courts to ignore clearly established judicial restraints on their conduct. Historically courts in America have honored the powers of the other two branches of government by consistently applying certain principles in constitutional interpretation that provided great deference to legislative and executive action. The courts recognized that although some legislative and executive actions may be unwise, that the people can quickly correct that action through the ballot or through pressure for change. We witnessed this in action this session when the legislature passed the clunker law to repeal an unfair tax.

These judicial interpretation restraints also recognized that courts are less flexible in adjusting to societal changes. I can provide you with the nation's first Supreme Court decision as this decision is memorialized and still has value as legal precedent today. The same is untrue for our nation's first legislative enactment, as the law has been repealed several times over. In other words, legislatures are swifter to correct their mistakes. If courts change their approach from year to year – uncertainty is bred into the law and rights are in jeopardy.

Furthermore, courts recognized that they do not have the breadth of knowledge or experience of legislatures in determining public policy. The small business owner was not allowed in Judge Terry Bullock's District Court to present evidence on the impact of school

taxes on his business – only the parties to the litigation are allowed in the courtroom to present evidence. This is only right as to allow extraneous evidence results in diluting the legal rights of the parties. Courts are not established as the appropriate forum for policy making.

This is why courts historically have been careful to give great deference to the other branches of government while protecting clearly articulated fundamental rights.

But now courts are increasingly creating new rights in order to meet policy objectives. We need to look no further than the District Court decision in the Montoy case. District Court Judge Terry Bullock continued on a 12-year mission to redefine article six of our constitution to include an individualized right of each child to be a success as a child and as an adult. Although the goal of success is laudable, the term is vague and does not appear anywhere in our constitution.

The result of such judicial vagueness and creativeness is to disenfranchise the legislature and the governor from policy-making authority and thereby remove parents and school officials from important decisions regarding education. Since the term "success" cannot be defined with any reasonable certainty, the court stated it would have to maintain jurisdiction over our educational system and even threatened to close schools if it's understanding of "success" was not met.

Judge Bullock is not an educator and he is not a policy-maker. He is not aware of the various difficult choices made by the Governor or legislature in balancing the tax burden and budget priorities between the need to fund health care, mental health, corrections and law enforcement and the need to recognize economic freedoms and the need to build a strong economy. Yet the scope of his decision would have dramatically altered these priorities if not for Kansas Supreme Court intervention.

In the Federalist papers, Hamilton opines that the judiciary is the least powerful of the branches of government because it does not have the power to legislate, does not hold the sword or purse, cannot direct the wealth of the nation to any specific purpose nor can it take any active resolution whatsoever. Judge Bullock's decision assumed all of these powers.

This has now changes with courts routinely directly changes in expenditures, applications of taxes, etc. This combines with a media that is largely ignorant of the various roles of the branches of government to provide courts with a dramatic impact on public policy debates.

The recent Kansas Supreme Court decision regarding the state's death penalty is another example of the tremendous power wielded by the judiciary and perhaps, another example of judicial legislation.

In 2001 the Kansas Supreme Court upheld the application of the Kansas death penalty. The very same law exists today and since the court's decision numerous victims have negotiated the tortuous path of our judicial system in an effort to achieve justice for their loved ones.

In December of last year the Kansas Supreme Court acknowledge that all of those on death row received a constitutionally fair trial and were constitutionally found guilty of the heinous crimes for which they were tried. The court also acknowledged that a jury in a unanimous verdict properly and constitutionally sentenced all of those sentenced to death to death.

Yet despite these findings and despite the 2001 decision on which lawmakers and the people of this state relied, the court set aside the entirety of the law based on a concern that has never arisen in this state. The court ignored the well-founded legal principles of attempting to reconcile legislative action with the constitution in order to preserve the will of the people. The court ignored the clause in the statute that states that if one portion of the law was rendered unconstitutional that the remainder of the statute shall remain in full force in order to preserve the will of the people.

Regardless of your position on the death penalty, such judicial activism should be a concern; for as justice McFarland stated in her dissent: nothing has changed in the law, the constitution or the facts in the three years since the court found the law constitutional; only the personnel of the court has changed and the only thing that motivated the court to take such action is that they had the power to do so.

Our constitutional principles and rights should not be subject to such whim. Senate confirmation will help in preventing judicial abuse and will open an otherwise secretive process while helping restore the proper balance between the branches of government; a balance, which is crucial to the preservation of liberty.

Sincerely,

Phill Kline
Kansas Attorney General

KANSAS BAR ASSOCIATION

Submitted by JACK FOCHT

Testimony in Opposition to

Senate Concurrent Resolution No. 1606

The Kansas Bar Association, a voluntary association of more than 6,300 attorneys registered to practice in Kansas, is opposed to the adoption of **SCR 1606**.

The KBA has long championed the merit selection of judges, and justices, in Kansas. The consequences of the proposed constitutional amendment are a significant departure from merit selection. For example, when the Judicial Nominating Commission presents three nominees to the Governor, and the Governor appoints the one that appears to be the best qualified to that particular Governor, what happens if the Senate has adopted a "litmus test' for Supreme Court appointees, i.e. whether the appointee is for or against the death penalty, or is in favor of posting the Ten Commandments prominently in the courtrooms of our state? Or what happens if Senate rules allow for the type of delay currently found in the confirmation process for members of the Federal judiciary? In these two instances, any selection becomes something other than one based on merit. The impetus for the resolution appears to be based on at least two grounds: Dissatisfaction with recent decisions by at least a majority of the members of the current Supreme Court; and a desire to emulate the federal process of judicial selection

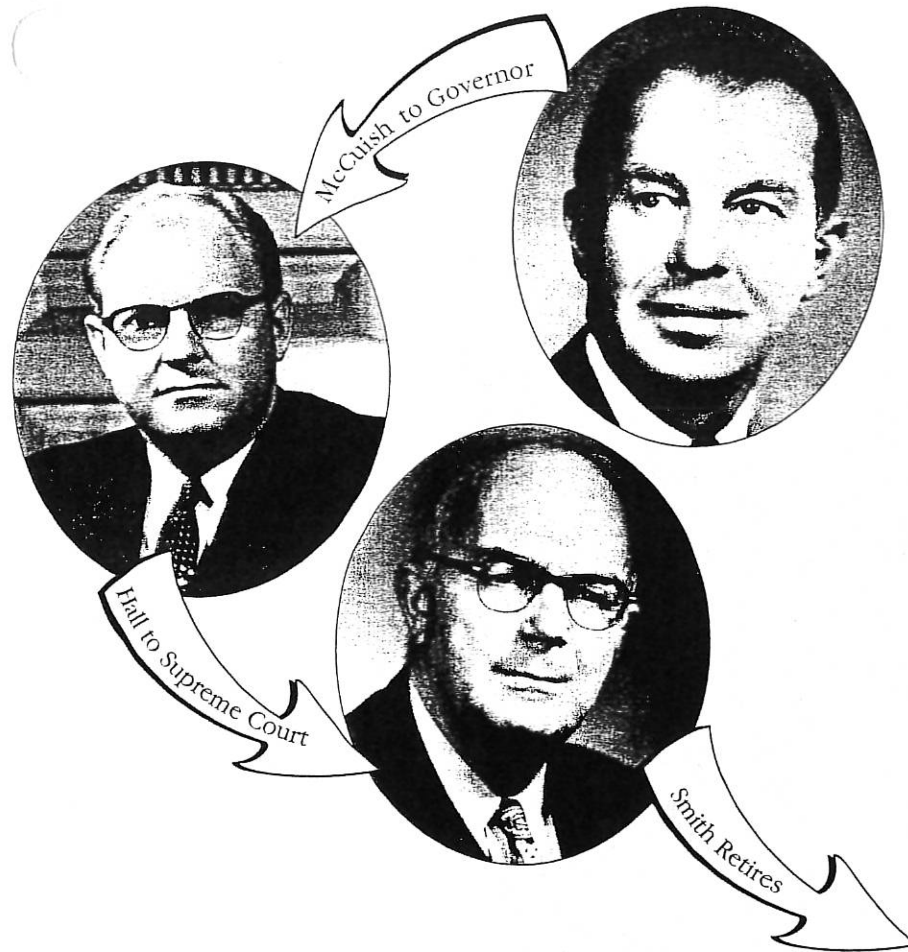
I was a first year law student when I got to cast my first vote on an amendment to the Kansas Constitution in 1958. Kansans, like me, had been horrified at the spectacle of raw political power which had resulted from the "infamous triple play" resulting in Governor Hall becoming Justice Hall. One of my professors, Schuler Jackson, later replaced Hall on the Supreme Court and the people of Kansas responded to the cries to remove partisan politics from the selection of Supreme Court Judges. The Supreme Court Nominating Commission began and it has worked well, chaired by respected members of the legal profession such as Robert Foulston and Richard Hite. There have been no complaints about the candidates forwarded to the various governors for appointment. Simply put: the system works — don't fool with it. The system attracts qualified candidates who would hesitate to become embroiled in a political process.

The independence of the American and Kansas judiciary is a value that Kansans and all Americans value. We do not want our political decision makers to be subject to the whims of the ebb and flow of the majority. Constitutions are the protectors of rights when carefully interpreted by competent, nonpartisan judges. If they do their job well they will, from time to time, be the catalyst for a change in the very laws they interpret. That is an appropriate job for a legislative body. But it is inappropriate to attempt to pick, or confirm judges because of their view points. The only view we want from our judges is a desire to interpret our laws fairly in accordance with our Constitution. We may disagree and when we do we can change the laws or the Constitution.

There is no fair comparison between the Kansas system for judicial selection and the Federal system. The latter is clearly designed to be non-merit based; with no qualifications required except the nod of the President. Clearly there is no vetting by a non-partisan selection committee. The process is obviously not working well now, as many areas of the country are without sufficient judicial resources. In the Federal system, the Senate is in session almost year round. Under a part-time legislative system, the Kansas Senate does not have the time, the staff, or the resources to justify this change. It would also be redundant to try to replicate the work of the non-partisan selection committee.

The Senate should be above reacting to a decision or two that may reflect badly on the laws it helps pass. The death penalty decision, if incorrect, may be changed by the United State Supreme Court. If that is not done, clearly a legislative change is required; and at least one Attorney General forecast this problem. The school finance decision is one that the Kansas Supreme Court had brought to them by citizens who believed that the system in place was wanting. The Court, rather that being activist, left the work to this legislature to fix. If you don't want courts to decide case, then dissolve the judiciary, but do not condemn the justices when they do their job, as they see it.

I am still proud of my vote in 1958, and I urge you to leave the judicial system above the partisan politics that are necessarily part of the legislative process.



