Approved: September 6, 2005
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:00 A.M. on June 24, 2005, in Room 123-S of the Capitol.

All members were present except:
Barbara Allen- excused
David Haley- excused

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:
Phill Kline, Kansas Attorney General
Senator Phil Journey
Senator Nick Jordan
Representative Lance Kinzer
Professor Kris Kobach, University of Missouri
Mr. Rich Hayse, Kansas Bar Association
Ms. Donna Whiteman, Kansas Association of School Boards

Others attending:
See attached list.

Chairman Vratil opened the hearings on **SCR 1602** and **SCR 1603**, stating that since most conferees were testifying on both resolutions, conferees could give testimony on both when they addressed the committee.

SCR1602--School finance; amount and manner of distribution determined by legislature
SCR1603--Constitutional amendment concerning appropriation of money by the legislature

Proponents:
Phill Kline, Kansas Attorney General, stated that **SCR1602** was a constitutional amendment that states the Legislature shall have the authority to determine a suitable education. Considering the breadth of the Supreme Court decision, this is one option available to the Legislature to preserve its authority to determine education policy. The Kansas Supreme Court decreed the Legislature should provide $150 million dollars during the Special Session for a total $285 million dollar additional funding during the 2005 legislative year. The decision states that it is likely the Court will also want to add an additional $580 million dollars in January. The Court has said that suitability may only be determined by experts and the legislative process is inherently deficient in determining suitability. The Court's opinion dramatically changed how school policy and educational policies were to be determined in Kansas. If the Legislature wants to preserve its authority, the constitutional amendment is aimed directly at allowing that authority to continue. **SCR 1602**, addresses the issue of the Court's opinion and puts the policy options squarely before this Committee as to whether the Legislature is going to engage in educational policymaking or whether the Court is the one that is going determine education policy through expert testimony and judicial actions.

General Kline stated that in **SCR 1603** the first and third statements restate current constitution provisions. The General's office was concerned that the original language could violate due process, it could involve suspect classes, and the Court could strike it down as overly broad. The draft before the Committee provides an exception to allow the interference of an appropriation consistent with the United States Constitution. If the Legislature were to appropriate funds with a clearly discriminatory intent, the United States Constitution would prohibit such action, and it would be struck down in a federal court. Therefore, the amendment is also constitutionally suspect in the federal context. General Kline encouraged the Committee to include language that allowed for the rights of the United States Constitution expressly, to potentially prevent a judicial action that would find the proposed language unconstitutional.

General Kline stated that the amendment did not address the current Court action. He did not believe that future Court's remedies were going to be with appropriations. The Court's remedy, potentially, was to order the State Board of Education not to surcharge Accounts and Reports in the State Treasurer's office. Such action would inhibit distribution of funds and close schools. Even if **SCR1602** passed, the Court could close schools. He encouraged the Committee to discuss the impact on the Tort Claims Act. If the state received an adverse judgment, the amendment would not allow collection on that judgment unless there was a legislative appropriation.

General Kline previously provided to the Majority Leader of the Senate and Leadership of the House, a constitutional amendment which his office supports. It stated that under Article 6, and a lawsuit on suitability, the Court shall not have, in order to enforce its remedy, the option of closing schools statewide. Kansas children, parents and teachers should not be punished through closure of the schools in order to provide a suitable education. It is irrational to not provide an education in order to provide a suitable education.

Senator Journey asked General Kline to compare the breadth of **SCR1602** and **SCR1603**. General Kline stated the public perceived **SCR1602** as narrower and **SCR1603** as broader. The opposite is true. **SCR1602** speaks specifically to education, Article 6, and the *Montoy* opinion. **SCR1603** could have a much broader application and deserved contemplation. Senator Journey stated that a KU Law School professor commented that **SCR1602** would prospectively enjoin the court from enforcing the *Montoy* decision. General Kline concurred. Chairman Vratil asked if **SCR1602** essentially writes out of the Constitution what currently exists. General Kline stated that it essentially states that the Legislature shall determine suitability, so it prevents judicial action. Chairman Vratil further clarified that it writes it out by making it impossible to enforce. If the legislature should decide that K-12 education needs only 20 percent of what it receives now, how would this constitutional amendment affect this decision? General Kline stated that unless there was a violation of other rights in the constitution, such as discrimination or there was a suspect class requiring strict judicial scrutiny, or an irrational basis as relates to a non-suspect class and the distribution of funds, or any other federal right, Article 6 would not itself provide a remedy. Chairman Vratil asked what would occur if legislation cut the funding to $1 per school district? General Kline stated the amendment to Article 6 would provide no judicial review of a violation. How would that hypothetical situation square with Article 6, Section 1, which requires the Legislature to provide for the intellectual improvement of Kansas citizens? General Kline stated that the Chairman raised an interesting point. The Court might seek to provide a remedy through Article 1. Chairman Vratil stated that we have other constitutional provisions that relate to providing educational opportunities to Kansas citizens. General Kline said that if the Legislature were to infringe upon those other constitutional guarantees by failing to adequately fund those educational opportunities, it would be available to the Supreme Court to interpret the proposed change to say that it implied that there would be adequate or suitable funding. If the amendment conflicts with the other constitutional protections, then the Court will act consistent with those other constitutional protections in calling into question the amendment. General Kline went on to state that he did not think that the Court will essentially read the amendment to mean the opposite of what it means.

Chairman Vratil asked General Kline about the Article 2 amendment, **SCR1603.** Section 24 now reads, "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." Did the General agree that the sentence would preclude the Supreme Court from exercising its garnishment powers? General Kline said a good argument can be made that the Supreme Court could not garnish funds. Chairman Vratil then asked if the Supreme Court were to attempt to garnish the state treasury, would that action, in General Kline's opinion, be consistent with the first sentence of Section 24? General Kline stated it would not.

Senator Donovan asked under **SCR1602**, whether the language that was left speaks to suitability? "The legislature shall provide for finance of the educational interests..." That, to me, sounds like the educational interests mean that what is good for education, what is good for making our kids smarter. If it just said education, it might look weaker, but "the educational interests of the state" could be interpreted several different ways.

General Kline stated that unfortunately, when we are dealing with this particular amendment, we're dealing with hypotheticals. Are the hypotheticals reasonable or probable? I doubt it. We have not had a suitability

lawsuit of this nature until now. K-12 education is over 50% of the state's general fund budget. It is approaching $3 billion. So the proposition that the Legislature might eliminate education funding, is not going to happen. This amendment, however, leaves no judicial remedy for the "suitable" funding requirement of the Constitution, unless the Legislature's actions infringe on a different Constitutional right. General Kline stated that was a policy for the Legislature to discuss. He stated that "these types of debates" are occurring on a more frequent basis. For example, Nebraska has a case challenging education funding by the Nebraska legislature under the word, "appropriate". Their Constitution states that "the Legislature shall make appropriate provisions for funding public education." And yet, a court judge just recently dismissed the lawsuit saying that funding is a legislative function in interpretation. Now, whether that prevails through the process is hard to determine. The Kansas Court found otherwise and said suitability must be determined by cost assessments made by experts, and that it must be focused on outcomes. Is that what the Kansas Legislature wants for public policy?

General Kline stated that there was a trend nationally in education litigation to try and focus constitutional provisions on outcomes. Therefore, funding becomes one of the guaranteed outcomes. If legislators want the judicial branch to determine continuously educational funding laws, then they will do what the Court says. If they believe that the Legislature has the responsibility for educational funding measures, legislators are going to have to work through the difficult policy provisions of **SCR1602** and **SCR1603** to ensure they are drafted correctly. The court decision is very broad. It is the first in the nation to specifically indicate that outcomes should be used to determine a definition in the State Constitution.

Senator Donovan also asked the Attorney General if it struck him as odd that the latest Supreme Court decision was a unanimous decision? General Kline said the unanimous decision indicated that the Court believed its venue was consistent with the Constitution and intended to see it carried out. The Court intends to enforce its decision. He assured Senator Donovan that if the Court tries to enforce its order by trying to put the Senator in prison, the Attorney General would be there to defend him. He encouraged the Committee look at a constitutional amendment to prevent school closure. It could be passed on a bipartisan basis, and it would be a reasonable and responsible action.

Senator Schmidt stated that he had questions for the Attorney General. First, Senator Schmidt had drafted some language that was intended to modify the second of the three amendatory sentences in **SCR1603**. (Attachment 1) The first proposed amendatory sentence was a restatement of the language already in the Constitution. The final amendatory sentences clarified that if the amendment were adopted by the people, it would have an immediate effect including in any ongoing case. New ground is proposed in that second sentence, which speaks to the issue of garnishment or other actions by which a court might attempt to redirect an expenditure of money. Senator Schmidt first asked General Kline if he had any thoughts on which of the three choices would give the Legislature the strongest hand in achieving its objectives? He then asked the General if he believed that it was possible to craft language that would prohibit the Court from redirecting any expenditure of funds, therefore, prohibiting the closure of schools. .

General Kline responded first, as it related to the three options before the Committee, that he believed the language in Option Two,"or as may be required by the United States Constitution," would make it is less likely to be found unconstitutional on its face. In response to Senator Schmidt's second question concerning the closure of schools, General Kline stated that he believed with regard to Option 2 , that the Court would say that the non-distribution of funds was not an interference with the provisions in **SCR1603** Option 2.

Chairman Vratil noted that **SCR1603**, the Article 2 amendment, indicated that a special election would be held on August 16, 2005, while the other concurrent resolution called for an election in November 2006. This difference seemed to be problematic if the amendment was intended to protect the power of the Legislature to provide for the educational interests of the state. What damage would occur between the Special Session and November 2006, in terms of the *Montoy* case? General Kline stated that the court has said that unless there is another indication, as it relates to true cost, the legislative process is deficient in determining true cost. What the Legislature does here would not be interpreted as a measurement of the true costs of education. The Court was expressly critical of the political give and take and compromise in the legislative process. The Court is saying that an outside expert is needed to identify true costs, and the only expert available is Augenblick & Meyer. Augenblick & Meyer essentially required another $580 million on top of the $143

million, on top of the $142 million as well as adjustments to low enrollment weighting. Unless the Legislature has a cost study to the contrary, $580 million will be necessary. And again, the threat of closing schools, the threat of garnishment or the appointment of special master will be before the Legislature. A Legislative Post Audit (LPA) study is to occur. before the next regular legislative session. The Court said it would consider the LPA study, however, it has told LPA to alter its scope statement. If Post Audit failed to consider outcomes, General Kline believed the Court would reject the study. The Court does not have the right to tell Post Audit what to do, but it does have the right to say whether or not the study is in tune with the Court's constitutional interpretation. The question becomes: Is the study to be different from Augenblick & Meyer and what outcomes are to be considered by LPA? What does the court mean by outcomes? Does it mean that the Kansas State Board of Education standard that call for 100% proficiency 2014? If that were the considered output, then General Kline believed the LPA study would exceed the costs identified by Augenblick & Meyer. If this were the situation, then what would the Legislature face in January 2006. Will it have the opportunity to pass a constitutional amendment response to an order from the Court? The General believed, as he reviewed and spoke people from both parties, that the majority of the Legislature believed that turning the educational policy over to the judicial branch perpetually, was not appropriate even though a majority of the senators believed that the additional funds are needed for education.