The Triple Switch: How the Missouri Plan Came to Kansas

By R. Alton Lee

I. Introduction

For almost a century, Kansans chose their judges through the process of popular election, despite evidence that other states had modernized their selection procedures in the 20th century. The dramatis personae of this episode included Gov. Fred Hall, the controversial leader of the "modern" wing of the Kansas Republican Party; William A. Smith, an active and unabashed partisan Republican chief justice of the Kansas Supreme Court; and John Berridge McCuish, an amiable small town newspaper editor who served as Gov. Hall's lieutenant governor. Then in the 1950s, a bizarre political episode caused the state to adopt a more democratic method of judicial selection that surrounding states already had experimented with successfully.

R. Alton Lee *holds a Ph.D. from the University of Oklahoma. He taught recent U.S. and American constitutional history for more than 40 years, the last 30 at the University of South Dakota where he is professor emeritus. He is currently a James Carey History Associate at Kansas State University.*

His publications include "Truman and Taft-Hartley"; "Eisenhower and Landrum-Griffin"; "A History of Regulatory Taxation"; John Houston: Congressman and Labor Mediator, *"Kansas History"*; Reining in the Threat: Right to Work Laws in South Dakota, *"South Dakota History"*; Indian Citizenship and the Fourteenth Amendment, *"South Dakota History"*; The Eradication of Phossy Jaw: A Unique Development in Federal Police Power, *"The Historian"; and* The Corwin Amendment in the Secession Crisis, *"Ohio History."*

He is currently researching Kansas history, and his most recent publication is "The Bizarre Careers of John R. Brinkley" (2002).

The st[illegible] begins in late 1956 when William [illegible] Smith, chief justice of the Kansas [illegible]me Court, became seriously ill. The normally hale and hearty 68-year-old shrugged off his symptoms until that December when he collapsed and was hospitalized with a high fever and abdominal pain. Doctors diagnosed uremic poisoning caused by a kidney stone, and they operated immediately. In this stricken condition, Smith made the important decision to retire from the bench, precipitating the "Triple Switch of 1957," which involved the sudden resignations of three state officials.

Had Smith been operated on earlier, he might have recovered sufficiently by Christmas 1956 and been able to complete his term in office through 1958. Had his surgery been a week later, there would have been no time to plan the switch. The timing was crucial because, either way, it would have precluded the "Triple Jump."[1]

During this period Kansas judges ran for office on a partisan ticket, and some judges continued their partisan political activity while on the bench. In fact, the system encouraged this intrigue in many ways. Justice Smith was notorious for his extensive actions in politics and was disliked by many party regulars. Among other incursions into politics, he supported his friend C. Wesley Roberts, Republican national chairman, when Roberts received an $11,000 commission for facilitating the sale of the Ancient Order of United Workers (AOUW) hospital at Norton. The hospital had been built on state property and soon would have reverted to the state without cost. A legislative committee exposed the episode, resulting in serious embarrassment for Republicans, statewide and nationally, and especially for Gov. Edward Arn's conservative faction of the party. President Eisenhower, who had just campaigned for office on the slogan to "clean up the mess in Washington," accepted Roberts' resignation as Republican national chairman. Former governor and elder statesman Alf Landon, an opponent of Roberts, decried the arrangement as "peddling his political influence in a raid on the public treasury of Kansas," adding that Roberts' explanation of his role "does not satisfy the people of Kansas by a long shot."[2]

Gov. Fred Hall opposed the Right-to-Work legislation and vetoed it.

The Roberts episode, and other issues regarding the entrenched officials in the Republican Party in Kansas, led young Republican Frederick Lee Hall to press for cleaning up the "mess in Topeka." Hall would later be elected governor, and his controversial term further exacerbated this split in party ranks. Yet Smith, whose son Don was a member of Hall's law firm, supported the liberal Hall in his battles with the party and the Legislature, primarily because Smith liked winners. On March 1, 1956, seniority allowed Smi[illegible] replace W.W. Harvey as chief ju[illegible] when Harvey retired. Smith planned to serve out the remaining two years of his term before mandatory retirement; however, kidney stones altered his plans.[3]

Hall, the second protagonist, had a tempestuous political career. Born July 24, 1916, in Dodge City, Hall received his education in that city's public schools. His ability as a high school debater won him a scholarship to the University of Southern California, where he received an undergraduate degree in 1938 and a law degree in 1941. He returned to Dodge City to practice but was unknown in Kansas politics, except for prior work in the Young Republicans organization. He ran for lieutenant governor in 1950, one of nine candidates, and won the election. This splitting of the Republican vote allowed Hall, the candidate "west of 81," to win because he was strong in western Kansas.[4]

Arn was a conservative who resigned as attorney general to accept a seat on the Supreme Court. He soon vacated that position to run for governor and won. He and Lt. Gov. Hall immediately began squabbling. Arn was part of the Old Guard faction in Kansas, and *Pageant* magazine described him as one of the five "worst" governors at the time. Gov. Arn and the liberal Hall proved to be incompatible from the start. Hall had a law degree from outside Kansas and had worked in Washington for the War Production Board during World War II. Hall had no military experience, however, because of a minor physical problem, and many believed he had a disagreeable personality, which were fatal flaws for success in the Republican Party in the period immediately after

FOOTNOTES

1. Brian J. Moline, *Bill Smith: The Jurist as Politician*, 58 JKBA, Nov/Dec 1985, at 34, calls this the "Triple Play"; Homer Socolofsky, GOVERNORS OF KANSAS, University Press of Kansas, 1990, at 202, 204, labels it the "Triple Jump," as do many other authors. It was a "triple jump" only if one thinks of Smith "jumping" into retirement, which is not entirely a correct term for his decision to retire at that time.

2. Donald R. McCoy, LANDON OF KANSAS (University of Nebraska Press, 1966): 552.

3. *Id* fn 1 at 31-34; *Id* fn. 2 at 552-53.

4. *Sketches of Governors* TOPEKA DAILY CAPITAL, Feb. 26, 1976. The "west of 81" term refers to Highway 81 that runs north and south, dividing the rural western two-thirds of the state from the more densely populated eastern part. Hall won this area solidly. *See* Photen A. Smith and Clarence J. Hein, *Republican Primary Fight: A Study in Factionalism*, CASE STUDIES IN PRACTICAL POLITICS (New York, 1958) at 2.

e war. In addition, Hall was aggressive and pugnacious and, as a result, Arn supporters determined to purge him from party politics. They ran Wayne Ryan, a veteran state senator and close personal friend of the governor, against Hall in the 1952 primary. The maverick Hall campaigned on the issue that the party leadership was trying to "purge" him. Hall's narrow victory earned him a statewide following among young, liberal Republicans because he was fighting the "machine," always a popular cause for youthful voters. During this term, the Arn faction could only curtail Hall's powers in presiding over the Senate, or as the *Topeka Daily Capital* expressed it, they "dehorned" him.[5]

Despite this "dehorning," Hall continued his crusade against the Old Guard. Their opposition to the "outsider" lieutenant governor won him additional support that year from the younger Republicans, especially in the legislative chamber. Hall played a key role in the exposure of the Roberts episode, which also increased the number of his enemies. He was continually at odds with Paul Wunsch, president of the Senate and the most powerful figure in the Legislature. Because of Hall's continual criticism of "government by crony" and the "mess in Topeka," the party leaders — Arn, Kansas City businessman and National Committeeman Harry Darby, U.S. senators Frank Carlson and Andrew Schoeppel, and Congressman Ed Reese (known as the "Arn, Darby, Carlson faction") — were determined to eliminate Hall from Kansas politics.

When Hall announced in January 1954 that he would run for governor, the Old Guard supported George Templar, who resigned as U.S. Attorney to run in the primary. Hall, campaigning on the issue of "the restoration of faith and dignity in Topeka," narrowly won with 52 percent of the vote. His theme in the general election was "Let's Clean Up Topeka as President Eisenhower Cleaned Up Washington." He easily dispatched democratic newcomer George Docking of Lawrence with a 40,000 vote majority, "the biggest majority that Kansas had ever given a state candidate." He thus replaced the dominant faction in control of the state government and, as he bragged to the people in his inaugural speech, "I am under obligation to no one but you. I have no master but you."[6]

Hall's strong support in the House of Representatives permitted his candidate to defeat the Republican leadership's "anointed" candidate for speaker, Warren Shaw, in a party caucus. The governor went on to press for extensive state aid to high schools and an increase in the state budget, issues that the conservative faction opposed. His veto of a "Right-to-Work" bill won him praise from Eisenhower's secretary of labor, James P. Mitchell, but this action, plus his attempts to clean out the Statehouse in Topeka, cemented his fate with the Old Guard. Although Republican state chairman Lloyd H. Ruppenthal was a Hall supporter and, in fact, had been his campaign manager in the recent election, he broke with Hall [illegible]cially over the firing of Purchasing Director Eugene W. Hiatt and over financing for Republican candidates. Ruppenthal believed that, as party chairman, he was not the governor's agent and should allocate party finances on the basis of the good of the party, not to promote Hall. In addition, Hall wanted state patronage to go to county workers who supported him while Ruppenthal supported the tradition that the county party chairmen controlled this patronage.

Hall needed friends in the party machinery. To gain support, Hall asked Old Guard stalwart Wilbur G. Leonard to head the Revenue and Tax Commission. The patronage post became available when the incumbent, Ruppenthal, found he could not devote full time to his state job and also hold the position of executive secretary of the Republican Party, a newly created post to which he had been named. Leonard had experience with the Alcoholic Beverage Commission, and the governor hoped he could use this expertise to straighten out the administrative problems in the Tax Commission and to serve as a foil to Ruppenthal and the conservatives who controlled the state party machinery. Leonard soon joined forces with Ruppenthal, however, when Hall demanded Leonard purge the Tax Commission of old time employees as part of his "clean out the Statehouse" campaign.[7]

On the other hand, Hall won widespread praise in this campaign. The national press gave him rave reviews. President Eisenhower, who had won office by stressing the issue of cleaning up "the mess in Washington," lauded Hall as "the kind of forward-looking young man the GOP must develop." In 1956, his second year in

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5. Pageant "worst" quote in TOPEKA DAILY CAPITAL, *Sketches of Governors*. Feb. 26, 1976. In an interview on December 11, 2001, Republican State Party Secretary Wilbur G. Leonard itemized Hall's political weaknesses, as he saw them.

6. Smith and Hein *Id* at 3-6; Robert Sobel and John Raimo (eds.), BIOGRAPHICAL DIRECTORY OF THE GOVERNORS OF THE UNITED STATES, 1789-1978 (Westport, Ct. 1978); WICHITA EAGLE, Jan. 11, 1954; TOPEKA DAILY CAPITAL (Feb. 15, March 28, 1953, Feb. 26, 1976); "biggest majority" quote from *Newsweek*, 46, Nov. 28, 1955, at 35. In its enthusiasm over Hall, however, the magazine overlooked the election two years previously when Ed Arn defeated his Democratic opponent, Charles Rooney, by more than 125,000 votes.

7. *Id.* fn. 5 State Right-to-Work laws in effect prohibited the closed shop. Leonard did not believe Right-to-Work was a great issue between Hall and party leaders because many of them were business people who had no problems with their unorganized employees and thus were not proponents of Right-to-Work.

5-6

office, [illegible]al columnists extolled Hall's v[illegible]es when he sought to "prune the deadwood in the state house." He persuaded the Legislature to increase state aid to high schools, he increased worker's compensation payments, and his Right-to-Work veto prompted *Time* magazine to describe him as "a man on the rise." In Kansas GOP circles, though, the governor was rapidly becoming anathema. When he called recalcitrant legislators "SOBs" to their faces, they formed the "SOB Club" and, as a result, "Kansas did a belly laugh and thin-skinned Hall was the victim." One of Hall's former supporters described his problem as wanting "to play every instrument in the band and lead it too."[8]

The Kansas governor visited President Eisenhower. On his return to Topeka, a political opponent wrote the president's press secretary that Hall utilized this friendly meeting "for all he is worth, which is not much. ... I sincerely hope that no one back there feels that there is any need to play footsie with him. He is losing ground here every day." Hall later received a letter from Eisenhower that read, in part,

> Aside from the personal endorsement [of Republican governors at their annual convention], your action is indicative of the teamwork that is so necessary to the existence of a dynamic Republican organization. Together we have already accomplished much. I am confident we shall work together to an even greater record in the future.[9]

Resolved to demonstrate his control over the state party machinery, Hall decided to select the slate of delegates to the Republican National Convention, which would meet in San Francisco in late summer 1956 to renominate Eisenhower and Nixon. Hall's office announced that the governor would seek a replacement for Darby as Republican national committeeman. This solidified the determination of the anti-Hall forces to crush him. When the district and state conventions met, they constituted a test of strength that defeated Hall. A majority of Old Guard delegates was chosen, along with Darby as national committeeman and his veteran cohort, Mrs. C.Y. Semple, as national committeewoman. The pair was elected to his fifth four-year term and her second. When the state convention also chose Ruppenthal and Leonard as delegates, Hall demanded they resign their party positions. They declined to do so, and the party apparatus sustained their decision. The unanimous election of Darby and Semple broke tradition as this action of selecting national committeemen was usually taken after the delegation arrived at the convention site.[10]

Resolved to demonstrate his control over the state party machinery, Hall decided to select the slate of delegates to the Republican National Convention, which would meet in San Francisco in late summer 1956 to renominate Eisenhower and Nixon. Hall's office announced that the governor would seek a replacement for Darby as Republican National Committeeman. This solidified the determination of the anti-Hall forces to crush him. When the district and state conventions met, they constituted a test of strength that defeated Hall.

In the Republican primary of 1956, the Old Guard ran Shaw against Hall. Shaw was bitter over his loss of the speakership the previous year and eager to confront the governor and his liberal forces. His major plank was unconditional support of Right-to-Work, a popular issue in a state where organized labor was particularly weak and farmers strongly opposed unions. [illegible] precedent-shattering television deba[illegible] in 1956, Shaw portrayed Hall as the labor candidate. Hall challenged Shaw on the question, but the debate altered few votes as Kansans had already made up their minds on the issue. The governor, in turn, alleged that Shaw had received a 1-cent kickback from wholesalers who sold gasoline to the state, and Shaw correctly responded that this was a routine form of political contributions. This money, however, went into the ruling party's campaign chest and party leaders did not distribute any of it to Hall. He had to raise his own campaign funds, which further provoked his anger at the party leadership.[11]

Hall printed his letter from the highly popular President Eisenhower in political advertisements under the banner of "leadership and teamwork." Former Gov. Arn informed Eisenhower's chief of staff, Sherman Adams, that this had made the Old Guard faction's primary fight against Hall "difficult by using the personal letter he received from the president. He has showed it on TV, read it in his speeches and published it in political ads as per the enclosed." Assistant staff member Howard Pyle penciled a note to Adams at the bottom of the missive, "this letter becomes increasingly familiar." Despite this advantage, Arn predicted success 'in our Kansas project' at tomorrow's primary ... keep your fingers crossed." His assessment was correct as Shaw won the contest by 33,000 votes. George Docking narrowly defeated Harry Woodring, former governor and secretary of war during the New Deal, in the Democratic primary by less than 900 votes. Shaw lost the general election to Docking, however, by a large margin of more than 100,000 votes. Hall blamed the loss on the Kansas

8. The first two quotes are from NEWSWEEK, 46, Nov. 28, 1955, at 35 and the last two are from TIME, 68, Aug. 20, 1956, at 16.

9. "Footsie" quotes are from Stewart Newlin to James Hagerty, May 11, 1955, OF 109-A- 2-Kansas I; Dwight D. Eisenhower to Fred Hall, July 12, 1956, OF 109-A-2 Kansas, box 502, Dwight D. Eisenhower Library, hereafter cited as DDEL.

10. KANSAS CITY TIMES, June 12, 1956.

11. Smith and Hein, fn. 3 at 13-15; TOPEKA DAILY CAPITAL, August 4, 1956, fn. 4, *Id.*

-publican Party because: (1) it failed to follow the lead of Eisenhower on the national level; (2) the Old Guard destroyed the unity of the party, opening the way for a Democratic victory; and (3) Republican newspapers repeated the "irresponsible charges of the primary." Other observers maintained that the issues raised in the Republican primary demonstrated to large numbers of voters that neither Hall nor Shaw deserved to be governor. Hall had his greatest percentage of loss in western Kansas and rural and small town areas. The party split and the Right-to-Work issue were disastrous to Hall and, eventually, to Kansas Republicans.[12]

The key issues in the primary were so vitriolic that Gov. Hall wrote the Kansas attorney general afterward, charging that

> Shaw and certain members of the Legislature and others have made and caused to be printed, written, and other wise charged that I sold pardons and paroles, that certain boards and commissions of the State Government have entered into illegal contracts. Literature has been circulated attacking my patriotism and character — all of which were intended to expose me to public hatred, ridicule and deprive me of public confidence. These charges have been made without evidence of any kind. In fact, you have requested evidence on such charges but it has not been produced. I doubt if any governor in the history of the state of Kansas has been charged with selling pardons and paroles in such a manner.

As governor, Hall planned an investigation and, when completed, he would ask the attorney general to "institute prosecution." "You know," he added, "that this direction from me [to prosecute] is mandatory."[13] This action prompted much speculation over Hall's doubtful political future.

Hall began a search for a new vocation immediately after his primary defeat and quickly explored possibilities in the Eisenhower administration. In December 1956, he sent Henry Cabot Lodge Jr., U.S. representative to the United Nations, a biography with a request for a position with that organization. Lodge responded that he would "find out what the prospects are for an appointment for a man of your caliber and will get in touch with you again." Lodge appeared to be in no hurry, however, as it was not until the following May that he reported that Andrew W. Cordier of the United Nations had notified him that because there were 21 new U.N. members, all open positions must go to these nations.

Former Kansas Supreme Court Justice William A. Smith's resignation set up the "Triple Switch" of 1957.

In January 1957, Hall visited New York City to see William L. White, son of Emporia editor William Allen White, to exploit this political contact. At the same time, he contacted the Giessen and Boomer Columbia e Bureau to arrange to go on the lecture circuit. The president, Edna Giessen, responded that the bureau would "do everything in our power to promote your interests in every way, not only financially but from the standpoint of your prestige and reputation," adding that she thought "young Republicans should get around the country more and I should like to be in a position to help as much as I can." The bureau arranged some speaking engagements for him before certain groups and with topics appropriate to his political interests.[14]

Hall also visited with Eisenhower officials, investigating employment possibilities in Washington, D.C. He particularly expressed an interest in a foreign assignment. Federal patronage in Kansas was controlled by senators Schoeppel and Carlson and National Committeeman Harry Darby. The Republican party machinery in Kansas appeared more willing to accommodate Hall than were administration officials. An aide to Sherman Adams wrote his boss that "Carlson will see Harry Darby ... on Friday. While Carlson has no objection he feels that Schoeppel must be consulted before Hall is offered any specific job." Schoeppel was on an extended trip to Latin America at the time, but a note at the bottom of the page instructed "please find out exactly the attitude of Darby and Semple on this" and another noted that "Harry Darby Oks Hall for a post." Like Lodge, the administration in Washington appeared to be in no hurry to place Hall. The secretary of the Kansas Electric Cooperatives, with Old Guard maverick Lawrence Blythe as its president, endorsed Hall for undersecretary of interior in December 1956. Another Adams aide, Robert Gray, happily notified the coops in mid-January that "you will be interested in knowing, if you haven't already learned, that Governor Hall has recently been

12. Smith and Hein, note 3 at 13-15: "personal letter" quote from Edward F. Arn to Sherman Adams, August 6, 1956, OF 109-A-2, box 502, DDEL: "irresponsible charges" quote from Topeka Daily Capital, Aug. 4, 1956: Docking primary victory vote from Time, 68, Aug. 20, 1956, at 16.

13. Fred Hall to John Anderson Jr., n.d., Frederick L. Hall, Correspondence and Papers, 1956 folder, Kansas State Historical Society.

14. Frederick L. Hall, Correspondence and Papers, Hall to Lodge, December 19, 1956; Lodge to Hall, May 8, 1957; "everything in our power" quote from Edna Giessen to Fred Hall, (Nov. 7, 1956), Coll. 38, 1957-1962 and 1964 folder, 1956 folder, Kansas State Historical Society.

appoint[ed to t]he Supreme Court of the State of [Kan]sas." Ten days before this exchange, Gray sent a memo to his boss, observing that "I know that you will be pleased to learn that Hall was appointed to the Supreme Court in Kansas."[15] This solved the administration dilemma of finding a position for the maverick Republican.