Chairman Vratil restated the question. Do we need to consider moving the election date up on **SCR1602** so that it has the desired or intended effect. General Kline stated that the earlier the public vote and passage, the less the damage to the Legislature.

Senator Journey suggested amending the date to the first Tuesday after 60 days from the passage by the legislature.

Chairman Vratil thanked General Kline for his testimony and called Senator Journey as the next scheduled to testify.

Senator Journey (Attachment 2) stated that he had read of **SCR1602** and wanted to assure all that he did not take the action lightly. During the debate on SB 5, he attempted to bring up the issue of the constitutional authority from the historical perspective, from the founding of Kansas, and in the modern terms of the evolution of government and the concept of judicial review. He has offered a distinction between appropriate judicial review and what he described as judicial preview in *Montoy*. A similar constitutional situation was found in *Harris v. Shanahan* in 1963. The State of Kansas was mandated to redraw the lines of the legislative districts. The Legislature had failed twice, in 1961 and in 1963, to redraw the lines in a constitutional manner. The Kansas Supreme Court, on both occasions, found them unconstitutional. They used an outside study by the National Academy of Sciences and its endorsement of what was appropriate to accomplish the goal. The Court said that in light of the 1961 Apportionment Act and the 1960 census, the House and Senate failed to create a constitutional plan in 1963. The parties to the suit wanted to unseat the entire legislature as part of the remedy. However, the Kansas Supreme Court did not believe it was within their constitutional authority to take such an activist position. They looked to Article 2 of the Kansas Constitution which said that these bodies housed in the Senate and House, are the only bodies that regulate who is seated in those bodies and only members of the legislature can remove their fellow members. The Court, in 1963, looked back and said that the Legislature didn't quite get it right, so try again. We are now in a Special Session and in very similar circumstances. The parallels between that case and what the court appropriately did in that circumstance demonstrate clearly what the current Supreme Court has done in *Montoy* is an overreaching of judicial power.

Senator Journey stated that in 1963, the Kansas Supreme Court had the opportunity to redraw the legislative districts because of the multiple failures of the state Legislature to comply with a federal mandate. The Court could have ordered new elections. It could have declared legislators unconstitutionally seated as a result of the unconstitutional elections. Judicial restraint prevailed. The Court recognized the constitutional separation of powers and recognized the power of the Legislature under the system of checks and balances. That did not occur in *Montoy*, therefore Senator Journey said he believed it was incumbent upon every member of the Legislature to enforce his constitutional power under Article 2, Section 24. The assumption that by doing this, the Legislature created a conflict with Article 6, Section 1, was not what was intended. Article 6, Section 1, states "we shall do this..." Some of the finest legal minds in the state concur that the modification to Article 6, Section 6, through **SCR1602** would solve the issue of the Court's excessive use of its authority in violation

of Article 2, Section 24, of the state's Constitution. Rather than a flashlight shining on the entire breadth of the Constitution, the amendment was intended to be like a laser, to address one simple problem and one simply overreaching act by the Court, and restore the balance of power between the branches of government and allow this government to go forward as it was originally intended, by not only the electorates in 1859 that ratified our constitution, but follows with every possible and potential amendment that has occurred since then, particularly the ones in 1966. When then the current Article 6 was ratified by the electorate by this state.

Chairman Vratil stated it occurred to him in looking at the sentence: "Legislature shall provide for finance of the educational interests of the state in the manner and amount as determined solely by the legislature," that the sentence is both a command to the Legislature to provide for finance of the educational interests of the state, and an indication that only the Legislature can determine whether it has complied with the command. He asked Senator Journey if his interpretation were correct? Senator Journey stated he believed that has always been the constitutional authority of the legislature to have the power of the purse. I believe that as the representative body of government in the State of Kansas that we are ultimately tested not by anyone else other than by constituents. I suggest that just as the Attorney General said, that if we did something which violated the rights of the suspect class or did something completely irrational, then other provisions would have been utilized to ensure that we acted constitutionally.

Chairman Vratil asked Senator Journey if the sentence he just quoted is both a command to the legislature to provide for the finance of the educational interests of the state and an indication that only the legislature will determine whether they have satisfied that command. Senator Journey stated only the Legislature has the power of the purse, and so, it was "our" duty to appropriate and to review what the Legislature does.

Chairman Vratil stated that if the Legislature is the only body that can determine whether it has complied with the command contained in that sentence, then there are no standards by which that command can be measured.

Senator Journey stated he didn't really agree because when the Legislature meets, through the committee process, testimony, the reports it reviews, etc., it has finite wisdom. That it "we do oversee ourselves." He went on to say that having a co-equal branch of government simply tell the Legislature that it was doing the wrong thing, does not create a system of checks and balances and goes outside that normal system. The acts of the Legislature can be held unconstitutional in a retrospective case of judicial review, but directing the Legislature to do something in the future is an excessive use of that judicial review.

Chairman Vratil stated that Senator Journey's phrase, "oversee ourselves," was an accurate description of the sentence, and that was his point. This sentence says that the legislature will provide financing and it will determine whether that financing is sufficient or adequate. What meaning does that really have if there can never be a question as to whether the financing is adequate or not? Senator Journey stated he thought there could always be a question as to whether the financing is adequate or not, but the question should be answered by our constituents and not by the judicial branch of government. He found no comparable provision under the United States Constitution and no comparable court venue that actually directed Congress to appropriate money for a specific topic and actually tells them exactly what they want them to do or else. All appropriate judicial review looked back at prior acts of a legislative or executive branch and their application to a specific set of facts. It says go back to the drawing board and come back with something better. The Court may have a suggestion, but its does not provide direct specifics.

Senator Schmidt stated to Senator Journey that it seemed to him that "we" would not be in this conundrum if the Court had done what most federal courts faced with a similar conundrum would have done, which would be to declare the situation to be a political question without judicial manageable standards and determined that this is a matter that needs to be resolved by other branches of government. That frequently is concluded in the federal courts. He asked Senator Journey if he would agree or disagree that part of the reason that the Legislature is in this difficult situation is because Article 6, Section 1 and Article 6, Section 6, are a bit peculiar in constitutional construction? They impose affirmative duties on the legislative branch, which is a bit unusual and begs the question of what the Court is going to do about it if the legislative branch fails to meet its obligation. He also asked a second question. Senator Schmidt stated the he was intrigued by Senator Journey's analysis of the1963 case regarding reapportionment. He remembered a 1957 case, in which there was a testing of Article 2, Section 24, the appropriations clause. The case related to the

establishment of state finance council of which the governor as a member. The question was whether or not it was possible for the Legislature to delegate its exclusive appropriations authority to a council that contained a member of the executive branch. The court ultimately concluded that the appropriation of power is exclusively in Kansas a legislative power. What struck Senator Schmidt about that case, as compared to the case described by Senator Journey, was the timing. Senator Schmidt stated that he was not a fan of going back to election of Supreme Court justices, but I am when people believe that the scales have tipped too far in terms of insulation verses accountability. It was 1957 when Kansas voters established the current system in which our justices are selected by a majority by members of the bar who are officers of the court. In 1957, a court, which was elected, was willing to defer to the Legislature. In 1963, a court which may have had a number of members who were elected prior to the changeover in 1957-1958, was still willing to defer to the Legislature. Today, the Court consists of persons of a variety of political persuasions, appointed by different governors, that are willing to move away from previous deferential habits. I just wonder if there is a correlation between how we choose the decision makers and the decision they are making with respect to the balance of power?

Senator Journey asked to answer the question with a question first, because he thought it was interesting, asked the Chairman to help him because the Chairman was a participant in the Blue Valley case. The current formula was found to be constitutional in the Blue Valley case. Did the Court also determine that the suitability issue was basically a political question for the Legislature? And, if that's so, then the court really has reversed itself. Chairman Vratil stated that this is not an unfair interpretation. They, of course, didn't use the words, political question, but his characterization of the decision in the USD 229 case has been always that the Supreme Court essentially said that the Legislature has great discretion in determining levels of funding for K-12 education and the Court was not going to interfere except in the most extreme case. Senator Vratil believed the *Montoy* decision effectively overruled USD 229 without saying so.

Senator Bruce pointed out that what are usually determined to be political questions are what Senator Schmidt pointed out as affirmative constitutional duties. Most people perceive the constitution invites typical constitutional review by the judiciary or negative rights where the government cannot enter a home without a search warrant, cannot enact cruel or unusual punishments. After making that point, he was more convinced that the Legislature was in a legal conundrum. To the lay person, it was in a situation where "darned if you don't and danged if you do." In **SCR1603**, the proposed amendment dealing with Article 2, basically accomplishes what the revision would do anyway. Using basic sentence diagraming, the word or phrase, "suitable provisions for finance," modifies finance of the educational interest. It is just basic English. It is talking about having a fair and equitable finance formula. Senator Bruce's concern was that at the end of the day, the Legislature can pass further constitutional amendments, get them voted on by the public, however, "we" will be left with the same court that gets to decide what the Legislature meant when we passed the amendment. Senator Bruce stated that the Legislature may want to look at the structure of the Court at some future time. He then turned his attention to Senator Journey, to **SCR1602**. Senator Bruce noticed that, "make suitable provision," was removed. He thought the Legislature could accomplish the same thing by saying, "the legislature shall make suitable provision for finance of the educational interests of the state in the manner and amount as determined solely by the legislature." Senator Journey agreed. Senator Bruce asked if there was any reason why the suitable language was removed? Senator Journey stated he believed he directed the modification to further clarify the intent of the amendment and eliminate that modifier of the subsequent phrase to eliminate all the questions.

Senator Goodwin stated that she and Senator Journey had discussed the word "suitability" and she indicated that Senator Journey seemed to have a negative idea that it shouldn't be in the Constitution. She noticed several times during Senator Journey's testimony that he used the word "appropriate". Why would the word "appropriate" be any different than the word "suitably"? Senator Journey responded that both "appropriate" and "suitable" are very similar in their subjective view, because what is suitable to one person may not be suitable to another. The real focus of this is to realign the separation of powers and to reaffirm the constitutional authority of the legislature to be the sole arbiter of appropriations. He believed a lot of the discussion, in particularly, the Wichita Eagle's editorial cartoon yesterday, emphasized the word suitability far more than it is necessary, misdirects the focus of the amendment and its intended effect. He said that Senator O'Connor reiterated that, ultimately, legislators are accountable for the appropriate finances of state government in all aspects of its operation and we are ultimately accountable only to their constituents. Senator

Goodwin stated that she has had considerable discussion with legal scholars, with constituents, local court people, and we seemed to have given them the message from the legislature that perhaps our Supreme Court justices should not be using their authority that they have been given to be making these kind of decisions. What I am hearing is they are determined and appointed to be Supreme Court justices by many criteria for them to be in that position. If we do not think they have the experience or the criteria to be making these decisions, would Senator Journey be receptive to putting some qualifications on people who are making laws in this legislature. Kansans ask me what kind of qualifications legislators must have to be making the sometimes controversial decisions that are put into Kansas law. Senator Journey stated that what a television station imparts to its their viewers in seven seconds, or what a newspaper editor imparts to readers in five column inches does not do the issue justice. He has never said that any of our appellate court justices are unqualified for their jobs. His concern was that in one case, of such great effect on every citizen of the state, perhaps they have overreached in their authority. There are qualifications for becoming a legislator. The individual must be a certain age, cannot be convicted of a felony, and be elected. That's what representative government is about, is the people choosing their representative, good or bad, educated or uneducated, a doctorate or high school graduate. It is their choice.

Chairman Vratil stated that Senator Jordan was next to testify. Senator Jordan stated he was testifying on behalf of **SCR1603**, The Court has overstepped its bounds in dictating specific appropriations. If they didn't appropriate, then why are Senators and House members running around the Capitol trying to figure out how to fund $143 million dollars for education? If they did not appropriate in this decision, why do legislators care about the number? Why do they care about $800 million, why do we care about $500 million if they believe that the Supreme Court did not appropriate in this decision? Senator Jordan believed that it was assumed by public and by the Legislature that the Supreme Court did appropriate in its decision. Senator Jordan believes that its is the full authority of the Legislature to decide appropriations. He agreed with Senator Bruce. Article 2 says that today. He was not appearing before the Committee to question the Supreme Court's constitutional right to question the constitutionality of laws passed by the Legislature. He was there to question the ability of the Supreme Court to tell the Legislature that a specific amount of money must be made available. His constituents were telling him that they were not troubled about the court trying to decide what is a suitable education, instead they were upset that the court gave us a specific amount of money and told us we had to appropriate "X" dollars. Legislators are upset that the Court told the Legislature a specific amount. What has the Governor said? The Governor has said that the court probably overstepped its bounds in giving a specific amount of money to the Legislature to appropriate. Senator Jordan said that Article 2 was in question. here. The Legislature's authority to appropriate money is a question he had heard from those appearing before him. It was the question the Committee was trying to address in Article 2 because somehow there is confusion about who has that right to appropriate. The reason Article 2 rather than Article 6, should be addressed is that this situation will arise again. It may not be in education. It may be in another budget areas. The Legislature wants to clarify who has the authority. We want to do a constitutional amendment to Article 2, because the Court has, at a minimum, threatened that authority. Where does the Legislator appeal? Who does it go to? It has been told by legal scholars that it cannot go to the federal courts and say: "we think the Supreme Court in Kansas overstepped its bounds." The only appeal we the Legislature has is to the people of Kansas, the real sovereign body in the state of Kansas. The Court overstepped its authority by telling us "X" number of dollars, and this is a way to appeal that decision through the real sovereign people of Kansas.

After a brief recess, the Chairman called on Representative Lance Kinzer to testify.

Representative Kinzer agreed that Senator Journey's language was better. He indicated that it may seem unique, but the concept is not foreign. Article 8, Section 2, says that the legislature shall "provide, organize, and equip..." we already have a constitutional directive to "appropriate" when it comes to public safety, for example. Senator Journey's suggestion was similar in that it allowed the legislature to make determinations independent of judicial review. Representative Kinzer stated that, based upon the feedback received from Senator Schmidt and others, that he concurred that Option 2 was preferable. The language that remains from the original Constitution does not change at all. It was a clarification. Representative Kinzer thought the purpose of the amendment was not to redraw the lines, in terms of checks and balances, but make it crystal clear to the Court that it does not have the authority to appropriate and their action fell outside of the boundaries of their legitimate authority. He believed the Court can look back at an individual case and make a determination as to whether the Legislature has complied with the Constitution. When Representative

Kinzer thinks about the system of checks and balances, he identifies a couple of different checks on judicial power. First, judicial power is not self-executing. They may direct others to act on their behalf, but the judiciary does not have an army. To have a check on the judicial power, via that mechanism, essentially requires someone (e.g., the legislature or the executive branch) to disobey an order by the judiciary. They clearly do not have the power of the purse. Therefore, they are restricted from directing the legislature to make an expenditure of money or to make an expenditure on their own. One reasons that Representative Kinzer proposed I am proposing a constitutional amendment was to preserve the checks and balances but to do so through an orderly process and not in a way that was defiant. He concluded by saying that he believed that Option 2 did nothing more than clarify existing law. It was unfortunate to have to go to the people with essentially a clarification. Representative Kinzer had not talked to many people who were concerned about the fact that we have an obligation to make suitable provisions for education. Citizens believe the Legislator needs to do that. He had talked Democrat and Republican legislators who believed we need to make suitable funding, but the Legislature should have discretion over the function. It should not be subject to prospective orders from the Court.

Chairman Vratil called on Professor Kris Kobach, from the University of Missouri, Kansas City, School of Law to testify. (Attachment 3)

Professor Koback stated that he would deviate from his written comments because previous discussion had covered what the planned to say. On June 3, he took the supplemental *Montoy* decision to his colleagues. He shared that it set a precedent. He asked his colleagues and other faculty members if they could come up with anything that is comparable. None could. The best example was the case of redistricting described by Senator Journey. It provided an example of a tedious, repetitive process of the Court saying, "no, the Legislature got it wrong, come back, no, its is still wrong, come back." That is the way judicial power is supposed to function. It is not efficient. It is retrospective, not proactive. The closest examples within the federal judiciary are examples involving school district cases, in terms of desegregation in the 1970's and 1980's. Even in even those cases, the federal courts pointedly refused to order the expenditure of money from what was not a co-equal branch. Professor Koback wanted to mention a few aspects of the *Montoy* decision because he thought it was useful to see where the *Montoy* decision got off track. The Court purported to offer a faithful interpretation of Article 6, section 6, of the Kansas Constitution, which does not say, "provide suitable education". It says, "make suitable provision for finance of the educational interests of the state". Suitable modifies provisions for finance, which means that the Legislature is to set up a suitable system. The provisions for finance might be a combination of state taxes, local property taxes and federal money. It does not require a suitable amount of money. For the sake of argument, one could imagine that the Kansas Constitution aid"suitable amount of expenditures" or something similar. Even if that were the case, and this is something that the court got into in the first *Montoy* decision, "suitable" is a flexible adjective. Suitable means appropriate to the given purpose. It is quite clear that "suitable"would not give the Court the authority to reach the extraordinary jurisdiction of dictating an amount of money that the Legislature must expend under court orders. The decision in *Montoy* two did not spend a sentence attempting to divine a local frame as part of Article 6, section 6, United States 1963, when they wrote "suitable provisions for the finance of the education of the state". It reads much like a policy reads, much like a committee report, talking about what advantages and disadvantages to various policy questions. Before leaving this point, Professor Koback provided an example of an appropriate state court adjudicating a similar question. The Illinois Supreme Court was presented a similar case in 1996, in the *Edgar* decision. Actually, the Illinois court had a much clearer invitation in the Constitution to do what the Kansas court did. Article 10, Section 1 of the Illinois Constitution says that the legislature must provide high quality public educational institutions and services–high quality– try that one on for size. The Illinois Court said: "What constitutes a high quality education, and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards. The constitution provides no principled basis for a judicial definition of high quality. It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary's field of expertise, such that a judicial role in giving content to the education guarantee might be warranted. Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion." The contrast between that court's exercise of appropriate judicial restraint and the *Montoy* case, succumbing to temptation to exercise legislative power, could not be more clear. As the court rambles on in the *Montoy* decision, it

finally comes to the local option budget cap provision. Here where the Court wandered the furthest from its normal judicial field. It expressed its policy judgment that the use of additional local property tax levies does not help some school districts. Now, that may or may not be correct, as a matter of policy, and that is for you to decide. But that has absolutely nothing to do with the meaning of the text of Article 6, Section 6 of the constitution. There is nothing in the Kansas Constitution that could plausibly be read as a prohibition of decisions by local school districts to raise additional property taxes to spend on schools, over and above state levels. And, even if there were something in the constitution that could do that, the court also fails to explain why a local option budget cap of 25 percent meets this imaginary constitutional constraint, but 30 percent doesn't meet this imaginary constitutional constraint.

Professor Kobach stated that as bad as these flaws are, he believed they paled in comparison to the more fundamental problem: The Court exceeded its judicial power. It can be described in two sentences. The Court must act as a *passive* branch of government. It may pass judgment and review legislative acts passed in the past. The Court cannot fill the void in the law that it creates by putting a new law in place. That is why the United States Supreme Court has never ordered the Congress of the United States to pass a law. It is why Alexander Hamilton said that the judiciary is the least dangerous branch of government: "The judiciary has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and *can take no active resolution* whatever."

The second fundamental transgression of constitutional boundaries was the Court's seizure of the quintessential legislative power. We know the war for independence in America was fought largely by the desire to end taxation without representation. It's already implicit that it be quintessential legislative power is the power to tax and spend. But the framers of the U.S. Constitution were so concerned that this be made clear that they did what was already implicitly known and recognized. They put it explicitly in the text of the U.S. Constitution, Article 1, Section 7 and 8. The framers of the state constitution did the same thing. They took the theme and said the same thing and said that appropriations and spending powers are vested in the legislature. And that's what our framers in this constitution in Kansas did with Article 2, Section 24.