In the midst of this search for employment, Gov. Hall's political ally, William Smith, notified him of his intention to resign from the Supreme Court. While in the hospital recovering from surgery, Smith discussed this decision with his family and, given his physical condition, they strongly urged him to retire. If he waited until January 14, 1957, to retire, he believed Gov. Docking would replace him with A. Lewis Oswald, the Democrat who ran against Smith for his court seat in 1952. Smith considered this an intolerable situation and the justice was quoted as saying "if I resign, you can rest assured I won't let George Docking name my successor." He wanted a liberal as a replacement, so he discussed the dilemma with his son Don, a member of Hall's law firm. Don Smith had a conference with the governor about whom he would want to nominate to replace his father if he should retire before Hall's term of office expired. Hall's immediate response was "how about me?" Smith, of course, had no objections, but Lt. Gov. John McCuish would have to be consulted about this unusual move.[16]

The third party to the switch, McCuish, was experienced in politics and, with his amiable disposition and connections, appeared on the threshold of a bright future in the Republican Party. He attended the public schools in Newton and enrolled at Washburn University, although he never received a degree. He bought the *Evening Star* in Hillsboro in 1931, and then sold it and purchased the *Harvey County News* in Newton the following year. McCuish discovered an interest in politics and became Republican County chairman. In this position he actively worked for Alf Landon, then later for the election of Payne Ratner to the governorship. The latter appointed him to the newly-established Department of Taxation and Revenue. He was chosen its chair, and Supreme Court Justice William Smith helped him operate "a smooth running machine" for the governor by serving as his "brains," another political intrusion by Smith that many Kansans resented.

Lt. Gov. John Berridge McCuish became governor in the "Triple Switch." He served as governor for 11 days from January 3 to the 14, 1957.

McCuish compiled a good military record in Italy in World War II, and the Army sent him to Japan in 1950 to help re-establish that country's newspapers. The veteran returned to Newton in 1952 to direct the Kansas presidential campaign for Eisenhower. He was a Hall man, but proper future actions could blot out this black mark with the party regulars.[17]

At this point McCuish also was [hos]pitalized and treated for high blo[od] pressure in the Axtel Clinic in Newton. Hall had received Smith's resignation on the last day of December but refused to confirm this to the press. He telephoned the lieutenant governor's doctor on Tuesday, January 1, 1957, to determine the patient's condition, then called Mrs. Cora "Sis" McCuish to explain the plot. She discussed it thoroughly with her husband, and on Wednesday they agreed to participate.

This was too good a secret to keep. Some party regulars got wind of the agreement, and Wednesday night Sis and the doctor "answered a battering of telephone calls." On Thursday morning, McCuish was dismissed from the hospital. The head of the highway patrol drove the couple to Topeka in a patrol car. The Halls and McCuishes visited Smith in Stormont-Vail Hospital, and at noon they were driven to the Capitol. A *Journal* reporter described Mrs. Hall as "smiling and charming, natty in a black suit and fur coat." She was dressed to celebrate her birthday. Hall immediately announced Smith's decision, tendered his own resignation as governor, and McCuish was sworn in to replace him. His first official act was to appoint Hall to the Supreme Court vacancy, and Supreme Court Justice Jay S. Parker administered the oaths of office. All this took place in a matter of minutes. McCuish was then saluted by a hastily-assembled National Guard unit with the traditional 21-gun salute. Most Republican politicians boycotted the festivities. *The Kansas City Star* observed that "events moved with bewildering speed" and was "the culmination of a deal in deepest secrecy."[18]

15. Quotes are from Robert Gray, memo to Governor Adams (Nov. 28, 1956), GF 121, box 476: Kansas Electric Coops to Dwight D. Eisenhower (Dec. 20, 1956); Robert Gray to Kansas Electric Coops, January 17, 1957, OF 138, box 692, DDEL. THE KANSAS CITY STAR, on the other hand, erroneously reported on January 6, 1957 that endorsements from Schoeppel, Carlson, and Darby were not "forthcoming."

16. "How about me" quote from KANSAS CITY STAR, January 6, 1957; "name my successor" quote from Moline fn. 1 at 34.

17. *Id.* fn 4; "brains" quote from Richard Walker, John B. McCuish: *Kansas' Unknown Governor,* (senior paper: Bethel College, 1970) at 10-13, 19-20.

18. "Deepest secrecy" quote from KANSAS CITY STAR, Jan. 3, 6, 1957; "battering" quote from WICHITA EAGLE, Jan. 4, 1957; TOPEKA JOURNAL, Jan. 3, 1957.

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While there was nothing illegal about this "triple switch," Kansans reacted immediately and bitterly over what many considered an "immoral" betrayal. It was useless for Sen. John Potucek, a Democrat from Wellington, to call attention to the fact that Frank Carlson had resigned as governor under similar circumstances in 1950. When U.S. Senator Clyde Reed died in office in 1949, Gov. Carlson appointed Harry Darby to complete the remainder of the term, provided the national committeeman promised not to run for the seat in the next election. Carlson was elected to the Senate position in 1950 and immediately resigned as governor. The new chief executive, former Lt. Gov. Frank Hagaman, appointed him to fill out the term that Darby conveniently resigned. This sequence of events was accomplished in order for Carlson to gain a few days seniority over the other U.S. senators elected that fall. In addition, Arn had some convenient political resignations on his record, as noted earlier. Most Kansas Republicans agreed with Democratic state chairman Frank Theis who commented on the triple switch: "I thought I was a pretty good title attorney, but this is the greatest shift of titles I have ever seen in such a short time." He called it "the sucker shift — the thing Notre Dame used in football." Many politicians, such as former Gov. Woodring and Republican Party secretary Wilbur Leonard, had "no comment." Alf Landon thought it "fortunate for Fred. I think he will make a good justice," but noted that the chain of events was "a complete surprise to me."[19]

The *Kansas City Times* was less generous, finding the "sorry episode an inglorious end to an inglorious administration." The editor said "Hall's stormy career was wrecked on political manipulations. He gave Kansas the most violently and personally-partisan administration the state had ever seen. 'This inglorious end' signified a 'callous disregard for the political decencies that are honored in Kansas.'" He considered Hall to be "wholly without judicial temperament."[20] Emporia editor William A. White agreed with *Kansas City Times* correspondent Alvin McCoy that this was "a brazen, raw deal for Kansas justice" and that Kansans "would be shocked by the brazen maneuver." Editor Clyde Reed Jr., of the *Parsons Sun* and soon to be a gubernatorial candidate, carefully observed that there was "seldom a dull moment" in Kansas political history. The *Salina Journal* labeled it the "Topeka Taffy Pull" and predicted:

> Hall is a bright enough lawyer to make a good justice if he wants to be. But this cozy little party confirms the suspicion that he is a bum politician. The Kansas reaction to this taffy pull will be such that Fred Hall will be permanently benched — and not in the sense of [Thursday's] seating.

The **Pratt Tribune** *agreed that Kansas needed to remove its supreme court vacancies from politics and "name top jurists . . . not defeated, retired, 'deserving' politicians." The* **Ottawa Herald** *believed the governor "should create a far better feeling for himself and for the party to remain aloof from any such political arrangements which are likely to strike a hot chord of antagonism from the voters of Kansas.*

The *Wichita Eagle* described the scenario as "a march of the lame ducks," adding "whether these deals to high public office without voter sanction will react on the principals in future elections is to be seen. The Kansas Democrats made lucrative political capital out of Republican miscues in the recent campaign and may do so again." The *Lawrence Journal World* was convinced that voters would not approve of this "funny business" and Hall "today does not [illegible] as a great, unselfish friend of the [illegible]ople," as he had once appeared to be. The editor continued,

> The Old Guard which the Hall followers have been screaming about for many months, looks pretty good today. The Old Guard apparently includes all Republicans who haven't approved of Hall. Whoever they are and whatever they are, the State of Kansas could use a few more of them to good advantage right now.

The *Pratt Tribune* agreed that Kansas needed to remove its Supreme Court vacancies from politics and "name top jurists ... not defeated, retired, 'deserving' politicians." The *Ottawa Herald* believed the governor "should create a far better feeling for himself and for the party to remain aloof from any such political arrangements which are likely to strike a hot chord of antagonism from the voters of Kansas."[21]

On the other hand, the *Hutchinson News Herald* observed that "slick a trick as it is, however, no political realist can cry shame. It is a tradition in our government to take care of the lame ducks and here the lame ducks only took care of themselves." The *Hays Daily News* correctly reminded its readers that "Gov. Hall isn't doing anything opponents in his own party wouldn't do if they were in the driver's seat. They brought about his defeat for renomination. This time it is Hall's turn to tag them." More importantly many editors agreed that the episode made even more obvious the need to reform the process of selecting judges.

"Public reaction, as polled by those close to politics over the state," the *Kansas City Times* editorialized, "has been universally bad to Hall's maneuver to put himself, a defeated governor, on the Supreme Court. Some of his opponents have almost blown gas-

19. "Sucker shift" quote from TOPEKA DAILY CAPITAL, Jan. 4, 1957; Landon quote from KANSAS CITY STAR, Jan. 3, 4, 1957.
20. KANSAS CITY TIMES, Jan. 4, 1957.
21. These and editorial opinions in the following paragraph are summarized in the EMPORIA GAZETTE, Jan. 5, 1957 and TOPEKA DAILY CAPITAL, Jan. 7, 1957.

kets." [illegible] would be two results from the "ju[illegible] the editor claimed: (1) the senate would give "careful scrutiny" to Hall appointees (he had just nominated 51 people to office for the next Senate to confirm and some were unhappy that one of the two he had named to the civil service board was one of the biggest liquor dealers in the state); and (2) there would be a renewed effort to enact a constitutional amendment to take the state courts out of politics. The *Wichita Eagle* noted that the Kansas bar, as a whole, had opposed Hall politically and now there were "some bitter comments expressed" about him, with lawyers wanting "to change the selection of judges." The *Pratt Tribune* also pointed out that this "shocker" came just as "the bar association was considering a plan to appoint district and Supreme Court justices from recommended attorneys instead of electing them." Alvin McCoy of the *Kansas City Times* hoped "the sorry events could result in constitutional changes that will take the Supreme Court out of politics, and prevent such schemes forever."[22]

In 1940 Missouri pioneered in the so-called Merit Plan for selecting judges in a nonpartisan manner, but by 1971 only 11 states had followed suit. Voters often were reluctant to relinquish their right to choose justices through the traditional ballot box.

The Kansas Bar Association (KBA) had been working on a method similar to the Missouri idea. The Triple Switch made their approach more acceptable to Kansans and also accelerated their efforts to develop a feasible plan of reform. After the exchange of offices, 30 senators endorsed the reform proposal. On March 1, 1957, the upper chamber voted 33 to four to support the Senate concurrent resolution to present the voters with a referendum. At the end of March, the lower house added a few minor changes and endorsed it 88 to 34, just barely the two-thirds necessary to propose a constitutional amendment to the voters.