Madison pointedly went on, and Hamilton went on to talk about great length about the power of the purse is the most important power to be exercised at all. Let me read you one sentence from Federalist 58, " This power over the purse, may in fact be regarded as the most complete and effectual weapon with which a constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The principle that this most important power be vested in the people's representatives is, of course, one that is transgressed by the Kansas Supreme Court's opinion. The reason this power is be vested in elected representatives is that there is a relationship there. The accountability of a taxing entity decreases its likelihood to tax. Professor Kobach stated that "we" need a constitutional amendment to resolve the constitutional crisis and he thought think **SCR1602** and **SCR1603** were useful. If one does nothing, and decides this was a question that was to be resolved some other day, the consequences will be damaging, If the Legislature simply complies with the court's order, it will be more difficult in a future judicial venue to challenge a second or a third or successive attempt by the Court to use this newly acquired judicial power of the purse. This is one of several steps. The Court has already said that there is going to be a next step. The Court retained jurisdiction, and indicated that at a minimum, $568 million dollars additional would be considered by the Court. From there, the door was opened to go into other areas as well. The Article 6, Section 6 "suitable" language does not just modify K-12. It also modifies higher education. Professor Kobach imagined that some attorneys at state universities are already thinking: "I wonder if we can do this to finally get the legislature to finally get them to do what we want them to do." One can go beyond that as well. If one looks in Article 7, Section 1, it requires the state to "foster and support" institutions for the benefit of mentally or physically incapacitated under the Kansas Supreme Court's expansive interpretation, that would be the next step- bring suits to suggest that the state is failing to "foster". Again, this language has pretty clear meaning to any person that is familiar with everyday English, but the court has only a limited ability to read so much into these words. Accordingly, Professor Kobach recommend that the Legislature pass a resolution stating that the Supreme Court has exceeded its power. More importantly, the Committee should endorse **SCR1602** and I would say also **SCR1603**. The reason this committee should endorse both is as follows: they are not redundant, although they are both driven by the same controversy and driven by the same Kansas Supreme Court case. They do different things. **SCR1602** solves the current breach of power by transforming or by restating Article 6, Section 6, and clarifying that,

to use Senator Bruce's term, what the court has done is that it has read Article 6, Section 6, into a positive right. Most rights are negative rights. For example, the government shall not do this, shall not do that to you. There is nothing in the U.S. Constitution that says that the government may demand or may be compelled to do this for you. The court has attempted, and if this *Montoy* decision is not reacted to appropriately by the people, the court will have transformed Article 6 into a positive right. Most rights are very expensive, which is why you don't see them very often. So I think **SCR1602** accomplishes that. And I think it is important to remove the word "suitable" because the court has shown the willingness to abuse that word in the constitution. Secondly, **SCR1603** accomplishes something different. It bars the court from doing this in other areas of the constitution. It bars the court from venturing into Article 7, Section 1 of the constitution, and attempting to determine appropriate levels of funding in those areas. This, in effect, **SCR1603** is a forward-looking determination that the court is not going to be able to do this anywhere. The court does not have the authority to commandeer the legislative power of the purse and exercise this power in any sphere, be it education or something else. Finally, in closing, I would say that your decision at this juncture is not only a decision about protecting your powers and your prerogatives under the Kansas Constitution, but it is a decision that will protect the people of Kansas. The people are, of course, the sole source of constitutional authority as defined by the preamble of the Kansas Constitution. Kansas is one of the 26 states that does not have a power of popular initiative of constitutional amendments. In other words, the sovereign can only speak in our system if legislators, choose to open the door and allow the sovereign to speak. And, I think what you have here is a dispute between co-equal branches of government. You have a responsibility to follow the constitution, just as the Supreme Court does. You have a very legitimate claim that the Supreme Court has transgressed constitutional boundaries and the best way, the most orderly way, the most democratic way to solve that dispute between co-equal branches is to turn it over to the people and to invite them to speak on this question.

Senator Journey stated that he could see that **SCR1602** and **SCR1603** blend together, as they are not contradictory to each other, and propose we amend **SCR1603**, with the second option, and then simply take the operative language without the deletion of "suitable" from **SCR1602**, and put them both together into one entity and move forward then. Jill Wolters stated that a constitutional amendment that you propose, I don't think you can do two articles together.

Senator Goodwin stated she had a question that was outside the realm of that we're talking about. I find it interesting that constitutional law professors have different ideas on this. Does that go back to where you received your previous education. Professor Kobach responded that there was a great debate in constitutional law today, mainly at the federal level, about whether constitutional texts should mean only what the framers of those texts said, drafted and ratified, or whether judges should have the authority to mold and adapt and allow those words to evolve over time. But that has primarily been a debate in the federal judiciary and this decision is more then just molding the words. The *Montoy* decision was well beyond the "living breathing document" interpretation. Even those courts in the federal judiciary never transgress this line of attempting to exercise legislative powers, the quintessential legislative power. Professor Kobach said that would be akin to this Committee deciding that there was a case going on in some Kansas district court and decided that evidence should be admitted. There is the notion that there are certain powers of prerogative solely presiding, one branch to another.

Chairman Vratil stated that constitutional lawyers are no different than the rest of us. We're all reading the same constitutional provisions, and coming up with vastly different conclusions. Senator Bruce stated he believes that the answer lies in whether or not you received a public education.

Opponents:

Chairman Vratil called Mr. Rich Hayse, President of the Kansas Bar Association, an opponent.

Mr. Hayse stated that he did not have written testimony. Although he was listed as an opponent to the measures before the Committee, he did not purport to speak on behalf of the 6,500 members of the Kansas Bar Association in opposition to the process taking place. The Association's membership was concerned with the principle of judicial independence. It did not want to see an erosion of the ability of the courts to independently render judgments based upon the evidence presented and on the law which applied to that evidence. The Association urged the Committee to think about the ramifications of what it was doing with

regard to the sacred principle of judicial independence. He reminded members of the Committee, and the practicing attorneys on the Committee, of how *Montoy* came to the Kansas Supreme Court. Two school districts and three dozen students sued alleging that they were being underfunded. The remedy that they sought was more funding.

Mr. Hayse gave an analogy. What if he were to go into Senator Donovan's dealership and to test drive a brand new vehicle. While doing the test drive, he was involved in an accident, and returns the vehicle damaged. Senator Donovan says Mr. Hayse must pay the damages. Mr. Hayse says "no," as it was not his fault. Senator Donovan hires a lawyer and the lawyer sues Mr. Hayse and there is a trial. The trial court determines that Mr. Hayse was at fault. If that were the end of the case, then Senator Donovan obtains nothing. The court has to determine the amount of monetary damage necessary for a remedy. If, in the *Montoy* case, the judicial branch did nothing more than determine that **HB 2247** was unconstitutional, then where would be the remedy for the people who came to the court six years earlier and said our problem is that we're underfunded? It is not just the ability of the court to determine the relative rights and duties of parties. It is also its ability to decree and enforce a remedy that is at the heart of an independent judicial system. Mr Hayse was concerned, on behalf of his association, that anything the Legislature does to change the delicate system of checks and balances would have unintended consequences. How did the Supreme Court decide the opinion in the *Montoy* case? What was the basis for determining a suitable education or suitable funding for education? It is was K.S.A. 46-1225 (e) that defines a suitable education. The legislature created the definition and asked Augenblick & Meyers to tell it what it cost. It was described to Mr. Hayse at the district court level as "judging 101" to decide *Montoy* because the only evidence in the case yielded the result. The current hew and cry over the Court overstepping its bounds needs to be viewed in the context of how the case arose and how it was decided, and what remedy was sought by those whose rights were found to have been violated. Mr. Hayse stated that he could not imagine that there is any question in the mind of the six Supreme Court justices, that the power to appropriate funds is solely delegated to the Legislature of the State of Kansas. The question is, the delicate balance. Once a remedy is determined to be necessary, how does one effect that remedy if the Legislature takes away the Court's power to enforce its own judgments. The view that Mr. Hayse expressed concerning judicial independence is the view adopted by the Board of Governors of the Kansas Bar Association, which is elected by the membership, and to that extent, he purported to speak for the membership.

Senator Donovan asked Mr. Hayse when the lawsuit was filed by the medium size districts. Mr. Hayse stated it was in 1999. Senator Donovan asked if Mr. Hayse knew how much more funding the Legislature had provided since 1999. Mr. Hayse acknowledge there were increases. The Opinion points out that if one took the amount of money that was being legislated for 'base per pupil' in 2001, and applied cost of living increases during the period of the suit, it would require multiples of the amount appropriated by the Legislature for base state aid. Senator Donovan said he appreciated Mr. Hayse using the 'base per pupil' figure because that is always used when the legislature is being condemned for not keeping up with inflation. Granted, that has not gone up a great amount. Senator Donovan said that based on the way he was taught basic arithmetic, the way one would arrive at how much was spent per student, would be to take the total amount of state funding and divide it by the total number of students. It has nothing to do with the base. The "base" is part of the school finance formula. It is one of many other pieces called weightings. Senator Donovan stated that for the 1990-1991 school year, the Legislature spent $888 million to educate 409,000 students. In 2003-2004, it spent between $ 2.4 billion and $2.5 billion for 431,000 students. When one goes back and looks at year after year and compares with "spending per pupil", the amount has increased quite a bit. Senator Donovan did not think that all this information was given to the courts. They operated based on information that was too narrow in scope. What do test scores show concerning Kansas schools? They show that the schools are in the top ten percent of the United States. Senator Donovan did not understand how the Court came up the idea that the Legislature has starved the schools, and that $142 million was not a significant amount of money, and that the Augenblick & Meyer study was the only criteria when it came to the cost of educating children.

Mr. Hayse stated that he was not appearing before the Committee to urge any level of funding or non-funding. That was the job of the Legislature. From the evidence presented in *Montoy*, the appropriations by the Legislature were not adequate to accomplish what the Legislature said needed to be accomplished. From what Senator Donovan said, it sounded to Mr. Hayse like the evidence was inadequate. When evidence comes to a court, the court makes its decision on that evidence. It does not rely on evidence outside the case.

Senator Bruce stated that it was previously described that the Court relied on "evidence 101" to make its decision., but it failed "government 101." He asked Mr. Hayse if it were the position of the Kansas Bar Association that the Kansas legislature be bound by material or expert testimony or a study that was found in the court record. Experts, such as Mr. Hayse, come before the Committee to provide a variety of views, perspectives and expert testimony. Senator Bruce hoped that "our basic form of government" entitled the Legislature to use all the information it had. That the Legislature was not limited to just one study that was placed into evidence at a district court level. Mr. Hayse said that the Senator's remark went back to Mr. Hayse basic point: A case like *Montoy* would be litigated as an adversarial matter. Each side would be entitled to bring in evidence. Sometimes, the Court had a difficult time deciding among or between differing views on the evidence. In this case, there was no contrary evidence regarding the costs of an education. The decision of the court was entirely predictable and understandable. Legislative Post Audit is to conduct a study before the 2006 Legislative Session. It should provide additional evidence that will impact the Court's view of *Montoy*. Senator Bruce stated that the Court limited the scope of evidence, and its final decision relied on insufficient evidence. Legislators have an obligation to their constituents to do what they are elected to do. To do what is right. Senator Bruce respects and understands that the Court has certain inherent authority to execute a remedy that it fashions to be proper, but at some point, what kind of mechanism is there on the judicial branch, when the judicial branch itself behaves in an unconstitutional or inadequate fashion? The Court did not have the ability to tax or raise a standing army. The Senator did not believe that courts ability to carry out their will or their orders compares to the Legislatures prerogative to enforce the will of the people.

Senator Schmidt stated he appreciated Mr. Hayse appearing before the committee. Mr. Hayse's message was important. The Committee did not want to do anything to make anyone think it did not want to maintain the independence of the judiciary. It is a uniquely American system of government. Senator Schmidt stated that on prior occasions he had said that a debate should be held concerning line between being independent and being insulant. He was also grateful for Mr. Hayse's disclaimer that he could not speak on behalf of all the members of the Bar Association. As Association President, he must do what his Board of Directors directed him to do. As a member of the Association, Senator Schmidt was enormously disappointed in the Bar Association's role in the debate and not because he disagreed with the Association. Judicial independence must be part of the balance, However, within the Kansas context, what the Bar Association says about the law is given some weight by a great majority of Kansans who are not attorneys; not involved in difficult rankling over what a provision of may mean. Senator Schmidt believed the Association had done a disservice. It had not acknowledged that there are other principles at stake besides the independence of the judiciary. Senator Schmidt thought it was the role of the Legislature to defend the law. The Court is a component of a legal system, it is not the end-all and be-all of a legal system. Mr. Hayse had sat through the Committee discussions and should recognize that there are legitimately differing points of view concerning the basic legal principles before the Committee. It was not as simple as the Legislature passing a law and failing to follow it in terms of the amount of money described in a study. If one read the balance of the statute that authorized the Augenblick and Myers, one finds that the Legislature expressly stated that it was defining"suitability" for the sole purpose of conducting the study, and not for the purpose of determining what is needed for the state. The court conveniently ignored that portion of the law. There is a duty that the Association needs to fill, in terms of public. Many of the voices in this discussion are striving for a partisan outcome, or are factionalized or associated with other issues. The Bar has a unique role to play. It can help identify the range of choices and the reasonable consequences if the Legislature took path A, path B or path C. He encouraged Mr. Hayse to take thought back to his governors and encourage them to broaden their message. Mr. Hayse appreciated the Senator's comments but thought the perspective was that only one side of the debate. The other side of the debate was not being articulated by anybody, that it was necessary to articulate the other side of the debate.

Chairman Vratil joined Senator Schmidt, and on behalf of the entire Committee, commended Mr. Hayse for appearing. The Kansas Bar Association and Mr. Hayse play a valuable role in informing the public as to the need for an independent judiciary. Chairman Vratil agreed with Senator Schmidt that it was not the sole issue that the people should be concerned with, but it is certainly a very important issue. Senator Journey asked if Mr. Hayse to provide a written record of his testimony. (Attachment 4)

Chairman Vratil called Donna Whiteman, Kansas Association of School Boards and the Kansas National Education Association, as the next opponent to testify. (Attachment 5 & 6) As a former member of the House of Representatives, Ms. Whiteman stated that she understood the Committee's concerns about any litigation

dealing with school finance or education. However, it was important to know that in the Kansas Constitution and Bill of Rights, and throughout the history of Kansas the people of Kansas and the Legislature has placed funding public of education as a top priority. In 1992, before the last re-authorization of school finance there was a lawsuit before and after re-authorization. Ms. Whiteman limited her remarks to the legal concerns relating to the two resolutions. In **SCR1602**, her clients' position was that the term "suitable" is the correct word. It denotes flexibility. They wanted to maintain language that allowed flexibility as times and technologies change. The most important thing was to have educated citizens. Ms. Whiteman then drew Committee members' attention to her clients' position that too much emphasis was placed on the word "suitability". Inserting the word "appropriate", leaving in the word "suitable", or using the word"provide"would not prevent a lawsuit from being filed relating to the type of education the Legislature had provided to the 430,000 children of Kansas. Historically, quality public education was equated with basic freedoms. There is more litigation about education, because education is one of the three constitutional duties provided for in the Kansas Constitution.

The second issue Ms. Whiteman addressed the reason one is seeing increased school finance litigation in Kansas and across the nation. The increase occurred because there has been a trend over the last 20 to 30 years for the courts to deferred to legislatures to provide for education. The ability of plaintiffs to prevail in school law litigation is easier today because data are available to measure the effect of the amounts of money provided by legislatures. Most of the cases in which plaintiffs prevailed were adequacy cases. Two pieces of legislation played an important role in Kansas: One was a piece of Kansas legislation and the other was a piece of federal legislation. In 1992, the Kansas Legislature passed QPA. The second change came about as a the result of President Bush's No Child Left Behind legislation. Prior to No Child Left Behind, the state was not required to test students yearly to determine proficiency in math and science. Data was used in the *Barnes* case to show that, while the Legislature had provided funding for education, it hadn't provided it to the level that would allow students to achieve the proficiency required in math and science. The evidence was extremely damaging and continues to be an area of focus. School districts with 70 percent minority students have not met proficiency in math and reading. The evidence shown that funding is not adequate to meet the constitutional obligation. The final point Ms. Whiteman made was to point out that while "we" are dealing with the Supreme Court's direction in the latest directive in the *Montoy* case, that case was filed in both state and federal court. No matter what happens at the state level, the federal case is still there. It is on hold pending the outcome of the state case. The Federal case, has raised some of the equal protection arguments relating to minority students.

With regard to **SCR 1603**, Ms. Whiteman requested that the Legislature carefully analyze the resolution's language as it was extremely broad and needed to be understood in terms of all of its implications. The Kansas Legislature should not attempt to place itself above or outside of scrutiny by the patrons or citizens or any other body. The current language presumed that every act of the legislature and every act of appropriation was correct and in compliance with the rights guaranteed to all citizens. Ms. Whiteman recommend that the Committee consider the proposed language carefully. The Legislature has the power to appropriate and to set spending priorities. It was important that the Legislature allow challenges to the decisions its makes particularly in a state that prides itself on open government and open meetings.

Chairman Vratil asked if Ms. Whiteman had a copy of **SCR1603** and proposed language options One and Two. Ms. Whiteman stated she had a copy of **SCR1603.** Chairman Vratil stated that were some people who might contend that **SCR1603** is a change to what currently exists in the Kansas Constitution and others might contend that it is merely a clarification. The sentence that currently exists in the Constitution, reads, "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." Chairman Vratil asked Ms. Whiteman to review Option 2 and tell him if it changed or clarified the first sentence? Ms. Whiteman stated she did not believe it was much of a change. Chairman Vratil asked if it assuaged her concerns about changes to the constitution in **SCR1603**? Ms. Whiteman stated the Legislature needed to be cautious when changing the Constitution in response to an isolated court case no matter what the language of the amendment might be. Senator Journey and others have said that people get their information from what is portrayed in the media or perceptions. If there was a perception among the 450,000 parents and grandparents of the students, that the Legislature is attempting to change the Constitution to make it easier to not fund quality education she believed it would be problematic.

Chairman Vratil thanked all for being patient today, that he felt there had been a very lively discussion and an enlightening one. He asked if there were any comments from the Committee members. The consensus of the Committee was to stay and work the resolutions.

Chairman Vratil asked the Committee to consider **SCR1603**, which deals with the amendment to Article II, Section 24.

SCR1603 Constitutional amendment concerning appropriation of money by the legislature

Senator Schmidt stated that a consensus was developing around Option 2. It would replace the first amendatory sentence in the draft. The draft would retain the third amendatory sentence. There was a technical point to be made in the Option 2 language where it refers to the United States Constitution. It should use the phrase, "Constitution of the United States."

A motion was made to amend **SCR1603** with the form of Option 2 and the technical change. Senator Goodwin asked for clarification on the actual lines being changed on the resolution. Senator Schmidt stated that lines 20 and 21 will remain the same, that is current law and it will not be changed. Lines 22-25, and all of the first part of line 26, up to and including the period, would be stricken, and that language would be replaced with the language on the attachment previously handed out and described as Option 2, with the technical change of changing the words United States Constitution to read the Constitution of the United States. Senator Schmidt moved, seconded by Senator Umbarger, and the motion carried.

Senator O'Connor asked for a clarification of the date of the election. On page 2, it is described as August 16, 2005. Senator Journey made a motion that it be placed on the ballot on the Tuesday following 60 days after the appropriate vote and passage by both houses of the Legislature. Chairman Vratil stated, that in **SCR1602**, the language is November, 2006. He suggested amending the language in **SCR1603** to say in August or September of 2005 and leave it up to the Secretary of State to designate the exact day. Senator Schmidt stated that he wasn't sure this would work, in this context, because the November reference refers to a regularly scheduled election and other provisions of the law require such election be held on the first Tuesday. Chairman Vratil clarified that the language in question in **SCR1603** is on page 2, beginning on line 14, "The secretary of state shall cause resolution to be published as provided by law and shall cause the proposed amendment to be submitted to the electors of the state at a special election to be held on August 16, 2005." Chairman Vratil suggested the language read, "a special election to be held in August or September, 2005. Jill Wolters stated she had concerns with that language because it was not a date certain. After further discussion, the Committee agreed to return to Senator Journey's suggestion and Chairman Vratil asked that the language read, "the Tuesday following 60 days following ratification by both houses of the legislature." Chairman Vratil stated that the Committee should give the revisors latitude to redraft the explanatory statement to reflect the amendment. The Committee agreed. A motion was made to recommend favorably the passage of **SCR1603** as amended, and further amended to reflect the date changes in the revisor's language. Senator Journey moved, seconded by Senator Umbarger, and the motion carried.

Chairman Vratil asked the Committee to consider **SCR1602**.