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The plan established a nonpartisan committee, with the KBA electing one delegate from each of the state's congressional districts and the governor choosing one nonlawyer from each district. The lawyers across the state would elect one of their own as chairman. The committee would send three names to the governor to select one within 90 days, or the chief justice would make the selection. After serving at least 12 months in office, giving time for the voters to become familiar with the candidate's voting record, (assuming they would educate themselves on this question), the justice would stand for election on a nonpartisan ballot in the next general election. The system would apply to the Supreme Court and all other state appellate judges.[23]

There seemed to be no overwhelming enthusiasm for the proposal. No one doubted Hall's qualifications for the Supreme Court, but there was widespread disgust over the manner of his appointment. As a former member of the state Supreme Court and c[illegible] chairman of the judiciary committ[illegible] the governor's commission on constitutional revision expressed it, this resulted from the "blitz" change in governors "a little more than a year ago." The KBA endorsed the proposal five to one because it conformed to its code of judicial ethics in removing justices from the realm of partisan politics.[24]

Sen. Potucek, voted for the proposal, but cautioned that he "reserved the right to advise people to vote against the measure." He and fellow partisans claimed the system would "bar election of Democrats to the Supreme Court." Potucek was joined by Fayette Rowe, Republican of Columbus, who railed against the proposal for 25 minutes on the Senate floor. He insisted that this would remove the people's "God-given right to elect their own judges" and support for the plan was not justified merely because "Justice Hall slipped onto the bench." He further warned that, under the Missouri Plan, "[Boss Tom] Pendergast named the judges in Kansas City."

Both Potucek and Rowe, in cross-examining Sen. Wilfred Wiegle of Emporia, one of the plan's sponsors, forced him to admit that under the current partisan system about 70 percent "of Kansas judges today get their seat by appointment." The *Wichita Eagle* noted that many observers believed the voters would not accept the proposal in the election of 1958, except for the fact that the Triple Switch was still on their minds.[25]

Meanwhile, the Republican Party had not denied renomination to one of its governors since Clyde Reed in 1930. This convinced Hall he should seek vindication for his record as governor by running in the Republican primary in 1958. On April 1, after a

22. "Reaction" quote from KANSAS CITY TIMES, Jan. 5, 1957; "bitter comments" quote from WICHITA EAGLE, Jan. 4, 1957; McCoy and Pratt editor are cited in EMPORIA GAZETTE, Jan. 5, 1957)

23. SENATE JOURNAL, 1957, p. 16; HOUSE JOURNAL, 1957, p. 367. This was later changed to allow districts to choose their method in selecting their judges.

24. Hugo T. Wedell, *Non-Partisan Selection of Justices*, JKBA, 26, May 1958, at 359.

25. Pendergast quote from TOPEKA DAILY CAPITAL, March 1, 1957; Potucek quote from TOPEKA STATE JOURNAL, March 1, 1957; Rowe quote from WICHITA EAGLE, Nov. 6, 1958.

e 14 months on the bench, he tendered his resignation from the court to Gov. Docking. Rumors were rife that this would occur and the Democratic governor had already offered the position to Frank Theis. Democrat Theis was his party's state chairman and national committeeman and, not wishing to relinquish these posts, he declined the honor. Docking immediately turned to Schuyler Jackson, then dean of the Washburn School of Law, who accepted and became the first Democrat to sit on the high court since 1943. The *Topeka Daily Capital* noted that the switch from Hall to Jackson was "handled with a planned dispatch highly reminiscent of the now famous 'triple play.'" In naming Jackson, Docking reminded Hall that "this is one of our moves to take the court out of politics and administer the law (which had not yet been approved) as the people desire." Not exactly: Jackson was an important Democrat and certainly the original selection of Theis was politically motivated. Despite Bill Smith's efforts and fervent desire, his seat was taken by a Democrat.[26]

Clyde Reed Jr., publisher of the *Parsons Sun* since his father's death, was Hall's principal opponent in the primary. During the campaign both Reed and Hall carefully refrained from attacking each other in an effort to avoid further damage to the party. Reed maintained the "high road" throughout the campaign process. Both he and Hall devoted most of their time to attacking the Docking administration. Hall particularly claimed that the Democrat had brought Kansas state, city, and county governments "to the brink of financial disaster." Hall, however, could not shake his negative image in the minds of Republicans. Reed swamped him in the August primary with a five-to-one majority. In his loss to Shaw two years earlier, Hall received 42 percent of the vote; he now received only 18 percent. Former Gov. Landon, an early Hall supporter, seemed to speak for many Republican regulars when he refused to endorse his former ally. The "Old Fox" stated "I didn't approve when Ed Arn went on the Supreme Court then resigned to run for governor because I don't think the Supreme Court should be used as a stepping stone for other political offices." He could not sanction Hall's political maneuvers either.[27]

. . . the judicial selection amendment successfully slipped through 132,000 to 96,000. The judicial selection process for supreme court justices approved in 1958 has continued unchanged to the present day.

Reed anticipated leading a united party against Docking but failed to gauge the strong labor vote against Right-to-Work that year. As the *Kansas City Times* noted, in the fall of 1958 there seemed to be two separate races: one for governor and one for the Republican effort to approve a Right-to-Work amendment, a drive opposed by Democrat Docking. There was a limit of three constitutional amendments on a general election ballot. In 1958 they were: (1) the judicial selection process, (2) Right-to-Work, and (3) development of water resources. The union question became the predominant issue as organized labor fought it bitterly in Kansas and in four other states that fall, winning in all but the sunflower state. Some union leaders sought to convince their followers to oppose all three amendments to make certain that the hated Right-to-Work went down to defeat. Smith vehemently deplored this effort because he believed that each issue should be decided on its merits. Union leaders were especially active in the eastern, industrialized part of the state in getting out the vote.[28]

The "dramatic upset of ... election," according to the *Kansas City Times*, was the tremendous vote by organized labor in Wyandotte County against the Right-to-Work amendment, which, in turn, gave Docking a large majority there. Republicans won statewide on Right-to-Work, but it cost them dearly. Docking emerged the victor and thus became the first Democratic governor in the history of the state to succeed himself. In Wyandotte County, Democrat Newell George upset Republican Errett P. Schrivner for the congressional seat of the first district; J. Floyd Breeding withstood the challenge of Clifford Hope Jr. in the fifth district; and Democrat Denver Hodges of Coffeyville won his election in the third district, making the Kansas delegation to Congress evenly split three and three. This was a political phenomenon not seen since the Democratic halcyon days of 1934 when the division was three Democrats and four Republicans. Almost as an afterthought, the judicial selection amendment successfully slipped through 132,000 to 96,000. The judicial selection process for state Supreme Court justices approved in 1958 has continued unchanged to the present day.[29]

During his 11 days as governor, John McCuish conferred with the Democratic governor-elect, then appointed William Salome of Wichita as director of the Kansas Department of Administration because he was Docking's choice for the position. This was his only achievement as governor, other than his appointment of Hall to the court. Following the Triple Switch, Republicans believed the Newton man was untrustworthy. He returned to Newton, "tarred with the same brush as the Hall chicanery received." McCuish sold his newspaper and entered the oil business. He never held political office again and died of a stroke at the age of 55.[30]

Fred Hall moved to California following his primary defeat in 1958, became an executive for the Aerojet

26. Wichita Beacon, April 7, 1958; Topeka State Journal, April 7, 1958; Kansas City Star, April 7, 1958; "triple play" quote from Topeka Daily Capital, April 8, 1958.

27. Topeka State Journal, April 7, 1958; Topeka Daily Capital, April 8, Aug. 5, 1958; Landon quote *Id* April 8.

28. Kansas City Times, Nov. 5, 1958.

29. *Id.*; Topeka Daily Capital, Nov. 5, 1958.

30. Newton Kansan, Jan. 4, 1957; Walker, fn. 17 at 31.

project (General Corporation, practiced in Beverly Hills, and was elected president of the California Republican Assembly. He lost the Republican primary for a U.S. Senate seat to George Murphy, returned to practice law in Dodge City in the 1960s, and never again held public office in Kansas. He died in 1970 at the age of 54.

William Smith, the third participant who was responsible for the Triple Switch, retired on his pension of $6,500. If he had remained on the bench another two weeks, until January 14 when Docking was sworn in as governor, the retirement law would have made him eligible for an annual income of $8,450, a sum that Smith really needed as he was never affluent. And his participation in the unusual switch only postponed the inevitable for 18 months before Docking placed a Democrat in his court seat. He surely must have had second thoughts about his rash decision during his retirement years.

Divisions in party ranks can be initiated by small actions. Kansans, many of whom were dubious of Hall's character anyway, considered his method of obtaining a judgeship immoral and decided they could not trust him again in elective office. He achieved a number of his goals as a reformer, including the postponement of the Kansas decision on Right-to-Work for two years, but none of them were lasting. Reformers could learn from his experience that they should proceed slowly and with concern over political slights in their pursuit of change in Kansas.

Perhaps Hall's most lasting achievement, although unintended, was to be responsible for the new method Kansans accepted for choosing their judges, however meritorious one might consider that process to be. The entire episode demonstrated that Kansans took their politics seriously, especially when they believed politicians were playing fast and loose with accepted standards of morality. Some political maneuvers, however expedient, even for Republicans in what had been a Republican-dominated state, were not acceptable. Others who preferred the old ways of selecting judges might congratulate themselves on being correct, although the new process has demonstrated its proponents' arguments of its efficacy in "manning" the third branch of government. Overall, the Triple Switch displayed the pitfalls the dominant party faces in Kansas when Republicans engage seriously in intraparty fighting, although the fracas produced a significant judicial reform.

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SENATE JUDICIARY COMMITTEE
Hearing on SCR 1606
February 21, 2005, 9:30 AM, Hearing Room 123-South

Submission of Justice Fred. N. Six (Ret.)
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1. **Judicial Experience:** One year, Kansas Court of Appeals, 1987-88; Fourteen years, Kansas Supreme Court, retiring 2003.
2. **Education:** BA, History, University of Kansas, 1951; JD, University of Kansas 1956; LLM, Masters in the Judicial Process, University of Virginia, 1990.
3. **Military:** United States Marine Corps, 1951-1953; Korean War Service, 1952-1953.
4. **Professional:** Private practice of law, 1956-1987; Assistant Attorney General, Kansas, 1957-1958. An attorney member of the Commission on Judicial Qualifications from the Commission's creation in 1974 until appointment to Kansas Court of Appeals in 1987. Two terms as Chair.

COMMENTS IN OPPOSITION TO SCR 1606

1. The Birth of Kansas Merit Selection -- "The Triple Play of 1957" -- Politics, the Supreme Court, and Governor Fred Hall's "Why Not Me?"