SCR 1602 School finance; amount and manner of distribution determined by legislature

Senator Journey suggested a motion be made to make the language that established the time of the election to be identical to the language in **SCR1603,** that is, the election would occur on , "the Tuesday following 60 days following ratification by both houses of the legislature". Senator Journey moved, seconded by Senator Donovan, and the motion carried.

Senator Bruce suggested that a motion be made to re-establish the "suitability" provision as: "The legislature shall make suitable provision for finance of the educational interests of the state in the manner and amount as determined solely by the legislature." Senator Journey stated that the only reason that the language of "make suitable provision" was stricken was because of the *Montoy* decision. The Court "hung its hat" on "suitability". He felt that the operative clarification proposed by Senator Bruce would accomplish the same goals, so he had no objection to the motion. Senator Bruce moved, seconded by Senator Goodwin, and the

motion carried.

Senator Journey moved , seconded by Senator Donovan, that **SCR1602**, as amended, be recommended favorably for passage. Chairman Vratil clarified that **SCR 1602**, as amended would allow the revisors to change to the explanatory statement and Senator Journey concurred.

Senator Schmidt asked to talk about the wisdom of throwing too many balls in the air at once. From his perspective, he wanted the Legislature to pass a constitutional amendment which had the effect of clarifying the dispute of authority between two branches of government, and to do so during this session. Senator Schmidt stated he was struck by the 'bookends' on the testimony today: The Attorney General's comment in which he cautioned there might be political concerns at the advance of this particular measure and the last comment by Ms. Whiteman in response to Committee questions. She said an awful lot depended on how the hundreds of thousands of Kansans who have kids in our public schools perceive our actions, and whether they are received as punitive or whether they are perceived as an effort to, in the phrase that has gained some currency in some corners of this state "dumbed down" standards or failed to meet our duty or however the critics of the proposal would portray it. Senator Schmidt questioned if the Committee were passed , would it muddy the waters and minimizing the chance of passage. In Senator Schmidt's view, **SCR1603** had more buoyancy because it clarified that the Legislature had the "power of the purse". People elect legislators for that purpose and hold them accountable for that purpose. They do not expect a court proceeding which has gray merit in its proper applications substituted for the kind of work a legislature does in balancing competing interests regarding the expenditure of money. He was hearing large volumes of comment on the subject. Senator Schmidt wanted to pause for a moment before the Committee voted on **SCR1602** and ask if, by passing out two proposals will the waters be muddied. Will it be easier for critics of both proposals to paint everything with one brush, categorize it as some sort of assault on public education, and therefore, minimize the chance anything is accomplished? He preferred to do one now and save the other for discussion in January.

Senator Journey stated he saw the situation somewhat differently in reviewing both **SCR1602** and **SCR1603**. He thought the public was focused on the issue of educational finance and the narrower focus of **SCR1602**, gives it more buoyancy. **SCR1603** has an array of ancillary issues other than what the Committee was trying to accomplish during the Special Session such as its potential impact on funds for the disabled, funds for SR clients and all these other things that will come into that could probably cause far more people to get involved in a critical way with **SCR1603.** It could broaden resistance to it. It is so much broader in its effect and scope that it has that potential. He suggested that the Committee do both, but not debate them at the same time.

Chairman Vratil restated that Senator Journey's suggestion. The Committee would pass both of the amended concurrent resolutions out of the Committee and recommend to the Majority Leader and the Senate President that **SCR1603** be run first and if it passed the Senate, **SCR1602** would not run. Senator Journey confirmed his suggestion. Chairman Vratil state that the Committee needed to understand the suggestion was not binding on the Majority Leader and the President.

Senator Goodwin stated that she agreed with Senator Schmidt. If we start putting broad constitutional ballots on the ballot, not everyone is going to understand it. We have 450,000 kids that have parents and grandparents, teachers and the school boards, they don't trust the legislature at the current time. She supported using one and that would be **SCR1603**. **SCR1602** should be held until January.

Senator O'Connor stated she tended to disagree. She supported both resolutions. Senator Donovan stated that his 93 percent of his constituents were in favor of doing something to tell the Supreme Court that this is not their operation.

Senator Schmidt stated that his preference would be the option that Senator Bruce laid out. If the Committee recommended both resolutions today, he felt it would be difficult to get 27 votes. It would be more effective to focus on a single target. He expressed one substantive concern about **SCR1602**. With respect to the Article II amendment, **SCR1603**, if it goes on the ballot in August or September and the people vote it down, it really is an amendment in the nature of clarifying existing authority. He did not believe that if it failed, the

Legislature would lose its ability to defend its appropriations power. If we put **SCR1602** out and propose an amendment to Article VI, it will certainly be portrayed, as a direct response to the pending Supreme Court decision. Possibly it goes on the ballot in September, when families are back in school, those 430,000 to 450,000 folks are focused like a laser beam on the issue, and, if it does not pass, which is a possibility, particularly since it will certainly be portrayed as a frontal assault on public education, I wonder where that leaves us in January, facing the second part of the *Montoy* order, telling us to provide an additional $560 million dollars, and we have gone to the people and they have said we're not going to bail you out of this. So, I think there is at least a potential risk in following the avenue proposed in **SCR1602**, which does not exist in **SCR1603** –this is for the Committee's consideration.

Chairman stated that the choices were clear. Senator Journey offered to withdraw his motion to favorably pass the resolution out of Committee. Senator Donovan clarified that if it were left in committee, then the Committee would have to work it, and allow a one day layover before any action. Senator Donovan also withdrew his second to Senator Journey's motion.

Chairman Vratil stated that the Committee had advanced **SCR1603**, which is the Article II amendment, with a recommendation for passage.

Chairman Vratil adjourned the meeting.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 6/24/05

NAME	REPRESENTING
Sandy Jacquot	LKM
Ken Sreber	Hein Law Firm
Marsha Stratton	CWA
Jerry Sloan	Judicial Branch
MATT FLETCHER	INTEKHAB
Doug Henkle	AG
Erin Rich	AG
Jim Edwards	KASB
Whitney Watson	KSAG
F W Kerr	Wichita Eagle
Beth Bauman	KS Dist. Judges Assoc.
Richard Hayse	KS Bar Ass'n.
JIM CLARK	KS Bar Assn.
Norma L. Whiteman	Ks. Assn School Boards
ERIC RUCKER	A.G.
BRAD HARRELSON	KFB
Carlie Tiel Denton	KS Trial Lawyers Assoc.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 6-24-05

NAME	REPRESENTING
K L May	Little Gout Reservation
Richard Sandvig	Library Assn.

Submitted
by Sen. Schmidt

SCR 1603

Proposed changes to SCR 1603 draft. Delete 2nd sentence of amendatory language and alter first sentence to read as follows:

OPTION 1: The executive and judicial branches shall have no authority to direct the legislative branch to make any appropriation of money or to redirect the expenditure of funds appropriated by law, except as the legislature may provide by law.

OPTION 2: The executive and judicial branches shall have no authority to direct the legislative branch to make any appropriation of money or to redirect the expenditure of funds appropriated by law, except as the legislature may provide by law or as may be required by the United States Constitution.

Senate Judiciary
6-24-05
Attachment 1

STATE OF KANSAS

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STATE SENATOR, 26TH DISTRICT
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TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
MEMBER: SPECIAL CLAIMS AGAINST THE STATE (JOINT), CHAIR
HEALTH CARE STRATEGIES
JUDICIARY
PUBLIC HEALTH AND WELFARE
TRANSPORTATION

CORRECTIONS AND JUVENILE JUSTICE OVERSIGHT (JOINT)

Testimony in Support of Senate Concurrent Resolution 1602
Presented by State Senator Phillip B. Journey, 26th District

On June ~~23rd~~ 24th, 2005, before the Senate Judiciary Committee, the Honorable John Vratil, Chair.

Mr. Chairman, ladies and gentleman of the committee, it is a pleasure to be before you today as a proponent of this Proposed Constitutional Amendment. In response to our current situation I want to assure the Committee, my colleges and those in the gallery this action is not proposed lightly. Nor is it considered and offered without considerable thought regarding alternatives and their ramifications. It is only offered in response to the actions of the Kansas Supreme Court's opinion in the Montoy case. As I hope my fellow Senators recall during debate over HB2247 I offered 3 predictions and while I got 2 out of 3 right the fact that I missed the mark on the third. I honestly knew that the order of the court could be to direct action by the legislature, but I hoped they would not go this far and in turn precipitate this constitutional crisis.

During the debate regarding Senate Bill 5 on Wednesday June 22, 2005 I attempted to put the issue of the constitutional authority of the various branches of Kansas government in not only the historical perspective of our state's founding but also in the modern terms of the evolution of our government and the concept of judicial review. I attempted to distinguish the historic and well accepted concept of judicial review and the current action of the court in Montoy. I described the Court's opinion as judicial preview. Judicial review is retrospective in its direction. It looks back from a point in time to past acts of the legislature and that actions application to a set of facts. In Montoy the court looks to the future and demands that the legislature enact appropriation legislation in the future under the threat of future court action enforcing possible remedies of historic proportion.

An example of Kansas Supreme Court judicial review and its appropriate application is:

HARRIS v. SHANAHAN, 192 Kan. 183 (1963)
387 P.2d 771
At page 212 the court wrote about a very difficult legislative situation the following.

" Much more could be said on the subject, but it is sufficient to say that from the authorities classed as experts, from congressional action, and from the highest courts of the states which have considered the question, the method of equal proportioning is generally regarded as producing the smallest relative difference in population per representative, and the smallest relative differences in

Senate Judiciary
6-24-05
Attachment 2

the individual share in a representative. The fact that the National Academy of Sciences has given its endorsement to the method of equal proportions in preference to other systems, is highly persuasive, and we are of the opinion that this is the method which produces as close an approximation to exactness as possible in the apportionment of
Page 213 the 20 "extra" seats in conformity with the constitutional mandate to apportion the state into substantially equal legislative districts and each county should be divided into as many districts equal in population as it has representatives. Apportionment by such formula in good faith to the Kansas population would result in an allocation of seats to the counties based upon population which could not be challenged as inequitable. That is not the case with respect to the existing apportionment of the House of Representatives. When the method of equal proportions is applied to the 1961 apportionment act, considered in the light of the 1960 census, certain counties are assigned more representatives and other counties are assigned less representatives than they are entitled to by population.

As we have seen, the 1963 regular session failed to enact valid apportionments of the house of representatives and senate for reasons heretofore related. However, the duty to properly apportion legislative districts is a continuing one, imposed by constitutional mandate upon the legislature, notwithstanding the failure of any previous session to make such a lawful apportionment, and this duty may be performed prior to commencement of the next pending electoral process by a special session called by the governor for that purpose pursuant to Article 1, Section 5 of the Kansas Constitution. The parties are agreed that notwithstanding the effect of this opinion holding the 1961 and 1963 apportionment acts to be unconstitutional and void in violation of Article 10, Section 2, and Article 2, Section 14, the legislature may meet at the call of the governor in special session and lawfully enact valid apportionment acts. The appellants suggest, however, that from the time of the election of each of the 125 representatives in 1962 and the 40 senators in 1960 until the date of this decision declaring the 1961 and 1963 apportionment acts to be unconstitutional and void, each member was a de facto legislator and his acts were acts of a de facto official, and that upon the filing of this opinion, those who were so elected have no power to respond to the proclamation of the governor calling a special session and to enact new apportionment laws in conformity with the requirements of our Constitution. The point is not well taken. In the first place, the legal status of the members of the house and senate is not reached in this suit, for it seeks only to bar use in the future of any existing invalid apportionment statutes as the basis for electing members of succeeding legislatures and not to oust present members of either the house or senate, or to challenge
Page 214 their right to sit. In the second place, when each of the present 125 members of the house and 40 senators was duly elected, he was elected from a district then created by law for a term of two years and four years, respectively. (Article 2, Section 29.)

In Farrelly v. Cole, 60 Kan. 356, 56 P. 492, it was held that the matter of apportionment is only a provision for future elections; and is not designed to affect the title to office or the tenure of the

members making the apportionment; that a member of the legislature, unlike a county or township officer, has no official functions to perform within the district or territory from which he is elected; that members of the legislature are constitutional officers with fixed terms of office and are entitled to hold their respective offices for the constitutional period they were elected, and in the absence of a provision expressly provided when their term shall begin, it is competent for the legislature to fix the commencement of the term. This has been done by statute (G.S. 1949, 25-316) which provides that the regular term of office for members of the house and senate shall commence on the second Tuesday in January next succeeding their election. Article 2, Section 8 declares that each house "shall be judge of the elections, returns and qualifications of its own members." This is a grant of power, and constitutes each house the ultimate tribunal as to the qualifications of its own members. The power is exclusively vested in each house and cannot by its own consent, or by legislative action, be vested in another tribunal or officer, and the power continues during the entire term of office, (State, ex rel., v. Gilmore, 20 Kan. 551; State, ex rel., v. Tomlinson, 20 Kan. 692, 702.) It follows that when a member of the legislature is duly and regularly elected from a legislative district then created by law and his election and qualifications have been approved by the house to which he was elected and he takes the oath of office prescribed by law, he is entitled to exercise the legislative powers of his office during the term for which he was elected, at any regular or budget session or at a special session called by the governor. The fact that the present members of the legislature were duly elected from legislative districts under the 1947 apportionment law of the senate and the 1961 apportionment act of the house, which are declared to be unconstitutional and void by this opinion, does not preclude such members from meeting at a budget session or at a special session. They are de jure officers for the term for which they were elected and competent to enact legislation at either of those sessions, including at a special session, apportionment statutes Page 215 apportioning the state into equal or substantially equal legislative districts. (State v. Latham & York, 190 Kan. 411, 426, 375 P.2d 788.) "

In this case the Kansas Supreme Court had the opportunity to redraw the legislative districts after multiple failures to comply with the federal mandate. The Court could have ordered new elections as the legislators could have been considered to have unconstitutionally seated as a result of unconstitutional elections. In this case judicial restraint prevailed. The Court recognized the constitutional separation of powers and recognized the power of the legislature under our system of checks and balances.

Today we are faced with a very different situation. We have a court that has ordered a non-party to bend to its desires. The denial of basic due process by prohibiting members of the legislature or their legal representative from addressing the issues at have reveals the possibility of a result oriented process in which our State's constitution is selectively used to reach the desired conclusion.

Article 2 Section 24 is clear and unambiguous the power of the purse rests solely in the purview of

the Kansas State Legislature. This proposed constitutional amendment corrects the misinterpretation of Article 6 Section 6 of the Kansas constitution. It is intentionally drafted to have only the desired effect and limits the possibility of unintended consequences in other areas of Kansas Government.

I want to thank the committee for it's time and attention in this matter and urge the committee to pass SCR 1602 out with a favorable recommendation, and I will stand for questions.

Respectfully submitted,

Phillip B. Journey

Statement of Professor Kris W. Kobach

June 24, 2005

On June 3, in is supplementary opinion in the case of *Montoy v. Kansas,* the Kansas Supreme Court ordered the Kansas legislature to appropriate for K-12 education the specific amount of $285 million over previous levels in 2005-2006. The court also indicated its intent to order an additional $568 to be spent in 2006-2007. This extraordinary and unprecedented opinion is constitutionally problematic on numerous grounds. More importantly the Kansas Supreme Court transgressed the constitutional limits on judicial power. This breach of constitutional boundaries requires the Kansas Legislature to respond appropriately to restore the separation of power.

Flawed Interpretation of Article VI, Section 6

The court claimed that it was merely interpreting Article VI, Section 6 of the Kansas Constitution, which requires the legislature to "make suitable provision for finance of the educational interests of the state." What the court failed to recognize is that the word suitable modifies "provision for finance," not "amount of money." In other words, the legislature is only obliged by the Constitution to create a suitable *system* for financing the schools. The Constitution is silent on the *amount* of money to be spent.

For the sake of argument, let us assume that suitable did modify a phrase such as "amount of expenditures." "Suitable" is a very flexible adjective.
In my dictionary, suitable is defined as "appropriate to a given purpose." It is a constitutional term that permits discretion. But that discretion is plainly vested by the text of Article VI in the legislature.

However, the Court did not devote a single sentence of its opinion to determining what the framers of Article VI, Section 6 of the Kansas Constitution intended when they drafted this text. Instead, the Court issued a rambling opinion that includes 17 pages of policy analysis and absolutely no attempt to interpret the text of the Kansas Constitution.

In this respect, the court's opinion is a stunningly poor example of constitutional interpretation. By the end of the opinion, the court does not even bother to refer to the language of Article VI, Section 6. Instead, the measuring stick it uses is "a constitutionally adequate education."

In contrast, we can see an example of legitimate and restrained constitutional interpretation demonstrated by the Supreme Court of Illinois in the case of Committee for Educ. Rights v. Edgar, 672 N.E. 2d 1178, 1191 (Ill. 1996). In that case, Article 10, Section 1 of the Illinois Constitution presented the court with a much clearer invitation to assess education funding levels, requiring the legislature to provide "high quality public educational institutions and services." Nevertheless, the Illinois Court correctly recognized that the judiciary had no appropriate role in this area:

> What constitutes a "high quality" education, and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards. The constitution provides no principled basis for a judicial definition of high quality. It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary's field of expertise, such that a judicial role in giving content to the education guarantee might be warranted. Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.

The contrast between the Illinois Court's restrained exercise of judicial power and the Kansas Court's seizing of legislative prerogatives could not be more clear.

The Court's Unexplained Rejection of the Local Option Budget Cap Provision

As the court rambles through various policy arguments, picking and choosing the policies it likes, the court drifts further and further away from its legitimate duty to interpret the constitution. Nowhere is this failure more evident than in the court's decision to stay H.B. 2247's provision increasing local option budget authority.

The court expresses its policy judgment that the use of additional local property tax levies does not help some school districts. That may or may not be correct, as a policy matter. But it has absolutely nothing to do with the meaning of Article VI, Section 6 of the constitution. There is nothing in the Kansas Constitution that could plausibly be read as a prohibition of decisions by local school districts to raise additional property tax dollars to spend on schools, over and above state funding levels. And if there were, the court also fails to explain why the current LOB cap of 25 percent meets this imaginary constitutional constraint, but 30 percent does not.

Unconstitutional Remedy

As bad as they are, these flaws pale in comparison to the more fundamental problem with the opinion—the court was unwilling to observe two fundamental, constitutional limits on its own power.

First, the Court broke the constitutional rule that the judiciary must be a *passive* branch of government, not an active one.

Courts routinely judge the constitutionality of past legislation. However, that is as far as the judicial power extends: courts lack the authority to compel a co-equal branch of government to pass specific statutes in the future. In other words, courts can create a void in the law by striking down particular statutes; but they cannot seize the reins of

legislative power and attempt to fill that void. That is why the Supreme Court of the United States has never ordered Congress to pass a law.

It is precisely for this reason that Alexander Hamilton considered the judiciary to be the "least dangerous" branch of government: "The judiciary ... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and *can take no active resolution* whatever." THE FEDERALIST NO. 78.

Unfortunately, the Kansas Supreme Court did not heed the writings of Hamilton. Instead, it ignored this fundamental limit on judicial power and boldly ordered that "the legislature shall implement a minimum increase of $285 million...."

This unification of judicial and legislative power was what precisely Hamilton warned against: "there is no liberty, if the power of judging be not separated from the legislative and executive powers." THE FEDERALIST NO. 78 (quoting Montesquieu, SPIRIT OF THE LAWS)

Unconstitutional Judicial Use of the Appropriation Power

This raises the second constitutional violation committed by the court. It violated the separation of powers by commandeering what is a quintessentially *legislative* authority—the power to tax and spend.

It is a fundamental principle of American constitutional law the appropriation power is held *solely* by the legislative branch. The framers of the Kansas Constitution were so determined that this principle be followed that they included Article II, Section 24 in the Kansas Constitution—which states explicitly that the appropriation power is vested in the legislature.

This principle dates back to the American Revolution. The Founding Fathers declared independence from Britain because they could not tolerate "taxation without representation." After independence, the new state and federal constitutions deliberately placed the power to tax and spend solely in the hands of the people's elected representatives. In the Federal Constitution, this placement is found in Article 1, Sections 7 and 8.

As James Madison stated: "The house of representatives can not only refuse, but they alone can propose the supplies requisite for the support of government. They in a word hold the purse." THE FEDERALIST NO. 58.

Madison pointedly went on to explain why this was the most important of legislative powers: "This power over the purse, may in fact be regarded as the most compleat and effectual weapon with which an constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58.

But that principle that this imposing power must remain in the hands of elected representatives is shattered by the Kansas Supreme Court's opinion, which commands that a specific amount of money must be spent on K-12 education in the coming year.

The willingness of government officials to tax is inversely proportional to their electoral accountability. And the justices of the Kansas Supreme Court have absolutely no such accountability, because they are not elected. This is not the branch of government that the Framers of the Kansas Constitution or the U.S. Constitution chose to control the purse.