In 1957 a series of events combined to so outrage the Kansas citizenry that a fundamental change was made in the manner in which Supreme Court justices are chosen. The story is well known. Chief Justice William Smith was hospitalized, an invalid. He announced his intention to resign but coordinated that resignation with Governor Fred Hall in order to effect Hall's appointment to the Supreme Court. In discussing with Smith possible replacements, the Governor is reported to have said, "Why not me?" On January 3, 1957, Smith resigned from the Supreme Court, Hall resigned as Governor, and the former Lieutenant Governor, now Governor, John McCuish appointed Hall to the Supreme Court. All of this occurred just days before the incoming Governor Docking took office. *The Constitutional Amendment authorizing the judicial selection system we now have banished politics from its seat on the 50 yard line of the judicial playing field.*

Justice John Fontron, of Hutchinson, a Reno County District Judge, appointed by a Republican Governor, John Anderson, Jr., was the first merit selection appointment to the Kansas Supreme Court.

Senate Judiciary
2-21-05
Attachment 6

2. Kansans Desire a Supreme Court that Is Independent and Accountable.

We now have such a Court. A nine member Nominating Commission of laypersons and lawyers examines, investigates, interviews, and ponders. The Governor must appoint one of the three names submitted by the nominating commission. Judicial accountability is tested at the next general election and again at the end of each Justice's six-year term. The Justice's name is on the ballot. The voters give either a "thumbs up" or "thumbs down" for retention.

3. The Impact of SCR 1606: A "Hamstrung and Hobbled" Court.

The Kansas Constitution, Art. III, Sec 2 (a), mandates that "All cases shall be heard by the whole court with not fewer than four justices sitting, and the concurrence of four justices shall be necessary to a decision."

Imagine a situation occurring in the future under SCR 1606 similar to the 2002-2003 retirement of Justices Larson, Six, Lockett, and Abbott. Then please reflect on: a) the 60-day time line for the Nominating Commission to gather, investigate, interview, and select; b) the 60 days for the Governor to appoint; c) the convening of the Senate under SCR 1606; d) a majority of the Senate refusing to "consent;" e) a repeat of the Nominating Commission process; f) again, the Governor's appointment time limit; and g) the Senate's consent process repeating again and perhaps again. Add the total time accumulating with a), b), c), d), e), f), and g), and the Court may not be able to function.

4. The Federal Judicial System: A Compelling Reason for a Federal "Advice and Consent" Requirement of the United States Senate – Federal Judges Serve "FOR LIFE."

The federal judicial appointment system, unlike Kansas, has no nominating commission to screen and recommend, no six-year term, and no retention election at the end of the term. The President of the United States can appoint anyone he or she wishes to the U. S. Supreme Court. Art. III, Sec. 1 of the United States Constitution authorizes federal judges to "hold office during good behavior." Removal is by impeachment. Art. II, Sec. 2 of the United States Constitution [Powers of the President] requires a presidential judicial appointment to be made "with the advice and consent" of the Senate.

The federal constitutional safeguard of Senate consent is linked directly to the lifetime tenure of each federal judge. Judicial service "for life" is one long time.

Kansas requires Supreme Court Justices to retire at age 70, or to finish out a term if the 70th birthday falls within a six-year term.

5. SCR 1606 Will Discourage Judges and Lawyers in Kansas from Becoming Nominees for Consideration as Members of the Supreme Court.

Under SCR 1606, if a majority of the Kansas Senate declines to consent to the Governor's Supreme Court appointment, failure to consent has the potential of damaging that person's professional reputation. Also, such failure to consent will discourage other persons from submitting their names for a future vacancy. The result will be fewer judicial applicants.

Reflect please on the contentious and battering Senate confirmation hearings of Judge Robert Bork and Justice Clarence Thomas. Also, please consider the enormous time delays between the date of appointment and the date of the consent hearings encountered by judicial appointees of both President Clinton and President Bush.

6. SCR 1606 Has the Potential For Damaging the Working Relationship Between the Executive Branch and the Legislative Branch.

In the event the Senate should fail to "consent" to the appointment of a person who has cleared the vetting process of the nominating Commission and the investigation conducted by the Governor's office, the failure of the appointment will reflect directly on the Governor. Is not such a denial of a Governor's appointment also an affront to the Governor? Is not the working relationship between the Legislative and the Executive impaired? Is not a harmonious relationship between the Legislature and the Executive a goal of good government for Kansas?

Because of the vetting done by the Nominating Commission at the front end and the retention election after each six-year term, a requirement of Senate consent is unnecessary.

7. The Current Merit Selection System, as the Kansas Judicial Vehicle, Has a "Track Record" of Decisions Based on the Law, the Facts, and the Record From the Trial Court -- My 14 Years on the Supreme Court.

During my time on the Court, I served with colleagues appointed by Governors Bennett, Hayden, Carlin, Finney, and Graves. My observation is that, at all times, each justice approached the task at hand earnestly. The black robe worn by each justice spoke for an independent Third Branch of Government, the Judiciary, free from political ebbs and flows. We came to the Court with past party affiliations appointed by both Republican and Democrat governors. We served on the Court as judges, not as Republicans or Democrats. Kansas has a recent history of electing governors from both parties. Grafting a requirement of Senate consent to an ongoing working system of judicial selection has the potential of politicizing the selection process.

8. The Kansas Current Merit Selection System Is in "Good Mid-West Company."

Our surrounding sister states, Missouri, Nebraska, Colorado, and Oklahoma, as well as Iowa, all have adopted a method similar to that used in Kansas for Supreme Court selection.

9. The Kansas Merit Selection System, Adopted by the Voters at the November Election 1958, Is a Judicial Vehicle that Has Been "Road Tested" Over the Past 46 Years. SCR 1606 Appears to Be a New Judicial Vehicle Designed from the Federal Model, But Without the Federal "Drive-Shaft:" Life Tenure For Supreme Court Justices.

My research indicates that apparently only one other State, Utah, has a judicial selection system similar to the system that would be established by SCR 1606, coupled with the same nominating commission and retention provisions present in Kansas law. However, Utah Supreme Court justices serve ten-year terms, rather than the six-year terms served by Kansas justices. I would welcome the opportunity to view the conclusions on this point reached by the staff of this Committee. Fifteen states appear to have the Kansas system, *i.e.,* gubernatorial appointment from judicial nominating commissions. My information comes from: (1) the American Judicature Society's web site, Current Methods of Judicial Selection, http://www.ajs.org/js/, that is attached, and (2) Table 4, Selection of Appellate Court Judges, *State Court Organization 1998*, Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs. (Attached). A summary of the *State Court Organization* table by grouping based on the method of selection is also attached (Marked Attachment No. 3).

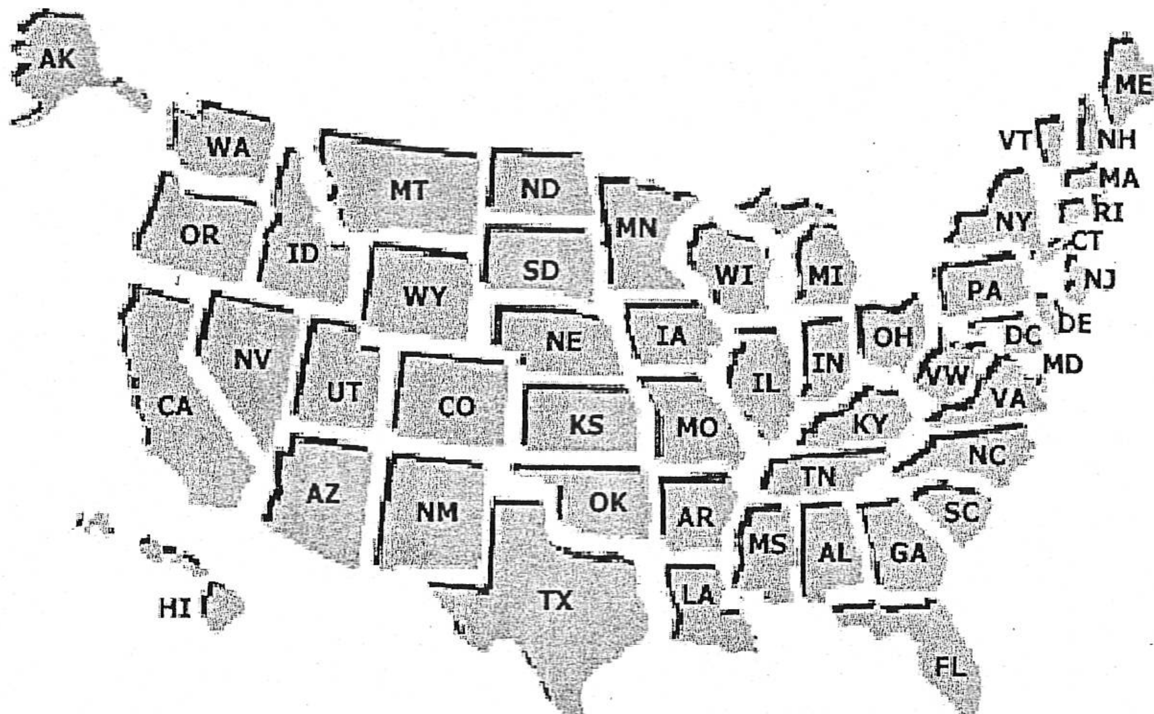
Thank you for the opportunity to appear before the Committee. I appear as an individual, a Retired Supreme Court Justice. The comments in this submission are my own.

Respectfully Submitted,
Fred N. Six

Judicial Selection IN THE STATES

AJS Judicial Selection Materials   Other Resources   AJS Home

Select a state from the map or chart below.



AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA
HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA
MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY
NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX
		UT	VT	VA	WA	WV	WI	WY		

Attachment 1: American Judicature Website, Current Methods of Judicial Selection, http://www.ajs.org/js/select.htm

U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Statistics

State Court Organization 1998

Courts and judges
Judicial selection and service
Judicial branch
Appellate courts
Trial courts
The jury
The sentencing context
Court structure

Attachment 2: Table 4, Selection of Appellate Court Judges, *State Court Organization 1998*, Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs.