The Need for a Constitutional Amendment

The court's opinion is a constitutional transgression of the gravest magnitude. If the Kansas Legislature simply complies with the court's order and does no more, that action will make it more difficult to challenge the legitimacy of the court's exercise of legislative powers in the future in any judicial venue.

And this is clearly only the first step in the court's commandeering of the appropriation power. The Court has said as much. On K-12 funding, the Court has retained jurisdiction in the *Montoy* case and has stated expressly that it will "consider, among other remedies, ordering that, at a minimum, the remaining … $568 million… be implemented for the 2006-07 school year."

From there, the door will be open for the court to take this newly-acquired judicial power of the purse into other policy areas. Article VI, Section 6 applies the same "suitable provision for finance" language to higher education as well. Article 7, Section 1 requires the state to "foster and support" institutions for the benefit of mentally or physically incapacitated or handicapped persons. Under this Kansas Supreme Court's expansive treatment, that clause could be similarly distorted.

Accordingly I recommend that the legislature pass a resolution stating that the court's *Montoy* decision exercises powers not vested in it by the Kansas Constitution and therefore exceeds the court's authority.

Finally, I urge the legislature to recognize that this is a dispute between co-equal branches of government. In such a situation, the only higher authority should be given the opportunity to settle the dispute. That authority is "We the People of Kansas," identified by the Kansas Constitution as the source of all political authority in the state.

To that end, S.C.R. 1602, should be proposed immediately. It would amending Article VI, Section 6 as follows:

> The legislature shall ~~make suitable provision~~ *provide* for finance of the educational interests of the state *in the manner and amount as determined solely by the legislature*.

However, given the proclivity of the current Kansas Supreme Court to exceed its authority, it would be advisable for this committee to also insert the following phrase after the word "legislature:"

> The courts of the state of Kansas shall have no jurisdiction to review the amount or distribution of expenditures on education.

This constitutional amendment provides the most legitimate and least problematic resolution of the current constitutional crisis. If the sovereign people of Kansas wish to transfer control of education spending from the legislature to the judiciary, they may do so by rejecting the amendment. If they wish to preserve the current constitutional framework and keep this power in the hands of their elected representatives, they may pass the amendment.

If on the other hand, the Kansas legislature fails to place any amendment before the people of Kansas, it will have failed not only to protect its own prerogatives, but it will have failed to protect the prerogative of the people of Kansas to pass judgment on any redistribution of constitutional powers. In other words, it will have failed to preserve a constitutional system in which "we the people" are sovereign.

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TESTIMONY OF RICHARD F. HAYSE, PRESIDENT KANSAS BAR ASSOCIATION BEFORE THE SENATE JUDICIARY COMMITTEE ON SCR 1602 AND SCR 1603 JUNE 24, 2005

Although I am listed as an opponent to these two concurrent resolutions, I want to make it clear that I do not speak as president of the Kansas Bar Association in opposition to the process in which this committee is engaged in seeking to resolve issues relating to the appropriation of funds in the wake of the decision of the Kansas Supreme Court in *Montoy*. My role on behalf of the Bar Association is to ask you to focus carefully on the principle of judicial independence in any actions which you may take. I urge you to be extremely cautious and to carefully consider the ramifications of any decision on constitutional amendments.

It is important to focus on how the *Montoy* decision came to be decided by the Kansas Supreme Court. Two school districts and about three dozen students brought suit in district court alleging that they were under funded and that the lack of funding was a violation of their constitutional rights. After a trial in the district court, the case was appealed to the Kansas Supreme Court on the evidentiary record introduced in the trial court. Based upon the evidence presented and the constitutional mandate of Article VI Section 6, the Supreme Court agreed with the district court that existing funding legislation was constitutionally inadequate to fund the requirements imposed by law. As with any other court decision, upon a finding that one litigant was entitled to relief from the other litigant, the Supreme Court established an amount of money which needed to be exchanged to remedy the legal deficiency indicated in the case. This is the function which is fulfilled by courts in Kansas on a regular basis: It is a futile task to adjudicate rights without also imposing a remedy. When the only cost evidence in *Montoy* demonstrated a deficiency in funding, the court had no choice but to order additional funding as a remedy.

If the legislature passes constitutional amendments which would deprive the court of the power to enforce its remedy, how would litigants in this or any other case obtain a redress of their grievances through the judicial process?

By changing the delicate constitutional scheme of checks and balances, the proposed amendments run a serious risk of producing unintended

Senate Judiciary
6-24-05
Attachment 4

KANSAS ASSOCIATION OF SCHOOL BOARDS

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Testimony on **SCR 1602**
before the
Senate Judiciary Committee

by

Donna L. Whiteman, Assistant Executive Director/Legal Services
Kansas Association of School Boards

June 24, 2005

Mr. Chairman and members of the Committee:

On behalf of the Kansas Association of School Boards and the Kansas National Education Association, thank you for the opportunity to testify in **opposition** to **SCR 1602**.

Changes to the Kansas Constitution should not be taken lightly and require careful consideration. The Kansas Constitution carefully establishes three branches of government and the balance of powers among the executive, judicial and legislative are specifically crafted to ensure no one group can usurp the express power of the other to the detriment of the rights of Kansas citizens.

Both the state and federal constitutions ensure that the rights of the citizens are protected from arbitrary acts of the executive and legislative branches by ensuring that while the Legislature has the power to change the law and appropriate finances, the judiciary has the power to interpret the laws passed by the Legislature to ensure that neither branch infringes upon the rights of citizens. Section 20 of the Kansas Constitution specifically addresses the powers retained by Kansas citizens, "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people."

Support for quality public schools and the importance of education has been a priority to Kansas citizens since the Kansas Constitution was adopted on July 29, 1859, and ratified October 4, 1859. Education was so important to the founding fathers of this state that the first section of the Kansas Bill of Rights required that sections 16 and 36 in every township, including Indian reservations, be used for the exclusive use of common schools. Sections 6 and 7 of the Kansas Bill of Rights directed proceeds from the sale of several pieces of public lands for the support of schools.

There are approximately 450,000 students attending Kansas public schools. Parents, grandparents and communities across the state want a strong education program and the funding to maintain a world class education that prepares Kansas children to contribute, compete and excel in a global economic market. As Americans and Kansans, we are obsessed with freedom and providing quality public schools that provide educational opportunities for our students is perceived as essential to the welfare of our state and nation. In

Brown v. Board of Education, 347 U.S. at 493 (1954) the U.S. Supreme Court stated, "In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Following are concerns about the specific language of **SCR 1602**:

1. The use of the current term "suitable" is appropriate as it connotes flexibility and can be used to meet the needs of an educated citizenry as times and technology change.

2. Deleting the language that requires the Legislature to "make suitable funding" for public education and inserting the general word "provide" will not prevent future litigation by interested parents and citizens. The U.S. Supreme Court has recognized that access to public education is a right that students possess and our state constitution directs the Legislature to fund education. This constitutional change would not prohibit parents, students and others from filing other claims under the Kansas and federal constitutions.

   Additionally, even if this resolution were passed by the voters, Section 6 of Article 6 states "The Legislature shall provide for intellectual, educational, vocational and scientific **improvement** by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as provided by law." (emphasis added). This language, along with the data now available to every Kansas taxpayer on-line in every Kansas school district, detailing how students are doing under the Kansas assessments and the federally mandated annual testing required under No Child Left Behind, provides the data to fuel future challenges to whether the state is actually providing the financing needed to allow students to meet the student achievement benchmarks required by state and federal law.

3. The insertion of the language "in the manner and amount as determined solely by the legislature" is vague. Section 6 (b) of Article 6 of the Kansas constitution currently reads "**The Legislature shall make** suitable provision **for finance** of **the educational interests** of the state" (emphasis added). The language "in the …amount as determined solely by the Legislature" is subject to several interpretations. Could this language be interpreted to limit the Governor's ability to veto bills? Furthermore, none of the three decisions thus far in the **Montoy** case, has attempted to usurp the Legislature's constitutional duty to provide for the financing of public education. The Court's have exercised considerable judicial restraint and defered to the Legislature's constitutional duties to provide for the education of Kansas school children. However, as in any court case, the court is limited to applying the law to the specific facts and evidence presented in the trial court record. Here the only cost study in the record is the Augenblick and Myers study previously authorized by the Legislature. Additionally, the Supreme Court has given the Legislature time to complete the study it authorized in **HB 2247**.

Thank you for the opportunity to provide testimony.

KANSAS ASSOCIATION OF SCHOOL BOARDS

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Testimony on **SCR 1603**
before the
Senate Judiciary Committee

by

Donna L. Whiteman, Assistant Executive Director/Legal Services
Kansas Association of School Boards

June 24, 2005

Mr. Chairman and members of the Committee:

On behalf of the Kansas Association of School Boards and the Kansas National Education Association, thank you for the opportunity to present testimony in opposition to **SCR 1603**.

The proposed language in this resolution is of great concern for the following reasons:

- Changes to our state constitution should be carefully considered and analyzed to ensure the proposed changes do not create more problems than the problem meant to be addressed. Experience teaches us to exercise caution and not to use a sledge hammer when a fly swatter will suffice and to be careful what one asks for as the solution may create greater problems than the original concern.

- Serious consideration must be given to the myriad of budgets and services the Legislature funds besides education, and the problems this language could create or opportunities for mischief that well meaning but overzealous state agencies and other providers of state services could create if the courts are prohibited from fashioning "… any remedy that interferes with the expenditure of funds from the state treasury in compliance with an appropriation made by law."

- The language in this resolution has the potential to upset the separation and delicate balance of powers established in our state constitution. These checks and balances between the judiciary, legislative and administrative branches of government protect ordinary citizens and allow them an opportunity to challenge legislative acts and the acts of the administrative branch of government that may infringe upon the constitutional rights of Kansas citizens. The wisdom of the separation of power in our state constitution and the delicate balance of power among the three branches of government has stood the test of time and has served our state and democracy well. To upset this balance of power by permitting the Legislature to act and not be challenged by citizens is a serious disruption and threat to the protections currently provided by the Kansas Constitution to Kansas citizens.

- The Kansas Legislature should not attempt to place itself and its acts above or outside of scrutiny by the courts or any other body. It sets a bad example for other public bodies and presumes that every act of appropriation by the Legislature is correct and in compliance with the rights guaranteed to average citizens.

Thank you for the opportunity to provide testimony.

Senate Judiciary
6-24-05
Attachment 6