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Table 4. Selection of Appellate Court Judges

	Method of selection for unexpired term	Method of selection for full term	Method of retention	Geographic basis for selection
Alabama				
Supreme Court, Court of Criminal Appeals, Court of Civil Appeals	Gubernatorial appointment	Partisan election	Partisan election	Statewide
Alaska				
Supreme Court, Court of Appeals	Same as full term	Gubernatorial appointment from judicial nominating commission	Retention election[1]	Statewide
Arizona				
Supreme Court, Court of Appeals	Gubernatorial appointment from judicial nominating commission	Gubernatorial appointment from judicial nominating commission	Retention election	Statewide (Supreme Court) County/region within division (Court of Appeals)
Arkansas				
Supreme Court, Court of Appeals	Gubernatorial appointment	Partisan election	Partisan election	Statewide (Supreme Court) District (Court of Appeals)
California				
Supreme Court, Court of Appeals	Gubernatorial appointment	Unopposed retention election	Unopposed retention election	Statewide (Supreme Court) District (Courts of Appeal)
Colorado				
Supreme Court, Court of Appeals	Gubernatorial appointment from judicial nominating commission	Gubernatorial appointment from judicial nominating commission	Retention election	Statewide
Connecticut				
Supreme Court, Appellate Court	Legislative appointment[2]	Legislative appointment[2]	Legislative appointment[2]	Statewide
Delaware				
Supreme Court	Gubernatorial appointment from judicial nominating commission with consent of senate	Gubernatorial appointment from judicial nominating commission with consent of senate	Gubernatorial appointment from judicial nominating commission with consent of senate	Statewide
District of Columbia				
Court of Appeals	Presidential appointment from judicial nominating commission with senate confirmation	Presidential appointment from judicial nominating commission with senate confirmation	Judicial nominating commission or Presidential appointment with senate confirmation	District of Columbia
Florida				
Supreme Court, District Courts of Appeal	Gubernatorial appointment from judicial nominating commission	Gubernatorial appointment from judicial nominating commission	Retention election	Regional (5) Statewide (2) Regional based on District Courts of Appeal (Supreme Court) District (District Courts of Appeal)
Georgia				
Supreme Court, Court of Appeals	Gubernatorial appointment from judicial nominating commission	Nonpartisan election	Nonpartisan election	Statewide
Hawaii				
Supreme Court, Intermediate Court of Appeals	Gubernatorial appointment from judicial nominating commission with consent of senate for a full term	Gubernatorial appointment from judicial nominating commission with consent of senate	Judicial nomination commission reappoints	Statewide
Idaho				
Supreme Court, Court of Appeals	Gubernatorial appointment from judicial nominating commission	Nonpartisan election	Nonpartisan election	Statewide

Table 4. Selection of Appellate Court Judges

	Method of selection for unexpired term	Method of selection for full term	Method of retention	Geographic basis for selection
Illinois				
Supreme Court, Appellate Court	Court selection (Supreme Court) COLR selection (Appellate Court)	Partisan election	Retention election	District
Indiana				
Supreme Court, Tax Court, Court of Appeals	Gubernatorial appointment from judicial nominating commission	Gubernatorial appointment from judicial nominating commission	Retention election	Statewide (Supreme Court, Tax Court) District (Court of Appeals)
Iowa				
Supreme Court, Court of Appeals	Gubernatorial appointment from judicial nominating commission	Gubernatorial appointment from judicial nominating commission	Retention election	Statewide
Kansas				
Supreme Court, Court of Appeals	Gubernatorial appointment from judicial nominating commission	Gubernatorial appointment from judicial nominating commission	Retention election	Statewide
Kentucky				
Supreme Court, Court of Appeals	Nonpartisan election	Nonpartisan election	Nonpartisan election	District
Louisiana				
Supreme Courts, Court of Appeals	Supreme Court selection[3]	Nonpartisan election	Nonpartisan election	District
Maine				
Supreme Judicial Court	Gubernatorial appointment	Gubernatorial appointment	Gubernatorial reappointment	Statewide
Maryland				
Court of Appeals, Court of Special Appeals	Gubernatorial appointment from judicial nominating commission with consent of senate	Gubernatorial appointment from judicial nominating commission with consent of senate	Retention election	Circuit
Massachusetts				
Supreme Judicial Court, Appeals Court	[4]	Gubernatorial appointment from judicial nominating commission with approval by Governor's council[5]	[6]	Statewide
Michigan				
Supreme Court, Court of Appeals	Gubernatorial appointment	Nonpartisan election	Nonpartisan election	Statewide (Supreme Court) District (Court of Appeals)
Minnesota				
Supreme Court, Court of Appeals	Gubernatorial appointment	Nonpartisan election	Nonpartisan election	Statewide
Mississippi				
Supreme Court, Court of Appeals	Gubernatorial appointment	Nonpartisan election	Nonpartisan election	District
Missouri				
Supreme Court, Court of Appeals	Gubernatorial appointment from judicial nominating commission	Gubernatorial appointment from judicial nominating commission	Retention election	Statewide (Supreme Court) District (Court of Appeals)
Montana				
Supreme Court	Gubernatorial appointment from judicial nominating commission	Nonpartisan election	Nonpartisan election (if unopposed, retention election)	Statewide

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Table 4. Selection of Appellate Court Judges

	Method of selection for unexpired term	Method of selection for full term	Method of retention	Geographic basis for selection
Nebraska				
Supreme Court, Court of Appeals	Gubernatorial appointment from judicial nominating commission	Gubernatorial appointment from judicial nominating commission	Retention election	Statewide: chief justices; district: associate justices (Supreme Court) All by district (Court of Appeals)
Nevada				
Supreme Court	Gubernatorial appointment from judicial nominating commission	Nonpartisan election	Nonpartisan election	Statewide
New Hampshire				
Supreme Court	Same as full term	Gubernatorial appointment with approval of elected executive council	Gubernatorial reappointment	Statewide
New Jersey				
Supreme Court, Superior Court-Appellate Division	Gubernatorial appointment	Gubernatorial appointment with consent of senate (Supreme Court) Chief Justice designation of Superior court judge (Superior Court, Appellate Division)	Gubernatorial reappointment with consent of senate (Supreme Court) Annual assignment by the Chief Justice (Superior Court, Appellate Division)[7]	Statewide
New Mexico				
Supreme Court, Court of Appeals	Gubernatorial appointment[8]	Partisan election	Nonpartisan retention election	Statewide
New York				
Court of Appeals	Gubernatorial appointment from judicial nominating commission	Gubernatorial appointment from judicial nominating commission	Gubernatorial reappointment with consent of senate	Statewide
Supreme Court, Appellate Divisions	Gubernatorial appointment	Gubernatorial appointment	Gubernatorial reappointment	Statewide[9]
North Carolina				
Supreme Court, Court of Appeals	Gubernatorial appointment	Partisan election	Partisan election	Statewide
North Dakota				
Supreme Court	Gubernatorial appointment from judicial nominating commission or elections[10]	Nonpartisan election	Nonpartisan election	Statewide
Ohio				
Supreme Court, Court of Appeals	Gubernatorial appointment	Nonpartisan election	Nonpartisan election	Statewide (Supreme Court) Appellate District (Court of Appeals)
Oklahoma				
Supreme Court, Court of Criminal Appeals, Court of Civil Appeals	Gubernatorial appointment from judicial nominating commission	Retention election	See full term	District
Oregon				
Supreme Court, Court of Appeals	Gubernatorial appointment	Nonpartisan election	Nonpartisan election	Statewide
Pennsylvania				
Supreme Court, Superior Court, Commonwealth Court	Gubernatorial appointment with consent of senate	Partisan election	Retention election	Statewide
Rhode Island				
Supreme Court	Gubernatorial appointment from judicial nominating commission	Life tenure	Life tenure	Statewide

Table 4. Selection of Appellate Court Judges

	Method of selection for unexpired term	Method of selection for full term	Method of retention	Geographic basis for selection
South Carolina				
Supreme Court, Court of Appeals	Legislative election	Legislative election	Legislative election (Supreme Court) Legislative reelection (Court of Appeals)	Statewide
South Dakota				
Supreme Court	Gubernatorial appointment from judicial nominating commission	Retention election	Retention election	Initial District Retention-Statewide
Tennessee				
Supreme Court, Court Appeals, Court of Criminal Appeals	Gubernatorial appointment from judicial nominating commission	Retention election	Nonpartisan election	Statewide
Texas				
Supreme Court, Court of Criminal Appeals, Court of Appeals	Gubernatorial appointment	Partisan election	Partisan election	Statewide (Supreme Court, Court of Criminal Appeals) District (Courts of Appeals)
Utah				
Supreme Court, Court of Appeals	Gubernatorial appointment from judicial nominating commission with consent of senate	Gubernatorial appointment from judicial nominating commission with consent of senate	Retention election	Statewide
Vermont				
Supreme Court	Gubernatorial appointment from judicial nominating commission with consent of senate	Gubernatorial appointment from judicial nominating commission with consent of senate	Legislative election	Statewide
Virginia				
Supreme Court, Court of Appeals	Legislative appointment	Legislative appointment	Legislative appointment	Statewide
Washington				
Supreme Court, Courts of Appeals	Gubernatorial appointment	Nonpartisan election	Nonpartisan election	Statewide (Supreme Court) District (Courts of Appeals)
West Virginia				
Supreme Court of Appeals	Gubernatorial appointment[11]	Partisan election	Partisan election	District
Wisconsin				
Supreme Court, Court of Appeals	Gubernatorial appointment from judicial nominating commission	Nonpartisan election	Nonpartisan election	Statewide (Supreme Court) District (Court of Appeals)
Wyoming				
Supreme Court	Gubernatorial appointment from judicial nominating commission	Gubernatorial appointment from judicial nominating commission	Retention election	Statewide
Federal				
U.S. Supreme Court, U.S. Courts of Appeals	Nominated and appointed by the President with the advice and consent of the Senate	Nominated and appointed by the President with the advice and consent of the Senate	–	United States (U.S. Supreme Court) Circuit (U.S. Courts of Appeals)

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Table 4. Selection of Appellate Court Judges

FOOTNOTES:

Alaska:
[1]Judge must run for retention election at the next general election, immediately following the third year from the time of initial appointment.

Connecticut:
[2]Governor nominates from candidates submitted by the Judicial Selection Commission.

Louisiana:
[3]Person selected by the supreme court is prohibited for running for that judgeship; election held within one year to serve remainder of term.

Massachusetts:
[4]There are no unexpired judicial terms. A judicial term expires upon the death, resignation, retirement or removal of an incumbent.
[5]The governor's council is made up of nine people elected by geographical area and presided over by the lieutenant governor.
[6]There is no retention process. Judges serve during good behavior to age 70.

New Jersey:
[7]All superior court judges, including appellate division judges, are subject to gubernatorial reappointment and consent by the senate after an initial 7-year term.

New Mexico:
[8]The governor shall select a candidate from a list submitted by the appellate judges' nominating commission created by the constitution.

New York:
[9]Presiding justice of each appellate division must be a resident of the department.

North Dakota:
[10]The governor may appoint from a list of names or call a special election at his discretion.

West Virginia:
[11]Appointment effective only until the next election year; appointee must run for election to any remaining portion of the unexpired term.

Attachment 3: Summary of Table 4, Selection of Appellate Court Judges, from *State Court Organization 1998*

Gubernatorial appointment from judicial nominating commission: 14 states
In addition to Kansas, these 14 states include the neighboring states of Colorado, Iowa, Missouri, Nebraska, and Oklahoma. (The remaining nine are Alaska, Arizona, Florida, Indiana, New York, Rhode Island, South Dakota, Tennessee, and Wyoming.)

Partisan election: 9 states: Alabama, Arkansas, Illinois, New Mexico, North Carolina, Pennsylvania, Texas, and West Virginia

Nonpartisan election: 14 states: Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin

Gubernatorial appointment: 5 states: California (with unopposed retention election), Maine (with gubernatorial reappointment), Massachusetts (from judicial nominating commission with approval by governor's council), New Hampshire (with approval of elected executive council), New Jersey (with consent of the senate)

Legislative appointment: 2 states: Connecticut (following Governor's nomination from candidates submitted by Judicial Selection Commission) and Virginia

Legislative Election: 1 state: South Carolina

Gubernatorial appointment from judicial nominating commission with consent of the senate: 5 states: Delaware, Hawaii, Maryland, Utah, and Vermont

Of the five states noted as using gubernatorial appointment from a judicial nominating commission with consent of the senate as the method of judicial selection for the full term, Delaware's method of selection can be distinguished from the method that would be created by SCR 1606 because its nominating commission is established by executive order, rather than by statute or the state constitution, and the Delaware Constitution requires there be a partisan balance within the Delaware judiciary. In addition, the Delaware method of retention is by gubernatorial appointment from a nominating commission with the consent of the senate, rather than by retention election, as in Kansas. Creation of the Maryland nominating commission is also by executive order.

Hawaii's method of selection can be distinguished from the method that would be created by SCR 1606 because its method of retention is reappointment by the judicial nominating commission. In Vermont, the method of retention is by legislative election, rather than by retention election, as in Kansas.

This leaves Utah as the only state with the same method of selection and retention that would be created by SCR 1606.

Before the Senate Judiciary Committee
Monday, February 21, 2005

Testimony in Opposition to SCR 1606

David J. Rebein, Member
Supreme Court Nominating Commission
620-227-8126
drebein@rebeinbangerter.com

I appear today on behalf of Chairman Dick Hite and the members of the Supreme Court Nominating Commission to speak in opposition to the passage of Senate Concurrent Resolution No. 1606.

We have had in place in Kansas a rigorous merit selection process for appellate judges since ratification of the constitutional amendment which created this Commission in 1958. In those intervening years, the Commission has earned a reputation for integrity and independence in the judicial selection process.

Currently, the Commission consists of nine members. Four are lawyers elected by lawyers who reside in each of the state's four congressional districts. Four are lay members appointed by the Governor. The Chair is a lawyer, elected by lawyers state-wide. 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 itself 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 individual notices to each active attorney admitted to practice in Kansas. A copy of the application form is attached to my testimony. After the closing date for receipt of applications, the Commission typically holds an organizational meeting followed, two or three weeks later, by personal interviews in

Topeka.

The Commission's starting point is typified by the stack of resumes on the table today. 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. All members of the Commission receive a copy of every application. Any member of the Commission can make inquiry about any one of the applicants; however, individual assignments are made for background checks and applicant contact to ensure that each applicant is throughly investigated as well as fully informed about the Commission's process. 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. It is the position of the Supreme Court Nominating Commission that our merit selection process would be weakened by injecting political review into the selection of appellate judges.

Lawyers are already reluctant to subject themselves to the Commission's thorough and rigorous screening process. Most vacancies on the Supreme Court will attract no more than thirty interested lawyers. To add a confirmation process would further inhibit attorneys from stepping forward.

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.

On behalf of the Supreme Court Nominating Commission, I present this testimony for your consideration.

Respectfully submitted,

David J. Rebein, 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

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.

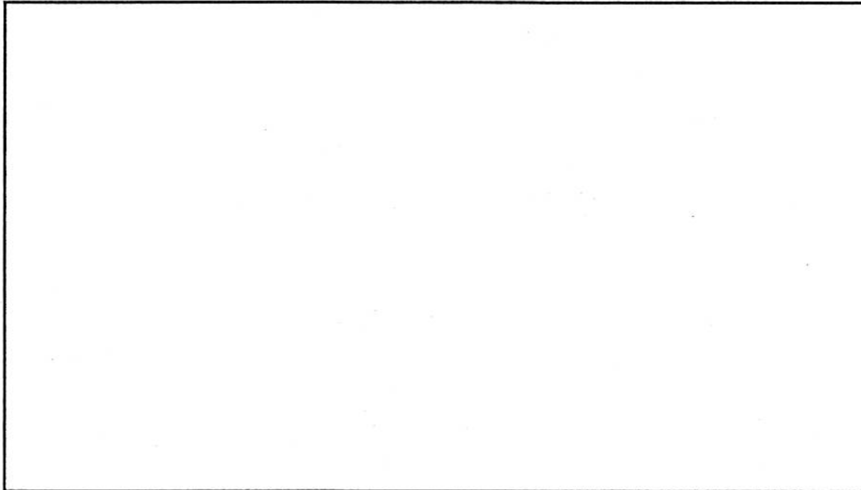
SUBMIT ONLY ONE COPY OF THE FOLLOWING TWO PAGES (DRIVER'S LICENSE PAGE AND KBI RELEASE FORM) WITH YOUR ORIGINAL APPLICATION.

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

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#7

Senate Judiciary Committee
<u>Testimony on Senate Concurrent Resolution No. 1606</u>

Submitted by Anne M. Kindling on behalf of the
Kansas Association of Defense Counsel

Chairman Vratil and Members of the Committee:

On behalf of the Kansas Association of Defense Counsel, my name is Anne Kindling and I submit this testimony in opposition to Senate Concurrent Resolution No. 1606. The Kansas Association of Defense Counsel (KADC) is an organization of more than 200 practicing attorneys who devote a substantial portion of their professional practice to the defense of litigation. This includes representing clients not only before trial judges but also before the appellate courts. As such, the KADC maintains a strong interest in the adversary system and the administration of justice, including the merit selection of those who decide such cases.

The KADC supports the merit selection of Supreme Court justices and favors the current selection process by a non-partisan nominating commission, consisting of lawyers and laypersons, which conducts interviews and submits a list of three well-qualified nominees to the Governor for appointment. Maintaining the current system of selection upholds the integrity of the process and affords the informed, merit-based, and prompt appointment of justices of the Kansas Supreme Court.

The KADC has several concerns about the provisions of Senate Concurrent Resolution No. 1606. First and foremost, this Concurrent Resolution will result in a delay of appointments to the Supreme Court due to the Senate confirmation process. The appointment process already allows the Governor 60 days to make an appointment from the date the Governor receives three nominees forwarded by the non-partisan nominating commission. The time period for filling a vacancy on the Court would be extended 30 days by this Constitutional amendment, and the time period could be even longer, another 90 days each time the Senate rejects the Governor's appointee and the process must begin again with a new list of three names from the nominating commission.

Another concern with this Resolution is the proposed language in new subsection (c) regarding the process if the Senate rejects the Governor's appointee. The current language provides that "In the event a majority of the senate does not vote to consent to the appointment, the supreme court nominating commission shall submit to the governor *three additional names* possessing the qualifications of office . . . ." (Emphasis added.) This language possibly suggests that if the Senate fails to confirm the Governor's appointee, the nominating commission must send a list of three *new* names to the Governor and cannot include the two persons originally nominated but not appointed by the Governor. The KADC believes this language should be clarified to allow the new panel of nominees to include those already submitted to the Governor but not appointed in order to assure the appointment of the best qualified candidates.

The KADC also believes there is a potential cost factor that should be considered. The Senate is typically in session only between January and May each year. If the vacancy on the Supreme Court needs to be filled at a time the Legislature is not in session, the Senate would be required to hold a special session to consider the Governor's appointee at a cost to Kansans. The fiscal note on this should not be ignored.

For these reasons, the KADC supports the current merit-based selection process and opposes Senate Concurrent Resolution No. 1606.

From: <Nmkindling@aol.com>
To: <nancyl@senate.state.ks.us>
Date: 2/18/2005 4:27:24 PM
Subject: SCR 1606

To Nancy Lister
Testimony against SCR1606
February 18, 2005

Senator Vratil Chairman and
Members of the Senate Judiciary Committee

As a matter of introduction to you, I am the Action Chair for League of Women Voters of Topeka-Shawnee County and today would like to present written testimony against SCR 1606 on behalf of the League of Women Voters of Kansas. I apologize for not being able to attend this hearing in person.

The State League has a position supporting the current Selection/Appointment of Justices. This, as much as possible, seems to keep politics out of the Judicial System. To change our system for selection of Supreme Court Justices, the new law should undergo extreme scrutiny. Testimony should be heard, not only from Justices, Judges and Attorneys, but from the general public who have had contact with our jurisprudence system. Their input should not be volunteered but requested.

Currently we have a nonpartisan commission who selects 3 candidates to present to the Governor from whom one is chosen by the Governor. During the process, candidates are selected by the qualities they posses such as ethics, knowledge of the law, judicial temperament, etc., all characteristics that should represent the best ideals of individuals seeking to serve on the Supreme Court.

The independence of the Judiciary is of prime importance for a fair system of justice. I am sure every elected official can agree upon this. Independence can best be attained when politics is not interjected into the selection of justices. Can the independence of the justices be protected better through Senate confirmation than under our current system?

If you are trying to copy the Federal system of selection, you should realize that Congress meets all year to make decisions when there is a vacancy on the federal courts. Federal justices and judges hold their positions for life and therefore Senate confirmation is appropriate. The federal system has no nominating commission comparable to the one in Kansas. U.S. Supreme Court Justices do not have to stand for a retention vote by the citizens as do Kansas justices. In addition, the federal system is not without problems. Many problems arise in Washington when there is no bipartisan commission making recommendations to the President as to qualifications and independence when selecting justices.

What has provoked the introduction of this bill to the Senate? Is it a reaction to recent decisions by the Kansas Supreme Court? Is it a failure of our selection process? Is it the qualifications of the justices now sitting on the bench? Or perhaps is it trying to improve on an already proven system? How will a vacancy be handled in cases when justices are unable to complete their terms? But the major question should be: If we change the system would we have better, more qualified, and independent justices?

Senate Judiciary
2-21-05
Attachment 9

The League of Women Voters, a nonpartisan political organization, encourages the informed and active participation of citizens in government, works to increase the understanding of major public policy issues, and influences public policy through education and advocacy. The League does not support or oppose any political party or candidate.

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